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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1912—JANUARY TERM, 1913.

VOLUME XCII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART

DEPUTY REPORTER.

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By Harry C. Lindsay, Reporter of the Supreme Court,

For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

MANOAH B. REESE, CHIEF JUSTICE.
JOHN B. BARNES, ASSOCIATE JUSTICE.
CHARLES B. LETTON, ASSOCIATE JUSTICE.
WILLIAM B. ROSE, ASSOCIATE JUSTICE.
JACOB FAWCETT, ASSOCIATE JUSTICE.
SAMUEL H. SEDGWICK, ASSOCIATE JUSTICE.
FRANCIS G. HAMER, ASSOCIATE JUSTICE.

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FRANK E. EDGERTON.....Assistant Attorney General
HARRY C. LINDSAY.....Reporter and Clerk
HENRY P. STODDART.....Deputy Reporter
VICTOR SEYMOUR.....Deputy Clerk

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME.

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.
		P. James Cosgrave...	Lincoln.
		Willard E. Stewart...	Lincoln.
Fourth	Burt, Douglas and Washington.	George A. Day.....	Omaha.
		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. Dickson.....	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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In Memoriam.

ELISHA C. CALKINS.

At the session of the supreme court of the state of Nebraska, October 23, 1912, there being present Honorable MANOAH B. REESE, Chief Justice, Honorable JOHN B. BARNES, Honorable CHARLES B. LETTON, Honorable WILLIAM B. ROSE, Honorable JACOB FAWCETT, Honorable SAMUEL H. SEDGWICK, and Honorable FRANCIS G. HAMER, Associate Justices, the following proceedings were had:

MAY IT PLEASE THE COURT:

The committee appointed by your Honors to prepare and report a memorial and resolutions concerning the recent death of the Honorable ELISHA C. CALKINS, respectfully submit the following:

On the eighth day of July, 1912, the Supreme Ruler, in His wisdom, removed from earthly scenes ELISHA C. CALKINS, a veteran of the Civil war, an honored member of this bar, and formerly a Supreme Court Commissioner.

Judge CALKINS was an accomplished scholar, a learned jurist, and beyond all a man of absolute integrity. The opinions written by Judge CALKINS, while an assistant of this court, are convincing evidence of his great learning, searching analysis, and masterful composition.

Judge CALKINS attained his high estate unaided by inherited wealth, or kindly circumstances, and after he had served his country one year as a soldier in the ranks. During all the years of his laborious advance his character remained unsullied.

Although not an office seeker, Judge CALKINS responded to the civic call to duty, as in early manhood he answered his country's call to arms, and, in the many places of trust and honor he was called upon to fill, more than fulfilled his most sanguine friends' just expectations: Therefore,

Be it Resolved, That the members of this court, in common with the people, and the bar of this state, deeply regret the death of the Hon-

orable ELISHA C. CALKINS; that we will ever hold in reverential remembrance his wonderful attainments, his magnificent character and his patriotic record;

Be it Resolved, That he honored the state of his adoption, and the bar of which he was a most distinguished member; that he leaves to his family a priceless heritage, and that his career will be an inspiration for years to come;

Resolved, That these resolutions be spread upon the records of this court, and that a copy be sent to the family of the deceased.

WARREN PRATT.
NORRIS BROWN.
FRANK M. HALL.
JESSE L. ROOT.
THOMAS F. HAMER.

BY THE COURT:

It is ordered that the resolutions adopted by the committee be spread upon the records of this court, and that they be published in the next volume of the reports.

M. B. REESE,
Chief Justice.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1912.

AMERICAN SURETY COMPANY, APPELLANT, V. DUNCAN M. VINSONHALER, APPELLEE.

FILED SEPTEMBER 28, 1912. No. 16,771.

1. **Principal and Surety:** ACTION AGAINST PRINCIPAL: PETITION: SUFFICIENCY. The defendant held the office of county judge for three successive terms; the plaintiff was surety on his official bonds. The agreement between them was that the defendant should indemnify the county and save it harmless from all claims, etc., arising out of the suretyship, and should place the surety in funds to meet any claim, etc., "before it shall be required to pay the same." The defendant, as principal, and the plaintiff, as surety, were sued by the county for the alleged unlawful detention of fees by the defendant; it was found that the county had no cause of action and the suit was dismissed. Afterwards the plaintiff began this action to recover from defendant expenses incurred by plaintiff for attorney's fees and other expenses in defending the original suit. It appeared from the petition that the defendant herein employed counsel and defended the original suit, and it was not alleged that this defendant had failed to indemnify the plaintiff, and place the plaintiff in funds to meet all claims arising out of the suretyship as agreed, or that there was any real or apparent necessity of incurring the expenses sued for, or that the surety had any reason to, or did, consider that such expenses were necessary for its protection. *Held*, That the petition failed to state a cause of action, and that a general demurrer thereto was rightly sustained.

2. ———: LIABILITY OF PRINCIPAL. Also, *held*, that the surety under the alleged contract was entitled to be protected against all necessary expenses incurred in defending itself against liability on these bonds, and should be allowed to exercise a reasonable discretion as to necessary measures of defense.

3. ———: ———. Also, that when the petition itself indicates that the expenses sued for were unnecessary, and no circumstances are alleged showing any necessity therefor, or that the surety had any reason to, or did, regard such expenses necessary, there can be no recovery.

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

Montgomery & Hall, for appellant.

Gurley & Woodrough, contra.

SEDGWICK, J.

