REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1912.

VOLUME XCI.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

LINCOLN, NEB.
STATE JOURNAL COMPANY, LAW PUBLISHERS.
1912.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Johnson, Nemaha, Pawnee and Richardson.	John B. Raper.....	Pawnee City.
Second.....	Cass, Otoe and Sarpy.....	Harvey D. Travis...	Plattsmouth.
Third.....	Lancaster.....	Albert J. Cornish	Lincoln.
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		Willard E. Stewart...	Lincoln.
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		Lee S. Estelle.....	Omaha.
		Howard Kennedy....	Omaha.
		Charles Leslie.....	Omaha.
		Willis G. Sears.....	Tekamah.
		Abraham L. Sutton..	South Omaha.
		Alexander C. Troup..	Omaha.
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran..	York.
		Edward E. Good....	Wahoo.
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck..	Fremont.
		George H. Thomas...	Schuyler.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth.....	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Wayne.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
		James N. Paul.....	St. Paul.
Twelfth.....	Buffalo, Custer and Sherman.	Bruno O. Hostetler...	Kearney.
Thirteenth ..	Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, Logan and McPherson.	Hanson M. Grimes...	North Platte.
Fourteenth...	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Ernest B. Perry.....	Cambridge.
Fifteenth	Boyd, Holt, Keya Paha and Rock.	R. R. Dixon.....	O'Neill.
Sixteenth	Brown, Box Butte, Cherry, Dawes, Sheridan and Sioux.	William H. Westover	Rushville.
Seventeenth..	Banner, Garden, Morrill and Scott's Bluff.	Ralph W. Hobart....	Mitchell.
Eighteenth ..	Gage and Jefferson.....	Leander M. Pemberton.....	Beatrice.

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WILLIAMS, B. E.

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CASES MARKED * ARE DISTINGUISHED IN THIS VOLUME.

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED.

NEBRASKA.

CONSTITUTION.

SESSION LAWS.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1912.

HENRY AMEND, ADMINISTRATOR, APPELLEE, V. LINCOLN & NORTHWESTERN RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 12, 1912. No. 16,886.

1. **Negligence:** LIABILITY FOR DEATH FROM DROWNING: ACT OF GOD. What is known in law as the "Act of God" is an accident or unexpected occurrence due directly and exclusively to natural causes, without human intervention, the resulting injury or damage not having been produced or contributed to by the hand of man. If a resulting injury is in part produced by the wrongful or negligent act of any person, such person will be held liable therefor.

2. ———: QUESTION FOR JURY. "Whether the natural connection of events is maintained or interrupted by the introduction of a new and independent cause is usually a question of fact and not of law." *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448.

3. **Railroads:** OBSTRUCTION OF FLOOD-WATERS: LIABILITY FOR DEATH. Where a good faith effort, without negligence, is made to rescue one from a place of danger, wrongfully or negligently caused by another, such effort, even if unsuccessful, will not relieve the wrongdoer from liability for the consequences of his act.

4. **Evidence:** INTOXICATION. The evidence, copied in the opinion, is examined, and found not sufficient to prove the intoxication of a rescuing party.

5. **Instructions**, a portion of which are set out in the opinion, are examined, and no prejudicial error found in them.

6. **Evidence.** The evidence is found sufficient to support the verdict of the jury.

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

James E. Kelby, Byron Clark and *Stout & Rose*, for appellant.

Wilmer B. Comstock, contra.

REESE, C. J.

This is an action for damages alleged to have been sustained by reason of the death by drowning of the daughter of the plaintiff, who sues as the administrator of her estate. The decedent was drowned on the 6th day of July, 1908. There is no serious question as to the sufficiency of the pleadings, and there is little conflict in the evidence. Neither the pleadings nor evidence will be set out except so far as may appear from the practically conceded facts. Plaintiff recovered, and defendant appeals.

The plaintiff with his family resided in that part of the western portion of the city of Lincoln generally known as the "Salt creek bottoms." Prior to the date of the drowning of the decedent (in 1906) the defendant, in connection with other improvements in that vicinity, constructed a railroad grade across the principal portion of the Salt creek valley, the surface of which, with the ties and rails, was several feet above the general level of the valley, depending upon the topography of the ground. There was one opening left in the embankment for the passage of water, being a concrete bridge 250 feet in length across Salt creek. The bridge rested on nine concrete piers four feet thick at the bottom and two feet thick at the top, and which were 25 feet apart from center to center, leaving a waterway of about 220 feet in length under the bridge. Resting on these piers was a concrete "slab" two and one-half feet thick, above which were placed the ties and rails. The remainder of the work was a solid fill. We have been unable to ascertain the exact length of the embankment. It

is said by appellee in his brief to be three-quarters of a mile long.

An important question of fact is as to the capacity of the bridge to permit flood-waters to pass through. The evidence shows without conflict that the whole valley is subject to occasional overflow and has been since the first settlement of the country, and that the flood-waters have with more or less frequency covered the whole surface of the valley, which was known to defendant long prior to the final construction and completion of the grade. The channel of a stream known as "Middle creek," coming from the west and subject to overflow, was changed so as to empty its waters into Salt creek above the bridge, thus very materially increasing the quantity of water which would have to pass under it. During the forenoon of the 6th day of July, 1908, owing to very heavy rains, the waters from Salt creek and Middle creek came down to the embankment and flooded the valley above it so that the water at and around plaintiff's residence rose to the depth of six or seven feet. Later on, but on the same day, the impounded waters broke over the fill and railroad tracks and ran down onto the lower side. It is said by some of the witnesses that at that time the water above the fill was five or six feet higher than the water below. This, with other facts which we do not detail, was sufficient to justify the jury in finding that the outlet was inadequate. Water when at rest seeks its level, and had it not been for the obstruction the flood would have presented practically a level surface, and as a consequence the water would not have been so deep above the fill. Judged by this evidence, there was sufficient to justify a finding by the jury that there was a faulty construction of the track bed, and by reason thereof the waters were held back and the depth of the flood greatly increased.

It is shown that the rainfall at the city of Lincoln on the 5th and 6th of July, 1908, was greater than at any time since the year 1884 (the government records having been first kept in 1885) and .86 of an inch greater than

the flood of August 15 and 16, 1900. That there was an unprecedented precipitation to that extent cannot well be doubted. It is urged that this constituted an act of God and for which defendant could not be held responsible. This might be urged with more persuasive force had it not been for the construction of the obstructing fill which acted as a dam and greatly augmented the danger.

The question of the negligence of defendant in constructing its fill and roadbed and its provision for the escape of flood-waters was one of fact for the consideration of the jury. The jury having found by their verdict, supported by sufficient evidence, that such was the fact, we must for the purposes of this appeal accept it as final. It is pretty well settled that if a wrong or act of negligence is committed and that act contributes proximately to the injury, even though combined or in conjunction with the act of God, the wrongdoer will be liable. It is not deemed necessary to discuss this subject further, as we think it clear that, whenever any wrongful, careless or negligent act of man contributes to an injury, he cannot escape liability by showing that such injury was produced in part by the act of God. Hence, if in negligently damming a stream and such floods come as might with propriety be denominated the act of God, and by reason of the negligently constructed dam an injury resulted greater than would have been suffered had the dam not been so constructed, the wrongdoer cannot escape liability by showing that the storm flood was, of itself, the act of God. As stated by the decisions and authorities, if by any act of man in conjunction with the act of nature an injury is inflicted, he will be held to respond for the injury suffered. In 1 Cyc. 758, it is said that the act of God "may be defined to be any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains or care, reasonably to have been expected, could have been prevented"—citing cases in note. 1 Words and Phrases, 118.

It is shown that early on the morning of the 6th of July,

1908, the water above the railroad embankment, or grade, rapidly accumulated over the surface of the valley. Plaintiff had left his home at an early hour to go into the business section of the city of Lincoln on an errand. During his absence, which was not prolonged, the water rose to such an extent as to prevent his return to his home. His family were in the residence. As the flood increased plaintiff's wife placed their children upon the table. The water rose in the house to a depth of over three feet. Finding that she could not save the family in that way she made her way to the porch, and with the help of a son she and the children were lifted to the roof of the porch. The rain was falling and they were unprotected when two men came to the house in a small boat. The water was at that time six or seven feet deep in the street and yard in front of the house, and all escape by the unaided efforts of the family was completely cut off. A part of the family, including decedent, were lifted from the porch roof into the boat, and as thus laden the boat started for a place of safety. On the way toward the shore the boat came in collision with a telegraph or telephone pole, was overturned, and plaintiff's daughter drowned. There is no evidence of any wilful or wrongful act on the part of those in charge of the boat. The overturning of the craft is not shown to be other than accidental and without fault. A great number of boats were in use, and hundreds of people were transferred from their places of danger in their homes to safety.

It is insisted that plaintiff's family were in a safe place and out of danger while upon the porch roof; that their removal therefrom was the interference by a new and independent element or agency which caused the accident, but which was not in any way procured, set on foot or contributed to by defendant; that there could be no connection in natural sequence between the construction of the embankment, even if negligently and wrongfully made, and the drowning of plaintiff's daughter. The rule of law upon this subject is well stated by Post, J., in *St. Joseph*

& *G. I. R. Co. v. Hedge*, 44 Neb. 448, where it is said: "The question in all such cases is whether the facts shown constitute a continuous succession of events so linked together as to make a natural whole, or was there a new and independent cause intervening between the wrong and the injury. The intervening cause must be one not produced by the alleged wrongful act or omission, but independent of it, and adequate to produce the result in question. There may be, it is evident, a succession of intermediate causes, each dependent upon the one preceding it and all so connected with the primary cause as to be in legal contemplation the proximate result thereof (citing cases). Whether the natural connection of events is maintained or broken by the intervention of a new and independent cause is, according to the authorities cited, a question of fact." See, also, *Cornelius v. Hultman*, 44 Neb. 441.

Accepting this as a correct statement of the law upon the subject, it is left for us to inquire whether the evidence disclosed sufficient to justify the submission of the case to the jury. As we have seen, there was enough to justify the jury in finding that defendant by its servants and agents had full knowledge of the habits of Salt creek as to the overflowing of its waters at the place where the embankment was constructed. This, and the question of the negligent construction of the embankment, and that that construction was the cause of the damming up of the water, by which the valley was flooded to the depth named, were questions of fact to be solved by the jury. Assuming, as we must from the verdict, that the jury found these facts in favor of plaintiff, the inquiry would be whether the action of the persons in charge of the relief boat constituted a new and independent cause of the accident, so far disconnected from the original cause as to relieve defendant of liability? As we have seen, the valley was so covered with flood-waters as to render it impossible for the people residing in that part of the city to escape from, or go to, their homes by their usual methods of travel. The only method by which this could be done was in the use

of boats or rafts by which the people could be floated out or in. The decedent, with her mother and other members of the family, had taken refuge on the roof of the porch, having been driven there by the depth of water in the house. The rain was falling during the time they were so situated, and had been so falling during the entire day. They were drenched with water, and, beyond doubt, in a very precarious situation. One of the chilren was a babe in arms. Acting upon the humane impulse to relieve the distressed and render aid to the suffering, the people more fortunately situated undertook to assist those thus marooned and in danger to places of safety. One of the boats, in charge of two men, one of whom was a special policemen, went, or was sent, to the relief of plaintiff's family. A part of the family, including decedent, were placed in the boat and started for the shore. There is no proof that the boat was overloaded. The mother and others were left on the porch roof to be taken off later. On the way to the shore the boat was cast against or, in some way, struck the obstruction, was capsized, and plaintiff's daughter and the child referred to were drowned. There is no evidence that those in charge of the boat were guilty of any wrongful act or negligence causing the accident. All efforts were directed to the relief of those who had been placed in danger by the increased depth of the flood, found by the jury to have been caused, in part at least, by the negligent construction of the embankment. It is not necessary for us to decide what the effect upon defendant's liability would have been had the rescuers been shown to have been guilty of negligence, for no such negligence is shown. It could hardly be claimed that, where a good faith effort, without negligence, were made to rescue one from a peril wrongfully or negligently caused by another, such effort, if unsuccessful, would relieve the original wrongdoer.

There is an intimation in the evidence, and referred to in defendant's brief, that the men in charge of the boat, which removed decedent from the house, were under the

influence of intoxicating liquor. They were working in the rain and were doubtless very wet. When they came to the house they asked for whisky, but none was given to them. The brother of decedent was standing in the porch in some three feet of water and assisted in transferring a portion of the family to the boat. We quote the following from his testimony: "Q. Your mother was not very willing to trust the children in the boat without being with them? A. Yes, sir. Q. Didn't you say she wanted to go with them? A. Yes, sir. Q. Was Mr. Coburn the other man besides Mr. Hudson? A. I don't know. I heard his name was Heny. Q. Were the boatmen under the influence of liquor? A. That is what they asked for when they were there. Q. They asked for whisky? A. Yes, sir. Q. Did you give it to them. A. No, sir. Q. Did they really get whisky at the house? A. No, sir. Q. What is the reason your mother did not want the children to go with them without being with them? A. That was the reason. Q. They had the appearance of being somewhat under the influence of liquor? A. Not while they were sitting down in the boat. Q. But when they got up? A. Yes, sir. They showed the star, and he said he would send down and get them, and of course we could not do anything else, and they pushed the boat away from the porch and took them anyhow. Q. That is the reason your mother did not want them to take the children without being along? A. Yes, sir. Q. But they did not get any whisky at your house? A. No, sir." The mother did not testify as to the condition of the men, nor give any reason why she desired to accompany her children. Without reference to the competency of the testimony of the son as to the mother's reasons for desiring to enter the boat, we are unable to find any proof that the rescuing men were so intoxicated as to interfere with their effective labors on behalf of the family, if under the influence of liquor at all. There is nothing in this evidence requiring further notice.

It is insisted by defendant that the trial court erred in giving numbers 4, 11, 12 and 13, of the instructions given

to the jury. Instruction numbered 4 is as follows: "The burden of proof in this case is upon the plaintiff to establish all the material allegations of his petition by a preponderance of the evidence, and if you find that the evidence is equally balanced, or that it preponderates in favor of the defendant, then you should find for the defendant. The material allegations of said petition are: (1) That the defendant's railroad improvements complained of in the petition were negligently constructed and caused flood-waters to accumulate at number 228 F street in the city of Lincoln, which would not have accumulated except for such improvements. (2) That in consequence of such diversion and accumulation of said flood-waters the life of Catherine M. Amend was imperiled, and that she was compelled to flee for safety. (3) That her death was caused by the negligence of the defendant in the construction of the embankments and inefficient openings therein, near her home. (4) That her parents have sustained a pecuniary loss by her death." The objection to this instruction is the failure of the court to include, or add to the third clause, the words, "and not by any other intervening efficient force or cause," as requested in number 2 of those asked by defendant. While it may be that the instruction is not open to criticism, as it was given, if standing alone, yet, even if it is not complete, the subject is sufficiently covered in instructions numbered 8 and 10, in which all necessary information upon that part in question was given.

Objection is made to number 11. The consideration of this instruction carried with it the tenth. They are here copied: "Number 10. Where the casual connection between the negligence complained of and the injury inflicted is interrupted by the interposition of an independent human agency, which of itself inflicts the injury, the independent agency, in law, is regarded as superseding the original wrong complained of. In such case, the new intervening cause becomes the proximate cause of the injury, while the original wrong becomes the remote cause

only, and is not actionable. Number 11. It is contended by the defendant that, even though it did negligently, by its railroad grades and embankments, accumulate and divert the waters of Middle creek and Salt creek, and thereby imperil the life and safety of Catherine M. Amend, it would not be liable for her death, because the proximate cause of her death was the overturning of the boat in which she was being conveyed from her home to higher and more elevated ground. But, before you could find that the overturning of the boat was the proximate cause of the death of Catherine M. Amend, you must find that the intervening cause of the overturning of the boat was not procured or produced by the original act of accumulating and diverting the waters of the creeks aforesaid, if you find they were wrongfully and negligently accumulated and diverted. Where the evidence discloses a succession of intermediate events, each dependent upon the one immediately preceding it, and all depending upon the original act complained of, such original act is, in legal contemplation, the primary and proximate cause of the resultant injury." No criticism is made on number 10, but it treats of substantially the same subject as the other. The objection to number 11 is in the use of the words, "it is contended by defendant that," at the beginning, and the words, "before you could find that the overturning of the boat was the proximate cause of the death of Catherine M. Amend," you "must find" that the intervening cause of the overturning of the boat "was not" procured or produced by the original act of accumulating and diverting the waters, etc. As to the first words quoted, it is apparent from the whole record that the instruction stated the contention of defendant correctly. It is claimed that the use of this language tended to discredit the general rule stated in the tenth. It is possible that the proposition might have been stated in other language, but we are unable to detect any prejudice in the phrase adopted. The other clause correctly stated the law. If the construction of the embankment was negligent and "the evidence

discloses a succession of intermediate events, each dependent upon the one immediately preceding it, and all depending upon the original act," etc., it would be necessary for the jury to find that the overturning of the boat was the independent, intervening, proximate cause of the death.

The twelfth instruction is complained of, but it is not deemed necessary to set it out here, as it is in harmony with the law as stated herein upon the concurrence of the negligent acts of a wrongdoer with the act of God. It need not be further noticed.

The thirteenth instruction is in harmony with our holding in *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448, and need not be set out.

The final contention, that the evidence is not sufficient to sustain the verdict and judgment, has been sufficiently noted in the body of this opinion, and the evidence will not be further reviewed.

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

AFFIRMED.

ROSE, J., took no part.

ELIZABETH A. NEFF, APPELLEE, V. EMIL BRANDEIS, APPELLANT.

FILED MARCH 12, 1912. No. 16,584.

1. Master and Servant: INJURY TO THIRD PERSON: LIABILITY. To sustain a recovery for injuries caused by being run down by an automobile owned by the defendant, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was, at the time of the accident, engaged in the master's business or pleasure with the master's knowledge and direction.

2. Torts: NEGLIGENCE: LIABILITY. The defendant agreed with a third party, for a stated monthly compensation, to take charge of his

automobile, keep it at a garage, wash it, polish it, keep it ready for running at all times, and furnish a chauffeur to the defendant whenever he might desire to use his car. Defendant loaned the car to another, and the keepers of the garage sent it out in charge of their man for the use of the borrower. After such use, and while the chauffeur was returning the car to the garage, he ran into a vehicle driven by the plaintiff and her husband, and injured her. *Held*, That at the time of the accident no such relation of master and servant or of principal and agent existed between the defendant and the chauffeur as would render defendant liable for such injuries.

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

Greene, Breckenridge & Matters, for appellant.

W. J. Connell and *Walter P. Thomas, contra.*

BARNES, J.

Action in the district court for Douglas county by Elizabeth A. Neff against Emil Brandeis and Arthur Brandeis to recover damages alleged to have been sustained by the plaintiff as the result of a collision with an automobile of which Emil Brandeis was the owner. There were two trials in the district court. On the first trial the jury were directed to return a verdict in favor of the defendant Arthur Brandeis, and upon the question of the liability of Emil the jury disagreed. On the second trial the plaintiff had the verdict and judgment, and the defendant Emil Brandeis has appealed.

It appears that in April, 1906, Emil Brandeis was the owner of two automobiles, one of which was called the "White Steamer," which was kept for him by the Powell-Bacon Automobile Company of Omaha, Nebraska, under an agreement which was described by Mr. Powell in substance, as follows: I was to wash the machine, polish it, store it, and keep it ready for running at all times. I was to furnish a man any time Mr. Brandeis might call for it. Mr. Brandeis was to pay me so much a month for

storing the machine, washing it, keeping it in good shape, and was also to pay me a stated sum for the man. Mr. Brandeis could call on the man—for that man—any time of day or night, and keep him as long as he wanted him. Mr. Brandeis said that he did not want to have the care of a man, to keep his eye on him all the time, and he would prefer to pay me a certain sum per month, with the understanding that I should keep the man at work, but have him subject to his call. I told Mr. Brandeis that I was perfectly willing to do that; that a man would be at his call and disposal at any time he should telephone or give instructions to have him sent out. The defendant corroborated this statement, and further testified as follows: "Q. Who furnished the chauffeur that drove your cars on April 15, 1906, and prior to that time? A. The Powell-Bacon Automobile Company. Q. Did you have some agreement or arrangement under which the chauffeurs were furnished by them? A. Yes, sir. Q. What was it? State what was said as nearly as you can. A. I kept my automobiles at the Powell-Bacon garage. They looked after them in the way of furnishing oil and gasoline, and repairs and extras, and furnishing chauffeurs whenever I wanted to use the cars. Q. How much did you pay? A. $80 a month.

It appears from the record that on the 15th day of April 1906, the defendant loaned his automobile to his brother, Mr. Arthur Brandeis; that he did not use or even see his car on that day. Defendant also testified as follows: "Q. Who did use it, if you know? A. My brother. Q. Your brother, which one, A. D.? A. A. D. Q. That is Arthur Brandeis? A. Yes, sir. Q. State whether that car was used at all or out for your personal pleasure or business. A. No, sir. * * * Q. How did your brother Arthur happen to be using this machine on this particular day in question? A. Well, he asked me, I believe it was in the forenoon, whether he could use my car, and I think he said he wanted to go out to his farm; and I said yes, and he telephoned to the Powell-Bacon garage. Q. In other

words, you loaned it to him for that afternoon? A. Yes, sir. Q. You made no use of it yourself, at all? A. No, sir."

With respect to the delivery and return of the machine, Mr. Brandeis further testified: "Why, I had an arrangement at any time I wanted to use either of the cars I would telephone, and they would furnish a man to take me out riding and take the car back to the garage. Q. Who would take the car back? A. The man that ran it—the chauffeur that ran the car. Q. You may state whether or not the driver, Arthur Bell, who drove that car on the afternoon of the day when the collision with Mr. and Mrs. Neff occurred, had to your knowledge ever driven you? A. Why, I did not know Mr. Bell. Q. And had he to your knowledge driven either of your cars before this particular day? A. I would not know that either. Q. State whether or not you had the same chauffeur continuously? A. No, the agreement was that they were to furnish any chauffeur they had there that was at leisure that they could furnish. There was not any particular chauffeur. Q. So you would have sometimes one and sometimes another? A. Yes, sir. * * * Q. You had nothing to do with selecting the particular chauffeur for a particular trip? A. No; I just telephoned them to send the car around." It also appears that the defendant never paid the chauffeur anything, but paid the Powell-Bacon Company for his services, which payment was included in the $80 per month, as above stated.

It further appears that on the afternoon of the 15th day of April, 1906, the Powell-Bacon Company sent the defendant's automobile out in charge of a chauffeur named Arthur Bell, who testified that, acting upon the order of Mr. Powell, he took the car in question to the home of Arthur Brandeis, and waited there for some time; that Mr. Arthur Brandeis and his family came out, got into the car, and he drove them to Arthur's farm; that upon his return he left them at their home, and started to take the car back to the garage; that on his way there he had a

collision with a vehicle driven by the plaintiff and her husband, which caused the injuries of which she complained.

On cross-examination Mr Powell stated: "I cannot give the exact conversation, but the substance was that I told Mr. Brandeis that he could have the man any time he saw fit, and that the man would be subject to his direction when he left my place. * * * There was something said. I told Mr. Brandeis that he had the direction of the man, and that he was responsible for the man after he left my place." On cross-examination the defendant gave the following testimony: "Q. It was your arrangement with the Powell-Bacon Company that, while he was out in the service with your automobile, running it for you or your friends by your authority, he was doing that for you, was it not? * * * A. I presume so. Q. And he would so continue to run the machine for you and by your authority until he returned the machine to the garage, was not that true? And is not that correct under the arrangements you had with the Powell-Bacon Company? A. It would be if he took the car to the garage after he got through. * * * Q. Then, after he got back to the garage and had delivered it, he would then be out of your direction and no longer subject to it? Is not that correct? A. Yes, Powell might send him out with some other man's car right away. Q. When he came back and returned the machine to the garage then he would no longer be subject to your control, his connection with you then ceased for the time being? A. I suppose so."

The foregoing is the evidence, but not all of it, and about the facts thus established there seems to be no dispute. At the close of the evidence the defendant requested the court to instruct the jury to return a verdict in his favor. His motion was overruled, and that ruling is now assigned as error. It is strenuously contended by counsel that upon the evidence contained in this record there can be no recovery against the defendant. It appears from the pleadings and the evidence that this suit was brought against Emil Brandeis on the theory that

Bell, the chauffeur, was his servant, and it is contended that the facts do not support that theory. It is the well-settled rule that, where one person has sustained an injury from the negligence of another, he must in general proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant, while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief and hold the master responsible for the damages sustained. The master selects the servant, and the servant is subject to his control, and, in respect to the civil remedy, the act of the servant is, in law, regarded as that of the master. But it is not enough, in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them. *King v. New York C. & H. R. R. Co.*, 66 N. Y. 181. In *Wyllie v. Palmer*, 137 N. Y. 248, it was held that the doctrine of *respondeat superior* applies only when the relation of the master and servant is shown to exist between the wrongdoer and the person sought to be charged, for the result of some neglect or wrong at the time and in respect to the very transaction out of which the injury arose. *Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75; *Doran v. Thomsen*, 74 N. J. Law, 445. In *Lotz v. Hanlon*, 217 Pa. St. 339, the court held that, where plaintiff's suit is to recover for injuries received by being run down by an automobile owned by the defendant, he must show not only that the person in charge of the machine was the defendant's servant, but also that he was at the time engaged on the master's business with the master's knowledge and direction. It was said in the body of the opinion: "But it comes to nothing that the driver was the defendant's servant, if it appears that at the time the accident happened he was not on the master's errand or business."

In *Slater v. Advance Thresher Co.*, 97 Minn., 305, the supreme court of Minnesota said: "The expression 'in the course of his employment' means, in contemplation of law, 'while engaged in the service of the master,' and nothing more. It is not synonymous with 'during the period covered by his employment.'"

Counsel for the plaintiff vigorously assert that the cross-examination of the defendant and the witness Powell established the relation of principal and agent between the defendant and the chauffeur, and was sufficient to sustain the verdict. This seems to have been the theory upon which the trial court submitted the case to the jury. We are of opinion that the testimony of witnesses on their cross-examination, and upon which plaintiff's counsel rely to sustain the judgment, is not sufficient to render the defendant liable for the negligence of the chauffeur. It did not change the terms of the agreement, as stated by the witnesses on their direct examination. It was nothing more than their opinion of the legal effect of that agreement. As such it was entitled to little, if any, consideration. It must be remembered that the evidence clearly shows that the chauffeur, whose negligence caused the injury of which the plaintiff complains, was the hired servant of the Powell-Bacon Company, and not of the defendant; and where, as in the case at bar, the defendant had not used his car for any purpose, but had merely loaned it to another, and had no control over its movements or the conduct of the chauffeur, we are of opinion that the owner of the car would not be liable for the negligence of the servant of another. Again, it would seem clear, from the evidence, that if the chauffeur, in returning the defendant's car to the garage, had by his negligence injured or wrecked it, the Powell-Bacon Company, whose servant he was, would have been liable to the defendant therefor; and it cannot be said that the chauffeur was his agent to such an extent as to make defendant liable to third persons for the chauffeur's negligence while returning the car to the garage.

While the legal questions involved in this case have been often decided, it has been difficult to find an adjudicated case where the facts are the same as those in the case at bar. *Parsons v. Wisner*, 113 N. Y. Supp. 922, is perhaps the nearest in point of any of the cases. There the owner of an automobile loaned it to his brother, and the keeper of a garage furnished the chauffeur to run it. The court, in passing on the liability of the owner, said: "Upon the case presented it is established by a clear preponderance of the evidence that the chauffeur in charge of the machine at the time of the accident was not in the employ of the defendant, and had never been in his employ, and that he was not engaged in the business of the defendant, or under his direction or control, at that time." Upon the facts there stated, and for those reasons, a judgment against the owner of the automobile was reversed. It appears that the rule there announced is approved and supported by Babbitt, Law Applied to Motor Vehicles, sec. 382; Berry, Law of Automobiles, sec. 148; *Cunningham v. Castle*, 127 App. Div. (N. Y.) 580; *Reynolds v. Buck*, 127 Ia. 601. To hold the defendant liable upon the facts of this case, we are required to infer that the chauffeur, whose negligence was the cause of the accident, was at that point of time the servant of the defendant and under his control. We are of opinion that such an inference is too far fetched and is not warranted by the evidence.

For the foregoing reasons, we are unable to sustain the judgment in this case upon either the law of master and servant, or of principal and agent. We are of opinion that the trial court erred in overruling the motion for a directed verdict. The judgment of the district court is therefore reversed and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

LETTON, J., concurs in the conclusion.

PERRY & BEE COMPANY, APPELLEE, V. HOLBROOK OPERA HOUSE COMPANY, APPELLANT.

FILED MARCH 12, 1912. No. 17,025.

1. **Corporations:** INDEBTEDNESS: LIMITATIONS IN CHARTER. A corporation, when sued on its promissory note executed in settlement of a debt contracted for materials used in the erection of a building which it was the corporate purpose to construct, at a time when it had contracted no other debts, and had a sufficient amount of money on hand to pay for such materials, cannot defeat a recovery because of a provision contained in its charter limiting the amount of its indebtedness.

2. ———: ———: ———. The fact that by the action of a majority of the stockholders and directors of the corporation it used its funds for purposes other than paying for the materials so purchased affords no legal excuse for its refusal to pay for such materials.

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

W. S. Morlan and *J. F. Fults,* for appellant.

Perry, Lambe & Butler, contra.

BARNES, J.

Action on a promissory note dated July 8, 1907, for the sum of $503.74, due in one year from the date thereof, with interest at 8 per cent., given in settlement of an indebtedness due from defendant to plaintiff for lumber and materials used in the erection of defendant's opera house. The execution and delivery of the note was admitted, but defendant alleged want of power to execute it, and plead that by its articles of incorporation it was limited in the amount of its indebtedness to the sum of $700; that the sum which it owed plaintiff was $2,503.74, which far exceeded that limit; that the defendant executed a mortgage for the sum of $2,000, and the proceeds thereof were paid to the plaintiff; that the note in question was

given to cover the balance of said indebtedness, all of which transactions were void because of the limitations contained in its charter or articles of incorporation. The plaintiff, by its reply, denied the limitation, and alleged that the defendant had amended its charter by a provision increasing its capital stock to $4,000, and the limit of its indebtedness to $2,000. The reply also contained allegations creating an estoppel. The cause was tried to the court without the intervention of a jury. Plaintiff had the judgment, and the defendant has appealed.

The bill of exceptions establishes the following facts: In the month of June, 1906, certain persons residing in the village of Holbrook organized the defendant corporation for the purpose of constructing, managing and conducting an opera house in that village. The defendant's charter or articles of incorporation provided, among other things, that the capital stock of the company should be $3,000, divided into shares of $10 each; that the indebtedness of the company should not exceed the sum of $700, and that each stockholder should be entitled to one vote for every share of his stock, and that a majority of the stock represented at any regular or special meeting should constitute a quorum for the transaction of business. About $2,800 worth of stock was subscribed and paid for, and thereupon a lot was purchased on which to erect a building, which together with the excavating and grading, cost $250. Plans for the building were procured and adopted, and the lumber and other material for its construction to the amount of $2,503.74 was thereupon purchased of and furnished by the plaintiff.

The undisputed evidence discloses that at that time the company was not otherwise indebted to any one, and had on hand a sum of money sufficient to pay the plaintiff's claim. It appears, however, that, instead of applying the money then on hand to that purpose, a majority of the directors and stockholders determined to use it for the purpose of seating and heating the building, together with other necessary furnishings, including stage and scenery.

The effect of this proceeding was to defer the payment of plaintiff's claim until about the 1st of May, 1907, when at a meeting of the stockholders, at which there was represented 171 shares of stock, a resolution was adopted increasing the capital stock of the company to $4,000, and authorizing an indebtedness to the amount of $2,000; that thereupon the defendant company executed a mortgage upon its property to the bank of Holbrook for the sum of $2,000, obtained that amount of money thereon and paid it over to the plaintiff. At the same time it was voted to execute the note in suit for the balance of plaintiff's claim, which amounted to $503.74. This was accordingly done, and the plaintiff received the same in settlement of the indebtedness. It also appears that in August, 1907, the defendant paid to the plaintiff the sum of $100 upon the note which was indorsed thereon. The record contains no evidence of fraud, and the testimony tends to show that no objection was raised to the proceedings by any of the directors or stockholders until about the time this suit was instituted. Upon the foregoing facts, the district court found generally for the plaintiff and rendered the judgment of which the defendant now complains.

In disposing of defendant's contentions, it is sufficient to say that from a careful reading of the bill of exceptions we are satisfied that the defendant failed to establish any of the several defenses set forth in its answer. It is apparent that at the time the defendant purchased the materials used in the construction of its opera house, and contracted to pay the plaintiff therefor, it was not indebted in any sum whatever, and had a sufficient amount of money in its treasury to pay for the same in full; and the fact that defendant used the funds which had been raised for the payment of the plaintiff's claim for other purposes cannot be successfully urged as a reason for defeating the payment of its just debt.

Finally, it may be said that the defendant lawfully procured the material furnished to it by the plaintiff, has received and retained the benefit thereof, and has estab-

lished no valid or legal defense upon which it can escape payment for the same.

Therefore, the judgment of the district court was clearly right, and it is

AFFIRMED.

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

FILED MARCH 12, 1912. No. 16,559.

1. **Statutes**: POWER OF LEGISLATURE: DEFINITION OF TERMS. It is within the power of the legislature within reasonable limitations to define the terms used in its enactments. It cannot extend the definition of a term so as to denote ideas entirely without its province, but it may properly use the word in the broadest sense and include within its meaning any thought not unwarranted by usage, though perhaps not entirely within its ordinary definition.

2. **Monopolies**: CONSPIRACY TO FIX INSURANCE RATES. By the provisions of chapter 79, laws 1897, commonly known as the "Gondring act," combinations to prevent competition in insurance of any kind, or to settle the price of the same, are declared to be a trust and an unlawful conspiracy against trade and business.

3. ———: ———: "TRADE AND BUSINESS": "TRUST." The words "trade and business" in this act are intended as a generic term embracing all the transactions and practices mentioned in the act, and the term "trust" is properly made to include combinations or contracts in restraint of competition in insurance.

4. **Statutes**: CONSTRUCTION: MONOPOLIES. The entire series of statutes directed against combinations and monopolies should be considered as parts of a connected system, and recourse may be had in considering the intention of the legislature in the later acts to definitions of terms used in prior acts in connection with the same subject matter.

5. ———: UNLAWFUL COMBINATIONS: SCOPE OF ACT. Considering the prior legislative definitions, a combination to prevent competition in insurance may properly be a subject for legislation under the title of "An act to protect trade and commerce against unlawful restraints and monopolies," etc. Laws 1905, ch. 162.

6. ———: ———: ———. The purpose of section 4 of that act

requiring certain statements and undertakings to be filed in the office of the attorney general is to aid him in enforcing the statute, and the subject matter of the section falls properly within the scope of the title of the act.

7. **Insurance:** FOREIGN CORPORATIONS: STATUTORY PROVISIONS. Permission granted by former statutes to foreign surety companies to do business in this state, under certain conditions, does not create a contract between such companies and the state, but, even if it did, the state, under its police powers, would still have the right to regulate the business and by additional legislation to require such reports and statements as seemed to it necessary to that end.

8. ———: ———: ———. A state may impose additional conditions on the right of a foreign corporation to do or engage in business within this state, and, unless such additional requirements change or affect those imposed by prior acts of the legislature, the act imposing the additional conditions is not amendatory.

9. **Monopolies:** ENFORCEMENT OF STATUTE. Under the terms of the Junkin act (laws 1905, ch. 162), its administration and enforcement are committed to the attorney general and the governor of the state, and it is made the duty of the attorney general to institute and prosecute such proceedings in any court of competent jurisdiction as may be necessary to carry into effect its provisions.

REHEARING of case reported in 90 Neb. 154. *Former judgment vacated, and judgment of district court reversed.*

LETTON, J.

The former opinion in this case is reported in 90 Neb. 154. The principal contention now made by the attorney general on rehearing is that the provisions of chapter 79, laws 1897, commonly known as the "Gondring act," when considered in connection with the provisions of chapter 162, laws 1905, commonly known as the "Junkin act," made it the duty of the defendant to file the statements and undertakings required by section 4 of the latter act; that these statutes must be considered and construed together, and that, since a combination to prevent competition in insurance is within the definition of a "trust" by the terms of the former act, it was the intention of the

legislature to protect trade from such an unlawful restraint on competition by the latter act, and, consequently, that a foreign insurance company is among those corporations required to make report thereunder.

The defendant insists that the Junkin act is by its title restricted to "trade and commerce;" that insurance does not fall in either of these classes; that insurance is a distinct and separate subject of legislation; that since 1905 the state has not required such reports to be filed and that its right to the same, if one ever existed, has been waived, and it is now estopped to insist upon it; that section 4 is in violation of the constitution; that the penalties imposed by the act are not for failure to file the statements required by section 4; and that if insurance is held to be commerce the act is an attempted regulation of interstate commerce, and therefore void.

At the outset of the discussion it is proper to say that we agree with the defendant that the requirements of section 4 can only apply to such persons or corporations as may reasonably be considered as being embraced within the title of the Junkin act. We adhere to the view expressed in the former opinion that generally the words "trade and commerce" would not include the business of insurance, but we have no doubt that it is within the power of the legislature within reasonable limitations to include within the concept and definition of a term ideas which may not unreasonably be included therein, though perhaps not strictly within its ordinary definition. The line of demarcation between the ideas expressed by the words "trade and business" and "trade and commerce" is somewhat hard to draw, and the legislature may without violence to any constitutional limitations and with propriety embrace within the definition of one term or the other transactions which may lie close to the border line. Statutory definition often relieves the court of questions otherwise hard to solve when endeavoring to ascertain the meaning of the legislature, and is a practice which is to be commended if exercised within proper limitations.

As was said in *In re Pinkney,* 47 Kan. 89, 27 Pac. 179, which was quoted in the former opinion: "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."

Was it the intention of the legislature that the prevention of competition in insurance should be included within the title?

The title of the Goudring act, so far as necessary to consider here, is "An act to define trusts and conspiracies against trade and business, declaring the same unlawful and void, and providing means for the suppression of same." Section 1 of that act, so far as essential here, is as follows: "That a trust is a combination of capital, * * * skill or acts by two or more persons, or by two or more of them for either, any or all of the following purposes: * * * (3) to prevent competition in insurance, either life, fire, accident or any other kind. * * * (5) To make or enter into, carry on or carry out any contract, obligation or agreement of any kind or description * * * by which they shall in any manner establish or settle the price of any article of merchandise, commodity, or of insurance, fire, life or accident, * * * or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale, production or transportation of any such article of merchandise, product or commodity or the carrying on of any such business, that its price might in any manner be affected thereby." By section 2 it is declared: "That any and all acts by any person or persons carrying on, creating, or attempting to create, either directly or indirectly, a trust as defined in section one (1) of this act, are hereby declared to be a conspiracy against trade and business and unlawful," etc. By section 13 of the act it was provided:

"That the word 'person' or 'persons' wherever used in this act shall be deemed to include firm, firms, corporation, corporations, partnerships, copartnerships and associations existing under, permitted or authorized by the laws of the United States, this state or any other state, or the laws of any foreign country or territory of the United States." By this statute, therefore, a combination for the purpose of preventing competition in insurance of any kind is defined as a trust, and a trust is declared to be a conspiracy in restraint of trade and business, and unlawful. Evidently the words "trade and business" are intended as a generic term to embrace all the transactions and practices set forth in the preceding section, and properly include the regulation of insurance contracts in restraint of competition.

At the same session there was passed "An act to prevent combinations between fire insurance companies and providing penalties therefor," commonly known as the "Haller act." Laws 1897, ch. 81. This act prohibited combinations to fix rates and commissions by fire insurance companies, but made no attempt to prevent such combinations to prevent competition in other classes of insurance.

Eight years later the Junkin act was passed. Laws 1905, ch. 162. It was a further development of the legislative campaign against the evils of combinations to enhance prices and to prevent competition in all lines of trade and business. The legislature necessarily must have had in mind the existing statutes on the general subject and the prior definitions of the terms used therein. Our views on this subject are plainly expressed in the opinion in *State v. Omaha Elevator Co.*, 75 Neb. 637, as follows: "We think it clear that the whole series of statutes directed against combinations and monopolies should be considered as parts of a connected system, and that no one act should be singled out for construction and be considered apart from the general trend of legislation upon the subject. * * * It is apparent that the Junkin act of

1905 in a large measure covers the same subject matter as the Gondring act of 1897. Its provisions in some respects are more specific. It is preventive in its nature as well as remedial, and it is apparent that it was intended by the legislature to cover the same subject matter and to furnish like and additional remedies to those provided by the Gondring act. It evidently was intended to be a substitute for that act, in so far as the preventive and remedial features are concerned. It fails, however, to specifically define or construe or determine what a 'trust' is. We think that recourse may be had, however, to the definition of 'trust' in the first section of the Gondring act to throw light upon what the legislature meant when it prohibited 'every combination in the form of trust' in the Junkin act. The extent of the repeal of the former act is measured by the extent to which it covers the subject matter, and if any portion of the former act is not inconsistent with or repugnant to the latter, and it can fairly be said that it was within the contemplation of the legislature when the later statute was enacted, it will be upheld and construed as forming a part of the later enactment." The legislature in the Junkin act did not again define the words "trust" or "conspiracies against trade and business," for this it had already done in the Gondring act. The title of the new act, so far as pertinent here, is "An act to protect trade and commerce against unlawful restraints and monopolies," etc. By section 1 it is declared: "That every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal."

Since a combination to prevent competition in insurance had already been defined as a trust, it seems evident that the protection of trade from such trust or unlawful combination was within the intent and purpose of the legislature. We are of opinion that the prior legislative definitions made in the Gondring act, to which our attention was not directed upon the argument at the former hearing, when considered in connection with the Junkin

act, bring the case within the rule of *In re Pinkney*, *supra*, *Beechley v. Mulville*, 102 Ia. 602, and *Queen Ins. Co. v. State*, 86 Tex. 250, cited in the former opinion. Furthermore, we are satisfied that by the passage of the Junkin act it was not the intention of the legislature to narrow the field of the protection given by the Gondring act, and that in both acts the same purpose is manifested, namely, the protection of "trade and business" or "trade and commerce" from unlawful restraints. As used by the legislature in these acts, we think the terms are practically synonymous. In fact, the latter term is, if anything, broader than the former, for, while the terms "trade and business" may have to some extent a somewhat local significance, "trade and commerce" connotes the widest latitude of commercial transactions, interstate or even international in extent. We conclude, therefore, that by prior legislative definition a combination to prevent competition in insurance may properly be a subject for legislation under the title of the Junkin act. The conclusion must follow that the purpose of section 4 in requiring the statements and undertakings therein mentioned to be filed in the office of the attorney general is to furnish that officer with information necessary to aid him in his duty to enforce the law, and that the subject matter of that section falls properly within the scope of the title.

We are not convinced by defendant's argument that by the passage of the Haller act the legislature evidenced the thought that an insurance combination was a separate subject, and therefore not included in the Gondring act. Perhaps this may be true as to fire insurance, but it cannot be so as to other classes of insurance, for they are specifically mentioned in the latter act.

We are not impressed with the contention that section 4 is unconstitutional because it applies to a subject different from the general subject matter of the act. It merely provides a detail the legislature believed to be necessary to carry out the purpose of the law, and, as said before, is clearly within the general scope of the title.

So, also, as to the claim that the act is amendatory of the act of 1885 (laws 1885, ch. 23, Ann. St. 1911, sec. 6711), setting forth the requirements to be met by foreign surety companies as a condition of doing business in this state. True it adds another duty, but it leaves the former act unaffected. The legislature may impose additional conditions if it so desire, but such imposition would not be amendatory, unless the former requirements were changed or affected.

Neither can we agree to the assertion that the permission granted by former acts to such corporations to do business in the state creates a contract which is violated by this act. A license or permission is not a contract; but, even if it were, the state under its police powers would still have the right to regulate the business and to require such reports and statements as seemed necessary to protect its people from unlawful exactions. *State v. Standard Oil Co.*, 61 Neb. 28.

The contention that the state is estopped by reason of the failure of its officers to call for the report for several years, and that thereby the right of the state in this regard has been waived, does not present much difficulty. There is nothing in the record on which this argument can be based. Moreover, no officer is empowered by nonaction to repeal mandatory provisions of a statute. It is not infrequent that laws imposing fines and penalties are not enforced, but the penalties are not abrogated thereby nor the laws repealed. If the failure to enforce laws in this country should have the effect of abrogating or repealing them, the bulky and ponderous volumes of both state and federal statutes might easily shrink to pocket size.

The object of this action and the prayer of the petition is that the defendant be enjoined "from further transacting or carrying on its business within the state of Nebraska, and for such other and further relief as equity and justice may require." Defendant contends that the penalties imposed by the act are not imposed for the failure

to file the statements and undertakings required by sections 4 and 5 of the act, but are only imposed for the violation of its provisions with respect to contracts in restraint of competition in buying and selling merchandise and commodities, or in restraint of trade and commerce in the general acceptation of these words. Section 4 (laws 1905, ch. 162) provides, in substance, that no corporation of the class described in the section "shall engage in business within this state, or continue to carry on such business, unless it shall comply with the following conditions:" (Then follows an enumeration of the reports required.) Section 5 provides that the attorney general may at any time require any statement he may think fit in regard to the conduct of the business of such corporation. Section 6 is still broader in its provisions, and makes penal a violation of its terms by "every corporation * * * engaged in business within this state." Section 8 provides, in substance, that all the books of record and papers of every corporation, joint stock company or other association engaged in business within this state shall be subject to inspection by the attorney general and shall make such further returns as shall be by him prescribed. Sections 11 and 16 provide, in substance, that a defaulting corporation may be enjoined against further engaging in such business in this state by a suit brought by the attorney general in behalf of the state, and "that the several courts of record of this state having equity jurisdiction are hereby vested with jurisdiction to prevent and restrain all violations of this act, and especially" the giving or receiving of rebates or concessions.

From a consideration of these sections and of the act as a whole, it is clear that its administration and enforcement is committed to the attorney general and the governor of the state. By section 22 it is expressly provided: "It is hereby made the duty of the attorney general and the county attorneys of the state under direction of the attorney general to institute and prosecute such proceedings as may be necessary to carry into effect all of the pro-

visions of this act." Since the relief prayed for in this action is that a foreign corporation which fails, neglects, and refuses to obey the law as to filing reports be enjoined from continuing to do business in this state, while so violating the provisions of the act, we are of opinion that the petition states a cause of action.

Under the provisions of section 11, the court may enter a modified or conditional decree or a decree to take effect at a future time as justice shall require. It is not obligatory to render a decree in the first instance absolutely barring the defendant from doing business in the state. It is within the power of the court to enter a conditional decree providing that, if the reports and undertakings required by the statute are not filed within a specified time, a final decree may be entered as prayed. Holding these views, the former judgment of the court must be set aside, the judgment of the district court reversed, and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., not sitting.

STATE, EX REL. WILMOT L. BAUGHN, JR., RELATOR, V. WILLIAM G. URE, CITY TREASURER, RESPONDENT.

FILED MARCH 12, 1912. No. 17,501.

1. Statutes: ENACTMENT: CONSTITUTIONAL PROVISIONS. Where an act is passed as original and independent legislation and is complete in itself so far as applies to the subject matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application.

2. ———: ———: ———. The mere fact that an act of the legislature adopts the provisions of prior acts by reference thereto does not render the new act amendatory of the acts to which reference is made if in other respects it is a complete act in itself.

3. ———: CONSTITUTIONALITY: COMMISSION PLAN OF CITY GOVERNMENT. The provisions of the constitution dividing the powers of government into three distinct departments, legislative, executive, and judicial, and prohibiting any person of one department from exercising the powers belonging to the others, apply to the government of the state, and not to the government of local subdivisions such as municipal corporations; therefore, the Commission Plan of City Government provided for in chapter 24, laws 1911, which permits the exercise of all such powers by certain officers named therein is not invalid as violating such constitutional provisions.

4. ———: ———: ———. Where a law is general and uniform throughout the state, operating alike upon all persons and localities in the same class, it is not open to the objection that it is local or special legislation.

5. ———: ———: ———. There is no requirement in the constitution that the details of local government shall be the same in all cities of like population. Although under the operation of the act allowing the adoption of the Commission Plan of City Government some cities, within the class described in the act, may not adopt the provisions thereof, this does not render the act violative of the constitutional provision that no local or special act shall be passed "changing or amending the charter of any town, city or village."

6. ———: ———: TITLE OF ACT. The provisions of section 11, art. III of the constitution, that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," are intended to prevent surreptitious legislation. The court will not be warranted in holding that an act of the legislature is void because more appropriate or a better arrangement of the language in the title might have been adopted, if the general purpose of the act is expressed and the matter contained in the body of the act is germane thereto.

7. ———: VALIDITY. Where a portion of a statute is in violation of the constitution, if the objectionable part was not an inducement to its passage and may be eliminated without interfering with the general purpose of the act, and the remainder of the act is valid and capable of being enforced, the act will be upheld.

8. ———: CONSTITUTIONALITY: ELECTIONS. The provisions of the act in question, that the only candidates "whose names shall be placed upon the official ballot" at the city election shall be those nominated at the preceding primary election, does not prohibit any voter from inserting in such ballot the name of any person for whom he may desire to vote, and does not violate the pro-

visions of the constitution with regard to the freedom of elections.

9. Officers: LEGISLATIVE CONTROL. As a general rule offices created by the legislature may be controlled by that body. The term of officers may be shortened, the office abolished, or changes made in the duties to be performed, without thereby violating any constitutional provision.

10. Statutes: CONSTRUCTION. A statute of doubtful meaning should be construed, if reasonably possible, so as to carry out the purpose and intention of the legislature, and when this purpose is manifest it will prevail over a seeming conflict in the language. The meaning must be ascertained from a consideration of all that is said in the act upon the same subject matter, and later expressions will usually control the language used in preceding portions of the statute.

ORIGINAL application for a writ of mandamus to compel respondent to accept filing fee, to enable relator to become a candidate for city clerk of the city of Omaha. *Writ denied.*

Isidore Zeigler, for relator.

John P. Breen and *John A. Rine, contra.*

E. O. Kretsinger, A. M. Morrissey and *Meier & Meier, amici curiæ.*

LETTON, J.

This is a proceeding in mandamus to compel William G. Ure, as city treasurer of the city of Omaha, to receive from the relator the filing fee of $5 provided by law to enable him to file his application to have his name placed upon the ballot at the primary election in 1912 as a candidate for the office of city clerk provided for in chapter 12*a*, Comp. St. 1909, governing cities of the metropolitan class.

Relator alleges his tender and the refusal by respondent of the lawful fee; the reason given being that the office of city clerk is no longer an elective office in said city, and that he as such treasurer had no authority or power

to receive said fee because of the provisions of chapter 24, laws 1911, commonly known as the "Commission Plan of City Government," which act it is alleged was regularly and legally adopted by the electors of that city at a special election and so declared by the duly authorized officers of said city.

Relator in substance alleges that the statute last referred to is in violation of the constitution and void for the following reasons:

(1) Because, although the act purports to be an act complete in itself, it modifies and repeals various prior laws and sections thereof, without naming the same, or in express terms repealing or re-enacting such prior laws and sections. Certain sections in chapter 12*a*, Comp. St. 1909, being the general law governing cities of the metropolitan class, and also several sections of the general primary election laws of the state are alleged to be amended and repealed by the act, without naming them, which is said to be in violation of section 11, art. III of the constitution.

(2) Because it becomes operative and goes into effect only upon, and not until, the electors of any city desiring to come under its operation and be governed by it vote upon its adoption, and that the legislature thereby has unlawfully attempted to delegate its powers of legislation to that portion of the people of the state adopting said act.

(3) Because whenever the provisions of the law are adopted by any city, then the act becomes special legislation as to the city adopting the same, in that such city is not thereafter governed by the same law as cities of the same class not adopting the act, which result is prohibited by section 15, art. III of the constitution.

The cause is now before us for hearing upon a demurrer to the petition, which, of course, admits all the foregoing facts well pleaded. If the act is void, then it was the duty of respondent to receive the filing fee tendered, and the relator is entitled to the writ; but, if valid, the writ must be refused.

The title of the act under consideration is "An act for the government of all cities having, according to the last preceding state or national census, five thousand or more population, and to enable such cities to adopt the provisions of this act called the 'Commission Plan of City Government.'" Laws 1911, ch. 24.

The relator concedes that, so far as its title is concerned, this may be deemed an act complete in itself, but it is said that the officers whose election is provided for in the act have to resort to other and prior laws governing the cities in the state adopting the plan to ascertain the powers and duties of the government of such cities, and that for that reason the act is not complete in itself but amendatory; that it does not clothe the officers with power sufficient to govern a city by its own terms, and that consequently, it cannot be said to be an act complete in itself, although the title so indicates. In support of this contention relator cites *Smails v. White,* 4 Neb. 353; *Sovereign v. State,* 7 Neb. 409; *In re House Roll 284,* 31 Neb. 505; *Stricklett v. State,* 31 Neb. 674; *Haverly v. State,* 63 Neb. 83; *German-American Fire Ins. Co. v. City of Minden,* 51 Neb. 870; *Van Horn v. State,* 46 Neb. 62; *City of South Omaha v. Taxpayers' League,* 42 Neb. 671; *Trumble v. Trumble,* 37 Neb. 340; *Board of Education v. Moses,* 51 Neb. 288.

These cases to some extent give countenance to this argument. The law is firmly settled by the later decisions in this state, however, that, where an act is passed as original and independent legislation and is complete in itself so far as applies to the subject matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application. It is pointed out in 1 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 239, that the later cases in this state are in harmony with the current of authority in other jurisdictions. We deem it unnecessary to do more than refer to the following decisions: *Allan v. Kennard,* 81 Neb. 289; *Zimmerman v. Trude,* 80 Neb. 503; *State v. Cornell,* 50 Neb. 526; *Affholder v. State,* 51 Neb.

91; *Van Horn v. State*, 46 Neb. 62; *De France v. Harmer*, 66 Neb. 14; *Wenham v. State*, 65 Neb. 394; *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254; *State v. Moore*, 48 Neb. 870.

In *Smails v. White*, *supra*, the opinion seems to indicate that because the act denounced changed the time in which to file an undertaking on appeal and left the manner of taking the appeal as it was, so that reference was necessary to the former act to ascertain the manner of appealing, this made the law obnoxious to the constitution. This point is considered in *Pacific Express Co. v. Cornell*, 59 Neb. 364, 377, where it is said of the new law: "It but placed the companies, to which it was made applicable, under the supervision of certain officers, cast further duties upon the latter, and for the extent of their jurisdiction or power, and the manner of procedure in its exercise, refers to another law of prior existence. This was not fatally objectionable legislation." Also, in *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254, where discussing it, this court said: "Nor is the fact that it refers to another law, making it requisite to follow the requirements of the latter in forming these corporations, a reason why the rule should not prevail. This does not constitute the act so uncertain as to render it difficult to ascertain just what the law is intended to be. The object of the constitution in requiring the portion of the law amended to be included in the new legislation is to preclude the amendment of laws in so blind a maner as to render it difficult to ascertain just what law is intended to be amended." The mere fact that the act requires reference to the existing laws governing cities of the class embraced within this act for matters of detail and administration does not operate to change the character of the act as a complete act. *State v. Junkin*, 87 Neb. 801.

In *People v. Knopf*, 183 Ill. 410, 415, where the validity of a new revenue law was assailed on the ground that the act was amendatory and violated the provisions of the constitution with reference to amendment of statutes, the

court say: "Under all the circumstances the act should be sustained, if possible, as independent legislation, and not as amendatory in character. The mere fact that portions of the old law are left in force, so that the statutes present the aspect of what has been called patch-work legislation, as they undeniably do, should not render the act void, if it can be said that the act is reasonably complete and sufficient in itself upon distinct branches of the general subject." See, also, *People v. Lorillard,* 135 N. Y. 285; *Fornia v. Wayne Circuit Judge,* 140 Mich. 631; *People v. Mahaney,* 13 Mich. 481.

The case last referred to has been repeatedly cited and approved in this court, and we are satisfied with the principles of law therein announced. We think the act under consideration does not violate the constitutional provision respecting the amendment of statutes.

Relator's next contention is that the act in question violates section 1, art. II of the constitution, providing for the distribution of powers for the government of the state into legislative, executive, and judicial. He argues that, since the provisions of the law do not become effective with reference to cities of over 5,000 inhabitants, except on an affirmative vote of the electors thereof, the act is an attempt on the part of the legislature to delegate legislative powers to a municipality; and that, since the legislature is not authorized to submit to a popular vote of the state the question whether or not an act proposed by it shall become a law, it cannot submit such a question to the electors of a municipality; that by the act the choice of selecting two different forms of government is left to the electors of each city, which choice the legislature has not the power or the right to delegate to the electors of a municipality.

The provision of the constitution referred to by its express terms is concerned only with the government of the state, and does not attempt to limit the legislature as to its power to prescribe the manner in which municipalities or local subdivisions of the state may administer their

local affairs. The constitution committed to the legislature the general power to create, regulate and govern such municipalities and the authority to pass laws providing all the administrative details necessary, except as to a few matters where such powers are expressly limited by its terms. This question has been raised, considered at length, and decided in a number of recent cases in other states where similar acts have been passed, and courts in general have taken the same view. We believe it only necessary to refer to the reasoning in these opinions on this point. *Eckerson v. City of Des Moines*, 137 Ia. 452; *Cole v. Dorr*, 80 Kan. 251; *Bryan v. Voss*, 143 Ky. 422, 136 S. W. 884.

On the general subject of the powers of the legislature to submit to electors of a local subdivision of the state the question whether they shall adopt or reject, as applying to such subdivisions, the provisions of a general law, many cases are cited in 8 Cyc. 840, note 17. In this state, so far as has been brought to our attention, the right of the citizens of a county to vote upon the division of the same, or to vote upon the adoption of the "Herd law," or upon the question as to whether bounties should be paid by the county for the killing of wild animals, has never been questioned. We conclude, therefore, that it was within the power of the legislature by general law to allow the electors of all cities in the same class to adopt or reject the commission plan of government.

It is next contended that the act is unconstitutional for the reason that it is a local and special law, and thereby violates section 15, art. III of the constitution; that, if the electors of one municipality should adopt the commission form of government and other cities of the same class should refuse to adopt that form, the electors would be permitted to do that which the legislature is prohibited from doing, and that thereby various forms of government for municipalities belonging to the same class are made possible. We think the act is not inimical to the constitution for this reason. It is a general act applying to all

cities within the state of over 5,000 inhabitants and operates on all cities alike within the class. It affords to each city within its terms opportunity to select its system of government. The mere fact that the ultimate result may be that some cities of the state may have a different form of government from others does not necessarily make this a special or local law.

In *In re Petition of Cleveland,* 52 N. J. Law, 188, 7 L. R. A. 431, the facts were that an act of the legislature of New Jersey vested in the respective mayors of the cities of the state the power to appoint certain municipal officers in substitution for certain previously existing methods of appointment, and the law was made operative only in cities which elected to accept its provisions. The city of Jersey City accepted the provisions of the act and the mayor thereupon filled the municipal offices. Prior incumbents contested the validity of the statute, among other grounds, for the reason that the act was special and local. The language of the court is so apt that we quote it: "The alleged vice in the law, mainly relied upon to overthrow it, is that it is local and special, and therefore proscribed by our constitutional provision. In this argument it is an obvious and fundamental fact, which must be ever present in mind, if we would not be misled, that the grant of the powers of local government inevitably leads to diversity. The object of delegating powers is to enable local governments to make such diverse laws as they may deem expedient. The grant of such powers implies that diversity is requisite. If uniformity was to be preserved, the legislature would establish an inflexible and uniform code for all localities, leaving nothing optional. If we hold that the fact that diversity arises out of the use or application of a legislative act is destructive of its validity, we must affirm that the constitution of our state, in its present form, absolutely forbids the delegation of powers of local government. Such a proposition, I think, no one will seriously advocate. Uniformity in results cannot coexist with the right of local self-government until all men

shall be of one mind. No one will assert that an act is local or special which gives to all the cities of this state the right to establish by ordinance the mode in which their subordinate officers shall be elected. Under such a statute, one city might make the tenure of office a term of years, another during good behaviour, and a third, at the will of the common council. Such diverse results in the execution of the granted power obviously could not outlaw the act of the legislature. The authority granted to all is the same; the dissimilarity is in its use—a dissimilarity inherent in the idea of local government. The uniformity exacted by the constitutional mandate must be sought for, not in the results which flow from the free, unhampered exercise of the granted power of local government, but in the fact that every locality is afforded a like right to adopt and exercise in its own way the same powers which are bestowed upon every other like political body. To the one no privilege must be offered for acceptance which is not extended to the other. The authority given must be the same; it may be executed in a different way, or in the same way, at the option of the recipient. That is the uniformity to which the judicial declarations in the adjudged cases in this state must be referred." See, also, *State v. Holmes,* 68 N. J. Law, 192, 53 Atl. 76. The same question is treated of at length in the leading case of *Eckerson v. City of Des Moines, supra,* where it is held: "The fact that it is possible, or even probable, that some one or more cities may not avail themselves of the provisions of an act granting special powers to the class of cities to which they belong will not affect the uniform application of the law if all who do accept it are to be governed alike. A law which is a complete enactment when it leaves the legislative department is not objectionable as a delegation of the legislative power, because containing a provision that it shall not become operative except upon a vote of the people to whom it is made applicable."

The principles announced and discussed in these decisions are the same as those announced by this court in

Allan v. Kennard, 81 Neb. 289. In that case it is said: "It is settled law in this state, as well as in most others having like constitutional restrictions, that where a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, it is not open to the objection that it is local or special legislation (*State v. Graham,* 16 Neb. 74; *State v. Berka,* 20 Neb. 375; *Van Horn v. State,* 46 Neb. 62; *Livingston L. & B. Ass'n v. Drummond,* 49 Neb. 200), and it is unnecessary to do more than state the principle in this connection. See, also, *State v. Frank,* 61 Neb. 679." See, also, *Cole v. Dorr,* 80 Kan. 251; 1 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 201, and cases cited.

There is no requirement in the constitution that the details of local government shall be the same in all cities of like population. Cities in the same class so far as population is concerned may and often do have quite different methods of local government in some details of administration. That which is illegal in one city may be legal in another, depending upon the different ordinances in effect. Moreover, in classification by population the line of differentiation is almost imperceptible. What essential difference is there to justify placing a city of 10,000 inhabitants in one class and a city of 9,999 inhabitants in another? The real difference becomes obvious only as each city recedes in population from the dividing line, yet, it cannot be successfully contended that acts making classification on such a basis are local or special in their nature.

The remaining objections urged by the relator are answered in the opinions in the cases cited and will not be further considered.

A brief, however, has been filed by counsel appearing as friends of the court, suggesting certain other provisions which it is claimed render the statute unconstitutional. The title of the act is "An act for the government of all cities having, according to the last preceding state or national census, five thousand or more population, and to enable such cities to adopt the provisions of this act called

the 'Commission Plan of City Government.'" It is argued that since the title shows that the act can only apply to cities having 5,000 population, according to the national census of 1910, cities hereafter reaching 5,000 population are not within its terms, which, under the doctrine of *State v. Scott,* 70 Neb. 685, is a violation of section 15, art. III of the constitution. The operation of the act condemned in *State v. Scott, supra,* was, by its terms, limited to counties having a population of 50,000 according to the census of 1900. There were only two counties in the state coming within the class. It was held that, since the act could never apply to any other counties, it was local and special in a matter which the constitution required to be general. By the terms of section 1 of the act under consideration, it is provided that "any city in this state *now or hereafter* having, according to the last officially taken and promulgated state or national census, five thousand or more population, may adopt the provisions of this act," etc., so that the act is not subject to the vice pointed out in the *Scott* case.

It is contended, however, that section 1, in so far as it refers to any census taken hereafter, is void, for the reason that this portion of the act is broader than its title. We are not inclined to take such a narrow view. The title may be said to be ambiguous to a slight extent, but the section immediately following is specific. The title may reasonably be held to apply to cities having, at the time they vote on the adoption of the act, 5,000 population, according to the last preceding census. A title is not expected to specify minutely all the provisions of the act. In *Nebraska Loan & Building Ass'n v. Perkins,* 61 Neb. 254, it is said: "It is not essential that the title chosen by the legislature be the most appropriate; if it indicates the scope and purpose of the act, it is sufficient. *State v. Bemis,* 45 Neb. 724; *In re White,* 33 Neb. 812. Neither is it necessary that the title inform its readers of the specific contents of the bill. If it indicates the subject of the proposed legislation, it meets all essential requirements. It

needs not that it be a complete abstract and epitome of the contents of the bill. If no portion of the bill is foreign to the subject of legislation, as indicated by the title, however general the latter may be, it is in harmony with the constitutional mandate. *Boggs v. Washington County,* 10 Neb. 297; *Hopkins v. Scott,* 38 Neb. 661; *State v. Moore,* 48 Neb. 870." The provision of section 11, art. III of the constitution, should not be given such a narrow and technical construction as to require the title to contain an index to or abstract of the provisions of the bill. *Alperson v. Whalen,* 74 Neb. 680; 3 Neb. Syn. Digest, secs. 132-136, p. 2968. Unless the purpose of the constitution makers to prevent surreptitious legislation has been thwarted, the court will not be warranted in holding that an act of the legislature is void because a better title might have been adopted.

It is next suggested that section 17 of the act violates the provision of the Bill of Rights relative to freedom of speech. Even if this be true and the section is void for that reason, it can be eliminated without affecting in any degree the remainder of the act. It could not have been an inducement to its passage. The views of this court as to the meaning of section 5, art I of the constitution, have been fully expressed in the majority opinion and in the dissenting opinion of the writer in *State v. Junkin,* 85 Neb. 1, 10, and it is unnecessary to repeat them.

Objection is made to sections 5, 7 and 8, with reference to the manner of printing the official ballot, and it is said that these provisions are in violation of the constitutional provision that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Const., art. I, sec. 22. We do not understand that the act prohibits or prevents any voter from writing the name of any candidate upon the ballot, either at the primary or general election. In fact, as to the primary, it is provided, after stating in what manner the names of candidates shall be placed on the ballot: "In all other respects the general

character of the paper ballot to be used shall be the same as authorized by the 'Australian Ballot Law' of the state." (Sec. 6.) And, as to the city election, it is provided: "In all other respects the general laws in force in any such city respecting the holding and conducting and declaring the result of any such regular or general city election shall apply, so far as the same are applicable and not inconsistent with the provisions of this act." (Sec. 8.) We understand the provision that the only candidates "whose names shall be placed upon the official ballot" (sec. 7) at the city election means that these are the only candidates whose names shall be printed on the official ballot, and we find no prohibition against any voter inserting the names of such other persons as he may desire to vote for.

It is also objected that section 21, which provides for the removal of any incumbent of the office of councilman by means of an election held upon a petition filed by a specified number of voters, is amendatory of prior statutes. It will be observed that the "councilman" who is subject to removal under the provisions of this section is the officer who is provided for by the terms of this act, and that this section does not apply to the holder of any municipal office created by any other statute. Since section 21 does not affect or modify the provisions of prior statutes, it cannot be said to be amendatory of them. In any event, the recall provisions of this section may be eliminated and still the main provisions of the act remain effective, since it cannot have been one of the main inducements to the passage of the act. If the occasion ever arises for a direct attack upon it, and it is pointed out that for other reasons this section violates any of the provisions of the constitution, the court, even though we hold the act is valid, may still consider whether for any reason this section is vulnerable to attack. It may be said, however, that as a general rule offices created by the legislature may be controlled by that body, that the term of officers may be shortened, the office abolished, or changes made in the duties to be performed, without violation to any constitutional provision.

It is also contended that since it is provided, in substance, in section 19, that all general state laws governing the several classes of cities described in the act which are inconsistent with the provisions of this act shall, upon its adoption by any city and the election of officers thereunder, be deemed and held to be repealed, and, in section 24, that any city which shall have operated for more than four years under the provisions of the act may abandon its provisions and organization thereunder, and accept the provisions of the general law of the state then applicable to such cities by a majority vote at a special election, these provisions are inconsistent with each other; that, if under the provisions of section 19 the general statutes are repealed with respect to such cities, they cannot again be revived and made applicable under the provisions of section 24. Perhaps it is unnecessary to anticipate the contingency that a city which has adopted the commission plan of government will ever desire to return to a government under the general laws of the state, but we see no difficulty in construing these two sections. It is evident that the legislature intended that the operation of the general laws should be abrogated or suspended so long as the municipality elected to proceed under the commission form and that an absolute repeal was not intended. In construing a statute of doubtful meaning, the rule is to do so, if reasonably possible, so as to carry out the purpose of the legislature, and when this purpose and intention is manifest it will prevail over a seeming conflict in the language. *Flagg v. Flagg*, 39 Neb. 229; *Parker v. Nothomb*, 65 Neb. 315. The meaning must be ascertained from a consideration of all that is said in the act upon the same subject matter. Moreover, since the latter provisions clearly show that it was the intention of the legislature that cities might again resume the former method of government, the rule applies that where different portions of the same statute conflict the last words stand. *Van Horn v. State*, 46 Neb. 62.

At the oral argument it was further contended that the

provisions of section 11, vesting in the council "all executive or legislative or judicial powers and duties hitherto held, possessed or exercised under the then existing laws governing any such city, by the mayor or mayor and city council or water commissioners," etc., and providing that such powers, duties, and office shall thereupon cease and determine, also violates the provisions of the constitution. This section, however, expressly excepts from its operation any office or officer in the city named in the state constitution, and city school or school district officers. As we have seen, the legislature is not restricted by the constitution with regard to the creation or termination of municipal offices, and it may provide that the duties heretofore exercised by certain officers may be exercised by others. It is, therefore, within its powers to so enact.

We have not found it necessary to elaborate by an extended course of reasoning the principal grounds upon which our decision rests. The act is, in the features attacked, very similar to the statute of the state of Iowa, which was construed by the supreme court of that state in *Eckerson v. City of Des Moines, supra,* and, while we cannot, for the reason that this act is not identical in several respects with the Iowa act, apply the rule that, where the legislature adopts the statute of another state, the judicial construction which it has already received in such state is also adopted, much of the extended discussion of principles found in the opinion in that case is applicable. So, also, with those stated in *Bryan v. Voss, supra; Cole v. Dorr, supra; Cole v. Tucker,* 164 Mass. 486; *Graham v. Roberts,* 200 Mass. 152; *Orrick v. City of Ft. Worth,* 52 Tex. Civ. App. 308, 114 S. W. 677; *In re Pfahler,* 150 *Cal.* 71, 88 Pac. 270.

As a whole, the act does not seem to us to be subject to the objections urged, and the respondent was justified in refusing to accept the filing fee. The writ of mandamus is

REFUSED.

REESE, C. J., not sitting.

CATHERINE KRAMER, APPELLEE, V. JOHN A. WEIGAND, APPELLANT.

FILED MARCH 12, 1912. No. 16,638.

1. **Limitation of Actions:** TRESPASS UPON THE PERSON. Section 13 of the code, providing that a civil suit for assault and battery must be commenced within a year from the time the cause of action accrues, does not apply to an action for trespass upon the person of plaintiff, resulting in her pregnancy and in the subsequent birth of a bastard child.

2. **Assault and Battery:** WEIGHT OF EVIDENCE: QUESTION FOR JURY. In a civil action for such a trespass, the weight of evidence that plaintiff made no outcry when assaulted, and that for a time she did not complain of the assault, is for the jury, where her testimony tends to show that she resisted defendant to the extent of her ability.

3. **Evidence:** ASSAULT. The rule that, in a civil action, a preponderance of the evidence proves any issue, applies to a civil action for such a trespass.

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

H. C. Vail, for appellant.

A. E. Garten, *William R. Patrick* and *O. M. Needham*, *contra.*

ROSE, J.

Plaintiff is an unmarried woman, and this is an action for trespass upon her person. In her petition she charges defendant with forcible debauchment, resulting in her pregnancy and in the subsequent birth of a bastard child. From a judgment in her favor for $5,000 defendant has appealed, relying upon the following points for a reversal: (1) The action is one for damages for assault and battery and is barred by the statute of limitations, because it was not commenced within a year from the time it accrued. (2) The evidence is insufficient to prove that plaintiff did

not consent to the acts of defendant, and for that reason does not sustain the verdict. (3) The damages are excessive.

1. If the suit is merely a civil action for damages resulting from assault and battery alone, it is barred, because it was not commenced within a year from the time the cause of action accrued, as required by section 13 of the code. The nature of the action therefore determines the first question. In the petition it is alleged: "That on the 15th day of September, 1907, at Petersburg, in the county aforesaid (Boone), the defendant with force and violence made indecent assault upon the plaintiff, and violently laid his hands upon her and her the said plaintiff then and there overcame and then and there wickedly defiled, debauched and carnally knew her, whereby she became sick and pregnant with child, and so remained for a long space of time, to wit, for the space of about nine months; at the expiration of which time, and on the 8th day of July, 1908, she was delivered of the child of which she was so pregnant." Defendant argues that those allegations charge assault and battery and that the action was brought to recover damages therefor. While the acts of which complaint is made include the elements of assault and battery, they are not limited thereto. They charge a wrong against the sex which is not generally classified, either in criminal law or in civil procedure, as "assault and battery." Plaintiff's injury extends beyond the common understanding of those words as used in the statute. According to the petition defendant overpowered her and violently invaded her organs of generation. As a result she must involuntarily bear the suffering and the shame of his trespass and the burden of his illegitimate offspring. His violence will follow her as long as she lives, and may, through the means of reproduction, connect her by her ravisher's blood with the immortality of human life. This was not the kind of trespass the legislature had in mind when the words "assault and battery" were used in the statute of limitations. Plaintiff's action is more like one to re-

cover damages for rape than for assault and battery. In criminal law the two offenses are different, though the elements of assault and battery are included in the graver offense of rape. A prosecution for one must be commenced within three years, and for the other within one year. Criminal code, secs. 12, 17, 256. The statute of limitations applicable to civil actions seems to make a similar distinction. Section 13 of the code specifically mentions assault and battery, and provides that a suit therefor must be commenced within a year from the time the cause of action accrues. In limiting the time for commencing civil actions, the statute does not refer directly to actions for rape, but section 12 of the code provides that an action for an injury to the rights of plaintiff, not arising on contract and not subsequently enumerated, must be commenced within four years from the time it accrues. The latter provision rather than section 13 applies to this case. The distinction here made seems to have been recognized at common law. Damages for assault and battery were recoverable in a civil action, but damages for rape were not, and where rape was part of the violence proved there could be no recovery for assault and battery. *Desborough v. Homes,* 1 Fost. & Fin. (Eng.) 6; *Wellock v. Constantine,* 9 Jurist, pt. 1 n. s. (Eng.) 232. The distinction is illustrated in the latter case, wherein the facts are strikingly like those in the case at bar. This difference between the nature of the offenses was evidently observed by the legislature when the statute of limitations was enacted. The trial court properly held that this is not a civil action for assault and battery, and that therefore it is not barred by the statute of limitations.

2. Should the trial court upon a consideration of all of the evidence have said as a matter of law that it was insufficient to sustain a verdict in favor of plaintiff? Did plaintiff consent to the unlawful conduct of which she complains? If she did, she of course participated in the wrong and cannot recover in this action. Defendant was a married man about 45 years old. His family consisted

of his wife and five children. They lived on a farm near Petersburg. Plaintiff had been an orphan since childhood, and at the time of her ravishment was about 23 years of age. She had been living in the home of defendant about three years. She was a servant, but was treated as a member of the family and attended church with them. She testified to these facts: Plaintiff, defendant, the hired man, and one of the children returned from church in the evening before 9 o'clock, September 15, 1907, when defendant's wife was away from home. Shortly afterward plaintiff was in the dining room. The others soon retired, with the exception of defendant, who assaulted her and pulled her into his lap. In a few minutes he attempted to drag her through a doorway into an adjoining bedroom. She caught hold of the doorframe, but was forced through the door into the bedroom and thrown on the bed. He tore her drawers and ravished her. She testified that she resisted his advances to the extent of her ability. She admitted, however, that she made no outcry, though the hired man and a son of defendant were upstairs, and that she did not tell any one about the assault for several weeks. She further testified that the trespass was forcibly repeated in absence of defendant's wife. The evidence shows that a jury in a bastardy case found that defendant was the father of plaintiff's child. The judgment of filiation was affirmed by this court. *Kramer v. Weigand*, 88 Neb. 392. A witness for plaintiff testified he had heard defendant say in a saloon that the latter had sexual intercourse with plaintiff. Defendant denied the assault and any undue intimacy with plaintiff, but, without the inference to be drawn from such testimony, her proof of resistance is uncontradicted.

Defendant argues that the weakness of the proof of resistance, the failure to make an outcry and plaintiff's secrecy, when considered with all the circumstances, show conclusively that plaintiff consented to defendant's acts. In her testimony she explained that she did not think to make an outcry and that she was ashamed to tell what had

taken place. While these are circumstances which the jury should consider on the issue of resistance, they are not conclusive evidence of plaintiff's consent. When first attacked, she was in the dining room where she owed obedience to all proper directions of defendant. He was nearly twice her age. She had lived in his home nearly three years, and would naturally feel that she would receive his protection there. When confronted under such circumstances by a sudden and unexpected assault and seized by a fear of being discovered in a disgraceful situation, a virtuous woman, before making an outcry, might trust to her powers of resistance until it was too late, and even conceal the outrage in the hope of escaping exposure. It is well-settled law that the weight of evidence showing a failure to make an outcry or to complain of an assault are questions for the jury in a civil action. *Starnes v. Stevenson,* 98 N. W. (Ia.) 312; *Witzka v. Moudry,* 83 Minn. 78; *Linville v. Green,* 125 Mo. App. 289; *Dean v. Raplee,* 145 N. Y. 319. This court has often announced the rule that in a civil action a preponderance of the evidence proves any issue. *First Nat. Bank v. Goodman,* 55 Neb. 409; *Davidson v. Davidson,* 70 Neb. 584; *Link v. Campbell,* 72 Neb. 307; *Search v. Miller,* 9 Neb. 26. This principle is applicable to the present case, and the evidence outlined is sufficient to sustain the judgment. *Schenk v. Dunkelow,* 70 Mich. 89; *Rogers v. Winch,* 76 Ia. 546; *Beseler v. Stephani,* 71 Ill. 400; *Dean v. Raplee,* 145 N. Y. 319; *Dickey v. McDonnell,* 41 Ill. 62.

3. No sufficient reason for setting aside the verdict as excessive has been suggested, and none has been found in the record. It follows that the judgment must be

AFFIRMED.

BEDILIA WARD, APPELLEE, V. ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, APPELLANT.

FILED MARCH 12, 1912. No. 17,234.

1. **Appeal:** EVIDENCE. The conjectural opinion of an expert, based solely on a hypothetical question not submitting all of the material facts, is insufficient to sustain a verdict.
2. **Trial:** DIRECTING VERDICT. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, it is error for the trial court to overrule a motion for a peremptory instruction in favor of defendant.

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

Greene & Breckenridge, for appellant.

John M. Macfarland and *Weaver & Giller, contra.*

ROSE, J.

This is an action to recover $1,500 on a policy of accident insurance issued by defendant December 1, 1904, to Frank Ward, a locomotive fireman in the employ of the Union Pacific Railroad Company. Plaintiff is the mother of assured and was named in the policy as beneficiary in the event of his death by accident. He was injured August 1, 1905, and died August 17, 1905. According to the petition, injuries to his left foot and left side and internal injuries received August 1, 1905, when he was engaged in the duties of the employment described, resulted in his death. In the answer defendant denied that assured came to his death as the result of any accidental injury. From a judgment on the verdict of a jury for the full amount of plaintiff's claim, defendant has appealed.