This defendant was county judge of Douglas county for three several terms, and the plaintiff was surety upon his official bond for each of the terms. After the end of the third term the county began an action against the defendant and against this plaintiff as his surety, upon the three official bonds, to recover several thousand dollars for fees of the office which it was claimed had been received by the defendant and not accounted for. It was finally determined in that action that the defendant was not liable to the county, and the action was dismissed; and the plaintiff brought this action to recover its attorney's fees and other expenses incurred in the former action. A general demurrer to the amended petition was sustained and the action dismissed, and the plaintiff has appealed.

The amended petition, after alleging the above facts and the usual formal matters, alleged that the defendant made application to the plaintiff in writing, requesting the plaintiff to become surety upon his official bonds in the sum of $50,000, and, as a part of his said application, agreed in writing with the plaintiff as follows: "That I will, at all times, indemnify and save the surety harmless from and against every claim, demand, liability, cost, charge, expense, suit, order, judgment and adjudication whatsoever, and will place the surety in funds to meet every claim, demand, liability, cost, charge, expense, suit.

order, judgment or adjudication against it by reason of such suretyship and before it shall be required to pay the same."

The bonds executed by the plaintiff are alleged in the petition to have contained the following: "Now the condition of the above obligation is such, that if the above bounden Duncan M. Vinsonhaler shall faithfully and impartially perform and discharge the duties of said office according to law and shall promptly account for and pay over all money, papers, or other property that may come into his hands in virtue of his said office, to his successor in office, or to the person or party entitled thereto, then this obligation to be void, otherwise to be and remain in full force and virtue."

The several applications do not appear to have been worded precisely the same, and it is alleged that the third application contained the following agreement on the part of this defendant: "And I do further hereby bind myself, my heirs, executors and administrators, to save the said surety company harmless, and on demand to pay it any and all claims, demands, loss and damages of every nature and kind and on demand to pay it all legal and other costs, counsel fees, and expenses directly or indirectly which said surety company shall at any time sustain by reason or in consequence of such suretyship, and any and all renewals, extensions and continuations thereof, whether before or after legal proceedings by or against said surety company, and without notice thereof to me."

It is alleged that the action begun by the county was jointly against the principal and surety, and that after the principal had answered the surety answered separately, and "employed attorneys to represent, look after and so act as might be deemed necessary to protect the the interests of this plaintiff as defendant in said action." It appears from the petition that this defendant also answered and defended the original action. There is no allegation in the petition that the defendant failed or neglected to indemnify the surety and protect it against

the claim of the county, or to "place the surety in funds to meet every claim or demand" that might be made against it by reason of its suretyship, or that the defendant in any other way failed to perform his agreement with this plaintiff, or that the defendant failed in any respect to properly and fully defend the original action against him and the surety.

The plaintiff insists that by the terms of the contract between the parties it was left to the discretion of the surety to employ attorneys if it saw fit to do so, and that unless the defendant showed that the plaintiff acted in bad faith, so that its action would amount to a fraud upon the defendant, the fees so paid to attorneys constitute a proper charge against the defendant. To support its position the plaintiff relies upon the decision of the supreme court of Iowa in *United States Fidelity & Guaranty Co. v. Hittle*, 121 Ia. 352. Without determining whether we would be willing to follow that court to the full extent of its opinion in that case, we are satisfied that the language there used should not be applied in a case of this kind. In that case, it does not appear that the principal upon the bond agreed to place funds in the hands of the surety sufficient to protect it against any claim or demand, and we cannot believe that that court would hold that in such case, if the defendant complied with that agreement, and while there were funds in the hands of the surety, furnishing protection against the claim that was being urged against the principal, and while the principal was properly and sufficiently defending the action, the surety could, without the knowledge or consent of the principal, incur additional and apparently unnecessary expense, and recover the same from the principal. The case at bar is more clearly analogous to *American Surety Co. v. Lehr*, 93 S. W. (Tex. Civ. App.) 681. In that case, the agreement between the principal and the surety also contained the agreement on the part of the principal to place the surety in funds to meet every claim and demand, and the opinion in the case shows that this was done by the prin-

cipal. Their contract also provided that in case the principal requested the surety to defend the action he would defray any cost, charges and expenses which it might incur in so doing. While the surety held these funds for indemnity, and, without any request to do so from the principal, it employed counsel to defend the action brought against the principal and surety upon the bond. That court held that under these circumstances the surety, which was fully indemnified by the deposit of collaterals, could not defend the action at the expense of the principal without the principal's request so to do. In the case at bar, we have very much the same conditions. The petition shows that the agreement was that the principal should furnish funds to the surety sufficient to indemnify it against any claim, and, in the absence of any allegation that he failed to do so, or failed to properly defend the suit, it must be considered, as against the pleader, that the principal had complied with all of his agreements in that regard. If the surety was fully protected by the prinicpal against any possible judgment that might be obtained by the county in its action, and the principal had employed attorneys who were fully and properly defending the action, further expense on the part of the surety must have been unnecessary and wanton. No doubt under this contract the surety ought to be protected against all necessary expenses incurred in defending itself against liability on these bonds, and should be allowed to exercise a reasonable discretion as to necessary measures of defense, but the allegations of this petition indicate that the expenses sued for were unnecessary, and there is no allegation of circumstances showing any necessity for such expense, or even that the surety regarded such expense necessary. In these respects the petition failed to state a cause of action and the demurrer was properly sustained.

The judgment of the district court is therefore

AFFIRMED.

JOHN GASTER ET AL., APPELLEES, V. ESTATE OF FREDERICK GASTER, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 17,057.

1. **Statutes:** INHERITANCE LAW: CONSTITUTIONALITY. Chapter 49, laws 1907, does not violate the provision 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."
2. **Wills:** RIGHTS OF SURVIVING SPOUSE. A husband cannot lawfully devise his real estate or lawfully dispose of his personal property by will so as to deprive his wife of all interest therein given by the said act.
3. ———: ———. If a married man by his will disposes of all his property, real and personal, to others, and gives nothing to his wife, she will be entitled to take the distributive share given her by the statute as though he had died intestate.

OPINION on motion for rehearing of case reported in 90 Neb. 529. *Rehearing denied.*

SEDGWICK, J.

The first opinion in this case, 90 Neb. 529, considered principally the alleged antenuptial agreement. The right of election under section 7 of the statute, commonly known as "King's Inheritance Act" (laws 1907, ch. 49), was also discussed. In that discussion the constitutionality of the act was assumed, and it was also assumed that under that act the widow inherited one-fourth of the property of the decedent, although he left a will disposing of all of his property and making no provision for her. The question as to the constitutionality and proper construction of the act was necessarily involved in the case. Upon the motion for rehearing the importance of this question was pointed out, and the motion was set down for argument and further consideration. In considering the difficult and somewhat complicated question so presented, we have had the assistance, not only of the able counsel employed in the case, but also several other eminent attorneys who have

appeared as friends of the court. The act is entitled: "An act to provide for succession to the estates of decedents and to repeal sections 4901, 4902, 4903, 4904, 4905, 4906, 4907, 4908, 4909, 4910, 4911, 4912, 4913, 4914, 4915, 4916, 4917, 4918, 4919, 4920, 4921, 4922, 4923, 4924, 4925, 4926, 4927, 4928, 4929, and 4930, and, also, sections 4940 and 5041 of Cobbey's Annotated Statutes of Nebraska of 1903 (C. S. ch. 23, secs. 1-30 inc., 40, 176)." Sections 4901 to 4928, inclusive, gave the widow dower in the lands of her deceased husband and were the general provisions of our statute relating thereto. Section 4929 provided for the descent of estates of married women. Section 4930 provided for the descent of real estate when not lawfully devised. Section 4940 provided that nothing in the chapter should affect curtesy or dower or any limitation of any estate by deed or will. Section 5041 provided for the descent of personal property not disposed of by will. Apparently the legislature attempted to give the wife a share in the estate of her deceased husband in lieu of dower. The statute is said to be unconstitutional because it legislates upon more than one distinct subject, and because the subject or subjects of legislation are not clearly expressed in its title, and so violates section 11, art. III of the constitution.

The act is very vigorously assailed upon general principles. It is said that, whereas the tendency of legislation in this state has continually been to enlarge the rights of married women, and it is to be presumed that the legislature attempted to do so in this act, still the effect of it is to rob them of valuable rights that they already enjoyed, and to give them nothing substantial in lieu thereof. Section 1 of the act, which attempts to give the wife a share in the real estate of her deceased husband, describes it as real estate "which has not been lawfully devised;" and section 3 of the act, which relates to personal property, gives her a share in personal property "not lawfully disposed of by his last will." And so, if this language is literally construed, the husband may dispose of all his property, real

and personal, except the homestead, without the consent or even the knowledge of his wife. By the terms of the act, whatever interest in the real estate of her husband the wife takes is subject to his debts, and, dower being abolished, the wife may thus be deprived of all interest in his real estate, except her homestead right. It is also said that section 7 of the act gives the wife a right of election when her husband has provided for her in his will; but when he has devised his property to others she has no election, but is deprived of all interests therein; she is left no election to take her dower free from the claims of creditors in lieu of her rights under this statute, and so what the creditors leave, if anything, her husband may deprive her of by his will.

The objections to the constitutionality of the act are quite serious. It is said that the word "succession" in the title, "An Act to provide for succession to the estates of decedents," has a well-defined and technical meaning; that it denotes the "coming in of another to take the property of one who dies without disposing of it by will." This seems to be its meaning in the civil law and in those jurisdictions which have adopted that procedure. The term is expressly so defined in the statutes of some of the states. *Estate of Headen*, 52 Cal. 294. It has not been so defined in this state, and neither by statute nor judicial construction has it received any technical meaning. In Webster's New International Dictionary we find the following definition: "The change in legal relations by which one person (called the *successor*) comes into the enjoyment of, or becomes responsible for, one or more of the rights or liabilities of another person (called the *predecessor*), * * * when it is to a right to be enjoyed, as property, it is called active." We think that the title to this act might suggest to the legislators and others interested a subject of legislation as broad as that indicated by this definition, particularly when as a part of this title specific sections of the statute are named relating to the subjects legislated upon. The title specifies various sections of the statute

relating to dower, with the statement that they are to be repealed by the act, which is accordingly done, and so, also, the section which provides for the descent of the estates of married women together with the sections which provide for the descent of property both real and personal. Prior to the enactment of this statute, section 4940 provided that nothing in the decedent law should affect estates by curtesy or dower, and this section is also named in the title of the act. We think therefore that by this title the attention of the legislators and others interested must have been called to the purpose and scope of this legislation.

We do not feel justified in holding the act unconstitutional as legislating upon more than one distinct subject. Its subject of legislation is the passing of property from the dead to the living, and would include either the title to property or the possession, or both. The act purports to be complete in itself. Having this broad general title, it may incidentally affect some matters that might be connected with other legislation and not for that reason be invalid. The general statute upon the subject of wills provides: "Every person of full age and sound mind, being seized in his own right of any lands, or any right thereto, or entitled to any interest therein descendable to his heirs, may devise and dispose of the same by his last will and testament, in writing." Comp. St. 1911, ch. 23, sec. 123. By the statute on the subject of dower, as it existed before the enactment of the law in question, the husband's right to devise his real estate was limited, and by the homestead act the widow could not be deprived of her right of homestead by will. Neither the dower nor the homestead statute referred to the statute of wills, and yet their validity was never questioned for that reason.