This is the fourth appeal by defendant in this case. The former opinions are reported in *Ward v. Ætna Life Ins. Co.,* 82 Neb. 499, 85 Neb. 471, 87 Neb. 724. While acting as fireman, assured's left foot was injured August

1, 1905, and it was promptly dressed by his employer's surgeon. About ten days later the latter certified that assured was able to return to his work, and he did so August 15, 1905, attempting to fire an engine running from Omaha to Grand Island. He did the firing until he arrived at Central City. During the remainder of the run he was sick and unable to work, and was taken to a hospital at Grand Island, where he died a few hours later. The weather was warm, and he told the nurse he drank ice water and that he was taken suddenly with cramps and vomiting, but made no reference to his previous injuries. The physician who attended him at the hospital testified he died of heat exhaustion. The substance of the evidence relating to assured's injuries and to his subsequent sickness is stated more fully in the opinion delivered on the third appeal. 87 Neb. 724. At the fourth trial the evidence varied from that adduced at the third in this respect: The testimony of Dr. Walker, who gave his opinion as an expert, was eliminated, and Dr. Connell testified for the first time in that capacity. It is the law of the case that plaintiff is not entitled to a recovery on the insurance contract without proving that "the accident was the sole cause of the death of the insured independent of all other causes." It was also held that the evidence at the third trial was insufficient to support a verdict in favor of plaintiff. 87 Neb. 724.

The controlling question now is: Does the additional testimony of Dr. Connell, in place of that of Dr. Walker, contain evidence to support the verdict that the accident was the sole cause of assured's death independent of all other causes? The proof relating to the nature and extent of assured's injuries is very meager, but the record shows, as already stated, that the surgeon who dressed the injured foot certified that assured was able to return to his work in about ten days after the injury. The weather was warm, and the physician who attended him in his last illness gave "heat exhaustion" as the cause of his death. When in the hospital assured told his nurse

that he drank ice water and that he was taken with cramps and vomiting, but said nothing about the injuries to his foot and side. In this condition of the evidence Dr. Connell was called as an expert. He had never seen assured and personally knew no fact in connection with his injuries or with his last illness, but was asked this question: "Doctor, I want to submit to you a hypothetical question, and get your opinion on the question, and I will state it in detail: Assuming, doctor, that a young man 22 years of age in good health, on the 1st day of August, 1905, received an injury on an engine by having his foot crushed and bruised between the apron and the cab of said engine, and assuming that he was thereupon compelled to quit work and remain about his home for a period of two weeks, and assuming that within three hours after receiving said injuries he complained of pain in the left side reaching down to the groin, and assuming, further, that he continued to limp in said left foot for said two weeks, and assuming that he complained of pain in his left side many times during said two weeks, and assuming further that he stated to his relatives on the 15th day of August, 1905, just before taking his run from Omaha to Grand Island as fireman, that he was not strong enough to go out, and assuming that he fired the engine for 15 hours out as far as Central City, and that just before reaching Central City he drank some water and thereupon became sick and vomited, and assuming that he remained upon the train for two hours after reaching Grand Island, and that within 48 hours after reaching Grand Island he died, what in your opinion was the primary cause of his death?" This was answered by the expert as follows: "From the facts stated here, and not knowing anything about his condition in the 48 hours that he was sick, or the last 48 hours he was alive not being given, my opinion is that the primary cause of death would be from the injury." Some of the conditions, symptoms and other evidential facts disclosed by the record were not included in the hypothetical question, and

the answer therefore was not an opinion based on all of the evidence. On cross-examination the witness said his answer might be affected by assured's symptoms during the last 48 hours of his life, if the witness knew what they were. When asked what would produce the symptoms preceding assured's death, as restated from the proofs, by counsel for defendant, the witness replied that they could be produced by an "embolism"—a term described by him as follows: "I mean a clot of blood in the artery or vein at the seat of the injury, and it becoming loosened and traveling through the circulation until it would become lodged in some portion of the circulation until it would produce the symptoms you have described." He also stated that it would be necessary to see the patient before testifying that such symptoms were caused by an embolism, but that on the hypothetical question he would say it could be the cause; that he wouldn't undertake to say the death of assured was produced by an embolism; that he was not sufficiently informed to pass judgment on that question; that he wouldn't swear to what caused assured's death, but from the hypothetical question alone his opinion was that he died from an embolism due to an injury; and that the cause of the death was a matter of speculation. In answer to the question, "And if it were true that he had cramps, nausea and vomiting as the result of drinking large quantities of cold water on a hot day, that would have something to do with the cause of his death, might it not?" he answered: "If it was due to the water; yes, sir." When all of the testimony of this expert is considered, it amounts to no more than the expression of an opinion, in answer to a hypothetical question not submitting all of the facts, that the death of assured could have resulted from his injuries of August 1, 1905, and that the drinking of cold water might have had something to do with it. In the light of the entire record, the opinion is mere speculation and conjecture, and, in connection with the facts proved, is wholly insufficient to sustain a verdict that the accident was the

sole cause of assured's death independent of all other causes. At the close of the testimony defendant requested a peremptory instruction, which should have been given. Plaintiff having repeatedly failed to establish by a preponderance of the evidence the controverted fact essential to a recovery, the cause will not be remanded for a new trial. Instead, the judgment is reversed and the cause remanded, with directions to the district court to dismiss the action.

REVERSED.

D. C. PATTERSON, TRUSTEE, APPELLANT, V. CHARLES E. REITER, APPELLEE.

FILED MARCH 12, 1912. No. 16,629.

1. **Taxation:** JUDGMENT: RULE OF PROPERTY. *Ambler v. Patterson*, 80 Neb. 570, 575, adhered to, and *held* to have established a rule of property in Nebraska upon the questions therein decided.
2. **Quieting Title:** PLEADING. The pleadings set out in the opinion examined as a whole, and *held* properly construed by the trial court and sufficient to support the judgment entered thereon.

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

D. C. Patterson, pro se.

Thomas W. Blackburn, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county to quiet his title to lot 7, in block 4, in Thornburg, and to lots 6 and 7, in block 6, in West Cuming, both designated as additions to the city of Omaha. The petition alleges that plaintiff acquired title to the lots in controversy by deeds from the county treasurer of Douglas county; that said deeds were founded upon and executed

in pursuance of proceedings in the district court for Douglas county in a state tax suit for the year 1904; that the proceedings from the commencement of said tax suit to and including the execution of the deeds were in all respects regular and valid; that the district court had jurisdiction of the suit and of all persons and corporations having any right, title, claim or interest in the lots described; that by virtue of said proceedings and deeds plaintiff acquired and now has a valid and indefeasible title in fee simple to all of the lots. The petition then sets out the names of the persons who, by the records in the register of deeds' office of Douglas county, appeared, during all of the proceedings in the suit referred to, to be the owners of the lots described, and alleges that, since plaintiff acquired the title and possession of the lots, such owners have conveyed the same by quitclaim deeds to the defendant. The prayer is that the plaintiff be adjudged the owner in fee simple of all of the lands described and that his title may be quieted.

The answer denies all allegations in the petition not specifically admitted; admits the ownership at the time of the commencement of said tax suit of the parties named in plaintiff's petition and the conveyance by said parties of the lots in controversy to the defendant; alleges that on behalf of the parties of whom he purchased, and of himself, defendant offered to pay plaintiff all sums of money paid by plaintiff to the county of Douglas or to any of its officers or to any other person, in and about the proceedings connected with the said case, with 7 per cent. interest, but that plaintiff refused to consider any proposition whatever except such sums as plaintiff claimed would be necessary to redeem said lots from taxes; and that plaintiff informed defendant that he would not consider any tender of any less sum; that the property was sold at tax sale to plaintiff, stating the amounts which plaintiff paid as such purchaser; that the deeds executed by the county treasurer to plaintiff were, at the time they were issued, and at all times since have

been null and void, for the reason that, prior to the execution of the tax deed, no notice of the expiration of the time of redemption from the tax sale and no final notice, as provided in section 33, ch. 75, laws 1903, under which said property was sold, notifying defendant's grantors of the time when said real estate was sold, or the time when the period of redemption from such sale would expire, were served; that the only notice claimed to have been served upon said parties was a final notice claimed to have been published and served by publication; that said printed notice did not comply with the law as appears upon the face thereof, in that the so-called final notice was what is termed a blanket notice, covering a large number of lots and tracts of land owned by different persons. For further answer, and by way of cross-petition, defendant offered to pay to plaintiff the sums which he had paid on account of the purchase of said lots, together with 7 per cent. interest; alleges that defendant is the owner of the lots described, and that plaintiff's claim is a cloud upon his title; concluding with a prayer that the alleged title set up in plaintiff's petition be declared null and void; that the deeds of the county treasurer to plaintiff be declared null and void and canceled of record as against the property in controversy; that the court take an account and ascertain the amount actually paid in and about the proceedings whereby the pretended deeds from the county treasurer were obtained by plaintiff, with interest on said total sum; and that a decree be entered that, upon payment by defendant of the amount so found due, his title to the lots in controversy be quieted and confirmed in him.

For reply plaintiff admits the ownership of defendant's grantors at and prior to the confirmation of the sale in said state tax suit and the issuance to plaintiff of the deeds set out; and alleges that by said proceedings defendant's grantors had lost their title to the premises in controversy and that their conveyances to plaintiff were null and void; admits the purchase of the lots for the

sums set out in defendant's answer and again alleges the regularity of all proceedings and the validity of his deeds; admits that defendant had tendered to him full payment of the amounts which he had paid out for said property, including all subsequent taxes and costs, with 7 per cent. interest thereon; and alleges that the amount so paid out by him, with interest at 7 per cent., would be $130; that the amount so paid out, with 1 per cent. per month interest, would be $146; that the tax decree rendered against the lots was for the sum of $271.29; that, if plaintiff's deed should be held to be void and that defendant has the right of redemption, the amount necessary to redeem said lots would be $514; that neither the defendant nor his grantors have redeemed or offered to redeem said lots; admits that the only final notice given to the owners of said lots is the notice set out in defendant's answer.

Upon the trial the district court found against the plaintiff on his petition as to both of his causes of action; that at the time of the commencement of this suit defendant was the owner in fee simple of the lots in controversy; that plaintiff has no estate or interest in said lots; that the deeds of the county treasurer to plaintiff were of no force and effect and should be canceled, and that the relief prayed for by defendant should be granted, finds the amount expended by plaintiff to be as stated by him in his reply, to wit, the sum of $130, and that plaintiff is entitled to a lien upon the lots in controversy for said sum, together with interest at 7 per cent. per annum from the time of his purchase until the date of defendant's tender, and adjudged that defendant's title to the lots in controversy be quieted, subject to the lien so found; that the deeds referred to are null and void and are canceled in so far as the lots in controversy are concerned; that plaintiff and all persons claiming under him are barred and enjoined from claiming any interest other than represented by such lien. From this decree plaintiff has appealed.

No evidence was taken; the judgment being rendered upon the pleadings as above set out. The errors assigned are: "First. The lower court erred in holding the tax deeds void by reason of a 'blanket' notice. Second. The lower court erred in setting aside the tax deed and in quieting appellee's title upon payment *only* of the amount the lots sold for at the sale instead of the amount of the decrees against the lots. Third. The court erred in setting aside the tax deeds and quieting appellee's title upon payment of the bid price, with sub taxes and costs and with interest at *only* 7 per cent."

In his brief plaintiff concedes that, under the holding of this court in *Ambler v. Patterson,* 80 Neb. 570, the "blanket" notice rendered the deeds void, but he urges that our decision in that case was wrong and asks us to now recede therefrom. The reason given for asking us to review that question is "that the question was not fully presented to the court upon the hearing of that case —no reference to the question being made in either plaintiff's or defendant's briefs filed therein, and as the authority upon which this court based its decision was to some extent later modified by the supreme court of Iowa," in certain cases noted. We have not taken the time to examine the briefs filed upon the original hearing of *Ambler v. Patterson,* but we have examined the brief filed at that time in support of a motion for rehearing, and find that an able brief of 22 printed pages, prepared by counsel of high standing, was submitted. In 80 Neb. 575, in passing upon the motion for rehearing, Mr. Commissioner DUFFIE said: "A motion for rehearing, supported by a brief of unusual merit, induced us to order a reargument of the case, and to reexamine the opinion herein." The opinion upon rehearing then proceeds to consider the argument advanced in support of the contention that the original opinion was wrong, and concludes thus: "Further consideration and reflection has convinced us that our former holding is right, and should be adhered to." Plaintiff here was defendant in that suit. He was given

a full hearing at that time. The opinion and judgment of this court complained of were carefully considered on the application for a rehearing and adhered to. The judgment there announced has stood unchanged and unchallenged for more than three years, and, considering the nature of the question involved, it ought now to be considered as a rule of property in this state. We must therefore decline to again consider the question. This disposes of plaintiff's first assignment.

The second and third assignments may be considered together, and, we think, must both be decided adversely to plaintiff's contention. The case under consideration here is a plain, ordinary suit to quiet title. Plaintiff bases his title upon deeds received by him in a proceeding which he sets out. He asserts, and relies throughout the trial upon the assertion, that those deeds were valid and vested in him a perfect and indefeasible title. The question of redemption from a tax sale is not raised, but his demand simply is that his title be quieted because of the fact that he holds what he alleges are valid deeds which vest in him the title to the property. Defendant alleges that the deeds are invalid and never vested any title whatever to any of the property in plaintiff, but offers to do equity by repaying plaintiff the consideration which he paid for his void deeds, together with all moneys that he had paid out or expended in connection therewith and for subsequent taxes, etc., together with 7 per cent. interest. We think this was all that defendant was required to do, and that the trial court was right in so holding.

The judgment of the district court is therefore

AFFIRMED.

GOODYEAR TIRE & RUBBER COMPANY, APPELLANT, V. FRANK W. BACON, APPELLEE.

FILED MARCH 12, 1912. No. 16,640.

1. **Evidence:** BOOKS OF ACCOUNT. Section 346 of the code defines the circumstances under which books of account are receivable in evidence. The evidence in the case at bar examined, and *held* entirely insufficient to bring the offer of plaintiff's books of account within the provisions of said section.
2. **Evidence** examined, and *held* sufficient to sustain the action of the trial court in directing the verdict.

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

William N. Chambers, for appellant.

Baldrige, De Bord & Fradenburg, contra.

FAWCETT, J.

This action was instituted in the county court of Douglas county upon an account for merchandise sold and delivered to defendant. By his answer in that court defendant denied one item in the account, and claimed a discount on the residue of 10 per cent., and offered to confess judgment for the balance, with interest to the time of filing the answer, and for costs. When the case reached the district court by appeal, defendant filed a similar answer and offer to confess judgment. When plaintiff rested, defendant moved the court to direct a verdict in favor of plaintiff for the amount for which defendant had offered to confess judgment, with interest to the time of making his offer in the county court. This motion was sustained, a verdict entered in accordance therewith, and judgment entered upon the verdict, from which plaintiff appeals.

The only "points" assigned in plaintiff's brief are: Did the evidence prove the allegations of the petition to

such an extent that the case should not have been taken from the jury? That the court erred in ruling out the following question asked of the witness Nash, who was a bookkeeper in the office of the plaintiff at Akron, Ohio: "Q. You may state the amount appearing on the books of the Goodyear Tire & Rubber Company as owing to said company by Frank W. Bacon, the defendant, Omaha, Nebraska;" and that the court erred in excluding exhibit B.

It would serve no good purpose to set out the evidence. We have carefully read it all and find that it is ample to sustain the trial court in directing a verdict as was done. As to the second and third points above set out, it is sufficient to say that neither the books of the company nor exhibit B were established in any such manner as to render them competent as evidence against the defendant. Code, sec. 346.

The judgment of the district court was clearly right, and it is

AFFIRMED.

JOHN TIGER, APPELLEE, V. BUTTON LAND COMPANY ET AL., APPELLANTS.

FILED MARCH 12, 1912. No. 17,006.

Quieting Title: EVIDENCE: FRAUD. Evidence examined and partially set out in the opinion, *held* sufficient to sustain the findings and decree of the district court.

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

Flansburg & Williams and *Leonard A. Flansburg,* for appellants.

E. J. Clements, contra.

FAWCETT, J.

From a decree of the district court for Lancaster county, canceling certain notes and a mortgage upon the northwest quarter of section 29, township 11, range 8, in Lancaster county, and ordering the execution of a deed by plaintiff to defendant H. E. Gibson for certain lands in Costilla county, Colorado, together with certain shares in two irrigation companies in that county, and canceling a deed to the land in Lancaster county, above described, executed by plaintiff to one H. Ross, and a deed to said lands executed by said Ross to defendant Free, and quieting plaintiff's title in and to said land, defendants appeal.

The brief of defendants contains three assignments of error, as the grounds upon which the appeal is based: (1) That the evidence is not sufficient to sustain the findings and decree. (2) That there was no actual fraud on the part of defendants and no damage to plaintiff, and that in any event plaintiff, by his acts and conduct after discovering the fraud and deception, waived his right to rescind. (3) That the settlement pleaded was in full force and effect, and that the court erred in not giving full faith and credit thereto.

The record shows that defendants A. L. and B. G. Button are brothers, and in 1908 were doing business under the name of "Button Land Co." Their stationery set forth that the company had a capital of $300,000; that A. L. Button was president and B. G. Button secretary and treasurer. In February, 1908, W. S. Tiger, a brother of plaintiff, who was then in the service of the Buttons as a soliciting agent, contracted with them for the purchase of 80 acres of land in the San Luis Valley, Colorado, for the sum of $2,800, upon which he paid $600 in cash, and agreed to apply certain of his salary on the purchase price of said land. While so employed he introduced plaintiff to his employers. The Buttons at that time were conducting excursions from Lincoln to the San Luis Valley.

Upon one of those excursions, which started from Lincoln about March 8, 1908, plaintiff, with a number of others, accompanied the Buttons on a trip through the valley named. Plaintiff testified that when they reached the valley the Buttons had conveyances ready in which they took the excursionists to Monte Vista, and showed them some irrigated farms near that place, telling them what immense crops were raised on the land shown, that the land was selling for $150 to $200 an acre, and that the land which they had to sell was just as good as that land. On the day following, the excursionists, including plaintiff, were taken by the Buttons and shown the lands which they wished to sell. These lands were in the vicinity of Mosca. On this trip plaintiff rode in a carriage with defendant A. L. Button. Much of the land shown had the appearance of having been improved and cultivated and then abandoned. Plaintiff asked Mr. Button the reason for this, and was informed by him that it was on account of the lands being in litigation, which resulted in the water being shut off and that the people had to move out, but that the litigation had been settled and many of them were returning again. Just before reaching a certain quarter section, Mr. Button told plaintiff that the place they were coming to was a bargain; that the owner, who lived in Iowa, had been holding it at $50 an acre, but had been speculating, was hard-up for money, "and had given them an option on it at $40 an acre cash; that the time was nearly up and they had to sell it pretty quick;" that he told plaintiff that this land was just as good as that he had shown them at Monte Vista; that two water rights went with it sufficient to irrigate the land, and that it was a great bargain at $40 an acre; that he told Mr. Button that he (plaintiff) knew nothing about that country or the land or of irrigated lands, and that if he bought he would have to depend on Mr. Button's judgment for he knew nothing about it; that Button told him he could do so "as they had investigated it and knew it was all right;" that he then told Button that he had no

money with which to buy land; that if he bought it he would have to put a mortgage on his Lancaster county farm; that Mr. Button said they would attend to that; "that he could get the money for plaintiff any day;" that plaintiff relied upon the statements and representations made by Button and was thereby induced to and did agree to purchase the quarter section at $40 an acre. Upon their return to Nebraska, Button had a mortgage prepared for $6,400 upon plaintiff's farm in Lancaster county, which the undisputed evidence shows was then worth $16,000, encumbered by a $1,500 mortgage. The mortgage for $6,400 was executed by plaintiff and his wife and delivered to Button. For this plaintiff was entitled to receive a deed to the quarter section of land in Colorado, clear of all incumbrances. This mortgage was executed to defendant J. W. Drown, as mortgagee. Drown is the father-in-law of defendant B. G. Button. After entering into the agreement for the purchase of the quarter section of land in Colorado, and before the execution of any deed therefor to plaintiff, defendants Button undertook, as agents for plaintiff, to sell his equity in the Lancaster county farm, which at that time, under the undisputed evidence, was worth $8,100. For doing this they were to receive a commission of $400. Shortly after undertaking the sale of this equity, Button represented to plaintiff that he could obtain, in exchange for his equity, two quarter sections of the Colorado land, situated not far from the quarter he had already purchased, each of which was equally as good land as the first quarter, and was worth from $35 to $40 an acre. Plaintiff stated to him that he did not know anything about the land, but would have to trust to them entirely; that if they thought it was a good deal for him, and if they could sell the land, to go ahead and make the trade. Shortly thereafter defendant took a man to plaintiff's home upon the Lancaster county farm, representing him to be the owner of the Colorado land (but who was in fact an employee of the Buttons), who had come to look the

farm over. Plaintiff showed him through the buildings and he departed. This was on Saturday. On Monday A. L. Button informed plaintiff that he had succeeded in making the trade, and stated that he never had worked so hard in his life to get a deal through. Button then had a deed of plaintiff's land prepared, running to H. Ross as grantee, who plaintiff supposed was the owner of the Colorado land, but who was in fact a sister-in-law of one of the Buttons. Up to this time plaintiff had not received a deed from the Buttons to any of the Colorado lands. The evidence shows that the statements made by Button to plaintiff, when they were out upon the Colorado land, that the owner of the land had been holding the same at $50 an acre, but on account of being hard-up was willing to make a sacrifice and sell it at $40 an acre, were untrue. Mr. Foster, who was the then owner of that land, testified that he had not been engaged in any speculation, was not hard pressed for money, had neved asked $50 an acre for the land, but, on the contrary, at the very time Button made the representations above set out, he had the quarter section listed with a real estate agent at Colorado Springs at $13.75 an acre, payable $1,000 in cash and a mortgage upon the property for the other $1,200. After Button had succeeded in making his deal with plaintiff and had obtained from him the $6,400 mortgage, he then sought out Mr. Foster's agent at Colorado Springs and purchased the quarter section of land, which he had sold to plaintiff for $6,400, for $2,400, taking a deed therefor in the name of his sister, H. E. Gibson. He paid the agent $1,000 in cash and executed a mortgage in the name of H. E. Gibson for $1,200, the other $200 going to the agent as commission. After making the agreement with plaintiff to trade him the other two quarter sections for his equity in his Lancaster county farm, of the value of $8,100, they obtained from one Albert S. Harper a deed to H. E. Gibson for one quarter, and from one Oliver H. Blank a deed to Gibson for the other

quarter, paying for each quarter $800. Button then, in the name of H. E. Gibson, executed a deed to plaintiff for the three quarter sections, subject to the $1,200 mortgage upon the first quarter, in favor of Mr. Foster from whom they had purchased it. For the $400 commission, which they were to receive from plaintiff for selling his farm, they obtained plaintiff's note. It will be seen that the $1,200 mortgage, which they had plaintiff assume, plus the $400 commission note which they received from him, exactly equalled the amount which they paid for the two quarter sections of land they had traded him in exchange for his equity. So that, instead of receiving a commission of $400 for their services, they received the equity in the farm, worth $8,100; and for the mortgage of $6,400, which they received from plaintiff, they paid out $2,400, making their total profit in the round-up of plaintiff which they had succeeded in making, $12,100. The evidence shows that neither Drown, who was named as mortgagee in the $6,400 mortgage, nor H. E. Gibson, in whose name the title to the Colorado lands was taken and then conveyed to plaintiff, nor H. Ross, in whose name the deed to the Lancaster county farm was taken, had any interest in any of the transactions or knew anything about them, but that in all of these transactions the Buttons were the real parties interested, and the three relatives named were mere dummies. The evidence also shows that the deed from H. E. Gibson to plaintiff for the Colorado lands was never signed by Mrs Gibson, but that the name, "H. E. Gibson," was signed by A. L. Button, who admitted upon cross-examination that he may have attempted to imitate the handwriting of H. E. Gibson in making the signature. The deed is acknowledged before one Nellie Sheehy, notary public, who certified that "H. E. Gibson (Single)" personally appeared before her and acknowledged the execution of the deed to be "his" voluntary act and deed. Miss Sheehy was an employee of the Buttons. Mr. Button attempts to justify his action in signing the deed as was done, by tes-

tifying that he had a power of attorney from his sister, H. E. Gibson, authorizing him to sign her name to deeds and other instruments, and that he supposed that it was all right to sign that way. It is incredible that, after transacting business as a real estate dealer for about 20 years, in seven states and territories, with offices in something like 15 cities in those states, he should be ignorant of the fact that his power of attorney did not give him authority to sign a deed in any such manner. That the whole scheme of using the names of their relatives, and in using the initials of the christian names of the two ladies, was to hide their tracks and enable them to carry out their "peculiar" methods, is apparent. The learned district judge, sitting as a court of equity, and weighing the evidence introduced upon the trial of the case, regarded these transactions as so unconscionable that he set them all aside. We are now asked to reverse the action of the learned district judge upon the ground that the evidence is not sufficient to sustain the judgment. Our answer must be that far less evidence than is shown in the record before us would have been sufficient.

But it is said that plaintiff, by his acts and conduct after discovering the fraud and deception, waived his right to rescind. It is true that, after discovering the deception and fraud which had been practiced upon him, plaintiff, who had been a farmer all his life, did not act with the promptness that would have been shown by men of experience in the business world. He may have been more trustful than a shrewder man would have been, but in a court of equity cupidity is not a good offset against stupidity. We hold that the evidence was sufficient to sustain the decree; that actual fraud on the part of defendants and damage to plaintiff are shown, and that plaintiff's acts, after discovering the fraud, were not, under the circumstances shown, sufficient to constitute a waiver of his right to maintain this suit.

Was the settlement pleaded in defendants' answer proven? We think not. While it is sworn to by one of the

defendants and one of the employees in their office, and by the witness Wilson (who we think was successfully impeached), the circumstances surrounding the transaction and the execution of the so-called settlement agreement, exhibit 3, the inclusion therein of the adjustment of the matters in controversy between defendants and plaintiff's brother, together with the fact that the $400 note, which defendants' witnesses say was produced from defendants' safe and placed upon the table before plaintiff and defendants at the time of the execution of the agreement, was not delivered to plaintiff, but was retained by defendants and found in their possession at the time of the trial, all so strongly corroborate the testimony of plaintiff that the district court was justified in discrediting defendants' witnesses and finding for the plaintiff upon that point.

We do not deem it necessary to refer to or discuss any of the authorities cited. There is no question of law involved in this suit which is not perfectly familiar to every member of the profession. We think counsel for plaintiff is warranted in his contention that, when defendants undertook to represent plaintiff in the sale of his equity in the Lancaster county farm, a fiduciary relation was created between them, and that the rules of law requiring a full disclosure by and the utmost good faith on the part of an agent in dealing with his principal apply; and that, defendants having themselves merged the deal as to the first quarter section into their subsequent dealings with plaintiff as his agent, the whole transaction from start to finish should be treated as one. There is no theory of law or in equity that will warrant our disturbing the righteous judgment entered by the district court.

The judgment is therefore in all things

AFFIRMED.

HERMAN BARNHARD ET AL., APPELLANTS, V. VIRGIL F. BARNHARD ET AL., APPELLEES.

FILED MARCH 12, 1912. No. 16,639.

Appeal: AFFIRMANCE. The evidence is found to be insufficient to support a judgment in favor of the plaintiffs, and, that being the only question presented, the judgment of the district court dismissing the action is affirmed.

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

H. C. Vail, for appellants.

A. E. Garten, contra.

SEDGWICK, J.

In the years 1880 and 1881 the defendant Virgil F. Barnhard was the owner of the quarter section of land in question, which was occupied as a homestead by himself and his wife, Minerva Barnhard. These plaintiffs are the children and grandchildren of the defendant Virgil F. Barnhard and the said Minerva Barnhard, and have brought this action to establish an interest in their favor in the land. They allege that during the years mentioned Virgil F. Barnhard conveyed the land by deed to his wife, Minerva Barnhard, and that some five years afterward Minerva Barnhard died, and that the children of Minerva Barnhard inherited the land from their mother subject to the life estate of Virgil F. Barnhard. One of the daughters of the defendant Virgil F. Barnhard and Minerva Barnhard refused to join in bringing the action and was for that reason made a defendant. Another daughter was joined as plaintiff, but afterward renounced all interest in the land and asked to be dismissed from the action. The district court found for the defendants and dismissed the action, and the plaintiffs have appealed.

The defendant Virgil F. Barnhard denied that he ever conveyed the land to Minerva Barnhard, and this is the question now presented in this appeal. The plaintiffs insist that the evidence is of such a character as to require the finding that the deed was executed and delivered as alleged.

It appears that the defendant Virgil F. Barnhard continued to occupy the premises as a homestead, and some 17 years before the commencement of this action he was married again, and together with his present wife has continued to occupy the premises as their home up to the present time. If the contention of the defendant is right and no deed was executed by him to his former wife, his present wife has an interest in the land and will be entitled to occupy the same as her home during her life. She was not made a party to these proceedings, but this fact is not now insisted upon, and we will dispose of the case upon other grounds.

The plaintiffs called one W. J. Nelson as a witness, who had resided at Albion, in Boone county (in which county the land lies), for several years from 1871 to 1882, and was well acquainted with Mr. and Mrs Barnhard. He appears to be a reliable witness, and testified that he remembered the transaction of making a deed "for that homestead land," and that in 1880, or "along there some time," Mr. Barnhard and his wife came to him "about some protection against a debt. I think it was some collections that the bank held against them. I think it was a thrashing machine they had some difficulty about, and they were pressed about the matter and spoke to me about what would be exempt, and the matter was talked over at that time, and they had more land than their homestead and they inquired of me about making a deed to his wife. I had some doubt whether a man could deed to his wife. It was an unsettled question at that time, and I had to take some time to examine into it, and I decided they could and I made a deed for them and turned it over to Mrs. Barnhard." They also called a Mr. Robinson as

a witness, who testified that about the year 1882, "or in the early eighties," he had a conversation with Mr. Barnhard; that they were both in debt at the time and had several talks "about how to fix our respective properties so we could protect ourselves against claims of former creditors until we were ready to sell our properties and pay these claims;" that Mr. Barnhard told him that he had a Mr. Nelson make a deed from him to his wife, Minerva Barnhard, of his quarter section, and that Mr. Barnhard said he had fixed it so his creditors could not bother him; and that he was not worrying about the claim "because he had it fixed so they could not touch the property, as it was deeded to his wife, Minerva Barnhard." The plaintiffs offered to prove that it was common rumor in the neighborhood that Mr. Barnhard had deeded the homestead to his wife. Upon objection this evidence was excluded. We suppose that this ruling was proper and that the court properly disregarded any incidental statements of that nature that appeared in the evidence of some of the witnesses. We have stated substantially all of the evidence upon which the plaintiffs rely to obtain a reversal of the judgment of the trial court and for a judgment in their favor. An attempt was made to impeach the witness Robinson, and there is evidence tending to show that his evidence is somewhat unreliable. It will be observed that the plaintiffs' evidence is quite indefinite as to the contents of the deed. The land supposed to have been conveyed is not identified, except by the statement that it was Mr. Barnhard's homestead. It consisted of the S. ½ of the S. ½ of a certain section, and was one mile in length and 80 rods wide. The transaction that Mr. Nelson testifies to and the conversation between Mr. Barnhard and Mr. Robinson (if the latter's testimony is to be believed) all occurred more than 30 years before the trial. No such deed was ever recorded. If it existed it was kept among the other family papers. Soon after the alleged conveyance Mr. Barnhard mortgaged the land to secure indebtedness of his own, and Minerva Barnhard joined

with him, executing the mortgage as his wife. No claim was made by Mrs. Barnhard or by any of these plaintiffs of any interest in the land until this action was begun. There was no evidence tending to show that Mr. Barnhard conveyed this land to his wife as a gift. So far as any motive is shown for making and receiving this deed it was for the purpose of delaying creditors. The plaintiffs allege this to be a sufficient reason for making the conveyance because the land, although the homestead at that time and not worth more than $2,000, was increasing in value, and for that reason both parties to the deed thought that they would be more secure if the conveyance were made. But, nevertheless, the plaintiffs also contend that there could be no fraudulent intent on the part of the parties to the deed, which would prevent the interference of a court of equity on behalf of either of them, because the land was a homestead and wholly exempt. If such a conveyance was innocently made and was not intended nor received as a gift, it would convey no beneficial interest. The defendant Barnhard testified directly and positively that no such deed was ever executed. There are other circumstances than those already suggested which tend to support him in this testimony. No such deed could be found, and, even if it were executed for the purpose of protecting the parties to it against the claims of creditors, it was afterward disregarded by both parties when they mortgaged the land, and was evidently never delivered and relied upon as a valid conveyance. We think that the evidence is wholly insufficient to establish the plaintiffs' claim.

The judgment of the district court is

AFFIRMED.

PATRICK RODDY, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED MARCH 12, 1912. No. 16,756.

1. Appeal: ABANDONMENT OF APPEAL. If the petition alleges two distinct causes of action and the judgment is for a gross amount upon both causes of action, the defendant will not be held to have abandoned his appeal to this court from the judgment as rendered, although the verdict finds specially upon each cause of action and the errors assigned in the brief relate to one cause of action only.
2. ———: ABSTRACT. If the party preparing the abstract has not given the other party an opportunity to make suggestions as to what the abstract should contain, and has purposely or carelessly omitted matters material to the determination of the case, and such defects are complained of and supplied in an additional abstract by the other party, the rules will be construed liberally in favor of the party not in fault.
3. Railroads: SETTING OUT FIRE: EVIDENCE. The evidence which is stated in the opinion is found to be insufficient to support the judgment.

APPEAL from the district court for Otoe county: LEANDER M. PEMBERTON, JUDGE. *Reversed with directions.*

F. A. Brogan and *B. P. Waggener,* for appellant.

Thomas F. Roddy and *A. A. Bischof, contra.*

SEDGWICK, J.

The plaintiff in his petition alleged two causes of action, and judgment was entered in his favor upon both of them. The defendant has appealed, and alleges that the evidence is insufficient to support the judgment upon the second cause of action. The second cause of action was for damages caused by a fire which passed over the plaintiff's land and injured his trees and perhaps other property. It was alleged that this fire was caused by the neg-

ligence of the defendant, and the question is whether this allegation is supported by the evidence.

1. The first objection is that the defendant's motion for a new trial in the district court was properly overruled because it was a joint motion, "being directed to both causes of action in plaintiff's petition." It is recited in the plaintiff's brief that the appellant abandoned its appeal with reference to the first cause of action. The assignments of error in the defendant's brief are wholly with reference to the second cause of action, no errors being assigned directly affecting the first cause of action. This waiving of errors as to one cause of action cannot be said to be an abandonment of the appeal in any respect, and we find nothing in the abstract of the record from which it can be determined that the defendant has abandoned its appeal. In the motion for a new trial the defendant assigned errors in connection with both causes of action. The jury found the amount of plaintiff's damages on each cause of action separately, but the judgment of the court was for the gross amount. No separate judgment was entered on the first cause of action. The appeal was necessarily taken from the judgment as entered. If the court had entered judgment on each cause of action separately, the question might have been presented whether the defendant could appeal from one of those judgments without appealing from the other also. In the condition of this record we do not think that this question is presented. This objection of the plaintiff is not well taken.

2. The plaintiff has discussed in the brief some matters that are not disclosed by the abstract. The abstract was prepared by the defendant, and, if found to be deficient or incorrect in any respect, the plaintiff should have furnished an abstract correcting those defects. If the party preparing the abstract has not given the other party an opportunity to make suggestions as to what the abstract should contain, and has purposely or carelessly omitted matters material to the determination of the case, and such defects are explained in an additional abstract by the

other party, the rules will be construed liberally in favor of the party not in fault. If no objection to the abstract is properly taken, "it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision," as provided in rule 16 (89 Neb. vii). The only exception to this practice is "in felony cases when the question to be presented is as to the sufficiency of the evidence, the abstract may refer to the bill of exceptions with or without abstracting the same as the parties elect."

3. The abstract shows that the land lies along the defendant's railroad right of way, and that the fire originated about 25 or 30 feet from the center of the railroad track to the northeast from the track, and that the wind was blowing in that direction. The evidence in the abstract also shows that the defendant had caused the weeds and grass on its right of way to be mowed and had left them lying on the right of way, and that they were dry and inflammable. It is also shown that soon after the fire originated one of the defendant's trains of cars passed the location. There is no evidence that any train had passed prior to or at the time the fire originated and there is no evidence that any of the defendant's engines were improperly equipped or threw any sparks or fire. Some of the defendant's sectionmen assisted in putting out the fire, and the plaintiff asked a witness upon the stand this question: "Do you know whether or not it is a part of their duty to put out fires that originate adjoining the track? Do you know whether it is part of their employment to extinguish fires that originate near the track?" This was objected to as incompetent, but the objection was overruled, and the defendant answered: "Yes, sir; that's their duty—part of their work." If this question and answer were competent, which may well be doubted, the evidence does not tend to prove that the company's engines started the fire. The fact that a man assists another in extinguishing a fire ought not to be considered as evidence that the fire originated through his fault. To

lend such assistance is no more than right and duty, no matter how the fire originated. It may be that one of the defendant's trains did pass this place at the time the fire originated, and that the engine threw out sparks which caused the fire, but such a supposition is wholly conjectural and not supported by any evidence whatever. Under this evidence conjectures as to an entirely different origin of the fire may be indulged with equal propriety. Judgments cannot be supported by such conjectures, and this judgment is unsupported. The plaintiff is entitled to an affirmance upon remitting the amount found by the jury upon the second cause of action. The judgment as entered is reversed, and the district court will enter a judgment upon the verdict for the amount found upon the first cause of action, and proceed further upon the second cause of action in accordance with this opinion.

REVERSED AND REMANDED.

PINE-ULE MEDICINE COMPANY, APPELLEE, V. YODER & EPLY, APPELLANTS.

FILED MARCH 26, 1912. No. 16,653.

1. **Pleading**: CAPACITY TO SUE: DEMURRER. Where it appears on the face of the petition that the plaintiff has no legal capacity to sue, such defect should be taken advantage of by demurrer, and not by answer.
2. ———: ———: ANSWER: SURPLUSAGE. Where the defect appears upon the face of the petition and the defendant answers to the merits, a statement in his answer that the plaintiff has no legal capacity to sue will be treated as surplusage.
3. **Evidence** examined, and found sufficient to sustain the judgment.

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

A. D. McCandless, for appellants.

S. D. Killen, contra.

BARNES, J.

Action for the recovery of money alleged to be due from defendants to plaintiff for certain proprietary medicines sold and delivered to defendants on a written order. It appears that the cause was originally commenced in the county court of Gage county, where the plaintiff had the judgment, and the defendants appealed.

Plaintiff's petition in the district court was entitled "The Pine-Ule Medicine Company, Plaintiff, v. Yoder & Eply, a partnership formed for the purpose of doing business in the state of Nebraska, and not incorporated, consisting of Elva Yoder and ——— Eply (first Christian name unknown), partners, Defendants." Then followed a statement of the plaintiff's cause of action, and there was attached to the petition as an exhibit a written order for the medicines, for sale of which recovery was sought, together with a list of the medicines alleged to have been sold and delivered to the defendants. To this petition the defendants filed an answer in part as follows: First. That the plaintiff has no legal capacity to sue, and therefore cannot maintain this action as shown by the petition. Second. That the allegations of said petition are not sufficient to constitute a cause of action in favor of the plaintiff and against the defendants, or to entitle plaintiff to the relief demanded. Third. Defendants deny each and every allegation in said petition contained. Fourth. A plea to the merits, in which it was alleged that the defendants took the agency from plaintiff for the sale of certain goods, a part of which they sold; that the contract was terminated, and that all goods on hand were delivered to the plaintiff prepaid, and the amount due for the goods sold was remitted to and accepted and retained by plaintiff. The reply was a general denial. Upon a trial to the court without the intervention of a jury, the plaintiff again had the judgment, and the defendants have appealed.

Defendants assign error as follows: Plaintiff has no

legal capacity to sue or maintain the action. Second. The petition does not state facts sufficient to constitute a cause of action. Third. The finding and judgment of the court are contrary to law; the finding and judgment of the court are contrary to the evidence, and are not supported by any competent evidence.

In disposing of the first assignment of error, it is sufficient to say that want of plaintiff's legal capacity to sue appeared upon the face of the petition. Therefore, the plaintiff should have taken advantage of this defect by demurrer, as provided by the second subdivision of section 94 of the code. Section 96 of the code provides: "When any of the defects enumerated in section 94 do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." It thus appears that, where the defect complained of is apparent upon the face of the petition, it is not to be challenged by answer.

It may be suggested that the first paragraph of the answer is in effect a demurrer; and, if the answer had contained nothing more than that paragraph, it might have been considered as a demurrer; but when the defendants answered over to the merits they waived the objection that the plaintiff did not have the legal capacity to sue. The rule is well settled that by answering to the merits the defendant waives his right to demur to the plaintiff's petition, and that part of his answer, which in form amounts to a demurrer, will be treated as surplusage. *Kyner v. Whittemore,* 90 Neb. 188. It follows that the defendants' first assignment of error must fail.

It is contended that the petition does not state facts sufficient to constitute a cause of action. It is argued that the original contract attached to the plaintiff's petition, and found in the bill of exceptions, is a contract of

agency, and not one of sale. By the terms of that instrument the plaintiff appointed the defendants retail distributing agents for the sale of its medicines, and agreed that the defendants might purchase of the plaintiff the proprietary medicines manufactured by it (naming them) for certain prices therein specified. Certain restrictions were contained in the instrument which bound defendants not to sell plaintiff's medicines to wholesale or retail dealers, not accredited agents of the company, nor to any person, firm or corporation at less than the retail price printed on each package of its remedies. The contract also contained certain other restrictions, and it was provided that, in case of a violation of those provisions, the plaintiff should be entitled to recover $24 as liquidated damages. There followed an order for the purchase of the medicines in question, which was signed by the defendants. It is therefore apparent from the terms of the order itself that the defendants purchased the remedies for which the plaintiff sued to recover the purchase price.

An examination of the record discloses that the plaintiff's testimony was sufficient to sustain the judgment; and, the defendants having offered no evidence, it follows that the judgment complained of was right.

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

AFFIRMED.

REESE, C. J., not sitting.

A. L. CHASE, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED MARCH 26, 1912. No. 16,622.

1. **Master and Servant:** INJURY TO SERVANT: DEFECTIVE APPLIANCES: DUTY OF MASTER. Where a boy, between the age of 17 and 18, inexperienced in railroad work, was employed at night as a hostler helper, and a part of his duty was, when the engines were taken to the coal chutes, to go upon the top of the tender, to call

up to the man in charge of the chute, whose station was above, and ask from which bin the coal was to be taken, to indicate to the person moving the engine where to stop, to lower the apron in order to deliver the coal, to distribute it in the tender, and to raise the apron thus closing the chute, all being done by the light of a lantern, and it appeared that the track was defective so that the engine and the structure of the coal chute were in dangerous proximity, and that iron bolts projected from the side of the posts supporting the structure, *held* that it was the duty of his employer to warn him of the peculiar dangers connected with the coaling of engines at that place.

2. ———: ———: ———. An employee is entitled to assume that his employer has used due care to provide reasonably safe appliances for the doing of his work. Knowledge of the increased hazard from the negligent construction or location of a structure in dangerous proximity to a defective railway track will not be imputed to a boy between 17 and 18 years of age who had been employed for about three weeks, doing his work at night by the light of a lantern, merely because he was aware of the general surrounding conditions.

3. ———: ———: ———: ASSUMPTION OF RISKS: QUESTIONS FOR JURY. Unless from the undisputed facts a court can declare, as a matter of law, that the employee actually had or was chargeable with knowledge of the dangerous condition of the place where he worked or the defective condition of the structures and appliances in connection therewith, so that he assumed the risk, those questions should be submitted to the jury. *Tobler v. Union Stock Yards Co.*, 85 Neb. 413.

4. ———: ———: TRIAL: INSTRUCTIONS. It is not erroneous to instruct a jury, in substance, that the natural instinct and disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person injured or killed was at the time in the exercise of ordinary care, and that it should, in determining this question, consider all the evidence and the circumstances proved.

5. ———: ———: NEGLIGENCE OF MASTER: EVIDENCE. Evidence examined, and *held* to establish the negligence of defendant in respect to the construction, maintenance and manner of operating a coal chute and the track adjacent thereto.

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

James E. Kelby and *Frank E. Bishop,* for appellant.

W. B. Comstock and *G. W. Simpson, contra.*

LETTON, J.

Burton A. Nunn was killed as the result of an accident occurring at the coal chute of defendant in the Lincoln yards on February 14, 1907. The plaintiff is the administrator of his estate. This action was brought to recover damages for the death of Nunn, based upon the alleged negligence of defendant in the construction and maintenance of its coal chute and the track adjoining the same. Plaintiff recovered a judgment, from which defendant has appealed.

The deceased was a young man between 17 and 18 years of age. He had worked for the defendant as helper for a night hostler named Young for three weeks, and had never worked in the yard or about the coal chute in the day time. In addition to other duties usually performed by a hostler helper, it was the duty of Nunn when the engines were taken to the coal chutes to go upon the top of the tender, to call up to the man in charge of the chute, whose station was above, and ask from which bin the coal was to be taken, to indicate to the person moving the engine where to stop, to lower the apron in order to deliver the coal, to distribute it in the tender, and to raise the apron thus closing the chute. On the night of the accident two locomotives coupled together, which had been used as a "doubleheader," had just come in from being used upon a train. The engines were headed south. The north engine was out of repair or "dead," and the two were operated by the south engine. The hostler, Young, with two helpers, Nunn and Eitel, went upon the north engine, and another hostler, Freeland, and his helper went upon the south engine. Nunn entered the engine at the gangway, or open space between the fire-box and the tender. Young began to adjust the air valve on

the engine, when Freeland on the other and live engine started to back both engines to the north on the west side of the coal chute. The engines moved only a few feet when Freeland abruptly stopped. He testifies he could give no reason for so doing. The moment the engines stopped, Young, who was on the side of the cab farthest from the chute, heard the sound of breaking glass on the side of the cab next to the chute. A moment before Nunn was seen standing by him directly in front of the opening to the coal box from the gangway. When Young heard the glass break he stepped to the side of the engine next to the chute, and there discovered Nunn hanging by the collar of his coat on the projecting end of a stay-rod extending through a post on the west side of the chute at a point about 3 or 4 feet south of the south end of the cab, his head partially crushed. He was unable to speak and died next morning.

The petition alleges that Nunn was, on account of his age and inexperience, wholly unacquainted with the dangers and hazards of the employment. It is further charged that the posts of the coal chute were carelessly and negligently constructed too close to the railway track; that defendant had carelessly and negligently allowed the track adjoining the chute to become out of repair and to sag on the side next to the chute so far as to cause engines and tenders in passing along the track to lean towards and strike against the chute; that about 8 or 10 feet above the ground the end of a large iron bolt projected towards the railroad track a distance of about 3 inches horizontally; and that by reason of defendant's negligence in maintaining the posts with the bolts therein so close to the railway track, in maintaining the railway track so close to the post, in permitting it to become defective and to settle and sag next to the posts, and in failing to warn and instruct Nunn and to furnish proper and safe appliances, Nunn was caught and crushed, from the effects of which he died. The defense is a general denial, and pleas of assumption of risk and contributory negligence.

The coal chute was originally constructed about 20 years ago when smaller engines were generally employed in the service. It stood upon a stone foundation about 2½ or 3 feet high, upon the top of which were timbers about 15 feet long, supporting bins in which coal was stored; the space underneath the bins being open. These timbers were tied or fastened together with iron rods extending from side to side and fastened with washers and nuts on the outside of the posts. The particular rod or bolt upon which Nunn was suspended projected about 2½ or 3 inches from the post, a portion of which extension, however, was taken up by the washer and nut. The testimony is conflicting as to the height of the projecting bolt with reference to the engine. The witness Slye, who was working for the defendant at the time but who was at the time of the trial not in its service, testified that it was a dark and cloudy night at the time of the accident, that he was working about 120 feet away from the place, that he helped to take Nunn down, and that the projecting bolt would be below the eaves of the cab somewhere between 6 or 8 inches, and would be 3 or 4 feet above the head of a person of Nunn's size if he was standing in the gangway. The testimony on this point on behalf of the defendant is that the bolt was below the sill of the cab window; one of the witnesses testifying that it was 8 inches below the bottom of the window. This is practically the only point upon which there is a serious conflict in the testimony. It appears that the overflow from a water-tank nearby, used to furnish water for the engines, had run down near and about this track, and that on this account the rail on the side next to the coal chute had settled in such a manner as to incline the engines towards the chute, thus leaving a very small space between the large engines and the posts. There is no dispute, but that the rail next to the chute was irregular and uneven both vertically and horizontally, and that it had settled so that large engines came very near the posts; and there is some testimony that they sometimes rubbed the same near the south end of the

chute. It was also shown that the supporting timbers of the coal chute at the point where the accident happened bulged towards the track. A moment before the accident, Nunn was standing in the gangway behind the other helper who was working with the fire-box. There were no foot-boards on the side of the engine. There is no testimony as to his movements after he left the position where he was last seen before the accident, or the exact position in which he was when he was caught by the projecting bolt and crushed between the engine and the chute. If the testimony of plaintiff's witnesses with respect to the height of the bolt is to be believed, he must have been standing upon the tender where it was his duty to be when the engine stopped and he was caught by the projection, and there is sufficient testimony to sustain the verdict of the jury upon this point if they believed the witnesses for the plaintiff. On the other hand, if the testimony of defendant's witnesses as to the height of the bolt is taken as true, Nunn must have been caught as he stood in the gangway looking up to the coal bins so as to notify the person operating the engines where to stop. He had the right to be in either place. He could not have been in the cab, since the window was evidently broken by the crushing of his body between the cab and the post as the engine was backed.

The defendant contends that no negligence is alleged or proved which was the cause of the injury, that the danger of the place was manifest during Nunn's service, that he assumed the risk, and that the injury was the result of his own negligence. We are compelled to take another view. No person saw Nunn fall or saw him caught by the projecting rod; but, taking all the circumstances into consideration, it is evident that the negligence of defendant in permitting the track to sag so as to tilt the moving engines towards the chute, in permitting the posts of the coal chute to bulge towards the track, and the rods fastened thereto to project far enough to catch and hold the clothing of the deceased while he was on the engine.

must have been the cause of the accident. The accident occurred in the month of February. The deceased went to work at or after 6 o'clock in the evening. He was furnished a lantern to work by; there seems to have been no fixed light near. There is no evidence that he had ever been warned or notified in regard to these dangerous projections; in fact, the evidence justifies the conclusion that he had never been so warned. We are further of the opinion that it was the duty of the defendant to warn and instruct this boy of the peculiar dangers surrounding his employment at the south end of the coal chute, where the combination of sagging track, bulging posts, and projecting rods, when considered in connection with the fact that he was inexperienced and his work was to be performed at night by lantern light, formed a particularly dangerous combination. Neither are we of the opinion that, under the facts in this case, he assumed the dangers of such a situation, nor that the accident was the result of negligence on his part.

We think the facts in this case are distinguishable from those in *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb. 649, cited by defendant, but the law laid down therein applies. As said in that case, it is only "when the risks and conditions are known to him or are apparent and obvious to persons of his experience and understanding" that an employee assumes the risk arising from an unsafe place of work. The rule is that the servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known and so far as they would have been known to one of his experience and capacity by the use of ordinary care. *Kotera v. American Smelting & Refining Co.*, 80 Neb. 648. In the case of *Tobler v. Union Stock Yards Co.*, 85 Neb. 413, opinion by BARNES, J., where the facts were that a watchman's shanty stood by the side of a railroad track so close thereto as to leave less than 17 inches between its projecting eaves and the ladder on the side of an ordinary box car, and a brakeman was hurt by being crushed

against the structure, the same contention was made as in this case, and some of the same cases were cited by the defendant, but the court held, following *Texas & P. R. Co. v. Swearingen*, 196 U. S. 51: "An employee is entitled to assume that his employer has used due care to provide reasonably safe appliances for the doing of his work. Knowledge of the increased hazard resulting from the negligent location of a structure in dangerous proximity to a railroad track will not be imputed to an employee, using ordinary diligence to avoid it if properly located, because he was aware of its existence and general location; and, unless from the undisputed facts the court can declare, as a matter of law, that the employee actually had or was chargeable with such knowledge and thereby assumed the risk, those questions should be submitted to the jury."

It is also contended that the verdict and judgment depend alone upon conjecture and are without foundation. The statement of facts already made is sufficient we think to answer this contention.

It is said that the court erred in giving instruction No. 7, which told the jury, in substance, that the natural instinct and disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person injured or killed was at the time in the exercise of ordinary care, and that it should, in determining this question, consider all the evidence and the circumstances proved. We have often said that, in the absence of direct evidence, there may be a presumption that at the time a person was injured or killed he was in the exercise of ordinary care. *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720; *Swift & Co. v. Holoubek*, 60 Neb. 784; *Clingan v. Dixon County*, 74 Neb. 807; *Grimm v. Omaha E. L. & P. Co.*, 79 Neb. 387, 395; *Nilson v. Chicago, B. & Q. R. Co.*, 84 Neb. 595. See, also, 16 Cyc. 1057, and note.

Complaint is made as to the giving or refusal of certain other instructions, but we find no prejudicial error in the ruling of the district court in this respect. The rights of

the defendant seem to have been carefully guarded at the trial, and the evidence amply sustains the verdict.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., not sitting.

SARAH REDMAN, APPELLEE, V. FIDELITY ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED MARCH 26, 1912. No. 16,645.

Insurance: PAYMENT OF PREMIUMS. An accident insurance company received from its collector the amount of premium money due from a member for the renewal of monthly insurance. It appeared that the collector, pursuant to an agreement with the member, furnished the money on the pay-day, placed it in a separate fund with that collected from other members and remitted the whole amount to the company at the usual time. The company, having heard of the death of the insured before the receipt of the money from the collector, retained the premium money of all except the deceased member which it attempted to return to the collector by check. *Held*, That it was immaterial who furnished the money, and that, under these facts, the insurance was in force at the time of the death of the insured.

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

Burkett, Wilson & Brown, for appellant.

H. C. Vail and *J. A. Price, contra.*

LETTON, J.

The plaintiff is the beneficiary under a policy issued by the defendant, an accident insurance company, to Charles C. Redman, her son, who was killed in a railroad accident on the 7th day of October, 1908. The policy was issued on June 1, 1908. By its provisions the defendant "hereby insures Charles C. Redman, of St. Edward, Ne-

braska, for the term of one calendar month from noon, standard time, of the 1st day of June, 1908, and for such further periods of time stated in renewal receipts as the payment of premium specified therein will maintain this policy and insurance in force." The question involved is whether this policy was in force at the time Redman was killed. The petition pleads the issuance of the policy and renewal receipts extending the policy until October 1, 1908. It is further alleged that on the 1st of October, 1908, one Frank Bruno, the defendant's agent at St. Edward for the collection and transmission of assessments due from members in that vicinity, paid for Redman $1 for the renewal of the policy for the month of October, 1908, that Bruno was accustomed to making such payments for members residing in that vicinity, and it was the custom of defendant to receive all such payments and extend the policies of all persons for whom payments were so made. The defense is that Redman defaulted in the payment of the premium due on October 1, and that by such failure his certificate lapsed.

Two assignments of error are presented: That the court erred in admitting the original answer of defendant in evidence; second, that it erred in giving the following instruction: "You are instructed that if you find from the evidence that Frank Bruno, pursuant to an agreement between himself and Charles C. Redman, took of his own money the amount of Charles C. Redman's assessment for the month of October, 1908, and placed the same with the moneys paid by the other members of the defendant company, and credited the said Redman with the amount thereof on the first day of October, 1908, on the notice of assessment sent him by said company, and remitted all such moneys to the defendant company, and that the defendant retained all such moneys except that of said Redman, still such payment and remittance is payment by Redman, and on that issue your finding should be for the plaintiff."

We think it only necessary to notice the latter assign-

ment. Mr. Bruno testified, in substance, as follows: I was collector for the defendant company from about the 1st of June until November, 1908. The middle of the month before assessments became due I received a statement from the company stating those I was to collect from, and on the 1st of the month I paid the assessments of those who had not paid and were good fellows in town. This money I placed in a fund by itself and left it at home with my wife and generally remitted to the company at Lincoln from the 5th to the 7th or 8th of the month. On October 1, 1908, I paid Redman's assessment, marked it paid on the slip, and put the money by itself in the fund with the rest of it. Mr. Redman told me any time he didn't pay his assessment on the 1st of the month for me to pay it for him, and for me to call at the barber shop at any time and he would pay it to me. It was in performance of that understanding I paid the money on the 1st of October, 1908. I didn't see Redman on or after the 1st of October. About the 8th or 9th I sent the money in the fund to the defendant company with all of the dues for all of the members at the same time. They kept the other money and sent me a check for $1, refusing to accept Redman's assessment. Cross-examination: Exhibit No. 2 is the list that I received from the defendant containing the names of the parties from whom to collect, and upon which I remitted for Mr. Redman. The entries thereon made in pencil, giving the date of October 1 and the amount of the assessment in each case, were made on that day, October 1. I sent exhibit No. 2 to defendant by mail about the 7th or 8th of October after I learned of the death of Redman. Didn't notify them he was dead. I have the check the company returned to me in my possession, not cashed. For the defendant Mr. Corrick, its president, testified, in substance, that Bruno had no authority to make any other arrangement for the payment of the assessments than the receipt of the money; that he, Corrick, had no knowledge until the day before the trial as to the time of the payment of the October assessments,

except the information contained in exhibit No. 2; that he received this on October 9, 1908, and at that time knew that Redman had already been killed; that he received $12.50 at the same time and returned by check the $1 represented by Redman's assessment. Exhibit No. 2 is as follows:

"FIDELITY ACCIDENT INSURANCE COMPANY.
"LINCOLN, NEB., September 19, 1908.

"Mr. F. M. Bruno, St. Edward, Neb.

"DEAR SIR: Below is a list of members who have an assessment due October 1st. You are to detach and retain the duplicate sheet, sending in the original with amount collected less commission. * * *

Name	No.	Amount	Date Paid
Bruno, F. M.....	1480	1.00	Oct. 1, 1908
* * * * * *	*	* *	* *
Redman, Chas. E.....	1490	1.00	Oct. 1, 1908"

The amounts of money paid and the date of payment as shown in the two columns above were written in pencil by Bruno.

The insurance provided for by the contract is clearly term insurance from month to month, hence the policy expired by its terms, unless renewed on the first of each succeeding month by the payment of the premium. The testimony of the collector is undisputed that on the 1st day of October he paid the amount due for the insured, placed it in a fund separate from his other money, and on that day marked the amount paid upon the list sent him. The company did not expect or require payment at its office in Lincoln on the first day of each month. The renewal receipts in evidence show they are dated after the time Bruno says he sent the money in August and September and it retained all the money sent for October except that sent for Redman. This was evidently returned for the reason that Mr. Corrick had learned of Redman's death before the money reached Lincoln. Under these circumstances, Bruno, after he had credited Red-

man and had placed his premium money in a separate fund, became liable to defendant for the amount, as well as for that paid by the other members. The arrangement by which Bruno paid the money for Redman and looked to Redman for repayment was a personal one. If the premium was in fact paid on October 1, it was immaterial to the defendant company who furnished the money to pay it. 1 Cooley, Briefs on Law of Insurance, 484, and cases cited; *Puls v. Grand Lodge, A. O. U. W.*, 13 N. Dak. 559.

We are of opinion that the instruction complained of correctly stated the law. Having reached this conclusion, it is unnecessary to consider the other assignments of error.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., not sitting.

A. J. MINOR LUMBER COMPANY, APPELLEE, V. ELMER E. THOMPSON; A. J. SHUMWAY, INTERVENER, APPELLANT.

FILED MARCH 26, 1912. No. 16,659.

Mortgages: ATTACHMENT: PRIORITY OF LIENS. A prior unrecorded mortgage on real estate, made in good faith and for a valuable consideration, will take precedence of a title derived by virtue of a sale under attachment or execution, if such mortgage is placed on record before the sheriff's deed based upon such proceedings is recorded.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Judgment modified.*

L. L. Raymond, for appellant.

Wright, Duffie & Wright, contra.

LETTON, J.

The controversy in this case is as to the priority of liens. On January 22, 1908, a writ of attachment was levied in this action on certain real estate belonging to defendant Thompson, who is a nonresident of this state. Service was had by publication, and proof thereof made on March 3, 1908. On the same day a deed was placed upon record from Thompson to "A. J. Shumway, Trustee," to the same property. Afterwards, the trustee intervened in this case and filed an amended answer and cross-petition, alleging, in substance, that on November 25, 1907, Thompson executed to him a trust deed to the property; that the agreement between Thompson and him was verbal and not in writing, and that the deed was in fact a mortgage given to secure Shumway and another against loss or damage by reason of each of them having become sureties upon two several notes of Thompson; that Thompson made default in the payment of each of the notes; that the sureties paid them, and there is now due and owing by Thompson to the sureties $290.33 and $83.50, respectively, which is secured by the trust deed; and further alleging that the lien created by the trust deed is prior and superior to that derived under the attachment proceedings. The prayer was for a foreclosure of the trust deed as a mortgage. A copy of the deed and of the notes mentioned are attached to the cross-petition as exhibits. The reply is a general denial. Defendant Thompson made default. The court found for the plaintiff on its count for goods and merchandise; found for the cross-petitioner, that the deed is in effect a mortgage, and was given to secure the notes as alleged; found, further, that the attachment was the first and prior lien upon the real estate, and the lien of the mortgage junior and inferior thereto. Judgment went for the amount due plaintiff, and a decree of foreclosure was rendered for the amount found due under the mortgage. The intervener excepted to the finding making the judgment the prior lien, and has appealed on this point..

No motion for a new trial was filed. The only point necessary to consider, therefore, is whether the findings and decree are sustained by the pleadings. We have repeatedly held that a prior unrecorded deed conveying title, made in good faith and for a valuable consideration, will take precedence of a title derived by virtue of a sale under attachment or execution, if such deed is placed on record before the sheriff's deed based upon such proceedings is recorded. *Harral v. Gray*, 10 Neb. 186; *Mansfield v. Gregory*, 11 Neb. 297; *Naudain v. Fullenwider*, 72 Neb. 221; *Mahoney v. Salsbury*, 83 Neb. 488. The same principle applies with respect to mortgages.

Under the facts alleged as to time, the mortgage created a lien on the property valid between the parties from the date of its execution on November 25, 1907. The attachment proceedings could only operate upon the interest of the debtor in the land. If, however, the mortgagee had withheld the trust deed from record until after a deed based upon the attachment proceedings had been recorded, in that event, by the operation of the recording act, his lien would have become postponed and subsequent to that of the purchaser at sheriff's sale. But, having recorded the mortgage before the judgment in the case was rendered or any sale made thereunder, his prior lien was preserved and the attachment lien was junior thereto.

But plaintiff argues that, since the trust deed recited "This deed is made in trust to secure the performance of certain conditions set forth and contained in a separate agreement bearing even date herewith and signed by the parties hereto," and since these recitals are contradicted by the allegations of the petition that the agreement or contract was a verbal one, the averments of the petition as to the contract being oral are effectually disproved. It also contends that the terms of a trust cannot be shown by parol testimony, and that there is no competent evidence in the record that the intervener has any such interest in the attached property as he claims. It has been often decided here that the actual consideration of a deed,

or that a deed is in fact a mortgage, may be shown by parol.

Under analogous principles it would be proper to show under the pleadings in this case that the recital in the deed, that the defeasance was in writing was untrue, and that the deed was, in fact, executed under a parol agreement to secure Mr. Thompson's sureties as alleged. This being the case, we are satisfied that the allegations of the cross-petition are sufficient to sustain the findings of fact; but we think the court erred in holding as a matter of law that the lien of the mortgage was the junior one.

The judgment of the district court should be modified so as to constitute the lien created by the trust deed the first lien on the property and the lien created by the attachment proceedings the second lien thereon. The judgment of the district court is, therefore, affirmed as to the findings of fact, and the cause is remanded to the district court, with directions to modify the judgment in conformity with this opinion.

JUDGMENT MODIFIED.

REESE, C. J., not sitting.

SAMUEL J. STEWART, APPELLANT, V. SILAS R. BARTON, AUDITOR, APPELLEE.

FILED MARCH 26, 1912. No. 17,462.

1. **Statutes: CONSTITUTIONALITY: PROVINCE OF COURTS.** The courts will not inquire into the motives prompting the enactment of laws by the legislature or the wisdom of the legislative measures adopted.

2. ———: ———. Where an act is passed as original and independent legislation and is complete in itself so far as applies to the subject matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application.

3. ———: ———. The mere fact that an act of the legislature refers by implication to a prior act does not render the new act

amendatory of the act to which reference is made if in other respects it is a complete act in itself.

4. ———: ———: TITLE OF ACT. The title of an act is "An act to appropriate $100,000 for the construction and equipment of a laboratory building on the campus of the Medical College of the University of Nebraska at Omaha under the supervision of the Board of Regents." *Held*, That a provision in the body of the act that "said building shall be known as the 'laboratory build ing' and shall be used for a clinical laboratory and administration and such other purposes as the needs of the medical college shall require" may properly be embraced within the title and does not violate section 11, art. III of the constitution, providing, "No bill shall contain more than one subject, and the same shall be clearly expressed in its title."

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

Tibbets & Anderson, for appellant.

W. G. Hastings and *H. H. Baldrige, contra.*

LETTON, J.

The legislature of 1911 passed an act entitled "An act to appropriate $100,000 for the construction and equipment of a laboratory building on the campus of the Medical College of the University of Nebraska at Omaha under the supervision of the Board of Regents." Laws 1911, ch. 205. The regents of the university were proceeding to carry out the purposes of the act when this action was begun to enjoin the defendant as Auditor of Public Accounts from allowing any claims against the appropriation. A demurrer to the petition was sustained by the district court, and the cause dismissed. Plaintiff has appealed.

The plaintiff contends that the act constitutes special legislation; that it violates section 11, art. III of the constitution, relating to the amendment and repeal of statutes; that the title of the act is restrictive and that the act is broader than the title.

1. The petition alleges that the purpose and effect of the act is to appropriate money for the purpose of promoting and establishing an exclusively allopathic school of medicine, and, hence, that it is a special act. We find nothing therein which relates to the establishment of an allopathic school, and there is no direction of any kind to the regents of the university as to whether any particular school, or whether professors or practitioners giving adherence to the tenets or doctrines of any given sect or division of the profession, shall have the privilege of inculcating its peculiar ideas in the building provided for. The whole matter is within the discretion of the board of regents, and if in the use of the building they violate no provision of the constitution or of the statute, no one can complain. While it is alleged that this is the purpose of the act, the allegation is mere surplusage, since it is clearly beyond the power of the court to inquire into the springs of legislative action. With inquiries as to the hidden motives prompting the enactment of laws or the wisdom of legislative measures, the courts can have nothing to do. Moreover, the prohibition against the legislature enacting local or special laws is not general, but is confined to the specific cases mentioned in section 15, art. III of the constitution. It is within its power to legislate upon any subject not therein prohibited (*State v. Moores*, 55 Neb. 480, 489), and we find no prohibition in the clause mentioned against such an act as this.

2. It is next contended that the act is not complete in itself but is amendatory of the general act governing the state university; that the constitutional provision, "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed"—is mandatory and must be complied with, and that repeal by implication is not favored by the law. In accordance with the provisions of section 10, art. VIII of the constitution, establishing the University of

Nebraska, and providing for the creation of a Board of Regents for its government, the legislature in 1869 passed an act establishing the university, providing for its government, describing the departments into which it might be divided, setting apart lands for a model farm, specifically stating the general powers of the board of regents, providing for funds for the support of the institution, giving the regents control of the designs and plans for buildings for the university, and providing, "The several buildings of the university shall all be erected within a radius of four miles from the state house." Laws 1869, p. 176, sec. 11. Plaintiff contends that the act under consideration changes and amends the act of 1869 with respect to the latter and other provisions controlling the erection of university buildings. *Smails v. White,* 4 Neb. 353, and a number of early cases in this court taking a rather narrow view of this constitutional question are cited by the plaintiff. We think, however, that the act is complete in itself and does not transgress these provisions of the fundamental law.

The act of 1869, which established the university and created its governing body, conferred upon that body certain specified powers and duties, and prescribed certain limitations. Among the powers granted was the control of the erection of buildings; among the limitations was that such buildings should not be erected more than four miles from the state house. We think it cannot with reason be contended that the legislature has not the authority to enlarge by a separate and subsequent act the powers and duties of any officer of its own creation, nor that it cannot widen or relax by later enactments any building limitations it may have established. The provisions of the general act limiting the powers of the regents with regard to the erection of other university buildings was not interfered with by the new act, but it conferred additional powers and prescribed a definite location for another building; while, in some sense, supplemental to the former act, it leaves its general provisions

untouched and therefore is not amendatory in the proper sense. It is true that for the control and management of the medical school reference must be made to the powers given in the general act, but this feature of itself does not operate to make this act amendatory. Where an act is complete within itself, it may be valid even though in conflict with a prior law not referred to in the later act. *State v. Cornell,* 50 Neb. 526; *Affholder v. State,* 51 Neb. 91; *Zimmerman v. Trude,* 80 Neb. 503; *Allan v. Kennard,* 81 Neb. 289; *State v. Ure, ante,* p. 31.

3. It is next argued that the act is broader than its title, in this, that the title of the act is "An Act to appropriate $100,000 for the construction and equipment of a laboratory building," etc. Section 2 provides that "said building shall be known as the 'laboratory building' and shall be used for a clinical laboratory and administration and such other purposes as the needs of the *medical college shall require.*" The argument is made that, since the title is restricted so that it applies to a "laboratory building," it cannot include the broader and more comprehensive provision in section 2 that it shall be used for administration and other purposes, as well as for a laboratory; that at the time of the passage of the act the regents of the university were carrying on the clinical laboratory work of the medical college of the state university at Omaha, and were carrying on the administrative and all other work at the university in Lincoln, and therefore that the public would be deceived by the title as to the object of the bill. We are not inclined to take such a narrow and restricted view. Even if no express words permitting the use of the building for administrative and other purposes connected with the needs of the medical college had been used in the act, we are of opinion that its use for such purposes as are incidental to its main purpose as a clinical laboratory might properly be permitted by the board of regents. It would seem to be an unreasonable construction of such a constitutional provision to hold that, when the legislature authorized the board of regents

to erect a building, it should be compelled to specify in the title of the act and in minute detail each and every purpose for which the building should be used incidental to the main object, at the penalty of having the act declared invalid if this were not done. This would be carrying refinement to excess. *Bonorden & Ranck v. Kriz,* 13 Neb. 121; *Affholder v. State, supra; State v. Stuht,* 52 Neb. 209; *Paxton & Hershey I. C. & L. Co. v. Farmers & Merchants I. & L. Co.,* 45 Neb. 884; *Alperson v. Whalen,* 74 Neb. 680.

The constitutional provisions herein treated of have been recently considered in the opinion in *State v. Ure, supra,* to which we refer, in order to avoid useless repetition as embodying our views at greater length.

Finding no error, the judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

STATE, EX REL. J. HERMAN KRITTENBRINK, APPELLEE, V. CHARLES W. WITHNELL, BUILDING INSPECTOR OF THE CITY OF OMAHA, APPELLANT.

FILED MARCH 26, 1912. No. 16,600.

1. Municipal Corporations: ORDINANCES: VALIDITY: EVIDENCE. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.
2. ———: ———: ———: PRESUMPTIONS. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.
3. ———: POLICE REGULATIONS. In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised.

4. ———: ———. Within constitutional limits, private property is held subject to proper rules regulating the common good and the general welfare of the people.

5. ———: ———. In testing police regulations, the court should inquire whether they have some relation to the public health, safety or welfare, and whether such is in fact the end sought to be attained.

6. ———: ———: NUISANCES. While a city having authority "to define, regulate, suppress and prevent nuisances," cannot arbitrarily prohibit harmless and inoffensive private enterprises by the exercise of such power, the acts of the city council in dealing with nuisances may be held conclusive, if the subject of legislation might or might not be a nuisance, depending upon conditions and circumstances.

7. ———: ———. The passing of an ordinance forbidding the construction of brick-kilns in a city may be a valid exercise of police power.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Harry E. Burnam, I. J. Dunn, John A. Rine and *Clinton Brome*, for appellant.

H. C. Murphy, S. L. Winters and *R. E. McNally, contra.*

ROSE, J.

This is an application for a writ of mandamus commanding defendant, as building inspector of Omaha, to issue to relator a permit to construct a brick-kiln on a tract of land owned by him in that city. Defendant had refused to issue the permit because he could not do so without violating an ordinance declaring: "It shall be unlawful for any person, persons, firm or corporation to erect or construct within the city of Omaha any kiln or oven to be used in the manufacture of brick." The trial court held, in harmony with the views of relator, that the ordinance was arbitrary, unreasonable and void, as being an invasion of personal rights and of private property. The writ was allowed, and defendant has appealed.

To establish the invalidity of the ordinance relator adduced proof tending to show: He is the owner of six and a half acres of land situated in the outskirts of Omaha, in the immediate neighborhood of a dairy and a pasture, remote from the densely populated portions of the city. He planned to construct and operate on the premises described a modern kiln, different from that formerly used in the manufacture of brick. According to his summary of the proofs relating to the new method, the brick-kiln "is nowise harmful to health or vegetation, produces little or no smoke, no deleterious gases, no obnoxious odors, and is not a rendezvous for vagrants and tramps." It is argued by relator that the contemplated enterprise at the place described would not be a nuisance *per se*, and that the city had no authority to interdict it as such. Had the city power to pass and enforce the ordinance?

By charter the state legislature delegated power to the city of Omaha in the following terms: "To make and enforce all police regulations for the good government, general welfare, health, safety and security of the city and the citizens thereof;" and "to prescribe fire limits and regulate the erection of all buildings and other structures within the corporate limits;" and "to define, regulate, suppress and prevent nuisances." Comp. St. 1911, ch. 12*a*, sec. 144, subds. XXV, XXXII, and sec. 52. Under the authority thus conferred, the city council in passing the ordinance obviously intended to exercise the police power of the city, and the courts should not interfere with its enforcement unless its unreasonableness, or the want of a necessity for such a measure, is shown by satisfactory evidence. *Peterson v. State*, 79 Neb. 132. It will be presumed that the city council in passing the ordinance acted with full knowledge of the conditions relating to the subject of brick-kilns located within the city limits. The reasons of public policy which prompted the city lawmakers to pass the ordinance may not appear on the face of the legislation, or in relator's petition, or in the evidence adduced at the trial of this case. *Gardiner v. City*

of Omaha, 85 Neb. 681. The inquiry, therefore, is not necessarily limited to the city's authority to prevent or abate nuisances, but extends to every phase of police power delegated in any form to the municipality. In *State v. Drayton,* 82 Neb. 254, a well-established doctrine was announced in this form: "Within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised." Relator's land in Omaha is held subject to proper rules regulating the common good and the general welfare of the people of that city. *Wenham v. State,* 65 Neb. 394. In testing police regulations like the ordinance assailed, the court should inquire "whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained." *Smiley v. MacDonald,* 42 Neb. 5; *In re Anderson,* 69 Neb. 686; *Union P. R. Co. v. State,* 88 Neb. 247. According to the principles of law to which reference has been made, relator was not entitled to a writ commanding defendant to issue a building permit in violation of the ordinance, unless the proofs clearly answer those inquiries in the negative and show that the enactment was an unreasonable and arbitrary invasion of individual rights under the guise of police regulation. *Wenham v. State,* 65 Neb. 394; *Union P. R. Co. v. State,* 88 Neb. 247.

Relator has not yet constructed his kiln, and the testimony adduced to show that it would not become a nuisance is based largely on observations of existing kilns operated according to the modern method described in his plans and evidence. According to the proofs the volume and character of the smoke will be less objectionable under the new process, but the stack will emit smoke of a light color continually. The fair inference from all the evidence is that black smoke in great volume will escape at intervals under ordinary management of the plant. It is undisputed that clay, excavated on the premises, and

coal, ashes and brick, in vast quantities, will be handled there. Teams and men will be required for that purpose. The fact that the wind in this climate will carry dust and soot long distances at times cannot be disproved. On one side of the kiln site an addition to the city is rapidly being occupied by valuable residences and there is no factory in the immediate neighborhood. The proofs show that there are 13 houses within two blocks of relator's land, and a witness for defendant testified that within 5 blocks there were 20 or 25 families. Smoke alone may amount to a nuisance, where it materially interferes with the comfort of human existence in the house and grounds of the owner, though they are located near the edge of a city no great distance from smoke-producing factories. *Crump v. Lambert,* 3 Eq. Cas. (Eng.) 408. An ordinance "prohibiting the emission of dense smoke within the corporate limits of the city" has been held valid as a proper exercise of police power. *City of St. Paul v. Haughbro,* 93 Minn. 59; *City of Buffalo v. Ray Mfg. Co.,* 124 N. Y. Supp. 913; *City of Rochester v. Macauley-Fien Milling Co.,* 199 N. Y. 207, 32 L. R. A. n. s. 554. While a city, having authority "to define, regulate, suppress and prevent nuisances," cannot arbitrarily use it to prohibit harmless and inoffensive private enterprises, the acts of the city council in exercising such police power may be held conclusive, if the subject of municipal legislation might or might not be a nuisance, depending upon conditions and circumstances. *Harmison v. City of Lewistown,* 153 Ill. 313; *North Chicago City R. Co. v. Town of Lake View,* 105 Ill. 207; *Bowers v. City of Indianapolis,* 169 Ind. 105; *City of Buffalo v. Ray Mfg. Co.,* 124 N. Y. Supp. 913; *Powell v. Brookfield Pressed Brick Tile Mfg. Co.,* 104 Mo. App. 713; *Kansas City v. McAleer,* 31 Mo. App. 433; *Lawton v. Steele,* 119 N. Y. 226. Brick-kilns are frequently condemned as nuisances and are proper subjects of police regulation. *State v. Board of Health,* 16 Mo. App. 8; *Kirchgraber v. Lloyd,* 59 Mo. App. 59; *Harley v. Merrill Brick Co.,* 83 Ia. 73. If a brick-kiln is in

fact a nuisance, modern methods of construction and careful operation are immaterial. *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. 713.

In the present case, it seems to be conceded that a brick-kiln is an inviting place for tramps in cold weather. While relator expressed the conviction that he could keep them away, there is nothing to indicate they would not be turned loose on the residents of the neighborhood in the outskirts of the city, where police protection may be inadequate. Near valuable residences relator intends to build a smoke-stack 130 feet high, and to remove clay to a depth not disclosed by his plans or evidence. The value of residence property in the neighborhood might be damaged by relator's enterprise. These were proper matters for the consideration of the city lawmakers. When the entire record is considered, the evidence does not justify a finding that the ordinance in question has no relation to the public health, safety or welfare, or that it is not a *bona fide* exercise of police power, or that it amounts to an unconstitutional invasion of relator's individual rights, or that it is arbitrary and unreasonable. In this view of the law and the facts, he has not made a case entitling him to the writ.

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

REVERSED.

JOHN M. QUICK ET AL., APPELLEES, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED MARCH 26, 1912. No. 16,657.

1. **Insurance:** BENEFICIAL ASSOCIATION: BY-LAWS: REPEAL. Minutes of the proceedings of the legislative body of a fraternal beneficiary association, by merely reciting that a section of the by-laws has been amended and repealed, do not prove that the provisions of the original section have been eliminated from the by-laws, where neither the original nor the amended section is disclosed.

2. ———: ———: ———: RE-ENACTMENT. The simultaneous repeal and re-enactment, in terms or in substance, of parts of a by-law of a fraternal beneficiary association preserve without interruption the re-enacted provisions of the original by-law.

3. ———: ———: ACTION: INSTRUCTIONS. Where defendant's pleadings and proofs in a suit on a fraternal beneficiary certificate tend to show that assured changed his occupation from painter to locomotive fireman, that he was killed while engaged in the duties of his new employment and that the change was made under conditions releasing defendant from liability under the terms of the insurance contract, it is error for the trial court to refuse an instruction that plaintiff is not entitled to recover, if the jury find the facts to be as stated.

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

Talbot & Allen and *Benjamin D. Smith,* for appellant.

George W. Berge, contra.

ROSE, J.

This is an action to recover $1,000 on a fraternal beneficiary certificate issued by defendant to Charles S. Quick, May 20, 1908. Assured died November 14, 1908. Plaintiffs are named in the certificate as beneficiaries. From a judgment in their favor defendant has appealed.

It was pleaded as a defense that assured's application for membership and the by-laws of the fraternity were parts of the insurance contract; that assured in his application stated he was a painter, and paid assessments at the agreed rate for that occupation; that he afterward entered the hazardous occupation of locomotive fireman without paying the increase for the extra hazard, and without complying with sections 16 and 17 of the by-laws which required him to procure from defendant a certificate covering the new risk; that he was killed while engaged in the performance of the duties of his new employment, and that on the facts stated defendant was, by contractual terms fully pleaded, not liable for the payment

of any insurance. In the reply plaintiffs pleaded that assured's application was written by agents of defendants; that in answer to a question asked by defendant's agent assured correctly answered that he was a locomotive fireman; that, personally knowing the fact, the agent incorrectly inserted "painter" in the application as the answer; that the rate required by defendant was paid and that section 16 of the by-laws relating to the increased rate to be paid by a locomotive fireman had been waived by defendant and had been repealed prior to the death of assured. The by-laws pleaded by defendant were introduced in evidence, and there is direct proof that assured, in making his application, was asked to state his occupation, and answered that he was a painter; that the answer as given was written in the application, which was signed by assured, and that he was in fact engaged in that occupation at the time. It is at least doubtful whether there is sufficient evidence in the bill of exceptions as it now stands to sustain a finding that the occupation in which assured was really engaged was not correctly written in the application as given by him. That he was killed when performing the duties of a locomotive fireman is shown by evidence not disputed.

Plaintiffs, in attempting to prove that sections 16 and 17 of the by-laws, which, if binding on assured, released defendant from the increased hazard of the changed occupation of locomotive fireman, if he engaged therein without paying the increased rate and without procuring a certificate covering the new risk, offered in evidence the following entries from the record of a meeting of the head camp, or defendant's legislative body, which convened in June, 1908, the action having been taken in considering the report of the law committee: "Reading Clerk: Section 16, beginning on page 17, is stricken out. There is a new section 16, or almost new, substituted for it. The question is now upon the adoption of section 16 as amended. All those in favor of the adoption of this section will vote aye, those opposed, no, and the section is

adopted. The Reading Clerk will read the next. Reading Clerk: Section 17, starting at the bottom of page 18. General Attorney Plantz: If there is no objection to section 17 as submitted by the law committee, we will consider it adopted. There is no objection and it is adopted."

It is contended by plaintiffs that sections 16 and 17 were repealed before assured was killed, and that therefore his beneficiaries did not lose their insurance, even if there was a violation of those by-laws. Plaintiffs' failure to prove that the original provisions relating to the increased hazard did not remain in the new enactments is a sufficient answer to this argument. The by-laws pleaded and proved by defendant were parts of the original contract of insurance and were made so by the terms of the contract itself. Having alleged in the reply that section 16 had been repealed and that the contract had been thus changed, the burden was on plaintiffs to prove facts showing that the original provisions relating to the hazardous occupation of locomotive firemen were not carried into the amendments. The simultaneous repeal and re-enactment of parts of a law, in terms or in substance, preserve without interruption the re-enacted provisions. *State v. McColl,* 9 Neb. 203; *State v. Bemis,* 45 Neb. 724; *Stenberg v. State,* 50 Neb. 127. Within the meaning of this rule, that part of the proceedings of the head camp introduced in evidence does not show that the provisions relating to the hazardous occupation of locomotive fireman were not continued without interruption in the amendments of sections 16 and 17. There is no other proof to show that those sections were unconditionally repealed in a form which eliminated the provisions relied upon by defendant. The amendments of 1908, however, are in the record, and it is unnecessary to determine whether they should be considered; but, if it were proper to resort to them to see what was in fact done by the head camp, they would show that the changes did not eliminate the provisions pleaded by defendant as a defense.

With the proofs in the condition indicated, defendant requested and the court refused the following instruction: "The jury are further instructed that the by-laws of the defendant society provide that engaging in or entering on, or continuing in, the occupation of railroad locomotive fireman by any beneficiary member of the society shall totally exempt said society from any and all liabilities to such member, his beneficiary or beneficiaries on account of the death of such member directly traceable to employment in such hazardous occupation, unless such member shall have complied with the by-laws of the defendant extending his certificate to cover the hazards of such occupation, and shall have made application therefor and paid the increased rate provided in the by-laws of members engaging in such hazardous occupations, and you are instructed that if you find from the evidence that the said Charles S. Quick, after signing the application herein, engaged in the occupation of railroad locomotive fireman, without having complied with the defendant's by-laws extending his certificate to cover the hazards of his occupation and without having made application therefor and paid the increased rate required by the by-laws for members engaging in such hazardous occupations, then you are instructed that the defendant herein would be totally exempted from any and all liability to such member, his beneficiary or beneficiaries on account of the death of such member directly traceable to employment in such hazardous occupation."

To make available to defendant the terms of its contract, as shown by the pleading and proof already outlined, the foregoing instruction, or one of similar import, was necessary. The failure to give it was prejudicial error for which the judgment in favor of plaintiffs must be reversed.

Other errors of which complaint is made will not likely recur in the further proceedings, in view of the discussion of the principal assignment, and will not be con-

sidered further, since the judgment must be reversed for the error already pointed out.

REVERSED AND REMANDED.

REESE, C. J., not sitting.

JOSEPH SITTLER, APPELLANT, V. BOARD OF SUPERVISORS OF CUSTER COUNTY ET AL., APPELLEES.

FILED MARCH 26, 1912. No. 16,615.

1. **Highways:** LOCATION: DAMAGES: WAIVER. "Where a landowner files a claim for damages caused by the location of a public road over his land, he thereby waives all objections on the ground of irregularities in locating the road." *Davis v. Commissioners of Boone County*, 28 Neb. 837.

2. ———: ———: ———: INJUNCTION. "Before a county can appropriate lands to public use for a public road it must provide for the payment of damages for the right of way either by the appropriation of money from the proper fund for that purpose, or the levy of sufficient taxes to pay the damages upon which a warrant may be drawn. In either case the compensation must be sure, and the landowner may enjoin the use of his property by the public until such compensation is made." *Zimmerman v. County of Kearney*, 33 Neb. 620.

3. ———: ———: PAYMENT OF DAMAGES. By the amendment, April 5, 1909, of section 6157, Ann. St. 1907, it is required that "all damages caused by the laying out, altering, opening or discontinuing any county road shall be paid by warrant on the general fund of the county in which such road is located." Laws 1909, ch. 115.

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

Sullivan & Squires, for appellant.

N. T. Gadd, A. R. Humphrey and *Alpha Morgan, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Custer county, to restrain the board of supervisors and other

officials from going upon his land for the purpose of laying out a public road, and, from a judgment of the district court of that county dismissing his suit, he prosecutes this appeal.

The petition shows that a petition for the laying out of the road in controversy was filed April 19, 1909; that the proposed road runs through the land of plaintiff; that after such petition had been filed plaintiff procured and filed a remonstrance against the establishment of the road, signed by 200 electors of the county; that, when the matter came on regularly to be heard by the board, the remonstrance was overruled; that the board and the county clerk are about to direct the surveyor to go upon his land, to survey the same; that the board made an order allowing plaintiff certain damages, but directed that the same be paid by road district No. 4 of Custer county, through which it is proposed to run the road, and refused to allow such damages against the county. The petition contains certain other allegations which we deem it unnecessary to recite.

The stipulation of facts shows that the petition for the road was filed April 19, 1909; that personal notice was given to the owners of the various tracts of land, including plaintiff; that on June 25, 1909, the remonstrance, hereinbefore referred to, was filed; that on the 11th day of August, 1909, the board met in regular session, all members being present, and the parties interested in the road controversy were also present; that testimony was submitted for and against the establishment of the road; after which the committee made the following report: "We, your committee, recommend that the petition be granted as recommended by the commissioners, and the remonstrance be rejected and damages allowed against road district No. 2 Kilfoil township as follows: * * * Joseph Sittler for land, 6.04 acres, $302; for fences, $108;" that the report of the committee was accepted and adopted as read and the road established as recommended by the committee. It is further stipulated that it is the inten-

tion of the defendants, or those authorized so to do, to go forward and take possession of plaintiff's land, for the purpose of the road as charged in the petition, and that Custer county is under township organization. It is also stipulated that plaintiff filed a claim for damages with the board in the following language: "Comes now the undersigned, Joseph Sittler, who with others signed and filed a remonstrance against the said proposed road, in which they set out fully their objection to said road, and without waiving any of his objections to said proposed road and all the while insisting upon the same, alleges that in the event the said road is laid out he will be damaged in the following items and amounts, to wit:" For land taken $700; for fencing $320; "for maintaining gates, inconvenience, and for damages to the value of the remainder of said farm by reason of said road $1,000." "The undersigned alleges that he is the owner of the west half of section 9, township 17, range 21, across which said proposed road runs and the aforesaid damages will accrue to said premises, and while the undersigned still objects to the laying out of said road, subject to the official action of said board on said remonstrance, he prays that in the event said remonstrance and his said objection to said road are overruled and said road is laid out he may be allowed damages as by the items set forth in the aggregate sum of $2,020." It is further stipulated that on August 16, 1909, the county clerk duly notified plaintiff of the action taken by the board on August 11, and that plaintiff took no appeal from such action of the board and prosecuted no error proceedings therefrom.

It is contended by the defendants that, by failing to appeal or prosecute error proceedings from the action of the county board in laying out the road, and by filing with the board his claim for damages, he waived the right to question the regularity in any of the proceedings by the board. As to everything done by the board, except the allowance of the damages against the road district instead of providing for their payment by warrants on the

general fund of the county, we think the contention of defendants is sound and must be sustained. The rule must be considered as settled in this jurisdiction, that by filing a claim for damages in such a case the claimant waives all objections to the location of the road. As said in *Davis v. Commissioners of Boone County,* 28 Neb. 837: "He, in effect, says to the defendants, 'You have taken my land for a public road and I demand damages therefor.' These he is entitled to recover, but the filing of the claim is a waiver of irregularities in locating the roads." But, plaintiff says, that rule should not be applied to him, for the reason that he at all times stood objecting to and resisting the establishment of the road; that it was not inconsistent for him to say to the board, "While I remonstrate against, object to and resist the establishment of the road, yet if you are determined to lay out the road, and if in spite of my objection the road is laid out, my damages are so much." We cannot agree with counsel that this language was sufficient to avoid the waiver.

The second point urged by plaintiff, that no provision was made for the payment of plaintiff's damages, stands upon a different footing. Giving the waiver the full force claimed for it by defendants, it simply sustains the regularity of all the proceedings of the board in laying out the road; so that, up to that point, the case stands as if no remonstrance or objections of any kind had been filed. In such a case, the county has a right to take the land for the proposed road, but not until it has made provision for the payment of the damages. In *Zimmerman v. County of Kearney,* 33 Neb. 620, we held: "Before a county can appropriate lands to public use for a public road it must provide for the payment of damages for the right of way either by the appropriation of money from the proper fund for that purpose, or the levy of sufficient taxes to pay the damages upon which a warrant may be drawn. In either case the compensation must be sure, and the landowner may enjoin the use of his property by the public until such compensation is made." In the opinion it is

said: "It is conceded that no attempt has been made to levy taxes to pay the damages in question, nor is it proposed to levy any for that purpose. If we understand the position of the defendant in error, it is that the plaintiff must give up his land and take the chances of recovering payment therefor. This is not the law. The rule as stated in *Republican V. R. Co. v. Fink*, 18 Neb. 82, is applicable in case of a municipal corporation, with this exception, that, where the damages have been allowed and taxes levied to pay the same so that warrant may be drawn thereon, the levy constitutes a fund that is available to the landowner and the property may be appropriated therefor. In other words, the proper authorities must be able to deliver to him a warrant drawn upon the proper levy before the public can appropriate his property to its use. This is the means by which public corporations, like counties, townships, etc., effect payment. There must be an absolute provision for payment, however, or the property cannot be appropriated. Here there is no such provision, and the landowner may enjoin the proceedings." The language of Mr. Justice MAXWELL in that case seems to exactly fit the case at bar. The judgment of the board was that the damages should be "allowed against road district No. 2 Kilfoil township." Even if prior to July 1, 1909, the board might have made such an order, by reference to chapter 115, p. 450, laws 1909, it will be seen that on April 5, 1909, an act was approved which amended the law as it had theretofore existed, so as to read as follows: "All damages caused by the laying out, altering, opening or discontinuing any county road shall be paid by warrant on the general fund of the county in which such road is located, except as otherwise provided in section 6091 of Cobbey's Statutes for 1907." Section 6091, referred to, is the one giving the right of appeal by an applicant for damages. Prior to this amendment of 1909, which became effective in July of that year, it was optional with the county board whether the damages should be paid by a warrant drawn upon the county or by the dis-

trict, but the effect of the amendment referred to was to substitute the word "shall" for the word "may." As the action of the board was taken only a little over a month after this amendment became effective, it is more than probable that the board did not know of the change in the law. However that may be, the fact remains that the defendants are now threatening to go upon and take plaintiff's land and cause him more or less serious damage without having made any provision for the payment of his damages by the appropriation of money from any proper fund for that purpose. This cannot be done.

The judgment of the district court is therefore reversed and the cause remanded, with directions to grant an injunction restraining the defendants from entering upon or in any manner attempting to appropriate plaintiff's land until it has made due provision for the payment of the damages allowed in its order of August 11, 1909.

REVERSED.

HORACE W. PARSONS, APPELLEE, V. THEODORE F. BARNES ET AL., APPELLANTS.

FILED MARCH 26, 1912. No. 16,633.

1. Petition discussed in the opinion, *held* to state a cause of action for damages for fraud.
2. Evidence examined and considered in the opinion, *held* sufficient to sustain a verdict in favor of plaintiff for such damages.

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

Edward F. Pettis, Theodore F. Barnes and *Charles O. Whedon,* for appellants.

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

FAWCETT, J.

Plaintiff paid $200 for what he supposed was a piece of soldiers' additional homestead scrip entitling him to enter 40 acres of government land. The scrip proved to be worthless and the money paid therefor was never returned. Plaintiff charges his loss to the fraud of defendants and this is an action to recover from them resulting damages. Trial to a jury. Verdict in favor of plaintiff for $371.75. Defendants appeal.

Plaintiff was a dentist residing at Wamego, Kansas. Defendant Theodore F. Barnes was engaged in buying and selling soldiers' scrip, having an office at Lincoln, Nebraska. The Lincoln Safe Deposit & Trust Company, defendant, was transacting at Lincoln, Nebraska, the business indicated by its name, and defendant William E. Barkley, Jr., was its managing officer. The petition alleges: Defendants were partners in the business of buying and selling soldiers' scrip. For the purpose of locating 40 acres of land in Pottawatomie county, Kansas, plaintiff wrote to Barnes in April, 1901, to send him soldiers' scrip. What purported to be a 40-acre scrip of John W. Bowman, assigned to plaintiff by Barnes, was sent to the First National Bank of Wamego, Kansas, by the trust company and Barkley, with instructions to collect $200 from plaintiff therefor. The scrip was represented by defendants to be valid. By means of a draft, payable to the trust company, plaintiff, through the National Bank of Wamego, paid defendants $200. The draft was cashed and the money kept and appropriated. Believing the scrip to be valid, as it was represented to be, plaintiff went to the United States land office at Topeka for the purpose of locating 40 acres of land, but failed. The scrip was of no value. Bowman was not entitled to any additional entry under the United States land laws. The scrip was fraudulent and defendants had no right to make any entry thereunder. Defendants, well knowing that the scrip was fraudulent, and with the pur-

pose of cheating and defrauding plaintiff out of $200, entered into a conspiracy and induced him to buy the scrip and to pay that sum therefor. Plaintiff returned the scrip to the trust company December 6, 1901, and demanded of defendants the return of his money. The scrip has not been returned to plaintiff nor the money refunded.

The alleged partnership and conspiracy of defendants and all allegations charging them with fraud are denied in the answers. In addition, Barnes alleges that plaintiff bought the scrip after satisfying himself upon a full examination of its value and validity. Barkley and the trust company allege that they had no connection with the transaction, excepting as the collection agents of Barnes, and that they had no other interest in the scrip or in the proceeds of the sale.

The principal points relied upon for a reversal are the insufficiency of the petition to state a cause of action and failure of the proof to support the verdict.

One of the objections to the petition is that it does not allege that plaintiff relied upon any representation of any of the defendants. The allegations of the petition must be construed with reference to the acts of congress creating soldiers' additional homestead rights and authorizing the transfer thereof. 2 U. S. Comp. St., secs. 2304, 2305. Every soldier who is entitled to the benefit of the act, if he has entered less than 160 acres of land, is permitted to enter so much more as, when added to the quantity previously entered, shall not exceed 160 acres. By an amendatory act, a right to the additional homestead was made transferable. It thus appears that scrip, representing a fractional part of 160 acres as a soldiers' additional homestead right of entry, is valuable only for a specific purpose. It is not like ordinary personal property, and, unless it can be used for that purpose, it is absolutely worthless as a lawful investment. The petition shows that plaintiff applied for scrip to be used in locating 40 acres of government land. Valid scrip only would answer that purpose. When defendants sent the scrip to the Kansas bank, with

a demand for $200 upon its delivery to plaintiff, the law implied what is alleged in the petition, namely, that defendants represented it to be valid for plaintiff's purpose. It is further alleged that plaintiff believed that the scrip was what it was represented to be; that it was valid scrip; that he went to Topeka to locate land under it, but could not do so; that he was induced to pay $200 therefor, defendants well knowing that it was worthless. If the petition does not allege in direct terms that plaintiff relied upon the representation of defendants, it does allege facts from which such reliance is fairly shown. Besides, there was a long trial, in which that issue was contested, We do not think defendants were misled or their rights prejudiced by reason of any imperfection in the plea of plaintiff's reliance upon the representation of defendants.

The petition is also challenged upon the ground that it contains no allegation of fact to show why the Bowman scrip was of no value. This point seems also to be without merit. It is alleged that "Bowman was not entitled to any additional entry under the United States land laws as a soldier." In connection with other facts stated, and in view of the acts of congress to which we have already adverted, this is a sufficient averment that Bowman had previously entered 160 acres of land and therefore could acquire no further rights to government land.

We do not think the verdict should be set aside as not being sustained by the evidence. A partnership was alleged. Barnes was engaged in selling scrip. Barkley admitted that the trust company had possession of the Bowman scrip, that he sent it to the Kansas bank to be delivered upon payment of $200, that he collected that sum from plaintiff, that he was the managing officer of the trust company and that the Bowman scrip was returned to the bank.

It is shown that three pieces of scrip were sent to plaintiff. The first was the Bowman scrip. The second was the Maxwell scrip, and, though worthless, plaintiff was asked to accept it in place of the former one. The third

was described as the Ellis scrip, and purported to represent 80 acres, though it was worthless except for 40 acres. Plaintiff testified that after he had returned the Bowman scrip and after he had returned the Maxwell scrip in February, 1902, he visited Lincoln and had a conversation with Barnes, whom he met on the street, and with Barkley. The conversation with Barkley took place in the office of the trust company. In testifying to the conversation with Barkley, he said (the questions being omitted): "We had considerable conversation. I asked them with regard to Mr. Barnes whether he had any money on deposit or not, and he told me that he did not have any on deposit. I asked him if he thought there was any way in which he thought I could make a collection from Mr. Barnes, and he said he did not think there was; that Mr. Barnes was not in a condition to pay me. Then I asked him if he had any scrip in the bank and he said that they had such scrip there, and he said the way that we do business is like this: The scrip is sent to the bank. It is sent out and collections made and money returned and each get their share of it. I had some conversation with him in regard to this piece of scrip of Maxwell's. I asked him what became of that piece of scrip. I asked him where Mr. Barnes usually sold this scrip, or what disposition he made of it. He told me that Mr. Barnes—that he had no right to let me know what Mr. Barnes' business was, or let me into the arrangements that Mr. Barnes had with other parties, and it was really none of my business."

This is the only direct testimony that defendants were in partnership for the division of profits, but it is at least to some extent corroborated by the testimony of Barnes, who stated in answer to questions that his recollection in the beginning was that the Bowman scrip came to Barkley as all others; that if any scrip came to him he immediately handed it over to Barkley and wrote the parties it was there; that he did not remember of remitting any money to Bowman for the scrip; that Barkley always did

the transmitting for scrip. He further testified: "Q. Now, you have stated that the matter of payment to the men from whom you bought the scrip, including Bowman, was left to Barkley and that he alone could tell about that. Now, in each of these cases did Barkley retain the amount of money you had agreed to pay to the men you had bought the scrip from? A. He kept out his charges and all other charges that were against the claim. Q. Including the price of the scrip itself? A. Yes, sir; that I was paying to the men."

When the Ellis scrip was sent to the Kansas bank, plaintiff garnished it to satisfy his claim for $200. It is apparent that he could not apply the scrip to that purpose, because it did not belong to Barnes or to the trust company or to Barkley. When this matter was in controversy, Barkley, as the officer of the trust company, wrote to the banker in Kansas that Barnes had no interest whatever in the Ellis scrip and employed counsel to defend the suit. Acting in like manner, he tried to induce plaintiff to take three separate pieces of scrip, two of which were worthless, and the third not being as represented. In each instance the soldier had been paid nothing. The record shows that the trust company, which is not a bank and does not receive deposits, collected in advance the money for the scrip, when sold. In all of these three cases nothing had ever been paid to the soldier whose scrip was being handled. It is difficult to understand the denial by Barkley of all interest except as a collecting agent. In the matter of the Bowman scrip he performed a great deal of service for a collection fee of one dollar, which is the amount he credited to the trust company on its books. The circumstances shown, in which all three of the defendants participated, tend to prove a greater interest of the trust company and Barkley than that of mere collecting agents. The testimony is scattered through 500 pages, and direct evidence, other than that referred to, outside of the facts themselves, is not found in the bill of exceptions. If these circumstances

and the direct testimony of plaintiff, corroborated by the indefinite testimony of Barnes, do not show fraud and a combination of the three defendants, then the evidence does not sustain the verdict. The jury, however, found it was sufficient, and the district court refused to disturb their finding. We must also refuse.

AFFIRMED.

REESE, C. J., not sitting.

RALPH B. WELLER ET AL., APPELLEES, V. THOMAS L. SLOAN, APPELLANT.

FILED MARCH 26, 1912. No. 16,647.

1. Appeal: MOTION FOR NEW TRIAL. This court will not review alleged errors occurring during the trial of a cause in the district court, unless a motion for a new trial was made in that court and a ruling obtained thereon. *Jones v. Hayes*, 36 Neb. 526.
2. ———: AFFIRMANCE. And in such a case, where the judgment is sustained by the pleadings, it will, ordinarily, be affirmed.

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

Thomas L. Sloan and *Herman Freese*, for appellant.

Howard Sarton, contra.

FAWCETT, J.

This action was commenced in justice court to recover a balance claimed by plaintiff to be due from defendant on an account for lumber and coal. Plaintiff recovered in the justice court and defendant appealed to the district court, where plaintiff again recovered. The transcript shows the entry of judgment in the district court, January 8, 1910. Three days later, on January 11, 1910, defendant filed a motion for a new trial. This motion has never, so

far as the transcript discloses, been submitted to or passed upon by the district court. The grounds urged by defendant in this court for a reversal of the judgment of the court below are all based upon the alleged errors set out in the motion for a new trial. That motion not having been presented to and passed upon by the court below, none of the errors therein assigned can be considered here. An examination of the pleadings shows that they are ample to sustain the judgment.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., not sitting.

LULU E. PITTS, APPELLANT, V. MARGARET J. BURDICK, APPELLEE.

FILED MARCH 26, 1912. No. 17,012.

The petition shown in the abstract and set out in the opinion, examined, and *held* insufficient.

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

Matters & Matters and *J. H. Grosvenor,* for appellant.

Charles P. Craft, contra.

FAWCETT, J.

From a judgment of the district court for Hamilton county, sustaining a general demurrer to her petition and dismissing her suit, plaintiff appeals.

The abstract of the petition, prepared and filed by plaintiff, shows that Charles B. Burdick, father of the plaintiff and husband of the defendant, being seized of certain real estate, died in 1902, testate; sets out the

second, third and sixth paragraphs of the will of the deceased, which, it states, was duly proved and probated in the county court of Hamilton county. It then sets out the substance of the remaining averments of the petition, which, aside from formal allegations, are that defendant claims to be the owner in fee of all of the property described in the will, and that she "threatens to sell, consume and dispose of all of said property in a manner unreasonable and injurious to the reversionary interests and rights of said plaintiff, and inconsistent and prejudicial to the intention of the testator." The prayer is for a construction of the will; for an injunction restraining defendant from disposing of the property "in a manner unjust and unreasonable and prejudicial to the interests of the said plaintiff and the intention of the testator," and that defendant be required to give security to insure plaintiff "the future enjoyment of her rights in said property, unimpaired and in accordance with the provisions of said will."

The general demurrer interposed by defendant admits every fact well pleaded in the petition; but when we eliminate the conclusions of law, which the demurrer of course does not admit, the petition is insufficient to entitle plaintiff to the relief demanded. That defendant has a perfect right to sell the real estate and convert it into money is conceded, and the allegation that she "threatens to sell, consume and dispose of all of said property in a manner unreasonable and injurious to the reversionary interests and rights of said plaintiff, and inconsistent and prejudicial to the intention of the testator," is a mere conclusion of law, and is too vague, indefinite and uncertain to warrant the court in requiring defendant, as a condition of her future enjoyment of the provisions made for her in her husband's will, to give security for the benefit of the plaintiff; a condition which, so far as the abstract shows, the deceased himself never imposed upon her.

AFFIRMED.

J. W. ADAMS, APPELLEE, V. VILLAGE BOARD OF CURTIS, APPELLANT.

FILED MARCH 26, 1912. No. 16,765.

1. **Judgment: VALIDITY.** "The Village Board of the Village of Curtis" is not a person, natural or artificial, authorized by statute to sue and be sued in that name. A judgment nominally against a defendant not a person or entity competent to be sued binds no one.
2. **Appeal: DISMISSAL.** When an action has been begun in the district court naming "The Village Board of Curtis" as defendant, without naming any individual or person known to the law, either natural or artificial, as defendant, and judgment is entered therein, and upon appeal to this court in the name of "The Village Board of Curtis" the attorneys who took the appeal insist that there is no party defendant, and the appellee insists that the appeal is unauthorized, the appeal will be dismissed.

APPEAL from the district court for Frontier county: ROBERT C. ORR, JUDGE. *Dismissed.*

J. A. Williams, W. H. Latham and *B. F. Butler,* for appellant.

W. S. Morlan, contra.

SEDGWICK, J.

The plaintiff brought this action in the district court for Frontier county to enjoin the opening of a street across lands which he claimed to own in the village of Curtis. The petition and summons named as the sole defendant "The Village Board of Curtis, Frontier County, Nebraska." An answer was filed in that name, and the cause was tried and judgment entered against the defendant named, granting the injunction as prayed. Afterwards an appeal was taken to this court in the name of "The Village Board of Curtis, Frontier County, Nebraska." In behalf of the appellant a brief was filed in which it was contended that, there being no defendant in the case, the whole proceedings are a nullity, and *Barbour v. Al-*

bany Lodge, 73 Ga. 474, was cited, in which it was said: "No person being sued, no case was in court, and there was nothing to amend by." The plaintiff in the case filed a brief in which it is not seriously contended that an action can be maintained without a defendant, and no argument is advanced attempting to show that the defendant named here is a person or entity known to the law. The case of *Wabash Electric Co. v. City of Wymore,* 60 Neb. 199, is cited, in which it is held that, under some circumstances, an action may be maintained against a city or village and, under others, an action may be maintained against individuals who are members of the governing authorities of the city or village. The plaintiff in the brief accepts the contention made against the validity of the action, and answers it by saying that if there was no defendant there could be no appeal, and that by taking the appeal it is necessarily asserted that there is a defendant. There was no attempt or offer in any of the proceedings to bring in any party defendant, known to the law as an entity competent to sue and be sued, and, as we understand the briefs, the parties are substantially agreed that there is no judgment entered in the court below binding upon any person known to the law, and that there is no cause pending in this court between two persons or parties that are known to the law and competent on the one hand to sue and on the other to be sued.

Under those circumstances there is nothing for this court to do but dismiss the appeal, which is accordingly done.

DISMISSED.

HENRY E. LEWIS, ADMISTRATRATOR, ET AL., APPELLEES, V. WILLIAM E. BARKLEY, JR., ADMINISTRATOR, ET AL., APPELLANTS.

FILED MARCH 26, 1912. No. 16,962.

1. **Wills**: LEGACIES: INTEREST. Whether interest is to be allowed upon a specific legacy of money depends upon the intention of the testator. If that intention cannot be otherwise determined from the language of the will itself, it will be presumed that the testator intended that the legacy should be paid during the first year after the appointment of the executor under the will, and, if not so paid, should bear interest from that time. *Smullin v. Wharton*, 83 Neb. 328, distinguished.

2. ———: ———: ———. If the will gives a specific legacy of money to each of three persons respectively, and expressly provides that two of such legacies shall not bear interest in any event, the presumption is raised that the testatrix intended that the third legacy not so limited shall bear interest.

3. ———: ———: ———. Section 282, ch. 23, Comp. St. 1911, provides: "That at the expiration of the year from the time of the granting of letters testamentary or administration, such executor or administrator shall at once, and the court is hereby directed to compel such executor or administrator to at once make final settlement of such estate." And, unless otherwise indicated by the will, the presumption is that the testator intended that the legacy should be paid within that time, and, if not so paid, should bear interest thereafter.

4. **Executors and Administrators**: LEGACIES: INTEREST. If the legatee in a will is also appointed by the will as executor thereof, and duly qualifies as such executor, the fact that he unnecessarily delays settlement of the estate and keeps in his own hands money derived therefrom will not estop him to claim interest on such part of his legacy as remains unpaid after allowing thereon all money received and not disbursed by him in the management of the estate, it appearing that the value of the estate has been enhanced rather than lessened by such delay.

5. ———: ACCOUNTING BY LEGATEE AS EXECUTOR. In such case it is the duty of the probate court, and of the district court upon appeal, to state the entire account of such executor, both as executor and as legatee under the will, charging against such legacy all money that he has received, less proper disbursements and commissions.

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

Tibbets & Anderson, for appellants.

E. F. Pettis and *Greene & Greene, contra.*

SEDGWICK, J.

This litigation arose out of the settlement of the accounts of John D. Knight, as executor of the estate of Helena V. W. Knight, deceased, his wife. Helena V. W. Knight died in 1898, and left a will which, among other things, bequeathed a legacy of $10,000 to her husband, John D. Knight, and other property specified, and, after making some other bequests, the will gave all of the residue of her property, real, personal and mixed, to her said husband during his natural life, with remainder to various persons therein named.

John D. Knight entered upon the administration of the estate, and continued without any settlement until January, 1905, when he filed in the probate court of Lancaster county a report and account of his acts as executor of said estate. The residuary legatees under the will objected to the report, and afterwards it appears from the record that John D. Knight died, and Henry E. Lewis having been appointed administrator of his estate, the said Lewis was substituted as a party to the proceedings, and filed in the county court an application setting up the before mentioned legacy, and alleged that the same had been paid only in part. William E. Barkley, Jr., who had been appointed administrator of the estate of Helena V. W. Knight in the place of her husband, John D. Knight, filed objections to the application of Lewis as administrator, and the issues in the county court were made by this report of John D. Knight, and the application of the administrator of his estate afterwards appointed, and the objections of Mr. Barkley as administra-

tor of the estate of Helena V. W. Knight. A hearing was had in the county court, and from an order entered thereon an appeal was taken to the district court for Lancaster county. In the district court the matter seems to have been heard on the issues as made in the county court. A jury was waived and the cause tried by the court. The issue, as stated in these various papers, is somewhat complicated and presents several matters of dispute between the parties. The district court in stating the account between the parties allowed interest upon the 10,000-dollar legacy. There had been no order made by the county court for the payment of this legacy, and it is contended that no interest can be allowed upon a legacy until such order is made. This presents the principal question discussed in the briefs.

In *Smullin v. Wharton*, 83 Neb. 328, the matter involved was not a specific legacy, but a provision of the will allowing annual support, and, the amount of such annual support having been fixed by the court, the question was whether interest would be allowed upon the unused portions of the amount so fixed. In discussing the question, however, the court referred to the rule in regard to interest upon specific legacies as applied in other jurisdictions, and stated that the rule of English courts in regard to an annuity payable from the body or principal of a fund seems to be that the first payment is due at the end of the first year after the death of the testator, but when payable out of the income of the fund it becomes due at the end of the second year; and points out that in Pennsylvania it has been held that such annuities become due at the end of the first year in either event. The opinion then states that there can be little doubt that "the general rule of law is that, in ordinary cases of legacies bequeathed, the legatee is entitled to interest at the legal rate from the time they could be legally demanded." It is then said that probably the rule is modified by the statutes of this state. The statutes are referred to, and it is said: "By these sections it would appear that none of the legacies

are due and demandable until after the entry of the decree provided for, and therefore they could draw no interest prior to that date." The opinion does not regard it as necessary to determine that question in the case then being considered, but says: "If this be the case there could be no interest allowed in any event until after the termination of the litigation over the final admission of the will to probate and the necessary proceedings thereafter leading up to the decree." The question is disposed of "under the peculiar circumstances" of the case. The question here involved is not determined in that decision.

In the case of *Dickey v. Dickey*, 94 Fed. 231, the decided question is stated in the syllabus as follows: "A refusal to pay a legacy is not wilful and without reasonable cause, so as to entitle legatee to interest, where he claimed a larger sum than entitled to, and, on suit, was allowed only half of the amount claimed. If legacies bear interest within the provisions of Mills' Ann. St. sec. 2252, allowing creditors interest for all moneys after they become due, on any bond, bill, or promissory note or other instrument in writing, they do so only after an order of the court has been made directing their payment." In the majority opinion quotations are made from the statute of Colorado quite similar to those found in our statutes, and it is said that it is unnecessary to determine whether the statutes allow interest on legacies. The statement in the opinion that interest on legacies "can only be awarded as damages" is perhaps not in harmony with the authorities generally. Interest on legacies, like the legacies themselves, is to be allowed if the testator so intends, and the intention is to be derived from the construction of the whole will. Legacies, like promissory notes, may bear interest before they are due, if so intended by the testator. There is no express provision in our statute in regard to the matter. In doubtful cases as to the intention of the testator, assistance may be derived from the provisions of the statute in regard to the settlement of estates. The administrator is allowed in the first instance one year's

time from his appointment in which to settle the estate (Comp. St. 1911, ch. 23, sec. 282), and the testator being aware of this statute, it has in most cases been regarded that there is a presumption that the testator intended that the legacy should bear interest from that time. In many cases this has been regarded as determining the matter when the intention of the testator cannot otherwise be drawn from the will. In the case at bar the will was generally in favor of the surviving husband of the deceased. He was given specified property and a specified amount as a legacy, and a life estate in all of the real estate of the deceased and the use and control of all the property during his life. The will gave specific legacies to other persons and expressly provided that the same should not bear interest, but no such limitation was placed upon the legacy in question to her husband. Mr. Knight qualified as executor of her estate and took possession of the property and appears to have used and treated it as his own. The real estate apparently was not very valuable at the time he qualified as executor, but was sold after his death for a considerable sum. It is contended, on the one hand, that he ought to have reduced the property to money and so have prevented any interest accumulating upon the legacy, and that his unreasonable delay in closing up the affairs of the estate was an injury to the parties interested, and ought to estop him and his estate to claim interest in the settlement of his accounts. On the other hand, it is insisted that he acted with great prudence in the interest of the estate in holding the property without sacrificing it, which resulted largely to the benefit of the residuary legatees. Other circumstances disclosed in the evidence are insisted upon by both parties as affecting the equities of their respective claims. If we consider all of the circumstances in the case, in the light of the general rule above stated, we think the fact that the will gives two other specific legacies with express provisions that "he (the executor) shall in no event allow any interest thereon" and that no such limitation is

placed upon the legacy in question justifies the finding of the trial court that the testatrix intended that this legacy should bear interest after the first year of administration, if not realized during that time.

The trial court also was right in holding that it was the duty of the probate court, and of the district court upon appeal, to state the entire accounts of the executor with the estate, including his credits as legatee as well as his debits and credits as executor. The ancient rules derived from the technicalities of the common law forms of action are not applicable to our probate practice. In this state the county court applies equitable principles when necessary in the settlement of estates. The decision of the district court involved the examination of many items of account, and both parties seem to be somewhat dissatisfied with the results. Several of the items allowed in favor of the John D. Knight estate are criticised by the appellants, and many that are disallowed are insisted upon by the appellees. The district court appears to have made a very thorough investigation of the whole matter.

We do not consider it necessary to discuss the mass of evidence in regard to the many items criticised on each side of the account. Upon examination of the record, we find no reason to disturb the findings of the trial court upon any of these matters presented, and the judgment is therefore

AFFIRMED.

PLATTE COUNTY, APPELLEE, V. BUTLER COUNTY, APPELLANT.

FILED MARCH 26, 1912. No. 17,077.

1. **Counties:** BRIDGE REPAIRS: LIABILITY. When there is no contract between two counties to build or repair a bridge across a stream between them, one county cannot replace an old decayed wooden bridge, which it is dangerous to use, with a new steel structure

of three times the cost, by replacing several spans at a time until the whole bridge is rebuilt, and recover the expense of so doing from the other county as repairs.

2. ———: ———: ———. If one county resolves upon such a course and proceeds to replace three wooden spans with steel at three times the cost necessary to rebuild them as originally constructed, there being seven or eight times that many spans in the entire bridge, it cannot recover from the other county as for "needed repairs."

APPEAL from the district court for Butler county: GEORGE F. CORCORAN, JUDGE. *Reversed and dismissed.*

A. V. Thomas and *L. S. Hastings,* for appellant.

C. N. McElfresh, W. N. Hensley and *Louis Lightner, contra.*

SEDGWICK, J.

The plaintiff county recovered a judgment in the district court for Butler county upon an alleged claim for repairs of the bridge over the Platte river between the plaintiff county on the one side and the defendant county and Polk county on the other side, and the defendant has appealed to this court.

There has never been a contract between these two counties for the construction or repairs of this bridge. By sections 87-89, ch. 78, Comp. St. 1911, two counties may enter into a contract to build a bridge over a stream which divides the counties, and where such contract exists, if either county, after reasonable notice, neglects or refuses to build the bridge, the other county may build the same and recover a portion of expenses from the county in default; and where no contract exists between the counties, if either of them refuses to enter into a contract to repair the bridge, the other county may enter into such contract "for all needful repairs" and recover a portion of the costs from the other county. Under this provision the plaintiff county entered into a contract for work to put the bridge into condition for travel, and the defend-

ant county refused to pay any part thereof on the ground that the work done was not needful repairs, within the meaning of the statute. The plaintiff insists upon the application of the rule that, when each party requests the court to instruct in his favor, it amounts to a submission of the cause to the court for determination. This question, however, is not material, as in our view of the case the judgment is not supported by the evidence.

The question presented is whether this work was a part of a plan to build another and different bridge, or whether it was a needful repair of the existing structure. "Repair," as used in this statute, was defined in *Brown County v. Keya Paha County,* 88 Neb. 117: "The word 'repair' as applied to bridges in the road laws means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction." And in *Colfax County v. Butler County,* 83 Neb. 803, it was held that "to build practically a new bridge" is not repairs. The evidence shows that the bridge in question was constructed 22 or 23 years before this work was done, and was entirely of wood and had needed repairs quite often. Mr. Smith, a member of the board of supervisors of the plaintiff county, testified that "the whole bridge was pretty much out of repair, * * * the superstructure of the lower part of the bridge was badly rotted, and there was lots of caps, piling and timber of that kind that was rotten clear through," and that, while such a bridge would not be expected to be serviceable for more than about 20 years (one expert witness testified "in the neighborhood of 12 years"), a steel bridge ought to last from 50 to 75 years. Another witness testified: "The bridge was in pretty bad condition in 1909, and outside of this south turn-out it was rotten and in bad shape, and the board as a committee had the idea, even though the bridge was temporarily repaired, that it could not stand very long on account of being in such kind of condition. We built the steel spans so that part of the bridge would stay, and in one sense we knew from the condition of the other part of the bridge that it would

not stay very long. It was my judgment and the judgment of the board that it couldn't stay very long after the old part of the bridge went away. We have, since the old wood bridge went out, put in steel spans clear across there, connecting with the three steel spans already put in under the guise of repairing the bridge." The length of the bridge was 1,945 feet, and they concluded to put in three new steel spans of 80 feet each, 240 feet in all. The cost of the three steel spans was over $6,000, and these three spans could have been replaced with wood of a similar construction as the original bridge at a cost not exceeding $2,000. We have seen that the defendant might be held liable for its proportion of the needful repairs of the old bridge, but it could not, under the law, be held liable to contribute to the construction of a new bridge. The defendant alleged, and the evidence shows, that the authorities of Platte county considered and determined that the bridge as a whole had become dangerous and unserviceable and that it was necessary to replace it with a new structure of steel. Instead of removing the old structure and building a new bridge of steel at once, they determined upon a plan of putting in these new spans of steel, to be followed by replacing the other spans of the bridge in a similar way, and so replacing the old bridge with a new bridge of steel. This plan was executed and they now have a new steel bridge. The plaintiff contends that this was a proper and economical thing to do, and says in the brief: "It seems to us that, in the nature of things in this case, circumstances require a substantial and lasting bridge in place of the makeshifts that have been used. The evidence at the trial was that 'the relative life of a wooden bridge is in the neighborhood of 12 years, while a steel bridge similar to these three steel spans ought to last 50 or 75 years.' It further appears from the abstract that the cost of a wooden structure similar to these three steel spans would be about $2,000. It is, therefore, established that, while a steel structure costs three times as much as a similar wooden structure,

it lasts from four to six times as long. Therefore, so far as the question of economy goes, there can be no doubt that the board of supervisors of Platte county acted wisely and well in constructing the steel spans. It should also be borne in mind that necessity has changed since the erection of the old wooden bridge in 1871; for instance, the old horse-power threshing machine has given way to one propelled by a traction engine, weighing, perhaps, six times as much as the old horse-power. The pleasure vehicle of today is, in many cases, an automobile, weighing from one to two or three tons, instead of the carriage of our fathers." This reasoning is plausible, and we have no disposition to question its logic, but it should be addressed to the legislature. The legislature has not seen fit to allow one county to build a new bridge at the expense of another county, however desirable such a structure might be, and however much it might be in the interest of the people of both counties. To replace an old decayed wooden structure with a new, serviceable, economical steel bridge, at an expense of at least three times as much as the original cost of the wooden bridge so replaced, is not "needful repairs," within the meaning of the statute. In this view of the case it is not necessary to determine the question presented as to the sufficiency of the notice to the defendant county, and as to the true dividing line between the two counties, nor as to the proper construction of that part of the proviso of section 88, which limits the liability of the defendant county in any event to "such proportion of the costs of making such repairs *as it ought to pay,* not exceeding one-half of the full amount so expended," nor the effect, if any, that should be given to the fact that the plaintiff county has not paid for these repairs from its own funds, but from taxes levied upon the taxable property of the city of Columbus and Columbus township.

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

REVERSED AND DISMISSED.

REESE, C. J., not sitting.

TILTON-PHELPS FURNITURE COMPANY, APPELLEE, V. VERNE J. WIANT ET AL., APPELLANTS.

FILED MARCH 26, 1912. No. 16,601.

Evidence examined, and *held* to sustain the judgment of the lower court, which is affirmed.

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

H. W. Short, for appellants.

W. C. Dorsey, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Franklin county by Fred G. Hutchins.

The plaintiff, the Tilton-Phelps Furniture Company, filed its petition in the district court for Franklin county against Verne J. Wiant, L. H. McClung and Fred G. Hutchins. The petition alleged that they were co-partners engaged in the business of selling furniture in the city of Franklin, Nebraska, under the firm name and style of V. J. Wiant & Company, and that on the 2d day of July, 1907, they purchased from the plaintiff goods, wares and merchandise of the reasonable market value of $78.27, which were delivered to them, and for which amount the plaintiff prayed judgment, with interest. Hutchins filed a separate answer consisting of a general denial. Wiant answered for himself. He set up a general denial, and also pleaded that he was a minor under the age of 21 years, and that the goods alleged to have been sold never came into his possession or control, and that he never received any money or profit by reason of the purchase and disposal of the goods, and he alleged his minority as a defense to plaintiff's cause of action. The defendant McClung filed no answer, and was defaulted. At the trial the jury rendered a verdict against the de-

fendants McClung and Hutchins for $82.30. The verdict is silent as to the defendant Wiant. Hutchins filed a motion for a new trial. The motion was overruled, and he appealed to this court.

It is contended by Hutchins that the evidence fails to show that the plaintiff shipped and delivered the goods. The defendant Wiant testified that Hutchins telephoned him to go up to Franklin and buy the McClung stock of goods, and that he went up and bought the goods and paid $12 to bind the bargain; that afterwards Hutchins called him up and told him that he wanted the furniture store at Franklin run in his name, the name of V. J. Wiant; that under that arrangement McClung was to run the store and deposit the funds taken in for the sale of goods at the Franklin State Bank, at Franklin, and that all bills were to be checked out of the said deposit; that afterwards the original plan of running the business in the name of V. J. Wiant was changed, and that Hutchins told him that he (Hutchins) and McClung and Wiant should form a partnership, and that the store should be run in the name of V. J. Wiant & Company; that McClung was to receive one-third of the profits for his pay, and that the buying should be done by Hutchins from the wholesale houses, and that the goods should be shipped in the name of V. J. Wiant & Company to Franklin, Nebraska; that Hutchins should pay for the goods, and that the company should reimburse Hutchins out of the company funds; that Hutchins was to receive one-third of the profits and Wiant one-third of the profits, and that a bank account should be started in the name of V. J. Wiant & Company at the Franklin State Bank, and that all money received from the sale of goods should be deposited in said bank account; that McClung was to retain one-third interest in the stock, and that two-thirds of the purchase price was to be paid to McClung for the stock of goods on hand. He also testified to McClung and Hutchins being in the store at Franklin, and that McClung was selling and receiving goods, and the business was being conducted in

the name of V. J. Wiant & Company. The testimony clearly shows that McClung and Hutchins were both engaged in the business. The bills of goods were made out to V. J. Wiant & Company. The testimony of Earl A. Lee seems to corroborate the testimony of V. J. Wiant. He testified that the goods were actually shipped on the date shown by the bill of lading over the Burlington railroad, and that the goods have never been returned. The evidence is sufficient that the goods were sold and delivered. Wiant testified concerning his minority, and that he had received no benefit from the business. The jury probably left his name out of the verdict because of his testimony touching these matters.

A careful examination of the evidence clearly shows that the defendants were liable, and the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF ISAIAH PAISLEY.

SUSIE M. PAISLEY, APPELLEE, V. FRANK PAISLEY ET AL., APPELLANTS.

FILED MARCH 26, 1912. No. 16,642.

1. **Wills: UNDUE INFLUENCE: TRIAL: INSTRUCTIONS.** The court instructed the jury: "You are instructed that the fact that the proponent, Susie M. Paisley, and the decedent, Isaiah Paisley, were married, is not of itself undue influence. The law encourages marriage between men and women, and the fact alone and of itself that these parties contracted and entered into marriage relations would not raise any presumption whatever of undue influence." *Held* improper under the evidence in this case, and probably misleading.

2. **Instructions** numbered 1 and 2, requested by contestants, examined, and *held* applicable to the facts proved, and that it was prejudicial error to refuse them.

3. **Wills: UNDUE INFLUENCE: EVIDENCE.** The evidence examined, and *held* **insufficient** to sustain the verdict and judgment.

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

Mills, Mills & Beebe and *E. L. King*, for appellants.

W. M. Johnston and *Matt Miller, contra.*

HAMER, J.

On the 28th day of January, 1909, one Isaiah Paisley, of Polk county, executed a will by which he attempted to devise and bequeath all of his property, valued at about $20,000, to the proponent. It appears that on that day, and just prior to the execution of the will, he married one Susie M. Cyphers. At that time the testator was 66 years old and was afflicted with certain maladies of which he died 38 days thereafter. Miss Cyphers was 40 years of age, a spinster in good health, and in the full vigor of middle life. The testator left surviving him his said wife, two brothers, three sisters, and certain children of two deceased brothers. After the death of the testator the widow, who was the sole devisee named in the will, presented it to the county court of Polk county for probate. The collateral heirs of the deceased contested the will on the grounds of the mental incapacity of the testator and undue influence on the part of the widow in procuring its execution. E. L. King, Esq., was appointed and appeared as guardian *ad litem* for the minors, Stewart Paisley and David Paisley. The contestants had the judgment in the county court, which denied probate of the will, and the proponent appealed to the district court. On the trial in the district court of that county the proponent had the verdict and the judgment, and the contestants have brought the case to this court.

The appellants contend that the verdict was contrary to and was not sustained by the evidence. It appears from the bill of exceptions, without dispute, that the testator, a bachelor 66 years of age, was married to the proponent on the 28th of January, 1909; that immediately following

the marriage ceremony the bridal party, headed by an attorney, went to the office of Johnston & Ball in the town of Osceola, and the testator there executed the will in question, leaving all of his property, both real and personal, to his new wife to the exclusion of all of the contestants who were the natural objects of his bounty. It also appears that about three years before his marriage the testator had experienced a shock of paralysis which destroyed his physical health and to some extent impaired his mental faculties; that at the date of the marriage and for many months before that time Paisley was sorely afflicted with dropsy, rheumatism and other ailments to such an extent as to render him almost helpless; his feet, legs, generative organs and the lower part of his body appear to have been badly swollen so as to render him unable to properly dress his feet; his feet were so swollen that his shoes would not fasten. One of his sisters, Mrs. Lockard, seems to have looked after him and washed him and attended to his clothing. It appears beyond question that he could not, and never did, consummate the marriage relation with the proponent.

It was further shown that Paisley was introduced to the proponent by her sister, Mrs. Woodward, some time in the month of October preceding the marriage, and that from that time until after the ceremony took place Dr. Woodward, the brother-in-law of the proponent, was seen frequently with Paisley; that he often took him riding, and their relations seem to have been most friendly and intimate. At the trial Dr. Woodward testified that it was agreed between himself and the proponent that, if the marriage could be brought about and the will in question was made, then upon Paisley's death proponent was to pay him the sum of $4,000. It must be said, however, that Dr. Woodward was fairly impeached and there was testimony that his reputation for truth and veracity was bad. Notwithstanding this, certain facts and circumstances were shown which tended strongly to corroborate his statements.

It appears that Dr. Woodward was in the habit of taking Paisley into the country with him, and on these occasions he would talk to him about marrying Miss Cyphers, and would say to him that it would be no more than right and just for him to leave his estate to Miss Cyphers; that she loved him and cared for him. Woodward testified, and this is not disputed, that during the year previous to Paisley's death he (Woodward) saw Paisley nearly every day. On the morning of the day when the marriage took place he saw Paisley "about 15 minutes before he started to the county seat to be married." Woodward further testified that Paisley said to him that he was about to get married that day, "but I am not able, but I guess I will have to get married. I have told Miss Cyphers to put this off a while because my health is so bad, but Susie and your wife came to my house and said, 'If I didn't marry her at once, she would sue me for breach of promise.'"

The witnesses Brigham, Hanks, Hastert, Strain, Kinney, Stone, Anderson and Olson testified to Paisley's inability to express himself, and that he had difficulty in speaking. To the witness Cal White, the testator said that he did not think that he could live but a little while. He also said that he did not intend to get married, but that she insisted that they should, and that they were going to get married tomorrow. When the witness Joe Gubser shook hands with him at the court house and wished him much joy, Paisley said, "He didn't know whether there would be much joy the shape he was in." To witness Campbell he said, "Campbell, I am just all in." Paisley told the witness Lockard "that he hadn't intended to get married so quick; that Mrs. Woodward and Miss Cyphers came over to his place Sunday evening before this and talked it over and set the day for Thursday for the marriage, and that she had also threatened him with a lawsuit in case he went back on her and didn't marry her this time." He also testified that Miss Cyphers requested Paisley "to make her a trustee's deed to all of

his property." On the return of the party from Osceola on the day of the marriage, the testator immediately took to his bed, his ailments increased, and he died on the 7th of March following the marriage ceremony.

On the question of Paisley's mental condition and testamentary capacity, the evidence was conflicting; but it seems clear that however strong his mentality may have formerly been, his physical ailments were such that he was in a condition to be easily influenced and to fall an easy victim to the wiles of designing persons. It also clearly appears, considering his physical condition, that the proponent's motives in entering into the marriage relation with him could not have been the usual and proper ones of admiration, love and affection. She could have been prompted by nothing but a desire to obtain his property. She knew that in the nature of things Paisley had but a few days to live, and she no doubt concluded that she could, and would, endure him for a short time, although he must have been to her an object of disgust. Bearing upon the main question touching the question of undue influence by the proponent and her sister and Dr. Woodward, there was in evidence some statements made by the testator just prior to the ceremony which showed that he wanted to defer the marriage; but, because of the statement of the proponent that if he did not marry her he would be sued for a breach of promise, he hastened that event. It would seem to follow that the jury should have found that the will made by the testator was procured by means of undue influence on the part of proponent and her friends. The enfeebled condition of the testator is established by the testimony of all the witnesses who testify concerning the matter, and the evidence of Dr. Woodward concerning what he said and did to bring about the marriage is corroborated by the testimony of the witnesses Richard Clark, Ira Paisley, and the stipulation concerning the agreed testimony of John Fox. Undue influence and weakness of body and mind are often closely allied, and it may be difficult to tell exactly which

may have been the stronger factor in bringing about the result in any given case where the testator is enfeebled by illness, and has disregarded the natural objects of his bounty and has devised all, or the greater part of his property, to a stranger or to one whose integrity of purpose may well be questioned because of his conduct and his apparent self-interest as the chief beneficiary of the will, and because of his opportunity to exercise undue influence upon the testator. It is contended by the appellants that the evidence is insufficient to sustain the verdict. A careful reading of all the testimony contained in the bill of exceptions forces us to the conclusion that this point is well taken.

It is contended by the appellants that the court erred in instructing the jury as follows: "You are instructed that the fact that the proponent, Susie M. Paisley, and the decedent, Isaiah Paisley, were married, is not of itself undue influence. The law encourages marriage between men and women, and the fact alone and of itself that these parties contracted and entered into marriage relation would not raise any presumption whatever of undue influence." There is no doubt but that this instruction as an abstract statement is correct, but when given, as it was in this case, without explanation or modification so as to make it apply to the evidence and the conceded facts concerning the marriage, it must have been highly misleading and prejudicial and may have caused the jury to return a verdict for the proponent. The jury are told in the first sentence of this instruction that the fact that the Paisleys were married is not of itself any evidence of undue influence. The second sentence is the statement of justification, and that is, that the law encourages marriage between men and women; and then there is the statement that this fact alone and of itself does not raise any presumption of undue influence. The effect of this was to take away from the jury any consideration of the circumstances under which the marriage was contracted, the going over to the lawyer's office immediately after the per-

formance of the marriage ceremony, and having the will executed there, and the physical condition of the man on the day of the marriage. This instruction was also misleading because it seems to proceed upon the theory that some one was objecting to marriage as if it was not honorable, and that it was the duty of the jury to stand up for marriage. There was no issue of that kind in the case. There was danger that this instruction might be construed by the jury as a sort of license to the proponent to get married to the testator in any way that she could bring it about, and regardless of his condition. The evidence seems to establish the fact that this woman of 40, in good health and having plenty of force, got control of the testator and rushed him along towards the culmination of her desires to be his wife in name, so that she might have his property in fact. It would seem to be proper to cite a few cases properly applicable to the consideration of this one.

In the case of *In re Estate of Frederick*, 83 Neb. 318, this court, by REESE, C. J., said: "The evidence shows a state of mind throughout his whole life on the frontier and while an inmate of the soldiers' home at Leavenworth, which on some subjects was irrational and unreasoning, and which from imaginary and unreal causes would cause him to forget his obligations to his daughter, who in later years was in absolute want, with a family upon her hands, and whose husband had died. In the will presented, and which was the last of a number of wills made, he without any known cause practically disinherited his daughter and cast nearly all of his property upon a stranger to whom he was under no obligations and in no sense related. The evidence shows that he had at times taken a dislike to his daughter and determined to furnish her no aid or assistance, but, upon discussing the matter with friends, would declare she was worthy of his bounty and should have his property. This inclination would soon disappear, and he would declare his determination to leave what he had to strangers." The will was rejected.

In 1 Underhill, Wills, sec. 125, it is said: "The mental and physical capacity of the deceased is to be considered in determining what degree of influence will vitiate his will. * * * The will of one whose independence has been weakened by indulgence in dissipation, or whose stamina, physical or mental, has been broken by illness or old age, may be easily overcome. * * * *Every case depends wholly upon its own particular facts and attendant circumstances.*" Section 137: "The fact that the party superintending the execution of the will, or the person who propounds it for probate, takes a large benefit under it is a circumstance raising a suspicion of undue influence." Section 151: "Fraud employed in procuring a will, no less than coercion, may justify it being set aside. Both are equivalent to undue influence, and both are usually present in the same transaction." Section 148: "The motives that prompted the marriage upon the part of the proponent, the sickness and helpless condition of the testator at the time, the fact that the testator was an elderly man while the proponent was very much younger, the efforts of the proponent and of her parents and relatives to bring about the marriage, the poverty of the wife and the wealth of the testator, may all be considered on the issue of undue influence." *In re Estate of Wilcox,* 93 Mich. 438; *Reichenbach v. Ruddach,* 127 Pa. St. 564. Appeals to the affection and emotions of the testator, solicitation and persuasion may be carried to such a degree as to overpower his mind, and in such case will amount to undue influence. Page, Wills, sec. 128; *Higginbotham v. Higginbotham,* 106 Ala. 314; *Bevelot v. Lestrade,* 153 Ill. 625; *Rivard v. Rivard,* 109 Mich. 98; *Gordon v. Burris,* 141 Mo. 602; *Perritt v. Perritt,* 184 Pa. St. 131; *Orchardson v. Cofield,* 171 Ill. 14.

In *Orchardson v. Cofield, supra,* the court said: "It appears beyond cavil that Charles Orchardson entertained for this deluded old lady no single sentiment of affection or esteem, which must prompt every honorable marriage, and that he married her for money, and nothing else."

The woman in that case was 83 and the man was 57. She was wealthy. He called himself "The Son of Wisdom." He wrote a book in which he flattered the old lady. She paid the expense of printing the book. The book, besides being written for the purpose of getting the old lady's money, was to reform the world.

The case of *Baker v. Baker,* 102 Wis. 226, is an instructive case touching the method of exercising undue influence upon the testator, as also concerning the proper rule applicable to all such cases.

In *Hampson v. Guy,* 64 L. T. Rep. n. s. (Eng.) 778, the court said: "I think the true result of the authorities is this, which has been already indicated by Lindley, L. J., that when you have a case of evidence tending to show some mental incapacity and also evidence tending to show undue influence, it is very much more easy to satisfy yourself that undue influence has been used where the mind of the person to whom it is addressed is evidently in a weak condition—two things which it was said here in the argument are almost inseparably connected—the amount of influence which would induce a person of strong mind and in good health to make a will according to the wishes of the persons who were attempting to induce such a testator must be very much greater than the amount of inducement which would improperly influence the mind of a person who was weak partly from mental infirmity and partly from ill health, as is the case here."

In *Hall v. Hall,* 18 L. T. Rep. n. s. (Eng.) 152, the testator told his brother, who was a witness in the case: "My wife is very vexed about the will I have made, and unless it is destroyed and a fresh one made she will give me no more rest." The husband wanted to make "peace and quietness" with her, but she was abusive and said of her husband "the black-looking thief has altered his will." The will was rejected.

In *Gordon v. Burris,* 141 Mo. 602, the evidence showed that the beneficiaries of the will, sons of the testatrix, were heard talking to their mother about making a will.

They said to her that they three ought to have the property. While they were talking the father came in, and he said: "Mother is sick, don't bother her now." In that case the granddaughter, for whom the testatrix wished to provide, was left out of the will. The reviewing court held that there was evidence of undue influence.

In *Carroll v. Hause*, 48 N. J. Eq. 269, the court said: "Against a beneficiary having a testator under his control, with power to make his will, the will of the testator, especially in a case where the testator has made an unnatural disposition of his property, the law presumes undue influence, and puts upon the beneficiary the burden of showing, affirmatively, that when the testator made his will he did not exercise his power over the testator to his own advantage and to the disadvantage of others having an equal or superior claim upon the bounty of the testator."

In *Purdy v. Hall*, 134 Ill. 298, the court said: "Naturally, the mind sympathizes with the body in that which debilitates, and, even when not otherwise impaired, it may become so wearied from long continued, serious and painful sickness that it is willing to purchase rest and quiet at any price, and when in that condition it is susceptible to undue influence, and is liable to be imposed upon by fraud and misrepresentation. The feebler the mind of the testator, no matter from what cause—whether from sickness or otherwise—the less evidence will be required to invalidate the will of such person."

In *Brown v. Fisher*, 63 L. T. Rep. n. s. (Eng.) 465, the court held, adopting the language of certain cases cited: "The rules of law, according to which cases of this nature are to be decided * * * are two: The first is, that the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator; the second rule is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument,

in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased." In that case there seemed to have been suspicious circumstances, and the court refused to probate the will, and on appeal from such refusal the appeal was dismissed.

In *Hegney v. Head,* 126 Mo. 619, the court held: "Where a will is made in favor of one's spiritual adviser to the total or partial exclusion of the testator's lawful heirs, the burden of proof is on the devisee to show that the testator possessed testamentary capacity and that the will was not the result of undue influence."

In *Sheehan v. Kearney,* 82 Miss. 688, it was held that the proponents of a will have the burden of proof both as to testamentary capacity and undue influence.

In *Whitelaw's Ex'r v. Sims,* 90 Va. 588, it was held: "The fact that the will of a person 88 years old differs from her previously expressed intention, and is made in favor of those standing in a relation of confidence and dependence toward her, raises a presumption of fraud and undue influence, which must be overcome by satisfactory testimony in order that the will may stand."

In *Miller v. Miller,* 187 Pa. St. 572, it was held: "In a contest over a will in which a son is largely preferred, if it appears that the son, although not the father's attorney, was his trusted and confidential agent, the burden of proof is on the son to rebut the presumption of undue influence."

It is further contended that the court erred in refusing to give to the jury instructions numbered 1 and 2, requested by the contestants. To quote them would perhaps unnecessarily extend this opinion, and it is sufficient to say that they seem to contain a fair statement of the law, that they were applicable to the facts as shown by the evidence, and that they should have been given.

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

REVERSED.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. CITY OF LINCOLN ET AL., APPELLANTS.

FILED APRIL 8, 1912. No. 17,450.

1. **Appeal:** REMAND: NEW PARTIES: LAW OF THE CASE. Where, upon an appeal to this court, a judgment of the district court is reversed and the cause is remanded with directions to bring in other and additional defendants for the purpose of enabling the court to determine the rights of all parties interested in the subject matter of the action, such order will be adhered to in all subsequent stages of the litigation.

2. **Municipal Corporations:** CONSTRUCTION OF VIADUCT: ACTION FOR DAMAGES: JOINDER OF CAUSES OF ACTION. A petition in an action for damages to abutting property caused by the construction of a viaduct upon a city street over and across the tracks of a railroad company is not vulnerable to the objection that two causes of action are improperly joined, because the city and the railroad are joined as defendants.

3. ———: ———: LIABILITY FOR DAMAGES. The provisions of article I, ch. 13, Comp. St. 1909, authorizing cities to require railroad companies to build viaducts over and across their tracks where they intersect streets and highways, are governmental in character, and the reasonable exercise of that authority creates no liability on the part of the city for damages to property abutting on such viaducts.

4. ———: ———: ———. Appraising the damages caused by the construction of a viaduct in accordance with the provisions of subdivision 3, sec. 129, art. I, ch. 13, Comp. St. 1909, does not of itself create a liability against the city for the payment of such damages, and where the city has in no way bound itself by contract or otherwise for such payment, no action can be maintained against it to recover the damages to property abutting upon the viaduct.

5. **Railroads:** STREET CROSSINGS: DUTY TO MAINTAIN. By the statutes of this state railroad companies, when they lay their tracks over and across public streets or highways, are charged with the duty of restoring such streets or highways to their former usefulness; and that duty is not discharged when a street or highway is restored to its proper condition at the time the railroads are constructed. The duty is a continuing one, and embraces such alterations and improvements as may afterwards be made necessary by the growth of the city and the increased travel.

6. ———: ———: CONSTRUCTION OF VIADUCT: LIABILITY FOR DAMAGES. In the performance of such duty railroads may be required, when necessary, to construct viaducts over and across their tracks, and are liable for damages to any person whose property is injured by such construction.

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

Fred C. Foster, D. H. McClenahan, James E. Kelby, Byron Clark, B. H. Dunham, Hall & Bishop, F. A. Brogan and *B. P. Waggener*, for appellants.

Samuel J. Tuttle, contra.

BARNES, J.

On the former hearing of this case a judgment for the plaintiff was reversed, and the cause was remanded to the district court, with directions to make the railroad companies defendants, in order to enable the court to determine the question of the liability, as between them and the city of Lincoln, for damages to the plaintiff's property abutting upon what is known as the "Tenth street viaduct," caused by the erection of that structure. *Phœnix Mutual Life Ins. Co. v. City of Lincoln*, 87 Neb. 626. When the mandate was returned to the district court the plaintiff filed its amended petition; summons was issued thereon and served upon the railroad companies. They appeared and demurred separately upon the ground that the facts stated therein were not sufficient to constitute a cause of action as against them. The demurrers were overruled, and, answering over, they alleged the facts which they now contend constitute a complete defense to any liability on their part. There being no dispute as to the facts, and the amount of plaintiff's damages having been settled for the purpose only of the trial by stipulation, a joint judgment was rendered against them and the city of Lincoln, from which all of the defendants appealed.

The record discloses that the railroad tracks of the

Chicago, Burlington & Quincy Railroad Company, the Missouri Pacific Railway Company, and the Chicago & Northwestern Railway Company cross what is known as "Tenth street," in a populous part of the city of Lincoln, and at the same point; that Lincoln is a city of the first class, having a population of 40,000 and less than 100,000 inhabitants; that at a regular election held on the 7th day of May, 1907, the question of the necessity for the construction of a viaduct on Tenth street over and across the railroad tracks of the above named defendants was duly submitted to the electors of that city, and the majority of said electors voted to require such construction; that thereafter an ordinance was enacted declaring it necessary for the public safety and convenience that said viaduct be constructed by the railroad companies; that the companies refused to comply with the provisions of the ordinance, and a mandamus suit was commenced on behalf of the city to require the defendants to build said viaduct; that pending the mandamus proceeding the railroad companies entered into a stipulation with the city whereby they agreed to build the viaduct, and the city agreed to commence proceedings for the appraisement of damages to abutting property owners, and thereafter plaintiff's damages were appraised and fixed at the sum of $500, from which appraisement the plaintiff appealed to the district court, where judgment was rendered against the city of Lincoln for that amount; and from that judgment the city prosecuted the former appeal. When the mandate was returned to the district court plaintiff complied with the directions contained therein, and the proceedings above set forth were had, and, from the judgment therein rendered against them, all of the defendants have appealed.

It is contended by the railroad companies that there was a misjoinder of causes of action, for which they insist the judgment of the district court must be reversed. It is argued that the action, so far as the city was concerned, was founded on the provisions of its charter.

while the action as against them is one in tort, and that such causes of action cannot properly be joined. We are of opinion that this contention is unsound. Section 21 of the Bill of Rights provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." It must be conceded that the viaduct, which the railroad companies were required to build, was necessary, not only for the benefit of the general public, but for the safe and convenient operation of the defendants' trains over and across a public thoroughfare. It must also be conceded that the construction and maintenance of the viaduct upon the highway in front of the plaintiff's lots, adjacent to and abutting thereon, created such additional burden as to entitle it to maintain an action for damages therefor. *Hastings & G. I. R. Co. v. Ingalls,* 15 Neb. 123.

Section 10578, Ann. St. 1909, provides, among other things, that every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct for the purpose of enabling their road to pass over or under any turnpike or public road. It is admitted that by its charter provisions the city had the power to require the railroad companies to construct the viaduct in question, and had lawfully exercised that power. It therefore follows that, when constructing the viaduct in compliance with the orders of the city, the companies were acting under lawful authority, and their act cannot be said to have been wrongfully or tortiously done. We have then a lawful act properly done which gave the plaintiff a right of action, which if originally brought against the railroad companies and the city together would not have been a misjoinder of causes of action.

It is next contended by the railroad companies that this case was originally commenced against the city by plaintiff's appeal from the award of damages, to which they could not thereafter lawfully be made parties, for that would amount to the bringing of another or different ac-

tion against them. In disposing of this contention it is sufficient to say that by our former judgment the proceeding of which complaint is now made was required in order to determine the rights of all of the parties interested in the subject of the litigation. The order thus made is the law of the case, and is, and will be, adhered to at all stages of this action.

It may be further said that, when the railroad companies were served with a summons duly issued upon the plaintiff's amended petition, they appeared generally, and thus conferred jurisdiction upon the court for all purposes; and it must be observed that, if they are liable to the plaintiff at all for the damages occasioned by the construction of the viaduct, it can make no difference to them whether that liability is determined in this action, or in a separate suit brought for that purpose.

This brings us to the main question presented for our determination, which is, whether the plaintiff is entitled to recover against both the city and the railroad companies, and, if not against both, which of them is liable for the damages to plaintiff's property caused by the construction of the viaduct? From what has already been said there can be no doubt of plaintiff's right of recovery. It is contended, however, that no judgment can be rendered against the city, because it acted in its governmental capacity only, and, if this be so, the contention is well founded. It clearly appears that the city of Lincoln in ordering the railway companies to construct the viaduct in question acted pursuant to the governmental power conferred upon it by its charter provisions for the protection of life and property. The exercise of such power does not of itself subject the municipality to a private action for damages. 2 Elliott, Roads and Streets (3d ed.) sec. 890 (702); *Wagner v. Portland*, 40 Or. 389; *Burkam v. Ohio & M. R. Co.*, 122 Ind. 344; *Allentown v. Kramer*, 73 Pa. St. 406; *Murphy v. Chicago, R. I. & P. R. Co.*, 247 Ill. 614; 3 Dillon, Municipal Corporations (5th ed.) sec. 1159.

It is claimed by the railroad companies that by caus-

ing plaintiff's damages to be appraised the city rendered itself liable therefor. We cannot assent to this proposition. By the section of the statutes above mentioned the city was authorized to provide for appraising, assessing and determining the damages caused to any property by the construction of the viaduct and its approaches; but nothing is contained therein which requires the city to pay such damages. This section also provides that the damages may be paid by the city and assessed against the property benefited; but it contains the further provision that the mayor and council shall have power, whenever any railroad company fails, neglects or refuses to erect, construct, reconstruct or repair any viaduct or viaducts after being required so to do, as therein provided, to proceed with such work by contract in such manner as shall be provided by ordinance, and assess the costs thereof against the property of the railroad company or companies required to do the same; and such cost shall be a valid lien against such property, and be also a legal indebtedness of said company or companies in favor of the city, and be enforced and collected by suit in the proper court. It must be said, in passing, that the damages occasioned by the construction of a viaduct are a necessary part of the costs of such construction. So it seems clear, from a consideration of that section, that it was the intention of the legislature to relieve the city from any liability for the cost of such construction; and that the provision relating to the appraisement of damages must have been inserted therein solely for the benefit of the railroads. This question was before the supreme court of Connecticut in *Burritt v. City of New Haven*, 42 Conn. 174, where, in an able and exhaustive opinion, it was held that the city was not liable for damages to abutting property by reason of the construction of a viaduct over and across the tracks of the New Haven & Northhampton Railroad Company. A careful examination of the record satisfies us that neither by any act, stipulation or agreement on its part has the city rendered itself liable for the

damages to plaintiff's property. It follows that the judgment against the city of Lincoln must be reversed.

But one question remains for consideration, which may be stated as follows: Upon the undisputed facts of this case, are the railroad companies liable to abutting property owners for the damages caused by the construction of the viaduct? Railroads are given the right to lay their tracks in and across the streets of the municipalities of this state by statute, and this right carries with it a corresponding duty on their part to construct and maintain at all times proper and safe crossings on the streets intersected. *Omaha & R. V. R. Co. v. Brady,* 39 Neb. 27. It would therefore seem that, when such companies in the performance of that duty are required to construct and maintain viaducts, they are liable for the cost of such construction, and all of the necessary incidents thereto. The facts of the case of *Burritt v. City of New Haven, supra,* are like those in the case at bar. That is a leading and well-considered case. It was there said: "The privilege of crossing the streets of the city is a part of the franchise of the company, and the necessary approaches constructed for the purpose of restoring city streets to their former usefulness under and as a condition of the exercise of the privilege are a part of the railroad structure authorized by its charter, and in their erection a party incidentally injured has as perfect a remedy against the company for consequential damages, as for a direct injury by it in the original construction of its railroad. The obligation to make compensation is as strong in one case as in the other, and to the discharge of that obligation in the manner prescribed it impliedly bound itself by its acceptance of its charter. *Parker v. Boston & M. R. Co.*, 3 Cush. (Mass.) 107, 116; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294, 310.

"It is insisted that this case is essentially different from the one last cited, because here the bridge is found to have been required by public convenience and necessity only, while there it was for the sole benefit and accom-

modation of the railroad company. We do not see that this distinction affects the obligation of the company in this particular. If public convenience and necessity, by the growth of the city and the resulting increase of travel, require the change in order to restore the street to its former usefulness, the duty of the company under its charter, which was before inchoate, is complete, and the same responsibility adheres to it as if the work was demanded for its corporate benefit alone; and to the responsibility in the performance of the work are attached all the legal consequences which flow from the improper and injurious performance of it. The fact that the duty is by law imposed upon the company is sufficient to charge it with all the consequences of such an execution of it as results in injury to others." To the same effect are *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131; *State v. Minnesota Transfer Co.*, 80 Minn. 108; *State v. St. Paul, M. & M. R. Co.*, 98 Minn. 380; *Northern P. R. Co. v. State*, 208 U. S. 583.

The ordinance under which the railroad companies were granted the right to cross Tenth street provided that, by the acceptance and exercise of the rights so conferred, the companies would save and keep the city harmless from the payment of any and all damages growing out of the exercise of those rights. By exercising the right granted by this ordinance, the railroad companies assumed the obligations thereby imposed; and it necessarily follows that they are liable for the payment of all damages occasioned, not only by the original occupation, but also the necessary expense of making all needful and proper changes in the situation in order to insure to the public a safe and suitable means of travel upon that street; and it can make no difference whether they performed that obligation voluntarily or under legal compulsion.

From the foregoing we are of opinion that both upon principle and precedent the railroad companies are liable to the plaintiff for the damages occasioned by the con-

struction of the viaduct, and the judgment of the district court as to them should be affirmed. The record, however, contains a stipulation which leaves the question as to the amount of plaintiff's damages open for futher consideration, and the judgment of the district court is therefore reversed and the cause is remanded, with directions to allow the parties to litigate that question if they so desire; and, if not, then that court will render a judgment in favor of the plaintiff for the amount stipulated, and against the railroad companies.

REVERSED.

SEDGWICK, J., concurs in the conclusion.

REESE, C. J., not sitting.

ROBERT J. WALLACE V. STATE OF NEBRASKA.

FILED APRIL 8, 1912. No. 17,452.

1. **Larceny:** EVIDENCE. Evidence examined, its substance stated in the opinion, and *held* insufficient to sustain a conviction of the crime of larceny as charged in the information.

2. **Criminal Law:** STATUTE: CONSTITUTIONALITY. The act of the legislature of 1911, defining the crime of hog stealing, and known as section 117*b* of the criminal code, is an act complete in itself. It was not intended to, and did not, amend sections 114 and 119 of the criminal code. Its purpose was to create an independent substantive crime and provide a penalty therefor, and is not violative of any of the provisions of the constitution of this state.

3. ———: INDETERMINATE SENTENCE ACT: VALIDITY. Chapter 184, laws 1911, commonly called the "Indeterminate Sentence Law," is not vulnerable to the objection that it vests the prison board with judicial powers. It is not in conflict with the provisions of section 26, art. V of the constitution, and is a valid exercise of legislative power.

4. ———: INSTRUCTIONS: WEIGHT OF EVIDENCE. When a defendant

in a criminal prosecution becomes a witness in his own behalf, it is not error for the court to instruct the jury that in considering his testimony they may weigh it as they would the testimony of any other witness, taking into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and give to it such weight as under all of the circumstances they think it is entitled to.

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

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

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

BARNES, J.

At the December, 1911, term of the district court for Buffalo county Robert J. Wallace, hereafter called the defendant, was convicted of the crime of hog stealing, and was sentenced to the penitentiary for a period of not less than one year, nor more than five years, "as shall hereafter be determined by the prison board." To reverse that judgment the defendant has prosecuted error.

His assignments are: First, the verdict of the jury is not sustained by the evidence; second, the sentence of the court is contrary to law; third, the sentence of the court by reason of its being indefinite in time of duration is a violation of the constitution of this state and is unauthorized by law, especially that part of the judgment of the court which leaves the "prison board" to determine the duration of the imprisonment is obnoxious to the constitution of this state; fourth, certain errors in the instructions of the court given by it on its own motion. The assignments will be considered in the order stated.

1. As to the sufficiency of the evidence to sustain the verdict, it may be said that the hogs alleged to have been stolen, and which were found in the defendant's possession, were identified and shown to have been the property of

the complaining witness beyond a reasonable doubt. However, it is strenuously argued that the evidence fails to show any felonious intent on the part of the defendant in taking them into his possession. On the trial the defendant testified in his own behalf, in substance, that he resided about 5½ or 6 miles northeast of the village of Amherst; that his business was farming; that his father, on the 12th day of August, 1911, lived in the west part of Amherst; that his father had some hogs, as he expressed it, "I expect between 40 and 45, big and little;" that he went to Amherst on that day, the 12th of August, and arrived there about half past 2 o'clock; went right to his father's place and unhitched his horses and put them in the stable; went into the house and got dinner; that he wanted to get some shelled corn of his father; that he put the sacks in the wagon and then went over to town; that he met his father in town, about 6 o'clock in the afternoon; that they visited around town a while before they went home; that they got home about 6 o'clock; that after they got home his father called his attention to some shoats there. He said they must be the Graham hogs; he was expecting the Graham hogs, and he says you can take them if you still want hogs, as he had bought them from my brother George. He said the hogs were large enough and thrifty enough to be worth $4 apiece, and he would take them at that price and he gave me his chance. I got the sacks ready because I was going to lodge—got the sacks ready; when I got back from lodge it would be too late to find them, and I got the sacks ready and I pulled the door down on the pig pen and closed the pigs in. The hogs were in the yard. We looked at them. I got the sacks ready and put the pigs in so they would not get away, for I had agreed to take the pigs if the price was all right. Then I went in to supper. We got our supper, and by that time it was 8 o'clock. As I was one of the officers of the lodge I wanted to be there just about 8 o'clock. The lodge adjourned about 25 minutes past 10. When I got to my father's house I loaded the hogs

right about then. I put the hogs in the sacks and went in and had lunch, hitched up and went home. I was thinking it was the Graham pigs. "Q. At the time you took those pigs did you think they belonged to Mr. Patterson? A. No, sir; I did not know a thing about it. Q. Whose pigs did you think they were? A. I labored under the impression they were the pigs that were to be delivered that George had bought or traded for from Mr. Graham. Q. Did you intend to steal any one's pigs? A. No, sir; I never intended to, and never want to do anything like that." The defendant's father testified in his behalf. He stated that he had 50 or 60 hogs in the lot on August 12, nine old hogs and the rest spring pigs. He said in substance: I told Robert there were some pigs there running through the yard that George delivered, and he was talking about the hogs and he took them home, and we would settle on the price. I think they were George Wallace's hogs. I did not know what time Robert got the hogs, did not help him. Did not see Patterson that night. On cross-examination by the county attorney the witness made some contradictory statements, but none of them were so inconsistent as to destroy his evidence in chief. The defendant further testified that after they came home his father called his attention to the shoats. He said they must be the Graham hogs. He said he had bought them from George. He said the hogs were large enough and thrifty enough to be worth $4 apiece, and he would take them at that price, and he gave me his chance; had the conversation with father when we came into the yard. The hogs were running around in the yard; he said he supposed that was the Graham hogs; don't recollect that one was a cripple.