The first, and perhaps one of the most prominent, difficulties in the construction of this act is that, in defining the rights of the husband or wife in the property of the deceased spouse, the statute contains the expression, "not lawfully devised," in the case of real estate, and "not law-

fully disposed of by will," in the case of personal property. Section 7 of the act undertakes to give the widow the right of election, but gives her such right only in case provision is made for her in the will; so that, if these provisions are taken literally, she has the right of election if she is remembered in the will; but, if nothing is given her in the will, she has no right of election nor any other right in the property of the husband other than the homestead.

The duty devolved upon this court to construe and enforce the limitations which the constitution has placed upon the several departments of the state government is a very important and delicate duty. All presumptions are in favor of the validity of acts of the legislature. The construction which that branch of the government placed upon the constitutional limitations of its own powers must be considered, and no act of the legislature will be held to violate the constitution unless such conclusion is unavoidable. The presumption that the legislature intended to regard constitutional limitations is so strong as to control the meaning of the language used in all doubtful cases. Every act will be so construed, if reasonably possible, as to harmonize it with the fundamental law. No duty of this court is more manifest and exacting than the duty to avoid trespassing upon the province of the legislature. The tendency of the courts in recent years has steadily been towards a more liberal construction of legislative enactments in this regard. It is not for this court to determine the legislative policy, nor to criticize that policy when adopted by the lawmakers. If apparently matters have been omitted in legislation which would have been supplied if brought to the attention of the lawmakers, it is not within the province of the court to supply such omissions. Hasty and ill-considered legislation can be revised only by the legislature itself. The difficulties presented in this legislation may suggest remedies which the contemplated revision of the statutes will supply.

In this case the deceased devised all of his property, but

made no provision for his widow: She insists that she ought to share in the property as though there were no will. The statute says that, when the real estate is not lawfully devised, she may do so. We are asked to hold that the property was lawfully devised, and that therefore the provision of the statute giving her a distributive share in the property has no application. Did the legislature intend such a result? Under the former statute she had her well-defined right of dower that neither the other heirs, nor the creditors of her husband, nor the will of the husband himself, could take from her. By the divorce law (Comp. St. 1905, ch. 25, sec. 23), also, the right of dower was secured to her if she obtained a divorce for certain causes. This section was amended in a special act of the same legislature. Laws 1907, ch. 50. The amended section leaves it to the discretion of the court to award to the innocent party a share or interest in the real estate of the guilty party. It would seem that if it was intended to subject her right to a distributive share of the property, which this new statute gives her, to the claims of the creditors, and to the will of her husband, the right of dower would have been preserved so that she might elect that right in case it was more valuable to her than such precarious provisions as this statute makes for her. Section 7 of the act gives her the right to elect between the provision made for her by the statute itself and the provision of the will. Did the legislature intend that when she was provided for in the will she might enjoy this right of election, but if she was given nothing in the will she should have no right at all? Language of a statute, not used in a technical sense, will be given its ordinary meaning, and every word used will be given its proper force and effect, if possible; but words that are inconsistent with the statute as a whole, so that their literal sense could not possibly have been intended by the legislature, will be disregarded or so construed, if possible, as to give effect to the will of the lawmakers. We find but one way to reconcile these provisions of the statute and sustain them.

If the property which by this statute is given to the surviving spouse cannot be lawfully devised to others, the principal difficulty in construing the statute disappears. A statute of Wisconsin presented a similar difficulty. It implied the ability of the husband to lawfully devise the homestead. If not lawfully devised the homestead went to the widow. And this statute, like section 7 of our act, gave her the right of election if provision was made for her in the will. Referring to this apparent anomaly in the law, the supreme court of that state said: "What would be her rights in that regard where no provision is made for her in such will, may be difficult to tell. Whether, in such case, further legislation is necessary in order to properly protect the wife and widow is a matter addressed to the wisdom of another department of the state government." *Albright v. Albright,* 70 Wis. 528. In a later case that court said: "In *Albright v. Albright,* 70 Wis. 528, attention was called to the difficulty felt to exist, and, as it is not necessary now to decide the question, we mention it again, so that the legislature in its wisdom may settle the uncertainty in accordance with the wise and liberal policy of our laws in favor of the wife." *Church v. McLaren,* 85 Wis. 122. The Wisconsin court did not find it necessary to determine the proper meaning of the statute in either of these cases.

The supreme court of Ohio appears to have definitely construed a similar statute. Their statute provides that, if the husband dies "intestate" and leaves children, the widow shall be entitled to a specified share of the personal property. In *Doyle v. Doyle,* 50 Ohio St. 330, the husband died leaving a will whereby he disposed of all of his property to his children and others, "making no provision whatever for his wife," thus presenting the same question we have here. The supreme court of that state held that the wife was entitled to her distributive share of the estate. That court stated the question as we now have it before us, in these words: "Noting the fact that section 4176, giving her this portion of her husband's estate, is limited