Patterson, the complaining witness, testified that he saw Robert Wallace and his father, James, on August 12, driving two red hogs out of the cornfield at James' place near Amherst; that he tried to count his hogs that night, but failed; that he counted them in the morning, they were seven short; that he found the hogs at Robert Wal-

lace's place; five had their tails cut off. He (Robert) said he bought the hogs of his father; afterwards he said his father told him there were some hogs, and he could take them; that he took them between 12 and 2 o'clock that night. The county attorney asked Robert if his father gave him the hogs, and he said yes; that Jim Wallace had about 25 hogs, all black, except four red, but they were not like "mine." Wagner, the constable, testified that the defendant said he had bought the hogs, and then that he and his father bought them together. Witness Higgins testified that defendant said he bought them. He told Patterson that if he said they were his hogs they might be. He was willing to turn them over because he did not know where his father got them. When asked how he came into possession of the hogs belonging to Patterson, he said his father gave them to him. George Wallace, who testified for the defendant, stated that he had traded with Graham for four shoats; that they were to be delivered on the day the hogs were taken, but were not delivered until about a week later. It appears that the Graham hogs, when delivered, were black, and there were only four of them, while the hogs in question were red.

The state contends that, because of the contradictory statements made by the defendant and his witnesses, the jury might have reasonably concluded that, when the hogs were taken, defendant and his father intended to deprive the complaining witness of his property, and that Robert expected to convert them to his own use. We are of opinion, however, that the evidence is insufficient to sustain the verdict. In order to convict the defendant of the crime of larceny, as charged in the information, the state was required to prove, beyond a reasonable doubt, that defendant participated in the larcenous taking of the hogs in question from the complaining witness. We think the evidence was insufficient to establish that fact beyond a reasonable doubt. Having reached this conclusion, we could well decline to consider the other questions argued

by counsel for the defendant; but, in view of the fact that they have been ably presented, we deem it best to determine them.

2. It is next contended that the act of the legislature declaring hog stealing a felony, without regard to value, is repugnant to the constitution. The act in question appears in the criminal code as section 117*b*. It provides: "If any person or persons shall steal any sow, barrow, boar or pig of any value, * * * every such person so offending shall be imprisoned in the penitentiary not more than five nor less than one year and shall pay the cost of the prosecution." We have omitted the provisions of the section relating to receiving such property, because that question is not presented by the record. It is argued that this classification has nothing for its basis; that there is no good reason why the theft of a hog worth one cent should be made a felony, and a theft of $34.99 of money be a misdemeanor only. This argument was disposed of by the opinion in *Granger v. State,* 52 Neb. 352. That action involved the constitutionality of the cattle stealing law, an act similar to the one here in question. It was there said: "It is suggested in the brief that this 'act is a vicious one, and possesses no point whereby it impresses the court to uphold it.' We cannot yield assent to the proposition; nevertheless, if it be true that the law is not a wise one, it is no reason why the courts should declare it invalid. The argument made by counsel against the statute under consideration would have been more appropriate were it addressed to the lawmaking body, as the constitution has not conferred upon this court the power to repeal laws, but the authority to interpret and enforce them in proper cases." *Ream v. State,* 52 Neb. 727; *State v. Arnold,* 31 Neb. 75.

It is further argued that the law is unconstitutional because the defendant might have been prosecuted under the provisions of section 119 or of section 114 of the criminal code as well as section 117*b* upon which the prosecution was based, and therefore the state had the

power of election, and that such power renders the act obnoxious in that it destroys the uniform operation of the law. We cannot give our assent to this contention. By section 117*b* hog stealing is made a definite and substantive crime. The information on which the defendant was prosecuted charged him with a violation of that section, and in order to warrant a conviction the state was required to produce testimony establishing the commission of that offense. The effect of section 117*b* was to eliminate the offense of hog stealing from the provisions of sections 114 and 119 of the criminal code, and compel the state to prosecute, if at all, under the provisions of that section. It follows that there was no right of election, and this contention must fail.

3. It is further contended that the act in question operates as an amendment to sections 114 and 119 of the criminal code; that amendments are not mentioned in the title, and therefore the act is violative of the provisions of section 11, art. III of the constitution. That question is disposed of in *State v. Arnold, supra,* where it was said: "The act entitled 'an act defining the crime of larceny from the person and providing a penalty therefor,' approved March 14, 1887, was not, nor was it intended to be, an amendment of section 114, or section 119, of the criminal code, or of any statute then in force. Its purpose was to define a new crime and provide a penalty therefor. It is not inimical to the provisions of section 11, art. III of the constitution of this state."

4. Defendant also contends that "the sentence of the court by reason of its indefiniteness in duration is violative of the constitution of the state, and is unauthorized by law, especially that part of the judgment of the court which leaves the 'prison board' to determine the duration of the imprisonment is obnoxious to the constitution." Various reasons are assigned in support of this contention, and if this were a case of first impression we might be inclined to adopt defendant's view of it. We find, however, that in a number of our sister states what is

called an indeterminate sentence law has been adopted and the courts of these states have uniformly sustained the constitutionality of those acts. The constitution of the state of Illinois is similar to our own, and the legislature of that state passed an act very like the one in question in this case. The constitutionality of that act was challenged in *People v. Joyce,* 246 Ill. 124. There all of the objections to the constitutionality of that act were urged that are now presented in the case at bar. It was there said: "The powers granted to the board of pardons by the parole act of 1899 are not judicial in character but are matters of prison discipline, to be exercised for the benefit of offenders imprisoned in state institutions. The parole act of 1899 is not an interference with the functions of the court, but is rather the exercise, through the legislative and administrative departments of the government, of the power of discipline which the state possesses, and is not unconstitutional as conferring judicial power upon administrative officers. The provisions of the parole act of 1899 with reference to the final discharge of a paroled prisoner are not invalid, as infringing the constitutional right of the governor to grant pardons and reprieves and commute sentences. The sentence of a convicted person under the parole act of 1899 is not a matter of discretion with the court, but is for the maximum term provided by law, and is therefore not indefinite and uncertain. The right of a convicted person to have the court fix his punishment is not a fundamental right, and the fact that the parole act of 1899 does not secure that right to a convicted person does not render the act invalid, as repugnant to the constitutional provision concerning due process of law."

The decision in that case was followed and approved in *People v. Roth,* 249 Ill. 532. A like act of the legislature of Kentucky was upheld in *Berry v. Commonwealth,* 141 Ky. 422. To the same effect are *State v. Ferguson,* 149 Ia. 476; *Palmer v. State,* 168 Ala. 124, 53 So. 283; *George v. Lillard,* 106 Ky. 820. We think that the foregoing sufficiently disposes of this question.

Finally, it is contended that the district court erred in giving the jury the following instruction: "You are instructed that under the laws of this state the accused is a competent witness in his own behalf and you are bound to consider his testimony; but, in determining the weight to be given to his testimony, you may weigh it as you would the testimony of any other witness, and you may take into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and give to his testimony such weight as under all the circumstances you think it entitled to." It is argued that this instruction carries the insinuation that, while the accused is permitted to testify, his interest in the result of the suit destroys the force of his testimony. This court has refused to declare this instruction erroneous, in *St. Louis v. State*, 8 Neb. 405; *Davis v. State*, 31 Neb. 247; *Johnson v. State*, 34 Neb. 257; *Housh v. State*, 43 Neb. 163; *Philamalee v. State*, 58 Neb. 320; *Palmer v. State*, 70 Neb. 136. Opposed to these decisions counsel for defendant cite *Clark v. State*, 32 Neb. 246. It appears, however, that the vice of the instruction in that case was a too frequent repetition by the court that the jury, in weighing the defendant's testimony, might consider his interest in the result of the suit. It was there held that the trial court cannot, by repeating this statement, give it undue weight, or say aught calculated to disparage the testimony of the accused. The instruction complained of in the case at bar is not tainted with that vice.

For the reason that the evidence does not sustain the verdict, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

STATE, EX REL. GEORGE S. PETERS, APPELLANT, V. HARRY E. COLEMAN, APPELLEE.

FILED APRIL 8, 1912. No. 17,488.

County Officers: FILLING VACANCY: COUNTY ASSESSOR. Where a vacancy occurs in the office of county assessor more than 30 days prior to a general election, the board of county commissioners is required to fill the vacancy by appointment. In such case the person appointed holds the office until the next general election, at which time his successor should be elected for the remainder of the unexpired term.

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

A. W. Crites, for appellant.

R. L. Wilhite, contra.

BARNES, J.

Action in *quo warranto* brought by the relator to oust the respondent from the office of county assessor of Sheridan county. The information alleges, in substance, that at the general election of 1907 one Sol B. Pitcher was elected county assessor of Sheridan county, Nebraska, for the term of four years, beginning on the first Thursday after the first Tuesday in January, 1908; that he duly qualified and entered upon and performed the duties of that office until the last of December, 1910, when he resigned and removed from the county; that on or about January 3, 1911, the board of county commissioners, in writing, duly appointed the relator to fill the vacancy in said office occurring by reason of such resignation and removal; that he qualified and entered upon the duties of the office, and has ever since, up to the happening of the events hereinafter set forth, been in the full performance of said duties; that chapter 43, laws 1911, provides that in all counties one county assessor shall be elected in the

year 1908, and every fourth year thereafter; that said chapter went into effect and force on the 1st day of July, 1911, and has been, and still is, in full force and effect; that thereby the term of office of the relator as county assessor of said county was extended until the first Thursday after the first Tuesday in January, 1913; that he has never resigned or abandoned his said office; that the respondent, Harry E. Coleman, assuming and pretending that there was a vacancy in said office to be filled at the general county election to be held in November, 1911, did cause and procure his name to be placed on the official ballot at said election as a candidate for said office; and did at said election receive a majority of the votes cast thereat for the office of county assessor of said county to fill an assumed and pretended vacancy; that thereafter, and within 20 days, the respondent qualified and took the oath of office in the form prescribed by law, and gave his bond therefor, which bond was, on or about the 13th day of November, 1911, duly examined and approved by the county judge of said county; that ever since that time the respondent has intruded into said office and usurped the power and functions and franchises thereof, and now assumes to hold the same and exercises all the powers, duties and functions of said office, and claims to be entitled to the emoluments and salary thereto annexed. The information concluded with a prayer that the respondent be ousted from, and the relator be installed into, said office. To this information the respondent filed a general demurrer, which was sustained by the district court for Sheridan county, and the action was dismissed. From that judgment the relator has appealed.

The appellant relies for a reversal on *State v. Rankin*, 33 Neb. 266. We are of opinion that this question should not be ruled by that case. The law relating to county assessors simply provides that in case of a vacancy in that office the county board shall fill such vacancy by appointment. Nothing whatever is said as to how long the appointee shall hold the office, and nothing is contained

therein which in any manner conflicts with the general provisions of the statutes upon that subject. It therefore follows that this case must be ruled by such general provisions.

By section 5759, Ann. St. 1911, it is provided that vacancies occurring in any state, judicial district, county, precinct, township or any public elective office, 30 days prior to any general election, shall be filled at such general election. Section 5757 provides: "Appointments under the provisions of this chapter shall be in writing and continue until the next election at which the vacancy can be filled." It therefore seems clear that, when the relator was appointed to fill the vacancy caused by the resignation of his predecessor, his appointment held good until the next general election, which was in November, 1911, and if the provisions of chapter 43, laws 1911, operated to extend the term of the office until the 1st of January, 1913, the person chosen at that time would hold his office for the unexpired portion of the term. This seems to be the view adopted by the district court, and we are of opinion that the demurrer to the information was properly sustained and the action rightly dismissed.

The judgment of the district court is

AFFIRMED.

OLIVER WILSON, APPELLANT, V. FRANK G. SPENCER, APPELLEE.

FILED APRIL 8, 1912. No. 16,637.

1. **Pleading**: SUFFICIENCY: ACTION FOR DAMAGES. In an action for damages against a road overseer for grading a road and removing a culvert, which work was clearly within his discretion and the scope of his duties, the mere allegation in the petition that in so doing he acted maliciously, unlawfully, and not for the public interest, does not state an actionable wrong.

2. Petition set forth in the opinion examined, and *held* vulnerable to a general demurrer.

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

H. C. Vail, for appellant.

O. M. Needham and *F. A. Doten, contra.*

LETTON, J.

This is an action for damages against a road overseer for the destruction of a culvert and the digging of a ditch in the highway in front of plaintiff's premises. A demurrer was filed to the petition, which was sustained and the action dismissed. Plaintiff appeals.

In substance, the petition alleges that the plaintiff is a farmer and a resident landowner in Road District No. 1 of Boone county; that the defendant is the road overseer in that district; that a public highway runs north and south along the east line of plaintiff's farm for a distance of one mile, and that there is no way of access to his land except by the public road mentioned; that his land is inclosed by a fence, and that he maintains a gate at a point about midway on the line of the road; that the public authorities about five years ago graded the road and left a ditch and steep embankment opposite the gate, and afterwards built a culvert opposite the gate for the purpose of allowing access thereto; that the defendant, pretending to act as road overseer, recklessly, wantonly, and maliciously, and for the gratification of his malignant feelings, caused the road to be again graded and the culvert to be destroyed and removed; that the culvert was not an obstruction in the road and the grading was not necessary to be done for the good of the public; that defendant left an embankment about five feet high and a ditch about three feet deep in front of the gate, and caused a ditch about twelve inches deep to be made opposite plaintiff's

premises extending for more than half a mile along the road, and left an embankment along said ditch; that he refused to place a culvert or other means of passage across the ditch and refused to allow plaintiff to erect a culvert or other means of passage across to the embankment; that defendant as road overseer had ample funds under his control to erect and maintain a culvert across the ditch, and that the acts of defendant were done wantonly, wilfully, and with malicious intent to injure plaintiff.

Bearing in mind the rules that the allegations of a petition are to be construed most strongly against the pleader and that a demurrer does not admit mere conclusions of law, does the petition state a cause of action? It is evident that the officer charged with the duty of maintenance of highways must, in the absence of supervision or direction by the county board, be vested with the discretion of determining the necessity for grading the road or ditching along the side. Chaos would reign if each abutting landowner should have the power to dictate as to the manner in which a road was to be constructed in front of his premises. The road overseer may act unwisely, but the entire highway within the road district over which his authority extends is within his jurisdiction, and it is for him to determine the work to be done in the highway space so as best to provide for the convenience of public travel. The petition shows that the road was graded for at least half a mile, and it is clear that such acts were within the scope of the overseer's authority and within his discretion.

The general principle is that a public officer is not liable to an action if he acts unwisely in a matter wherein it is his duty to exercise judgment and discretion, even though a private person may be damaged thereby. This rule is particularly applicable to officers in control of highways, for the reason that their operations touch the property of so many persons that, if not exempt, they might be constantly harassed. *McConnell v. Dewey,* 5 Neb. 385; *Kendall v. Stokes,* 44 U. S. *87, 11 L. ed. 506; *Upham v. Marsh,* 128 Mass. 546; *Denniston v. Clark,* 125 Mass. 216;

Highway Commissioners v. Ely, 54 Mich. 173; *Dean v. Millard*, 151 Mich. 582; *Packard v. Voltz*, 94 Ia. 277. As was well said in *Yealy v. Fink*, 43 Pa. St. 212, 82 Am. Dec. 586: "It is of the utmost importance that officers intrusted with such powers be protected in exercising them, without being terrified with the apprehension of personal responsibilty, if their acts should result in harm to any private property." The mere allegation in the petition that in performing work which was clearly within the scope of his duties the officer acted maliciously, wantonly, and unlawfully, does not state an actionable wrong. "Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. * * * When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged." Cooley, Torts (3d ed.) *832.

The discussion so far has been with reference to the allegation as to the grading. But the use of the highway is not confined alone to ordinary travelers in front of a landowner's property. He is equally entitled to the use of it as a means of ingress and egress to and from his property, and if deprived of the same by the action of the public authorities the constitution preserves to him his right to compensation. *Stehr v. Mason City & Ft. D. R. Co.*, 77 Neb. 641, and cases cited. There are allegations in the petition that the defendant refused to place a culvert across the ditch and refused to allow the plaintiff to do so. Undoubtedly plaintiff was entitled to the means of access either by the action of the road authorities or by his own subject to their approval and direction. *Highway Commissioners v. Ely, supra; Village of Sandpoint v. Doyle*, 14 Idaho, 749, 95 Pac. 945. But, this may be conceded, and yet not aid the plaintiff's contention. The petition is to be construed most strongly against the pleader, and the presumptions are against him.

It was clearly within the scope of the defendant's duties to control the construction of culverts or bridges across ditches within the highway. The presumption is that the public officer acted in accordance with his duty in the premises. So far as the pleading discloses the plaintiff might have contemplated placing an unsuitable crossing or culvert across the ditch, which would be an obstruction to the road, and which would interfere with the proper drainage of the highway. The refusal of the defendant to allow the plaintiff to erect a culvert or crossing is not of itself an actionable wrong. The defendant might well refuse to allow an unsuitable culvert to be constructed and would be entirely within his legal rights and duties in so doing. We doubt the mere plea that defendant "refused" is more than a conclusion of law, which is not admitted by a demurrer, but, however this may be, it is clear that the refusal by a highway officer to allow a structure to be erected in a highway by an abutting owner does not constitute a cause of action. If the road overseer believed that the removal of the culvert in front of plaintiff's gate was necessary in the regrading of the road, he was undoubtedly entitled to remove the same, and to refuse to replace it, regardless of what his feeling might be towards the plaintiff. The removal of the material of the culvert which belonged to the public could not be a violation of any property right of plaintiff in the same.

We are of opinion that the mere statement that the defendant acted maliciously and wantonly and not for the public interest in performing acts clearly within the scope of his duties as road overseer, without setting forth any facts to indicate that the work was not performed for the public interest but alone intended to damage the plaintiff, is not sufficient to state a cause of action.

The judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

CHARLES P. BRESEE, APPELLANT, V. JOHN W. PRESTON, APPELLEE.

FILED APRIL 8, 1912. No. 16,648.

1. **Pleading:** DEMURRER. A general demurrer admits the truth of all material facts well pleaded, but does not admit conclusions of law.
2. ———: SUFFICIENCY. When the claim is made that an act is unconstitutional, not because of its substance, but because not regularly passed, the defect in the proceedings must be specifically pleaded. It is insufficient to allege generally that it was not legally passed. *City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572.
3. **Judicial Sales:** VOID AND VOIDABLE. A sale of real estate under an order of sale, where the notice is not published at least 30 days before the sale, is not void, but voidable, and the defect is ordinarily cured by confirmation.

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

Allen G. Fisher, William P. Rooney and *A. M. Morrissey*, for appellant.

Ross Amspoker and *Lear & Lear, contra.*

LETTON, J.

The petition in this case alleges in substance that the plaintiff is the owner of a certain tract of land in Keya Paha county; that the defendant is in possession of the same claiming title by virtue of a sheriff's deed issued to his grantor on a sale under a decree rendered in proceedings brought by the county of Keya Paha in the district court for that county to foreclose a tax lien upon the land; that no prior administrative sale had been had, and no tax certificate had been issued to the county; that "the acts of legislature whereunder county attorney claimed to act was void and did not pass with regard for constitutional requirements." It is further alleged that "the said purported sale was void and of none effect for the reason

that the court was without jurisdiction of the subject matter and the defendants therein named never appeared in said action nor consented that the said court might have jurisdiction at any time, and because the notice of the said proposed sheriff's sale was not published in any newspaper printed in said county, nor of general circulation therein, for 30 days before the date of said sale, April 5, 1902, but on the contrary, the only notice by advertisement in a newspaper was for 29 days before the date of sale and not longer." The petition further alleged that neither the plaintiff nor his grantors had any knowledge of the proceedings; that the rents and profits exceed in value the taxes against the premises. He prays that he may be permitted to redeem from the sale; that the sheriff's deed be canceled, and defendant be required to execute a deed to him, for an accounting, and general equitable relief. To this petition the defendant filed a general demurrer. This was sustained by the district court, and the action dismissed.

Only two assignments of error are found in the appellant's brief: "The court erred in giving judgment for defendant and dismissing the petition of plaintiff. The court erred in sustaining the demurrer of defendant." The brief, however, in general terms argues that the act providing for foreclosures by counties was not passed by the legislature in conformity with the provisions of the constitution; that the affidavit for constructive service was insufficient; that the published notice for constructive service was insufficient; and that the sheriff's sale and deed were void for want of notice of sale. The trouble with much of appellant's argument is that the questions raised are not presented by the record. We can only look to the allegations of the petition to determine whether it states a cause of action, and cannot consider allegations found in the brief but not in the petition. The demurrer, of course, admits all material facts properly pleaded, and the only question before the court is whether the facts pleaded constitute a cause of action.

As to the plea that the statutes are void for the reason that "the acts * * * did not pass with regard for constitutional requirements." No facts are pleaded showing the breach of any constitutional requirements. It is an elementary rule of pleading that a demurrer admits only facts well pleaded, and does not admit conclusions of law. *Burlington & M. R. R. Co. v. Dobson,* 17 Neb. 450; *American Water Works Co. v. State,* 46 Neb. 194; *State v. Ramsey,* 50 Neb. 166. Of course, under section 136 of the code it is unnecessary to plead the validity of a statute, because it is a presumption of law. But, when it is claimed that facts exist which rebut the presumption of law, the facts which are claimed to exist should be pleaded so as to inform the court of what is the real issue. Some act of omission or commission by the legislature in conflict with the provisions of the constitution with reference to the manner of passing bills must be relied upon to support this allegation. This is a matter to be proved, and while under our former decisions the court will take judicial notice of the legislative journals, this notice cannot supply the want of a specific plea of the fact upon which the pleader relies. The supreme court of the United States holds: "Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make these facts a part of the complaint for the purpose of giving jurisdiction to a federal court, as the averments, if not sufficient in themselves to give jurisdiction, present no controversy in respect of which resort may be had to judicial knowledge." *Mountain View Mining & Milling Co. v. McFadden,* 21 Sup. Ct. Rep. 488 (180 U. S. 533). *Arkansas v. Kansas & Texas Coal Co.,* 183 U. S 185, 22 Sup. Ct. Rep. 47.

If a statute is invalid because it is in substance violative of the constitution, it is sufficient to allege generally that it is invalid, but when its invalidity is claimed, not because of the substance of the act, but because in its passage or adoption the legislature did not follow the proceedings required by the constitution, the defect must be specifically pleaded, and it is insufficient to allege generally that it

was not legally adopted and did not pass with regard for constitutional requirements. *City of York v. Chicago, B. & Q. R. Co.,* 56 Neb. 572. In that case it is said: "The petition also contains the following averment: 'The plaintiff alleges that said ordinance * * * was never passed legally and as by law provided so as to make it a valid ordinance.' So far as the last averment is concerned it is clearly the pleading of a conclusion of law without any pleading of any ultimate traversable facts which would lead to such conclusion. When an act is legal or illegal because of the existence or nonexistence of certain facts, those facts must be pleaded. The mere assertion of illegality is not enough. It tenders no issue." While this language referred to an ordinance, the principles of pleading announced apply also to statutes.

We have repeatedly held that, even though a decree entered in a tax foreclosure action by a county without a prior administrative sale is erroneous, it is not void, and a sale based thereon will divest the owner of the land of his title. *Russell v. McCarthy,* 70 Neb. 514; *Cass v. Nitsch,* 81 Neb. 228; *Jones v. Fisher,* 88 Neb. 627.

It is further contended that the sheriff's sale was void for the reason that the notice was published only 29 days instead of at least 30 days, as the statute requires. Had this objection been made at the time of confirmation, it would undoubtedly have been sustained. If overruled, such ruling would, on appeal, have been reversed. If the defendants were duly served with summons, they were before the court and it was their duty to interpose such objection at that time, and, if overruled, to have brought the ruling directly to this court for review. They could not stand by with folded hands and permit this error of the court to go unchallenged and subsequently assail the confirmation collaterally. That they had been duly served and were before the court must be presumed, from the absence of any allegation in the petition that they had not been served with process in the foreclosure suit. The allegation of the petition is, "and the defendants therein

named never appeared in said action, nor consented that the said court might have jurisdiction at any time." This is all the petition recites upon that point. If they were duly served, and thereafter "never appeared in said action," that was their fault; and, such being the case, it is immaterial that they never "consented that the said court might have jurisdiction at any time." The service gave the jurisdiction. For these reasons, the contention of defendants upon this point cannot be sustained.

This disposes of all the points made in the brief which are based upon facts set forth in the petition. The demurrer to the petition was properly sustained by the district court, and its judgment is, therefore,

AFFIRMED.

REESE, C. J., took no part in the decision.

FIRST NATIONAL BANK OF SHENANDOAH, IOWA, APPELLANT, V. CHARLES KELGORD, APPELLEE.

FILED APRIL 8, 1912. No. 16,672.

Bills and Notes: INDORSEMENT. A promissory note was made payable to "Wonder Stock Powder Company." The only indorsement is "James J. Doty, Prop." A banker who purchased it testified that Mr. Doty was the sole owner of the company, but there was no evidence as to whether the payee was a corporation or a trade name for Doty. *Held*, That the indorsement did not constitute the bank a holder in due course, under the Negotiable Instruments Act.

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

L. F. Jackson, for appellant.

W. T. Wills and *M. F. Harrington, contra.*

LETTON, J.

This is an action upon a promissory note made by the defendant payable to the order of "Wonder Stock Powder Company." The petitioner alleges that one James J. Doty is the owner and proprietor of "Wonder Stock Powder Company," and that the plaintiff before maturity and in the usual course of business purchased the note for a valuable consideration. The answer denies the execution and delivery of the instrument, and that plaintiff purchased same. It further pleads that the alleged note was without consideration; that the defendant is of foreign birth and cannot read or write the English language; that at the time the alleged note purports to be signed the agent of the company read over to him a paper which purported to be a conditional order for a shipment of Wonder stock powder, and that defendant signed such alleged conditional order and no other paper. The reply was a general denial. The cause was tried to a jury, which returned a verdict for the defendant.

The note in question is made payable to "Wonder Stock Powder Company." It is indorsed in blank, "James J. Doty, Prop." This indorsement is clearly insufficient under section 30 of the Negotiable Instruments Act, chapter 41, Comp. St. 1911, to constitute the plaintiff a holder in due course of business. The only evidence as to the relation of Doty to the concern is that of Albert A. Reed who purchased the note for the plaintiff. He testifies that he purchased it with 59 others from Mr. Doty, and that Doty is sole proprietor of the "Wonder Stock Powder Company." It is not shown whether the Wonder Stock Powder Company is a corporation of which Doty owns all the stock or whether it is a trade name used by Doty in his individual business.

The plaintiff relied upon the law merchant as expressed in the Negotiable Instruments Act for its right to recover as an innocent holder in due course, and has no greater right than is conferred by that act. The purchase

and delivery of the note transferred the title to plaintiff, but there being, so far as the evidence shows, no indorsement by the payee, the transfer could not vest plaintiff with the privileges of a holder in due course, and the note was subject to the same defenses as might be set up against the original payee. *Freeman v. Perry,* 22 Conn. 617; *Ellis v. Brown,* 6 Barb. (N. Y.) 282. The verdict of the jury must have been based upon a finding that the defendant, who could not read English and could only write well enough to sign his name, was deceived into signing a paper which he believed to be an order for stock food, but which was, in fact, a promissory note, and that he received no consideration for the same. The evidence, while conflicting, is sufficient to support such a finding. This, in the absence of negligence, may constitute a good defense even against a holder in due course. *Willard v. Nelson,* 35 Neb. 651. No exceptions were taken to the giving of the instructions complained of, hence we cannot examine their correctness. We think it unnecessary to consider the other errors assigned.

The judgment of the district court is, therefore,

AFFIRMED.

REESE, C. J., not sitting.

WILLIAM P. FERGUS, ADMINISTRATOR, APPELLEE, V. M. J. SCHIABLE, ADMINISTRATOR, APPELLANT.

FILED APRIL 8, 1912. No. 17,446.

1. Wills: RIGHT OF ELECTION. The right of a widow to elect under the provisions of sections 4907, 4908, Ann. St. 1911 (laws 1907, ch. 49, secs. 7, 8), whether she will take the provision made for her in the will of her deceased husband, or take the interest in the estate given her by law, is a personal one, and does not pass at her death to her heirs or personal representatives.

2. ———: ———. A widow made, and the county court recorded,

her election to take under the law instead of under the will of her deceased husband. She did so under a mistake as to her right to take under the law, but she took no valid steps in her lifetime to have her election set aside. After her death her administrator brought an action to recover some of the provisions made for her benefit in the will. *Held*, That he had no power to make an election for her, and that the court could not ignore the election made in her lifetime of which there was a judicial record.

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

Reavis & Reavis, for appellant.

Clarence Gillespie and *Edwin Falloon, contra.*

LETTON, J.

In 1905 Henry Rieger died leaving a will, one clause of which is as follows: "I give and bequeath to my beloved wife Amelia Rieger, in addition to the $200, which the law gives her out of my personal estate, the sum of $100. I also desire that my said wife Amelia Rieger shall live in our homestead as long as she shall live; that is, I desire that she occupy it herself and not rent it." The will was duly probated and allowed. During the settlement of the estate and within the statutory time his widow, Amelia Rieger, filed in the county court a written renunciation of the provisions made for her in the will. The widow afterwards made a claim for an allowance as such widow out of the estate, which was resisted by the administrator and the heirs on the ground that she had entered into an antenuptial contract by the terms of which she had barred herself of all rights in the estate of her deceased husband. This litigation was carried on for some time, culminating in an appeal to this court, where it was finally determined that the ante-nuptial contract was valid. After the case was remanded to the district court Amelia Rieger died. This action was brought by the administrator with the will annexed of her estate to recover the provision made

for her in the will of her deceased husband which she renounced. The defendant, who is administrator of the estate of Henry Rieger, deceased, pleaded the facts as to the widow's election and renunciation, and, further, that she had possession and control of the real estate owned by Rieger from the time of his death until her own death. The reply alleges that at the time Mrs. Rieger signed the paper making an election she made a mistake; that it was subsequently adjudicated that she had no right to take under the law; that in the litigation incident to the ante-nuptial contract she filed a reply in the district court in which she asked that, in case it should be determined that she had no right to take under the law, the court would permit her to reconsider her election and take under the will; that the request was never passed upon by the court; that by the adjudication she was deprived of her right to take under the law, and that, therefore, she is presumed to take under the will.

The county court found generally for the defendant, found that the widow had occupied the homestead to the time of her death, and that the wearing apparel, ornaments and household furniture, etc., were set off to her by the appraisers; that on the 14th day of June, 1903, the widow filed her renunciation of the provision made for her in the will and elected to take under the law, and that she did not in her lifetime ask the court to be permitted to make her election and take the provision made for her in the will. The court further found that the second amended reply filed in the district court was filed after trial, and after the motion for a new trial had been overruled, and rendered judgment dismissing the proceedings. On appeal the district court found that the plaintiff is entitled to the legacy of $100 made to Amelia Rieger in the will, and rendered judgment accordingly. The defendant administrator appeals.

The testimony shows that on the 3d day of October, 1908, a second amended reply was drawn up by Mrs. Rieger's attorney with her knowledge and consent in the

antenuptial contract case. It was not signed by her, or verified by any one, and there is no proof that it was filed before judgment, or that permission of the court was given to file it, or that it was ever seen by the court.

The election made by the widow was not withdrawn in her lifetime. No attempt was made in the county court to be relieved from its operation by virtue of the equity powers of that tribunal. The present proceedings are, in effect, an attempt by her administrator to set aside the election made by the widow in her lifetime and to elect for her that she will take under the will of her deceased husband. There can be no question but that the election made by the widow, however badly advised, was effectual until it was set aside by a court of competent jurisdiction. Her relations to the estate having been fixed and made a matter of judicial record, it could only be changed at her request, or at her instance. The right given to a widow to renounce the will and take a share of the estate which she is allowed by statute is a personal right and does not pass to her representative. It is for her to make the determination, and not for one who is merely appointed to administer her estate. We know of no authority given an administrator to make an election for her and either to accept or reject the provisions made in a will. *Sherman v. Newton,* 6 Gray (Mass.) 307; *Atherton v. Corliss,* 101 Mass. 40; *Harding's Adm'r v. Harding's Ex'r,* 140 Ky. 277; *Welch v. Anderson,* 28 Mo. 293; *Davidson v. Davis,* 86 Mo. 440; *Pennhallow v. Kimball,* 61 N. H. 596; *Williamson v. Nelson,* 62 S. W. (Tenn. Ch.) 53; *Estate of Nordquist v. Sahlbom,* 114 Minn. 329. Conversely, after an election has been made by the widow, if she takes no effective steps during her lifetime to change her status with respect to the estate and to be allowed to withdraw her election, this right, being purely personal, dies with her. The finding of the county court as to the property which the widow received seems to be sustained by the evidence, so that she has had the benefit of the provision in the will, except the money legacy. We think her election cannot be

set aside in the manner attempted, and that the district court erred in awarding judgment for the plaintiff.

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

REVERSED AND DISMISSED.

HUGH MCCAFFREY ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED APRIL 8, 1912. No. 16,567.

1. **Municipal Corporations:** STREET IMPROVEMENT DISTRICTS: LEVYING ASSESSMENTS. Before the mayor and council of a city of the metropolitan class are authorized to order the paving of a street in a district not entirely within 4,500 feet from the streets surrounding the city hall grounds, there must be a petition of the property owners of the proposed district, and a street improvement district must be created by ordinance (Comp. St. 1911, ch. 12*a*, secs. 106, 107). The improvement district so formed is the foundation of all further proceedings in that behalf, including the levying of taxes to pay for the improvement (sec. 198) and the relevying of taxes for the improvement when a former levy has been set aside for irregularities (sec. 186).

2. ———: ———: ———. All taxes for such improvements must be levied on property specially benefited by the improvement, but no taxes for the improvement can be levied on property outside of the improvement district.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

B. N. Robertson, H. C. Robertson, Joseph McCaffrey and *Harry Fischer,* for appellants.

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

SEDGWICK, J.

In August, 1907, the mayor and council of the city of Omaha passed an ordinance "creating improvement district No. 961 in the city of Omaha for the improvement of that part of Jackson street from 28th street to the west line of 30th street in said city, by curbing and paving, and fixing and defining the boundaries of said district and ordering the improvement of the same." The ordinance fixes the boundaries of the district, names the lots and blocks included therein, and directs the city clerk to advertise for and receive bids upon material of different kinds. Afterwards, an ordinance was passed reciting that the record owners of lots in the improvement district "have failed to designate the material for said pavement" and providing that the material used shall be "Purington vitrified brick block for paving and Indiana stone for curbing." Afterwards an ordinance was passed entitled "An ordinance levying a special tax and assessment on all lots and real estate within street improvement district No. 961 in the city of Omaha, to cover the cost of paving and curbing Jackson street from 28th street to 30th street." By this ordinance taxes were levied against lots not included in the improvement district. The owners of such lots objected to the assessment of such taxes and afterwards appealed to the district court. The district court sustained the action of the city council, and the property owners have appealed to this court.

The counsel for the city insist that the mayor and council can levy taxes to pay for the improvement upon any and all property benefited thereby, whether the same is within or without the improvement district. Section 107, ch. 12*a*, Comp. St. 1911, provides that the mayor and city council shall have authority to create street improvement districts for the purpose of improving all streets, alleys, or other public grounds therein by paving, etc., and section 106 provides that in the same ordinance that creates improvement districts for paving, etc., the mayor and council

shall "direct the city clerk to advertise for and receive bids upon" different kinds of material. Section 107 provides that the mayor and council may order the improvement by ordinance and cause it to be made when it is embraced in any district, the outer boundaries of which shall not exceed a distance of 4,500 feet from any of the streets surrounding the city hall ground. If the improvement is in a district "outside of said 4,500 feet limit" it can be ordered "only upon petition of the record owners of a majority of the frontage of taxable property in such district." This improvement district was outside of the specified limit.

The principal purpose of creating an improvement district is to determine what property is liable to assessment if specially benefited, and to give to the owners of property liable to be assessed for the improvement "a voice in the determination of how, when and where the improvement shall be made." The formation of the improvement district is the foundation for all subsequent proceedings. This district so formed composes the territory to be affected by the improvement, which it is supposed will be benefited thereby. Property owners within the district must take notice that their property will be affected, and that they may be called upon to pay the expenses of the improvement. The second subdivision of section 108 of the act requires the mayor and council "to give the property owners *within any district*" opportunity to designate the materials to be used. The district so formed must be given a definite corporate name for the purpose of paying for the improvement. Section 198. The formation of the district is also important because all of the property owners within the district, as above stated, are entitled to participate in designating the materials to be used. "Property owners whose property will be charged by the establishment of a paving district are entitled to insist that the several petitioners therefor sign in such a way as to be fully and legally bound, * * * the whole tendency of recent legislation in this state has been to

give those who are to be *assessed with the cost of paving* a voice in the determination of how, when and where the improvement shall be made." *Batty v. City of Hastings,* 63 Neb., 26. In *Morse v. City of Omaha,* 67 Neb. 426, this court quoted with approval the following statement of the supreme court of the United States, in *Ogden City v. Armstrong,* 168 U. S. 224: "No jurisdiction vested in the city council to make an assessment or to levy a tax for such an improvement, until and unless the assent of the requisite proportion of the *owners of the property to be affected* had been obtained," and in the same case this court quoted from *Sharp v. Speir,* 4 Hill (N. Y.) 76, in which it was held that it was not competent for the city authorities to decide "that a majority of the persons intended to be benefited had signed" the petition for the formation of the district, unless such was the fact, and that that question could be subsequently investigated by the courts. It also quoted from the supreme court of Michigan in *Auditor General v. Fisher,* 47 N. W. 574 (84 Mich. 128), to the effect that whether a majority of the property holders had signed the petition could be determined in collateral proceedings. In *Wiese v. City of South Omaha,* 85 Neb. 844, this court, as the basis of its decision, quoted with approval from Welty, Law of Assessments, sec. 297: "An important principle of law in this connection is that the district which is to be taxed with an assessment to pay for a local improvement must be accurately defined." In the syllabus the law is stated to be: "It is the duty of a city, when creating an improvement district for a local improvement, to define the limits thereof with sufficient certainty to identify the lots or lands sought to be included therein, and to publish a statement of such limits." The discussion in the opinion is upon the theory that the property to be assessed must be included in the improvement district. In *Shannon v. City of Omaha,* 73 Neb. 514, it is said in the first paragraph of the syllabus: "All of the property in a sewer district which is benefited by the improvement should bear its fair proportion of the neces-

sary expense," and in the opinion, "Such expense should be borne by the property in that district especially benefited thereby to the extent and in the proportion of such special benefits." It was held that when improvements are contemplated in a sewer district the council cannot determine in advance what part of the property in the district will be benefited and form a new district embracing only such property, because by so doing they would exclude property in the old district, and not included in the new, from assessments for the improvement. It is not necessary to cite and review the innumerable decisions of this court that are predicated upon that proposition. Various other sections of the act of 1905, under which these proceedings were had, declare and imply the importance of the power to form an improvement district for such purposes, and the statute as a whole is in harmony with our numerous decisions. It has also been held by this court, as stated in *Morse v. City of Omaha*, 67 Neb. 426: "Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not be aided by presumptions."

Under the contention of the city in this case, the formation of an improvement district has no purpose whatever, no subsequent action of the city authorities or the property owners has any reference to the improvement district in any manner; and this in the face of the statute which forbids the council to take any other proceeding in the matter until they have created the improvement district. The contention is that, if the improvement district has been formed and the improvement has been made, the authorities may levy assessments to pay for the improvement without any regard to the improvement district, and upon property beyond its limits. It is not necessary to determine whether the legislature could confer such, here-

tofore unheard of, powers upon the city council. It is sufficient to know that it has not intended or attempted to do so. This question is to be determined by a construction of the statute, and if the various provisions of the statute are construed together there can be no doubt of the legislative intention. Section 198 of the act provides that for the purpose of paying for the the improvement the mayor and council may issue bonds of the city to be called "'District Street Improvement Bonds' of District No. —," and may provide that the "special taxes and assessments levied *in said district* shall constitute a sinking fund for the payment of said bonds and interest." Here is direct and plain legislation that when bonds are issued property outside of the district cannot be assessed for the improvements. And, again, section 186 provides that in cases of mistakes, irregularities, etc., in the proceedings the mayor and council may correct the proceedings and levy (if no levy had been made) or relevy (if a former levy had proved invalid) "a special assessment on any or all property in said district"—an express provision that no relevy can be made on property outside of the district. Did the legislature intend that, while no property outside of the district can be taxed to pay for the improvements when bonds are issued, still when no bonds are issued property outside of the district may be assessed for the same improvement, and that the first levy can be made on property outside of the district, and if that levy is set aside for irregularities the relevy can only be made on property inside the district? It is not necessary to inquire whether the legislature, if it desired, could so trifle with the interests of the taxpayers, because it is manifest that it has neither intended nor attempted to do so.

Section 107 provides that "the mayor and city council shall have power to levy special taxes or assessments on account of said improvements on any or all property benefited thereby according to the special benefits received by said property from said improvement." This follows the provision authorizing the mayor and council "to

create street improvement districts for the purpose of improving all streets," and the general language used in regard to the special assessments clearly applies to property within the district, which by the preceding clause is created for that very purpose. No taxes for such purpose can be levied upon property in excess of benefits to that property. Without such limitation the statute would be unconstitutional, and the purpose of this clause is to restrict the amount of the levy to the special benefits received by the property taxed. It was unnecessary to repeat in the second clause of the section what was so plainly said in the first, that the district was created for the purpose of improving the streets, which necessarily included the formal proceedings and providing the means for such improvement. That clause of the second subdivision of section 108 of the act, which provides that before improvements are ordered in any district there must be a petition of the "record owners of a majority of the taxable foot frontage of property upon such street or alley to be improved within said district," is cited. We are asked to construe this clause of the statute as though it read: "Record owners of a majority of the frontage of lots or tracts abutting upon the improvement." It would give no meaning whatever to the words, "taxable foot frontage of property upon such street or alley to be improved within said district." It is not the object of this clause of the statute to limit the territory that shall be embraced in the improvement district, nor to change the law as to the purposes for which an improvement district may be formed. The object is to afford a method of determining when the proper number of property owners within the district have signed the petition.

Section 177 of the act provides: "All special assessments to cover the cost of any public improvements herein authorized shall be levied and assessed on all lots, parts of lots, lands and real estate specially benefited (by) such improvement, or (and) within the district created for the purpose of making such improvement." It is con-

tended that this means that property can be assessed if either of two things exist; that is, if it is specially benefited, *or* if it is within the improvement district, but such construction would make the section unconstitutional. No property can be assessed unless it is specially benefited. Therefore this language cannot be given such an extended meaning. It is the duty of the court to construe the act of the legislature so as to uphold it rather than to give such meaning to the words as to render the act unconstitutional. When this section is construed together with the remainder of the act, it is manifest that the legislature intended that property within the district specially benefited should be assessed for the improvement. Sections 186 and 198, above quoted, plainly show that it was the purpose and meaning of the legislature to provide for the creation of an improvement district which should include all property to be assessed, and that the owners of all property to be assessed for the improvement shall have a "voice in the determination of how, when and where the improvement shall be made," as is said in *Batty v. City of Hastings, supra,* and substantially also in many other decisions.

It is suggested that the mayor and council might, by a subsequent ordinance, create a "taxing district" which would include property benefited but not included in the improvement district required by statute. In all the different states it is required when work of this kind is to be done that a district shall be formed. This district is sometimes called a paving district, a sewer district, a taxing district, and assessment district, or an improvement district. The latter is a general word and covers all of the purposes for which the district is formed. It makes no difference which one of these several names is given to the district. Our statute requires that the district be formed the first thing that the council does, and calls it the improvement district, and says that it is for the purpose of "improving all streets * * * by paving," etc. In the index to Page and Jones on Taxation by Assess-

ment we find the title "Improvement District," and a reference to section 249 for a discussion of the power of an improvement district. Section 249 refers to the district that the law requires to be formed several times, and in this same section it names it "a special assessment district" and "an assessment district" and "the improvement district" and again "an assessment district." These authors used the names interchangeably. The same authors say in section 874: "The power of fixing an assessment district is frequently conferred by statute upon the council of the public corporation, by which the improvement is to be constructed, or some body corresponding thereto. Under such statutes the assessment district must be fixed by ordinance. * * * A general description of the property embraced in an assessment district is sufficient. It has been said that any description which would be sufficiently certain in a conveyance is sufficiently certain as a description of an assessment district." And in section 833: "If the statute requires the resolution to specify the exterior boundaries of the district benefited, an ordinance which describes the exterior boundaries as 'the land fronting upon a given described street between two specified cross-streets' is insufficient, as it does not show the depth of the improvement district from such street. Whether the resolution which fixes the boundaries of the assessment district is in compliance with statute is a state question, and not a federal question." In *Whitney v. Common Council of Village of Hudson,* 37 N. W. 184 (69 Mich. 189), the supreme court of Michigan states the law to be: "Under a village charter (Sess. Laws Mich. 1867, Act No. 266, sec. 38) providing that the council may levy a tax for paving streets upon such premises as in their opinion are benefited thereby, a resolution of the council to pave part of a street, declaring that 'the real estate abutting or adjoining said street * * * shall constitute the taxation district for such purpose' is illegal, as not specifying a definite taxing district." And in *Boehme v. City of Monroe,* 106 Mich. 401, the court ad-

hered to this decision, and in the first paragraph of the syllabus shows that it is necessary that the resolution to pave a street shall designate the paving district. Can such a district be formed by mere implication by simply levying a tax upon a certain lot or lots?

Our statute requires the council to form an improvement district, as before stated, but it nowhere requires or authorizes them to form another district. The term "taxing district" is not named in the statute. Section 175 provides that the council shall sit as a board of equalization, and that as such board it shall "hear and determine all complaints, and shall equalize and correct such assessment" (that is, the assessment that has been reported by the proper authorities). That is all that the board of equalization can do, and then, after all corrections have been made, the council, not as a board of equalization, but "at a regular meeting thereafter," can levy such special assessments; that is, such special assessments as have been equalized by the board of equalization. This is all that the council can do, and it is impossible to find in these provisions any authority for forming any taxing district, and it would seem to be an idle thing to do, after the district which the law requires has been already formed in the commencement of the proceedings. The improvement district is the foundation of all other proceedings, and the improvement is to be paid for by issuing bonds, styled "Improvement district bonds," giving the number of the district, and by levying a tax upon the property in said district to pay the bonds. If the first assessment is set aside for irregularities a new assessment may be made upon the property *in the district.*

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

REVERSED.

REESE, C. J., took no part in the decision.

BARNES, J., dissenting.

I cannot concur in the majority opinion for the follow-

ing reasons: Subdivision 2, sec. 107, ch. 12*a*, Comp. St. 1907, which was in force and constituted a part of the Omaha charter when the improvement district in question was created, gave the mayor and council power to order a street improvement upon a petition signed by the record owners of a majority of the frontage of taxable property within the district, and contained no provision which required the signatures of the owners of nonabutting property which would utlimately be benefited thereby. It appears that the owners of the lots in question herein were not required to sign the petition, and therefore the charter gave them no right to protest against the formation of the improvement district, or to select materials to be used in making the street improvement. See subdivision 2, sec. 108 of the charter. This fact gave appellants no legal right to complain of the assessment in question, for, as was held in *Kountze v. City of Omaha*, 63 Neb. 52, it would have been competent to commit the propriety of paving the streets of Omaha to the uncontrolled discretion of the mayor and council in all cases; and in *Dennison v. City of Kansas*, 95 Mo. 416, it was said: "The legislature can confer on a city council the power to improve the streets of the city at the cost of the property owners without requiring a petition therefor."

It appears from the record that the questions actually litigated and determined by the district court are as follows: Did the board of equalization and assessments have the power to create a taxing district embracing lots not actually abutting upon the street improvement? And could such nonabutting lots be taxed to pay for the improvement to the extent and amount to which they were benefited thereby? Chapter 12*a*, Comp. St. 1907, commonly called the Omaha charter, so far as it relates to the foregoing questions, reads as follows: Section 177. "All special assessments to cover the cost of any public improvements herein authorized shall be levied and assessed on all lots, parts of lots, lands and real estate specially benefited by such improvement, or within the district

created for the purpose of making such improvement, to the extent of the benefits to such lots, parts of lots, lands and real estate by reason of such improvements, such benefits to be determined by the council sitting as a board of equalization. Where they shall find such benefits to be equal and uniform, such assessment may be according to the foot frontage, and may be prorated and scaled back from the line of such improvement according to such rules as the board of equalization shall consider fair and equitable." It is provided by section 180: "In cases where paving has been already done in whole or in part, or contracts have been let therefor under existing laws, in case the lots and real estate abutting upon that part of the street ordered paved as shown upon any such plat or map, are not of uniform depth as well as in all cases where, in the discretion of the board of equalization, it is just and proper so to do, the said board shall have the right and authority to fix and determine the depth to which real estate shall be charged and assessed with the cost of such improvement, without regard to the line of such lots, the same to be fixed and determined upon the basis of benefits accruing to the real estate by reason of such improvement. The provisions of this section in regard to the depth to which real estate may be charged and assessed shall apply to all special assessments except assessments for sidewalks."

The record discloses that the board of equalization found that the lots situated upon each side of the street improvement in question to the center of each adjoining block were benefited by the improvement, and therefore, to that extent, included the nonabutting lots owned by the appellants within the assessment district and assessed them for actual benefits. By section 6, art. IX of the constitution, it is provided: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited." Therefore, it seems clear that the foregoing provisions of the Omaha

charter are not unconstitutional, and from a reading of those sections it is not to be doubted that the board of equalization, in creating the taxing district, and in making the assessments complained of, did not exceed its jurisdiction. It apears that the district court found that the property of appellants was especially benefited to the extent of the assessments of which they complain. That question having been litigated and determined by the district court in favor of the city, and there being sufficient evidence in the record to sustain the finding, a court of review should not set it aside.

The majority opinion holds that the provisions of sections 186 and 198 of the charter, which authorize a relevy of special assessments, and provide for the issuance of bonds to pay for street improvements, require us to place such a construction upon the charter as will prohibit the board of equalization and assessments from assessing property benefited by the improvement to pay for such benefits unless it is included in the ordinance passed and approved by the mayor and city council creating what is called an improvement district. In answer to this declaration it may be said that, at the request of the inhabitants of the city of Omaha, the legislature, in the year 1905, enacted a law creating charters for cities of the metropolitan class; and since that time the authorities of the city of Omaha have paved and improved many miles of its streets, and to pay the costs of such improvements the property actually benefited thereby has been assessed to the extent of such benefits. Unless compelled to do so, we should not reverse the judgment of the district court and adopt a different construction of the charter provisions. To do so will result in great hardship and confusion, will encourage litigation, and the courts will soon be congested with suits by which the many will seek to compel the few to bear the whole burden of paying for necessary public improvements.

In Page and Jones on Taxation by Assessment a clear distinction is made between what is called an improvement

district and a taxing district. An improvement district as such is scarcely mentioned at all in that work, while the whole treatise deals almost exclusively with what is called the taxing district. In section 554 of the work it is said: "If, on the other hand, the legislature has given to commissioners specially appointed for that purpose, power to determine what property is benefited and thus to lay out the assessment district, the city council cannot, by restricting the district to the property contiguous to the improvement, prevent the commissioners from including property benefited by the improvement but not contiguous thereto." It must be observed that the Omaha charter confers the power upon the city council to order the improvement, but withholds the authority from that body to create the taxing district. It confers the power to determine what property is benefited and to assess the same to pay for the improvement upon the board of equalization and assessments. Under a like charter, in *In re Westlake Avenue,* 82 Pac. 279 (40 Wash. 144) it was said: "Under laws 1893, p. 189, ch. 84, providing that all property benefited by a local improvement shall be assessed by commissioners appointed by the court, and imposing on the commissioners the duty to examine the locality where the improvement is proposed to be made and the parcels that will be benefited, the commissioners are authorized to determine what property is benefited, and the court appointing them cannot restrict the assessment to the property embraced in the district prescribed by the ordinance providing for the improvement, or set aside an assessment roll made by the commissioners because they assessed property not within the district created by the ordinance." This rule was also approved in *Bigelow v. City of Chicago,* 90 Ill. 49 (see p. 55); *People v. City of Buffalo,* 147 N. Y. 675; *Spencer v. Merchant,* 100 N. Y. 585. In *People v. City of Buffalo, supra,* it was said: "Section 143 provides that the common council shall estimate and fix the amount of money to be raised by local assessment. There is no provision that the common council shall fix the assessment

district. In the absence of any indication that the assessors or other body should possess this power, it might very well be that it would reside with the common council under the grant of legislative power. But section 145 declares that the board of assessors shall assess the amount ordered to be assessed for local improvements upon the parcels of land benefited by the work, act or improvement in proportion to such benefit. The common council under the charter are to determine what local improvements shall be made and the amount to be locally assessed therefor. But the clear implication from section 145, in the absence of any other charter provision on the subject, is that the assessors are both to fix the district of assessment and distribute the tax." From the foregoing it seems clear that the judgment of the district court in construing the sections of the charter in question is supported both by principle and precedent.

It has also been suggested that the form of the bond described in section 198 prevents us from approving the construction adopted by the city authorities and the trial court. Upon this point it may be said that it is the duty of the board of equalization and assessments to determine what property is actually benefited by the improvement, and the final determination of that question fixes the boundaries of the improvement or taxing district; and in case it is deemed best to issue bonds to reimburse the city for the cost of the improvement instead of dividing the tax into ten annual payments, then the board should designate the taxing district by the number adopted at the time the improvement is ordered. This would comply with the requirements of the charter and avoid any confusion or misunderstanding. Upon a careful review of the authorities and of the charter provisions, I am of opinion that the construction given by the district court to those provisions is a reasonable one, and ought to be sustained.

Finally, it appears that the appellants have had their day in court; that the questions presented by them have been fairly litigated and determined; and it follows that

the payment of their just proportion of the cost of the street improvement according to the special benefits accruing to their lots does not deprive them of their property without due process of law. *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 550, 53 Am. St Rep. 557. For the foregoing reasons, the judgment of the district court should be affirmed.

ROSE, J., concurs in this dissent.

IN RE ESTATE OF MARIE GAMBLE.

EDWARD GAMBLE, APPELLEE, V. ESTATE OF MARIE GAMBLE, APPELLANT.

FILED APRIL 8, 1912. No. 16,651.

1. **Executors and Administrators:** CLAIMS AGAINST ESTATE: APPEAL. Upon appeal from the allowance by the county court of a claim against the estate of a deceased person, the district court tries the case *de novo*, and must determine whether the claim was filed in time in the county court and whether an amendment allowed by the county court was such a departure from the original claim as amounts to filing a new and different claim after the time limited therefor had expired.

2. ———: ———: AMENDMENT. A claim filed in county court against the estate of a decedent alleged that the deceased, being liable upon two promissory notes, requested the claimant to pay the balance due thereon and agreed to repay him the amount so paid, and that he made the payment accordingly, and asked that the amount with interest be allowed against the estate. Claimant afterward asked leave to file an amended claim, which was in substance the same as the original claim, except that it alleged that upon the said payment by him the payee delivered the notes to the claimant, and that claimant then became and still is the holder of the notes and entitled to the money due thereon. *Held*, That the amendment was justly allowed.

3. **Bills and Notes:** PAYMENT: EVIDENCE. When the balance of a promissory note is received by the payee from one who is a stranger to the paper, the fact that the payee marked the note

"paid" is not conclusive; it is competent to prove by oral evidence that the person making the payment intended to hold the note as a liability of the maker, and that the note was so received by him at the time of making the payment, and without knowledge on his part at the time that the word "paid" had been written thereon.

4. **Pleading**: DEFENSE OF COVERTURE. Coverture is an affirmative defense and must be pleaded and proved or it is waived.

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

Henry M. Kidder, for appellant.

George L. Loomis and *H. C. Maynard, contra.*

SEDGWICK, J.

The county court of Dodge county allowed a claim of Edward Gamble against the estate of Marie Gamble, his deceased wife. Upon appeal to the district court for that county the cause was tried to a jury, and the court instructed the jury to find a verdict in favor of the claimant, Edward Gamble, and an appeal has been taken to this court on behalf of the estate.

1. It appears from the record that the claim of Edward Gamble first filed alleged that Marie Gamble made and delivered to one Nicholas H. Schreiner two promissory notes, one for $150 and the other for $1,018.50, and that afterwards, the said notes having been paid only in part, this claimant, at the request of Marie Gamble, advanced and turned over in payment of the balance of the remaining note certain live stock of the value of $300, and that the said note was thereupon turned over by the payee therein to this claimant, and "that said Marie Gamble was to pay to said Edward Gamble said amount so paid by him, to wit, about $300, with interest thereon according to the tenor of said notes," and asked that his claim for $300 and interest be allowed against the estate. Some time afterwards, the county court having heard evidence

upon this claim and having taken the matter under advisement, the claimant asked to file "an amended petition and claim instanter." This amended claim described the notes as before, and alleged that they were secured by a mortgage, and that the mortgaged property had been taken and the value allowed upon the notes, and that there was still a payment due upon one of the notes of $300, which amount the claimant, at the request of Marie Gamble, advanced of his own money and paid to the payee of the note, who thereupon turned over and delivered said notes to this claimant, and that the claimant then became and still is the owner and holder of the said promissory notes, with interest thereon according to the terms of said notes. It appears that when this amended claim was offered an objection was made, among other things: "That the said amended petition and complaint does not state any new fact or allegation constituting a cause of action against the estate." The objection was overruled and the claim filed, and afterwards a motion was made to strike the amended claim from the files, "for the reason that said amended petition raises a new cause of action not alleged in the original claim filed herein." This objection that the amended claim raises a new cause of action becomes material in this case because, at the time when the amendment was filed, the time for filing claims against this estate had passed and claims not then filed were barred. Upon appeal to the district court this objection was renewed, and it was there insisted in behalf of the claimant that this question could not be raised upon appeal, and that alleged errors of the county court in the hearing of claims against an estate could only be reviewed in the district court upon petition in error. We think this objection was not well taken upon the part of the claimant. The record from the county court necessarily showed the nature of the original claim filed, and of the amendment and the date of filing the amendment. If the alleged amendment constituted a new claim and not an amendment of the old one, the district court must have found that it was barred, not having

been filed in time, and this question could be raised and determined upon appeal from the county court.

2. It will be noticed that the only change introduced by the amendment was to the effect that, when Mr. Gamble paid the amount due upon this note at the request of Mrs. Gamble, he did so expecting to hold the note himself as evidence, whereas in the original claim the allegation was that she agreed to repay him the amount which he paid for the note according to the tenor of the note. The identity of the transaction is preserved. The liability of Mrs. Gamble to this claimant arose from the fact that Mr. Gamble paid the balance of the note and so became substituted for the original payee, and the allegation that he intended to and did take the note and hold it as evidence of the existing liability does not change the origin and basis of the claim which he makes. We think that the county court was right in allowing the amendment.

3. It is contended that the evidence shows that Mr. Gamble paid the debt as a voluntary payment and that the notes were canceled and surrendered upon that payment. The oral testimony, as contained in the bill of exceptions, is not conflicting. The question upon this point as presented in the briefs is one of law upon the construction of the facts as established by the evidence. It appears that, when the property was taken under the chattel mortgage which secured these notes, a settlement of the whole matter was made in the office of Mr. Loomis, an attorney at law, who was acting at that time solely for the mortgagee; the mortgagee and other parties interested in the matter being present. The evidence shows that when Mr. Gamble paid the balance of the notes to the mortgagee, Mr. Loomis, acting then for the mortgagee, wrote across the face of the notes: "Paid. January 23, 1904," and turned the notes over to Mr. Gamble. Mr. Gamble testified that he did not know that the notes were so marked until "after I took possession of the notes." And Mr. Loomis testified that he so marked them without the knowledge or consent of Mr. Gamble, and simply by force of habit in the interest of the

mortgagee whom he was representing. Ordinarily when one, who is not connected with or interested in negotiable papers, pays the amount thereof to the holder, the presumption is, in the absence of evidence indicating the contrary, that he becomes the holder of the paper himself, and we think that the district court was right in holding that under this evidence Mr. Gamble became the holder of this note and was entitled to present the same as a claim against this estate.

4. It is suggested that, the decedent being a married woman at the time the notes were given, her estate is not liable thereon, there being no evidence that she executed the notes with reference to her separate estate. The record does not show that any such question was raised in the county court, nor in the district court. The defense of coverture must be pleaded, and we cannot now determine that the district court was wrong upon this point.

The judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

LINCOLN GRAIN COMPANY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED APRIL 8, 1912. No. 16,972.

1. Carriers: DIVERSION OF SHIPMENT: ATTACHMENT: LIABILITY. If a carrier accepts property upon agreement to transport it to a certain destination, and diverts the shipment to a different point in another state where the property is attached upon an alleged claim against the shipper, and the shipper thereby loses the property, the carrier is liable therefor as for conversion.

2. ———: ———: ———: JUDGMENT. In such case where the foreign attachment is purely *in rem*, and no service is had upon, or appearance made by, the shipper, the finding and judgment is

binding upon the property only, and not an adjudication of the personal liability of the shipper to the attaching plaintiff.

3. ———: ———: ———: SET-OFF. It appearing from the evidence in this case that this plaintiff was not in fact indebted to the attaching creditor, the measure of damages is the value of the property at the point of shipment, and the carrier is not entitled to offset the amount realized by the attaching creditor on his alleged claim.

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

J. E. Kelby, A. R. Wells, E. C. Strode and *M. V. Beghtol,* for appellants.

John M. Stewart, contra.

SEDGWICK, J.

This plaintiff delivered to the defendant, the Chicago, Burlington & Quincy Railroad Company, at Palmyra, Nebraska, a car-load of corn, to be transported, as provided in the original bill of lading, to Louisville, Kentucky. Afterwards, at the request of the plaintiff, the bill of lading was amended by the said railroad company so as to require the corn to be transported to Nashville, Tennessee. The railroad company disregarded this change in the bill of lading and delivered the corn to St. Louis to the defendant, the Illinois Central Railroad Company, and by that company it was transported to Louisville, Kentucky, where it was attached at the suit of A. C. Schuff & Company against this plaintiff. It was agreed that the attachment proceedings were regular and that the corn was sold thereunder. This action was brought against both railroad companies to recover the value of the corn, and upon trial in the district court for Lancaster county the plaintiff recovered a judgment as prayed, and the defendants have appealed.

1. The defendants contended that there was no conversion of the corn, because the car of corn had arrived at

St. Louis and had left the hands of the Burlington Company before the original bill of lading was amended by its agent and the new shipping directions indorsed thereon. Without determining whether this would be a defense for either of the defendant companies, it is sufficient to say that we do not find the evidence in the record supporting this position, and the presumption must be that the corn was delivered by the Burlington company after the bill of lading was amended by its agent, and therefore contrary to the contract of shipment. If the corn had been shipped as agreed in the amended bill of lading, it would not have been seized as it was, and in such case it seems the defendant is liable as for a conversion. *Western & A. R. Co. v. Ohio Valley Banking & Trust Co.*, 107 Ga. 512; *Cleveland, C., C. & St. L. R. Co. v. Schaefer*, 90 N. E. (Ind. App.) 502.

2. The defendants contend that the plaintiff is bound by the Kentucky judgment, and that therefore the amount which the sale of the corn paid upon the liability of the plaintiff to Schuff & Company should have been deducted from the damages allowed the plaintiff in this action. The proceedings in Kentucky were purely *in rem*. This plaintiff was not personally served and made no appearance therein. That court therefore had jurisdiction of the property, but not of this plaintiff. The plaintiff is therefore not bound by the finding of the Kentucky court that an indebtedness existed against it in favor of the plaintiff in the attachment proceedings; and it is stipulated in this action that the president and bookkeeper of the plaintiff company "will testify that such claim is absolutely without any foundation and that the Lincoln Grain Company never did owe A. C. Schuff & Company anything upon the alleged cause of action." There was no evidence offered that any such indebtedness in fact existed. The plaintiff therefore was entitled to recover the value of the corn at the place of shipment. The defendant companies each asks in its answer and in the brief that the court determine which of the two defendant companies is liable. The trial

court did not determine this question, but rendered a judgment against both defendants. The point is not argued in the brief, and we do not find sufficient evidence in the record to enable us to determine it.

The judgment of the district court is

AFFIRMED.

WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLANT, V. CHEYENNE COUNTY ET AL., APPELLEES.

FILED APRIL 20, 1912. No. 16,992.

OPINION on motions to modify opinion reported in 90 Neb. 748. *Former opinion modified.*

PER CURIAM.

On motions for modification of the opinion. By the former opinion (90 Neb. 748) a judgment was directed in favor of the plaintiff "for the amount of its claim, less the amount of the freight bills, which by the terms of the contract, and by leave of the state railway commission, the Union Pacific Railroad Company had agreed to receipt in full as a donation" to Cheyenne county. It appears from the record that plaintiff has paid to the Union Pacific Railroad Company $1,087.14 for freight on the bridge material over that line. Cheyenne county refused to accept the goods or receive the receipted freight bills, hence the plaintiff was compelled to pay the freight. This amount, under the terms of the contract, plaintiff is entitled to receive from Cheyenne county in addition to the contract price for which judgment has already been directed.

Morrill county has also requested a modification of the opinion. Its principal complaint is that, while by the opinion Cheyenne county is compelled to pay for the

bridge, it retains all the money in the bridge fund. As the judgment is now modified Cheyenne county is required to pay $9,359.29, with interest, to plaintiff. There is a difference of about $700 between one-third of the cost of the bridge and one-third of the bridge fund on hand at the time of the division of the county. Since it is stipulated that the relative assessed valuation of the two counties was two-thirds and one-third, respectively, under the provisions of section 16, art. I, ch. 18, Comp. St. 1911, the balance remaining in the bridge fund must be divided in this proportion, and the opinion must be modified so as to allow Morrill county to recover one-third of the net amount remaining in the bridge fund after the plaintiff's judgment and costs are fully paid.

With respect to the request of Morrill county that it be relieved from the burden of paying interest, this should not be allowed. If it were not for the positive provisions of the statute referred to, we should adhere to our former opinion, since we consider that Morrill county is getting all that it is in justice, and perhaps more than it is in equity, entitled to.

Our former judgment is modified, and the cause reversed and remanded, with direction to the district court to render judgment in accordance with the former opinion, as now modified, in favor of the plaintiff and Morrill county.

FORMER OPINION MODIFIED.

NICHOLAS AEBIG, APPELLANT, V. W. M. BINSWANGER, APPELLEE.

FILED APRIL 20, 1912. No. 16,682.

1. **Appeal: CONFLICTING EVIDENCE.** Where, in a law action, the evidence is conflicting, and there is sufficient to sustain the finding made by the trier of fact, such finding will not ordinarily be molested upon appeal.

2. Sales: DELIVERY: EVIDENCE. The evidence is examined, though not set out in detail, and, considering the facts and circumstances shown, the finding that there was a delivery and surrender of possession in the sale of the property involved in the transaction is approved.

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

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

Mockett & Peterson, contra.

REESE, C. J.

This is an action by plaintiff to recover of the defendant the sum of $1,500 paid to defendant in the purchase of a saloon, its stock and fixtures, at De Witt, in Saline county. It is alleged in the petition, in substance, that plaintiff entered into the contract with defendant by which he purchased the saloon of defendant for the sum of $2,500, paying in cash $1,500 on the purchase price, the possession of the saloon to be immediately delivered to plaintiff, but that defendant failed to deliver such possession and plaintiff had been deprived of the same, and that by the failure of defendant to comply with his contract in that behalf plaintiff is entitled to recover back the money so paid as money had and received. The answer admitted the sale and the receipt of the money, but denied that plaintiff had not been placed in possession, alleging that possession was delivered at the time of the sale. The reply denied these averments of the answer. Other issues were presented by the pleadings, but, as we view the case, they need not be here set out. The cause was tried to the district court without the intervention of a jury, resulting in a general finding in favor of defendant and a judgment dismissing the action. Plaintiff appeals.

Upon the question of delivery there is a sharp conflict in the evidence. It appears that one Roonfeldt, who had

previously been in charge of the saloon, had some interest with defendant in it. Upon the completion of the sale defendant and Roonfeldt executed and delivered to plaintiff a written memorandum of the sale as follows: "De Witt, Nebraska, 12-23-1907. Sold my saloon interest to Nick Aebig my saloon at De Witt, Neb., including stock of liquors, wines, cigars, and all goods contained in the saloon building. (Signed) W. M. Binswanger. Hy. Roonfeldt." Plaintiff gave defendant a check for the $1,500, when defendant and Roonfeldt went to the bank, cashed the check, defendant paying Roonfeldt $500 previously agreed upon as due him. In the meantime plaintiff put on an apron, such as worn by bartenders, and took his position behind the bar. Defendant and Roonfeldt returned to the saloon, when Roonfeldt passed behind the counter and resumed his labors as bartender. This transaction occurred on the 23d day of December, 1907. The interest of Roonfeldt grew out of the fact that the license was in his name and he was to receive as his wages the sum of $50 a month and 25 per cent. of the profits. The cost of procuring the license and the bond was paid by defendant. It was agreed that the services of Roonfeldt should be retained until the expiration of the license the following May, defendant guaranteeing his wages until that time upon condition that he would remain sober, which he did not always do. Defendant did not reside at De Witt, and upon the completion of the transaction he left on a train which soon passed through the town. Defendant testified that the possession of the saloon was surrendered to plaintiff. This is denied by plaintiff. The district court evidently found that the delivery of possession was made, and we think the facts and circumstances shown justified the court in coming to that conclusion. It appears that Roonfeldt was a hard drinker, often intoxicated, and not overconscientious in his dealings. There is some evidence tending to prove that the next day after the sale and the receipt by him of the $500 for his interest in the saloon, he excluded plaintiff from

any control over the business of the saloon, and continued to do so from that time on, but no efficient means were adopted by plaintiff for the protection of his rights. These facts, if true, would not justify plaintiff in abandoning his purchase and suing defendant for the return of the money paid. Plaintiff was well acquainted with Roomfeldt before the transaction and knew his habits.

We see no reason why the judgment of the district court should be molested. It is therefore

AFFIRMED.

FIRST NATIONAL BANK OF SUPERIOR, APPELLEE, V. J. F. BRADSHAW ET AL., APPELLANTS.

FILED APRIL 20, 1912. No. 16,683.

Pledges: LOSS OF LIEN. In the absence of fraud or a special bailment, a pledge will be deemed to be waived or lost by the surrender of the pledged property by the pledgee.

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

J. H. Grosvenor, for appellants.

Stubbs & Stubbs, contra.

REESE, C. J.

This is an action to foreclose the lien of an alleged pledge of certain shares of the capital stock of plaintiff, which it is alleged were pledged to plaintiff to secure the payment of certain promissory notes made to plaintiff by H. N. Bradshaw in his lifetime, but who is now deceased. A trial was had to the district court, which resulted in findings in favor of plaintiff and decree for the sale of the stock. Defendants appeal.

It is not deemed necessary to set out, nor to even refer to, the pleadings, as they are in the usual form, since, as we view the case, it must be disposed of upon the facts either admitted or conclusively shown by the evidence. A brief history of the case will render it more easily understood.

On the 25th day of October, 1893, a certificate for 74.42 shares of the capital stock of plaintiff was issued to H. N. Bradshaw, and on the 26th day of July, 1894, another certificate was issued to him for 3.33 shares of stock, making in the aggregate 77.75 shares held by him. Without so deciding, we will assume that those certificates were pledged to secure certain indebtedness due plaintiff upon his promissory notes held by it. The capital stock of the bank was $100,000, represented by shares of the par or face value of $100 each. Later on it was found that the capitalization of the bank was greater than its business and condition required, and, by the consent of the comptroller of the currency, it was scaled down to $50,000, and stock issued for one-half the number of shares of the first issue. On the 10th of January, 1901, the original certificate having been canceled, a certificate for 38.875 shares was issued to H. N. Bradshaw. On the 21st day of the following February (1901) H. N. Bradshaw died, the last named certificate being in the bank, as were a number of other papers belonging to the decedent. Some time shortly after his decease the bank delivered to his widow, Mrs. E. J. Bradshaw, a number of papers belonging to the decedent, and among which was the certificate of stock of the date of January 10, 1901, on the back of which was written, "Left as security to note of H. N. B. Bo (to?) Bank. C. E. A." (C. E. A. are the initial letters of C. E. Adams, the cashier of the bank. There was no indorsement or transfer by H. N. Bradshaw.) The certificate was retained by Mrs. Bradshaw in her possession until the 2d day of January, 1906, nearly five years, and during which time the surplus of dividends, after the payment of interest upon the notes of H. N. Bradshaw, was paid to

her and by her distributed to the heirs of his estate. On the said 2d day of January, at the suggestion of the bank officers, she surrendered the certificate in her possession to the bank, and it was indorsed, "Canceled by reissue to E. J. Bradshaw, No. 209. 1-2-06," and a certificate was issued to her, in her name, for an equal number of shares. On the 5th day of January, 1906, that certificate was assigned by her to "the estate of H. N. Bradshaw," the assignment being witnessed by C. E. Adams, the then president of the bank, and soon thereafter she delivered the certificate to J. F. Bradshaw, the administrator of the estate of H. N. Bradshaw, deceased, and he has retained its possession ever since; it being shown that it was in his possession at the time of the trial of this cause. From the time of the delivery of the certificate to Mrs. Bradshaw, early in 1901, to the date of the trial, the certificate had never been in the possession of the bank, either actual or constructive, nor had any information been given Mrs. Bradshaw or the administrator that the bank claimed a lien upon the stock as pledgee, no demand ever having been made for its surrender, nor did either one have any knowledge that such lien or pledge was claimed, nor did the bank ever take, or cause to be taken, any steps to obtain the possession of the certificate.

It is contended by defendant that, assuming that the stock, as originally issued, had been pledged, the lien of the bank had been waived and lost by the surrender and the subsequent issues of the stock, as above outlined, with the total absence of any claim of a lien upon it. There is no intimation of fraud or deception on the part of E. J. Bradshaw, the widow of deceased. Did plaintiff waive its lien?

In *Mahoney v. Hale,* 66 Minn. 463, the supreme court of Minnesota, in discussing the law of pledge, say: "To constitute a pledge, the pledgee must take possession, and to retain it he must retain possession. An actual delivery of property capable of personal possession and a continued change of possession is essential. In case of a

pledge, the requirement of possession in the pledgee is an inexorable rule of law adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. * * * There must not only be an actual delivery, as distinguished from a mere pretense, but the change of possession must be continuing; not formal, but substantial."

In Jones, Pledges and Collateral Securities (2d ed.) sec. 40, it is said: "It is a well-settled principle that a delivery back of the possession of the thing pledged terminates the pledgee's title, unless such redelivery be for a temporary purpose only, or be to the pledger in a new character, such as special bailee, or agent"—and a large number of cases are cited in the note as sustaining the doctrine.

The rule is stated in 22 Am. & Eng. Ency. Law (2d ed.) 860, to be: "In general—The pledgee must not only obtain possession of the property pledged, but must also retain possession, and a delivery back of the property with the consent of the pledgee terminates the bailment and the pledgee's lien." The rule is well supported by the citation of authorities in the foot-note. See, also, *Casey v. Cavaroc,* 96 U. S. 467; *Walker v. Staples,* 5 Allen (Mass.) 34; *Walcott v. Keith,* 22 N. H. 196; *Black v. Bogert,* 65 N. Y. 601; *Collins v. Buck,* 63 Me. 459; *Kimball v. Hildreth,* 8 Allen (Mass.) 167; *Thompson v. Dolliver,* 132 Mass. 103; *McFarland v. Wheeler,* 26 Wend. (N. Y.) 467; *Smith v. Sasser,* 49 N. Car. 43; *Hickok v. Cowperthwait,* 122 N. Y. Supp. 78, 137 App. Div. (N. Y.) 94.

In *Harding v. Eldridge,* 186 Mass. 39, it is said: "It is uniformly held that by a contract of pledge only a special title passes to the pledgee, which depends on actual possession, while the general right of property remains in the pledgor, and in order to hold and preserve his lien there must be not only a physical delivery, where the chattel can thus be transferred, but continued possession also retained"—citing cases.

As we have seen, the certificate for the 38.875 shares was issued to H. N. Bradshaw on the 10th day of January, 1901, and remained in the bank until after his death, which occurred February 21, 1901. Soon after his death the certificate was delivered to Mrs. Bradshaw, and she retained the exclusive possession of it until about the 2d day of January, 1906, a period of nearly five years, during which time the surplus of dividends, after paying interest on the notes, was paid to her, and during which time no intimation was ever conveyed to her that a lien or pledge was claimed. On the last named date she surrendered the certificate, and one was issued to her in her name and delivered to her, which she retained for a short time, when she transferred and delivered it to the administrator of the estate of H. N. Bradshaw, who retained its possession from that time on. No demand was ever made for its possession, nor was any claim of pledge made. Under all authority this must be held to have been a waiver of any lien which might have existed during the life of Dr. Bradshaw. It is unfortunate to plaintiff that we must so hold, for, if Dr. Bradshaw owed the bank at the time of his decease, every principle of honor would require that the debt be paid, but payment cannot be enforced by this action without running counter to the great weight of authority. Payment will have to be enforced by a resort to the assets of his estate, if at all.

It follows that the decree of the district court will have to be reversed and the cause remanded for further proceedings, which is done.

REVERSED.

LETTON and SEDGWICK, JJ., not sitting.

AMANDA CARLSON ET AL., APPELLANTS, V. CITY OF SOUTH OMAHA ET AL., APPELLEES.

FILED APRIL 20, 1912. No. 16,901.

1. **Appeal:** ABSTRACTS. In preparing abstracts of cases, section 675*f* of the code and the rules of the supreme court should be consulted and followed. The substance of the transcript and bill of exceptions should be preserved, the testimony of witnesses reduced to narrative form, excluding immaterial matters, but the conclusion of counsel as to what is shown should not be stated.

2. **Municipal Corporations:** STREET IMPROVEMENTS: PAVING DISTRICTS. As shown by the only available evidence, Missouri avenue in South Omaha extends continuously throughout the whole paving district, and it does not appear that the district includes parts of three different and distinct streets.

3. ———: ———: ———: DISCRETION OF CITY COUNCIL. The fact that the street to be paved is of different levels does not present a question for decision by the courts. Streets of considerable length are seldom of the same level throughout, and the propriety of or necessity for their pavement is for the discretion and judgment of the tribunal authorized by law to provide for the improvement.

4. ———: ———: ———: SUFFICIENCY OF ORDINANCE. The ordinance establishing a paving district provided that the district should include all the territory on each side of the street named and back to the middle of the block on each side thereof. The record showing that the land on either side of the street was platted into blocks throughout the whole length of the district, it is *held* that the ordinance, under the South Omaha charter, though not skilfully drawn, is sufficiently specific.

5. ———: ———: ESTIMATE OF COST. The estimate of the total cost of paving required by statute to be presented to the council by the city engineer and which was submitted by him is set out in the opinion, and *held* sufficient, the same being approved and acted upon by the council.

6. ———: ———: REGULARITY OF PROCEEDINGS. The fact that, after a public improvement is legally ordered and partly constructed under a contract, a new contract for the remainder of the work is entered into cannot affect the legality of the first steps taken by which the improvement was authorized and required.

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

E. T. Farnsworth and *E. R. Leigh,* for appellants.

S. L. Winters and *H. C. Murphy, contra.*

REESE, C. J.

This is an action to cancel special assessments levied to cover the cost of paving Missouri avenue in the city of South Omaha. The cause was tried to the court and resulted in a finding and judgment in favor of the defendants. Plaintiffs appeal.

The abstract is quite imperfect and does not comply with any rule of the court, nor with the statute. It is provided in section 675*f* of the code, that the appellant shall prepare a printed abstract of the transcript of the record and bill of exceptions in which the substance of the transcript and bill of exceptions only shall be stated, and that the abstract, when filed, shall be presumed to contain the whole record, unless the correctness or sufficiency be denied by the opposite party, and in which case the denying party may file a supplemental abstract. No such supplemental abstract has been filed and the presumption provided by the statute prevails. However, the abstract filed is clearly not complete, as it contains no condensed statement of the contents of the transcript and evidence as required by rule 16 (89 Neb. vii) of this court, but rather the conclusion of counsel as to what is shown, without any reference to the page of the record where the testimony or exhibits may be found, with perhaps two exceptions referring to exhibits. This limits our inquiry to such propositions, but which are the vital questions involved.

It is said in the abstract that "the chief grounds relied upon are that ordinance No. 1,393, which defines the boundaries of the district, are vague, indefinite and uncertain; the statute under which the city paved the street

without a petition had been repealed before the final contract was executed; the paving district includes parts of three different and distinct streets, of different widths and different levels, the lots on Missouri avenue being above grade and those on L street or West Missouri avenue being 60 feet below grade and having no value; Missouri avenue is 60 feet wide and L street is 80 feet wide," etc.

As there is no abstract of the oral testimony, we are limited to the map or plat of Missouri avenue, which is sufficiently referred to, and by it we find that the avenue extends the whole distance of the paving district from Thirteenth to Twenty-fourth streets, and we can find no reference to L street or West Missouri avenue. It does not appear, therefore, that "the paving district includes parts of three different and distinct streets." What the rule would be if that were shown we need not inquire. The fact that the street varies in width is not deemed material, if true, as it is not contended that there is a variance in width of the paving. It is shown by the map that Missouri avenue extends westward from Thirteenth street to Twentieth street where it "buts" against about the middle of block 123, and is then deflected southward to the south side of the block and is continued to the westward. Since this is shown to constitute a part of the avenue, we may presume that such is the fact. The claim that the avenue is of different levels cannot be material, since it is seldom that a street of any considerable length can be found of the same level throughout, and the question of the propriety of paving streets, whether of the same or different levels, must necessarily be left to the judgment and discretion of the council and those interested where petitions are necessary. No petition was required in this case.

As said in the abstract, the chief ground relied upon for relief is that ordinance No. 1,393, which defines the boundaries of the district, is vague, indefinite and uncertain. The ordinance, omitting the formal parts, is as follows: "Section 1. That improvement district No. E,

being paving district number 19, be and the same is hereby created, and the limits thereof fixed and defined as follows: All that territory on each side of Missouri avenue from the east line of Twenty-fourth street to the east line of Thirteenth street, and back to the middle of the block on each side of said portion of said avenue." Passed July 31, 1905, and approved August 1, 1905. The exhibit shows that the ground is platted into lots and blocks on each side of the avenue throughout its entire length, the blocks being of the same size along its border, with the exception of block 2 on the north and block 3 on the south at the extreme eastern end and abutting on Thirteenth street, which are somewhat smaller. Sublot 5 of lot 10 is the same size of the other blocks, but is not all subdivided into lots, so that there are "blocks" on either side of the avenue the whole of the distance. The ordinance specifying that the district shall extend "back to the middle of the block on each side of said portion of said avenue" would be sufficiently specific, notwithstanding the conceded fact that the ordinance might have been much more skilfully drawn. When read in the light of common understanding, the idea is clearly presented that the district extends to the middle of the adjacent and abutting blocks on each side of the avenue. This is not in conflict with our decision in *Wiese v. City of South Omaha*, 85 Neb. 844, for in that case the ordinance extended the limits of the district "to the alley," where there was no ally within the abutting blocks—nothing which could lend any aid to the ascertainment of the boundaries of the district.

The statute under which this improvement was ordered (laws 1903, ch. 17, sec. 61) provides that before such improvements may be made an estimate of the total cost thereof, together with detailed plans and specifications thereof, shall be made by the city engineer and submitted to the council, and, if approved, shall be returned to the engineer and kept by him subject to public inspection, and the work shall conform substantially therewith, and no

contract shall exceed such estimates. The estimate of cost as made by the engineer is set out in the abstract and is, "19,800 sq. yds. of paving at $2.10, $41,580; 8,000 lineal feet of curbing at 45c, $3,600; 5,000 cubic yds. of excavation at 25c, $1,250; total $46,430." Signed by the engineer. This appears to have been a sufficient compliance with the statute as to the estimate of cost. There is no sufficient showing in the abstract as to the furnishing or failing to furnish detailed plans and specifications of the work, and that question is not before us.

The ordinance defining the boundaries of the district was passed July 31, 1905. The abstract does not show when the estimate of the cost of the improvement was presented to the council. It must be presumed, in the absence of proof to the contrary, that all requirements of the law were complied with and the authority of the city to cause the paving to be done was fixed by the ordinance and the steps then taken. The fact that after a part of the paving had been done a new contract was entered into with the contractor could make no difference.

Some questions are presented by the briefs which we cannot notice for the reason that they do not arise from the record before us. All presumptions are in favor of the correctness of the judgment.

The judgment of the district court is

AFFIRMED.

CHARLES LUKEHART V. STATE OF NEBRASKA.

FILED APRIL 20, 1912. No. 17,444.

1. **Criminal Law:** INSTRUCTIONS: REVIEW. "The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial." *Lackey v. State*, 56 Neb. 298.

2. ———: ———: ———. Defendant was on trial charged with receiving stolen property knowing it to have been stolen. On the trial the court gave an instruction defining the crime of larceny. *Held*, no error.

3. ———: WITNESSES: IMPEACHMENT: REVIEW. A witness was called on the part of the defense in a trial, and against whom a prosecution was pending for stealing the property alleged to have been unlawfully received by the defendant. He denied the theft. On cross-examination he was asked if prior to the larceny he had not stated to another party, in the absence of defendant, that if stolen harness was brought to him he could secrete and dispose of it without detection. He denied the statement. On rebuttal the state was allowed to call the party to whom the statement was alleged to have been made, and he testified to the statement. The evidence was admitted for the purpose of impeaching the witness who denied making the statement. *Held*, if erroneous, it was without prejudice to the defendant.

4. New Trial: NEWLY DISCOVERED EVIDENCE: REVIEW. Where one of the grounds for a motion for a new trial was newly discovered evidence, and the motion was submitted on conflicting affidavits, the decision of the trial court thereon will not be reversed unless manifestly wrong.

5. Trial: QUESTIONS FOR JURY. Questions of fact on conflicting testimony are for the solution of the trial jury.

ERROR to the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed.*

Thomas L. Sloan and *Herman Freese*, for plaintiff in error.

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

REESE, C. J.

This is a proceeding in error by plaintiff in error, whom for convenience will hereafter be referred to as defendant, to reverse the judgment of the district court for Thurston county, by which he was adjudged guilty of having stolen property of the value of $35.50. The county attorney filed an information in the district court consisting of two

counts: The first, charging defendant with having stolen the property; the second, for receiving and buying the same knowing it to have been stolen. At the commencement of the trial the county attorney dismissed the prosecution as to the first count, and defendant was placed upon trial on the second count alone, which charged him with receiving and buying a set of harness of the value of $50, the personal property of John Summers, then and there lately stolen from the said Summers, the said defendant well knowing the property to have been stolen. The jury having returned a verdict of guilty and finding the value of the property to be $35.50, the defendant was sentenced to confinement in the penitentiary for the indeterminate term of from one to seven years.

Complaint is made of the action of the court in the giving of the sixteenth instruction, given by the court upon its own motion. An examination of the motion for a new trial, filed in the district court, discloses the fact that the giving of this instruction was not assigned as one of the grounds of the motion, and by the well-known rule of practice we are precluded from discussing it. *Lackey v. State,* 56 Neb. 298, and cases there cited. Instruction numbered 15 is complained of, but we find no reference to it in the motion for new trial, and it need not be noticed.

Complaint is made of the giving of instruction numbered 8. This instruction defines the crime of larceny. It is insisted that the giving of the instruction was prejudicially erroneous as the accused was not on trial for that offense. There is no objection to the correctness of the instruction as an abstract statement of the law, but it is maintained that, as defendant was not on trial for the larceny, the instruction could not be otherwise than prejudicial. The defendant was on trial for receiving stolen property. Whether the instruction was essential or not, it seems clear that it could work no prejudice to the accused. In order to find defendant guilty, it was necessary that the jury determine from the evidence that a larceny of that

property had been committed. It seems proper that they should be informed of what that offense consisted. The instruction consisted of a simple definition of larceny without any reference to the question then being tried. It was permissible for the court to inform the jury of what the crime consisted in order that they could pass upon the question of defendant's guilt or innocence intelligently.

Objection is made to the ruling of the court on an objection to the testimony of one Albert Laughlin, who was called by the state in rebuttal. A prosecution was pending against Charles Lambert for stealing the harness in dispute. He was called as a witness for the defendant and denied having stolen the property. On his cross-examination he was asked if at a certain time when he and Laughlin were on the road toward Homer he did not say in substance, in the absence of defendant, that if stolen harnesses were brought to him he could dispose of them without danger of detection or apprehension. He denied the conversation *in toto*, and also denied ever being in Laughlin's company on the road named. In rebuttal Laughlin was permitted, over the objection of defendant, to testify to the conversation, the court permitting him to do so on the ground that it tended to impeach the testimony of Lambert. It is not clear to the writer that the evidence should have been admitted in the trial of this defendant, however competent it might be in the prosecution against Lambert. But be that as it may, we are unable to see how the ruling of the court could work any prejudice to defendant. We may assume that the court erred in overruling the objection, and yet the error would not call for a reversal of the judgment if not prejudicial. We are unable to see how his rights could be prejudiced by the admission of the testimony referred to.

One of the grounds contained in the motion for a new trial was that of newly discovered evidence. This is supported by two affidavits, and is to the effect that after the close of the trial in this case the affiants J. E. Beam and Rolland L. Burke were in the county jail where Laughlin

was confined when he was asked why he had testified falsely against defendant, and his answer was that he had "gotten into trouble himself and he was almost crazy to get out of it, and he had to do something, and they had promised to let him go if he would help them to stick these two fellows (Lambert and defendant). Said Laughlin expressly admitted that he had sworn falsely at some one else's request, but did not mention who." The statement attributed to Laughlin is denied by him in the most positive terms in an affidavit. An affidavit was filed by the county attorney showing that Burke had been convicted of a felony, and was confined in the county jail awaiting his commitment to the penitentiary at the time he claimed the statements were made by Laughlin, and had previously been confined in penitentiaries of other states. It will thus be seen that the evidence was conflicting, and at least two of the affiants had been before the court on trial for felonies and convicted. This conflict was for solution by the court, and we cannot say that the finding and decision were wrong. *Russell v. State,* 66 Neb. 497; *Hill v. State,* 42 Neb. 503; *Carleton v. State,* 43 Neb. 373.

The testimony upon the trial was conflicting on many material parts of the case, and this is especially true as to the value of the property and the knowledge on the part of defendant as to it having been stolen, but these questions were submitted to the jury, and their findings thereon will have to stand.

Being unable to detect any error in the record, the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

EMILY A. JONES, APPELLANT, V. RUDOLPH KNOSP ET AL., APPELLEES.

FILED APRIL 20, 1912. No. 16,668.

1. **Judgment:** RES JUDICATA: DEFENSE OF COVERTURE. In an action against a married woman and another, as joint makers of a promissory note, which contains nothing from which it may be inferred that she is a married woman, that she signed the note as security for her husband, that she did or did not intend to thereby bind her separate estate, or that she did not directly receive the consideration therefor, if she fails to avail herself of the defense of coverture, and allows a judgment to be rendered against her as such joint maker, she is conclusively bound thereby, and is estopped to afterwards avail herself of the matters which constitute such a defense.

2. ———: ———. If she suffers her separate property to be sold on execution based on such judgment, she cannot thereafter maintain an action in equity to set aside a sheriff's deed to the purchaser for any reason that was available to her as a defense to the action in which the judgment was rendered.

3. ———: LIEN. A judgment of a justice of the peace, filed and indexed in the office of the clerk of the district court, is a lien upon after-acquired property, and such property is subject to the levy of an execution in satisfaction thereof.

4. ———: RES JUDICATA: PROCESS: NAMES. If process in an action is served on the person really intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or, after appearing, omits to plead the misnomer in abatement, and judgment is taken against him, he is concluded thereby, and in all future litigations he may be connected with the suit or judgment by proper averments.

5. ———: ———: ———: ———. In such a case the defendant should appear and object by motion, in the nature of a plea in abatement, to being designated by another than his true name. Failing to do so, he will be concluded by the judgment, notwithstanding the misnomer.

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

M. A. Hartigan, for appellant.

J. A. Gardiner and *John C. Stevens, contra.*

BARNES, J.

Action to set aside a sheriff's deed and quiet the title, in the plaintiff, to certain lots in the city of Hastings. The defendants had the judgment, and the plaintiff has appealed.

The evidence which was received by the trial court, over defendants' objections, shows the existence of the following facts: In the year 1901 plaintiff, a married woman, and her husband resided in the city of Hastings. The husband was engaged in the business of repairing wagons, and to carry on his trade he borrowed $100 of the defendant Norton, and gave his promissory note therefor, payable in one year from its date. Certain payments were made thereon, which reduced the indebtedness to $70. When the note became due the maker was unable to pay it, and after waiting some time Norton agreed to an extension of one year if Jones would give him a new note signed by himself and his wife. The note was executed by the plaintiff and her husband. It was not paid when it became due, and suit was brought thereon in the justice court of Adams county against the joint makers, the plaintiff being named or described in that suit as "Emma A. Jones." Personal service of summons was made on the plaintiff, and service upon her codefendant was made by leaving a copy of the summons at his usual place of residence. Both of the defendants defaulted, and a judgment was rendered against them in that action for the sum of $77.93. Shortly after the judgment was obtained it was transcripted to the district court for Adams county, and was duly filed and indexed by the clerk of that court. At that time, and for nearly a year thereafter, the plaintiff had no separate estate and no property in her own right of any kind whatsoever. Within a year after the transcript was filed the plaintiff inherited some property from her father's estate, and with it purchased the lots in question, which were conveyed to her by a deed of general warranty, in which she was described by the name of

"Emily Amanda Jones." On the 8th day of December, 1908, an execution was issued by the clerk of the district court upon the transcripted judgment and delivered to the sheriff of Adams county. It was levied upon the lots in question; they were appraised, advertised and sold, and were purchased by the defendant Knosp. In due time the sale was confirmed, and by the direction of the district court the sheriff executed a deed of the premises to the purchaser. It appears that when confirmation was applied for the mistake or discrepancy of the plaintiff's name was ascertained, and when the order of confirmation was made the court endeavored to correct this discrepancy without the service of notice of any kind upon the plaintiff. After the introduction of the evidence there was a general finding in favor of the defendants, and upon that finding this action was dismissed.

It is contended by appellant that, notwithstanding the undisputed facts above recited, the defense of coverture, which she might have successfully made in the suit upon the note, is still available to her in this collateral action; that the transcripted judgment never became a lien upon her after-acquired property, and that such property was not subject to levy and sale thereunder.

It is apparent that appellant's first contention entirely ignores the binding force and conclusiveness of the transcripted judgment which was rendered against her in the action on her promissory note. It must be observed that it was not not shown that there was anything contained in that instrument which indicated that she was a married woman, that she signed it as security for the payment of her husband's debt, that she did or did not intend to bind her separate estate, that she was not the principal maker thereof, or that she did not directly receive the consideration therefor. If any of the facts on which she bases her present contention existed, she should have appeared in that action and made her defense known to the court. If she had appeared and defended, the matters of which she now seeks to avail herself would have been

a complete defense, but having failed to thus assert her rights she is fully concluded by the judgment of that court. The rule is well settled that the doctrine of *res judicata* "applies not only to the points upon which the court was required by the parties to pronounce a judgment, but to every point which properly belonged to the subject matter of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time." *First Nat. Bank v. Gibson,* 74 Neb. 232. "A judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose." *Lowe v. Prospect Hill Cemetery Ass'n,* 75 Neb. 85. It is also well settled that a judgment by default is just as conclusive between the parties, upon all matters necessary to support the judgment, as one rendered after answer and and contest. 2 Black, Judgments (2d ed.) sec. 508; *Last Chance Mining Co. v. Tyler Mining Co.,* 157 U. S. 683.

It was contended on the hearing that the plaintiff was not served with summons in the action upon the note, and the record discloses that she testified that no summons was ever served upon her. We find, however, that her testimony was not only disputed by the record itself, but the officer who served the summons testified in this case that he was acquainted with the plaintiff, and that he actually delivered to her a copy of the summons at the time and in the manner recited in the record. It follows that this contention must fail; and, while the situation is a regrettable one, it seems to have been caused either by the neglect or ignorance of the plaintiff herself, from which we are unable to give her any relief.

It is further contended that the transcripted judgment never became a lien upon the lots in question because they were acquired by the plaintiff after its rendition, and were not subject to levy and sale thereunder. Section

477 of the code provides: "The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered. * * * All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution." It was held in *Colt v. Du Bois*, 7 Neb. 396, that the lien of a judgment attaches to land subsequently acquired. Section 561 of the code provides for filing transcripts of judgments rendered by justices of the peace in the office of the clerk of the district court. And section 562 provides: "Such judgment, if the transcript shall be filed in term time, shall have a lien on the real estate of the judgment debtor, from the day of the filing; if filed in vacation, as against the judgment debtor said judgment shall have a lien from the day of the filing, and as against subsequent judgment creditors from the first day of the next succeeding term, in the same manner and to the same extent as if the judgment had been rendered in the district court." Therefore, it cannot be said that the transcripted judgment was not a lien upon the lots in question, for in any event, upon levy of the execution, it became a lien thereon, and the sale thereunder regularly and lawfully made and confirmed by the district court vested the title to plaintiff's lots in the purchaser.

It was also contended that, by reason of the fact that plaintiff was designated in the transcripted judgment as "Emma A. Jones" instead of "Emily Amanda Jones," the purchaser at the execution sale obtained no title as against her to the lots in question. In 1 Black, Judgments (2d ed.) sec. 213, it is said: "It is a well established rule that if process in an action is served upon the person really intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or, after appearing, omits to plead the misnomer in abatement, and judgment is taken against him, he is concluded thereby, and in all future litigation he may be

connected with the suit or judgment by proper averments." In *Kuhn v. Kilmer,* 16 Neb. 699, it was said: "Where a judgment is rendered and execution issued against Rosina Coons, it is not sufficient reason for setting aside a sale of real estate made on such execution that the right name of the defendant is shown to be Rosina Kuhn." In *Davis v. Jennings,* 78 Neb. 462, a case of misnomer, it was held, where the right defendant was actually served with a summons, that the misnomer was no ground for quashing the writ or service; that in such a case the defendant should appear and object by motion in the nature of a plea in abatement to being designated by any other than his true name. We are therefore of opinion that defendants' contention upon this point is not well founded.

Finally, we may say that we have not overlooked *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Kocher v. Cornell,* 59 Neb. 315, and other cases of a like nature. But it must be observed that in those cases the defense of coverture was interposed in due time and before final judgment.

From the foregoing it seems clear that the judgment of the district court was right, and is therefore

AFFIRMED.

LORENCE BOWERS, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED APRIL 20, 1912. No. 16,678.

1. **Negligence: PLEADING: BURDEN OF PROOF: INSTRUCTIONS.** Where a plaintiff pleads and relies upon one or more specific acts or omissions as negligence, which are denied by the defendant, and the petition contains no general allegation of negligence, the burden of proof is upon the plaintiff to establish the affirmative of that issue, and evidence of other acts of negligence may properly be excluded, and it is not error to so instruct the jury.

2. **Carriers:** INJURY TO LIVE STOCK: RIGHT OF RECOVERY. One not an owner of, and not beneficially interested in, an animal alleged to have been injured by the negligence of another, and who has no assignment of the owner's right of action, cannot recover for such injury, and an instruction to that effect is proper.

3. **Trial:** INSTRUCTIONS: FAILURE TO REQUEST. A party, in order to predicate error on a failure of the court to instruct the jury with reference to his theory of the case, must tender an instruction on such theory.

4. **Evidence** examined, and found sufficient to sustain the verdict.

APPEAL from the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Matthew Gering, for appellant.

Byron Clark and *William A. Robertson, contra.*

BARNES, J.

Action in the district court for Cass county for damages to plaintiff's live stock and household furniture alleged to have been sustained by defendant's negligence as a common carrier in transporting the property from Spencer, in Boyd county, to Cedar Creek, in Cass county, Nebraska. The defendant had the verdict and judgment, and the plaintiff has appealed.

It appears that the plaintiff chartered a box-car of the Chicago & Northwestern Railroad Company at Spencer, in which he placed his live stock, consisting of a stallion, a gelding, a pony, one cow, about 75 chickens, and some household furniture, and routed the car to Omaha, and thence over defendant's railroad to Cedar Creek; that he was furnished transportation for one person to ride in the car as a caretaker, and his son assumed that duty under the contract of shipment. It also appears, without dispute, that the caretaker rode in the way-car, and paid no attention to the shipment until it arrived at Omaha. There is a conflict of evidence as to whether the son rode in the car and cared for the shipment from that point to

Cedar Creek, or whether he rode in a passenger coach attached to the train in which the box-car was placed. It was alleged in the petition: "Said defendant did not safely carry and deliver said horses, pony, cow, cupboard, chairs, chickens and other personal property, as it had undertaken to do, but, on the contrary, conducted itself so carelessly in and about carrying and transporting the same that at its switch yards in the city of Plattsmouth, Nebraska, the defendant, its agents and servants, well knowing the contents of said car, carelessly and negligently pushed, switched and propelled said car with unnecessary and unusual violence against other cars, and so carelessly and negligently operated its locomotive, cars and train that the said horses, pony, cow and other property herein described were violently thrown upon and against said car and each other, so that, in consequence of said negligence, said Percheron stallion received injuries of which he died on the 22d day of March, 1909, and the other horse and pony injured and bruised, one dozen chickens killed, the cupboard, chairs, rocking-chair and other household furniture injured to the damage of the plaintiff in the sum of $1,186," for which the plaintiff prayed judgment. This statement was denied by the answer. The petition contained no other allegation of negligence or damage whatsoever.

It was shown by the evidence that shortly after the shipment arrived at Cedar Creek the stallion showed signs of distress and illness, from which he afterwards died. There was some evidence tending to show that the other horses and the cow were bruised to some extent; that some of the chickens died, and that the furniture was also scratched and damaged. The caretaker testified that up to the time the car reached Plattsmouth all of the shipment was uninjured, and the live stock was in good condition. He also testified that while the car was in the yards at that place it was so roughly handled that the horses and cow were thrown down, and the furniture was damaged to some extent. His last statement was flatly

contradicted by the defendant's witnesses, and the jury, by their verdict, resolved that question against the plaintiff.

The record also contains evidence from which the jury might reasonably have concluded that the illness and death of the stallion was caused by confinement in the car, lack of feed and water and want of proper attention on the part of the caretaker.

It is plaintiff's contention that the district court erred in giving the jury paragraphs 3, 9, 13 and 14 of the instructions given on his own motion. The first three instructions complained of were alike in substance, and may be summarized by quoting paragraph 9, of which complaint is made. That instruction reads as follows: "You are instructed that the plaintiff must show by a preponderance of the evidence, before he can recover, that the proximate cause of the death of the plaintiff's stallion and the damage to the other property in the car, if any there was, was the careless and negligent manner in which the defendant's agents and servants switched and handled said car and handled said property at Plattsmouth, and it is immaterial in what manner defendant handled the car at Plattsmouth, unless you believe that such negligent and careless handling at said place caused the sickness from which the stallion died, and unless the plaintiff has shown by a preponderance of the evidence that said stock and personal property was injured on account of the rough handling of the car in which it was carried while it was being shipped, which was not ordinarily incident to the handling of cars so being switched and handled by engines, your verdict will be for the defendant."

Counsel for the plaintiff concedes that the live stock in question was transported under a contract between the plaintiff and the defendant in charge of a caretaker or attendant, and that if by reason of his negligence or the natural propensities of the live stock, under the conditions in which it was surrounded, it injured itself, then

defendant would not be liable, and that, in order to recover for such injuries, the burden of proof was on the plaintiff to establish by a preponderance of the evidence the specific allegations of negligence contained in his petition. But it is argued that as to the household goods, or inanimate property, the burden was upon the defendant to prove that the injury, if any, to such property was caused either by an act of God or the public enemy. It may be conceded that, if the plaintiff's petition had contained a general allegation of negligence, this contention would have been well founded. But, as above shown, the plaintiff saw fit to confine his allegations and proof to the specific act of negligence in the handling of the car in question in the defendant's yards at Plattsmouth. He rested his whole right to recover, both as to live stock and inanimate property, upon this ground alone. He alleged his damages in a lump sum without separating the items, and therefore he is in no position to complain of instructions which conform to the issue made by the pleadings and the evidence which he offered to sustain it.

In *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726, it was said: "The burden of proof to establish the affirmative of an issue involved in an action rests upon the party alleging the facts constituting that issue, and remains there until the end." *Union P. R. Co. v. Porter*, 38 Neb. 226; *Omaha Street R. Co. v. Clair*, 39 Neb. 454. "Where a pleader relies upon one or more specific acts or omissions as negligence, then evidence of any act or omission not within some of such specifications is irrelevant." *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456.

In *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166, it was said: "In an action to recover damages from a carrier for injury sustained by live stock in transit, which are accompanied by the owner or his agents, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence." The opinion in that case makes a clear distinction between cases where the live stock is committed exclusively to the care of the

common carrier, and where it is shipped under a contract by which the owner in person or by his employees accompanies the stock for the purpose of caring for it during transit. It was there said: "We think these cases establish the rule in this jurisdiction that, where by contract the shipper accompanies his live stock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, sustained was occasioned by the negligence of the carrier." This rule is sustained by the courts in other jurisdictions. *Hanley v. Chicago, M. & St. P. R. Co.*, 134 N. W. (Ia.) 417; *Mostcller v. Iowa C. R. Co.*, 133 N. W. (Ia.) 748.

Plaintiff admits this to be the correct rule, for in his brief he says: "As to the transaction which took place in the yards at Plattsmouth, there is conflict in the evidence, and for the purpose of this appeal it must be assumed that the verdict of the jury of the nonexistence of negligence on the part of the railroad company was established." This being conceded, and the jury having found against the plaintiff upon the only ground on which he could recover under his pleadings, and the plaintiff having tendered no request for an instruction stating his present theory of the case, he is not in a position to challenge the correctness of the instructions complained of.

Error is assigned for giving instruction 14, at the request of the defendant, which reads as follows: "You are instructed not to allow any damages to plaintiff on account of the pony, in this action." An examination of the record discloses that a Mrs. Wooster, who testified for the plaintiff, stated that the pony belonged to her; that it was her personal property, and was bought by her own money; that the plaintiff had nothing to do with it in any way of ownership. There is no evidence in the record showing, or tending to show, that her claim had been assigned to, or was the property of, the plaintiff. Therefore the court did not err in giving that instruction.

A careful examination of the record convinces us that the cause was fairly tried, and the verdict of the jury is sustained by the evidence. Therefore, the judgment of the district court is

AFFIRMED.

BENJAMIN TAIT, APPELLANT, V. ROBERT B. REID, APPELLEE.

FILED APRIL 20, 1912. No. 16,681.

1. Appeal: MOTION FOR NEW TRIAL: REVIEW. When it is sought to review the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree accordingly, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. *Johnson v. Songster*, 73 Neb. 724.
2. Pleadings examined, and found sufficient to sustain the judgment of the district court.

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

William E. Shuman, for appellant.

L. E. Roach and *Crissman, Linville & Churchill, contra.*

BARNES, J.

Action in the district court for Lincoln county upon a foreign judgment aided by an attachment and garnishment.

It appears that the defendant, who formerly resided in the state of Iowa, on the 11th day of September, 1909, entered into an agreement with one Taylor of Cedar Rapids, in that state, to purchase a tract of land known

as the Taylor addition to North Platte, in Lincoln county, Nebraska, of which Taylor was the owner, for an agreed consideration of $13,000, of which defendant paid the sum of $400. Taylor retained the legal title, but agreed to convey the land to the defendant Reid upon the payment of the balance of the purchase price. By the terms of the agreement Reid was to have the right to enter upon the premises for the purpose of showing lots and making sales thereof. That on or about the 12th day of September of that year defendant and his wife removed from their home in Cedar Rapids, Iowa, to North Platte, Nebraska, to engage in the business of selling real estate; that before defendant left the state of Iowa the plaintiff had obtained a judgment against him in the courts of that state; that on or about the 2d day of February, 1910, plaintiff commenced this action upon that judgment, in the district court for Lincoln county, and obtained a writ of attachment therein, which the sheriff attempted to levy upon the real estate above described, and garnishee process was served upon the bank in North Platte, where defendant and his wife each had money on deposit. Personal service was had upon the defendant Reid, who, after entering his appearance, filed a motion to dissolve the attachment for the reason, among others, that his interest in the real estate, if any, was not subject to execution or attachment. Upon the trial of the cause the district court rendered judgment for the plaintiff, ordered the bank to pay the money in its possession into court, but dissolved the attachment so far as it related to the real estate, upon the ground, and for the reason, above stated. From that part of the judgment the plaintiff has brought the case to this court by petition in error.

In 1907 the legislature passed an act to provide for appeals to the supreme court in civil cases, and repealing the statutory provisions then existing for the prosecution of proceedings in error to the supreme court. Laws 1907, ch. 162. Since that law went into effect civil cases can only be brought to this court upon appeal. There was no

motion to dismiss the proceeding, and the defendant filed his answer within the time allowed by law. No objection was interposed by the parties, and therefore the case will be treated as though it were brought here by appeal.

An examination of the record discloses that the question here presented was tried upon its merits; that evidence was introduced in the form of affidavits and counter affidavits, together with considerable oral testimony showing or tending to show the defendant's residence, his interest, if any he had, in the real estate in question, and this evidence seems to have been preserved in the form of a bill of exceptions.

The record further discloses that the plaintiff filed no motion for a new trial, and the alleged error of which he now complains was never presented to the district court for its consideration or determination. The well-established rule in such case is that this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree accordingly, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. *Johnson v. Songster,* 73 Neb. 724; *Storey v. Burns,* 53 Neb. 535; *Holmes v. Lincoln Salt Lake Co.,* 58 Neb. 74.

An examination of the pleadings and affidavit for attachment satisfies us that they are sufficient to support the decision of the trial court and sustain the findings and judgment appealed from.

Therefore, the judgment of the district court is

AFFIRMED.

JAMES WHELAN, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

FILED APRIL 20, 1912. No. 17,007.

1. **Appeal:** INSTRUCTIONS. "It is not error for the court to instruct a a jury as to the legal significance of uncontradicted evidence or admitted facts." *Oelke v. Theis*, 70 Neb. 465.
2. ———: ———. Error cannot be predicated on a part of a paragraph of an instruction when the paragraph as a whole correctly states the law.
3. **Adverse Possession:** TITLE TO STREETS. The effect of chapter 79, laws 1899, is to prevent any one from obtaining title to a part of a public street in any city or village within this state by adverse possession only since the passage of that act.

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

I. J. Dunn, George W. Cooper and *Charles L. Dundey*, for appellant.

John A. Sheean, contra.

BARNES, J.

Action to recover the value of certain real estate in the city of Omaha of which the plaintiff claimed to be the owner, and which he alleged had been wrongfully taken from him by defendants to his damage in the sum of $10,000, for which he prayed judgment. The defendants denied plaintiff's ownership, and alleged that the title to the land in controversy was in the city of Omaha; that it was a part of a regularly laid out public street of that city known as Eighth street; that the mayor and city council, by an ordinance duly passed and approved on the 19th day of March, 1907, had granted the defendant, the Union Pacific Railroad Company, the right to lay its tracks over, upon and across said Eighth street; that the defendant company, acting under such grant, entered

upon the premises and did nothing other than was necessary to prepare the property for its use in operating its railroad across and along said street. Plaintiff, by his reply, denied the allegations of the answer, and upon the issues thus joined the cause was tried to a jury in the district court for Douglas county, and a verdict was returned in favor of the defendants. Judgment was rendered upon the verdict, and the plaintiff has appealed.

It appears that the plaintiff, to maintain the issues on his part, introduced in evidence a contract of sale and a quitclaim deed from one Albertina Driftcorn to himself of the tract of land in question, and attempted, by oral evidence, to establish his title by adverse possession in himself and his grantor for more than ten years next before the commencement of the action.

Plaintiff's first contention is that the court erred in permitting the defendants to cross-examine the witnesses Albertina Driftcorn and her husband in relation to statements they had made at different times to various persons to the effect that plaintiff did not own the land in controversy, that it belonged to Charles Driftcorn; and also in admitting a letter in evidence written for Mrs. Driftcorn by her son to one of the defendants, in which she stated that the land was owned by Charlie Driftcorn, and warned defendant not to buy the property from the plaintiff for that reason.

It appears, without dispute, that the plaintiff had no title to the land in question other than such as he obtained from Mrs. Driftcorn; that her title, if any, was acquired by adverse possession for a period of ten years prior to July 1, 1899; and that during the pendency of this action she executed the quitclaim deed to the plaintiff in consideration of a part of his recovery, if any there should be. Therefore, her statements as to the length of time she occupied the property in controversy and her statements relative to her occupancy and ownership thereof were relevant to the main issue in the case, and this contention is not well founded.

Plaintiff alleges error for the giving of instruction No. 7, which, in effect, withdrew from the jury the issue as to whether the land in question was located in, and was a part of, Eighth street. By the plaintiff's evidence, and by the plat found in the bill of exceptions, it clearly appears that the land in controversy is situated wholly in Eighth street in the city of Omaha, and the plaintiff is bound by his own evidence. That fact was also proved by other witnesses, and we find no competent evidence in the record by which it is seriously disputed. Such being the condition of the evidence, it was proper for the trial court to withdraw that question from the consideration of the jury. "It is not error for the court to instruct a jury as to the legal significance of uncontradicted evidence or admitted facts." *Oelke v. Theis,* 70 Neb. 465; *McDonald v. Tootle-Weakley Millinery Co.,* 64 Neb. 577.

It is contended that the court erred in giving instruction No. 6. It appeared from the testimony that plaintiff's grantor erected a shack or small shed upon the land in question, and it was claimed that she thereby took possession of the entire tract. The instruction complained of was given in view of that situation. It appears, however, that only a part of the instruction is quoted in plaintiff's brief and assailed by him as erroneous. An examination of the record discloses that the instruction, as a whole, correctly states the law in such case. Error cannot be predicated on a part of an instruction when the instruction as a whole correctly states the law.

Finally, an examination of the record discloses that the main question litigated and determined in the trial court was that of adverse possession by the plaintiff's grantor, and, that question having been determined by the jury upon conflicting evidence, the verdict should not be set aside unless found to be clearly wrong. *Ohio Nat. Bank v. Gill Bros.,* 85 Neb. 718; *Landis & Schick v. Watts,* 82 Neb. 359; *Teasdale Commission Co. v. Keckler,* 85 Neb. 712.

A careful reading of the record satisfies us that the

Driftcorns unlawfully entered upon that part of Eighth street in the city of Omaha now in controversy, and attempted to obtain title thereto by some sort of a claim of adverse possession; that the plaintiff's only interest in the land was such as they attempted to convey to him. In order for the plaintiff to have any standing whatever, it was incumbent upon him to show by a preponderance of the evidence that his grantor had been in the open, notorious, exclusive and adverse possession of the tract of land in question for more than ten years prior to the time when chapter 79, laws 1899, went into effect, and it clearly appears that the evidence does not establish that fact.

It follows that the judgment of the district court was right, and it is therefore

AFFIRMED.

E. D. MCCALL, RECEIVER, APPELLEE, V. RICHARD BOWEN ET AL., APPELLANTS.

FILED APRIL 20, 1912. No. 16,922.

1. **Insurance: MUTUAL COMPANIES: INSOLVENCY: PROCEEDINGS AGAINST MEMBERS.** An action by the receiver of a mutual insurance company, organized under chapter 46, laws 1899, against the members to recover an assessment made by the court in order to pay the liabilities of the insolvent corporation may properly be brought in a court of equity in the same manner as an action by the receiver of a stock corporation against its stockholders for a like purpose, and, in such case, summons may be issued out of the county in which the action is brought to any other county in the state in which a defendant resides or may be summoned.

2. **Limitation of Actions: MUTUAL INSURANCE COMPANIES: SUIT BY RECEIVER.** Where the directors of such a corporation, before it was declared insolvent, levied certain assessments which were invalid because not made in accordance with law, and which were afterwards set aside by the district court in the proceedings to wind up the affairs of such corporation, the cause of action against members for assessments made by the receiver under

the direction of the court was not barred, although the invalid assessments were made more than four years before the latter.

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

E. P. Holmes, George L. De Lacy, J. F. Fults, J. C. McNerney, F. A. Berry, F. D. Hunker, W. L. Kirkpatrick, J. W. Purinton, E. R. Hitchcock and *Tibbets, Anderson & Baylor,* for appellants.

E. J. Clements, contra.

LETTON, J.

The Hog Raisers Mutual Insurance Company of Lincoln, Nebraska, was organized in April, 1899, under chapter 46, laws 1899. It did business from its organization until June, 1900, during which time it issued about 560 policies. Losses were sustained which were adjusted, audited and allowed by the company. On the 6th day of June, 1900, there was more than $6,000 due and unpaid on the same. Judgment was recovered by a policy holder on an unpaid loss and an execution issued thereon which was returned wholly unsatisfied. Afterwards, the creditor began an action in the district court for Lancaster county, alleging the insolvency of the company, the issuance and return of the execution, that the officers of the company have failed and neglected to enforce the statutory liability of the members, or to collect from them the necessary funds to pay the judgment and the other unpaid losses, and praying for the appointment of a receiver.

Pursuant to this application the plaintiff was appointed receiver, and was authorized to make any and all assessments necessary to pay all valid obligations existing against the company, including the costs and expenses of the receivership, and to collect the assessments by suit or otherwise. In the receivership proceedings claims to the

amount of $8,721 were presented, heard by the court, and allowed. Afterwards, the receiver, in pursuance of an order of the court, made an assessment upon each of the members for his proportionate share of the amount necessary to defray the losses and expenses. This assessment was approved, adopted and confirmed by the court, and the receiver was ordered and directed to collect the same. A number of members paid the assessment, but a large number refused to pay. This suit is brought to recover this assessment.

The petition herein alleges that the assessments as made would be sufficient to meet all claims and assessments, but that certain of the defendants have removed from the state, and others are insolvent, and that it is necessary that a court of equity take into account the losses that will necessarily result from these facts, and that, upon rendition of judgment for the full amount of the assessment, the court should determine whether execution should issue for the full liability, or whether in the first instance an execution for a part only will be adequate for the collection of the necessary amount. It is further alleged that this action is ancillary to the suit brought to wind up the affairs of the company, that separate and independent suits against each of the members would require a multiplicity of suits and excessive and unnecessary expenses, and that the plaintiff is without an adequate remedy at law. The prayer is that a several judgment be entered against each of the defendants, that the court ascertain the amount for which execution shall issue in the first instance against each defendant, and for such other relief as may be equitable.

A large number of the defendants live and were served in Lancaster county, but many are residents of other counties. Judgment was entered by default against a number of defendants. Trial was had as to the others who were served and judgments rendered against them. Eighty defendants have appealed to this court. Special appearances objecting to the jurisdiction were made and

demurrers were filed by a number of defendants residing in other counties than Lancaster upon three grounds. These demurrers for the most part set forth, first, a general demurrer; second, that the statute of limitations had run; third, that the causes of action were improperly joined. The special appearances and demurrers were overruled, but the same objections were carried forward into the answers. The answers plead certain assessments made by the directors while in control of the company, that such assessments were sufficient to cover and pay the losses sustained and the expenses incurred up to their respective dates, that the assessments now sought to be collected are to cover the same losses as the assessments made by the directors, and that the cause of action is barred by the statute of limitations.

In reply the plaintiff alleged that the assessments attempted to be made by the directors were void, and, further, that the prior assessments were by the court declared invalid and set aside and all payments made upon the same were credited to the member so paying.

The appellants argue and rely upon the propositions that the court erred in overruling the special appearances and the demurrers for the lack of jurisdiction over the person of defendants; that the cause of action is barred; and that, there being no proof of signature to the application, the evidence does not sustain the judgment.

The question as to whether the court erred in overruling the special appearances and the demurrers depends upon the question whether this is a proceeding in equity, in which all of the defendants have a common interest and where the powers of the court may be invoked to increase or diminish the amount each defendant may be compelled to contribute in order to pay the losses and expenses, or whether it is an action at law in which each defendant is entitled to a jury trial. This question must be determined from a consideration of the statute under which the corporation was organized and whereby the rights, duties and liabilities of its members were fixed. If the policy

holders in a mutual insurance company organized under the act of 1899 are, in point of fact, stockholders in the corporation, although not so denominated either in the suit or in other dealings with the company, their rights and liabilities are fixed by that relation. Under section 2 of the act all persons who take insurance in the company become and continue members during the period their insurance is in force and no longer, and it is provided that they shall sign an application obligating themselves to pay all assessments made for losses and expenses while they continue members. Section 4 provides, in substance, that each member may vote in person or by proxy for as many persons as there are directors to be elected, or to cumulate his votes or distribute them as he may think fit; section 9, that a member may be sued for failure to pay an assessment for 30 days after personal notice of the same; section 14, that any member may withdraw by giving notice of the surrender of his policy *"and paying his or her share of all unpaid claims or liabilities of such company for losses or expenses accruing while a member;"* section 15, "Bodies Corporate. Such company shall be deemed a body corporate with succession, and shall possess the usual powers and be subject to the usual duties of corporations within the limitations of this act." The liabilities of a member of a company organized under this act are fully as great as those of a stockholder in an ordinary stock corporation. It is immaterial whether the members of this body corporate be designated as members or stockholders, because during the term that their policy of insurance covers they are as essentially members of the corporate body as owners of stock in a stock corporation are of such a corporation. 2 May, Insurance (4th ed.), secs. 548, 549; *Huber v. Martin,* 127 Wis. 412; *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.,* 60 Neb. 636; *Straw & Ellsworth Mfg. Co. v. Kilbourne Boot & Shoe Co.,* 80 Minn. 125; *Morgan v. Hog Raisers Mutual Ins. Co.,* 62 Neb. 446; *Swing v. Karges Furniture Co.,* 123 Mo. App. 367.

Having reached the conclusion that the policy holders are, in their relation to the corporation and in respect to their liabilities thereto, virtually stockholders and that they occupy with respect to the unpaid assessments the same position with reference to the corporation debts that stockholders whose subscriptions are unpaid do in stock corporations, the question as to the proper method of collecting funds to pay the liabilities after the corporation is insolvent and has passed into the hands of a receiver is easily solved. In this jurisdiction it is settled law that such an action must be brought in equity by the receiver against all of the stockholders jointly. It would be a useless repetition to set forth at length the reasons for this rule. They may be found plainly set forth in the opinions in the following cases: *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593; *Emanuel v. Barnard*, 71 Neb. 756; *Brown v. Brink*, 57 Neb. 607; *Van Pelt v. Gardner*, 54 Neb. 701; *Fremont Package Mfg. Co. v. Storey*, 2 Neb. (Unof.) 325; *Reed v. Burg*, 2 Neb. (Unof.) 117.

Appellants rely upon the opinion of this court in *Burke v. Scheer*, 89 Neb. 80, but that case is not in point. The insurance company involved in the *Scheer* case was organized under a different statute which limits the liabilities of the members to the amount of the obligations expressed in the application, which provided that members could not be compelled to pay more, and also prescribed the form of action by which such liability could be enforced.

We are satisfied that a court of equity is the proper forum, and that summons may issue out of the district court in Lancaster county to any county in this state wherein one of the defendants resides or may be summoned; and that proper service therein will vest the district court for Lancaster county with jurisdiction.

It is next contended by a number of the appellants that the statute of limitations had run upon the cause of action against each of said defendants. The argument is made

that because the directors in 1899 and 1901 made certain assessments for the purpose of paying some of the same claims which were allowed by the court, and to pay which the assessment sued upon was levied, the cause of action accrued, and that to the amount of such assessment the bar of the statute has fallen. These assessments were not paid by the appellants. The record discloses that the assessments made by the directors did not comply with the requirements of the statute, in that they did not confine the liability of each member to the losses sustained during the time covered by his policy, and that, recognizing this fact, the attempt to enforce their payment was afterwards abandoned. The assessment was one which the board of directors had no power to make, and which they could not compel a member to submit to if he chose to resist the payment. Such an assessment could have no binding force, and cannot be set up as a defense against an attempt by the receiver to collect sufficient funds to pay the just debts of the corporation. *Davis v. Oshkosh Mutual Fire Ins. Co.*, 82 Wis. 488; *Great Western Telegraph Co. v. Burnham*, 79 Wis. 47; *Bowen v. Kuehn*, 79 Wis. 53; *Union Savings Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441. Moreover, upon a showing made by the receiver in the principal case and upon his application, the district court found "that all the assessments made by the defendant upon its members were irregular and not in conformity with the provision of the statute of Nebraska, and should be and the same are hereby set aside." We are of opinion that this finding and decree, having been made in a direct proceeding to which the corporation was a party, is binding upon all of its members and cannot be collaterally attacked in this ancillary proceeding. The appellants are as much bound by the proceedings of the district court in this respect as they are with respect to the allowance of claims against the corporation and to the amount of the assessments necessary to be made. We are of opinion that the statute of limitations is no bar to this proceeding in this respect.

From an examination of the pleadings and the evidence, we are satisfied that the claim that there is not sufficient proof that the defendants signed the application is untenable. We think it unnecessary to set out at length the pleadings referred to or the evidence, but it is sufficient to satisfy us that the decree of the district court in this respect is correct.

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

AFFIRMED.

PHILIP S. RINE, APPELLEE, V. JOHN A. RINE, ADMINISTRATOR, ET AL., APPELLEES; WILLIAM VON GAHLEN ET AL., APPELLANTS.

FILED APRIL 20, 1912. No. 16,673.

1. **Parties**: ACTIONS AFFECTING PERSONALTY OF DECEDENT. The executor or administrator, in actions affecting decedent's personal property in due course of administration, is the proper party to prosecute or defend, but an exception to that rule permits an heir or legatee to appear in a suit to protect his own rights, where there is collusion between parties asserting adverse interests and the legal representative of decedent.

2. **Judgment**: OPENING. Under section 82 of the code, providing that "a party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may at any time within five years after the date of the judgment or order have the same opened and be let in to defend," relief may be granted after the expiration of the five-year period, where notice was given and a sufficient showing made within the statutory time.

3. ———: ———: AMENDMENT OF AFFIDAVIT. In an application for relief under section 82 of the code, providing for the opening of a judgment within five years, the authentication of the affidavit in support of the application may be amended after the five-year period has expired, where the showing in other respects meets the statutory requirements and notice of the application was given within the time limited.

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

S. L. Geisthardt and *John W. Graham,* for appellants.

Frank Dolezal and *Smyth, Smith & Schall, contra.*

ROSE, J.

This is an application by Wilhelm von Gahlen, Wilhelm Grunewald and Heinrich Steinacker for relief under section 82 of the code, which provides: "A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may at any time within five years after the date of the judgment or order have the same opened and be let in to defend." The application was denied, and the applicants named have appealed.

The decree which applicants seek to open was rendered June 27, 1904, in a suit wherein Philip S. Rine is plaintiff. In Dodge county he owned a tract of land incumbered by mortgages aggregating $6,000. Carl Hembeck was mortgagee, but died before the debt was paid or the present suit instituted. According to the petition plaintiff sought to determine judicially the ownership of the mortgages, to make payment of the amount due thereon, and to discharge the liens on his land. The defendants were John A. Rine, administrator of the estate of Carl Hembeck, deceased, Laura Rine, Louise Steinacker, William von Gahlen, William Grunewald and the unknown heirs of Carl Hembeck, deceased. A summons was personally served on the administrator and Laura Rine, but there was no service on the other defendants except by publication in a newspaper.

In his petition plaintiff alleged: Defendants Steinacker, von Gahlen and Grunewald are respectively niece and nephews of Hembeck and are legatees under his will. Hembeck died without issue and without leaving surviving him a wife. Defendant Laura Rine is a niece of the de-

ceased wife of Hembeck. They adopted and raised her as their daughter, and she asserts that she cared for them under an agreement that after the death of both the balance due on the mortgages should belong to her. In making a testamentary disposition of his property Hembeck omitted to change his will to conform to the agreement described, and John A. Rine as administrator claims the mortgage securities. The legatees and heirs of Hembeck are interested in the mortgages. Plaintiff prayed that defendants be required to interplead and establish their respective interests, that he be permitted to pay the debt to the parties entitled thereto, and that the liens on his land be discharged. By answer the administrator admitted that he claimed the mortgages, but otherwise denied the allegations of the petition. Laura Rine answered that she entered into and performed the contract mentioned in the petition and that she was owner of the mortgages. The other defendants made default. June 27, 1904, the trial court decreed that Laura Rine was the owner of the mortgages and granted plaintiff the relief prayed by him.

June 24, 1909, defendants von Gahlen, Grunewald and Heinrich Steinacker, the latter claiming to be the sole surviving heir of defendant Louise Steinacker, who died April 22, 1899, filed a motion to vacate the decree on the ground that they had no knowledge or notice of the action or opportunity to make a defense, that no service was had upon them except by publication in a newspaper, and that five years had not elapsed since the entry of the decree. Notice of this motion was served on plaintiff and Laura Rine June 24, 1909, and on John A. Rine the next day. The notice was accompanied by affidavits of the applicants that they had no knowledge of the pendency of the suit until July 14, 1908, and that they had no opportunity to make a defense. With their motion the applicants filed an answer admitting their relationship to Carl Hembeck, deceased, but denying the allegations on which Laura Rine's claim of ownership of the mort-

gages is based, and alleging that John A. Rine had entered into a fraudulent and collusive conspiracy with her and the plaintiff to avoid the payment of the mortgages. It is further alleged in the answer that plaintiff, Philip S. Rine, is the husband of defendant Laura Rine and that they are the parents of defendant John A. Rine; that the Rines, for the purpose of defrauding the applicants out of the estate to which they are entitled under the duly probated will of Carl Hembeck, deceased, entered into a fraudulent agreement and conspiracy to have John A. Rine appointed administrator and to have Philip S. Rine bring the suit at bar for the purpose of divesting the applicants of their interests in the mortgages; that the pendency of the action was concealed from applicants for the same purpose; that under the will each of the applicants is entitled to $750 and interest, and that applicant von Gahlen is entitled to the residuary estate. There is a prayer for a dismissal of the action and for a denial of the relief demanded by defendant Laura Rine. As already stated, the hearing on the application to open the original decree resulted in a judgment denying relief to the applicants.

1. On appeal applicants argue that they complied with the statute, that the decree should have been opened, that they should have been allowed to make their defense, and that the refusal of the trial court to grant them relief was error. The first proposition argued by the Rines to sustain the action of the trial court is that applicants have no such interest in the decree of June 27, 1904, as entitles them to have it vacated. In this connection the following principle is invoked: "A party against whom a judgment or decree has been rendered, upon service by publication, must show that he has an interest in the subject of the action and that he is entitled to be heard in a defense thereto, before he can be entitled to have the decree or judgment set aside under the provisions of section 82 of the civil code." *Powell v. McDowell*, 16 Neb. 424. The doctrines relied upon to prevent a reversal are: An ex-

ecutor or administrator represents the persons to whom the personalty of decedent devolves, and in the execution of his trust his acts, in the absence of fraud or collusion, bind them. In his representative capacity he has a right to the possession and control of the personal property of the estate in course of administration, without interference from the legatees or next of kin, and during that time, in actions affecting such property, he is the proper party to prosecute or defend. 2 Woerner, American Law of Administration (2d ed.) secs. 322-324. These rules are of universal application. Cases cited in note in *Buchanan v. Buchanan,* 22 L. R. A. n. s. 454 (75 N. J. Eq. 274). The rules stated were established because they are necessary to the proper performance of the duties of executors and administrators and because they are essential to the protection and preservation of the estates of deceased persons and to the enforcement of the rights of heirs and legatees. There is, however, a recognized exception to such rules. They cannot be successfully invoked in litigation to protect a deceased person's legal representative in the betrayal of his trust, in corrupt or fraudulent conduct, in the spoilation of an estate, or in the wrongful and fraudulent refusal to prosecute or defend suits. Nor can litigants who fraudulently collude with an executor or administrator for such unlawful and dishonest purposes gain an illegal advantage or preserve the fruits of their wrongdoing by invoking the principle that such a representative alone can act in litigation for the persons to whom personalty of the decedent devolves. The exception to the general rules permits an heir or legatee to appear in a suit to protect his own rights, where there is collusion between parties asserting adverse interests and the legal representative of decedent. Cases recognizing the exception are cited in the note to which reference has been made. *Buchanan v. Buchanan,* 22 L. R. A. n. s. 454 (75 N. J. Eq. 274). In a petition alleging that two of the applicants are interested in the mortgages in controversy, plaintiff made them defendants, and by their

answer they have all brought themselves within the exception mentioned. They are clearly parties within the meaning of section 82 of the code, and as such are entitled to make a defense under the circumstances disclosed by their motion, affidavits and answer.

2. Another point urged to justify the trial court in refusing to open the judgment is that relief under section 82 of the code must be granted within five years from the rendition of the judgment. Not having presented their application to the trial court for determination until after the statutory period expired, and no relief having been granted to applicants within that time, it is argued that it was too late to open the judgment.

The statute provides: "A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may at any time within five years after the date of the judgment or order have the same opened and be let in to defend; before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense." This is clearly a remedial statute within rules formerly announced by this court and should be liberally construed with a view to suppressing the mischief at which the legislation is directed and to advancing the remedy. *Buckmaster v. McElroy,* 20 Neb. 557. The code itself requires a liberal construction of the language quoted. Code, sec. 1. Construing section 82 of the code, this court in *Savage v. Aiken,* 14 Neb. 315, said: "The right to relief by a party who has not been actually before the court, nor had actual notice of the proceeding against him, is earned by his appearing and claiming it, and doing the things required of him by the statute, within the time therein limited, and the power of the court to grant the

relief continues until it is exercised." Where notice has been given and a sufficient showing made within five years, the court may grant relief afterward. *Merriam v. Gordon,* 17 Neb. 325; *Nornborg v. Larson*, 69 Minn. 344.

3. It is further contended that the affidavits were not sufficient to make it appear to the satisfaction of the trial court that during the pendency of the action applicants had no notice; that when originally filed the affidavits were not sufficiently authenticated; that on November 6, 1909, after the time for making a showing had expired, applicants asked leave to withdraw their affidavits and to amend them by adding thereto the certificate of George Eagem Eager, Consul of United States at Barmen; that such leave was granted over the objections of the Rines; and that for these reasons the refusal of the trial court to open the judgment was correct. The position thus taken is also untenable. Within five years applicants made their motion, gave proper notice and filed their answer and affidavits. The affidavit of each contained the statements required by statute. These statements remain unchanged. The objection to the affidavits is not that any material statement is wanting, but that the evidence of affiants' having sworn to the statements before a proper officer is insufficient. In this connection it is asserted that the notary's seal does not disclose the impression required by law. The record makes it clear that the trial court, notwithstanding the objections, permitted applicants to withdraw the affidavits and to amend them in the manner stated, and that after they had been amended they were received in evidence. The original affidavits as amended are not in the bill of exceptions, and the copies do not show any infirmity in regard to the seal of the notary or in any other respect. If the amendments were properly allowed, there is nothing to show that they should not be considered in support of the application to open the decree. Were the affidavits amendable? Section 1 of the code declares that "all proceedings under it shall be liberally construed with a view to promote its object

and assist the parties in obtaining justice." Section 144 provides that "whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." In *Knox County Bank v. Doty*, 9 Ohio St. 505, it is said: "A motion to vacate a judgment for irregularity is a 'proceeding' authorized by the code, and, as such, is amendable." This rule is the same under the code of this state. When the motion of applicants was submitted to the trial court, they were entitled to relief under section 82 of the code. The refusal of the trial court to grant it cannot be justified on any ground presented on this appeal.

The judgment is therefore reversed and the cause remanded to the district court, with directions to open the original decree and to allow applicants to make their defense.

REVERSED.

M. G. SIBERT ET AL., APPELLEES, V. F. E. HOSTICK, APPELLANT.

FILED APRIL 20, 1912. No. 16,675.

1. **Appeal:** CONFLICTING EVIDENCE. On an issue of fact submitted to a jury, their finding, unless clearly wrong, is conclusive in the appellate court, where the evidence is conflicting.

2. **Landlord and Tenant:** LEASE: BREACH BY LESSOR: MEASURE OF DAMAGES. In a suit by a lessee against the lessor for breach of contract to surrender possession of the demised premises, the measure of damages is the difference between the rental value of the leased property and the rent reserved in the lease, and in addition such special damages as are shown by the petition and the proofs to have necessarily resulted from defendant's breach of agreement.

3. **Evidence:** ADMISSIONS IN PLEADING. In proving an admission against defendant by an averment of his answer, plaintiff is only required to offer so much of the pleading as is necessary to show the admission, where the severing of the admission does not

pervert its sense or change the meaning of other language of the pleader.

4. Contracts: CONSTRUCTION BY PARTIES. The interpretation which the parties to a contract put upon it may, in that respect, determine their rights under it.

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

G. H. Bailey and *H. A. Brubaker,* for appellant.

H. N. Marshall and *R. D. Sutherland, contra.*

ROSE, J.

By written contract dated August 11, 1908, defendant leased to plaintiffs a section of land in Nuckolls county from March 1, 1909, to March 1, 1914. Plaintiffs paid $200 down, and agreed to pay an annual rental of $1,200, one-half on March 1st of each year and the other half on January 1st following. The second payment was to be secured March 1st each year by a note and a mortgage on the crops. Plaintiffs allege that they tendered to defendant March 1, 1909, $400 and the stipulated note and mortgage for $600, and at the same time demanded possession of the demised premises, which was refused. This is an action to recover damages for defendant's breach of contract. The execution of the lease and the payment of $200 are admitted. The tender by plaintiffs, the refusal of possession by defendant, and an oral modification of the lease, permitting defendant to surrender possession a few days after March 1, 1909, are controverted issues. Upon trial to a jury plaintiffs recovered a verdict and judgment for $2,460, and defendant has appealed.

The first assignment of error challenges the sufficiency of the evidence to sustain the verdict. Did plaintiffs make the necessary tender and demand possession? Was possession refused? Was the lease modified by parol to permit defendant to surrender possession a few days after March 1, 1909? When the contract was executed there

were two houses on the leased section, an old one occupied by defendant and her husband, but not suitable for plaintiffs, and another which had recently been built for the use of tenants. Plaintiffs demanded houses for two families, and defendant in her lease agreed to build a new house on the premises and have it ready for occupancy March 1, 1909, and she did so. Prior to that date the husband of defendant had advertised that he would sell at auction on the premises, March 9, 1909, live stock, farm machinery, grain, hay and household goods. Between 3 and 4 o'clock in the afternoon, March 1, 1909, plaintiffs, with seven or eight wagon loads of property, accompanied by their attorney, a police officer and another witness or two, arrived at the leased premises and found that defendant and her husband were occupying the new house. At the time there were horses, cattle, hogs, feed and machinery on the farm. Plaintiffs, their attorney, and a number of witnesses stopped in front of the new house. Defendant and her husband came out, and a controversy lasting an hour or more ensued. About sundown plaintiffs left with their belongings and did not return. Defendant remained in possession. Plaintiffs had paid $200 on their lease, and had abandoned their former home. After leaving defendant's farm, they wandered from place to place in search of another. In the meantime they boarded at hotels, and herded some of their cattle. In contemplation of the lease defendant built a new house for her tenants, allowed most of the stock on her farm to be sold, rented rooms in Superior for her own occupancy, and packed most of the furniture in her old house with a view to moving it. These facts indicate that plaintiffs desired in good faith to occupy the section of land under their contract, and that defendant intended that they should do so. Under such circumstances wise counsel would ordinarily result in the performance of mutual obligations. The record is full of suggestion that litigation for breach of contract should have been avoided.

The testimony on behalf of plaintiffs tends to show that

through their attorney they tendered to defendant in front of her new house, March 1, 1909, $400 in currency and a note and mortgage for $600, in compliance with the terms of the lease; that they demanded exclusive possession; that the tender and the possession were refused; that defendant said complete possession at that time was impossible; that there was room for plaintiffs and defendant in the houses on the place; that the live stock and other property of both parties could be cared for temporarily on the premises; that a sale was advertised for March 9, and that defendant could not surrender exclusive possession before that time. The proofs adduced on behalf of defendant tend to show that no proper tender was made; that defendant, with a camping outfit, was temporarily occupying the new house for the purpose of completing it; that plaintiffs had informed her they did not expect to move March 1st; that they had orally agreed to allow her to remain until after the sale; that after plaintiffs started away, and while they were still on the premises, she moved her camping outfit from the new house and offered to surrender possession. The evidence relating to the parol modification of the lease was contradicted by plaintiffs, and they adduced proof that defendant subsequently admitted that possession had been refused because plaintiffs did not have money to pay the rent. The record is long and has been carefully considered, but a more extended reference to the testimony is deemed inadvisable. Though the evidence is conflicting, it is sufficient, when considered with all of the circumstances, to sustain a finding that defendant did not in good faith offer to surrender complete and unqualified possession according to her written contract, that its terms had not been changed, and that the tender by plaintiffs was sufficient. The jury having found in favor of plaintiffs on those issues, their verdict thereon, for the purposes of review, settles the facts adversely to defendant.

It is insisted that the trial court misstated the law to the jury in an instruction that the measure of damages,

in the event of a finding in favor of plaintiffs, is the difference between the rental value of the premises and the rent reserved in the lease, and in addition such special damages as are shown by the petition and the proofs to have necessarily resulted from defendant's breach of agreement. The general rule was thus correctly stated. *Herpolsheimer v. Christopher,* 76 Neb. 355, 9 L. R. A. n. s. 1127; *Shutt v. Lockner,* 77 Neb. 397; *Cannon v. Wilbur,* 30 Neb. 777. It is argued, however, that the measure of damages is different under a long-term lease, but in the last case cited the stipulated tenancy was for a period of four years.

It is further contended that the verdict is excessive as including a rental value not proved and improper items of special damages, but the allowance thereof is clearly sustained by the evidence under the rules stated. The $200 advanced and not returned, the rental value of the section of land in excess of the rent reserved in the lease, as shown by a number of witnesses, the expenses necessarily incurred in finding and leasing other land, and in moving from defendant's farm to another, and the loss of work for plaintiffs' teams exceed the amount of the verdict, and there is competent proof of these items.

Defendant filed a duly-verified answer, alleging: "This defendant has suffered loss by reason of 240 acres of tillable land being uncultivated and not farmed for the year 1909, the rental value of which is reasonably worth to this defendant $4 per acre, $960," and "further damage by reason of loss of rental value on 60 acres of alfalfa hog pasture, $360." Plaintiffs offered, and the trial court admitted, these averments in evidence, as admissions against defendant, and the ruling is assailed as erroneous under the principle that a fragment of a pleading should not be admitted in evidence, where the severing would pervert the sense of the admission or other language of the pleader. Plaintiffs were not required to offer the entire answer. So much as was sufficient to prove the admissions of defendant was all that was required. If the

admissions were qualified or explained by other averments, defendant was free to offer them. There was nothing in the context to require plaintiffs to offer more of the answer than the admissions quoted.

It is further contended that plaintiffs were not entitled to possession until the end of March 1, under the literal terms of the lease, and that defendant had all of the next day to vacate. A recovery by plaintiffs cannot be defeated on this ground. The record shows conclusively that both parties had construed the contract, as made, to mean that plaintiffs were entitled to possession March 1. Defendant alleges in her answer that she was willing to vacate within two hours after they came upon the premises, and that "plaintiffs gave consent that defendant might remain on said premises for a few days after March 1, 1909." This was pleaded as an oral modification of the lease, and proof was adduced by defendant to establish the fact thus alleged. In her answer she also demanded the balance of the rent for the year from March 1, 1909, "to March 1, 1910." Her testimony shows that she was willing at all times to surrender at least partial possession on the earlier date. During the controversy at that time she did not assert the right to remain longer under the terms of the contract, but claimed that privilege through an oral modification. In this respect her rights will be determined according to the interpretation which all parties to the contract put upon it.

Complaint is made of rulings in giving and in refusing instructions, but the charge as a whole is fair to defendant and correctly states the law. No error being found, the judgment is

AFFIRMED.

REESE, C. J., not sitting.

CITY OF OMAHA, APPELLEE, V. WILLIAM J. YANCEY ET AL., APPELLANTS.

FILED APRIL 20, 1912. No. 16,979.

1. **Judgment:** CONCLUSIVENESS: NOTICE TO INDEMNITOR. In an action to recover from a contractor the amount paid by a city to satisfy a judgment against it for damages resulting from his negligence and breach of contract, personal notice advising him of the original action, of the nature thereof, of the court and docket number, of his right to make a defense and of his liability for the amount of any judgment which might be rendered against the city, is sufficient to show that the amount of damages fixed by the judgment is binding on him. SEDGWICK, J., dissents.

2. **Appeal:** SUFFICIENCY OF EVIDENCE: ABSTRACT. Where appellant relies for a reversal on the assignment that the only proof sufficient to establish a fact in issue is incompetent, he should insert such proof in his abstract with the objections, rulings and exceptions necessary to a review of that question.

3. **Contracts:** CONSTRUCTION: CONTRACT FOR CONSTRUCTION OF SIDEWALKS. The phrases, "from the first day of January, 1902, to the 31st day of December, 1902," as used in a contract between a city and a contractor who agreed to furnish materials and construct sidewalks when ordered, *held* to refer to the ordering of sidewalks by the city, and not to the furnishing of materials and the construction of sidewalks by the contractor.

4. **Judgment:** CONCLUSIVENESS: NOTICE TO INDEMNITORS. In an action by a city to recover over from contractors and their bondsmen the amount paid by the city to satisfy a judgment for personal injuries resulting from the contractors' negligence and breach of contract, timely notice to the bondsmen of the pending action, of an opportunity to make a defense, and of their own liability, is sufficient to show that the judgment against the city is binding on them. SEDGWICK, J., dissents.

5. **Evidence:** NOTICE BY MAIL. In testimony that a letter containing a notice was mailed, the word "mailed" implies the payment of the necessary postage.

6. ———: ———: PRESUMPTIONS. A letter duly addressed, stamped and posted is presumed to have reached the addressee in the usual course of mails, but such a presumption may be rebutted by proof.

7. ———: ———: ———: QUESTION FOR JURY. Testimony denying the receipt of notice inclosed in a letter properly addressed,

stamped and mailed, does not overcome the presumption of law that the notice was received, but presents a question of fact for the jury.

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

James H. Adams and *Weaver & Giller*, for appellants.

John A. Rine, W. C. Lambert and *Clinton Brome, contra.*

ROSE, J.

Contractors who had been directed to build 50 feet of sidewalk along the east side of Fifteenth street between Ohio street and Spring street in Omaha made and left unprotected an excavation in the sidewalk space at that place. Lizzie Wright fell into it and was injured. In an action against the city for damages for personal injuries caused in the manner stated, she recovered a judgment for $5,000. The city paid the judgment and brought this suit against the contractors and their bondsmen to recover the amount so paid. From a judgment in favor of the city for the full amount of its claim defendants have appealed.

The first point urged by the contractors as a ground of reversal is that they are not bound by the judgment in the case of Wright against the city, because they had not been notified of the pendency of the action in which it was rendered. This position cannot be maintained. Two abstracts were filed, one by defendants and the other by the city. The latter states that a formal notice by the city attorney to the contractors, advising them of the action of Wright against the city, of the nature of the suit, of the court and docket number, of their right to make a defense and of their liability for the payment of any judgment which might be rendered against the city, was served personally on each of the contractors July 17, 1903. The suit against the city had been commenced June 6, 1903, and the case was tried at the October term, 1904. This

notice, if properly given, was sufficient. It is argued, however, by the contractors that the proof of notice, as stated, is incompetent, but it is not found in their abstract, nor is there anything therein to show it was erroneously admitted. While the city's abstract contains the evidence showing proof of notice, it does not show that the contractors objected to its admission or excepted to the ruling admitting it, and the bill of exceptions, under the circumstances disclosed, will not be examined for the purpose of sustaining this assignment of error.

The only other assignment argued by the contractors is that the trial court erred in holding them liable for an injury occurring subsequent to the termination of their contract. They assert that the excavation was made November 25, 1902; that their contract terminated by its own terms December 31, 1902; that the injury to the plaintiff in the suit of Lizzie Wright against the city occurred January 20, 1903; and that they were not required to protect the public from the excavation after the contract expired December 31, 1902.

By formal, written contract duly executed the contractors bound themselves: "To furnish material and construct therewith, and maintain, in a good and workmanlike manner, permanent sidewalk in the city of Omaha, according to plans and specifications on file in the office of the board of public works of said city, and as hereunto appended, as may be ordered from time to time by the mayor and city council of said city, from the 1st day of January, 1902, to the 31st day of December, 1902," and "to hold the said city harmless and free from all damages that may result through the injury of any person or thing by reason of any negligence or lack of care in or about the said work or property, and to guard all dangerous points and obstructions resulting from or about the said work, by providing and maintaining proper and sufficient safeguards and day and night signals for that purpose." One paragraph of the contract is as follows: "If the contractor shall fail to construct any sidewalk that may be

ordered within sixty days after a written order to construct the same has been given, unless prevented by storms, cold weather or other equally good cause, then the city shall have the right to cause such work and all further work required by the contract to be done and charge the difference between what it would have cost under the contract and what it did cost to such contractor or his bondsmen."

Do the phrases, "from the 1st day of January, 1902, to the 31st day of December, 1902," in the connection in which they are used in the contract, refer to furnishing materials and constructing sidewalks? Do they mean that the contract terminated on the latter date, and that work commenced before the end of the year could not be completed by the contractors under the same contract in 1903? The city insists that those phrases refer to the ordering of sidewalks, and that it had a right, any time before the end of the year 1902, to order the contractors to proceed with new work, which could be completed in 1903, if necessary. The city's interpretation seems to indicate the intention of the parties, as expressed by the entire instrument. The phrases, "from the 1st day of January, 1902, to the 31st day of December, 1902," seem to limit the immediately preceding clause, "as may be ordered from time to time by the mayor and city council of said city," rather than the more remote words "to furnish material and construct therewith." There is no intimation in the contract that the city did not have the right to direct the contractors, as late as December 31, 1902, to construct a sidewalk. Had such an order been given, how could it have been obeyed in a fraction of a day? The right of performance at a later date is clearly indicated by another provision. "If the contractor shall fail to construct any sidewalk that may be ordered within sixty days after a written order to construct the same has been given," says the contract, "unless prevented by storms, cold weather or other equally good cause, then the city shall have the right to cause such work * * * to be

done" and to charge the difference in cost to the contractor. This provision indicates an intention to give the contractors ample time to complete a sidewalk after having been ordered to construct it. The contractors not only agreed to construct permanent sidewalk in good workmanlike manner according to plans and specifications on file in the office of the board of public works, but they obligated themselves to so "maintain" such walks. They were also required to furnish materials and to perform their work "to the satisfaction of the board of public works and the city engineer." If there should be an unfinished sidewalk, or if materials should be found unsatisfactory, on the last day of the year 1902, the contract, on that date, would clearly not be terminated in such a sense as to prevent the contractors from completing the sidewalk or from furnishing satisfactory materials to replace those rejected. In giving effect to every part of the instrument and to the expressed intention of the parties, it must be held that the dates fixing the beginning and the end of the period refer to the ordering of the sidewalk, and not to the construction thereof by the contractors. This interpretation permits the completion of work begun by the contractors and gives them the benefit of full performance, and relieves the city from the embarrassment of a divided responsibility for defects in materials or workmanship. These are factors which would naturally appeal to both parties in agreeing on terms. In this view of the instrument the contractors were required to protect the public from the dangers of their excavation, and this duty did not terminate at the end of the period for ordering sidewalks. For failure to do so they cannot escape liability on the ground that their contract had expired before the accident occurred. This assignment of error must therefore be overruled.

The bondsmen, F. A. Nash and D. P. Redman, are also seeking a reversal. Their interpretation of the sidewalk contract is the same as that of the contractors, Yancey and Redman. For reasons already stated they are not

entitled to relief on the ground that their liability ended before the accident occurred.

The bondsmen further argue that the judgment against them is erroneous because the city stopped the work of the contractors and prevented them from completing the sidewalk. This point is without merit for the reason that the evidence shows the work was temporarily suspended, as it should have been under the contract, on account of cold weather.

The bondsmen bound themselves as follows: "Now the condition of this obligation is such that if the said Yancey and Redman shall well and faithfully perform all the obligations under the said contract and according to the plans and specifications in the office of the board of public works of said city, then these presents shall become void, otherwise to remain in full force and effect." The bondsmen thus became liable for the damages resulting from the failure of the contractors to keep their agreement "to hold the said city harmless and free from all damages that may result through the injury of any person or thing by reason of any negligence or lack of care in or about the said work or property, and to guard all dangerous points and obstructions resulting from or about the said work, by providing and maintaining proper and sufficient safeguards and day and night signals for that purpose." As grounds of reversal of the judgment against them for the amount paid by the city to satisfy the former judgment for damages, the bondsmen now assert that they are not bound by the judgment therefor, and that the record thereof was erroneously admitted in evidence against them. The following copy of a letter dictated by the city attorney, with his signature omitted, was received in evidence:

"May 25, 1904.

"F. A. Nash and D. P. Redman, as bondsmen of Yancey and Redman under their sidewalk contract to the city of Omaha.

"Gentlemen: I desire to notify you that a new trial has

been granted in the case of Lizzie Wright v. The City of Omaha, Doc. 83, No. 317, and that the case will soon be on trial again. If you desire to take part in the trial of said case, you will be afforded an opportunity to be represented by counsel, and make such suggestions as to the control of the case as may be proper. You are doubtless aware that the negligence complained of in this case consists of the negligence of Yancey and Redman in the construction of the walks under their contract, and in the event of recovery against the city you will be held liable as bondsmen.

"Yours very truly,

"....

"City Attorney."

This letter, if signed by the city attorney, and delivered to the bondsmen, gave them sufficient notice. C. C. Wright testified: He was city attorney. He remembered dictating such a letter as that quoted and signing it and leaving it to be mailed. It was addressed to the bondsmen. The letters were to be mailed to them through the regular course of the United States mail. So far as he knew this was done. It was the proper course of this work. He thought his stenographer would attend to it. The letter had not come back to his department, to his knowledge. His stenographer was called as a witness, identified the communication as a copy of a letter dictated by the city attorney to the bondsmen, and testified: She mailed the letters in connection with her regular duties. She was not sure of the date, but thought it was probably May 25, 1904. She sent the letters in the regular course of mail and they never came back, to her knowledge. They were inclosed in the regular envelope used by the legal department, with its card on them. She had in a way a personal recollection of the letter because there had been trouble about finding the address of one of the bondsmen, and it was finally obtained from the assistant city attorney. Though the copy quoted was admitted in evidence, the bondsmen contend that there was no proof of notice to

them of the former suit for the following reasons: There was no foundation for the introduction of the letter. There was no proof that postage on the letters was prepaid or that they were ever delivered. Each of the bondsmen denied on the witness stand that he had ever received the letter. They therefore insist that there is no competent proof of notice, and that the record of the judgment against the city was erroneously admitted to establish a liability against them. Is this position tenable? The city attorney testified that he dictated and signed the letters and left them in his office to be mailed. His stenographer testified that she mailed them. Without violating an act of congress the letters could not have been "mailed" without payment of postage. The meaning of her testimony is that the postage was paid.

In *National Butchers' & Drovers' Bank v. De Groot*, 43 N. Y. Super. Ct. 341, the court said: "A question was raised on the argument, as to the meaning of the term 'mailed.' The word is usually employed to designate the placing of letters or parcels in a post office, to be delivered under the public authority. The delivery of this class of mail matter is prohibited unless the postage thereon is prepaid. 2 U. S. Comp. St., secs. 3896, 3900. When the word 'mailed' appears as a note or memorandum in the official register of a deceased notary, it is consistent with reason and the actual meaning of the term to presume that it describes what that act in its common and ordinary performance calls for."

In *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, it was held: "The word 'mailed' as applied to notice of protest implies that the requisite postage was prepaid on the letter."

From the testimony in the present case the trial court was warranted in concluding that the letters, bearing sufficient postage, were committed to the United States mails. The rule is that a letter duly addressed, stamped, and posted is presumed to have reached the addressee in the usual course of mails. *National Masonic Accident*

Ass'n v. Burr, 44 Neb. 256. The presumption, however, is rebuttable, but a well-established principle applied in *Miller v. Wehrman*, 81 Neb. 388, was stated in an earlier case as follows: "Testimony positively denying the receipt of a written demand shown to have been properly mailed, stamped, and addressed does not overcome the presumption of law that it was received, but presents a question of fact for the jury." *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437.

According to this rule it was for the trial court, acting by consent of the parties instead of a jury, to find from all the evidence whether the letters were delivered. In addition the city attorney testified that he told the bondsman Nash he ought to see the contractors and have the case tried and settled. The testimony is sufficient to sustain a finding that the bondsmen had sufficient notice of the original suit. They are bound by the amount of damages fixed by the former judgment.

AFFIRMED.

SEDGWICK and LETTON, JJ., concur in the conclusion.

FIRST NATIONAL BANK OF TRENTON, APPELLANT, V. LINK L. BURNEY ET AL., APPELLEES.

FILED APRIL 20, 1912. No. 16,569.

1. **Evidence:** PAROL EVIDENCE: NOTES. "It is not error to submit oral testimony to the jury to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note." *Davis v. Sterns*, 85 Neb. 121.

2. **Contracts:** WRITTEN CONTRACT: CONTEMPORANEOUS PAROL AGREEMENT. "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a

distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." *Norman v. Waite*, 30 Neb. 302.

3. **Evidence** examined, and *held* sufficient to sustain the verdict.

OPINION on motion for rehearing of case reported in 90 Neb. 432. *Former judgment vacated, and judgment of district court affirmed.*

FAWCETT, J.

This case was argued and submitted upon a motion for rehearing, our former opinion being reported in 90 Neb. 432. The issues will be found clearly stated in the opinion there reported. It will be observed that the controversy here is between the plaintiff bank and defendant Britton, who was surety upon the note in suit.

The case turns upon the proposition as to whether or not defendant Britton could rely upon the contemporaneous oral agreement set up in his answer, and the performance of the terms and conditions of that agreement, as a defense to the note. The evidence offered by defendants shows that the oral agreement, so far as defendant Britton was concerned, was contemporaneous with the execution by him of the note in suit. The evidence as to the making of the oral agreement and as to what was said and done by the officers of the bank and Burney, after the returns upon the Clarinda shipment had been received, is conflicting. Upon one point, however, there is no conflict, viz., that the draft for the entire proceeds of the shipment was received by the bank. The evidence as to the making of the oral agreement, and of its subsequent performance, being conflicting, that issue was submitted to the jury. The finding of the jury was in favor of defendant Britton. If, therefore, the evidence was properly received, the verdict of the jury must stand. This leaves nothing but the question of law to be considered by us.

Jones, Evidence (2d ed.) sec. 495 (507) says: "The exceptions to the general rule which excludes parol evi-

dence to explain written instruments apply in respect to negotiable paper, as well as to other contracts. We have seen in a former section that wide range is given to the proof when the issue of *fraud* is raised. On the same principle, *illegality, alteration* and *want of consideration* may be shown. As between the original parties, the *conditional delivery* of a note may be shown, as that it was delivered in escrow. So it may be shown, as between the original parties, that the note had been *discharged* by the performance of an oral agreement, or that the delivery was conditioned upon a certain event. * * * It is also admissible to show by parol the capacity and true *relations of the parties,* such as that a signer of a note is a surety, and that this was known to the plaintiff. * * * Nor is it any violation of the rule to show by extrinsic evidence an entirely distinct and *collateral contract,* or to show whether the instrument was given in satisfaction of a former note, or as security therefor; or that the note has been *discharged* by the performance of an agreement."

In *Walters v. Walters,* 34 N. Car. 28, it is held: "Where A gave B a bond for fifty dollars, and, at the same time, it was agreed by parol, that, whenever A paid certain costs in a suit then pending between the parties, the bond should be surrendered and given up, and A afterwards paid the costs; *held,* that this was competent and sufficient evidence of the discharge of the bond."