to where he dies 'intestate' leaving children, and that sections 5963 and 5964 of the chapter relating to wills apply in terms only to where provision is made for her in the will of her deceased husband, they claim, that as he did not die 'intestate' and made no provision for her in his will, she is within the provisions of neither of these sections, and is, therefore, entitled to no part of his personalty subject to distribution, since, in the exercise of the power given him by statute to make a will, he has bequeathed it all to his children." The court then said: "We do not accept this construction. A careful consideration of the language of these sections shows, as we think, a clear recognition of the right of a widow to a portion of the personalty of her deceased husband, on distribution, that is beyond his power to affect by any will he may make, unless she assent to it. And this is in accordance, not only with the general understanding on the subject, but, also, with the liberal policy that has always prevailed in our law toward the widow. * * * Where he makes a will containing a provision for his wife, she is not compelled to accept the provision so made, but may renounce it and take under the provisions of section 4176, as if her husband had died intestate. But where provision is made for her in the will of her deceased husband, the statute requires that she shall be cited by the probate court to *elect*. * * * Why cite her to make an election, if she has not a right at law which she may retain if she chooses? No election can be made by any one between something and nothing. There is no alternative. The term necessarily connotes at least two things between which a choice can be made." The circuit court afterwards followed this construction of the statute and stated the law to be: "When the wife dies leaving a will in which no provision is made for her surviving husband, her estate will be treated (as) to him as if she had died intestate within the meaning of secs. 4176 and 5963, Rev. St." *Coon v. De Moore*, 25 Ohio C. C. Rep. 776. See, also, *Cummings' Ex'r v. Daniel*, 9 Dana (Ky.) *361.

No other view as to the legislative intention can be reconciled with the act as a whole and the general purpose and policy of its provisions. Section 5 of the act is as follows: "The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage, may be barred by a conveyance executed by such husband and wife while residents of this state, and, if either such husband or wife be not a resident of this state, by a deed of conveyance executed either by both of said parties or by the one seized at the time of such conveyance; and such right to inherit may also be barred by the sale of such real estate under execution or other judicial sale, during the lifetime of the owner of the title." It is wholly inconsistent with the idea that the right can be defeated by will. It recites the right of a married man or woman in the property of his or her spouse, provides in express terms how that right may be barred, and excludes the power to bar that right by will. If the husband in his will makes such provision for the wife as she will prefer to the property rights that the law gives her, she may elect to take by the will, but, if he fails to do so, she may insist upon her rights under the statute.

The motion for rehearing is

OVERRULED.

FRED F. KANERT V. STATE OF NEBRASKA.

FILED SEPTEMBER 28, 1912. No. 17,453.

1. **Rape:** EVIDENCE. A conviction for rape cannot be sustained upon the uncorroborated testimony of the complainant.

2. ———: CORROBORATIVE EVIDENCE. The testimony of the complainant as to the commission of the crime by the defendant may be corroborated by evidence of facts and circumstances showing a disposition on his part to commit the crime and an opportunity to do so.

3. ———: WEIGHT OF EVIDENCE: QUESTION FOR JURY. If the crime

itself is established beyond question, and there are inconsistencies in the evidence of the defendant, as to material matters, from which it may reasonably be inferred that the testimony of the complaining witness implicating the defendant is substantially correct, it presents a case for the jury, under suitable instructions.

4. ———: INSTRUCTIONS: CORROBORATIVE EVIDENCE. It is the testimony of the prosecuting witness as to the guilt of the defendant that must be corroborated. When there is evidence tending to prove several distinct crimes, and the prosecution has elected upon which to proceed, a request to instruct the jury that defendant must be acquitted, "unless you find from the evidence, beyond a reasonable doubt, that the defendant committed the act so elected, and as to this act you cannot find the defendant guilty on the evidence of Mary Waddick alone, as to the act she must be corroborated by testimony other than her own," was properly refused, for, although this language might be considered a correct technical statement, still, in the connection asked, the language might probably be misleading to the jury.

5. **Criminal Law**: INSTRUCTIONS: DISTINCT CRIMES: ELECTION. When upon the trial there is evidence tending to prove several distinct crimes, and the prosecution has been required to elect upon which it will proceed, the court should so instruct the jury in the submission of the case. It is erroneous under such circumstances to instruct the jury: "You are instructed that if you should find from the evidence, beyond a reasonable doubt, that an act of sexual intercourse did take place between the defendant and said Mary Waddick, and that at the time of said intercourse the said Mary Waddick was under the age of 15 years, then you should find the defendant guilty as charged in the indictment."

6. **Rape**: WITNESSES: EVIDENCE: ADMISSIBILITY. In a prosecution for rape of a female child under 15 years of age, it is not a defense that others have also abused the child in the same manner; but when the fact that the prosecuting witness has given birth to a child is relied upon by the state as evidence, and in her testimony she has denied having had intercourse with any one other than the defendant, she may properly be cross-examined as to circumstances tending to show that another than the defendant is the father of her child.

7. **Criminal Law**: TRIAL: IMPROPER ARGUMENT. Arguments and insinuations to the jury, not based upon competent evidence, are improper, and, although not so wilful and prejudicial as to require a reversal of the judgment, are indicated in the opinion to be avoided at a future trial.

8. **Rape:** SENTENCE. The crime of rape upon a child under the age of consent is a serious one, and we cannot say that, if the defendant is guilty as charged, a sentence of seven years' imprisonment in the penitentiary is beyond the reasonable discretion of the trial court.

ERROR to the district court for Hall county: JAMES N. PAUL, JUDGE. *Reversed.*

Harrison & Prince, for plaintiff in error.

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

SEDGWICK, J.