In *Howard v. Stratton,* 64 Cal. 487, it is held: "In an action upon a promissory note, parol evidence is admissible to show that it was given to secure the performance of an agreement whereby the payee conveyed certain lands to the maker in consideration that the latter should support him during the residue of his life, and that the defendant had performed the conditions of the agreement."

In *Maltz v. Fletcher,* 52 Mich. 484, in an opinion by the eminent Chief Justice Cooley, it is said: "It is always competent to show that a contract sued upon is without consideration. And no rule or policy of the law is violated by allowing proof to be made of the purpose for

which negotiable paper was given or that the purpose does not require that payment should be enforced."

In *Clark v. Ducheneau,* 26 Utah, 97, it is held: "Where, in an action on a note, defendant admitted its execution, parol evidence that it was not given for a loan, as plaintiff contended, but to secure performance of defendant's verbal agreement to purchase certain mining stock for plaintiff, and was to be surrendered on delivery of such stock, and that defendant had fully performed such agreement, was not objectionable as tending to vary or contradict the terms of the note."

In *Oakland Cemetery Ass'n v. Lakins,* 126 Ia. 121, it is held: "Where a note was executed in consideration of other prior agreements between the parties, parol evidence is admissible in an action on the note, to show the entire agreement and that it has been performed." In the opinion by Deemer, C. J., it is said: "The general rule of inadmissibility of parol evidence to contradict, change, or vary the terms of a written instrument, and the reasons underlying the same, are well understood; but there are certain exceptions to that rule, which are not so familiar to the profession, nor so well settled. There seem, however, to be two well-recognized exceptions which are applicable to this case. One is, parol evidence is admissible to show that delivery was subject to a condition that upon a certain contingency or event the contract should not be binding, and the other, such evidence is admissible to show that a note has been discharged by the performance of an undertaking which it was given to secure. Thus it may be shown that what purports to be a written obligation has been discharged in accordance with the terms of a collateral parol agreement."

In the opinion *Gifford v. Fox,* 2 Neb. (Unof.) 30, written by our Mr. Commissioner DAY, is cited as supporting Judge Deemer's conclusions. The syllabus in *Gifford v. Fox* reads: "(1) While parol testimony may not be received to vary or contradict the terms of a promissory note, yet the considerations for which it was given may be

established by parol testimony. (2) Parol testimony is admissible in an action upon a promissory note to show that it was given to secure the performance of an agreement whereby the payee conveyed to the maker certain lands in consideration that the maker should support the payee during his lifetime, and that the maker had performed the conditions of the agreement." In *Walker v. Haggerty,* 30 Neb. 120, the first paragraph of the syllabus reads: "While parol testimony may not be received to contradict or vary the terms of a promissory note, yet the consideration for which it was given may be established by parol testimony." In *Norman v. Waite,* 30 Neb. 302, it is held: "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend."

In *Barnett v. Pratt,* 37 Neb. 349, Mr. Commissioner IRVINE said: "Further, it is settled by a considerable line of authority that where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument. Among the cases establishing this principle are: *Chapin v. Dobson,* 78 N. Y. 74; *Ferguson v. Rafferty,* 128 Pa. St. 337. The same doctrine substantially has been adopted by this court. *Norman v. Waite,* 30 Neb. 302. It will be observed that the allegations of the petition and the evidence offered brought the case strictly within this rule."

Finally, we have *Davis v. Sterns,* 85 Neb. 121, which would seem to be decisive of this case. In the first para-

graph of the syllabus it is held: "It is not error to submit oral testimony to the jury to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note." The opinion on page 127 cites *Walker v. Haggerty, Norman v. Waite* and *Gifford v. Fox, supra,* and quotes with approval from the last named case. The writer has examined numerous other cases from various courts, all to the same effect as those above quoted from.

After a careful reconsideration of the questions involved and the law applicable thereto, we conclude that this case is controlled by the rule announced in *Davis v. Sterns* and *Norman v. Waite, supra,* as shown by the quotations from those two cases above given. It follows that the evidence as to the oral agreement and its performance was properly received.

Our former judgment is therefore vacated, and the judgment of the district court is

AFFIRMED.

BARNES, J., dissenting.

For the reasons given in our former decision of this case, I cannot concur in the foregoing opinion.

EDWARD B. COWLES, APPELLANT, V. ANNIE E. KYD, APPELLEE.

FILED APRIL 20, 1912. No. 16,664.

1. **Judgment:** RES JUDICATA: TAX LIEN. A right obtained under a tax sale certificate, like any other civil right, may be barred by the decree of a court of competent jurisdiction in a suit where the owner of such certificate is duly made a party, and his claim to priority under such certificate is assailed in the pleadings and adjudicated against him by the court.

2. ———: ———. One duly served with summons thereby becomes a party to the suit or action, and, unless subsequently dismissed,

remains such throughout the proceedings. As such party he is presumptively present in court during the trial and at the entry of judgment. He is charged with notice of every claim adverse to him contained in the plaintiff's petition.

3. ———: ———. And, in such a case, if the petition alleges that he has or claims a lien or some interest in the land involved in the suit, but that his lien or claim is junior and inferior to that asserted by the plaintiff, and he stands mute and permits the entry of findings and judgment against him and in favor of the plaintiff upon that contention, and an innocent third party purchases the land at sheriff's sale under the judgment so entered, the judgment is *res adjudicata* as between such party and the plaintiff, and as between him and the purchaser at such sale.

4. ———: ———: TAX LIEN. And the fact that, at the time he is required to answer in such suit, he is the holder of a tax sale certificate, issued to him less than two years prior thereto, will not excuse him from failing or refusing to set up his lien under the certificate so held by him. Failing so to do, his right to subsequently assert it against the judgment entered in such suit, or against those claiming as purchasers under said judgment, is forever barred and foreclosed.

5. ———: ———. Where the district court has jurisdiction of the subject matter and of the parties, its determination of all disputed questions in the suit is binding upon all the parties thereto. If the court errs, the remedy is by appeal, and not by subsequent collateral attack.

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

C. H. Denney, for appellant.

Samuel Rinaker and *A. H. Kidd, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Gage county to foreclose a tax sale certificate on lot 3, block 22, in Cropsey's addition to the city of Beatrice. The petition is in the usual form. Defendant filed an answer and cross-petition, pleading a former adjudication and praying that the title of defendant be quieted. Defendant prevailed in the court below, and plaintiff appeals.

The record shows that on November 4, 1897, one Sibbernsen purchased the lot in controversy for the delinquent taxes for the year 1896, and received a certificate of purchase therefor; that he subsequently paid the taxes for the years 1897 and 1898. On September 16, 1904, Sibbernsen filed a petition to foreclose his tax lien. In his petition he made Mr. Cowles, plaintiff in this suit, a defendant, and summons was duly served upon him. The answer day fixed in the summons was October 17, 1904. On November 5, 1902, Mr. Cowles had purchased the lot at tax sale for the delinquent taxes of 1901, and received a certificate therefor. He subsequently paid the taxes for the years 1902 and 1903. At the time he was required to answer in the Sibbernsen suit, two years had not elapsed, by 19 days, from the date of his certificate, and he now contends, first, that he was neither a necessary nor proper party in the Sibbernsen suit, and therefore could not be affected by any decree rendered therein; second, "the court did not have jurisdiction of the subject matter in said foreclosure proceedings and therefore the proceedings were void," and, third, "a valid tax lien can only be barred by payment or the statute of limitations." The petition in the Sibbernsen suit alleged that "the defendant E. B. Cowles (and other defendants not necessary to name here) each have, or claim to have, some lien or interest in and to the said premises, but the exact nature and extent of which the plaintiff does not know, but plaintiff says that whatever lien, title, or interest the defendants, or any of them, may have in said premises is subsequent, junior and inferior to plaintiff's lien for the taxes purchased and paid as aforesaid." It is admitted by plaintiff here that he was duly served with summons in the Sibbernsen case; that he never entered his appearance therein but deliberately made default. The decree entered in that case found that Mr. Cowles had been duly served, and default was entered against him. It found that the allegations in plaintiff's petition were true; that he was the owner and holder of the various tax sale certificates

set forth; found the amount due to the plaintiff Sibbernsen and adjudged that the amount so found due was a first lien on the premises in controversy; found further that "whatever interest in, or lien upon, the said real estate the defendant may have is junior, inferior and subsequent to the lien of the plaintiff's tax sale certificates;" adjudged that if the defendants failed for 20 days from the date of the decree to pay the sums found due plaintiff they be foreclosed and forever barred; that an order of sale issue to the sheriff to sell the property as upon execution, etc. The sale was duly advertised, made, and the sale confirmed and deed ordered to be made to Annie E. Kyd, the defendant in this suit, which deed was issued August 12, 1907. Under this deed she took and still holds possession. The record shows that the sum realized from the sale of the property in the Sibbernsen suit was sufficient to pay the liens established and costs of the suit, and leave a surplus of $562. The question to be determined here is, do the proceedings in that suit establish the defense of *res adjudicata* in this? The trial court so found, and we so find.

We do not agree with the contention of plaintiff that a valid tax lien can only be barred by payment or the statute of limitations. General expressions of that kind may be found in reported cases, but in every instance it will be found that those general statements apply to the facts of the case in which the language is used. A right obtained under a tax sale certificate, like any other civil right, may be barred by the decree of a court of competent jurisdiction in a suit where the owner of such certificate is duly made a party, and his claim to priority under that lien is assailed in the pleadings and adjudicated against him by the court. One duly served with summons thereby becomes a party to the suit or action, and, unless subsequently dismissed, remains such throughout the proceedings. As such party he is presumptively present in court during the trial and at the entry of judgment. He is charged with notice of every claim adverse to him con-

tained in the plaintiff's petition. If it is therein alleged that he has or claims a lien or some interest in the land involved in the suit, but that his lien or claim is junior and inferior to that asserted by the plaintiff, and he stands mute and permits the entry of findings and judgment against him and in favor of the plaintiff upon that contention, and an innocent third party purchases the land at sheriff's sale under the judgment so entered, that judgment is *res adjudicata* as between such party and the plaintiff, and as between him and the purchaser at such sale. If, in such a case, the party so served, at the time of such service and at the time when he is notified to answer, is the holder of a tax sale certificate, issued to him less than two years prior to the answer day, the fact that he cannot then demand a foreclosure of his lien will not excuse him from failing or refusing to set up his lien under the certificate held by him. Failing so to do, his right to subsequently assert it against the judgment entered in that suit, or against those claiming as purchasers under said judgment, is forever barred and foreclosed. *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735; *Barton v. Anderson,* 104 Ind. 578.

In so holding, we have not overlooked *Western Land Co. v. Buckley,* 3 Neb. (Unof.) 776, and *Gibson v. Sexson,* 82 Neb. 475. *Western Land Co. v. Buckley* is an unofficial commissioner's opinion and has no standing as an authority in the sense in which the doctrine of *stare decisis* is applied. *Flint v. Chaloupka,* 72 Neb. 34. But, even if it were to be considered as an authority generally, it could not be treated as such in this case. In that case the amount due upon the tax lien was deducted by the sheriff at the time of the sale of the property under the mortgage foreclosure suit in which the holder of the lien failed to appear; hence, the purchaser at the mortgage foreclosure sale took subject to the rights of the holder of the tax lien. Again, in that case it was said: "Upon the question whether or not the holder of a tax lien prior in point of time to the date of a mortgage being

foreclosed is a necessary or proper party, we express no opinion." Therefore, that question was not decided. The subsequent language of the writer of that opinion, to the effect that, because less than two years had elapsed from the date of the certificate of tax sale, the court would be without authority to enter a decree foreclosing the lien until after the expiration of the two years, and therefore the holder of the tax lien, "while likely a proper party, was, at all events, not a necessary party to the mortgage foreclosure proceedings," is *obiter dictum* pure and simple. It is clear that the proceedings in the foreclosure suit did not cut off or in any manner bar the lien or right of action thereunder of the Western Land Company, the holder of the tax lien, because the appraisement and sale reserved and left those rights unimpaired. The writer of the opinion cites and relies upon *Lincoln Nat. Bank v. Virgin, supra,* but it is evident from a careful examination of that opinion, that he misapprehended its scope. The writer of this opinion fell into the same error when he wrote the opinion in *Gibson v. Sexson, supra,* and indulged in discussion and included in the syllabus a holding upon a point not necessary in the decision of that case. *Lincoln Nat. Bank v. Virgin* does not support *Western Land Co. v. Buckley,* nor *Gibson v. Sexson;* but is in harmony with the rule we have above announced.

In *Lincoln Nat. Bank v. Virgin* it is said: "There is no doubt of the jurisdiction of a court of equity, upon proper pleadings in a foreclosure proceeding, to determine the rights of all parties thereto with respect to the subject of the controversy, whether plaintiffs or defendants. But the power to conclude parties not claiming adversely to the plaintiff, whether subsequent mortgagees, or mortgagor and mortgagee, so as to prevent them from afterwards asserting their rights as against each other, depends upon whether such power has been invoked by one or more of the parties thus interested. * * * The general rule is that a default is an admission of such facts only as are properly alleged in the petition or complaint.

1 Herman, Estoppel, sec. 53. A recognized exception, however, is that where, in a foreclosure or other kindred proceeding, a defendant who is called upon to disclose his supposed but unknown interest in the subject of the action makes default, he will be held thereby to have admitted that his interest therein is subordinate to that of the plaintiff. *Barton v. Anderson,* 104 Ind. 578. The Merchants Bank, by its default, must be held to have confessed the cause of action of the plaintiff therein, and to that extent the decree is conclusive."

The reasoning of POST, J., in that case applies here. In the Sibbernsen suit the plaintiff asserted the priority of his lien over any claim or lien of defendant Cowles, who had been personally served with summons. There is no doubt of the jurisdiction of the court to determine in that suit the rights of those two parties with respect to the subject of the controversy, viz., the priority of their liens. The petition called upon defendant to disclose his interest or claim. The defendant saw fit to decline to do so and therein made default. He must, therefore, "be held thereby to have admitted that his interest therein is (was) subordinate to that of the plaintiff," and "must be held to have confessed the cause of action of the plaintiff therein, and to that extent the decree (therein entered) is conclusive." The only right then remaining to defendant Cowles in that suit was to have had his claim satisfied out of the surplus arising from the sale. The surplus was ample to have satisfied his claim. He could not refuse to obtain satisfaction from that and thereafter seek satisfaction out of the land which passed to the purchaser by the sale under that decree. Any other rule than this would permit parties duly served with summons in a court of general jurisdiction, in a case involving subject matter of which the court has full and complete jurisdiction, to determine for himself the question as to whether he is a proper party, and the further question as to whether disputed priorities of himself and the plaintiff can be adjudicated by the court in that case. Where the court

has jurisdiction of the subject matter and of the parties, its determination of all disputed questions in the suit are binding upon all parties thereto. If the court errs, the remedy is by appeal, and not by subsequent collateral attack. The justice of this rule is well exemplified in the present case. The decree in the Sibbernsen case was entered March 23, 1906; sale made thereunder July 15, 1907; sale confirmed July 16, 1907; deed issued August 12, 1907; present suit commenced November 12, 1907. The parties to that suit were Sibbernsen, plaintiff; Cowles, defendant. The parties to this suit are Cowles, plaintiff; Annie E. Kyd, purchaser under the Sibbernsen judgment, defendant. Everything claimed by plaintiff here could have been decided there. Every right demanded here could have been obtained there. He not only could have been protected by the decree in that case, but the funds realized from the sale were sufficient to pay all claims, including his. We think the district court was warranted in finding that plaintiff's claim, as against the defendant, was barred and foreclosed, and that "there is no equity in the claim and action of the plaintiff."

The judgment of the district court was right, and it is

AFFIRMED.

REESE, C. J., not sitting.

JOE MCKAY V. STATE OF NEBRASKA.

FILED APRIL 20, 1912. No. 16,975.

1. **Information:** SUFFICIENCY. An information is 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 such amended information and without giving him the statutory time of 24 hours in which to plead thereto.

3. ———: FORMER JEOPARDY. Where one accused of a felony is put upon trial under an information defective upon its face, and, after trial begun, the information is amended and the trial proceeded with, there being no change in the offense charged, *held*, that the accused is not thereby placed in jeopardy a second time.

4. **Former Opinion Modified.** Our former opinion examined, modified as set out in the following opinion, and in all other respects adhered to.

OPINION on motion for rehearing of case reported in 90 Neb. 63. *Rehearing denied. Former opinion modified.*

FAWCETT, J.

When our opinion was handed down in this case (90 Neb. 63) the county attorney of Antelope county requested, and the attorney general directed, a mandate to go down. Subsequently, and within 40 days from the filing of the opinion, the private prosecutor employed by the relatives of the deceased requested and was given leave to file a motion for a recall of the mandate and for a rehearing of the case. Upon the filing of the motion argument thereon was ordered and has been had. The case is now before us on that motion, for review.

Counsel for defendant has entered objections to a further consideration of the case in this court for various reasons which we deem it unnecessary to set out. It is sufficient to say that we permitted the filing of the motion for rehearing and must now decline to dispose of it without consideration. Defendant's objections are therefore overruled.

Upon the original hearing we held the information originally filed to be void. This holding is now assailed. The writer is satisfied with our former holding and is still of the opinion that the information was void. A majority of the court, however, are of oipinion that this is stating the matter too strongly; that the information was defective merely, but not void. Paragraphs 1, 2 and 3 of the

syllabus of the former opinion are, therefore, hereby modified so as to read as follows:

1. An information is 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. 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 such amended information and without giving him the statutory time of 24 hours in which to plead thereto.

3. Where one accused of a felony is put upon trial under an information defective upon its face, and, after trial begun, the information is amended and the trial proceeded with, there being no change in the offense charged, *held,* that the accused is not thereby placed in jeopardy a second time.

That portion of the opinion upon which the above three paragraphs of the syllabus are predicated is also modified so as to conform therewith.

Our opinion in relation to the employment of private counsel, as embodied in paragraphs 4, 5 and 6 of the syllabus, is next assailed. We deem it unnecessary to again discuss that question. We are satisfied with our former opinion upon that point and adhere thereto. This case presents a good illustration of the sufficiency of the reasons which prompted the legislature to amend the statute in relation to the employment of private counsel in felony cases, and of the soundness of our former holding. Here we have private counsel, employed by relatives of the deceased, not only dominating the trial of a felony case in the court below, but obtruding himself into this court, after the attorney general and the county attorney had accepted the opinion and obtained the issuance of a mandate, and attempting to further serve his private clients by a persistent contention at variance with the orderly course then being pursued by the able prosecuting officers of the state.

Our opinion as reflected in paragraph 7 of the syllabus is next assailed. An attempt is made to justify the offering in evidence of the blood-stained garments of the deceased upon the theory that the evidence shows that the defendant was seen leaving the house of the deceased early in the morning of the day when the body was discovered, and that this evidence would show that the deceased was murdered after arising in the morning. It had already been shown by the testimony of the persons who first found the body of the deceased that, at the time they made the discovery, the body was lying at the foot of the cellar stairs, fully dressed, with the bloody ax, with which the deed had evidently been committed, lying beside it. This undisputed testimony established the fact that at the time of the murder the deceased was fully dressed; but neither that testimony nor the blood-stained garments themselves would prove that he had been murdered after arising in the morning, any more than they would prove that he had been murdered before the time for retiring the evening before. No attempt to disguise the motive of counsel in offering these blood-stained garments in evidence can obscure the fact that the real motive was for the purpose of exciting the passions of the jury. We are satisfied with our former holding and adhere thereto.

The motion for rehearing is therefore overruled, and our former opinion, modified as above set out, is adhered to.

FORMER OPINION MODIFIED.

REESE, C. J., not having heard the arguments upon the motion, took no part.

ROSE, J., dissenting.

Upon further reflection, I do not think the conviction should be set aside for any reason assigned in the former opinion or in the modification thereof on the motion for a rehearing.

1. Though the information was filed in the district

court April 28, 1910, and the homicide occurred December 7, 1909, the date of the murder, as stated in the charge, was December 7, 1910. Why should the future date, which was palpably erroneous, control the charge that the felonious act had been committed in the past, where time is no part of the crime and the prosecution never outlaws? The information shows on its face that it was verified by the oath of the county attorney April 28, 1910, and that it was filed in the district court the same day. It is also formally and fully charged in technical language that defendant did feloniously make the fatal assault in Antelope county, and did strike and wound his victim, and that in consequence the victim "then and there did die." The verbs are in the past tense. They contradict the immaterial future date. The figures "1910," which constitute no part of the felony, are repugnant to the material charges in the past tense. The nonessential future date should yield to the fundamental charges that the unlawful acts were committed in the past. In these respects the legislature in adopting the criminal code of this state departed from the technical exactitude formerly required by the rules of the common law. "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected," declares the criminal code, "for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense; nor for stating the time imperfectly"; nor "for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Criminal code, sec. 412. The criminal code further provides that a variance between the statements of the information and the evidence offered in proof thereof shall not be deemed "ground for an acquittal of the defendant, unless the court before

which the trial shall be had shall find that such variance is material to the merits of the case or may be prejudicial to the defendant." Criminal code, sec. 413.

Construing these provisions of the criminal code, this court held: "Under section 412 of the criminal code, an indictment or information is not rendered fatally defective 'for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly.'" *Rema v. State,* 52 Neb. 375. This rule applies to the present case, because time was not of the essence of the offense, and the date was imperfectly stated. Within the meaning of the criminal code the erroneous figures "1910" are repugnant to the formal charge that the felony had been committed by defendant before the county attorney filed his information. Besides, the omission to give the date correctly did not prejudice defendant. The county in which the murder was committed was named. The name of the murdered man was stated. The weapon used was described. In the complaint filed before the justice of the peace the date was correctly stated. Under this complaint he was arrested and bound over to the district court to answer the identical charge, giving the correct date. He had time to prepare for trial under the original information filed in the district court, and was represented by eminent counsel. Every fact necessary to a flawless information was as fully imparted to him by the judicial record of the proceeding, as would have been disclosed, had the date been correctly stated. That the information, before the year "1910" was changed to 1909, was sufficient to support a conviction seems to be sustained by the weight of authority, where the rules of the common law have been modified by statute, as in this state.

The report of *Conrand v. State*, 65 Ark. 559, shows that the indictment was filed July 14, 1896, and that it gave the date of the felony as May 15, 1899. In passing on the sufficiency of the indictment under statutes which modify the rules of the common law, the court in that case said:

"In the indictment before us the grand jury of Faulkner county accused the defendant of the crime of slander, 'committed as follows,' and alleged that the defendant, 'on the 15th day of May, 1899, then and there maliciously, wilfully, feloniously, and falsely *did* use, utter and publish,' etc. They alleged that the offense was committed in the past, using the words 'committed' and 'did' for that purpose, on a day some time in the future. No man of common understanding could infer from the indictment that the grand jury intended to accuse the defendant of having committed a crime before it was committed. To accuse one of a crime is to charge that it was committed prior to the accusation. The allegation as to the date of the commission of the offense was a clerical error, apparent on the face of the indictment, and was not calculated to, and did not, mislead the defendant, and did not affect the validity or sufficiency of the indictment or the judgment against him"—citing *Williams v. Commonwealth,* 18 S. W. (Ky.) 1024.

In *Stevenson v. State,* 5 Bax. (Tenn.) 681, defendant was indicted for burglary February 5, 1876, the date of the crime as stated in the indictment being February 22, 1876. In passing on the sufficiency of the indictment under statutes changing the common law, the supreme court of Tennessee said: "The indictment was found 5th of February, 1876, and charges that the offense was committed 'heretofore, to wit, the 22d of February, 1876.' The code only requires that the offense be charged to have been committed previous to the finding of the indictment, no particular day being necessary to be alleged or proved where time is not an ingredient in the offense. Code, sec. 5124. It is true it has been held that it must be distinctly alleged and not left to inference or construction (*King v. State,* 3 Heisk. (Tenn.) 148), but the language here is heretofore, to wit: This certainly means before the finding of the indictment. It is true 22d of December (February) 1876, is repugnant and an impossible date, in reality a mere mistake of the draftsman, and may

be rejected, but we think the indictment good after verdict."

In *State v. Brooks,* 85 Ia. 366, the indictment was returned February 13, 1890, and charged that the offense was committed November 15, 1890, whereas the latter date should have been November 15, 1888. The prosecution was allowed to correct the mistake, and the supreme court observed: "It is not only apparent that the date '1890' was an impossible date and a clerical error, but that, omitting that date, still the offense is charged to have been committed at a time possible and certain, namely, 'on or about the fifteenth day of November, 1888.' Code, section 4538, requires that we 'must examine the record, and, without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. A mere clerical error, which can be discovered by a casual reading of the indictment itself will not render it fatally defective.' *State v. Crawford,* 66 Ia. 318; *State v. Gurlock,* 14 Ia. 444; *State v. Emeigh,* 18 Ia. 122; *State v. White,* 32 Ia. 17. This being a mere clerical error, apparent upon the face of the indictment, the defendant was not prejudiced by allowing the correction."

In *State v. McDaniel,* 94 Mo. 301, the court enforced a statute providing that no indictment shall be deemed invalid for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened. The rule was stated thus: "An indictment for murder which charges the assault and wounding to have occurred on the twenty-fifth day of December, 1886, from the effects of which the deceased died on the twenty-fifth day of December, 1885, is not fatally defective. The mistake is merely clerical, is cured by the statute (R. S. 1879, sec. 1821), and should be disregarded."

In *Conner v. State,* 25 Ga. 515, the presentment was dated September term, 1857, and charged that the offense was committed December 15, 1857, and the court said:

"Have not all the courts, both in England and in this country, settled it so long ago, that the memory of man runneth not to the contrary, that while some day must be stated, any other may be proven? Who does not see, that if it be immaterial to prove the day as charged, that no day or an impossible day will do just as well? But it will be replied, that it never was decided, but that the time charged must be before the accusation is preferred. And I concede this to be so, at least for the purposes of the argument. But let us look at the reason of the thing. Suppose the day be laid subsequent to the finding of the grand jury; it is the same in effect as stating an impossible day, as the fortieth of May, and if it be correct that any day within the statute of limitations and before indictment found will suffice, it is quite clear that no day, or one that is impossible, will do just as well."

In *State v. Pierre*, 39 La. Ann. 915, it was decided: "An immaterial and impossible date in an indictment may be corrected at any time; particularly when the date is not of the essence of the offense charged."

In modifying the rules of the common law on this subject the criminal code of Nebraska goes further than that of most of the states in which the decisions cited were rendered. To give effect to the changes which the legislature of this state made in the rules of the common law, it seems to me to be necessary to hold that the information as originally filed in the district court in the present case was sufficient to support a conviction without amendment or correction. If I am correct in this conclusion, it follows that the amendment inserting in the information "1909" instead of 1910 was immaterial, and that there was no error in refusing a postponement because of the change.

2. As I view the law, the majority opinion places too many restrictions around the engaging of private counsel to assist in criminal prosecutions. The proper solution of this question must rest upon the construction of the statute relating to the powers and duties of county at-

torneys. In 1885 the legislature passed an act containing the following provisions:

"It shall be 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 suits, applications or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested. * * *

"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 reasonable 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 the services rendered by such assistant or assistants." Laws 1885, ch, 40, secs. 2, 6; Comp. St. 1885, ch. 7, secs. 16, 20.

It is matter of common knowledge that the officers of the executive department of the state government, in the enforcement of the criminal laws, have construed the foregoing statutory provisions to allow the county attorney such assistance as he believes to be necessary, if obtained by him with the consent of the court and without expense to the county; and such assistance, if allowed by the judge of the district court without objection from the county attorney, has not been regarded as a violation of the statute. This construction is not unreasonable. It does not deprive accused of any right. The statutory provisions quoted show that the county attorney has ample control of criminal prosecutions. As the representative of the state he may exclude at any time an assistant who abuses his privileges or otherwise misbehaves. The trial

court has authority to protect the defendant from all improper acts of any attorney representing the state. It ought to be assumed that a judge of the district court, in presiding in his own tribunal, will be anxious about proper decorum and the due administration of justice. It should not be presumed that a trial judge will fail to observe and repress improper conduct of counsel for the state, whether it grows out of excessive zeal, malice, hope of reward, or professional vanity. The construction which gives sanction to the rulings of the trial court in this case has been followed by the prosecuting officers of the executive department of the state government with the approval of the district courts since the statute was passed in 1885. While the sections containing the provisions under consideration have been amended from time to time, the provisions themselves, construed and applied as already stated, have remained unchanged during all these years. The question should therefore be determined according to a doctrine recently stated in the following language: "When a statute has for nearly 40 years been practically construed by the officers whose duty it is to enforce it, and has during that time been several times re-enacted by the legislature in substantially the same terms, such construction will be regarded as adopted by the legislature, although the language of the statute would indicate a different meaning." *State v. Sheldon*, 79 Neb. 455.

For these reasons, I am constrained to recede from the construction adopted in the former opinion.

3. I am unwilling to say that the garments worn by the victim of the homicide at the time of his death were incompetent for every purpose in proving the state's case. In my judgment the record does not establish the correctness of that proposition. "If the evidence offered be legally admissible for any purpose, an objection to such evidence should be overruled." *Carleton v. State*, 43 Neb. 373. Competent evidence bearing on an issue cannot be excluded from the jury because it may incidentally arouse

their prejudices. *Missouri P. R. Co. v. Palmer,* 55 Neb. 559. If this were not the law, the shocking atrocity of the homicide in this case would prevent a conviction. I think the majority opinion attaches too much importance to the rulings admitting the garments in evidence, when more revolting proofs of the crime are considered. Unless an assignment of error not discussed is meritorious, the judgment, in my opinion, should be affirmed.

LETTON, J., concurs in dissent.

WESLEY H. MADDOX, APPELLANT, V. W. A. HARDING, APPELLEE.

FILED APRIL 20, 1912. No. 17,046.

1. **Brokers: SALE OF LAND: RIGHT TO COMMISSION.** Where the owner of real estate contracts with an agent for its sale, and no limit of time is fixed by the parties, the agent's authority may be revoked at any time; but, if, at the time of the revocation, the agent had negotiations for a sale pending, with a party whom he had introduced to the owner, and the owner had himself participated in such negotiations, and afterward the negotiations are continued or within a few days renewed and consummated by the owner, in person or through another, the agent is entitled to his commission.

2. ———: ———: ———. And if during such negotiations the agent of the seller is also the agent of the proposed buyer for the sale of other real estate owned by him, which it is proposed shall be accepted by the seller as part payment, and both seller and buyer know of such dual agency, and with such knowledge continue to negotiate with each other through such agent, and a deal is finally consummated, the fact of such dual agency cannot be interposed by either as a defense in an action by such agent for his stipulated compensation.

3. **Evidence** examined, and referred to in the opinion, *held* sufficient to require a submission to the jury.

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

James E. Leyda, for appellant.

Reavis & Reavis and *H. N. Mattley, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Richardson county, to recover commission upon the sale of a farm. At the conclusion of the trial the court directed a verdict in favor of the defendant, upon which judgment was rendered, and plaintiff appeals.

The petition alleges that on September 19, 1908, plaintiff entered into a written contract with defendant to act as agent of defendant in the sale of certain land in Richardson county. A copy of the contract is attached to the petition. The contract described the land and the amount which defendant was to pay as commission in the event that plaintiff furnished a buyer or was instrumental in any manner in selling or transferring the property. The petition further alleges that the terms of the contract were afterwards modified by a letter, making the selling price of the land $17,000; that later, at the office of plaintiff, on or about December 31, 1908, by mutual agreement between defendant and one Poteet, the defendant and Poteet agreed upon terms of the sale, whereby defendant was to receive $14,500 in cash and notes, and a piece of town property of the valuation of $5,500; that, acting under said contract, at the suggestions and directions of defendant, plaintiff procured the purchaser, but defendant refused to convey, and attempted to withdraw the land from the market; that a few days thereafter defendant himself sold and conveyed the land in question to the said Poteet; that plaintiff first introduced Poteet to defendant; that plaintiff was instrumental in bringing about the sale and transfer of defendant's farm, and is entitled to his commission; that defendant's sale of the farm to Poteet was for the sum of $20,000. The answer admits the execution of the contract, the withdrawal of the

land from the market, and denies generally the other allegations in the petition. As a further defense, it alleges that whatever services were performed by plaintiff were at the special instance and request of Poteet; that plaintiff, for an alleged service claimed by him to have been performed in the sale of said land, charged Poteet $100, which was paid by him, and that plaintiff was not acting for defendant in the sale of the land; that the relationship existing between plaintiff and Poteet, whereby plaintiff was acting as the agent for Poteet, was unknown to defendant. The reply is a general denial.

The evidence shows the making of the contract as alleged; that defendant and Poteet were introduced to each other by plaintiff; that plaintiff sent several other parties to look at the farm, and continued negotiations with Poteet and defendant up to the 31st of December; that he had correspondence with defendant while defendant was in California and also while he was in Iowa; that early in December he telephoned defendant at Red Oak, Iowa; that defendant soon afterwards visited Falls City and again met Poteet at plaintiff's office; that the matter drifted along, plaintiff having talked to defendant and Poteet every few days during the month of December until the 31st of that month, when all the parties were in plaintiff's office and practically agreed on the terms of sale, for $20,000; $14,500 cash, and city property in Falls City, known as the Lindell Hotel, for the other $5,500; that the next day plaintiff drew up a memorandum of what he understood to be the terms of that agreement, which was signed by Poteet and by plaintiff as agent for defendant; that when he next saw defendant and showed him the memorandum defendant said, "to wait a minute that he wanted to go and see somebody." This occurred on the morning of January 2. That in the afternoon plaintiff received by registered mail the following notice: "The New National Hotel, Falls City, Nebr., Jan. 2, 1908 (1909). W. H. Maddox, Falls City, Nebr. Dear Sir: This is to notify you that I withdraw from the market

my 268 acres of land situated in sec. 35 & 36, Richardson Co., Nebr., known as the Randall farm, now listed with you. Yours truly, W. A. Harding." Defendant attempts to justify the discharge of plaintiff, and his alleged withdrawal of the land from the market, upon the ground that he learned on January 2 that Poteet had paid plaintiff $100 for his services in connection with the exchange of the hotel property. Thirteen days after defendant wrote plaintiff the letter of January 2, stating that the land was withdrawn from the market, he sold the property to Poteet for $20,000, conducting his negotiations with another real estate firm, known as Whitaker Brothers.

The rule invoked by defendant, and the one under which the court evidently directed a verdict in his favor, is that of dual employment. It is contended that because plaintiff was acting for Poteet as to the hotel property, and received pay from him for what he did in relation to that matter, he cannot now recover anything from defendant. There is no trouble with the rule contended for, when rightly stated and understood. It is that a real estate agent, acting for both parties in effecting an exchange of their property, can recover compensation from neither unless the agent's double employment was known and assented to by both of said contracting parties, or, more correctly speaking, by the one sought to be charged with such compensation. The simple question in this case is, did defendant, during the time he was negotiating with plaintiff and Poteet for the exchange of these properties, know that plaintiff was representing Poteet as to the hotel property, and did he assent thereto? If he did not know of it until January 2, at the time he wrote the letter above set out, his action in writing that letter and discharging plaintiff would have been justifiable. If he did know of the relations existing between plaintiff and Poteet, while the negotiations between the three of them were going on, and continued those negotiations from time to time after such knowledge, then his assent to such relations will be conclusively presumed.

Defendant testified that plaintiff introduced him to Poteet; that he and plaintiff and Poteet were carrying on negotiations looking to a sale of the farm; that he never at any time consented to accept the Lindell Hotel as a part consideration for the sale of the farm; that when shown the contract which plaintiff had drawn up with Poteet he refused to sign it; "and that that afternoon, after having talked with Mr. Poteet, he notified Mr. Maddox and the other real estate agents with whom the land was listed that it was taken off the market." In the light of what follows, this testimony is significant. Defendant was then examined as follows, in relation to the sale of the land which he finally made through Whitaker Brothers: "Q. You may state whether as a part of the consideration you took the Lindell Hotel. A. Well, the hotel was never deeded to me. I never had it in my name. Q. Just tell the facts. A. They had the hotel sold for a certain figure to balance up the deal. I got some cash and notes that were short time notes and well secured that I could turn to cash and did turn them right away. Q. When, if at any time during the negotiations between yourself and Mr. Poteet in which Mr. Maddox was concerned, did you learn that Mr. Poteet was paying Mr. Maddox for effecting the sale between you and Poteet? A. I learned that on the 2d day of January. Q. After learning that, what, if anything, did you do with reference to terminating your agency with Maddox? A. I notified him I withdrew it from the market." On cross-examination we have the following: "Q. You made up your mind you wouldn't sell? A. Yes, sir. Q. How soon after did you change your mind? A. Not until after Whitaker Brothers came to me. Q. The transaction was that Whitakers would take the hotel and Poteet would take the farm? A. I don't know who got the hotel, whether Whitakers or who got it. Q. Who paid you the money? A. For the hotel? Q. Yes. A. Whitaker Brothers gave me a check. Q. For the price of the hotel, less so much commission, didn't they? A. Yes. Q. Now,

you knew all the time you were negotiating with Mr. Maddox when you were in the office day after day, you knew Mr. Maddox had the hotel for sale or trade? A. Yes. Q. You knew that? A. Yes." Poteet was called as a witness for defendant, and on cross-examination testified that in purchasing the farm from defendant he turned in the Lindell Hotel as a part of the consideration; that the deed for the hotel was made to Whitaker, and Whitaker paid the money for the hotel to defendant. Bert Whitaker was called as a witness for defendant, and testified that he conducted the sale between plaintiff and defendant; that he now owns the Lindell Hotel; that the deed came to him from Poteet; that he took the hotel in at $4,500, and that he paid the consideration therefor to defendant. In the light of this record, it is clear that the district court erred in withdrawing the case from the jury and directing a verdict for defendant. There is no theory upon which defendant's conduct can be justified. He had obtained the services of plaintiff in the effort to sell his farm, and he actually sold the farm to the customer produced and introduced to him by plaintiff. He knew, by his own admission, during all the time negotiations were going on, that plaintiff was representing Poteet, so far as the hotel property was concerned. It is therefore clear that there was no fraudulent or improper concealment on the part of plaintiff in relation thereto, but that his relations with Poteet were fully understood. The fact that defendant did not learn until January 2 the amount which Poteet was to pay plaintiff for his services in connection with the hotel is, under the circumstances of this case, entirely immaterial. He knew that plaintiff was representing Poteet in that regard, and common knowledge and every-day experience would have told him that plaintiff expected remuneration from Poteet therefor. We are unable to discover any deceit or improper practice on the part of plaintiff. The letter of January 2, claiming that the land was withdrawn from the market, looks like a mere subterfuge. That the at-

tempted withdrawal of the land from the market should not, under the circumstances shown, defeat plaintiff's right to recover his commission, is well shown in *Smith v. Anderson,* 2 Idaho, 495, *Gottschalk v. Jennings,* 1 La. Ann. 5, and *Knox v. Parker,* 2 Wash. 34.

Plaintiff was clearly entitled to go to the jury upon the evidence introduced, and, for the refusal of the court to permit him to do so, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

MEEK COMPANY, APPELLANT, V. HENRY ROHLFF, APPELLEE.

FILED APRIL 20, 1912. No. 17,075.

1. **Sales:** ACTION: EVIDENCE. The evidence examined, and set out in the opinion, *held* insufficient to sustain the verdict and judgment.
2. **Trial:** DIRECTING VERDICT. "When the evidence which has been offered is not sufficient in *law* to make out the case of the party who has offered it, it is the duty of the court to so instruct the jury." *Hiatt v. Brooks,* 17 Neb. 33.

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

Baldrige, De Bord & Fradenburg, for appellant.

George W. Shields and *Robert J. Shields, contra.*

FAWCETT, J.

Action by plaintiff in the district court for Douglas county to recover for metal signs manufactured and delivered by it to defendant under a written order. Verdict and judgment for defendant, and plaintiff appeals.

On November 19, 1908, defendant signed and delivered to one Brown, a member of the firm of Frederickson, Brown & Chesney, plaintiff's agents at Minneapolis, an order for

500 stamped, framed signs for an expressed consideration of $200. In the order it was stated: "No proof wanted. Ship via Freight F. O. B. Coshocton. Special instructions—Use your own judgment as to displaying ad. Get signs as soon as possible." The order also recited: "The approval or acceptance of this contract being based upon the written requirements shown hereon, it is understood and agreed that any verbal alterations or agreements between buyer and salesmen, either now or hereafter, are not covered by this contract, and shall not be binding upon the parties hereto." The signs were promptly manufactured and shipped to and received by defendant. When received they did not meet with the approval of defendant, and he notified plaintiff that he would not accept them; whereupon, this suit was instituted.

The petition alleges the sale and delivery of the signs, the refusal of the defendant to receive the same, the amount due, and prays judgment. The answer denies all allegations of the petition not admitted; admits that he entered into the contract, but denies that the copy set out is a true copy; and alleges: "That prior to the time of the writing of said alleged contract, defendant had purchased from plaintiff other signs of a similar character, and one T. M. Brown, who was of the firm of Frederick, Brown & Chesney, the agent of the plaintiff, to induce the defendant to give him an order for said 500 signs, said to defendant that if he, the defendant, would leave it entirely to the Meek Company it would furnish to him 500 signs for $200, which in every respect would be as good and attractive as the ones that had been previously sold by the plaintiff to the defendant, and that said signs should be satisfactory to the defendant; that the signs that had been purchased by him from plaintiff prior to said time were first-class and artistic, whereas the signs sued for were botches and almost worthless; that there was neither art, nor good workmanship, nor taste exhibited in any of said signs; that when said signs came he refused to accept them and so notified the plaintiff." The

reply is a general denial. It is said by defendant that the reply was not filed until the conclusion of the trial, but no motion was made to strike it from the files, nor objection of any other kind interposed in the court below. We think it is too late to attempt to assail it here.

On behalf of plaintiff it was shown by the witness Selby that he had been treasurer of plaintiff since its organization; that the business of plaintiff was that of manufacturing all kinds of advertising goods, including metal signs; that it received defendant's order on or about November 19, 1908, through their agents at Minneapolis; that the order was duly entered on the books of the company and filled by them, and shipped on December 8, 1908; that he had examined the signs before they were shipped, and that they were in first-class condition and made exactly in accordance with the order sent them; "that they used their best judgment in regard to the display, and that they were first-class in every respect, both as regards the lithographing and lettering." The witness Townsend testified that he was in charge of the metal sign department of plaintiff; that he recalled the Rohlff order; that the order was turned over to his department and filled; that he personally examined the signs before they were packed and found that they were first-class in every respect and very attractive; "and as there were no instructions with the order as to the character of the lettering which should be done, the plaintiff followed its own judgment and printed the advertisement in the usual way with a shade of green in harmony with the color of the picture used; that a different advertisement could have been put on, had it been ordered, but that it was left to him and he followed his own best judgment as to what he thought would please the customer, and that the signs were made in exact accordance with the terms of the order, and that they were duly shipped to the defendant herein and that he had accepted the same, and that the only complaint received by the plaintiff from the defendant was that the printing of the signs was not according

o his liking." Witness Brown testified that he was an advertising broker and represented plaintiff in the solicitation of advertising matter; that on plaintiff's behalf he solicited from defendant and took the order for the signs in controversy; that defendant told him he was in a great hurry for these signs, and said it would be unnecessary to submit the sketch, but to let the artist display the "ad" in what he thought was the best way; "that he talked with Mr. Rohlff relative to the coloring to be used in the lettering, and Mr. Rohlff agreed with him that he had best let the artist use his own judgment in order to get the most harmonious effect, and for that reason Mr. Rohlff said that it would be unnecessary to submit a sketch, but to let the artist use his best judgment and hurry the signs along as fast as possible."

Defendant testified that he had been in the wholesale liquor business about 15 years, and had previous to this time ordered other signs from plaintiff; that he signed the order, copy of which was attached to plaintiff's deposition; that Mr. Brown, representing plaintiff, called upon him and showed him the sign in controversy without any letters on it and wanted to know if he couldn't sell it to him; that he agreed to buy it, "if he could have some nice satisfactory advertising on it and give him as nice letters as he had on the other signs, and he gave him the wording to put on it and suggested to get a good flashy sign; that, at the suggestion of Mr. Brown, he followed his advice and left it entirely to the artist." Defendant then offered in evidence the sign which he had previously purchased of plaintiff, and also one of the signs involved in the suit, which he had had altered by a sign painter in Omaha. He further testified that he had been in the saloon business for 23 years, was somewhat familiar with the methods of advertising, felt competent to examine cards, pictures, etc., and to state whether they were good advertising or not, and that the sign furnished by plaintiff "was bad advertising, in that it was dull, not a bit attractive, looked like a rubber stamp job, and not attractive to the

eye." The witness Zerzan, introduced by defendant, testified that his occupation was advertising novelties; that he was a sign painter by trade and also painted some pictures; that he had examined the signs in controversy; "that he would consider it faulty in that the coloring in the lettering was not bold enough for advertising purposes, and that the picture in itself is artistic, and the design in general, but that the lettering, or lay-out, could be improved upon, that is, that the space of the letters and the style of the letters could be made better; that he has taken several copies of this sign and experimented them with other colors for letters, and in order to make exhibit No. 2, being the sign in question herein, a good advertising card, a good strong color should be used for the lettering, something that is a slight contrast from the background, which would make it more effective and more attractive;" that he had retouched three of the signs, and that "for advertising purposes he considered it decidedly poor judgment in using the color that they did and making the display they did on the sign, and that it was not good workmanship." The witness Boder, called by defendant, testified that he was by occupation a sign painter. Upon being shown the sign in controversy, he testified "that his idea was that the coloring was not strong enough or not bold enough for advertising purposes, and if the colors were strengthened it would improve the artistic effect of the picture, and that if the coloring was stronger it would not in any way lessen the artistic effect of the picture, and the picture would be just as attractive notwithstanding bolder colors were used and such as were more easily seen."

The above is almost a complete transcript of the evidence set out in the abstract, and the most that can be said for it is that it shows that the judgment of defendant and his witnesses as to the artistic display of the lettering upon the sign (which, it is stated, was the picture of a beautiful woman) does not tally with the judgment of the plaintiff's officials and employees, who manufactured

the signs. It is urged by defendant that under the talk between defendant and the agent Brown, at the time the order was taken, the matter of display was left to the judgment of plaintiff's "artist;" that there is no evidence to show that plaintiff's artist ever had anything to do with the matter or his judgment obtained; that "these signs were metal signs, and various workmen must necessarily work upon them, blacksmiths, tinsmiths, or machinists must prepare the metal, artists must design the picture of the woman, and sign painters or persons skilled in advertising display would be supposed to paint or print the signs or direct how they should be done, so that they might just as well, in order to prove that they had done in accordance with the contract as construed by us, have called the blacksmith, the machinist, or the tinsmith, or even the janitor. The jury, having seen the sign sent by the plaintiff to the defendant, had a right to suppose from its appearance that they had chosen the janitor." This contention is quite readable, but not persuasive. The trouble with it is, the evidence shows that this work was done in the metal sign department, of which the witness Townsend was in charge; that, as there were no instructions with the order as to the character of the lettering which should be done, plaintiff followed its own judgment and printed the advertisement in the usual way; "that a different advertisement could have been put on, had it been ordered, but that it was left to *him* and *he* followed his own best judgment as to what he thought would please the customer." Parties of full age, free from restraint, are competent to contract as they see fit. In ordering the signs in controversy, defendant had a right to demand a sketch or proof of the advertising, including the color of the lettering thereon, and to use his own judgment, or he could agree to be bound by the judgment of the plaintiff. He saw fit to do the latter, and, there being no evidence in the record that plaintiff, through its officers and employees, was guilty of any bad faith, he is bound by their judgment. If men will persist in making improvi-

dent contracts, they must suffer the consequences thereof. It is not the province of the court to extricate them therefrom. In *Doolittle v. Callender*, 88 Neb. 747, a very similar case, we said: "Plaintiff was in the advertising business, making a specialty of furnishing this kind of cuts and of reading matter to accompany the same, and, if defendant saw fit to make a contract to take cuts and reading matter for a year and to leave the design of the cuts and the wording of the reading matter to plaintiff's judgment, that was defendant's own concern."

The evidence, in our judgment, utterly fails to establish any defense to plaintiff's claim, and its motion for a directed verdict, at the conclusion of the trial, should have been sustained. Having reached this conclusion, a consideration of the other point assigned in plaintiff's brief, and discussed by the parties, is unnecessary.

The judgment of the district court is reversed and the cause remanded, with instructions to render judgment for the amount of plaintiff's claim, with interest.

REVERSED.

STATE, EX REL. JAMES A. BENSON, APPELLEE, V. MAYOR AND COUNCIL OF THE CITY OF HASTINGS, APPELLANTS.

FILED APRIL 20, 1912. No. 17,504.

Elections: CONSTITUTIONAL OFFICERS: POLICE MAGISTRATE: POWER OF LEGISLATURE. The office of police magistrate being a constitutional office, and the constitution having fixed the time when such officer shall be elected, the time when, after election, he shall enter upon his term of office, and the duration of such term, the requirements of the constitution in those particulars must be complied with; and any attempt on the part of the legislature to provide for the election of such officers in any other manner or at any other times than fixed by the constitution is void.

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

John M. Ragan and *George W. Tibbets,* for appellants.

John C. Stevens, contra.

W. L. Hand, amicus curiæ.

FAWCETT, J.

Relator, having obtained a certificate of election as police magistrate for the city of Hastings at the general election in 1911, presented to the mayor and city council his certificate, oath of office, and bond in the sum required by law. The mayor and council refused to approve the bond, or to recognize relator's election to such office, upon the sole ground that at the time relator was elected there was no vacancy in such office and hence there was no such officer to be elected. Thereupon, relator brought proceedings in mandamus to compel the mayor and council to meet and approve the bond. The district court awarded relator a peremptory writ as prayed, and respondents appeal.

The city of Hastings belongs to that class having more than 5,000 and less than 25,000 inhabitants. It appears that at the city election in April, 1909, one Joseph Meyer was elected police magistrate for a period of two years; that he qualified and discharged the duties of the office for that period; that at the city election on April 4, 1911, Meyer was re-elected; that the vote was canvassed by the city council on April 10, and on April 11 he qualified as such officer. During all of those times, the city of Hastings acted under the provisions of article III, ch. 13, Comp. St. 1907, section 11 of which provided that the general city election in all cities governed by the act should be held on the first Tuesday in April annually. Section 12 provided that at the annual election held in April, 1907, there should be elected, with other officers, a police judge for two years, and biennially thereafter. On April 8, 1911, an act, with an emergency clause, was ap-

proved (laws 1911, ch. 23), defining the district of a police magistrate in cities and villages as co-extensive with the corporate limits of such city or village, in which he is elected, and three miles beyond such limits. Section 9 provided: "The election of a police magistrate shall take place at the next general election to be held on the Tuesday succeeding the first Monday of November, 1911, and on every alternate year thereafter, and the terms of office of police magistrate shall begin on the first Thursday after the first Tuesday in January next succeeding his election, and he shall continue in office until his successor shall be elected and qualified." At the election thus provided for, relator was a candidate, was elected, and received his certificate of election. One question argued in the briefs is, did the act of April 8, 1911, repeal the prior act, if not in terms, at least by implication? Counsel for respondents admits that if the act of 1911 did by implication repeal so much of section 8511, Ann. St. 1907, as fixes the election of the police judge in Hastings at the April general election, the judgment of the district court is right; but contends that, if it did not do so, the judgment should be reversed. We think the decision in this case must rest upon more substantial grounds than the repeal of the act referred to.

In the constitution of 1875 we find the following provisions: Section 1, art. VI: "The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns."

Section 13, art. XVI: "The general election of this state shall be held on the Tuesday succeeding the first Monday of November of each year, except the first general election which shall be on the second Tuesday in October, 1875. All state, district, county, precinct and township officers, by the constitution or laws made elective by the people, except school district officers, and municipal offi-

cers in cities, villages and towns, shall be elected at a general election to be held as aforesaid. Judges of the supreme, district and county courts, all elective county and precinct officers, and all other elective officers, the time for the election of whom is not herein otherwise provided for, and which are not included in the above exception, shall be elected at the first general election, and thereafter at the general election next preceding the time of the termination of their respective terms of office."

Section 18, art. VI: "Justices of the peace and police magistrates shall be elected in and for such districts, and have and exercise such jurisdiction as may be provided by law."

Section 20, art. VI: "All officers provided for in this article shall hold their offices until their successors shall be qualified, and they shall respectively reside in the district, county or precinct for which they shall be elected or appointed. The terms of office of all such officers, when not otherwise prescribed in this article, shall be two years. All officers, when not otherwise provided for in this article, shall perform such duties and receive such compensation as may be provided by law."

In *State v. Moores,* 61 Neb. 9, we held: "The office of police judge or police magistrate of an incorporated city is called into existence by the constitution." See, also, *Moores v. State,* 63 Neb. 345.

In 1897 the legislature passed an act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers, and government, and repealed the act of March 30, 1887, in relation thereto. Laws 1897, ch. 10. This act provided (sec. 13) that the first city election in all cities governed by the act "shall be held on the sixth Tuesday after this act goes into effect, and the next general city election on the first Tuesday in March A. D. 1900, and all succeeding general city elections every three years thereafter. Such elections shall be held at the same place as was the general election for state and county officials last preceding such city election.

The officers to be elected at such election shall be a mayor, police judge * * *; they shall each and all be elected by a plurality of all votes cast at said election for such officials respectively, and shall, when properly qualified, hold their offices for the terms herein designated, viz.: The terms of the officers first elected shall commence on the third Monday succeeding their election, and they shall hold office until the third Monday in March, A. D. 1900, and until their successors shall be elected and qualified, and all subsequently elected officers shall hold office for the term of three years, commencing on the third Monday succeeding their election, and shall hold their office until their successors shall be elected and qualified."

The constitutionality of this act was assailed by an original action in this court in the nature of *quo warranto*. *State v. Stuht*, 52 Neb. 209. On page 214 it is said: "The first point discussed by counsel is in relation to the police judge, and the provisions of the new act fixing the time of the election of said officer and the duration of his term of office. The section of the act of 1897 to which our attention is particularly directed in this connection is as follows: (Section 13 of the act of 1897 set out in full.) It will be noticed that by the provisions of the section quoted the terms of office of the police judge, after the first one, are fixed each at three years." The court then quotes section 1, art. VI, above set out. Section 20 is also set out. Continuing it is said (p. 216): "Under the act or charter of 1887, which the act of 1897 by its terms repealed, there had been elected a police judge, whose term of office, fixed by the constitution, will expire in January, 1898; this term could not be abridged by statute, hence the act of 1897, to the extent it purports to affect such term, is invalid; also such portion of it as makes the term of office of a police judge three years instead of the constitutional term of two years is of no effect." It will be seen that we there hold that the act of 1897, so far as it related to the office of police judge, was void upon two grounds: (1) To the extent it purported to affect the

term fixed by the constitution; and (2) to the extent that it sought to extend the term of a police judge to three years. Continuing it is said: "It seems quite clear that the mere designation of the time at which the police judge should commence his term of office, and the fixing the length of his term of office at three years, did not possess such significance or importance that the determination of the exact time of the inception of the term or its duration could, separately or combined, have operated as an inducement for the passage by the legislature of this act, containing, as it did, what was intended for a complete and entire scheme or plan for the organization and government of a class of cities; and, further, it seems clear that had the legislators known that either the time of the commencement of the term stated in the law, or the exact length of the term as fixed, must be abandoned, they would not have felt constrained to withhold approval from the other and more important parts of the act." Again it is said (p. 217): "The law of 1897 provided for a police judge and prescribed fully his jurisdiction, powers, duties, etc. The only defects in the law were that his term of office could not be for the length of time stated, and might not commence at the time fixed. * * * Turning our attention now directly to the enactment insomuch as it affects the police judgeship and the term thereof, it is clear that there is a police judge, whose term of office, being established by the constitution, cannot be interfered with or shortened by the legislature or its enactments. * * * (p. 221) It is also urged that to say that an incumbent, under the circumstances developed in this case, may hold the office until the election and qualification of a successor is equivalent to saying that a legislature may fix a term of office of indefinite duration, by repealing the law providing for the election of a successor. The legislature could not do what has just been stated. It might attempt it, but it would have no force or effect in regard to an office created by the constitution." The only reasonable deductions to be drawn from the

above quotations are that the defects in the law of 1897 were that the term of office of a police magistrate could not be for the length of time therein stated and could not commence at the time fixed. In other words, that the office of police magistrate being a constitutional office, and the constitution having fixed the time when such officer shall be elected, the time when, after election, he shall enter upon his term of office, and the duration of that term, the requirements of the constitution in those particulars must be complied with; and that any attempt on the part of the legislature to provide for the election of police magistrates in any other manner is absolutely void. Section 13, art. XVI of the constitution, provided that the general election should be held on the Tuesday succeeding the first Monday in November in each odd-numbered year; and section 20, art. VI, that their term of office should be two years.

By the act of April 8, 1911, the legislature appears, for the first time, to have caught up with the constitution and provided for the election of police magistrates in accordance therewith. Section 9, art. II, ch. 14*a*, Comp. St. 1911, provides for their election on the Tuesday succeeding the first Monday of November, 1911, and on every alternate year thereafter, and that their terms of office shall begin on the first Thursday after the first Tuesday in January next succeeding their election.

A distinction is attempted to be drawn, in the briefs of counsel for relator, between the designations police judge and police magistrate. It is so apparent that those designations refer to one and the same office that this contention does not require discussion. That this court so considered them is shown by the quotation from *State v. Moores, supra.*

Under the terms of the constitution above set out, and under the authority of our former decisions above cited, we hold that the act of the legislature, in authorizing cities of the class to which the city of Hastings belongs to elect police magistrates in April and to provide that their term

of office should run for two years from that time, was void, and that the only constitutional election of a police magistrate for the city of Hastings, shown by the record in this case to have ever been held, was the election in November, 1911; and that at such election relator was duly elected to the office of police magistrate.

The judgment of the district court is therefore

AFFIRMED.

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

FILED APRIL 20, 1912. No. 16,802.

1. **Reference:** FINDINGS OF REFEREE: REVIEW. When a referee, who has been appointed by the trial court to take evidence and report the findings of fact and conclusions of law, makes his report, the correctness of his findings and conclusions may be challenged by filing exceptions and objections thereto, stating the grounds of such objections. No motion for a new trial is necessary for that purpose.

2. ———: REPORT OF REFEREE: MOTION FOR NEW TRIAL. The statute (code, sec. 316) allows a motion for a new trial to be filed at the term that the report of the referee is "rendered." It must be within three days after the "verdict or decision." This limitation of three days does not apply to the report of a referee.

3. **Quo Warranto:** JURISDICTION OF SUPREME COURT: REMOVAL OF PUBLIC OFFICERS. Section 1*a*, ch. 71, Comp. St. 1911, provides for the removal of public officers for certain causes, and the proper procedure under this statute is by *quo warranto*. This court has original jurisdiction of *quo warranto* by section 2, art. VI of the constitution.

4. **Pleading:** INDEFINITENESS: REMEDY. If the allegations of an information are indefinite, the remedy is by motion. A general demurrer will not be sustained if the information as a whole charges a wilful neglect of duty within the provisions of the statute.

5. **Officers:** REMOVAL: POLICE OFFICERS. While the statute has more ready application to officers who are elected or appointed for fixed terms, and are not subject to removal under other statutes and upon similar grounds, it must be held to extend to inferior police officers in a proper case, since they are expressly included.

6. ———: ———: EVIDENCE. Prosecutions under this statute are highly penal in their nature, and the evidence must be clear and satisfactory. To wilfully fail, neglect or refuse to enforce a law involves more than oversight or carelessness or voluntary neglect. It must be prompted by some evil intent, or legal malice, or at least be without sufficient grounds to believe that he is performing his duty.

7. **Municipal Corporations:** ENFORCEMENT OF LAWS: CHIEF OF POLICE. The enforcement of the law in cities of the metropolitan class is placed by the legislature directly under the control of the board of fire and police commissioners, of which the mayor is principal officer. The chief of police is appointed by the board and removable at its pleasure. It is the duty of the mayor to "order, direct and enforce" the law. If the board directs in what manner and to what extent the law for the suppression of prostitution and the sale of intoxicating liquors shall be enforced, and the chief of police in good faith believes it is his duty to be governed by the established policy of the board and the directions of the mayor, and faithfully enforces the law accordingly, it cannot be found that he did "*wilfully* fail, neglect or refuse to enforce any law *which it is made his duty to enforce.*"

ORIGINAL application in *quo warranto* to oust respondent from the office of chief of police of the city of Omaha. *Dismissed.*

Grant G. Martin, Attorney General, George W. Ayres and *Arthur F. Mullen,* for relator.

W. J. Connell, contra.

SEDGWICK, J.

These proceedings were begun in this court by the attorney general, upon the direction of the governor, under the provisions of sections 1*a*, 1*b*, ch. 71, Comp. St. 1911, commonly called the "Sackett Law." The respondent is chief of police of the city of Omaha. The action was be-

gun in August, 1910. A referee was appointed to take the evidence and report his findings of fact and conclusions of law. The evidence taken before the referee is contained in nine large volumes of nearly 500 pages each. The questions presented are of more than usual importance. It being the first attempt to enforce the act under which it is brought, able counsel on both sides have given unusual attention to the case and have ably and carefully presented the numerous questions involved. The case has been greatly delayed, perhaps necessarily so under the circumstances, although ordinarily a case of this nature and importance should be promptly heard and determined. The counsel and the referee are to be commended for the thorough work which has been done. The referee made quite comprehensive findings of fact and conclusions of law, reporting that some of the charges against the respondent were not sustained by the evidence and that others were, and that the allegations of the information were sufficiently proved and that the prayer ought to be granted and the respondent removed from his office.

1. After the referee had filed his report, the respondent not having filed any motion for a new trial, the relator moved for judgment upon the report. It is now earnestly contended that a motion for a new trial is indispensable to entitle the respondent to any review of the proceedings by this court and that the motion for judgment ought to be sustained. This argument is derived principally from the provisions of sections 316 and 317 of the code. In *Aultman, Miller & Co. v. Leahey*, 24 Neb. 286, the case was tried to a jury in the district court and was brought to this court upon a petition in error. The motion for a new trial in the district court was filed on the fourth day after the verdict was rendered, and it was held that the motion was filed too late. The opinion contained what purports to be a quotation of section 316 of the code. The quotation, however, is inaccurate. Section 316 is as follows: "The application for a new trial must be made at the term the verdict, report, or decision is rendered,

and, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." It does not appear from the opinion that the decision in the case was rendered by the district court more than three days before the motion for a new trial was filed, and the court manifestly construed the section to mean that the motion must be filed within three days after the verdict, whether any final decision had been rendered in the case or not. If this is a necessary construction of the statute, the construction ought not to be extended to the report of a referee. The language of the section forbids such a construction. The application for a new trial in the district court must be made at the term that the report of the referee is filed and within "three days after the verdict or decision was rendered." There is a substantial reason for omitting the report of the referee in this clause of the statute, as it would be impracticable in many cases to comply with it, if the motion was required to be filed within three days after the report was rendered. In this case the record shows that the respondent had no notice of an unfavorable report of the referee until more than three days after the report had been filed, and if the report of a referee had been included in the three days' limitation it would in many cases practically prohibit a review in this court of the judgment of the lower court in cases that come here by appeal. This contention of the relator, then, is without merit. The respondent filed exceptions to the report of the referee, and this appears to be the proper procedure to present to the court in which the reference is had the matters relied upon to avoid the findings and conclusions of the referee. In such cases the motion for a new trial is addressed to the trial court and calls the attention of the trial court to the supposed errors in the proceedings and judgment. In law cases such motion is necessary in order to obtain a review in the appellate court.

2. A motion was filed by the respondent which was treated by the counsel and the court as a general demurrer to the information. This motion was overruled, and the respondent now contends that this ruling was wrong and that the information fails to state any cause of action against the respondent. In this connection it is urged that this court has no jurisdiction to enforce this statute. We are, however, satisfied that this court has jurisdiction. The constitution prescribes the original jurisdiction of this court. Section 2, art. VI of the constitution, provides that this court shall have "such appellate jurisdiction as may be provided by law." Its duties as a court of review may be enlarged, but it has been frequently held that the legislature cannot increase its original jurisdiction. The statute under which the proceedings are brought directs that the proceedings shall be begun in this court by the attorney general when directed by the governor. This provision would no doubt be ineffective unless the character of the proceedings was such that this court would have original jurisdiction thereof under the provisions of the constitution. The first section of the act provides that under certain circumstances officers shall forfeit their office and be removed therefrom. There can be no doubt of the validity of this provision, at least when applied to offices created by the legislature; and when an officer has forfeited his office and is subject to removal therefrom, there can be no doubt that *quo warranto* is the correct remedy, and this court is given original jurisdiction in all cases of *quo warranto* by the section of the constitution above cited. Whether the provision of the second section of the statute would in any way limit the jurisdiction of the district courts in such cases, it is not necessary now to determine.

The next contention upon the motion was that the information does not charge any acts or omissions on the part of the respondent that would forfeit his right to the office under the provisions of the statute. The informa-

tion is too long to copy in full. It alleges specific instances of wilful refusal on the part of respondent to make arrests for crimes when required by the mayor and board of fire and police commissioners to do so. Many of the allegations of the information are quite indefinite. No motion was made to require a more exact statement in any of the matters alleged. We will not discuss now this objection to the information. It is sufficient to say that, under our view of the law, the information was not subject to a general demurrer.

3. Many reasons are urged for the conclusion that this prosecution cannot be sustained. It is said that the act was never intended to apply to officers who are appointed by local authorities and who hold their offices at the will of the appointing power, if the duties of their office are neglected. It may be conceded that many substantial considerations are urged for such a construction of the statute. A discussion of other points in controversy will lead to a further consideration of this matter. The occasion for the statute is much more manifest in the case of officers who are elected or appointed for fixed terms and not subject to removal under other provisions of the statute upon similar grounds and for similar reasons as are contemplated in the statute in question, and yet the language of the first section of the act is so broad and general as to compel the construction that it must, in some instances at least, apply to inferior officers removable by the local authorities from which they receive their appointments. The section specifically names police officers and police commissioners, with the general words "or other officers," and these officers cannot in all cases be exempt from its provisions.

4. The next contention is that the evidence does not show that this respondent did "wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce." Notwithstanding the large amount of evidence taken by both parties, it appears that the evidence as to the principal facts upon which the determination of this

case depends is not substantially conflicting. The contention of the state is that the respondent has failed in many respects; that he has failed to enforce the liquor laws of the state and has neglected and refused to arrest and prosecute known violations of this law; that he has also failed to enforce the law against gambling; and that he has failed and refused to enforce the laws of the state and the ordinances of the city of Omaha, and the orders of the board of fire and police commissioners for the suppression of prostitution. The evidence abundantly shows that in all these respects the law has been openly, notoriously and continuously violated in the city of Omaha. According to this evidence there is and has been for more than 30 years continuously a large district embracing several blocks upon some of the principal streets in that city notoriously known as the "red-light district," in which prostitution and the illegal sale of intoxicating liquors, and in many cases gambling and other vices, have been and are so openly and brazenly practiced that all citizens of Omaha, and all citizens of the state, whose attention may have been called to the matter must be aware of existing conditions. Members of the police force have patrolled this district. At least two of these officers are continually in service there. They have seen these flagrant violations of the law from day to day for many years. They no doubt have the most direct and certain knowledge of the facts, but that knowledge extends beyond them to the police captain and to the chief of police, the board of fire and police commissioners, the city council, the state legislature, and the people of the state at large. All have sufficient knowledge to be responsible for existing conditions.

The governor and the attorney general, assisted by a number of public spirited citizens, have attempted, and without doubt in good faith, to use this new statute to compel a better enforcement of the law.

Are the provisions of the statute applicable to the case made against the respondent? Did he at the times and in

the manner specified "wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce"? The statute governing cities of the metropolitan class gives the mayor and city council ample power to make and enforce regulations for the "good government, general welfare, health, safety and security of the city and the citizens thereof." Comp. St., ch. 12*a*, sec. 144, subd. 25. The board of fire and police commissioners consists of the mayor, who is *ex officio* chairman of the board, and four electors of the city, and the mayor and council are by the statute given authority to remove the members of the board for misconduct in office or failure to discharge their duties. Section 60. The board of fire and police commissioners have power to appoint the chief of police and other police officers, and to remove the same "whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service of the police department" (sec. 62); and it is made the duty of the board "to adopt such rules and regulations for the guidance of the officers and men of said department, for the appointment, promotion, removal, trial or discipline of said officers, men and matrons, as said board shall consider proper and necessary" (sec. 63). Section 64 provides: "It shall be the duty of the mayor to enforce the laws of the state and the ordinances of the city, to order, direct and enforce, through the officers of the police department, the arrest and prosecution of persons violating such laws and ordinances, to co-operate with and assist the sheriff of the county in suppressing riots and mobs, and the arrest and prosecution of persons charged with crimes and misdemeanors." The statute also provides that the chief of police shall be subject to the orders of the mayor and board of fire and police commissioners, and that "all orders of the board relating to the direction of the police force shall be given through the chief of police" (sec. 67).

To our minds the most important question presented in this case is: Under the provisions of the statute, what

shall be regarded as a wilful failure to enforce the law? The next most important question, and one which it is necessary to consider, in order to determine the question already stated, is: What laws is it made the duty of the chief of police, upon his own initiative, to enforce? The decision of this court in *Minkler v. State*, 14 Neb. 181, is cited by the relator as determining what should be regarded as wilful refusal to enforce the law. In that case the county surveyor of Otoe county was removed from office "for wilful maladministration in his office." It appears that in his capacity of county surveyor, and while acting as such, he "'removed, and carried away all the government landmarks and the stones set up to mark the section, half-section, and quarter-section corners' of certain sections of land." The court said: "The removal of established monuments and landmarks was unlawful and forbidden even from the time of Moses, the great lawgiver." And it was shown that he "knew the true character of the corner stones." The court quotes from the case of *State v. Preston*, 34 Wis. 675. In that case the defendant was prosecuted for obstructing the highway. He offered to prove that the supervisor of the town had determined that there was no highway at the place in question, and instructed him to place the fence where he did. This the court held to be a good defense. This court distinguished that case from *Minkler v. State*, and, no doubt, properly so. Minkler acted upon his own authority. It is impossible to believe that he did not know the nature of government landmarks, and did not act wilfully in removing all of them from several sections of land. In an action to remove a county treasurer for wilful misconduct or maladministration in office, the supreme court of Iowa, in defining wilful misconduct, used this language: "What is the meaning of 'wilful misconduct' as that phrase is here employed? Manifestly it is not applicable to every case of misconduct, nor to every mistake, or every departure from the strict letter of the law defining the officer's duties, but only to wilful wrongs or

omissions on his part. The word 'wilful,' like most other words in our language, is of somewhat varied signification according to its context and the nature of the subject under discussion or treatment. Frequently it is used as nearly or quite synonymous with 'voluntary' or 'intentional,' and evidently this is the interpretation given it by the trial court in the case before us. But when employed in statutes, especially in statutes of a penal character, it is held with but few exceptions to imply an evil or corrupt motive or intent." *State v. Meek*, 148 Ia. 671. And, in an earlier case, the same court said: "Every voluntary act of a human being is intentional, but, generally speaking, a voluntary act becomes wilful in law only when it involves some degree of conscious wrong or evil purpose upon the part of the actor, or at least an inexcusable carelessness or recklessness on his part, whether the act be right or wrong." *State v. Willing*, 129 Ia. 72.

Prosecutions to remove officers are penal in their nature, and, while it is generally held not to be necessary that the charges should be proved beyond reasonable doubt, still it is universally considered that the evidence supporting the charges must be clear and satisfactory. The respondent has been connected with the police force for nearly 20 years, and appears, during all that time, to to have been in good standing with his superiors. If he continues in the office he will soon be entitled to a substantial pension for the remainder of his life. If he is found guilty in these proceedings he will be deprived of pension, and his character and efficiency as an officer placed in doubt. An action of this nature is highly penal, and to justify a conviction the charges should be clearly and substantially proved. Under such circumstances, wilful neglect to perform an official duty is considered to be something more than oversight or carelessness or a merely voluntary neglect. It must be prompted by some evil intent, or legal malice, or without sufficient ground for believing himself justified in the course pursued. *State v. Preston*, 34 Wis. 675, and cases cited; *Felton v. United*

States, 96 U. S. 699. This construction has been adopted by this court: "But where such act results from a mere error of judgment or omission of duty without the element of fraud, or where the alleged negligence is attributable to a misconception of duty rather than a wilful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state." *State v. Hastings,* 37 Neb. 96.

We have said that the citizens of the state and the state itself, in its governmental capacity, are not entirely free from responsibility for the conditions which are complained of as existing in the city of Omaha. There has been some difference of opinion expressed by the courts as to the conditions which will justify the state in interfering with the affairs of local municipal government, but there have been no differences of opinion upon the proposition that the state has the jurisdiction and the duty to see that its laws for the government and protection of its citizens are observed and enforced in all parts of the state. If the local authorities are unwilling or unable to enforce these laws the state may intercede and directly control the police power necessary to their enforcement. The enforcement of the law in cities of this class is now placed by the legislature directly under the control of the board of fire and police commissioners, of which the mayor is the principal officer. If this board is selected by the voters of the city it will presumably, so far as it is able, compel such enforcement of the law as the majority of its constitutents desire and command. If the laws of the state are disregarded in any locality because of the perversity of public sentiment, and the state is compelled to interpose for their enforcement, and to that end selects the immediate governing power of the instrumentalities of its enforcement, they will presumably enforce the law as the enlightened intelligence of the people of the state at large demand.

In 1897 a law was enacted by the legislature which provided that the board of fire and police commissioners of

cities of the metropolitan class should be appointed by the governor of the state. This statute was held by this court to be constitutional. *Redell v. Moores*, 63 Neb. 219. Such appointments were made accordingly. Afterwards this statute was repealed, and the selection of these officers was again confided to the voters of the municipality. In this case the evidence shows without conflict that there was a difference of opinion among the members of the board of fire and police commissioners. Mr. Karbach, one of the members, insisted that the laws, the violation of which is now complained of, were not adequately enforced. The mayor and the other members of the board appear to have disagreed with him, and they, apparently without his assistance, determined upon and adopted the policy of the board with regard to the enforcement of these laws. The difference of opinion in the board in regard to the suppression of these violations of the law was as to the degree that the violations should be tolerated. Mr. Karbach did not insist that these violations of the law could be wholly suppressed. He was called as a witness and testified: "I thought that a limited number of them (houses of prostitution) in the prescribed district was a necessary evil. As a member of the fire and police commission I was in favor of a limited number of houses of prostitution in the 'red-light district.'" Mr. Karbach testified that he introduced a resolution before the board of fire and police commissioners, the substance of which was: "The chief of police 'is hereby instructed to arrest and prosecute all parties selling liquor illegally,'" and that the resolution did not receive a second. He further testified: "The board, I think, practically, with the exception of Mr. Paige, agreed to allow those houses to open again on condition that they put curtains on all of the doors and windows, and stop soliciting of any kind. * * * I offered a resolution, looking toward a more strict enforcement of laws and ordinances. This resolution received no second, and didn't go into the minutes. In October I offered another resolution instructing the chief

to stop the illegal sale of liquor. There was no second to this motion. * * * My feeling of animosity toward the chief is not as strong as it is toward the other members of the board." They all appear to have considered that an attempt to wholly suppress or separate the social evil and the sale of liquor to be unsuccessful, they having been associated together in Omaha for more than 30 years. Two detectives were employed to investigate existing conditions as to the violation of the liquor law. They made quite an extensive report of existing conditions, and of the attempt that had been made to enforce the law, and the results. This report was submitted by the respondent to the board of fire and police commissioners and was discussed and acted upon by them. It appears that the entire board of fire and police commissioners considered these houses a necessary evil, and that the proper enforcement of the law did not require their suppression. Even the member who thought that the prosecutions were insufficient entertained this view. In this the board must have been supported by a majority of the voters of the city of Omaha. This policy was the foundation of all of the violations of law complained of. The evidence shows that all other violations of the law, such as are complained of, were practiced freely in these houses, and could not be suppressed if these houses were allowed to continue. It may be that the chief of police and every member of the police force were mistaken in supposing that they ought to be controlled by this policy of enforcing the law, but we cannot believe that they were guilty of a wilful refusal to do their duty because of this mistaken notion that they should be governed by the policy of their superiors.

It appears that the governor, after making some investigation, wrote to the respondent specifying in detail instances of the violation of the law. After the respondent received this letter he prepared an answer manifestly in accordance with what he thought were his instructions from the mayor and board of fire and police commis-

sioners. He then submitted the governor's letter and his proposed reply to his superiors, the mayor and board of fire and police commissioners. He concludes his letter to the governor with the following expression: "If you have any further suggestions or recommendations, I shall be pleased to have them, and I will, as above stated, take the matter up with the mayor and board and act upon their instructions." This is the key to the whole conduct of his office. The evidence shows that he is an intelligent and efficient officer. He knew, beyond doubt, the policy of his superiors, the mayor and the board of fire and police commissioners, and, being subject to removal by them at any moment, he seems to have believed that it was his duty to enforce the law against these houses of prostitution and unlawful sale of liquors in the manner and to the extent that they indicated. In this he seems to have succeeded as well as ought fairly to be demanded of him, and this is what he had in mind when he testified: "My understanding was, what I meant to say, was that we were enforcing the law, and had been, and would continue to the best of our ability. I didn't say that I was handicapped by anybody interfering with me." When he was asked whether there was any understanding with the members of the board of fire and police commissioners that the laws were not to be enforced with reference to the unlawful sale of liquor, he answered that there was no such understanding. The board had determined upon many restrictions upon the conduct of the inmates of these houses and upon the sale of liquors. They evidently considered that enforcing the law, and to some extent it was, and the respondent to that extent enforced the law acting under the policy and instructions of his superiors.

It was made the duty of the chief of police to keep the city attorney and prosecuting officers of the county informed of all matters that pertained to their several offices relating to the police interests of the city and of any breach of the law or ordinances. This appears from the

evidence to have been done, and prosecutions were commenced whenever so advised by the proper officers. Search warrants were issued and liquors seized. Many trials were had, and, in a few, convictions were obtained, but as a rule the prosecutions appear to have been unsuccessful. The city attorney testified that during the year 1910 there were seven or eight prosecutions for running houses for the purposes of prostitution, and about 75 or 100 prosecutions for keeping disorderly houses, and said: "I construe the 8 o'clock closing law to apply to saloon-keepers only. * * * I know of no case where the chief of police or the detectives failed, refused and neglected to aid and assist me in obtaining witnesses and bringing about a successful prosecution."

The board of fire and police commissioners adopted their policy with regard to these violations of the law complained of upon full information. The members of the police force, who continually patrolled the worst portions of the city, as well as those whose duties were in other localities, reported the conditions which they found, and these reports were before the board in its official capacity, as well as before the members of the board. The respondent kept his under officers informed as to the resolutions of the board regarding the manner of enforcing the law. In some of his communications to the captains of police we find the following language: "As you will see by a resolution passed by the Honorable Board of Fire and Police Commissioners, at its meeting last night, they further request the enforcement of the order of March 2d, in regard to closing of all cribs fronting on the streets, alleys or lanes within the 'District.' I wish to have you notify all the owners and occupants of said buildings where cribs have existed, and where they have made additional improvements, that they must cease operations at once, and any woman occupying a crib, or the places designated in the former resolution, will be arrested and brought into court after the notification given this day. You will also notify all landlords and women having name

plates on their doors that they must remove the same at once, and also all houses with glaring lights, showing names and numbers, must be removed, and they must confine themselves to an ordinary light, such as an incandescent electric light. In other words, all these glaring lights must be taken down, and, if they show a light at all, it must be of a small calibre. I wish to have this resolution of the board strictly enforced, beginning after the first notification for them to vacate."

The relator in his brief says: "In the nature of things, the entire surroundings of the respondent must be taken into consideration in passing on his good faith as an official. It would be unfair to separate and take a part of the duties or actions of the chief of police during the year 1910 and base a finding absolutely on one part of his administration. * * * The board of fire and police commissioners have the right and can remove the respondent without cause; they could remove him for a cause. * * * The house of prostitution is the pillar on which the whole system rests. If the police force would prosecute the keepers of the houses, public prostitution could not exist."