The defendant, who is plaintiff in error here, was convicted in the district court for Hall county of the crime of statutory rape upon one Mary Waddick, then under 15 years of age. He alleges that the complaining witness is wholly uncorroborated; that the evidence is entirely insufficient to support the conviction; that by various erroneous rulings of the trial court he was prevented from having a fair trial; and that the prosecuting attorney was guilty of misconduct which tended to prejudice the jury against him. When the first complaint was filed against the defendant, it was charged that the crime was committed on the first day of May, 1911. In a second complaint it was alleged that it was committed on the first day of April, and in the indictment afterwards found by the grand jury it was charged that the crime was committed on the first day of May. This indictment was returned on the 15th day of November, 1911. The complaining witness gave birth to a fully developed child on the 24th day of November, 1911. The complaining witness testified that she went into defendant's store in the evening and asked to see a pair of roller skates; that the defendant, who was alone in the store at the time, showed her a pair of skates, and told her that the price was $3.50; that she told him she couldn't buy them for she hadn't the money,

and that he then offered to give her the skates if she would sometimes run errands and otherwise accommodate him. She knew what he meant and at first refused, but afterwards consented. Thereupon the crime was committed in the back room of the defendant's store while she was sitting on the back part of an automobile. It was repeated in about a week later. She was a witness in the preliminary examination before the justice of the peace, and testified that this crime was first committed in the latter part of March and while she was sitting upon a sewing machine. The defendant was in Illinois from the 10th to the 25th of March. There was no sewing machine in his back room, but it appears that there was a dismantled automobile there during the month of March. It was shown by the evidence of experts that the average period of gestation is about 280 days, varying considerably, but seldom less than 260 days. If the first statement of the time of the crime was correct, it would allow about 240 days for this period. The evidence of other witnesses established the fact that, if this crime was committed by the defendant, it must have been in the first part of March, and, if so, the period of gestation was about 265 days. It does not appear that this girl had any satisfactory means of fixing in her own mind the precise time of the commission of the crime, and the discrepancies in her testimony in that regard are perhaps of little importance, except as showing that she was ready to swear positively to matters of which she had but little knowledge.

1. The principal question as to the sufficiency of the evidence to support the conviction depends upon the corroboration of her testimony. It has been uniformly held that in such prosecutions a conviction cannot be sustained upon the wholly unsupported testimony of the complaining witness. It was shown by a clerk of the defendant that early one morning in the fore part of March the prosecuting witness brought a pair of roller skates to the store, and that he was told by the defendant to oil them for her, which he did. There was, however, no dis-

pute in the evidence that she obtained a pair of skates from the defendant, and this circumstance merely corroborates that fact. It was also shown that the girl was several times at the store, but this was not denied by the defendant. He admits seeing her there at times, and admits that she obtained the skates from him.

The defendant was a witness in his own behalf, and denied emphatically and positively ever having had intercourse with her or having taken any liberties with the complaining witness. He testified that, when she said that she could not buy a pair of skates at $3.50, he showed her a pair that had been hanging in the show window and offered to sell them to her for $2; that she said she did not have that much money, but had some, and that she was working and would pay 75 cents on the skates and the remainder in a week or two. He agreed to that, and told her to get her 75 cents. This was in the afternoon, and a couple of hours later, in the evening, she returned, paid her 75 cents and took the skates. She brought them in the next morning and had them oiled, as the other witness testified. If the evidence of the complaining witness was corroborated, it is, so far as we can see, in the cross-examination of the defendant himself. He testified that the skates were procured from him on the 25th of March, after he returned from Illinois, and to substantiate this testimony he offered in evidence a slip of paper on which was written the name of the complaining witness, the charge of $2 for the skates, and the credit of 75 cents, showing a balance due of $1.25, and bearing the date of March 25, 1911. This memorandum he testified was made at the time, or soon after the transaction. He was not certain whether he or his clerk made it. If he falsely dated this memorandum for the purpose of deceiving the jury, it might discredit his testimony in other particulars. He also testified to selling the complaining witness a bicycle soon after the sale of the skates. He produced in evidence two sheets of paper, which he said were taken from his account book, upon which appeared an entry of

the sale of the bicycle for $5, on the 16th day of June. In this transaction he said the girl's employer was in the store with her and paid the money for her. Afterwards the bicycle was returned as unsatisfactory, and the defendant returned $4 of the money, one dollar apparently being retained for injury to, or use of, the wheel. During all of this time the $1.25 balance for the skates had been unpaid, and was still unpaid at the time of the trial. The defendant forgot, as he says, that circumstance when he returned the $4. Other circumstances disclosed in the cross-examination tend to show that he received no money for the skates and never expected any. In this respect the girl's story is corroborated. If he gave the skates to the girl and has failed to explain satisfactorily any motive for so doing, the jury might perhaps be justified in considering that the explanation of the complaining witness was more credible. There are other inconsistencies in the evidence of the defendant, and the whole matter must be determined by a jury. We cannot see that the court should have taken this case from them.

2. The complaining witness testified to a repetition of the crime on several different occasions. When this evidence was received the defendant's counsel asked the court to then instruct the jury that, "by the introduction of plaintiff's evidence, the state has elected to ask for a conviction upon the first act of intercourse alleged to have occurred about March 1st, or March 5th, or 6th, 1911, to wit, the first act of intercourse testified to by Mary Waddick," and the court answered that the question will stand open until the evidence is received. This ruling was objected to, but we think it was in the line of universal practice and was not objectionable. The defendant then asked the court "to at this time require the state to elect upon which of the alleged offenses he will ask for a conviction in this case as shown by the testimony." This request was also overruled. When the witness was excused from the witness-stand the defendant again moved the court to instruct the jury "that the state, by the introduction of its

evidence, has elected to ask for a conviction upon the first offense testified to by Mary Waddick." To this it appears that no objection was made, and there was no ruling thereon. When the evidence of the state was all in, the defendant made the following motion: "The defendant now asks that the state be required to elect on what alleged act of intercourse it will ask for a conviction, fixing the date of the same." The court sustained the motion in the following order: "Motion sustained, and the prosecuting attorney is now required to fix the time of the alleged offense on which he asks for a conviction in this case." The prosecuting attorney elected to ask for a conviction "on the first act of intercourse proven, to wit, on or about the 7th day of March."

The defendant duly requested the following instruction: "You are instructed that the prosecutor has elected the act which he claims to have taken place on or about the 7th day of March, A. D. 1911, as the one upon which he will depend for a conviction of the defendant, and you are further instructed that in your consideration of this case your verdict will be for the defendant, unless you find from the evidence, beyond a reasonable doubt, that the defendant committed the act so elected, and as to this act you cannot find the defendant guilty on the evidence of Mary Waddick alone, as to the act she must be corroborated by testimony other than her own." This instruction was refused by the court, and the defendant excepted. The eighteenth instruction given by the court on its own motion was as follows: "You are instructed that if you should find from the evidence, beyond a reasonable doubt, that an act of sexual intercourse did take place between the defendant and said Mary Waddick, and that at the time of said intercourse the said Mary Waddick was under the age of 15 years, then you should find the defendant guilty as charged in the indictment"—and the defendant excepted.

No other instruction was given to the jury by the court as to the election made by the prosecution. The order of

the court made at the close of the evidence requiring the prosecution to elect upon which crime, testified to by the complaining witness, it would rely for a conviction, was correct. The defendant was entitled to this protection. It is true that the time of the commission of the offense is immaterial, providing it is within the statute of limitations, but a defendant cannot be tried and convicted of more than one crime in the same trial, and, when several distinct crimes are testified to and circumstances surrounding each crime are in evidence so as to identify the several distinct offenses, the state is required to designate the crime for which it will ask a conviction. The attorney general admits that the order requiring the state to elect was proper and necessary in this case, but insists that those orders made by the court in the presence of the jury were sufficient, and that a formal instruction to the jury upon this point in submitting the case was unnecessary. No authorities are cited supporting this suggestion, and we are not aware of any. The jury may or may not heed the orders given to the prosecuting attorney in the progress of the trial. At the close of the evidence they were instructed by the court as to the matters to be determined by them and as to the law governing those matters. Erroneous rulings of law made at the trial are frequently corrected by the instructions, and the jury should be governed as to the law of the case by the instructions alone.

The instruction asked by the defendant was properly refused. That the prosecuting witness must be corroborated as to the particular act of which the defendant is found guilty may in one sense be technically correct, but, in the connection proposed to be given to the jury, might and probably would be misleading. The request, however, was a suggestion to the court of the necessity of an instruction upon this point, and the eighteenth instruction given by the court amounts to a direct refusal to so instruct, and would, if taken literally by the jury, be inconsistent with a proper instruction. We think, therefore,

the eighteenth instruction, under the conditions in this case, was prejudicially erroneous.

3. The complaining witness admitted that she had, sometime before the commission of this alleged offense, frequently after night been in the rooms of one Snyder, and that he had taken undue liberties with her; that the matter had become somewhat notorious and her brother had interfered to prevent her visiting Snyder's room. She was then asked if Snyder had ever had intercourse with her; to which she objected, and the objection was sustained on the ground that the evidence was incompetent and immaterial. She was under the age of consent, and if the defendant had had intercourse with her, as she testified, it was immaterial whether others had. In this case, however, it was in evidence that she had given birth to a child. The crime therefore had been committed, and the question was, who was guilty. She had already testified that no one but the defendant had ever so used her. If that testimony was true, it was important evidence in the case; in fact, conclusive against the defendant, and the defendant should have been allowed to cross-examine her in that regard.

4. After the prosecuting witness had testified that the defendant and no one else was guilty of the crime, she was asked by her attorney: "Did you ever tell your folks anything about this?" She answered: "No, sir." She was then asked: "Well, you did later on, didn't you?" and again, "What do you mean by that answer?" and she replied: "I didn't until about the middle of September." She was then asked: "And then to whom did you tell it?" This was objected to as an improper question. The objection was overruled, and she said: "I told it to my brother." She further testified that, when her condition became known, her mother and brother several times asked as to who was to blame, and that she finally told her brother and then her mother that it was this defendant. The prosecuting attorney in his address to the jury stated: "The parents of the little girl had to tease to get her to tell

who this man was." This was objected to, and it is now insisted that it constituted misconduct on the part of the prosecuting attorney. What she told her mother and brother several months after the transaction as to the guilt of the defendant was of course incompetent.

Again, it appears that the defendant's wife had died in Illinois and was buried on the 25th of September. In cross-examination the prosecuting attorney asked the defendant: "Have you ever been in Illinois since last March?" This was objected to, but the question was allowed, and he answered that he had not. This immaterial evidence was also made the basis of a remark to the jury in the argument of the prosecuting attorney, in which he attempted to infer that one who would not be present at his wife's funeral would be more likely to commit a crime such as that with which the defendant was charged. Without further discussion of this unpleasant matter, we take it for granted that this course of questioning and argument will not be repeated.

5. It is insisted that the sentence, seven years in the penitentiary, was excessive. The crime charged is a serious one. If the defendant is guilty, we cannot see that the court has abused its discretion in fixing the punishment.

For the errors indicated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

ROSE, J., dissenting.