The respondent testified: "We have done everything we could. Have never purposely or wilfully neglected to carry out the directions of the board or to do what I could to suppress lawlessness and crime. We have done what we could to suppress lawlessness and crime of the character referred to in the complaint. I mean that we have carried out the orders of the board. I have been ready and willing to act upon information furnished from any source and that was sufficient, according to the requirements of the prosecuting officer, to secure complaint. We made investigations and submitted what we found to the county attorney's office and to the city prosecutor with reference to the surreptitious sale, referred to in my letter, to the extent that I had knowledge of them. We made investigations with reference to the maintaining of houses of prostitution and the selling of liquor without license.

We have a section in the city known as the 'red-light district.' I presume it has existed for over 30 years in the northeast part of the town. It is a part of the Third ward. * * * In my judgment I would not have any right whatever to arrest any person without a warrant, except I found them in the commission of a crime. * * * As I recollect it, the ordinance directing the chief of police to suppress prostitution was repealed years ago, and it was taken away from him, giving him no jurisdiction whatever over it. I think the mayor has jurisdiction over the city to enforce the law. The chief of police acts under his direction. My construction of the law is that it is my duty to carry out the orders of the mayor. * * * All my conduct as chief of the police, with reference to the suppression of houses for selling liquor without license, was guided by the rules of the fire and police commission, laws of the city, and laws of the state. * * * I don't believe I remember of any resolution referring to this. I think the board took my letter and the governor's letter and went over them and said it was all right, my answer was all right, met with their approval, as I recollect it, no resolutions were passed."

Our statute provides: "Every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained." Criminal code, sec. 283. This section, no doubt, applies to the chief of police of Omaha. It was, then, his duty to arrest at once any one he personally found violating the law. He was under the control of the mayor and board of fire and police commissioners, as a deputy sheriff or deputy marshal is under control of his chief. If a deputy sheriff is informed, and has ample reason to believe, that the law is being violated in a certain building, and informs the sheriff of that fact, and proposes to make an investigation and see personally whether the law is being violated, and is told by the

sheriff, his superior officer, not to do so, but to give no more attention to the matter, it may be insisted that the deputy should disregard instructions of his chief and should ascertain whether the law is being violated, and, if he found that it was, make arrests and take his chances of summary removal by his chief; but it must be conceded that the deputy, under such circumstances, might reasonably have doubts in regard to his duty, and that, if he complied with the known policy and authority of his chief, he could not be convicted of wilfully refusing to enforce the law if he failed to make further investigation. This seems to be very nearly the position in which the respondent was placed. He was appointed by the mayor and police board. He was removable by them at their pleasure. They had all of the information in regard to existing conditions that the respondent had. He knew what had been determined by his superiors to be a sufficient and proper enforcement of the law. He knew that if he violated their policy they might be expected to immediately remove him in favor of one who would obey instructions. He had not personally seen the violations of the law complained of. He knew of them by the reports of the police force, as his superiors, the mayor and board of fire and police commissioners, knew of them. The statute (sec. 64) makes it the duty of the mayor to "order, direct and enforce" the laws "through the officers of the police department." It is not so clear that the mayor could not "direct" the manner and extent of the enforcement of law against these evils, which had been long tolerated by public sentiment and high officials, as to render an under officer guilty of wilful neglect in following those directions if he acted in good faith, believing that he was doing his duty. If he in good faith believed that it was his duty to take such action in regard to the enforcement of the law as the mayor and board of fire and police commissioners prescribed for him he may have been mistaken, but it does not clearly appear that he acted wilfully.

The complaint against respondent, therefore, is not sustained, and is

DISMISSED.

REESE, C. J., concurring in the conclusion.

It may be that the conclusion arrived at in the foregoing opinion is the only one which can be justified under the facts, but I cannot agree to all that is said. From the facts detailed, it may fairly be assumed that the mayor should have been included in the order of the governor to the attorney general. It is a part of the public history of Omaha that the officers have been inexcusably derelict in the discharge of the duties imposed upon them by law, their oaths, and the necessity for the protection of property and law-abiding citizens. It must be conceded that the chief of police is in some respect subject to the control of the mayor and police board, but, as pointed out in the opinion, the fact that those officers failed and refused to discharge their sworn duty, and might have removed respondent for no other cause than that he did discharge his, ought not to furnish any justification for his failure. He knew that the law was being violated within the city by day and by night continuously. True, he perhaps did not *see* those violations, but his officers reported them to him, and the *law* said it was his duty to enforce its observance. That law was of higher authority than the direction of the mayor or police board. The obligation of his oath of office could not be diminished by their directions or commands. He failed to do his duty. But, if he, acting in good faith, understood and believed that the mayor, whom the statute provides shall direct him in the discharge of his duties, had the right in connection with the police commissioners to control his actions, notwithstanding the mandatory provisions of the statute, it *may* be that it ought not to be held that he had "wilfully failed or refused to enforce any law which it is his duty as such officer to enforce." Questions of this kind must be solved

by a consideration of the facts in each particular case. If the mayor and police board, admittedly the superiors of the chief of police, knowingly and wilfully stand in the way of the enforcement of the law by their subordinate officers, it seems clear that they should not escape, and the whole of the penalties of the law inflicted upon their subordinates. Neither the attorney general nor the court are accountable for these discriminations.

ROSE, J., dissenting.

In my view of this case, the majority in their opinion have departed from three fundamental principles which seem to me to be essential to the welfare of society: (1) In a proceeding to remove a police officer for wilful failure to enforce the law, he should not be allowed to retain his office by showing that he obeyed the lawless directions of his superior officers, though in doing so he permitted open and notorious lawlessness and violated the solemn enactments of the legislature and the instructions of the governor whose duty it is as chief executive to see that the laws are faithfully executed. (2) The word "wilfully," in a statute providing for the removal of a police officer "who shall wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce," has a meaning different from the definition of that word as used in the criminal law to describe a felonious act, and does not mean that the conduct of the officer, to justify his removal, "must be prompted by some evil intent, or legal malice, or at least be without sufficient grounds to believe that he is performing his duty." (3) A statute establishing a new method of removing a public officer for wilful failure to enforce the law is remedial legislation and should be liberally construed with a view to suppressing the mischief which made the legislation necessary, and a construction which would weaken the effect of the statute should be avoided.

1. For the purpose of enforcing obedience to law in every part of the state, of extending to the people gen-

erally the protection of the governor as chief executive and of making effective that provision of the constitution declaring that "the supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed," the legislature recently passed an act containing these words: "Any county attorney or prosecuting officer, sheriff, police judge, mayor, police officer, or police commissioner or other officer who shall wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce shall thereby forfeit his office and may be removed therefrom." Comp. St. 1911, ch. 71, sec. 1*a*.

Other provisions of the act authorize the governor to direct the attorney general to institute proceedings to remove any police officer who wilfully fails, neglects or refuses to enforce any law which it is made his duty to enforce. Under power thus granted, the governor directed the attorney general to bring this suit against respondent as chief of police to remove him from office for neglecting to enforce the laws in the city of Omaha. A statute of this state makes it the duty of a chief of police to "arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained." Criminal code, sec. 283. Under the charter of the city of Omaha, additional power is conferred upon the chief of police in the following lanuage:

"He shall have, in the discharge of his proper duties, like powers, and be subject to like responsibilities, as sheriffs in similar cases.

"Each policeman shall give a bond conditioned as provided in this act, and shall have the same powers as constables in arresting all offenders against the laws of the state, and may arrest all offenders against the ordinances of the city with or without a warrant. In discharge of their duties as policemen they shall be subject to the immediate orders of the chief of police." Comp. St. 1911, ch. 12*a*, secs. 70, 71.

Referring to the laws forbidding gambling, prostitution and illegal sales of intoxicating liquors, the majority find: "The evidence abundantly shows that in all these respects the law has been openly, notoriously and continuously violated in the city of Omaha. According to this evidence there is and has been for more than 30 years continuously a large district embracing several blocks upon some of the principal streets in that city notoriously known as the 'red-light district,' in which prostitution and the illegal sale of intoxicating liquors, and in many cases gambling and other vices, have been and are so openly and brazenly practiced that all citizens of Omaha, and all citizens of the state, whose attention may have been called to the matter must be aware of existing conditions."

The conditions thus described have not only been known to respondent, but reports showing the facts are on file in the department of which he is the chief. The machinery and power of the police department of a great city are in his hands. His official connection with the police department extends over many years. It would be an affront to his intelligence to intimate that he is ignorant of the lawlessness proved. That he intentionally refused to enforce the law, knowing the lawless conditions described, is fully established by the evidence. I do not concur in the opinion of the majority that he is not answerable in this action because, in permitting open violation of the law, he is carrying out the policy of the police commissioners and the mayor who appointed him. He is the officer of the city. In the city's connection with the state, he is the state's officer. His obligation, like that of other officers, is to uphold the constitution and laws. Orderly society is entitled to his protection within his jurisdiction. He is not the employee of his superior officers. His power comes from the state and his compensation from the city, and not from his superiors who give protection to crime and vice. As an officer he owes a duty to the public. Only proper and lawful instructions from the mayor and police commissioners are entitled to

his official respect. He has no function except to enforce the law. There was no other purpose in the creation of his office. Every order from his superiors to sanction or permit outlawry is the wrong of those individual persons who for the time being hold the offices. The adoption of a policy to neglect the enforcement of the law is an offense of lawless individuals, and not the authorized act of officers. In criminal procedure it is no defense to a complaint charging a felony that accused committed the crime at the direction of a public officer or of an individual holding a public office. In a civil suit against an officer for dereliction of duty, why should a policy of lawlessness adopted by his superiors be a defense? Neither private citizens nor police officers should find protection in orders to disregard the law. Citizens and officers alike should disobey instructions to ignore valid statutes or ordinances. A police officer, when called to the bar of justice for failing to perform his duties, should not be permitted to make out his defense by showing that he acted under instructions from his superiors to disregard open and notorious lawlessness. The contrary doctrine sanctions a defense established by proof of wrong, neglect of official duty and violation of law. The chief of police has a higher duty than his obligation to the persons who happen to occupy the offices of mayor and police commissioners. The demands of the state and the welfare of society have stronger claims upon his loyalty. His duty to those who should direct his course aright is within the law, and he has no authority to follow them into open lawlessness, where the dividing line is not in doubt.

Like all other officers and individuals, respondent should respect the provisions of the constitution. That instrument declares that the governor of the state "shall take care that the laws be faithfully executed." Const. art. V, sec. 6. This duty extends to every part of the state. When the governor lawfully directs respondent to enforce a particular statute, his orders should not be annulled by a lawless policy adopted by persons tempo-

rarily acting as mayor and police commissioners. The governor called to the attention of respondent specific instances of violations of the law, with a view to the enforcement of its provisions. Respondent's answer was that he would take the matter up with the mayor and the board and act upon their instructions. As a result the unlawful conditions described in the opinion of the majority were allowed to continue in spite of the law, in spite of official oaths to enforce it, and in spite of the demands of the chief executive, whose duty it is "to take care that the laws be faithfully executed." Is the law-enforcement demanded by the governor less binding on a chief of police than the lawless acts of individuals who assume as officers to adopt a policy which sanctions lawlessness and protects lawbreakers? A chief of police may resign any time or he may be removed for any cause specified by statute. The record shows that respondent, after having been warned by the chief executive to enforce the law, wilfully and deliberately participated in carrying out the policy which resulted in the lawless conditions found by the majority to exist, and in my judgment the reasons for dismissing the action are unsound.

2. I cannot agree to the majority's construction that "to wilfully fail, neglect or refuse to enforce a law," as applied to the statutory duty of an officer, "involves more than oversight or carelessness or voluntary neglect," and that "it must be prompted by some evil intent, or legal malice, or at least be without sufficient grounds to believe that he is performing his duty."

There is a vast difference between the meaning of the words "wilful" and "wilfully," as used in criminal statutes, and the same words, as used in statutes imposing duties on public officers and providing punishment for failure to perform those duties. The distinction has generally been made by courts and text-writers. Those words, and other familiar words used in the criminal law to describe criminal acts made punishable at common law, were intended, in some measure, to protect innocent men from the exe-

cution block of bloody rulers or to prevent the punishment of men who had committed no offense. This meaning should not be borrowed from the criminal law of the odious past and inserted by the court in a recent statute imposing upon public officers the duty to enforce legislative enactments. It should not be used to justify a guilty officer in permitting open and notorious lawlessness. The distinction mentioned led the supreme court of Michigan to observe: "The word 'wilfully,' when used to denote the intent with which an act is done, is a word which is susceptible of different significations, depending upon the context in which it is used." *Highway Commissioners v. Ely,* 54 Mich. 173, 180.

In *People v. Herlihy,* 72 N. Y. Supp. 389, the captain of police in command of the Twelfth precinct of New York City was indicted for "wilfully omitting to perform a duty enjoined upon him by law." The conditions in his precinct resemble those in Omaha, as described in the opinion of the majority. In New York the captain was charged by law "with the duty of observing and inspecting houses of ill fame, repressing all unlawful and disorderly conduct and practices therein, enforcing the law and preventing violations thereof." The captain demurred to these facts: "(1) That he was captain of police; (2) that the law enjoined upon him the duty of carefully inspecting all houses of ill fame and houses where common prostitutes resort or reside, to repress and restrain all unlawful or disorderly practices therein, and to enforce and prevent all violations of law; (3) that during a certain period of time, and while he was in command of the Twelfth precinct, there were 109 houses of ill fame therein kept and maintained openly and notoriously; and (4) that he wilfully neglected his duty by permitting such violations of law to continue, and by omitting to take proper and effective means for their repression and prevention." In part, the court in the case last cited said: "Can it be seriously contended that a captain of police is not a public officer, or that he is not

in duty bound to enforce the law, or that the maintenance of a house of ill fame is not a violation of law, or that if houses of ill fame are notoriously maintained in his precinct it is not his duty to suppress them, or that if he wilfully neglects to suppress them he is not guilty of a neglect of duty, or that for such neglect of duty he is not amenable to the law? If these propositions can be successfully maintained, there is an end to the prosecution, and, indeed, there is an end to all responsibility of the policeman as a public officer. But such is not the law, for of necessity to the very existence of organized society a public officer is bound to a strict performance of and responsibility for the duties which devolve upon him. It is a rule of general application that every wilful disobedience of law enjoining the performance of official duties, and every wilful neglect of such duties, is a crime, and neither corruption nor injurious result need be proved as an essential of the crime. Both the common law and the statute declare this rule to be the law."

A statute of Kentucky required public service corporations to report to the state auditor the information necessary for the purposes of taxation, and imposed a penalty for "wilful failure to make such report." Referring to the sections containing those provisions, the supreme court of Kentucky decided: "The word 'wilful,' as used in those sections, does not mean a deliberate determination to refuse to make the report for the purpose of defrauding the state, or evading or hindering it in the collection of taxes. The term, as used in the statute, simply means a voluntary act of the defendant as distinguished from coercion, or, in other words, that he was free to report or not to report." *Louisville & Jeffersonville Ferry Co. v. Commonwealth,* 104 Ky. 726.

In *People v. Brooks,* 1 Denio (N. Y.) 457, 43 Am. Dec. 704, a justice of the peace was called to account for "wilful neglect of duty" in refusing to comply with a statute requiring him to take an affidavit. In defining the meaning of the statutory term, the court in that case said:

"The language of the statute is, that the neglect of duty must be 'wilful,' and this neglect was of that character. The justice knew what was asked of him, and he knew what he refused; there was nothing like surprise, inadvertence or misapprehension on his part. He refused to administer the oath, and he intended so to refuse. This was a wilful violation of duty, for 'every intentional act is necessarily a wilful one.' *Commonwealth v. Green,* 1 Ashm. (Pa.) 289."

A statute of Kentucky required every superintendent of schools to settle his accounts before August 1, and provided for his punishment for "wilful failure" to do so. In *Tracy v. Commonwealth,* 76 S. W. (Ky.) 184, it was ruled: "The failure of a superintendent to make his settlement within the time required was a 'wilful failure,' where it was voluntary, notwithstanding his excuse that he failed to do so because certain receipts for moneys paid had been destroyed, and it was his purpose to make the settlement as soon as he could obtain duplicates."

A statute of New York empowered the superintendent of public instruction to remove any school officer who "wilfully" disobeyed his decision. In construing that provision in *People v. Draper,* 63 Hun (N. Y.) 389, the supreme court held: "'Wilful' in the statute giving the superintendent power of removal was equivalent to 'intentional.'"

The precedents show that the word "wilfully," as used in a statute imposing duties on a public officer and providing penalties for the violation of those duties, does not mean, as stated in the opinion of the majority, "some evil intent, or legal malice, or at least be without sufficient grounds to believe that he is performing his duty."

In *State v. Hastings,* 37 Neb. 96, cited to sustain the opinion of the majority, the court was trying an impeachment for "misdemeanor in office"—a technical term used in the constitution. Its meaning is not the same as the term construed in this case—"wilfully fail, neglect or refuse to enforce any law." The case is not in point.

In the opinion of the majority it is said that "the chief of police is appointed by the board and removable at its pleasure." This means that the board may remove him from office without notice or hearing, with all the attending consequences. In *State v. Smith,* 35 Neb. 13, this court said: "Where by law there is no fixed term of office and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary and may be exercised without notice or hearing."

It is thus established that the board of fire and police commissioners, without notice or hearing, may remove respondent and deprive him of all hope of a pension, if he refuses to follow their policy of permitting open and notorious lawlessness, and I have been unable to follow the course through which the power of removal for wilful failure to enforce the law, when extended to this court, became suddenly of so little consequence to society, and of such magnitude to the individual person who as chief of police knowingly permits open and notorious lawlessness, that it is now "highly penal," requiring, as a condition of its exercise, evidence "clear and satisfactory," though it is declared in a long line of earlier decisions that a mere preponderance of the evidence establishes any issue in a civil case. This court was once of a different opinion. In *State v. Sheldon,* 10 Neb. 452, it is shown that a county treasurer was removable for the statutory ground of "wilful neglect of duty." In the opinion it is said: "The county treasurer, having failed to account for the moneys in his hands properly chargeable against him as treasurer, is guilty of wilful neglect of duty, and may be removed from office; and the fact that the moneys were stolen is no legal justification for the failure to account for them." This is in harmony with the following doctrine announced by Wharton: "A man who undertakes a public office is bound to know the law, and to possess himself diligently of all the facts necessary to enable him in a given case to act prudently and rightly. If he do not, and through mistake of law or of

fact be guilty of negligence, he commits a penal offense. This seems hard law, but it is essential to the safety of the state." 2 Wharton, Criminal Law (10th ed.) sec. 1582.

3. The statute providing for the removal of officers who fail to perform their duty is a remedial statute. Sedgwick in his work on Statutory Construction says: "Remedial acts are those made from time to time to supply defects in the existing law, whether arising from the inevitable imperfection of human legislation, from change of circumstances, from mistake, or any other cause." Sedgwick, Statutory Construction (2 ed.) p. 32. The same author also adopts the following rule of Dwarris: "The words of a remedial statute are to be construed largely and beneficially, so as to suppress the mischief and advance the remedy." Sedgwick, Statutory Construction (2d ed.) p. 309. Both of the foregoing rules were adopted by this court in its early history and were followed until the majority opinion in this case was written. *Buckmaster v. McElroy,* 20 Neb. 557. The statute making additional provisions for the removal of police officers does not deal with a new subject. It was intended as an additional civil remedy. It should be construed to give effect to its provisions with a view to correcting the mischief at which the legislation is directed. The construction of the majority has the opposite effect. It weakens the statute, and in many cases will make it inoperative. In my judgment the dismissal cannot be justified.

LETTON, J., concurs in the dissent.

HAMER, J., dissenting in part and concurring in part.

I am compelled, in part, to dissent from the opinion of the majority touching the question of jurisdiction to hear and determine this case. As this court has assumed jurisdiction, and has heard the case, and has reached a conclusion, I will say that I concur in the result reached, but I do not concur in the reasoning nor in the conclusion, except that I agree to the result. The respondent was

charged in this court in an information in *quo warranto,* as chief of police of the city of Omaha, with wilfully and unlawfully failing, neglecting and refusing to enforce the laws of the state of Nebraska "which it is made his duty to enforce," and the ordinances of the city of Omaha. After this general allegation there is in the complaint the charge that since said Donahue has held his office there have been a large number of persons, principally inmates and keepers of houses of prostitution and assignation, who have unlawfully sold "intoxicating liquors and are now unlawfully selling intoxicating liquors in said city of Omaha without having first procured a license to sell the same; all of which facts were well known to said John J. Donahue." It is then charged that said Donahue "unlawfully and wilfully" failed, neglected and refused to cause the arrest and prosecution of the guilty persons. A large number of places are mentioned in the information where it is alleged intoxicating liquors were unlawfully sold, giving dates of such sales, and the names of the proprietors and occupants of the houses. In this connection it is alleged that the rules of the board of fire and police commissioners for the said city of Omaha for the government of the police force enjoining said duties upon the said Donahue are: "It shall be the duty of the chief of police to see that the laws of the state, the ordinances of the city, and the rules and regulations of the board of fire and police commissioners are duly enforced throughout the department, and he shall keep the city attorney and prosecuting officers of the county informed of all matters that pertain to their several offices relating to the police interests of the city or of any breach of the law or ordinances. * * * He will be diligent in the enforcement of the laws relating to lotteries, lottery policies, and the sale of liquor and gambling of all kinds." It will be noticed that the complaint fails to allege that he neglected to keep the city attorney and prosecuting officers of the county informed of matters pertaining to their offices relating to the police interests of the city or of any breach

of the law or ordinances. It is not alleged specifically, as it would seem that it should be in any sort of criminal case, what particular law he "refused to enforce." It is said that he "neglected and refused to enforce the laws of the state of Nebraska, which it is made his duty to enforce," but the particular law that he so neglected and refused to enforce is not seemingly set out anywhere. It is only in a general way that any sort of charge is shadowed forth against him. It would seem that he was put on trial "on general principles," and without a specific charge, such as is ordinarily made under the rules of the criminal law.

The law under which this proceeding was brought is chapter 78, laws 1907, and reads: "Section 1. Any county attorney or prosecuting officer, sheriff, police judge, mayor, police officer, or police commissioner or other officer who shall wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce shall thereby forfeit his office and may be removed therefrom. Section 2. The attorney general of the state, when directed by the governor, shall institute and prosecute *quo warranto* proceedings in the supreme court against any such county attorney or prosecuting officer, sheriff, police judge, police officer, or police commissioner, mayor or other officer, and if the court shall find that such officer has wilfully failed or refused to enforce any law which it is his duty as such officer to enforce, then the court shall render judgment of ouster against such officer and the office shall thereby become vacant."

It will be noticed that there is an absence in the charge of any statement telling *how he refused* "to enforce any law." The impossible nature of the thing which the statute seems to contemplate that he may be compelled to perform, provided it is so construed, is seemingly a bar to any proceeding against the respondent. There is no allegation that he refused to communicate what he knew to the county attorney or to the deputy county attorney or the police judge or the mayor concerning any particular vio-

lation of law. All persons who know anything about the matter must realize that it is an impossible thing for a police officer himself to enforce the law. A police officer does not draw up complaints. A police officer does not examine witnesses nor make speeches before the police judge or before any magistrate or in the district court before the jury in criminal cases. A police officer is just a man to assist his superior officers in maintaining order. He is not a lawyer, neither is he a judge. In the enforcement of the law it is necessary that these officers participate. The chief of police is simply the arm of the law; he is not the prosecutor. He never was intended as a prosecutor. He is not supposed to have any legal knowledge or any duty to perform beyond that of arresting those who are charged with violating the law, or who are seen by him to violate the law. He is not a county attorney or a deputy county attorney or a sheriff or a police judge or a magistrate of any kind. It is peculiar in this case that the executive arm of the mayor and board of fire and police commissioners should be picked upon as the person to be punished, when the people whose real duty it was to maintain prosecutions, if there was a violation of law, were not charged with any sort of dereliction. Why was not a complaint made against the city attorney and the county attorney and the police judge and the justices of the peace and the mayor and the board of fire and police commissioners?

The purpose of the act under which this prosecution is brought would seem to be to thrust upon this court the burden of so disciplining the officers of cities that they will prosecute cases for misdemeanors which would not otherwise be prosecuted. The thing attempted to be done suggests mistrust of the morals of the people in the cities of the state and unwillingness upon the part of the legislature to trust the officers of our cities elected by the people with the administration of their own affairs and the punishment of their offenders. The thing sought to be done is not in accord with the love of self-government in city

communities or elsewhere. Communities desire to govern themselves, and if they can do so by a judge and jury of their own or by a board of their own they will be better satisfied. No community likes to be governed by some other community. No man wants to be tried by a foreign tribunal, however innocent he may be. The reason is that the foreign tribunal may not possibly know the things which are of advantage to the defendant. *Olive v. State*, 11 Neb. 1. If the case brought against Donahue could be tried before a Douglas county judge and jury or a Douglas county body of men of the average standard of morality, Donahue would have no cause of complaint. But if Donahue can be tried by one man belonging to one particular type, and not by a body of men, and this type of man, however unobjectionable in his private life and however upright, may bring in a finding as referee that shall be adopted instead of adopting the view of a judge and jury or of a board belonging to Douglas county, then Donahue is likely to be in most imminent danger. The man selected as referee is only *one* man, and, however upright he may be, there is danger that he will be influenced by special conditions that surround him or by particular individuals, and that his finding will not be as fair and as unbiased as the finding of a jury or board composed of a number of men. This method of trial would seem to be clearly objectionable if there is any other method of trial that has been provided under the constitution and the law. This man is practically on trial for an alleged criminal offense before a referee. He has been deprived of a trial by a judge and jury of Douglas county. He has been deprived of a trial by the mayor and board of fire and police commissioners who appointed him. He has been tried by a referee, when the thing brought against him is more serious and of greater magnitude to him than if he might be sent to the penitentiary. This trial, to the writer, violates every sense of propriety.

Section 58, ch. 12*a*, Comp. St. 1909, provides: "In each city of the metropolitan class, there shall be a board of

fire and police commissioners to consist of the mayor, who shall be *ex officio* chairman of the board, and four electors of the city who shall be elected by the qualified electors of the city by a plurality of votes at the city election provided for in this act on the first Tuesday in May, 1909, and every three years thereafter."

It is provided in section 61: "The board of fire and police commissioners shall have the power and it shall be the duty of said board to appoint a chief of police, and such other officers and policemen * * * as may be necessary for the proper protection and efficient policing of the city, and as may be necessary to protect citizens and property, and maintain peace and good order."

Section 62 of the same act provides that no member or officer of the police or fire department shall be discharged for political reasons, and also provides that before such policeman or fireman can be discharged charges must be filed against him before the board of fire and police commissioners, and a hearing had, and that he shall be given an opportunity to defend himself.

Section 67 of the same act provides: "The chief of police shall have the supervision and control of the police force of the city, subject to the orders of the mayor and board of fire and police commissioners."

Section 69 provides: "He shall be subject to the orders of the mayor in the suppression of riot and tumultuous disturbances and breaches of the peace."

It will be seen that the chief of police is appointed by the mayor and the board of fire and police commissioners. He is put under their direction and control by the statute.

Sections 91, 92 and 93 provide for the trial of any city officer and his discharge because of malfeasance in office. It will therefore be seen that there is jurisdiction to try the respondent before the board which appointed him or before a judge of the district court. For these reasons, there was no necessity of this trial in this court.

The mayor and board of fire and police commissioners had power to remove him if he refused to do their bidding.

To him their power meant official life or official death. With the chief of police his obedience to the mayor and the board of fire and police commissioners was a matter of self-preservation. They had power to discharge him at once, and the governor was absolutely without power to protect him. (1) It was a matter of duty to his superiors. (2) If he went contrary to the orders of his superiors they would at once put him out of office and put another in his place. That meant disgrace and dishonor. (3) It is not shown that he saw this misdemeanor contained in the complaint committed, or that he refused to file a complaint in any particular case charging a violation of the law. (4) Nor is it shown that his superiors at any time requested him to file a complaint which he refused to file.

It is my contention: (1) That *quo warranto* is not adapted to the trial of the right to hold an office where the person in possession has been unquestionably appointed or elected in a case where an office has been created and the appointing or electing power has the lawful right to appoint or elect. My contention is that *quo warranto* is not adapted to the trial of a case which is attempted to be made criminal in its nature.

If my contention has been properly overruled, and it is still held that *quo warranto* furnishes the proper remedy to try a case which is criminal in its nature, then I say that the rules to be followed throughout are the rules which apply in a criminal case, and the respondent cannot be found guilty unless it appears by the rules, as they would be ordinarily applied in a criminal case, that he wilfully, that is, without reason or justification, refused to comply with the order of the governor and to prosecute these cases.

(2) Donahue cannot be guilty of a wilful disregard of the order made by the governor, if he obeyed the orders of his immediate superiors, because they are directly in authority over him under the provisions of the statute. His immediate superiors were the mayor and the board

of fire and police commissioners. If this be not true, then there is no such thing as discipline.

While the remedy of *quo warranto* may be used to try title to an office, it may well be doubted whether it can be used to punish one who has committed some act alleged to be forbidden by law, and by reason of which his removal from office is sought to be accomplished. The machinery to try title to an office is not adapted to trying one who is found holding an office to which he has unquestionably been appointed or elected and whose term has not yet expired.

It must be admitted that the offense charged is highly penal in its nature for the reason that the punishment sought to be inflicted is of the severest character—loss of office, loss of honor accompanied by disgrace, denial of preferment and incidentally loss of pension earned by the long continued pursuit of a career in which there was the perpetual menace of injury and death by criminals and vicious persons. While the respondent may have found himself unable by himself to punish all the violators of law to be found in the metropolis of the state, it is seemingly undeniable that for the long period of nearly 20 years he faithfully and vigilantly devoted himself to the protection of the better class of peace-loving citizens of Omaha, and guarded them against theft, arson, violence and murder as best he could.

He is entitled in any event to a trial according to the forms of the law guaranteed by the constitution and the criminal code. I do not think that punishment almost, or quite, as severe as if he were to be sent to the penitentiary should be inflicted by a form or method of trial intended merely to determine the title of office as between contestants for official position, or to oust one who had never been qualified to enter upon an office wrongfully usurped and held. I do not think this court should be a court of original jurisdiction to hear and determine cases which are in their nature criminal. I am especially opposed to the trial of a case which is practically a criminal

case by a referee. I think that this court is clearly without jurisdiction to hear and determine the case presented, and to this extent I dissent from the majority opinion.

If it shall be held that there is a right to proceed in this case by *quo warranto,* then the rules established by the code of civil procedure are not applicable, because pleadings in such cases are still governed by the common law practice prevailing at the adoption of the code. *State v. McDaniel,* 22 Ohio St. 354. So in Illinois, where common law pleading is still in use, the rule is, that the same certainty is required in the information in the nature of *quo warranto* as in an indictment. *Lavalle v. People,* 68 Ill. 252; *Distilling & Cattle Feeding Co. v. People,* 156 Ill. 448.

In New Jersey the same view is taken as in Ohio, it being held that the statutes to facilitate pleadings in civil cases do not apply. *State v. Roe,* 26 N. J. Law, 215.

"In England the writ of *quo warranto* has long since gone out of use, and an information in the nature of *quo warranto* at the suit of the attorney general has taken its place." 2 Spelling, Injunctions and Other Extraordinary Remedies (2d ed.) sec. 1766.

While I dissent as to the jurisdiction of the court, I agree with the majority opinion that the case as alleged is not proved.

ELLERY R. HUME, ADMINISTRATOR, APPELLANT, V. SOREN T. PETERSON, APPELLEE.

FILED APRIL 20, 1912. No. 16,875.

1. Judgment: REVIVOR: PLEA OF PAYMENT: REVIEW. If a judgment debtor, in an action to revive the judgment in the name of the administrator of the deceased judgment plaintiff, answers that the judgment has been paid and satisfied, and, without objection to the answer, the issue so joined is tried by the parties, it will be too late to object in this court upon appeal that, the judgment not being dormant, such answer constituted no defense.

2. **Garnishment:** EFFECT OF PAYMENT BY GARNISHEE. If a judgment debtor, as garnishee in a suit against the owner of the judgment, is ordered to pay the amount of the judgment into court to be applied upon the claim of the plaintiff in attachment, and afterwards a judgment is entered in favor of the attachment creditor, and the original judgment debtor is again ordered upon garnishment after judgment to make such payment into court, and in good faith makes payment pursuant to said respective orders, such payment will satisfy the original judgment, although it should afterwards appear that the court was without jurisdiction to enter a personal judgment in favor of the attachment creditor and against the owner of the original judgment.

3. **Attorney and Client:** LIEN: PAYMENT: BURDEN OF PROOF. If a judgment debtor pays an attorney the amount of his claim of lien upon the judgment without the knowledge and consent of the owner of the judgment, and knowing that the attorney no longer represents such owner, the burden is upon the judgment debtor, in an action between himself and the owner of the judgment, to prove the validity of the lien and that the attorney was entitled to the money so paid thereon.

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

Leavitt & Hotz, for appellant.

J. O. Detweiler, contra.

SEDGWICK, J.

About 20 years ago Francis E. Reisdorph began an action in the district court for Douglas county against this defendant, Soren T. Peterson, and afterwards recovered a judgment therein. In July, 1902, Mr. Reisdorph died, and an order was made by the probate court appointing the Continental Trust Company as administrator of the estate. That company began proceedings in the district court for Douglas county to revive the judgment in the name of the administrator. Upon appeal to this court the proceedings were dismissed. *Continental Trust Co. v. Peterson,* 76 Neb. 411. Afterwards this plaintiff, Ellery R. Hume, was appointed administrator of

the estate, and began these proceedings in the district court for Douglas county to revive the judgment in his name as such administrator. Mr. Peterson answered, and alleged that the judgment had been fully satisfied. The court found that the principal part of the judgment had been paid, and that the balance due thereon was $172.60, with interest from the 4th day of October, 1909, and taxed the costs of the proceedings against the defendant. From this finding and judgment both parties have appealed to this court.

One David Van Etten, who was then an attorney at law practicing in Douglas county, represented Mr. Reisdorph, as such attorney, in procuring the said judgment, and afterwards, Mr. Reisdorph having become a nonresident of the state, and the said Van Etten having filed several attorney's liens against the said judgment, which remained unsatisfied, the said Van Etten began an action in the district court for Douglas county against Mr. Reisdorph to recover his fees represented in the said liens, and other alleged claims. In this action he filed an affidavit for attachment, and procured an order of attachment and garnishment process to be issued against this defendant as a debtor of Reisdorph upon the said judgment. Such proceedings were afterwards had in the attachment that on the 18th of November, 1897, an order was entered against this defendant as garnishee to pay into court the "sum of $1,500, except $202.34 paid in 1896, with interest from February 6, 1893, at 7 per cent. per annum."

A judgment was entered in favor of the plaintiff in the case of Van Etten v. Reisdorph on December 16, 1897, for $1,515.38, and in 1902, after the death of Reisdorph, Van Etten filed an affidavit and obtained an order of garnishment against this defendant, and on November 18, 1902, the court entered an order that this defendant "as garnishee herein after judgment pay into court the sum of $2,060.77, and $50 probable costs, for the benefit of Van Etten, as plaintiff and judgment creditor, and the same

when paid to be credited in the case of Reisdorph v. Peterson." Afterwards, in August, 1903, Van Etten filed a receipt acknowledging payment by this defendant of $2,185.10 in full of his judgment. The receipt recited that the costs be paid by this defendant, and the defendant presented receipt for costs paid by him. This payment by the defendant Peterson was allowed by the court as payment upon the principal judgment, and this raises the principal question presented upon this appeal.

1. The first objection is that, the judgment not being dormant, and the action being to revive in the name of the administrator, the court could not in such proceeding consider the defense of payment and satisfaction of the judgment. Section 472 of the code provides: "If either or both the parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment." We cannot find from the abstract that any objection was made to the answer of this defendant to the conditional order of revivor; it appears rather that the parties went to trial upon the issues so presented, and after this extended litigation they ought to abide by the issues which they have presented which have been fully tried and determined by the court.

2. Some objections are made to the preliminary proceedings in obtaining the attachment and garnishment in the suit of Van Etten v. Reisdorph, but these objections are not much discussed, and, so far as we have observed from the abstract, the petition, the affidavit and the service by publication were sufficiently regular to give the court jurisdiction of the garnishee.

It is objected that the judgment obtained by Mr. Van Etten against Reisdorph is void for want of service upon Reisdorph, it being insisted that Mr. Reisdorph as defendant in that action made no appearance therein. We find in the abstract a paper purporting to be the answer of Mr. Reisdorph which was filed in that action upon the

proper answer day therein. It is objected that this is a forgery, and there is evidence in the abstract strongly tending to show that, while the signature upon this paper is the signature of Mr. Reisdorph, it was placed by him in an unusual position upon a blank sheet of note paper upon which was afterwards written over his signature what purports to be a general denial in the action then pending. There is, however, no explanation in the record as to how Mr. Reisdorph's signature to this paper was obtained or in any way explaining the peculiar circumstances of the filing of this answer. We think, however, that this objection does not necessarily affect the merits of this controversy, nor is it material that no execution was issued upon the judgment obtained by Van Etten against Mr. Reisdorph until after the death of the latter, nor that subsequent garnishment proceedings upon the judgment of Van Etten v. Reisdorph were instituted after Mr. Reisdorph's death. It appears that, by the original proceedings in attachment and garnishment which were had in 1897, the district court obtained jurisdiction of the subject matter of the indebtedness of this defendant upon the judgment in favor of Reisdorph, and that, in pursuance of those proceedings, this defendant was ordered to pay the amount of that judgment into court to be applied upon Mr. Van Etten's claim. The court having jurisdiction of the subject matter, this order, when collaterally attacked, sufficiently protected the defendant in paying the money pursuant thereto, although such payment was for so long time delayed. After Mr. Reisdorph had placed his signature upon the paper which was afterwards filed as his answer, and upon which the court was led to rely as his answer in the case, he still neglected for several years to give any further attention to the matter, and his administrator is now asking for redress, not against the parties who may have deceived and wronged him; but against this defendant who has made payment upon the original judgment relying upon the record and upon the orders of the court. Of course, if this alleged

answer is a forgery and was never authorized, directly or indirectly, by Mr. Reisdorph, the judgment, so far as it attempted to fix the liability of Mr. Reisdorph in favor of Van Etten, would be without jurisdiction; but this does not affect the jurisdiction of the subject matter of the action, and does not invalidate the order of the court made at the institution of the attachment proceedings, which were never questioned by Mr. Reisdorph, although made more than five years before his death. We think the court did right in allowing this payment by Mr. Peterson as a payment upon the original judgment.

3. The defendant upon his appeal insists that he should have been allowed upon this judgment costs which he paid in the original garnishment proceedings; and certain claims of Van Etten which he paid that were not included in the order of the court in the garnishment proceedings. He insists that these items were liens upon the original judgment in favor of Van Etten, as Reisdorph's attorney; but the evidence in the abstract, so far as we have been able to ascertain, does not support these claims. Van Etten included his attorney's liens in his attachment proceedings, and the evidence does not establish that he had other liens upon the judgment that were not allowed and satisfied by those proceedings. The evidence, as shown by the abstract, is somewhat disconnected and unsatisfactory, and we cannot ascertain therefrom that the findings of the district court were so clearly wrong as to require a reversal.

The judgment of the district court is

AFFIRMED.

WILLIAM A. BECKER V. STATE OF NEBRASKA.

FILED APRIL 20, 1912. No. 17,448.

1. **Continuance:** DISCRETION OF COURT. It must necessarily be left to the sound discretion of the trial court to determine under all of

the circumstances of a particular case whether a continuance or delay of the trial is required in the interests of justice. The ruling of the trial court thereon will not be held prejudicially erroneous, unless an abuse of discretion is clearly shown.

2. ———: ———. The defendant, several months before the trial employed a firm of two attorneys for his defense, the junior of whom acted for him in the preliminary examination. At the time set for the trial the senior member of the firm, who was expected by both of the said attorneys to take charge of the defense, was engaged in the trial of a case in another court and so prevented from being present at this trial. The court appointed an experienced attorney to aid the junior counsel in the defense and refused a continuance or further delay of the trial. *Held* no abuse of discretion on the part of the trial court requiring a reversal of the judgment.

3. **Criminal Law**: RECEIVING STOLEN PROPERTY: EVIDENCE. In a trial for receiving stolen property, after evidence is received tending to prove that the property described in the information was stolen at or about the time alleged, and that the defendant had received the same, it is competent to prove, as tending to show guilty knowledge, that a short time prior to that transaction the same person had stolen property of a similar character, which had been received by the defendant and afterwards sold by the thief, and that the defendant had also received and cashed a check which had been delivered to the thief in payment for the same.

4. ———: ———: ———. In such case, if the stolen property is sold by the thief, and a check payable to defendant is taken therefor, and the money paid to the defendant thereon, the check is competent in evidence as a part of the transaction tending to show knowledge on the part of the defendant that the property described in the information was stolen property when received by him.

5. ———: ———: ———. It is not reversible error to receive in evidence indorsements on a check, not identified or explained, when the check itself is properly received, and the indorsements are of such a character as in no way to affect the parties to the suit or the subject matter of the controversy.

6. ———: INSTRUCTIONS. The words in an instruction, "the fact that he (the defendant) has been contradicted by other witnesses, if he has," are not erroneous, as implying that he has in fact been so contradicted.

7. ———: ———: CONFESSIONS: QUESTION FOR JURY. It is not error to refuse an instruction containing the statement that "the law

does not favor confessions." When confessions of guilt by the defendant are properly admitted in evidence, it is generally for the jury to determine what force and effect shall be given such confessions under the circumstances of the case.

ERROR to the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Byron Clark and *William A. Robertson,* for plaintiff in error.

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

SEDGWICK, J.

The defendant was convicted in the district court for Cass county of receiving stolen property. He has brought the case here upon petition in error, and urges three several objections against the regularity of the conviction.

1. The defendant was first arrested and had his preliminary examination in December, 1910. The information was filed in the district court on the 12th day of January, 1911. On the 10th day of June, 1911, the court being in session, he filed a motion for a continuance to the next term of court. This motion was overruled, and no serious complaint is made of this ruling. On the 12th day of June a motion was made to postpone the trial "until after the 17th day of June, 1911, for the reason that Byron Clark, attorney in charge of said case for defendant, was engaged in the trial of a cause in the federal court at Lincoln." From the affidavit filed in support of this motion it appears that the said Byron Clark and one William A. Robertson were partners in the practice of law, Mr. Clark residing in Lincoln and Mr. Robertson in Plattsmouth, and that this firm had been employed by the defendant at the time of the preliminary examination, and that it was expected by the members of the firm that Byron Clark would be present at the trial of the case and "have charge of said trial for the defendant." It

also appears that Mr. Robertson had acted as counsel for the defendant in the preliminary examination, and that prior to the filing of this motion Mr. Clark had not personally appeared in the matter. Upon this motion and showing the court appointed a member of the bar to assist Mr. Robertson in the trial of the cause, and overruled the motion for a continuance and set the cause for trial on the 16th day of June. Other matters are stated in the brief, but this is the substance of the proceedings as shown by the abstract.

Applications for continuance are addressed to the sound discretion of the trial court, and no abuse of discretion appears from this record. The case is within the principles announced by this court in *Cate v. State*, 80 Neb. 611, and *Ossenkop v. State*, 86 Neb. 539.

2. The next objection insisted upon in the brief appears to be that the court erred in allowing evidence of a former transaction of a similar nature to the one involved in this charge against the defendant. One Crawford had been convicted of stealing wheat, and was at the time of this trial serving a sentence in the penitentiary for that crime. He was called as a witness by the state, and testified as to the offense charged in the information against the defendant that he, Crawford, stole a load of wheat, the property of one Propst; that he took the stolen wheat to the premises of the defendant in the night time, and, with the knowledge of the defendant, the wheat was deposited in the defendant's bin preparatory to disposing of the same. This witness was then allowed to testify that shortly before this transaction, upon an understanding with the defendant, he had stolen another load of wheat and had taken it to the defendant's premises, using the defendant's team and wagon for that purpose, and had afterwards, pursuant to an understanding with the defendant, sold the wheat, receiving a check therefor in the name of the defendant, and had delivered the check to the defendant to be cashed by him, and had afterwards received from the defendant one-half of the proceeds of the

check. This check was identified by the grain dealer who drew it and by the banker who cashed it, and it was testified by the banker that the check was presented by the defendant and the money for the same paid to the defendant. This check was then received in evidence.

It is contended that all of this evidence in regard to the theft of the first load of wheat was incompetent, and that the check itself was also incompetent. The court instructed the jury upon this point as follows: "You are instructed that the evidence offered by the state for the purpose of tending to show a prior stealing of wheat and the check for such wheat, purporting to be indorsed by the defendant, is admitted in evidence for the sole purpose of showing whether or not the defendant had guilty knowledge that the wheat described in the information was stolen. You will consider this evidence along with all the other evidence in the case in determining whether or not the defendant had knowledge that the wheat was stolen property." We think that the evidence objected to was properly received for the purpose stated in this instruction, and that the rights of the defendant were properly guarded by the court.

The check was offered in evidence "with all the printing, writing, stamps and indorsements thereon." It is objected that these indorsements were not sufficiently identified and proved. The indorsements, as shown by the abstract, were immaterial, except that of the name of the defendant, and the defendant, when upon the witness stand, admitted that he indorsed the check; therefore, if these indorsements were erroneously admitted in evidence it was without prejudice to the defendant.

3. The instruction given by the court as to the testimony of the defendant himself is complained of "for the reason that said instruction amounts to instructing the jury that the defendant had been contradicted by other witnesses." This objection is not well taken. "The fact that he has been contradicted by other witnesses, if he has," was the language used, and will not admit of such

construction. As no other objection is made to this instruction it is not thought necessary to discuss it further.

4. The defendant requested the court to give the jury an instruction containing these words: "The law does not favor confessions, and you must scrutinize all evidence of alleged confessions closely." The court refused to give this instruction, and it is now insisted that this was error. The weight that should be given by a jury to confessions of facts made by a defendant depends largely upon the circumstances under which such confessions are made, and it is not proper to tell the jury that the law does not favor confessions. When evidence is properly admitted tending to show confessions of guilt made by the defendant, it is for the jury to determine what force and weight should be given to such confessions. This offered instruction would invade the province of the jury and was rightly refused. *Dodge v. People,* 4 Neb. 220.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. SCHOOL DISTRICT OF THE CITY OF LINCOLN, APPELLEE, V. SILAS R. BARTON, AUDITOR, APPELLANT.

FILED APRIL 20, 1912. No. 17,487.

1. **Statutes: AMENDMENT: CONSTITUTIONAL PROVISION.** "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Const., art. III, sec. 11. This provision makes inviolable the rule governing legislative bodies, that no proposed subject different from that under consideration shall be admitted under color of amendment. *Miller v. Hurford,* 11 Neb. 377.

2. ———: ———: ———. The provision of the constitution is directed against surreptitious legislation of which the members of the legislature and the public have no notice.

3. ———: ———: ———: TITLE OF ACT. Where the title to a bill is to amend an existing act, or a section thereof, no amendment

is permissible which is not germane to the subject matter of the original act or section indicated.

4. ———: ———: ———: ———. The title should clearly indicate the legislation embraced in the bill. While the requirements of the clause of the constitution under consideration are mandatory, they are not to be enforced in such a manner as to cripple legislation. The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute.

5. ———: ———: VALIDITY OF ACT. Where a statute was passed in 1881, and in 1883, under an act with an appropriate title, a section in said statute was amended, and in 1893, under an act with a proper title, said section was again amended so that it contained matter clearly within the title of the original bill, and in 1897 said section as amended was again amended, under an act with a proper title and concerning matters clearly within the title of the original bill, and touching the matter contained in the section as amended in 1893, and in 1901 said section as amended was again amended, under an act with a proper title and touching the subject matter contained in the section, and in 1903 said section as amended in 1901 was again amended, under an act with a proper title and touching the subject matter contained in said section at that time, and in 1911 said section was again amended, under an act with a proper title and touching the subject matter in said section at that time, *held* that the said section as it stood when last amended was valid.

6. **Schools and School Districts: BONDS: VALIDITY.** It is further *held* that section 24, subd. XIV, ch. 79, Comp. St. 1911, authorized the issue and registration of the school bonds in question, and that the same were properly issued and are entitled to registration.

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

Grant G. Martin, Attorney General, for appellant.

Frank E. Bishop, contra.

E. F. Pettis, amicus curiæ.

HAMER, J.

This is an appeal by the auditor of public accounts

from the judgment of the district court for Lancaster county directing that a mandamus issue to Silas R. Barton, as auditor of public accounts of the state of Nebraska, compelling him to register the school bonds of the school district of the city of Lincoln, amounting to $350,000. They were issued under section 24, subd. XIV, ch. 79, Comp. St. 1911. The attorney general urges this court to hold that said section 24 is unconstitutional and void for the reason that as it was at first enacted it was a limitation upon the amount of the aggregate annual tax which might be levied upon the property of the school district; that the amendatory act of 1893, providing for calling an election and voting bonds, was not germane to the subject contained in the original section, and that the act has not since been properly amended; that the amendatory acts did not contain sections 2, 3, 4 and 5, which are thereby sought to be amended, and that the same were not repealed by said amendatory acts.

It is claimed that the propositions submitted were: (1) The issuance of bonds for a high school building; (2) the question as to whether said high school building should be located on its present site; (3) the question as to whether the said high school building should be located on ground commonly known as the "Davenport tract;" (4) the question as to whether or not one grade high school building should be located in a certain place; and (5) the question as to whether an annex to another grade school building should be located at a certain place.

It is also claimed that the election was illegal and void because the school district takes in territory beyond the limits of the city and the school election was held at the time of the regular city election, and that no provision was made in the territory outside of the city limits within the school district where the voters of said outside territory might appear and cast their votes, and that the only places where the voters might appear and cast their ballots at said school election was in the city of Lincoln at the usual and regular voting places for the said election.

It is also claimed that the election was illegal and void because the school authorities published the notice of the election in a weekly paper called the "Trade Review," and also put one insertion in each of the daily papers, the Lincoln Daily Star and the Nebraska State Journal, but did not publish said notice of election in said daily papers for at least 20 days.

The first contention is that section 24, subd. XIV, ch. 79, Comp. St. 1911, is not valid as it at present exists, and this is most strenuously insisted upon.

It is claimed by the attorney general, and Mr. Pettis, who appears as *amicus curiæ,* that when the legislature in 1893 sought to amend section 24, subd. XIV, ch. 78, laws 1881, it entirely ignored so much of section 11, art. III of the constitution, as required (1) that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title. (2) And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." Mr. Pettis, as *amicus curiæ,* says in his argument: "It may be said that to a limited extent they observed the requirement that the subject should be expressed in the title." But he claims the attempt was only a partial observance of the constitutional requirement, either in the amendment of 1893 or in any subsequent amendment up to and including the amendment of 1911 (laws 1911, ch. 123). And the attorney general also contends that, "when the title of an act is to amend a particular section of a statute the proposed amendment must be germane to the subject matter of the section sought to be amended, or it will be void"—citing *Miller v. Hurford,* 11 Neb. 377.

It is necessary to give a history of the legislation by which the section was obtained. After many amendments it now reads: "That the aggregate school tax, exclusive of school bond taxes, shall in no one year exceed thirty-five mills. But the board of education may borrow money upon bonds which they are hereby authorized and em-

powered to issue, bearing a rate of interest not to exceed six per cent. per annum, payable annually or semi-annually at such place as may be mentioned upon the face of the bonds; which loan shall be paid and reimbursed in a period not exceeding thirty years from the date of said bonds. Provided, that no bonds shall be issued nor the question of issue submitted to the voters without the consent of two-thirds of the members of the board of education, and be offered in the open market and sold to the highest bidder for not less than par value of the dollar; and provided further that no bonds shall be issued by the board of education without first submitting the proposition of issuing said bonds at an election called for that purpose, or at any regular election, notice whereof shall be given for at least twenty days in one or more papers published within the district to the qualified voters of the district, and if a majority of the ballots cast at such election shall be for issuing bonds, said board may issue bonds in such amount as may be named in the election notice. Provided, that in cities of the first class having over twenty-five thousand inhabitants, if such question is submitted at a special election, it shall require to carry the same a two-thirds majority of the votes cast at said election." Comp. St. 1911, ch. 79, subd. XIV, sec. 24.

In the year 1881 the legislature passed a comprehensive general statute entitled "An act to establish a system of public instruction for the state of Nebraska." Laws 1881, ch. 78 (Comp. St. 1881, ch. 79). It contained 14 subdivisions. The fourteenth subdivision was under the heading "Subdivision XIV. Schools in Cities," and the particular section in controversy was section 24 of the fourteenth subdivision of the act, in which subdivision there were 29 sections. Each subdivision was sectionized and put under an appropriate heading.

The first section of said subdivision 14 provided, among other things, that each incorporated city, or those hereafter incorporated as such, having a population of more than 2,000, including such adjacent territory as now is, or

hereafter may be, attached for school purposes, shall constitute one school district and be known by the name of "School District of ..... City." This section was put in the Compiled Statutes of 1881 under the subtitle of "Subdivision XIV. Schools in Cities," and under the general title "Chapter 79. Schools." At that time there were in the Compiled Statutes of 1881 15 subdivisions under chapter 79 covering the Nebraska system of public instruction. At present in the Compiled Statutes of 1911, under chapter 79, there appear to be 19 subdivisions. Said original section 24, subd. XIV, Comp. St. 1881, was then as follows: "That the aggregate school tax shall in no one year exceed one per cent. upon all the taxable property of the district."

Section 22, subd. XIV of said act, authorized the board of education, if they found an indebtedness existing against the school district in the form of bonds issued for a valuable consideration in accordance with the law, and the validity of which had not been called in question, or, being called in question, had been declared by the courts of last resort to be valid, to issue to the holders thereof, who should surrender the same to the board, *other bonds* in like amount of the same tenor and effect, after the payment of principal and interest, as the bonds so surrendered.

Said subdivision XIV, ch. 78, laws 1881, was carried into the Compiled Statutes of 1881 in its entirety, and was designated in said statutes as subdivision XIV, ch. 79, each section seemingly retaining its original number (sections 1-29). At that time the educational system of the state was included under "Chapter 79. Schools."

The legislature of 1883 passed a law (laws 1883, ch. 72) entitled as hereinafter set forth. This was an amendment of many sections of different subdivisions, and made section 24, subd. XIV, read: "That the aggregate school tax shall in no one year exceed two per cent. upon all the taxable property of the district." The change was the striking out of the words "one per cent." in the original

and putting in their place "two per cent." in the amendment. Laws 1883, ch. 72, sec. 25 (Comp. St. 1883, ch. 79, subd. XIV, sec. 24).

Section 24, as amended by the legislature of 1883 as aforesaid, was carried into the Consolidated Statutes of 1891 as section 3722. It was placed under "Subdivision XIV. Schools in Cities." The whole legislation of the state of Nebraska touching schools appeared in this book under the general head "Chapter 44. Public Instruction. Schools."

In 1893 the legislature passed a law (laws 1893, ch. 31) entitled "An act to amend sections 3706, 3721 and 3722, of subdivision XIV, chapter 44 of the Consolidated Statutes of Nebraska, and to repeal the original sections amended." This seems to have contained the first provision towards raising money for school districts for future use by the issue of bonds. Section 3722, as amended by this act, was carried into the Compiled Statutes of 1893 (ch. 79, subd. XIV, sec. 24), and this same amendment was also carried into the Compiled Statutes of 1895 (ch. 79, subd. XIV, sec. 24), and was made to read: "That the aggregate school tax shall in no one year exceed two per cent., and in cities of the first class having over twenty-five thousand (25,000) population the school tax shall not exceed fifteen (15) mills upon all the taxable property of the district, but the board of education may borrow money upon the bonds, which they are hereby authorized and empowered to issue, bearing a rate of interest not exceeding six (6) per centum per annum, payable annually or semi-annually, at such place as may be mentioned upon the face of such bonds; which loan shall be paid and reimbursed in a period not exceeding thirty (30) years from the date of said bonds; provided, that no bonds shall be issued nor question of issue be submitted to the electors without the consent of two-thirds (⅔) of the members of the board of education, and be offered in open market and sold to the highest bidder for not less than par value on each dollar; *and,* provided further, that

no bonds shall be issued by the board of education without first submitting the proposition of issuing said bonds, at an election called for that purpose, or at any regular election, notice whereof shall be given for at least twenty (20) days in one or more daily papers published within the district, to the qualified voters of the district, and if a majority of the ballots cast at such election shall be for issuing bonds, said board may issue bonds in such an amount as shall be named in their election notice; provided, that in cities of the first class having over twenty-five thousand (25,000) inhabitants if said question is submitted at a special election it shall require to carry the same a two-thirds (⅔) majority of the votes cast at said election."

Section 24, as it appeared in the same numbered section in subd. XIV, ch. 79, Comp. St. 1893, and the Compiled Statutes of 1895 into which it was also carried, contained the provisions concerning the issue of bonds.

This amendment of section 3722, subd. XIV, ch. 44, Consolidated St. 1891, is claimed to be unconstitutional and void because, as it is alleged, the amendment was not germane to the subject matter of said section 3722, being section 24 referred to. It will be seen that the legislature attempted to confer upon the board of education the power to borrow money upon the bonds of the school district upon the terms and conditions fixed in the section. It is claimed by the attorney general that section 24 has remained substantially the same up to the present time, so far as the power which it attempted to confer upon the board of education to borrow money and issue bonds.

In 1897 said section 24 was amended under the title, "An act to amend section 24, chapter 79, subdivision XIV of the Compiled Statutes of 1895, to provide for the exclusion of school bond taxes in the computation of the aggregate school taxes under the provisions of this act, and to repeal section 24, chapter 79, subdivision XIV of the Compiled Statutes of 1895." Laws 1897, ch. 70.

The legislature of 1901 passed a law (laws 1901, ch. 69)

entitled "An act to amend section 24 of subdivision XIV, of chapter 79 of the Compiled Statutes of Nebraska." Section 24, as amended, was carried into subdivision XIV, ch. 79, Comp. St. 1901.

In 1903 the same section was amended under the title "An act to amend section 24 of subdivision XIV, chapter 79, Compiled Statutes of Nebraska, and to repeal said original section." Laws 1903, ch. 94.

In 1911 the legislature passed a law (laws 1911, ch. 123) entitled "An act to amend section 24, subdivision XIV, chapter 79 of the Compiled Statutes of Nebraska for 1909 (Cobbey's Ann. St. 1909, sec. 11814), relating to aggregate levy of school taxes in incorporated cities and villages, fixing the limit of said levy at thirty-five mills, and to repeal said original section as it now exists." Under this title the legislature gave us the law as it is today, being the one under which the relator proceeded to issue the bonds, and which we have heretofore set forth. It would seem that the provisions of the amendments of section 24, ch. 123, laws 1911, so far as the same relate to the borrowing of money and the issuance of bonds, are substantially the same as were contained in the acts of 1893, 1897, 1901, and 1903.

The amendment made in 1893 provided that the board of education might borrow money upon the bonds of the school district bearing a certain rate of interest not exceeding 6 per cent. per annum, fixed the time for which the loan should be made at not exceeding 30 years, and provided that no bonds should be issued unless the question of their issue should first be submitted to the electors with the consent of two-thirds of the members of the board; that the bonds should be offered in the open market and sold to the highest bidder for not less than par value; also that no bonds should be issued without submitting the proposition of issuing the same at an election called for that purpose, or at any regular election, of which notice shall have been given for at least 20 days by publication in one or more daily papers published within

the district, and providing, further, that in cities of the first class having over 25,000 inhabitants the said question should be submitted at a special election, and should require a two-thirds majority of the votes cast at such election to carry the proposition.

An examination of section 24 shows that it provided that the aggregate school tax in one year should not exceed 1 per cent. upon all the taxable property of the district. As it was amended by the act of 1883 it provided that the aggregate school tax in one year should not exceed 2 per cent. upon all the taxable property of the district. The act as originally passed, and as it was amended in 1883, clearly provided a limitation upon the aggregate school tax to be levied in any one year upon all the taxable property of the district.

In 1893 the section 24 was amended, the act changing the limitation of taxation for general school purposes from 2 per cent. to 15 mills, and, the same being within the title, was valid legislation, and, in lieu of the 5 mills reduction, the act provided that the board might borrow money and issue bonds therefor under the title which was to amend section 24 which then contained a limitation of 2 per cent. upon the power of taxation; the legislature changed the manner of raising the amount so limited, providing that a part thereof might be raised as theretofore had been done, and that the remainder thereof might be raised by issuing bonds in lieu of a direct levy.

The title of the act of 1883 (laws 1883, ch. 72) was "An act to amend section 4, subdivision 1, sections 4, 13 and 14, subdivision 2, section 10, subdivision 3, sections 4, 11, 16 and 17, subdivision 4, sections 3, 4 and 12, subdivision 5, sections 1, 2 and 3, subdivision 7, sections 5 and 6, subdivision 10, and sections 1, 3, 8, 12, 13, 15, 18, 24 and 26 of subdivision 14 of an act entitled 'An act to establish a system of public instruction for the state of Nebraska,' approved March 1, 1881, being chapter 79 of the Compiled Statutes of 1881."

Section 24 of subdivision XIV is the particular section

involved. Could the legislature have been deceived and misled by the act in question? By looking at the title, it will be apparent that the act amends 26 different sections of an act of at least 14 different subdivisions, 8 of which are amended by the act. The member of the legislature who voted for or against this bill knew, if he read the title, that it proposed to amend 26 sections in 8 subdivisions of an act which contained at least 14 subdivisions; and he knew that the act sought to be amended was an act to amend the system of education laws that had been established for the state. It was further part of the title that the act had been "approved March 1, 1881, being chapter 79 of the Compiled Statutes of 1881." By looking at chapter 79 of the Compiled Statutes of 1881 we find the heading "Chapter 79. Schools." There were 15 subdivisions of this chapter 79 under the heading "Schools" in the Compiled Statutes of 1881. The particular section 24 was carried into the Compiled Statutes of 1881 along with 28 other sections forming the fourteenth subdivision of the school law. These sections, including 24, were all parts of the system of education up to that time provided for our state by the several legislatures which had enacted laws pertaining to it. The 14 subdivisions of the act of 1881, including the particular section 24 under consideration, were carried into the Consolidated Statutes of 1891 and placed in chapter 44, under the heading "Public Instruction. Schools." Section 24 (p. 808) reads: "Section 3722. That the aggregate school tax shall in no one year exceed two per cent. upon all the taxable property of the district." The Consolidated Statutes of Nebraska appear to be certified by John C. Allen, secretary of state of the state of Nebraska, December 15, 1891, and it is also certified to by J. E. Cobbey, who appears to have been appointed to compile, annotate, edit, and publish all the general laws of the state then in force, and he does "hereby certify that the laws contained in this volume are true and accurate copies of the originals, as shown by the Revised Statutes of 1866, and the original rolls now on

file in the office of the secretary of state." The Consolidated Statutes of Nebraska became an authorized compilation supposed to contain all the laws of the state of Nebraska, and when the legislature referred to chapter 44, Consolidated Statutes of Nebraska, it referred to the system of public instruction provided for Nebraska by preceding legislatures, and it would be so recognized by the state government, by the school district officers, and by subsequent legislatures. The particular section 3722 of the Consolidated Statutes of Nebraska (Comp. St. 1881, ch. 79, sec. 24) was amended along with sections 3706 and 3721 which were carried along with it, and all three of the sections as originally existing were repealed. Section 4, ch. 31, laws 1893, provides that "sections 3706, 3721, and 3722, of subdivision XIV, chapter 44 of the Consolidated Statutes of Nebraska as now existing be and the same hereby are repealed." The sections had all become part of Nebraska's educational system of laws, and they were amended and repealed, and it would seem that they were so amended and repealed by a statute which could have deceived no one. The amendment was not an amendment alone of a section. The whole of chapter 44 of the Consolidated Statutes of Nebraska is devoted to the elaboration of that system, and the act in question was an amendment, as it would seem, not of the particular section alone, but of the fourteenth subdivision of chapter 44 of the Consolidated Statutes of Nebraska, and it amended sections in other subdivisions, as stated in the act, and indicated by the title. It was this amendment that provided for the issue of school district bonds, and which found section 24 part of the educational system of Nebraska, and amended it by attempting to provide for the issue of bonds.

It is claimed by counsel that the rule laid down by this court in *Miller v. Hurford*, 11 Neb. 377, disposes of the case and prevents the registration of the bonds. Judge MAXWELL delivered the opinion of this court in that case. In the opinion he says: "But an amendment must be

germane to the subject matter of the *act or section* to be amended." The purpose of the constitutional inhibition is not to be lost sight of. Judge MAXWELL did not lose sight of it. He calls attention to that provision of our constitution which says, among other things: "No bill shall contain more than one subject, which shall be clearly expressed in its title." He says of this provision, that it makes "inviolable the rule governing legislative bodies, that 'no proposition or subject different from that under consideration shall be admitted under color of amendment.'" He says: "Experience has shown that, in the absence of constitutional restrictions, the rule at times is liable to be overthrown, and objectionable and pernicious legislation is the result." He continues: "To guard against this evil, our constitution prohibits more than one subject being *embraced in a bill.*" It would seem that there can be no reasonable objection to the effect of the language used by Judge MAXWELL in the body of the opinion. The constitutional inhibition against more than "one subject being embraced in a *bill*" cannot be too strenuously insisted upon or too earnestly emphasized, because the purpose of the constitution, which is the recorded will of the people and which restricts the action of the legislature, is to prevent surreptitious legislation. Experience has demonstrated that legislators sometimes act in a clandestine and deceptive way. The purpose of the constitution is to confine legislative action to one subject, and that only the subject then under consideration, and if that subject is indicated by the title of the act which is being amended, or if the proposed amendment is clearly within the subject matter indicated by the title or section, then can there be any deception of the members of the legislature?

Because of the importance of the decision in *Miller v. Hurford,* 11 Neb. 377, it may be well to examine that case. The action was brought to foreclose certain alleged tax liens. The plaintiff alleged the purchase of five acres of ground for the taxes due thereon for certain years, and

that as a purchaser of said land he had paid other taxes, which he specified, the total amounting to $1,141.21. On the trial of said case there was a decree for the sum of $1,688 in favor of the plaintiff. Redick and Connell, the defendants, appealed to this court. This court determined that the plaintiff was entitled to a decree for the money actually paid by him in purchasing said lands at said tax sale, and for taxes necessarily paid upon said lands, together with interest at the rate of 12 per cent. per annum, and that the lands should be sold as upon foreclosure of a mortgage, and the proceeds applied to the payment of the amount found due and the costs. The title of the act of 1871 (laws 1871, p. 81), referred to and under which the foreclosure proceeded, is as follows: "An act to amend sections fifty, fifty-one, seventy-one, and one hundred and five of an act entitled 'An act to provide a system of revenue,' approved, February 15, 1869, and to make further provisions for collecting revenue." The title of the act does not cover the sale of land for the nonpayment of taxes. Concerning section 51 above mentioned, Judge MAXWELL says: "The subject matter of section 51 is to make taxes upon real property a perpetual lien thereon against all persons and bodies corporate except the United States and this state. Any amendment to the section in relation to the lien or mode of enforcing it is valid. But extraneous matter not relating to the subject of the section is in no sense an amendment, is within the inhibition of the constitution and void." The thing done by this court in *Miller v. Hurford* was to declare the taxes paid a lien upon the land and to decree the sale of the land to pay such lien as upon foreclosure of a mortgage. The plaintiff had a lien upon the land for the taxes. Speaking for this court, Judge MAXWELL foreclosed the lien as contemplated by the amendment to the section, but he did not allow the 40 per cent. per annum rate of interest provided for by the act. He only allowed interest at 12 per cent. per annum. In view of what he said and did, he probably considered, along with the other

members of this court, that the penalty part was unconstitutional.

It would seem that there should be a broad construction of the constitutional restriction that would not defeat the reasonable intent of the legislature. Of course, the intent of the legislature in all such cases is to amend the act. The constitution says nothing whatever about amending the *sections*. The real thing to be guarded against is the deception of one member of the legislature by another, or the deception of many members of the legislature by some one who draws a bill intended to deceive the members, or has such a bill presented and thereby does deceive them and induces them to pass an act which is surreptitious in its nature and perhaps vicious. Any amendment of the section ought to be such an amendment as might have been made to the act at the time of the consideration of the original bill. The constitution does not forbid the amendment of the act. It is always to be expected that first efforts will be ineffectual, and that it will be necessary to prepare and pass amendments. The constitution is only directed against surreptitious legislation of which the members of the legislature and the public have no notice. Suppose when an amendment to a section is offered it is held to relate to such subject matter only as might have properly been considered at the time the original bill was under consideration by the legislature, and it was clearly within the title of such original bill and the general scope and purpose of the act, or within the language of the section, then would there be any wrong done to the public by the passage of the amendment?

An examination of the session laws will show that a practice has grown up in the legislature of referring to the particular section which it is intended to amend as section — of the Compiled Statutes of such and such a year, giving it, or Cobbey's Annotated Statutes, or the Consolidated Statutes, as the case may be, altogether omitting the title of the original act. The thing done by

these legislators in referring to the section by its number is not prohibited, and it is perhaps only done for convenience, but it is assumed that a wrong is intended if anything else is put in the bill except matter of exactly the same kind as that contained in the section. It would seem to be unfair to the legislature to assume that it intends to pass surreptitious or clandestine acts for the purpose of deception, when its action is limited to such matters as are clearly indicated by the title of the original act, or the language of the section to be amended. Suppose we apply this reasoning to the instant case. The title of the act was "An act to establish a system of public instruction for the state of Nebraska." Laws 1881, ch. 78. If the amendment made to the original section 24 was one that might fairly have been contemplated under the title of the original act, has any harm been done to any one by the amendment of that act so as to enable the boards of the school districts to issue bonds and to borrow money and build school houses in accordance with the necessities of the people and their children, and according to the vote of the electors of the school district?

One of the constitutional restrictions is that "no bill shall contain more than one subject and the same shall be clearly expressed in its title." In *Kansas City & O. R. Co. v. Frey,* 30 Neb. 790, it was said, concerning this provision, that no bill shall contain more than one subject, this clause of the constitution "was never designed to place the legislature in a strait-jacket and prevent it from passing laws having but one object under an appropriate title." Concerning the rule as applied, Commissioner IRVINE, in *Trumble v. Trumble,* 37 Neb. 340, said: "Provided the object of the law be single the whole law may be embraced in a single enactment, although it may require any number of details to accomplish the object."

In *Smails v. White,* 4 Neb. 353, the act then under consideration was held to be unconstitutional because it undertook to shorten the time within which the transcript must be filed in the appellate court on taking an appeal

from the judgment of the probate judge or justice of the peace, and, second, to fix the time for filing the petition after the appeal and time for making up the issues in the case. It was held that there were two subjects.

In *State v. Lancaster County,* 6 Neb. 474, Judge GANTT in delivering the opinion of the court, among other things, said: "Notwithstanding the very restrictive terms of the title to the act in question, it not only contains provisions in regard to township organization, but it also provides for county organization and defines its corporate powers; it determines the number of county officers, defines their duties, provides for their election, and limits the terms of their respective offices, and it also materially amends and changes the general revenue laws."

In *State v. Lancaster County,* 17 Neb. 85, it is said by the attorney general that a provision in an amendatory act repealing an act not connected with the subject of the amendment is declared void. An examination of the case cited shows that the act was entitled "An act to amend an act entitled 'An act to provide for the registry, sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of funds arising from the sale of such lands,' being art. I, ch. 80, Compiled Statutes. *Also to repeal article III of said chapter 80.*" The court said: "Article III of chapter 80 is no part of the act amended, nor does it relate to subjects embraced either in the original act or as amended." An examination of the Compiled Statutes of 1881 and 1883 shows that the subject referred to in article III of chapter 80 is "refunding taxes," an entirely different subject.

In *City of Tecumseh v. Phillips,* 5 Neb. 305, the act under consideration undertook to exempt cities which had collected moneys from licenses for the sale of intoxicating liquors, and which had expended the same, from paying the money over to the county treasurer. By the section of the act in question they were declared "hereby exonerated from any and all liability therefor." The

title of the act in no way indicated this section. It was held that the section was void. The case of *White v. City of Lincoln,* 5 Neb. 505, presented the same question as in the former case of *City of Tecumseh v. Phillips.*

In *Burlington & M. R. R. Co. v. Saunders County,* 9 Neb. 507, the title of the act to be considered was "An act to amend 'An act to provide for the registration of precinct or township and school district bonds.'" This act is also contained in the laws of 1875, p. 185. It was sought to change the former statute by this amendment so as to read: "It shall be the duty of the board of county commissioners in each county to levy annually upon all the taxable property in each precinct or township and school district in such county a tax sufficient to pay the interest accruing upon any bonds issued by such precinct, township, or school district, and to provide a sinking fund for the final redemption of the same; such levy to be made with the annual levy of the county, and the taxes collected with other taxes, and, when collected, shall be and remain in the hands of the county treasurer a specific fund for the payment of the interest upon such bonds, and for the final payment of the same at maturity." It was held that the foregoing matter was void because of the fact that the title only provided for the registration of the bonds.

In *State v. Tibbets,* 52 Neb. 228, the second point of the syllabus reads: "Where the title to a bill is to amend an *existing act,* or a section thereof, no amendment is permissible which is not germane to the subject matter of the *original act or section indicated.*" Judge NORVAL, delivering the opinion of the court in the same case, said: "It has been uniformly decided that the provision of the constitution is mandatory, and that the courts will not declare a statute unconstitutional unless it is clearly so." He also said: "The purpose of the constitutional provision * * * is to give notice, *through the title of the bill,* to the members of the legislature and the public, of the subject matter of the projected law,—in other words,

that the title should clearly indicate the legislation embraced in the bill." He also said: "While the requirements of this clause of the constitution are mandatory, they are not to be exactingly enforced, or in such a manner as to hamper or cripple legislation. The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute."

In *Ives v. Norris,* 13 Neb. 252, it was held that the title to "An act regulating the herding and driving of stock" was not broad and comprehensive enough to sustain a provision giving damages for the castration of animals. In that case there was an action to recover the value of a grade Durham bull alleged to have been castrated by the plaintiff. On a trial in the county court there was a verdict and a judgment for the defendant. The case was taken to the district court on error and the judgment affirmed. The section under consideration provided: "No stallion over the age of 18 months, nor any Mexican, Texan or Cherokee bull over the age of 10 months, nor any Mexican ram over the age of 8 months, shall be permitted to run at large in the state of Nebraska." The remainder of the section provided that the owner or person in charge of such animals was prohibited from permitting them to run at large, and that such person might be fined, and further provided: "It shall be lawful for any person to castrate or cause to be castrated any such animal running at large." Concerning this act, it was held that the title of the act must express the subject of the bill; also, that, "if the bill have but one general object which is fairly expressed in the title," it will be sufficient—giving many citations.

In *Ex parte Thomason,* 16 Neb. 239, it was held that "an act to prevent the fraudulent transfer of personal property" was too restrictive in its title to include legislation making it a crime to remove mortgaged property out of the county.

In *Holmberg v. Hauck,* 16 Neb. 337, it was held that, under the title "An act to provide for the organization,

government, and powers of certain cities," the legislature could not invest police courts with a concurrent and co-extensive jurisdiction with county courts in ordinary civil cases.

In *Touzalin v. City of Omaha,* 25 Neb. 817, it was held that the title "An act to incorporate cities of the first class and regulating their duties, powers and government" did not permit a provision in the act forbidding the granting of injunctions to restrain the levy and collection of a special tax or the assessment to pay the cost of a city improvement.

In *State v. Holcomb,* 46 Neb. 612, it was held that section 5, ch. 66, laws 1895, providing for the leasing of convict labor, was in conflict with the clause of the constitution requiring the subjects of acts to be clearly expressed in their title.

In *Fish v. Stockdale,* 111 Mich. 46, the title of the act was "An act to amend section 1 of act No. 159, session laws of 1891, entitled 'An act to regulate the taking and catching of fish in the inland *waters* of this state.'" The actual title to the act amended read as follows: "An act to regulate the taking and catching of fish in the inland *lakes* of this state." It will be seen that there was no such act as the one described in the title to the amending act. In the act to be amended occurs the word "lakes," and in the amendatory act the title of the act to be amended contains the word "waters" in the place of "lakes." The Michigan court held that the title gave no notice to the legislators or to the people that the bill provided that the provisions of the original act should be extended to other subjects.

In *New York & G. L. R. Co. v. Inhabitants of Montclair,* 47 N. J. Eq. 591, there was an appeal from a decree overruling a demurrer to a bill. The bill was filed by the inhabitants of the township of Montclair to compel the railroad to construct a bridge across a cut alleged to impede the public travel along a public road within the township. One of the questions involved was the consti-

tutionality of the act under which the action of the court was invoked. The title of the act was "An act entitled 'A supplement to an act entitled "An act to authorize the formation of railroad corporations and regulate the same," approved April 2, 1873,' which supplement was approved March 31, 1882." The court said: "It is perceived that, while the act does not purport to be a supplement to the supplement of March 31, 1882, its effect is to leave the impression that it is a supplement to the earlier supplement. Any person reading the title to the act would conclude that the subject of the statute was the same as that involved in the act of March 31, 1882." The court then said that the act last mentioned "deals with a subject entirely foreign to the subject matter of the present statute. The act of March 31, 1882, * * * deals with the reduction of the capital stock of railroad companies under certain conditions. It is too obvious for argument that the title was entirely misleading. * * * For this reason the act is void."

Along the same line is the case of *Harper v. State,* 109 Ala. 28, 19 So. 857. In that case an act entitled "An act to amend an act for the trial of misdemeanors in Shelby county, approved February 12, 1891," was held to conflict with the constitution of Alabama providing that "each law shall contain but one subject, which shall be clearly expressed in the title." The trouble with the amended act was that it provided for the trial of felonies, something not included by the title.

In *State v. Tibbets, supra,* this court laid down the following rules: "Under the authorities the following propositions governing the enactment of laws are embraced in section 11, article 3 of the constitution: First. A plurality of subjects is prohibited. Second. The title of an act must fairly express the subject of legislation. Third. Matters can only be included in an amendatory bill which are germane to the original act. Fourth. An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or

sections as amended, and repeal the original section or sections." Authorities are cited in support of the propositions stated. Applying the rules herein laid down to the instant case, can it be said that any of these rules are violated? Concerning the contention that the title of the act does not fairly express the subject of legislation, we say that the amendment offered was an amendment to the educational system of the state. It did not purport to be an amendment alone of a particular section, but it amended three sections of subdivision XIV, of chapter 44, of the Consolidated Statutes of 1891. At the time it did so, said chapter 44 contained the whole educational system of Nebraska, and the act in question amended that system, and it amended a statute book that had been recognized by the legislature, known as the Consolidated Statutes of Nebraska.

In *State v. Tibbets, supra,* the court quoted from the brief of counsel: "The rule that an amended section must be germane to the original section amended is not a rule established by constitutional authority, but is one which necessarily arises from a compliance with the above named constitutional provision; and it simply arises from the fact that when a section is amended it is supposed to stand by itself in its amendment, to take unto itself a title which the subject matter of this section will allow and must be confined to a certain object. That an amended section must be germane to the section amended does not mean that it must be confined to the same limits; that it cannot be enlarged and extended beyond the limits of the original section. It only means that it must be confined to the same subject matter, or have the same object in view, and this subject matter or object may be general in its nature. So long as the legislature fairly confines itself to the object of the original section it is sufficient." Now, concerning this argument made by counsel, Judge NORVAL said in the opinion: "But it did not so confine itself in this case." Here is seemingly a recognition of the proper rule. If this rule is applied to

the instant case, it would seem that it must be held that all amendments relate back to the original title of the bill entitled "An act to establish a system of public instruction in the state of Nebraska," and under which everything that is sought to be done in this case might be done.

In *Kockrow v. Whisenand,* 88 Neb. 640, it was contended that, where the name of the school district was "The School District of Harvard, in the County of Clay, in the State of Nebraska" as fixed by statute, and the designation used was "Harvard School District No. 11, Clay County, Nebraska," the variation was material. The court said of this objection: "This objection, in the light of the stipulation of facts, is too technical for consideration." The court said of this: "We think it would be 'straining at a gnat' to hold that such use would invalidate any proceedings taken by the board of a school district." The opinion in that case seemingly tends to show that it is the view of this court that it is no part of its duty to tear down that which the people have built up by an expenditure of time, labor and money, coupled with a good faith effort at legislation. This view is seemingly emphasized by what the court further said: "That the boards of education of said district have, since May, 1887, employed superintendents of public instruction for various periods of time, in one instance for the period of three years; that no action has ever been instituted by plaintiffs or any one else or by the state to question the right of the district to operate under subdivision XIV, ch. 79, Comp. St. 1909, and no written objection thereto has ever been filed with any county superintendent or with the boards of education of said school district; * * * that plaintiffs have been residents and taxpayers and legal voters in said district for from 6 to 23 years. It thus appears that this school district has been in existence and its board of education performing all the functions and duties of a board for over 23 years, without any objection either by the state or by any resident, legal voter or taxpayer of the district."

Mr. Pettis, who objects to registering the bonds, in his brief as *amicus curiæ* says that the same rule does not apply where the attempt is to amend a specific section as where the attempt is made to amend a chapter. And he says: "Nor does the same rule apply as in cases where the title is 'An act to amend chapter 79 of the Compiled Statutes for the year 1909, and to repeal certain specified sections thereof.'" Now, he says in such a title as that, in such a case, it may be well said that that title is broad enough to permit by way of amendment the addition of any new matter which might have been included under the original title. He also says: "It will be conceded that usually the people have no knowledge of what is before the legislature, except what may be acquired from the custom of the press in publishing the titles of the several bills as they are introduced. Very rarely indeed is the full text of a bill published by the press, and, of course, until the legislature is over the session laws are not available." He then says: "Would they (the people) have any idea of notice that the legislature proposed to provide for the calling of an election, fixing the rate of interest which a bond might carry, and to confer a power to borrow money and issue bonds in an unlimited amount, etc?" Continuing he says: "If, however, the title was an act to amend a previous act, as for instance chapter 79, laws of 1909, then they would have fair notice that the legislature might be proposing to make radical changes in the entire law and that it behooved them to watch out." In the careful brief which Mr. Pettis has filed in the case, he has seemingly admitted the force of the proposition that there is no deception if the matter proposed to be amended is made a part of the educational system of the state. Courts may not be expected to look with favor upon an attack of a purely technical nature if there has been a substantial compliance with the main purpose of the law. In this case since 1893 the section referred to has been amended from time to time, and it provides at the present time for the issue of bonds very much as it did

after it had been amended by the act of 1893 which provided for their issue. If this was objectionable it should have been attacked long ago. It is an integral part of the educational system of the laws of the state. To declare it unconstitutional and void is to unsettle and depreciate the value of school securities in our state. It would seem that the brief of counsel who appears as the friend of the court to assist the attorney general is an admission of the fact that there may have been no deception of the public or of the legislature by the use of the title employed to designate the amendment made in 1893. By looking at chapter 79 of the Compiled Statutes of 1881 the person who looked saw the heading "Chapter 79. Schools." When the same person looked at chapter 44 of the "Consolidated Statutes of 1891" he saw the heading "Public Instruction. Schools." He further saw, when he looked at the last mentioned book, "Consolidated Statutes of 1891," that the book was certified by the secretary of state, and by J. E. Cobbey, who seems to have been "appointed by the legislature of the state of Nebraska to compile, annotate, edit, and publish all the general laws of the state now in force," and saw that he certified "that the laws contained in this volume are true and accurate copies of the originals, as shown by the Revised Statutes of 1866, and the original rolls now on file in the office of the secretary of state."

The amendment of 1893 put into section 24 and into the act to which the section belonged the provisions concerning the issue of bonds for the use of the district. The first amendment of section 24, after that provision of 1893 was put into it, adopted the provision as it found it. Section 24, as it appeared in subdivision XIV, ch. 79, Comp. St. 1893, and in the session laws of 1893, ch. 31, contained the provision concerning the issue of school bonds. It was put into the session laws of 1893 under the title "An act to amend sections 3706, 3721 and 3722, of subdivision XIV, of chapter 44, of the Consolidated Statutes of Nebraska, and to repeal the original sections amended."

Section 3722, referred to as being in the Consolidated Statutes of Nebraska, corresponds to section 24 of the Compiled Statutes of 1893, and for two years before the meeting of the next legislature this act was published as a part of the educational system of the state in the session laws and in the other publications containing the statutes of the state. The residents of the district and the members of the legislature could all see the section with the provision in it to issue bonds. When section 3722 was amended by the passage of the act of 1893, it was amended under a title that could not have deceived any one, because it appeared as subdivision XIV, of chapter 44, of the Consolidated Statutes of Nebraska, which contained the whole educational system of the state. We call attention to the fact that the act of 1893 changed the limitation of taxation for general school purposes from 2 per cent. to 15 mills, which, of course, was within the title and was valid legislation, and on account of its change and in lieu of the 5 mills' reduction the act provided that the board might borrow money and issue bonds therefor. Under the title which was to amend section 24, which then contained a limitation of 2 per cent. upon the power of taxation, the legislature changed the manner of raising the amount so limited, providing that a part thereof might be raised as theretofore had been done, and that the remainder thereof might be raised by issuing bonds in lieu of a direct levy.

In 1897 the legislature passed an act entitled "An act to amend section 24, chapter 79, subdivision XIV, of the Compiled Statutes, 1895, to provide for the exclusion of school bond taxes in the computation of the aggregate school taxes under the provisions of this act, and to repeal section 24, chapter 79, subdivision XIV, of the Compiled Statutes of 1895." Laws 1897, ch. 70. This title, it will be noticed, mentions school bonds and the section of the Compiled Statutes referred to, as the section appeared in the statutes of 1895. Section 24, as it appeared in the statutes of 1895, had prefixed to it as head words,

"Limitation of Taxation. Bonds." The section also appeared under "Subdivision XIV. Schools in Cities." This section, so formed, went into the Compiled Statutes of 1901 as section 24, subd. XIV, ch. 79. If the laws which were enacted prior to 1901 amending this section are unconstitutional as far as they authorized the issuing of bonds, the section, as it existed before the act of 1897, was repealed by that act and the substance thereof reenacted. There can be no doubt then, whatever may be thought of the prior legislation referred to, that at least a part of the section, as it appeared in the Compiled Statutes of 1901, was valid. Under the conditions which we have recited, the legislature might well have supposed the whole section constitutional. In 1903 the legislature, regarding the section as valid as it appeared in the Compiled Statutes (for we must uphold acts of the legislature if it is reasonably possible to do so) enacted a statute entitled "An act to amend section 24, of subdivision XIV, chapter 79, Compiled Statutes of Nebraska, and to repeal said original section." Laws 1903, ch. 94. The purpose of the constitutional provision in question is to prevent surreptitious legislation; to enable all members of the legislature to know from the title of the proposed law what general subject it intended to legislate upon. Would the fact, if it were a fact that some part of the section named in the title of the act might, by strict construction, be found unconstitutional prevent the lawmakers from taking notice that it was intended to legislate upon the general subject of the section as it appeared in the authorized compilation of the laws? We do not think we ought to give such a meaning to the rule announced in *Miller v. Hurford, supra.* If the title is such that it must necessarily call attention to the general subject of the proposed legislation, it cannot be said that the subject is not expressed in the title, when we consider the purpose of the constitutional requirement and the evil it was designed to remedy. The amendment of 1903 was germane to the section of the Compiled Statutes named in the title,

within the meaning of the rule in *Miller v. Hurford, supra.* The section so amended is now section 24, subd. XIV, ch. 79, Comp. St. 1911.

There can be no doubt that the legislature intended to provide a law to enable school districts containing cities to borrow money according to their needs. For 18 years said section 24 has been acted upon by all the city school districts in the state, except the metropolitan city school districts and those districts containing cities having a population of from 25,000 to 40,000. Concerning the latter class, it should be said that the legislature of 1903 passed an act almost identical with said section 24 and in almost the same words. Laws 1903, ch. 98, sec. 27 (Comp. St. 1903, ch. 79, subd. 14*a*, sec. 27). This action clearly shows the purpose of the legislature to authorize school districts to borrow money by issuing their bonds; unless the amendments made to section 24 have enabled it to become a valid law, then all the school districts in the state containing a city of more than 1,500 inhabitants and less than 25,000 are left without any way to issue bonds and borrow money. Every reasonable intendment is in favor of the constitutionality of section 24. It should be held valid unless it clearly violates the spirit of the constitutional limitation. There is perhaps little tendency at the present time to substitute the will of the judges for the expression of the people through their representatives in legislative session assembled. What the legislature declares to be the law should be accepted as such by the courts unless there is a clear disregard of constitutional restrictions.

In *State v. Board of Control,* 85 Minn. 165, the legislature had passed an act under a title which reads, "An act to create a state board of control, and to provide for the management and control of the charitable, reformatory and penal institutions of the state, and to make an appropriation therefor, and to abolish the state board of corrections and charities." The state normal schools of Minnesota were placed under the management of the

board of control, and a member of the normal school board objected, and on his relation the attorney general brought *quo warranto* to test the right of the board of control to manage the financial affairs of the normal schools of the state. It was claimed by the attorney general that the statute creating a "State Board of Control," so far as it related to normal schools, was in violation of section 27, article 4 of the state constitution, providing that "no law shall embrace more than one subject, which shall be expressed in its title." The Minnesota court prepared and delivered an exhaustive opinion holding that normal schools were within the title of the act and that the act was valid. The court laid down the following rules set forth in the first paragraph of the syllabus: "That every law is presumed to be valid; that this provision of the constitution is to be liberally construed, and all doubts resolved in favor of the law; that the title should also be liberally construed, giving to its general words paramount weight; that it is not essential that the best or even accurate words in the title be employed, but the remedy to be secured and mischief avoided furnishes the best test of its sufficiency to prevent such title from being made a cloak or artifice to distract attention from the substance of the act, provided the title be fairly suggestive, and not foreign to the purpose of the statute." In the body of the opinion the court say: "The duty of a court to set aside a statute because it is invalid is peculiarly an incident of our national and state policy." The court quote from the opinions of Chief Justice Shaw in *In re Wellington,* 16 Pick. (Mass.) 87, 26 Am. Dec. 631, Chief Justice Marshall in *Fletcher v. Peck,* 6 Cranch (U. S.) 87, Mr. Justice Washington in *Ogden v. Saunders,* 12 Wheat. (U. S.) *213, Mr. Justice Cornell in *Curryer v. Merrill,* 25 Minn. 1, 33 Am. Rep. 450, and Chief Justice Gilfillan in *Woodruff v. Town of Glendale,* 26 Minn. 78. Chief Justice Shaw said: "When called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to

give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." Chief Justice Marshall said: "The question whether a law be void for its repugnancy to the constitution *is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.*" Mr. Justice Washington said: "If I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt, * * * that alone would, in my estimation, be a satisfactory vindication of it." Mr. Justice Cornell said: "Plenary legislative power is therefore the rule, while want of it is the exception. As a sequence it logically follows that every statute duly passed by the state legislature is presumably valid, and this presumption *is conclusive* unless it affirmatively appears to be in conflict with some provision of the federal or state constitution; and, in order to justify a court in pronouncing it invalid because of its violation of some clause of the state constitution, its repugnancy therewith must be so *'clear, plain and palpable'* as to leave no reasonable doubt or hesitation upon the judicial mind." Chief Justice Gilfillan said: "There is no express provision to that effect. But, rather than hold the law to be void, the court will find such provision by implication, if the act will admit of such construction," to sustain it.

The objection to these bonds because of alleged unconstitutionality of attempted legislation presents a very important question. The subdivision as amended applies to many cities of the state. If that part of section 24, as it now appears, which authorizes the issue of bonds is held unconstitutional, very many outstanding bond issues will be invalidated. Before leaving the consideration of this part of the case, it may be proper to say that the

constitutional inhibition does not seem to have been disregarded in its purpose, because there is no evidence of surreptitious legislation, and the statute sought to be attacked has been in use without question for eighteen years. Succeeding legislatures have recognized and amended it. We hold that the rule stated in the syllabus in *Miller v. Hurford,* 11 Neb. 377, is generally applicable. If there is nothing to indicate the subject of the proposed legislation except the language of the section named in the title, the rule stated will apply. The constitutional provision requires that the title of the act shall be such as to inform the members of the legislature upon what subject it is proposed to legislate in the act, but it is not indispensable that the title shall recite all the details of the proposed legislation. The legislature has amended this section many times since the authority to issue bonds has been incorporated therein and under proper titles, so that the legislature has been apprised of the purpose intended. The amendments of the section made in 1901, 1903, and 1911 each repealed as it was made the preceding amendment, and finally left the section as it at present exists. As these amendments were within the title of the original act, they each became valid as made, and the last amendment leaves the present section in force as if it had been included in the original act of 1881 or in the title of any subsequent amending act. To refuse to adopt this view is to leave this school district and others of the same class without the means to borrow money for needed buildings, and it unsettles and depreciates the value of school bonds approximating two millions of dollars.

We hold that section 24 is valid, and that the issue of the bonds thereunder was not forbidden.

With respect to the contention that the amendments were void because they did not contain sections 2, 3, 4 and 5 of subdivision 15 of the Compiled Statutes of 1911, it is enough to say that the subdivision indicated simply prescribes a different manner for issuing school bonds, and that it does not apply to the school district of Lincoln.

Concerning the question as to where the high school building should be located, and as to whether there should be an annex to a grade school building, it is the view of the court that these matters were not necessarily connected with the purpose to issue the bonds; that the location of the school buildings did not in any way determine whether the bonds should or should not be issued. There was no dual proposition. *Hurd v. City of Fairbury*, 87 Neb. 745.

It is alleged in the attorney general's brief that the district court should have held that the election was void because the school district takes in a larger amount of territory than that covered by the city of Lincoln. It is not shown that any voters in the territory outside of the limits of Lincoln were prevented from casting their votes, and no complaint is made by any voter that he was denied the privilege of voting. It would also seem that this question has been disposed of in the case of *Kockrow v. Whisenand, supra*, where the court held that it was not the population of the city or the population of the district which controlled, but it was the particular organization of the district which could not subsequently be questioned. It would seem that this question may not properly be raised except by the voter or voters who have been wronged; but, whether that be true or not, no such complaint is made in this case.

The last point offered is that the election notice was not published in each of the daily papers for the period of 20 days. The answer to that is that the statute does not require it. The allegation is that the notice was published in a weekly paper called the "Trade Review" for the period of 20 days. That is enough under the statute. The language is, "Notice whereof shall be given for at least 20 days in one or more papers published within the district."

The judgment of the district court is right, and it is

AFFIRMED.

REESE, C. J., not sitting.

ROSE, J., concurs in the affirmance only.

Syllabus by SEDGWICK, J.

1. Statutes: AMENDMENT: CONSTITUTIONAL LAW: TITLE OF ACT. The rule stated in the syllabus in *Miller v. Hurford*, 11 Neb. 377, "When the title of an act is to *amend* a particular section of a statute, the proposed amendment must be germane to the subject matter of the section sought to be amended or it will be void," is generally applicable and will be applied in all cases when there is nothing to indicate the subject of the proposed legislation except the language of the section named in the title of the amendatory act.

2. ———: ———: ———: ———. The purpose of the constitutional limitation (Const., art. III, sec. 11) that the subject of legislation must be clearly expressed in the title of the act is to prevent surreptitious legislation; to enable members of the legislature and others interested to know from the title of the proposed law what general subject it is intended to legislate upon. When the title of an act is to amend a particular section of the authorized compilation of the statutes which appears to be valid, it is sufficient if the amendment is germane to the section named in the title, although some part of the subject of such section might by a strict construction be found unconstitutional.

3. Schools and School Districts: BONDS: SUBMISSION OF PROPOSITION FOR ISSUANCE. A proposition of a school district to issue bonds must be submitted separate and distinct from any other that is not germane thereto. It is not necessary that it be submitted at an election at which no other proposition is submitted.

4. ———: ———: ———. An election upon a proposition to vote bonds for a new school building will not be invalid because at the same election the voters are asked to choose between two locations for the proposed building.

5. ———: ———: ———: VOTING DISTRICT. When a school district includes a city and also other territory, an election to vote bonds upon the property of the district will not be held invalid because no voting places are named in the territory outside of the city, if the electors in such territory are notified to vote at the nearest voting place in the city, and it does not appear that any elector was prevented from voting at the election.

6. ———: ———: ———: PUBLICATION OF NOTICE. The publication

of the notice of school district election to vote bonds must be for 20 days prior to such election; such publication in a weekly paper of general circulation in the district is sufficient.

SEDGWICK, J., concurring.

The school district of the city of Lincoln applied to the district court for Lancaster county for a writ of mandamus to require the respondent, Silas R. Barton, as auditor of public accounts of the state of Nebraska, to register the bonds in the sum of $350,000, issued by the district. Upon trial in the district court the writ was awarded as prayed, and the respondent has appealed.

It is contended that the school district of the city of Lincoln has no authority or power to issue bonds, the section of the statute under which these bonds were issued being unconstitutional. It is also objected that "the propositions submitted at said election were illegal and void for the reason that they were dual, if not multiform," and that the election on the question of the issuance of said bonds was illegal and void for the reason that the school district extends beyond the limits of the city and that in this territory outside of the city limits there were no voting places provided where the school electors might appear and vote.

1. The objection to these bonds because of alleged unconstitutionality of attempted legislation presents a very important question. The subdivision as amended applies to all cities of the state which have 1,500 or more inhabitants with one or two exceptions. If that part of section 24, as it now appears, which authorizes the issue of bonds is held unconstitutional, very many outstanding bond issues will be invalidated. It is contended that section 24, subd. XIV, ch. 79, Comp. St. 1911, so far as it attempts to authorize issuing school district bonds, is unconstitutional. In 1881 the legislature enacted a comprehensive general statute entitled "An act to establish a system of public instruction for the state of Nebraska." Laws 1881, ch. 78. This statute, as originally enacted, contained 14 subdivisions. The fourteenth subdivision

consisted of 29 sections, and section 24 was as follows: "That the aggregate school tax shall in no one year exceed one per cent. upon all the taxable property of the district." In 1883 this section was amended, making the limit 2 per cent. instead of 1 per cent. In 1891 this section appeared in the Consolidated Statutes of Nebraska as section 3722, subd. XIV, ch. 44; and in 1893 the legislature passed an act entitled "An act to amend sections 3706, 3721, and 3722 of subdivision XIV of chapter 44 of the Consolidated Statutes of Nebraska, and to repeal the original sections amended." Laws 1893, ch. 31. In this act the section as amended contains the provision that the board of education "may borrow money upon the bonds, which they are hereby authorized and empowered to issue," it is contended that this provision is void as not being within the title of the act, and that the same objection exists to the various subsequent attempts to amend this section.

In *Miller v. Hurford,* 11 Neb. 377, and in other cases. the rule is said to be that, "when the title of an act is to *amend* a particular section of a statute, the proposed amendment must be germane to the subject matter of the section sought to be amended or it will be void." It is said in the opinion: "An amendment must be germane to the subject matter of the act or section to be amended. * * * Experience has shown that, in the absence of constitutional restrictions, the rule at times is liable to be overthrown, and objectionable and pernicious legislation is the result." The opinion does not state the title of the act, but assumes that the provision which is held to be unconstitutional was made a part of the section amended. The title of the act was "An act to amend sections fifty, fifty-one, seventy-one, and one hundred and five of an act entitled 'An act to provide a system of revenue,' approved February 15, 1869, and to make further provisions for collecting revenue." Laws 1871, p. 81. This title refers to the general revenue act of 1869, and proposes to amend certain specified sections, "and to make further provisions for collecting revenue." That part of the act

held to be unconstitutional appears to have been introduced into the act under the last clause of the title, to make further provisions for collecting revenue.

This rule, however, stated in the syllabus is generally applicable. If there is nothing to indicate the subject of the proposed legislation except the language of the section named in the title, the rule stated will apply. The constitutional provision requires that the title of the act shall be such as to inform the members of the legislature upon what subject it is proposed to legislate in the act. It is not indispensable that the title shall recite the details of the proposed legislation. The legislature has amended the section now considered many times since the authority to issue bonds has become incorporated therein. In 1893 this section was amended. Laws 1893, ch. 31. The act changed the limitation of taxation for general school purposes from 2 per cent. to 15 mills, which, of course, was within the title and was valid legislation, and on account of this change, and in lieu of the five mills' reduction, the act provided that the board might borrow money and issue bonds therefor. Under the title which was to amend section 24, which then contained a limitation of 2 per cent. upon the power of taxation, the legislature changed the manner of raising the amount so limited, providing that a part thereof might be raised as theretofore had been done, and that an additional fund might be raised by issuing bonds in lieu of a direct levy. In 1897 the legislature passed an act entitled "An act to amend section twenty-four (24), chapter seventy-nine (79), subdivision fourteen (14) of the Compiled Statutes of 1895, to provide for the exclusion of school bond taxes in the computation of the aggregate school taxes under the provisions of this act, and to repeal section twenty-four (24), chapter seventy-nine (79), subdivision fourteen (14) of the Compiled Statutes of 1895." Laws 1897, ch. 70. The section of the Compiled Statutes referred to, as it appeared in the statutes of 1895, had prefixed to it as head words, "Limitation of Taxation: Bonds." This

section, so formed, went into the Compiled Statutes of 1901 as section 24, subd. XIV, ch. 79, and this title, it will be noticed, mentions school bonds. If the laws amending this section which were enacted prior to that time were unconstitutional as far as they authorize the issuing of bonds, there can be no doubt that at least a part of the section, as it appeared in the Compiled Statutes of 1901, was valid. Under the conditions above recited the legislature might well have supposed the whole section constitutional. It became section 24, subd. XIV, ch. 79, Comp. St. 1893. In 1903 the legislature, regarding the section valid as it appeared in the Compiled Statutes (for we must uphold acts of the legislature if it is reasonably possible to do so), enacted a statute entitled "An act to amend section twenty-four of subdivision fourteen, chapter 79, Compiled Statutes of Nebraska, and to repeal said original section." Laws 1903, ch. 94.

The purpose of the constitutional provision in question is to prevent surreptitious legislation; to enable all members of the legislature to know from the title of the proposed law what general subject it is intended to legislate upon. Would the fact, if it were a fact that some part of the section named in the title of the act of 1893 might by strict construction be found unconstitutional, prevent the lawmakers from taking notice that it was intended to legislate upon the general subject of the section as it appeared in the authorized compilation of the laws? We do not think we ought to give such a meaning to the rule announced in *Miller v. Hurford, supra*. If the title is such that it must necessarily call attention to the general subject of the proposed legislation, it cannot be said that the subject is not expressed in the title, if the purpose of the constitutional requirement and the evil it was designed to remedy is considered. The amendment of 1903 was germane to the section of the Compiled Statutes named in the title, within the meaning of the rule in *Miller v. Hurford*. The section so amended is now substantially the section being considered and does not violate the constitutional requirement in question.

2. The abstract contains the published notice of the election, from which it appears that the proposition submitted was: "Shall the board of education of said district have power to borrow money and pledge the property of said district upon its bonds, and to issue and negotiate said bonds in the sum of $350,000, to be used" for three several purposes. The first purpose stated in the notice was "erecting and completing a high school building," and the notice stated that this building was "to be located on the place and upon the site to be selected by the electors at said election." The notice further stated that there would be two places voted upon, and the places were specified in the notice. The second purpose for which the proceeds of the bonds were to be used, as stated in the notice, was "for erecting and completing one grade school building," and the notice specified where that building should be located. The third purpose stated in the notice was for an annex to the Saratoga school building, stating the location of that building. The form of the ballot used is not shown in the abstract, and we have no other information as to the manner in which the proposition was submitted, except as indicated in the published notice. It is no doubt true that, when a proposition to issue bonds is submitted to the voters, it must be submitted "in *such manner as to enable the voters intelligently* to express their opinion upon it, and for that purpose the proposition should be submitted to them separate and distinct from any other proposal which is not germane to the question upon which a vote is desired." 2 Dillon, Municipal Corporations (5th ed.) sec. 891. This does not mean that it must be submitted at a separate election at which no other question or matter is submitted, and there is no such requirement in the statute. No objection is made to the form of the ballot, and it must be presumed to be sufficient in that respect. It is urged that the board was not authorized to submit the question of selecting sites for the buildings, and that some voters in the vicinity of the proposed locations might be in-

fluenced thereby and so vote upon the issuance of the bonds, which otherwise they would not do. It is suggested that, if such proceeding is allowed, the board might designate a large number of sites and unduly influence the adoption of the proposition. No precedent is cited for avoiding upon such grounds an election otherwise duly held. This question so submitted involved only the choice between the site of the present high school building and another proposed location, and it seems impossible that this could have improperly influenced the voters.

3. The objection that there were no voting places provided in the territory outside of the city limits does not seem to require that the election should be declared invalid. The evidence shows that this has been the customary way of voting at school district elections, and it appears to have been generally understood that the voters in the district outside of the city should vote at the polling places in the city nearest to their respective residences. At all events, there is no evidence that any elector was prevented from voting in this election, and the voters themselves are not now complaining. It seems that this objection is not well taken.

4. The final contention is that the publication of the notice of this election was insufficient. The notice was published in the "Trade Review," a weekly paper published in the district. It was also published in two of the daily papers published in the city of Lincoln. This publication in the daily papers was apparently not relied upon as a legal publication. The abstract shows that a witness who was examined as to the publication of these notices testified "that he would not say the notice published in the Star and Journal (the two daily papers) were published as much as 20 days before the election," and that there was only one publication of the notice in these papers. This evidence does not show that the publication in the Trade Review was insufficient. The statute requires that the notice "shall be given for at least 20

days in one or more papers published within the district." The notice therefore in the Trade Review for more than 20 days prior to the election was sufficient.

These considerations require that the judgment of the district court be

AFFIRMED.

BARNES, FAWCETT, and LETTON, JJ., concur in the conclusion in the opinion by HAMER, J., and in the syllabus and reasoning in the concurring opinion by SEDGWICK, J.

T. M. PARTRIDGE LUMBER COMPANY, APPELLANT, V. PHELPS-BURRUSS LUMBER & COAL COMPANY, APPELLEE.

FILED MAY 13, 1912. No. 16,695.

1. **Compromise and Settlement:** TENDER: ACCEPTANCE. "Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, nothwithstanding any protest he may make to the contrary." *Treat v. Price*, 47 Neb. 875.

2. ———: CONSIDERATION. "When there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334.

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

Burkett, Wilson & Brown, for appellant.

Charles S. Roe, contra.

REESE, C. J.

This action was commenced before a justice of the peace. The amount of plaintiff's claim is $95.60. The case was appealed to the district court, where a trial was had to the court which resulted in a finding that there had been an accord and satisfaction, and a judgment dismissing the case. Plaintiff appeals to this court.

The action is founded upon the sale of a car-load of cedar telephone poles, the price of which was $570.30 delivered in Lincoln. Defendant paid $150.80 freight charges, and remitted $323.90, making a total of $474.70. One of the principal issues presented by the pleadings was whether there had been an accord and satisfaction of the demand. The correspondence between the parties shows that the poles were warranted to be up to certain specifications as to size and quality, that plaintiff insisted upon an inspection before shipment, and defendant insisted upon inspection at the point of delivery. The poles were shipped, and upon their arrival in Lincoln they were inspected and some were rejected. There was a dispute as to the right of defendant to inspect the poles at Lincoln and also as to the quality of the poles shipped. On January 11, 1908, defendant sent plaintiff a check for $323.90, accompanied by the following letter:

"Inclosed herewith find check for $323.90 from the Phelps-Burruss Lbr. & Coal Co. in settlement with the Nebraska Telephone Co. for car of white cedar poles which you shipped in car M. & I. No. 1127.

"53	7"	top	25'	white	cedar	poles	@	$2.63.....	$139.39
34	7"	"	35'	"	"	"	"	8.25.....	$280.50
3	6"	"	20'	"	"	"	"	1.38.....	$ 4.14
9	7"	"	30'	"	"	"	"	5.63.....	$ 50.67
									$474.70
							Less freight		$150.80
									$323.90

"The following is a list of the poles rejected and are here on hand subject to your order:

"4—7" top 25' white cedar poles.
7—7" " 35' " " "

"The above rejected poles are all dead timber as per report made by the Nebraska Telephone Co., and are therefore worthless as telephone poles, and are not admissible by the Northwestern Cedarmen's Association grading rules. (Signed.)

"P. S. The above rejected poles are here in the Phelps-Burruss Lbr. yard subject to your inspect and order."

The check was received and the money retained by plaintiff, but a letter was sent defendant saying that it was not received in full payment, but on account, and that an inspection of the rejected poles would have to be made by an officer of the association of which plaintiff appears to have been a member. An inspector came from Des Moines, looked over the rejected poles and reported to plaintiff, but the report was not entirely satisfactory owing to there being some poles upon which the brand or hammer mark of plaintiff did not appear. It cannot be fairly contended, we think, that plaintiff did not understand that the $323.90 was sent in full satisfaction of all demands. If so, one of two courses was open to it—either retain the money as a full satisfaction, or return the check and sue for the whole amount claimed to be due. It chose the former course. Having retained the money, the stated purpose of the sender would control.

In *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334, we said, that if there was a disputed account, "and the defendant tendered a less amount in full settlement and discharge of the entire claim, and defendant (plaintiff?) accepted the money with the knowledge that it was so paid, the dispute is a sufficient consideration to uphold the settlement and will bar a recovery."

In *Treat v. Price*, 47 Neb. 875, we said: "When money is offered on condition that it be accepted in full satisfaction of a demand, the person receiving it, if he receives

it at all, must take it subject to the condition named. His acceptance of the money under such a tender is an acceptance of the condition, notwithstanding any protest that he may at that time or afterwards make to the contrary."

The decision of the district court is supported by sufficient evidence, and the judgment is

AFFIRMED.

CHARLES P. BRESEE, APPELLEE, V. ROSE EVER ORMSBY, APPELLANT.

FILED MAY 13, 1912. No. 16,710.

1. Appeal: OBJECTIONS TO PROCEDURE. When a cause involving equitable principles is appealed to the supreme court, the appeal based upon the merits of the whole case, all objections to the procedure on appeal should be made and presented by motion or otherwise, and not withheld until the filing of the briefs on final submission.

2. Mortgages: FORECLOSURE: SALE: EFFECT OF CONFIRMATION. In the absence of fraud, the confirmation of a sale made by a sheriff upon a foreclosure of a mortgage cures all defects in the proceedings of the sheriff thereunder subsequent to his receipt of the order of sale.

3. ———: ———: ———: ———. A husband, named George Mead, was made a party to a foreclosure suit. His wife was also named as "Mrs. Mead, his wife, first name unknown." Neither appeared, and a default was duly entered against them and decree of foreclosure rendered, the husband being, upon sale and confirmation, divested of any title he may have had. After confirmation of the sheriff's sale, a deed was made to the purchaser, who took possession, exercising acts of ownership and paying taxes. A short time before the commencement of this suit, the plaintiff, for a nominal consideration, obtained a quitclaim deed from Mead and wife, and brought this suit to quiet his title, basing his claim upon the inchoate right of dower of Mead's wife. *Held*, That this suit could not be maintained.

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

William C. Brown, for appellant.

Andrew M. Morrissey, Allen G. Fisher and *William P. Rooney, contra.*

REESE, C. J.

This action was commenced in the district court for Cherry county September 11, 1908, in ejectment. It is alleged in the petition that on or about January 1, 1902, defendant unlawfully entered the premises, and has ever since held and enjoyed the rents and profits thereof, etc. A judgment for possession and damages was demanded. To this petition defendant, on September 30, filed her answer in general denial. On November 24 plaintiff filed his amended petition, by which he changed his action to one to quiet title, alleging the ownership and possession of the real estate, which is described as the south half of the northwest quarter of section 22, and the south half of the northeast quarter of section 21, in township 35 north, range 29 west of the sixth principal meridian, in Cherry county; that defendant claims to be the owner of the land in her own right; that her claim is founded on a purported mortgage for the sum of $250 dated February 15, 1893, but the execution of which is denied; that a cause of action on said purported mortgage arose, if ever, not later than June 4, 1893; that no action thereon was commenced at any earlier date than June 4, 1903, and that the mortgage was barred by limitation. It is alleged that on March 21, 1901, and a long time prior thereto and afterward, Sarepta L. Mead had an inchoate dower right as the wife of George Mead, owner of the title of record; that she was never made a party to any foreclosure suit, nor appeared therein, and that all proceedings against her were void for want of jurisdiction. The plaintiff offers to do equity by the payment of any sum of money the court

may find due defendant. The petition contains an obscured averment that the mortgage, sparingly referred to above, was foreclosed, a decree of foreclosure entered, but for more than the amount due, and that by various defects in the proceedings the foreclosure, including the sheriff's sale and conveyance to defendant, was void. The prayer is that plaintiff's title be quieted.

An answer to the amended petition was filed consisting of various denials and admissions which took issue with the averments of the amended petition. It is admitted that the inception and foundation of defendant's ownership of the land in dispute was the mortgage and its foreclosure referred to in the amended petition. The assignment of the mortgage and debt to her, the foreclosure, sale, confirmation, and conveyance by the sheriff under the order of sale are alleged, and that therefore her title is complete. The reply is a general denial.

A trial was had to the court, which resulted in a finding and decree in favor of plaintiff, canceling defendant's deeds and record of the foreclosure, quieting plaintiff's title, and enjoining defendant from interfering with plaintiff's possession. Defendant appeals.

A number of objections are made to the procedure taken by defendant on this appeal, extending from the settlement of the bill of exceptions by the district judge to the final presentation of the case here, but as none of them were raised by motion or otherwise, and are suggested for the first time in the briefs, they will not be noticed, and, as nearly as this record will permit, the case will be disposed of on its merits.

The notes and mortgage upon which the foreclosure proceedings were had bear date of February 15, 1893, and by their terms matured on the 1st day of December, 1897, the interest, at the rate of 7 per cent., being payable semi-annually on the first days of June and December of each year. Default being made by the mortgagor in the payment of both interest and taxes, the defendant, assignee of the notes and mortgage, brought suit to foreclose the

mortgage, her petition and affidavit of the nonresidence of the defendants being filed March 21, 1901. The proceedings to obtain jurisdiction seem to have been regularly taken. A decree of foreclosure was entered ordering the land to be sold. The sheriff made the sale and submitted his report to the court, when the sale was confirmed and deed ordered. Objection is made to the order of confirmation on the ground that the sheriff did not give sufficient notice of the sale. With this question we have nothing to do in this collateral proceeding, as the order confirming the sale cured all defects and irregularities in the proceedings under the order of sale, if any existed. *Phillips v. Dawley*, 1 Neb. 320; *McKeighan v. Hopkins*, 14 Neb. 361; *Neligh v. Keene*, 16 Neb. 407; *O'Brien v. Gaslin*, 20 Neb. 347; *Wilcox v. Raben*, 24 Neb. 368; *Watson v. Tromble*, 33 Neb. 450; and many other cases which might be cited. We therefore treat the foreclosure proceedings as valid as against all parties to that action.

Plaintiff's alleged right is founded on a conveyance of the land in question to him from George Mead and Sarepta L. Mead, dated April 29, 1908, for the expressed consideration of one dollar and other valuable consideration. We are unable to find in the record any proof of what right or title the grantors ever had in the land, whether a title either legal or equitable, or a lien, by mortgage or otherwise. In the petition for the foreclosure of defendant's mortgage it was alleged that "the defendants, George Mead and Mrs. Mead, his wife, first name unknown, * * * have or claim to have some interest in, or claim upon, said mortgaged premises, but such interest or claim, if any they have, is junior and subject to the claim of plaintiff." In the affidavit of nonresidence the names of "George Mead, and Mrs. Mead, his wife, first name unknown," are referred to as defendants, and in the published notice they are notified in the same way. It is shown in the decree of foreclosure that the court found that due and legal notice of the filing and pendency of the

action had been given them, and upon "being three times solemnly called in open court," and still failing to answer, demur or otherwise plead, a default was entered against them, with the resulting decree of foreclosure. This, with the subsequent proceedings, presumptively extinguished the right of George Mead, whatever that right might have been. We do not find it necessary to decide as to what effect it had upon the rights of his wife. If we assume that it had none, and we further assume that George Mead, her husband, had the legal title to the land prior to the foreclosure, and his wife, as alleged in the amended petition, "owned and had in said real estate an inchoate dower right, as the wife of George Mead, owner of the title of record, and in fact," this would not confer on her, or any one to whom she might assign that inchoate right during the life of her husband, any title, and therefore neither she nor her assignee could maintain this action. However, the evidence leaves us in the dark as to what interest Mead ever had in the land. The confirmation of the sheriff's sale under the foreclosure was entered on the 4th day of October, 1901, and the sheriff's deed was made on the 24th of the same month and recorded the 4th of November of the same year. Since that time defendant has paid the taxes, and has, at times at least, exercised ownership over the land, being, as alleged in the original petition, in the possession of the property.

We have given this record as careful study and examination as we could, and are unable to find any equity in favor of plaintiff.

The decree of the district court is therefore reversed and the cause remanded to that court, with directions to vacate the decree in favor of plaintiff, and to enter a decree dismissing the action at his costs.

REVERSED.

LETTON, J., not sitting.

FRANK H. KAYLOR, APPELLANT, V. S. B. KELSEY ET AL., APPELLEES.

FILED MAY 13, 1912. No. 16,698.

1. **Mortgages: VOID FORECLOSURE: RIGHTS OF SUBSEQUENT GRANTEE.** One who takes possession of real estate under mesne conveyances from a purchaser at a void foreclosure sale of a valid mortgage is entitled to all of the rights of a mortgagee in possession.
2. ———: ———: **RIGHTS OF GRANTEE OF MORTGAGOR.** Where a valid mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor a person claiming under him will be permitted to assail the title acquired through the foreclosure proceeding without offering to pay the amount of the decree and interest. *Stull v. Masilonka*, 74 Neb. 309

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

Ralph D. Brown and *Glenn N. Venrick*, for appellant.

C. E. Eldred and *C. H. Boyle, contra.*

BARNES, J.

Action in ejectment to recover the possession of the south half of the south half of section 17, township 2, range 36 west of the sixth P. M., in Dundy county, Nebraska. The petition contained two counts. One for the possession of the premises, and the other for the rents and profits thereof from the year 1906 to the commencement of the action. The answer, in addition to a general denial, contained allegations sufficient to constitute the equitable defense available to a mortgagee in possession. The reply was a general denial. The cause was tried to the court without a jury. The trial resulted in a general finding and a judgment thereon for the defendant, and the plaintiff has appealed.

To secure a reversal plaintiff relies upon the single assignment that "the judgment is contrary to the evidence and the law applicable thereto."

It appears from the record that the plaintiff, then an unmarried man, was the owner of the land in question; that in the year 1888, for the consideration of $500, he executed a mortgage thereon, and immediately thereafter abandoned it; that since that time he has paid no taxes thereon; that he failed to pay either interest on the mortgage debt or the principal thereof, and on the 14th day of March, 1893, one Nancy E. Smith, as trustee, commenced an action in the district court for Dundy county to foreclose the mortgage; that service of summons was made by publication only; that the plaintiff herein, who was made a defendant in that action, then resided in Chase county, in this state; that he made no appearance, and such proceedings were had that a decree of foreclosure was entered therein, the property was thereafter sold under the decree to Nancy E. Smith, and upon confirmation of the sale a sheriff's deed was executed to her therefor. After receiving her sheriff's deed the purchaser paid the taxes from year to year, and finally leased the premises to one J. B. Stroup for the year beginning March 1, 1904, and ending March 1, 1905; that Stroup took possession of the premises under the written lease, fenced the same and occupied the land until his landlord sold and conveyed it by special warranty deed to one Lars Johnson; that Johnson, on the 26th day of September, 1905, sold and conveyed the same by deed of warranty to one Samuel Breeden, who took possession thereof, and on the 7th day of May, 1906, sold and conveyed the same by deed of warranty to the defendant S. B. Kelsey, who was in possession at the time this action was commenced.

The plaintiff testified that he had not sold or conveyed the land to any one; that after the foreclosure he supposed it was gone, and paid no attention to it until he was induced to bring this suit by one I. R. Darnell, who agreed to pay the costs, to hold the plaintiff harmless, and see that the suit did not cost him anything in consideration of receiving one-half of the results of the litigation.

It may be stated at the outset that the record suffi-

ciently shows that the decree of foreclosure was void for want of service, and therefore it will be assumed that the general finding for the defendant was founded upon the fact that he occupied the position of a mortgagee in possession, and plaintiff was not entitled to possession of the mortgaged premises until he had paid the mortgage debt. It is strenuously argued that the evidence shows that the purchaser at the foreclosure sale did not take immediate possession of the mortgaged premises, and does not show that she ever took possession thereof, and that a conveyance by a mortgagee, not in possession, does not operate as an assignment of the mortgage debt. It may be conceded that, if the defendant cannot successfully assert the rights of a mortgagee in possession, the judgment must be reversed. But to our minds the record contains sufficient evidence to support the finding that, at the time the purchaser at the void judicial sale conveyed the premises to her immediate grantee, she was in actual possession by and through her tenant, and her conveyance operated as an assignment of the mortgage debt. It follows that each subsequent conveyance of the premises, up to and including the deed to defendant Kelsey, under which he took possession of the premises, had that effect. *Currier v. Teske,* 82 Neb. 315. It being conceded that he was in possession when the action was commenced, he therefore occupied the position of a mortgagee in possession. The rule is well settled in this state that in such case the mortgagor will not be entitled to possession of the mortgaged premises until he has paid the amount of the void foreclosure decree with interest. In *Stull v. Masilonka,* 74 Neb. 309, it was said: "Where a valid real estate mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor a person claiming under him will be permitted to assail the title acquired through the foreclosure proceedings without offering to pay the amount of the decree and interest." The rule thus announced was followed and approved in *Currier v. Teske, supra.* In the case at bar it is not

claimed that the plaintiff ever offered to pay the amount of the void foreclosure decree with interest thereon, or the taxes paid by the defendant and his grantors.

It follows that the judgment of the district court was right, and it is therefore

AFFIRMED.

LEWIS H. SCHERZER, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED MAY 13, 1912. No. 17,070.

1. **Electricity:** STREET RAILWAYS: MAINTENANCE OF ELECTRIC WIRES: LIABILITY. The right to construct and maintain an overhead trolley wire carrying a deadly current of electricity across the tracks of a steam railroad imposes upon those having such privilege the duty of so managing affairs as not to injure persons lawfully operating the trains of the railroad company.

2. **Street Railways:** MAINTENANCE OF ELECTRIC WIRES: INJURY: PRESUMPTION OF NEGLIGENCE. An injury to an employee of the railroad company from contact with such an overhead trolley wire affords a presumption of negligence, and requires the party maintaining the structure to show that the dangerous condition of its wire was caused by some unforeseen act or agency beyond its control.

3. ———: ———: ACTION FOR NEGLIGENCE: DEFENSES. A release of the railroad company by the injured employee in consideration of the payment of wages and a small gratuity given the injured person, where no liability existed upon the part of the railroad company, is not a defense to an action against the party causing such injury.

4. **Instructions** examined and approved.

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

C. S. Allen, for appellant.

Greene & Greene, contra.

BARNES, J.

Action to recover damages for personal injuries sustained by the plaintiff by coming in contact with the overhead trolley wire of the defendant where its track crosses the line of the Chicago & Northwestern Railway Company on North Fourteenth street in the city of Lincoln. The cause was tried to a jury in the district court for Lancaster county, where the plaintiff had the verdict and judgment, and the defendant has appealed.

The appellant contends that the verdict is not sustained by the evidence. The abstracts disclose, without dispute, that in the spring of 1887 the Chicago & Northwestern Railway Company built its railroad across Fourteenth street in the city of Lincoln, and in the year 1891 the defendant constructed its street railway, consisting of tracks, poles and an overhead trolley wire upon and along North Fourteenth street, across the railroad tracks, for the purpose of transporting passengers to and from the Nebraska state fair; that for about a week before and after that event the defendant company uses its track on North Fourteenth street for that purpose, and that for the remainder of each year that part of its system is used very infrequently, if at all; that up to the 18th day of October, 1909, the defendant had maintained its overhead trolley wire where it crosses the railroad tracks at a sufficient height to enable the employees of the Northwestern company to safely operate its trains by riding, as it was necessary for them to do, upon the top of its largest freight cars; that on the day above mentioned, at about 7 o'clock in the evening, the plaintiff, while properly performing his duties as yardmaster of the Northwestern company, and while riding upon top of a box car in one of the company's trains of cars, was struck by the defendant's overhead trolley wire, which for some cause, not fully shown by the record, had sagged at the place of crossing sufficiently to allow it to strike the plaintiff in the face; that his face, mouth and tongue were cut and

bruised, some of his teeth were broken or destroyed; that he was badly burned by contact with defendant's live trolley wire, and thereby sustained severe injuries. It appears that it was dark at the time the accident occurred, and plaintiff could not see the condition of the trolley wire. It further appears that frequently for several years before that time, and once upon that day, plaintiff had passed under this wire, while riding upon one of the highest freight cars in use by the railroad company, without injury or danger, and therefore had the right to assume that the wire was still in its former position. There was some testimony introduced which tended to show that the next morning after the accident occurred the wire was sagged at that point, and hung from six inches to one foot below the place where it had theretofore been maintained. Plaintiff also testified that he noticed that the supporting poles looked old and weak.

Defendant argues, upon the foregoing facts, that plaintiff cannot invoke the rule *res ipsa loquitur,* or, in other words, that negligence on its part is not to be presumed. Section 1, ch. 26*a,* Comp. St. 1911, provides in part that all persons, associations, and corporations engaged in the generating and transmitting of electric current for sale in this state for power or other purposes are hereby granted the right of way for all necessary poles and wires along, within and across any of the public highways of this state. It further provides, among other things, that all such wires shall be placed at least 20 feet above all road crossings, and that all such poles and wires shall be so placed as not to interfere with the public use of any such highways; that such wires shall in no case be maintained at a less height than 27 feet above the top of the rails of any railroad tracks. It also provides that nothing contained in that section shall be construed to grant any rights within the corporate limits of any village or city of the first and second class or of the metropolitan class in this state. The record contains no ordinance or ordinances of the city of Lincoln relating to that subject.

Therefore, in the absence of direct statutory provisions, we are compelled to resort to the rule of the common law in such cases in order to determine this question.

In 1 Joyce, Electric Law (2d ed.) sec. 409, it is said: "The fact that a street railway is a proper street use will not entitle it to so construct its line across the tracks of a steam railroad as to substantially interfere with or obstruct the latter in the enjoyment of its rights." It was said by the court in a case in Connecticut that a steam railroad "holds its right of way charged with the performance of a public trust for its continuous use for public accommodation. * * * Its railroad is a great avenue of communication between one part of the state and another, and between this and other states. Any impediment to its safe and proper use is a matter of public concern, not to be measured by money, or dealt with on the footing of a claim for damages." *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 5 Am. Elec. Cas. 246. So, where it is proposed to construct an overhead trolley across the tracks of a steam railroad, the wires should be suspended at sufficient height to permit the free operation of the railroad. *Erslew v. New Orleans & N. E. R. Co.*, 49 La. Ann. 86, 21 So. 153.

Proper construction alone does not meet the full duties and obligations imposed upon the traction company in such case, but such duty extends to the proper maintenance thereof at all times. "Entirely apart from the fact that the wires may be charged with a dangerous current, the fact that such a structure is set up in a public street, even though duly authorized, involves the obligation to take care that it shall be constructed of good materials, in a substantial manner, so as to withstand all strains that may reasonably be anticipated, and that it shall be maintained in good repair." Keasbey, Electric Wires (2d ed.) sec. 233.

In *Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224, the court said: "The general rule is that the occurrence of the accident does not raise the presumption of negli-

gence, but where the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the defendant's negligence is a reasonable inference, a case is presented which calls for a defense." It has been held in other cases that from the happening of such accident, in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the defendant of showing ordinary care.

In the notes to *Western Union Telegraph Co. v. State,* 31 L. R. A. 572, 576 (82 Md. 293), it is stated: "The construction and maintenance of electric lines in the highways being a matter wholly under the control and care of the parties building them, and the maintenance being wholly under the care of the parties owning them, the court usually holds that the fact of an electric wire falling or sagging into the street in such a way as to obstruct travel, and cause injury, is *prima facie* evidence of negligence on the part of the company."

In 2 Joyce, Electric Law (2d ed.) sec. 608, it is said: "We have already stated in a prior part of this work that it is the duty of electrical companies, whose wires are suspended along or across the streets and highways, to string them in such a manner as not to interfere with or obstruct public travel. If a traveler who is free from contributory negligence is injured by contact with wires stretched along or across a public highway he may recover from the company maintaining such wires, for the injury."

It appears that the box car upon which the plaintiff was riding at the time he was struck by the defendant's trolley wire was approximately 13 feet and 6 inches high, that the plaintiff was 6 feet in height, and it would thus seem clear that defendant's wire by which he was struck and injured was only about 19 feet above the railroad track; therefore it may be reasonably inferred from the undisputed facts of this record that the height at which the defendant constructed and maintained its trolley wire was insufficient to enable the railroad company to operate

its trains with safety to its employees. We are therefore of opinion that the plaintiff made a case which called for explanation on the part of the defendant, and it was incumbent upon it to show that it had constructed and maintained its wires at a suitable and sufficient height, or that the accident was caused by the happening of some event beyond its control, and was not caused by its negligence. It follows that the defendant's contention upon this point should not be sustained.

Defendant further contends that the undisputed testimony shows that the plaintiff accepted the sum of $50 from the railroad company in satisfaction of the damages he had suffered by the accident upon which this suit is based, and that such payment and satisfaction operated to release the defendant from liability in this case. Upon this question the evidence discloses that the payment made to the plaintiff, for which the release in question was given, included his wages during the time he was unable to perform his labors as yardmaster, and the sum of $20 to enable him to have his teeth repaired, which it is claimed was given to him as a mere gratuity on the part of the railroad company. Plaintiff also testified that it was never his intention by the acceptance of this money to release his claim against the defendant. Appellant's argument proceeds on the theory that the railroad company was a joint tort-feasor with the defendant, and, if this were true, defendant's contention would be well founded. As we view the record, it contains nothing which shows or tends to show that the railroad company was guilty of any negligence which contributed to defendant's injury. It is suggested that it was the duty of the railroad company to have erected guards, or what may be called a whip-lash warning signal at a suitable distance from and on each side of the street-crossing in question, for the purpose of warning its employees to avoid being struck by defendant's trolley wire. It would seem that there is no merit in this suggestion, for it was the duty of the defendant to erect and maintain its wires in such a manner

as to in nowise interfere with the safe operation of the railroad company's trains at the point in question; and not only plaintiff but the railroad company as well had the right to presume that the defendant had suitably performed its duty in that behalf. We are therefore of opinion that the payment and release in question in no way inured to the benefit of the traction company.

Finally, it is contended that the court erred in giving paragraphs 7, 8 and 9 of its instructions to the jury. An examination of the instructions complained of satisfies us that they are in accord with the views heretofore expressed in this opinion, and afford no basis for a reversal of the judgment.

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

AFFIRMED.

EMMA HILL, APPELLEE, V. A. HOSPE COMPANY, APPELLANT.

FILED MAY 13, 1912. No. 17,076.

Appeal: AFFIRMANCE. Where a judgment of the district court responds to the issues raised by the pleadings, and appears to be just as between the parties, a court of review may disregard any error in the pleadings or proceedings which does not affect the substantial rights of the appellant.

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

R. H. Hagelin, for appellant.

George A. Adams, contra.

BARNES, J.

Action for damages alleged to have been sustained by plaintiff for a breach of contract for the sale or exchange

of pianos. The plaintiff was successful in justice court, and on appeal to the district court she had the verdict and a judgment for $150. To reverse that judgment the defendant has brought the case here by appeal.

By her petition the plaintiff alleged, in substance, that on or about the 5th day of June, 1908, she was the owner of a Brewster piano of the value of $250; that on or about that day the plaintiff purchased of and from the defendant a certain piano which was shown and exhibited to her, and for which she agreed to pay the sum of $475; that as part payment for said piano the defendant agreed to, and did, accept of her the Brewster piano; or, in other words, the plaintiff traded her piano to the defendant for a piano recommended to be a new, well-made, well-tuned, fully-equipped in every way, and a good-sounding first-class piano; that plaintiff turned over to the defendant her Brewster piano, and she gave her obligation to pay the balance at $8 a month to the defendant; that defendant showed the plaintiff a piano which they said was a new, well-built, well-tuned, and in every respect a perfect instrument, and guaranteed it to be first-class in quality, make and style; that defendant, instead of delivering to plaintiff a first-class and well-tuned, well-built, well-constructed, and first-class piano, delivered to her and placed in her home a comparatively worthless, old, patched-up, injured, damaged and worthless piano; that plaintiff relied upon the defendant's representations of the piano so traded for and purchased by her, and, relying upon said representations and guaranty, made said trade; that after plaintiff learned the character and condition of the piano she refused to make payments thereon, and ordered defendant to take back the same and furnish a piano in accordance with the contract; but the defendant wholly failed and refused so to do, and thereafter brought a replevin suit, and took from plaintiff the old, out-of-repair and out-of-date, and comparatively worthless piano, and defendant now has both of said pianos, all to plaintiff's damage in the sum of $200, for which she prayed judgment.

For answer to the petition the defendant alleged that on or about the 2d day of June, 1908, it sold and delivered to the plaintiff one Cable-Nelson piano at the agreed price of $375, and took as part payment therefor one old Brewster piano, and allowed the plaintiff, for the purpose of said sale, the sum of $200 therefor; that plaintiff and defendant, on that day, entered into a contract of conditional sale by which the plaintiff was to pay the balance of the purchase price at the rate of $8 a month; that the title to the Cable-Nelson piano was to remain in the defendant until the purchase price had been paid; that after entering into the contract of conditional sale the defendant discovered that one William Wiseman held a chattel mortgage on the Brewster piano for the sum of $50, and at plaintiff's request the defendant paid the said mortgage and secured a release thereof; that thereupon, on the 5th day of June, the plaintiff and the defendant entered into a new contract of conditional sale for said Cable-Nelson piano for the sum of $425, which included the purchase price for the Brewster piano and the $50 paid by the defendant to discharge the mortgage debt aforesaid; that the contract for the conditional sale provided that plaintiff was to pay the balance of the purchase price, including the $50 paid to discharge the mortgage lien, at the rate of $8 a month, and that the title to the said Cable-Nelson piano should remain in the defendant until the balance had been paid in full. It was further alleged that plaintiff failed and refused to make the payments, though frequently urged and requested so to do, and that on or about the 29th day of December, 1908, the defendant instituted a replevin suit in the justice court of Lancaster county, and on the 15th day of February, 1909, a judgment was duly rendered in favor of the defendant for the possession of the Cable-Nelson piano. Defendant therefore prayed that it go hence without day and recover its costs, and for a judgment against the plaintiff for $50, the sum paid to release the mortgage on the Brewster piano, with interest thereon at the rate of 7 per cent. per

annum, and for costs of suit. The reply was, in substance, a general denial. Upon the trial of the issues thus joined the plaintiff had judgment as above stated.

Appellant first contends that the court erred in receiving the testimony of one A. M. Bartram and one P. B. Eno, relating to the value of what is called the Cable-Nelson piano, and argues that the witnesses had not shown themselves competent to testify upon that subject. It would seem that this testimony was improperly received for two reasons: First, the value of the Cable-Nelson piano was not the matter at issue; second, it does not appear that the witnesses were qualified to testify as to the value of the piano. It seems clear, however, that this evidence did not prejudice the defendant, and for that reason its admission does not require a reversal of the judgment.

Defendant's second contention is that the court erred in refusing to strike out the answer to a question contained in the deposition of Beulah Hill, describing the condition of the Cable-Nelson piano. We think this testimony was both relevant and material, as tending to prove that the piano furnished plaintiff was not the one she examined at the defendant's place of business, and for which she had agreed to exchange her Brewster piano.

It is next contended that the court erred in refusing to strike the testimony of this witness relating to statements made by the party who called on the plaintiff to collect the instalments due upon her contract. It is argued that the testimony does not show that this person was an agent or employee of the defendant company. We think, on the whole, the evidence fairly tends to show that the person who sought to make the collections was the agent of and represented the defendant, and the motion to strike was properly overruled.

Error is assigned for refusing and giving certain instructions. We think there is no merit in this assignment. As we view the record, the instructions given in no way prejudiced the defendant's rights, and those refused would not have produced a different verdict.

Finally, it is contended that the verdict is not sustained by the evidence, and is contrary to law. An examination of the record satisfies us that, if the plaintiff and her witnesses were to be believed, she was entitled to recover; and, on the other hand, if the defendant's evidence is taken to be true, then the defendant should have had the verdict. It thus appears that the testimony was conflicting, and the verdict of the jury should not be set aside unless we can say it was clearly wrong.

It sufficently appears, however, that the judgment of the district court was neither unjust nor inequitable. Therefore, the case is one where we should apply the provisions of section 145 of the code, which reads as follows: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Applying this rule, the judgment of the district court will be affirmed, if the plaintiff within 40 days from this date files a remittitur in this court for the sum of $8.75, which represents the interest on the $50 paid by defendant to release the mortgage on the Brewster piano, which the jury failed to include in their verdict. But, upon her failure to file such remittitur, the judgment of the district court will be reversed; and, in case of an affirmance, each party will be required to pay his own costs in this court.

AFFIRMED.

ROY W. BURR, APPELLANT, V. ARTHUR G. FINCH ET AL., APPELLEES.

FILED MAY 13, 1912. No. 16,650.

1. Dower: NONRESIDENTS. Under the statutes of Nebraska the dower of a nonresident of the state is limited to lands of which her husband died seized.

2. **Process:** CONSTRUCTIVE SERVICE: PUBLICATION OF NOTICE. Notice to nonresidents, inserted in a weekly newspaper September 14, 21, 28, and October 6, 1899, was published "four consecutive weeks," within the meaning of section 79 of the code, providing that "the publication must be made four consecutive weeks in some newspaper."

3. **Evidence:** GENUINENESS OF SIGNATURE. In determining whether a notary's name was appended to a jurat with a rubber stamp, or written with pen and ink, the trial court, in a suit in equity, is not compelled to disregard the appearance of the name itself and accept as conclusive indefinite testimony that the name was printed with a rubber stamp.

4. **Taxation:** FORECLOSURE OF LIEN: JURISDICTION. In the district court, a county's foreclosure of a tax lien on land without an antecedent administrative sale is not, on account of that omission, void for want of jurisdiction.

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

Allen G. Fisher, William P. Rooney and *Andrew M. Morrissey,* for appellant.

Albert W. Crites, contra.

ROSE, J.

This is a suit to redeem a quarter-section of land in Sheridan county from a tax foreclosure sale and to quiet title in plaintiff. The patent to the land was issued by the United States to John Auchampaugh January 2, 1895. The patentee and his wife executed and delivered to G. N. Anderson a warranty deed dated October 5, 1898, and recorded December 10, 1900. From the latter grantee and his wife, plaintiff claims title by quitclaim deed dated March 1, 1909, and recorded June 2, 1909. In a suit instituted by Sheridan county September 9, 1899, against the patentee and his wife, who were nonresidents upon whom service was made by publication, the land, pursuant to a decree foreclosing the county's lien for unpaid taxes, was sold by the sheriff to H. C. Cutler Decem-

ber 26, 1899. The sheriff's sale was confirmed December 29, 1899, and a sheriff's deed to the purchaser was executed January 2, 1900, and recorded January 4, 1900. Cutler, after his purchase, improved the land to the extent of $1,100, deeded it to defendant Ervin Eddy by warranty deed dated July 16, 1908, and recorded August 4, 1908. For the consideration of $2,500 Eddy deeded the land to defendant Arthur G. Finch by warranty deed dated December 17, 1908, and recorded January 2, 1909, and took from the purchaser a mortgage for $1,500. Plaintiff claims title by mesne conveyances from the patentee, and defendants rely on mesne conveyances from the purchaser at the tax foreclosure sale. Under facts properly pleaded, the trial court denied relief to plaintiff, quieted in defendant Finch the title to the land, and confirmed the validity of the mortgage lien in favor of defendant Eddy. Plaintiff has appealed. Defendant Ervin Eddy died after the appeal was docketed in this court and the cause has been revived in the name of Helen Eddy as his successor in interest.

1. The first proposition argued, if correctly understood, is that the grantee of the patentee's wife has a right to redeem the land from the tax foreclosure because the sheriff's sale did not cut off the wife's inchoate right of dower. While the tax lien was being foreclosed the patentee and his wife were nonresidents, residing at Independence, Iowa. She is not entitled to redeem. Under the statutes of this state the dower of a nonresident is limited to lands of which her husband died seized. Comp. St. 1905, ch. 23, sec. 20; *Atkins v. Atkins,* 18 Neb. 474; *Miner v. Morgan,* 83 Neb. 400.

2. It is next asserted that the district court had no jurisdiction to foreclose the tax lien because the notice was not published four successive weeks as required by law. The statute provides: "The publication must be made four consecutive weeks in some newspaper printed in the county where the petition is filed." Code, sec. 79. The publisher's affidavit states that the notice was pub-

lished in a weekly newspaper "four consecutive weeks, the first insertion in the issue of September 14, 1899, and the last insertion in the issue of October 6, 1899." The argument of plaintiff is that the weekly publications commencing September 14, had they been consecutive, as required by statute, would have appeared as follows: Thursday, September 14; Thursday, September 21; Thursday, September 28; Thursday, October 5; whereas the affidavit shows that the last publication was made one day too late, namely, Friday, October 6. It is clear that there were four publications in a weekly newspaper and that the fifth and sixth days of October were days of the same week. In *Davis v. Huston,* 15 Neb. 28, it was held that the language of the code means that the notice must be "inserted in a weekly newspaper once in each week for four weeks successively, and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive insertion." In *Medland v. Linton,* 60 Neb. 249, it was held that the word "week," in its legal significance, "means a period of time commencing on Sunday morning and ending on Saturday night." According to these decisions the publication, in respect to the dates and the issues of the weekly newspaper, complied with the statute.

3. The jurisdiction of the court in the foreclosure suit is also collaterally attacked because, as plaintiff asserts, it is shown that the name of the notary before whom the proof of publication purports to have been made was appended to the jurat with a rubber stamp. The testimony supporting this assertion is not direct and positive. The original affidavit was submitted to the trial court. It is in the record, and in it the name of the notary looks very much like a signature written with pen and ink. Over plaintiff's objections the trial court in this case held the notary's signature to be genuine and that finding is here adopted as correct.

4. Plaintiff further contends that the foreclosure was void for want of an antecedent administrative sale. It

has often been held that "a county's foreclosure of a tax lien on land without an antecedent administrative sale is not, on account of that omission, void for want of jurisdiction." *Mathews v. Gillett,* 90 Neb. 763, and cases cited.

No error has been pointed out, and the judgment is

AFFIRMED.

CONSOLIDATED FUEL COMPANY, APPELLEE, V. WILLIAM R. BROOKS ET AL., APPELLANTS.

FILED MAY 13, 1912. No. 16,712.

Trade-Marks: INJUNCTION. A jobbing corporation which had established an extensive trade by purchasing a particular standard and preparation of coal from the South Canon Coal Company at Big Four, Colorado, where it is known as "Carbon Canon Coal," and by selling it to retailers by the trade-name of "Cristo Canon Coal," *held* entitled to an injunction to protect the use of that trade-name as against a former manager who engaged in the same business as a competitor and used "Cristo Canon" as a trade-mark for the same coal for the purpose of procuring trade which in the ordinary course of business would go to his former employer.

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

T. J. Doyle and *G. L. De Lacy,* for appellants.

C. E. Abbott and *Field, Ricketts & Ricketts, contra.*

ROSE, J.

Plaintiff and defendants are rival jobbers in coal, and both assert the exclusive right to use in the trade the name "Cristo Canon" to describe fuel mined by and purchased from the South Canon Coal Company at Big Four, Colo-

rado, where it is known as the "Carbon Canon Coal." From a decree perpetually enjoining defendants from using the name in controversy for the purpose stated, they have appealed to this court.

The following propositions of law and fact are urged on behalf of defendants to defeat the injunction: Defendants invented the name. They were the first to register with the secretary of state "Cristo Canon" as a trade-name for coal, and a similar registry by plaintiff was afterward rejected. By using that name they did not attempt to sell their own coal as that of plaintiff. They did not perpetrate a fraud on the public, because they sold by the same name the same grade and quality of coal from the same mine. Plaintiff did not own the mine, or any interest in it, or control the output. Any wholesaler could buy the coal identified by plaintiff as "Cristo Canon" at the same mine from the same mining company and sell it to the trade. The name is both generic and geographical, and therefore plaintiff could not acquire the exclusive right to use it as a trade-mark.

Conceding the correctness of the foregoing propositions urged by defendants, for the purposes of this case, but for no other, it does not necessarily follow that the injunction was erroneously granted. The questions are: As between the parties to the suit, is plaintiff entitled to the exclusive use of the name? Are defendants in using the name perpetrating on plaintiff a fraud which equity will stop? Plaintiff had a right to buy coal of a particular standard and preparation from the South Canon Coal Company at Big Four, Colorado, where the coal is known as the "Carbon Canon Coal," label it "Cristo Canon" and sell it to retailers under that name, provided that in doing so the name had never before been used for that purpose, that there was no objection on the part of the mining company, and that plaintiff did not deceive, mislead or injure retailers or the public or interfere with any right of a competitor. The record justifies a finding that plaintiff so adopted and used the name. If the name is generic, or

geographical, facts not established, the right to thus adopt and use it nevertheless existed, though it might not be protected for all purposes. *Lee v. Haley,* 5 Ch. App. (Eng.) *155; *McAndrew v. Bassett,* 4 De G. J. & S. (Eng. Ch.) *380; *Amoskeag Mfg. Co. v. Spear & Ripley,* 4 Sandf. (N. Y.) 599; *Newman v. Alvord,* 51 N. Y. 189. Other competitors of plaintiff purchased the same coal at the same mine and sold it by other names of their own selection. Plaintiff's use of the name "Cristo Canon" has only been questioned or disturbed by defendants. As against them, was the injunction properly granted? Plaintiff is a corporation. When defendant Brooks was its manager, it created a large demand for coal to which it had given, with his consent, the trade-name in controversy. As a result it transacted an extensive business as a jobber. It was the exclusive source of all coal on the market by the name of "Cristo Canon." Its customers were pleased with the fuel. They praised its preparation and quality. After the character of the coal, designated in the trade by that name, and plaintiff's reputation for fair dealing had been established, Brooks left its employ at Fremont, promptly registered in his own name "Cristo Canon" as a trade-mark for coal, organized the W. R. Brooks Coal Company (defendant), started in business at Lincoln as a competitive jobber in plaintiff's territory, advertised to sell "Cristo Canon Coal," sent solicitors among plaintiff's customers, and, for the purpose of promoting his own enterprise, made use of his knowledge of plaintiff's territory, of its customers, of its business, and of the fact that other dealers bought and sold the same coal under different names.

Following the doctrine of the English courts of chancery, Vice-Chancellor Van Fleet stated the requisites for acquiring title to a trade-mark as follows: "First, the person desiring to acquire title must adopt some mark not in use to distinguish goods, of the same class or kind, already on the market, belonging to another trader; second, he must apply his mark to some article of traffic;

and, third, he must put his article, marked with his mark, on the market." *Schneider v. Williams*, 44 N. J. Eq. 391.

With these requisites plaintiff complied. While it did not own the mine or control the output, it owned the coal offered to the trade by the name "Cristo Canon." Defendants understood and participated in the means through which plaintiff built up its trade in, and created the demand for, fuel thus designated. The manifest purpose of defendants in using the name "Cristo Canon" and in pursuing the methods already described was to divert to themselves the benefit of plaintiff's reputation for honesty and fair-dealing and to procure trade which in the ordinary and legitimate course of business would go to plaintiff as a proper reward of rectitude and enterprise. Their competition was unfair and their conduct was a fraud on plaintiff. The registration of the name with the secretary of state was part of the fraudulent purpose and is no protection to defendants. In discussing the use of the word "Anatolia" as a trade-name for licorice, Lord Chancellor Westbury said: "There is the deliberate imitation of a mark previously existing in the market. The thing is done in order that the rival article of the defendants' manufacture may be brought into the market in competition with that which is already there. There is nothing, in a word, which is necessary for the interposition of the court which is wanting on the present occasion. But, it is urged on behalf of the defendants, this word Anatolia is a general expression; is, in point of fact, the geographical designation of a whole tract of country wherein licorice root is largely grown, and is therefore a word common to all, and in it there can be no property. That argument is merely a repetition of the fallacy which I have frequently had occasion to expose. Property in the word for all purposes can not exist; but property in that word, as applied by way of stamp upon a particular vendible article, as a stick of licorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation whereby the stamp gets cur-

rency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public. Lastly, it is urged on behalf of the defendants, with respect to the costs of this suit, that they were unwilling to contest the right of the plaintiffs. When they imitated the mark they knew that there was that mark in use, and they intentionally imitated it. It is probable that at the time they were not aware that it was the mark of the plaintiffs. But if a man finds an article sent to him from the market bearing a particular stamp, and he intentionally appropriates that stamp, and thenceforth uses it for the purpose of designating his own article, laying aside the mark that he had previously used, and appropriating that which he ought to have inferred was the property of another, he must take the consequences." *McAndrew v. Bassett,* 4 De G. J. & S. (Eng. Ch.) *380. In *Perry v. Truefitt,* 6 Beav. (Eng.) 66, Lord Langdale observed: "I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark." This doctrine has been recognized in a former opinion of this court. *Chadron Opera House Co. v. Loomer,* 71 Neb. 785. On principle, plaintiff's right to the name is exclusive as against defendants. *Newman v. Alvord,* 51 N. Y. 189; *Amoskeag Mfg. Co. v. Spear & Ripley,* 4 Sandf. (N. Y.) 599; *Lee v. Haley,* 5 Ch. App. (Eng.) *155.

The judgment of the district court is therefore

AFFIRMED.

SEDGWICK, J., concurs in conclusion.

MILTON R. WESSELL ET AL., APPELLEES, V. MANDEVILLE HAVENS ET AL., APPELLANTS.

FILED MAY 13, 1912. No. 17,023.

1. **Contracts:** CONSTRUCTION: SALES: GOOD-WILL. In a duly-executed, formal, written contract containing the terms under which a stock of general merchandise is sold, a provision that the good-will of the seller's mercantile business is included in the sale does not imply an agreement that the seller shall not re-engage in such business.

2. **Evidence:** PAROL EVIDENCE: ADMISSIBILITY. Where the good-will of a mercantile business is included in a duly-executed, formal, written contract of sale, without any restriction on the right of the seller to re-engage in the same business, oral evidence that he agreed not to do so is inadmissible as varying the terms of the written instrument.

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

J. C. Cook, John C. Watson and *A. P. Moran,* for appellants.

Pitzer & Hayward, Edwin Zimmerer and *H. C. Maynard, contra.*

ROSE, J.

Plaintiffs bought a stock of general merchandise and the good-will of the owners in an established mercantile business. This is an action to recover damages from the sellers for subsequently engaging in the same business as competitors of the buyers in alleged violation of the contract of sale. From a judgment in favor of plaintiffs for $9,000, defendants have appealed.

Defendants owned and conducted a general store at Fremont. By written contract dated March 6, 1906, they agreed to sell their entire stock and the good-will of their business to plaintiffs. The agreement provided that an

invoice of the stock should be made by the parties as soon as possible; that the purchase price should be the amount of the invoice, after deducting 5 per cent. of the total; that plaintiffs should pay the consideration upon completion of the inventory; that for $150 a month for two years, with an option for two years more, defendants should lease to plaintiffs the rooms in which the mercantile business was being conducted; and that the good-will of the sellers should be included in the sale of the stock. After a satisfactory inventory had been made by both parties, plaintiffs paid the stipulated consideration and accepted from defendants a duly-executed, formal, written bill of sale, containing the following terms:

"Know all men by these presents: That I, M. Havens and Laura Havens, of the county of Dodge, state of Nebraska, of the first part, for and in consideration of the sum of $29,276.45, to me in hand paid by Wessel, Kohn & Co., of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, their executors, administrators, and assigns the entire stock of dry goods, millinery and ready-made goods and all articles of merchandise of whatsoever kind contained in my present place of business located on lots 3 and 4, block 143, in the city of Fremont. Goods sold are contained in the two-story and basement of said building, including all the store-fixtures of whatever kind. This to include also the good-will of the parties of the first part to go with the business belonging to me, and now in my possession, at the place last aforesaid."

The storerooms were leased according to contract. Plaintiffs took immediate possession of the leased premises and the purchased stock, and conducted a mercantile business at the same place until October, 1907, when they sold the remaining stock in bulk and retired. In the meantime defendant Mandeville Havens erected in the neighborhood of plaintiffs' store a new building, and defendant Laura L. Havens, his wife, opened therein, December 13,

1906, a suit store with an investment of $3,800. Both enterprises were carried on harmoniously without interruption until plaintiffs retired from the mercantile business in Fremont. During that time plaintiffs did not complain that defendants, by opening and conducting a suit house, had violated their agreement, nor did plaintiffs present or mention a claim for damages for breach of the contract of sale, and friendly relations existed between plaintiffs and defendants. After plaintiffs sold their stock they sent from Nebraska City to defendants at Fremont $150 to pay a month's rent for the storerooms which they had surrendered to their successors. Defendant Mandeville Havens went to Nebraska City, May 27, 1908, to make a further collection of rent, and was served with a summons in this case. Two days later a summons was served on his wife in Dodge county.

The original contract and the bill of sale are both pleaded in the petition. The agreements were executed. Under them defendants parted with their stock of merchandise and plaintiffs took possession of it. There was no dispute about the meaning of any term employed by the parties to express their agreements, or about any oral promise, until plaintiffs had resold all the property purchased. There is no allegation of fraud on the part of defendants in making the sale, or in formulating or executing the contracts. The contracts, though attached to the petition, do not contain a stipulation restricting defendants' right to re-engage in the mercantile business in Fremont while plaintiffs are engaged therein. Plaintiffs understood this, and pleaded: As a material consideration for the purchase and for the payment of the agreed price, defendants at the time orally promised and agreed not to engage in such business as competitors of plaintiffs, "which said promise and agreement all the parties to said transaction understood to be embraced in the sale of the good-will as embodied and set out in the said bill of sale." By plaintiffs' pleadings and the proofs adduced to support them, it is shown that the judgment

rests on the breach of an oral promise by defendants not to re-engage in the mercantile business, and on a parol understanding that such a promise was embraced in or implied from the following language of the bill of sale: "This to include also the good-will of the parties of the first part to go with the business." The evidence shows, without contradiction, that the sentence quoted was inserted by an attorney mutually selected by the parties after the discussion of a proposed stipulation binding defendants not to re-enter business as a competitor of plaintiffs, and after the sellers had refused to make such an agreement a part of the written instrument. The care and detail with which the contracts are drawn and the importance of a transaction requiring the payment of $29,000 and the transfer of a stock of goods valued at that sum evince an intention of the parties to leave no material matter to oral controversy. Plaintiffs themselves asserted no right resting in parol until after they had conducted the store a year and a half and had sold all the property purchased.

On a record presenting the situation outlined, two well-established rules of law defeat plaintiffs' case: (1) In a duly-executed, formal, written contract containing the terms under which a stock of general merchandise is sold, a provision that the good-will of the seller's mercantile business is included in the sale does not imply an agreement that the seller shall not re-engage in such business. (2) Where the good-will of a mercantile business is included in a duly-executed, formal, written contract of sale, without any restriction on the right of the seller to re-engage in the same business, oral evidence that he agreed not to do so is inadmissible as varying the terms of the written instrument. *Zanturjian v. Boornazian,* 25 R. I. 151, 55 Atl. 199; *Bassett v. Percival,* 5 Allen (Mass.) 345; *Costello v. Eddy,* 12 N. Y. Supp. 236; *Hoxie v. Chaney,* 143 Mass. 592; *Love v. Hamel,* 59 App. Div. (N. Y.) 360; *Cottrell v. Babcock Printing Press Mfg. Co.,* 54 Conn. 122. These principles apply to the present case, and they leave plaintiffs without any breach of con-

tract and without any competent evidence to justify a recovery.

The judgment is therefore reversed and the cause remanded to the district court, with directions to dismiss the action.

REVERSED.

LETTON, J., not sitting.

REESE, C. J., and HAMER, J., agree to the reversal, but not to the order requiring a dismissal of the case.

HENRY R. GERING, APPELLEE, V. JOHN M. LEYDA, APPELLANT.

FILED MAY 13, 1912. No. 16,693.

Malicious Prosecution: EVIDENCE. Evidence examined, and *held* insufficient to connect defendant with the criminal prosecution of plaintiff, set out in the petition.

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

J. E. Leyda, Byron Clark and *William A. Robertson,* for appellant.

Matthew Gering and *John C. Cowen, contra.*

FAWCETT, J.

Action in the district court for Cass county for malicious prosecution. Judgment for plaintiff for $1. Defendant appeals.

The complaint upon which plaintiff was prosecuted was filed in the county court of Cass county by the county attorney, and charged that defendant, being a druggist with permit from the city council of the city of Plattsmouth to sell liquors for medicinal, mechanical and chemical purposes only, did on July 5, 1908, unlawfully sell intoxica-

ting liquor, to wit, whisky, to one Samuel Beggs, "without first having obtained a license and given bond to the state of Nebraska, as required by law authorizing him, the said Henry R. Gering, to make such sale of intoxicating liquor, such sale not having been made for medicinal, mechanical or chemical purposes." Upon the hearing of that complaint, the defendant there (plaintiff here) was discharged and this action followed. The allegation against the defendant Leyda is that he maliciously and without probable cause procured the arrest and prosecution of plaintiff upon the complaint above set out.

One of the errors assigned by defendant, and the only one we deem it necessary to consider, is that the trial court erred in overruling his request for a peremptory instruction, and in submitting the case to the jury. The evidence of plaintiff himself is that one Beggs came to his store on Sunday, July 5, 1908. "He said he wanted some whisky. I said, 'We don't sell it on Sunday.' He said, 'I want it for medicine. I have got to have it. I am going to go into the country.' I asked him what his name was and where he lived, and he told me and that he was working out in the country. I says, 'Do you want it for medicine?' and he said, 'Yes, sir; I do.' I asked him how much he wanted, and put it up for him; took his money and delivered the goods to him, making the entry of the sale in the poison register." The poison register shows that the sale was 12 ounces.

The controlling question is: Did defendant Leyda procure the prosecution of plaintiff maliciously and without probable cause? The fact that a man is prosecuted on a criminal charge through promptings of malice on the part of the one instituting the prosecution is not sufficient ground upon which to base a suit for malicious prosecution, if there is probable cause for such prosecution. There must be both malice and want of probable cause before such an action will lie. In this case there is an entire absence of evidence to show that defendant made any false representations whatever to the county attorney, or did

anything improper in causing the filing of the complaint above set out. In fact, the county attorney himself testified that he never counseled with the defendant or asked his advice, nor did he know that he had with any one else. He says he met defendant on the street, and defendant said to him that he had heard that a man by the name of Beggs was getting liquor at plaintiff's store; that he told defendant that he knew about it and had the matter in hand. Without going into the evidence in detail, it is sufficient to say that it clearly establishes the fact that the complaint against plaintiff was filed by the county attorney entirely upon his own initiative and without procurement on the part of defendant. The petition of plaintiff and his testimony show that he sold a bottle of whisky to Beggs upon the mere statement of Beggs that he wanted it for medicine. The evidence also shows that Beggs did not purchase it for medicinal purposes. Admitting that he deceived plaintiff, that would not establish the fact that, upon receiving information of such sale, the county attorney acted without probable cause in filing the complaint and prosecuting plaintiff therefor. But, even so, viewed from any standpoint, the evidence in the record before us is entirely insufficient to connect defendant with the prosecution of plaintiff. We think the court erred in not directing the jury to find for defendant as requested. Plaintiff has evidently concluded that there is no substantial merit in his action, as his counsel have neither submitted a brief nor appeared to argue the case orally.

The judgment of the district court is therefore reversed and the cause remanded, with directions to dismiss the action at plaintiff's costs.

REVERSED.