I do not think the rulings held to be erroneous influenced the jury in arriving at their verdict, nor that defendant was prejudiced thereby. In my judgment, the conviction should not be reversed for any reason stated in the opinion. I do not put upon the conduct of the county attorney the interpretation suggested in the opinion, and I think that the prosecution as a whole should be commended by an affirmance.

FRANK V. LARSON V. STATE OF NEBRASKA.

FILED SEPTEMBER 28, 1912. No. 17,490.

1. **Criminal Law**: TRIAL: SANITY OF ACCUSED: QUESTION FOR JURY. When the contested issue in a criminal case is as to the mental condition of the defendant as affecting his responsibility for his act, that issue is to be determined by the jury; it is not a question for the court.

2. ———: ———: ———: NONEXPERT WITNESS. One not an expert is not allowed to testify to his opinion of the sanity or insanity of the defendant without first showing such knowledge of the defendant as would enable him to form an opinion.

3. **Quaere.** Whether a physician and surgeon who has treated the defendant in his professional capacity on various occasions for several years, and has also seen and conversed with him occasionally unprofessionally, and who testifies that he can give his opinion as to defendant's sanity based solely upon his knowledge of him derived unprofessionally, can be allowed to state that opinion when objected to by defendant on the ground of privilege under the statute—*quære.*

4. **Criminal Law**: TRIAL: SANITY OF ACCUSED: EXPERT EVIDENCE. If an expert witness fails to testify to the facts and conditions which he has observed upon which to form an opinion as to the sanity or insanity of the defendant, or that what he had observed was sufficient to enable him to form an expert opinion, it is erroneous to allow him to testify that he has not observed anything that led him to the conclusion that the defendant was insane.

5. ———: WITNESSES: PRIVILEGED COMMUNICATIONS: WAIVER. The defendant, without objection, answered questions of the prosecuting attorney upon cross-examination relating to treatment of defendant by his physician and the physician's opinion of his condition. *Held*, That by so doing he did not waive his privilege to object that the physician could not as a witness for the state testify to confidential communications between them.

6. ———: TRIAL: ADMISSION OF WRITING: HARMLESS ERROR. It is erroneous to allow a writing in evidence as the writing of the defendant without proof of his signature or otherwise identifying it as written or authorized by him. But, if the substance of the writing is testified to by defendant and otherwise clearly proved without conflict, the error is without prejudice.

7. ———: ———: INSTRUCTIONS. An instruction that, if the state has failed to establish "each and every" of the material allegations beyond a reasonable doubt, the jury must acquit, is not prejudicially erroneous, because of the use of the words "each and every" instead of the word "any."

ERROR to the district court for Burt county: GEORGE A. DAY, JUDGE. *Reversed.*

J. A. Singhaus and *Smyth, Smith & Schall,* for plaintiff in error.

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

SEDGWICK, J.

In October, 1911, the defendant killed his brother, Charles Larson, by shooting him in the head. The defendant was convicted of murder in the first degree in the district court for Burt county and sentenced to imprisonment in the penitentiary for life. He has brought the case here for review upon petition in error.

There is no dispute as to the principal facts in the case. The question is as to the mental condition of the defendant and his responsibility for the act. The defendant is a small man, was in poor health and very hard of hearing, so that it was necessary to use an ear trumpet in ordinary conversation. For many months there had been criminal relations of intimacy between the defendant's brother, Charles, and the defendant's wife. The defendant had suspected these relations for some time, and had at various times questioned his wife closely in regard to the matter, but she had continually denied that there were any improper relations between them. About the first of October she confessed to her husband that his brother Charles had attempted to take undue liberties with her, but insisted that it had not gone to extreme criminal relations. She seems to have fully repented of her part in the transaction, and had fully resolved to do everything in her

power to conciliate her husband and repair the injury she had done him. In explaining the conduct of Charles in answer to the defendant's questions, she was finally led to admit that the matter had gone much further than she had at first stated. She declared that she was unable to talk about it, and proposed to write the full statement of what had taken place, which she thereupon did, and gave it to her husband. This statement showed the criminal relations that had existed for some time, and the defendant insisted that they both must withdraw from the church of which they were members, and that they could not live together, and that she must leave their home. This she consented to do, and consented to do anything that her husband desired, but when she left her home, in pursuance of this arrangement, he followed her in the interest, as he said, of their children, and requested that she return, at least for the present, until suitable arrangements could be made. She thereupon returned. There was also evidence that the defendant was very much attached to his wife and children (there were six children, ranging from two to fourteen years of age); and that, when he became aware of the full enormity of his brother's conduct, he was entirely overcome and was wholly undecided what to do; that at times he contemplated taking his own life, and that he had taken his gun from the house to the shed, mentioned below, for that purpose, and was then only deterred from taking his life by his young son who found him and urged him to return to the house; that at other times he contemplated driving his wife from their home, and was partly impressed with the idea that his brother would be compelled to leave the country, and that some suitable arrangements could be made for the future care of the children.

If the defendant is found guilty, a very important question is presented as to the degree of his guilt. If he was in a state of mind to be responsible for his conduct and planned beforehand to induce his brother to come within his power for the purpose of taking his life, as might pos-

sibly be inferred from some of the statements that he made, as testified to by certain witnesses, and if he succeeded in that attempt and did take his brother's life as he intended, he was guilty of murder in the first degree. If, on the other hand, he was laboring under such mental strain and excitement that he was incapable of forming a deliberate plan, and expected that his brother would leave the community where they lived, and did not have any intention of using his shotgun upon his brother, but in doing so acted upon a sudden impulse, arising from his troubles, the conversation between them and his brother's insulting behavior, and the defendant was at the time in such use of his reasoning powers as to be responsible for his act, then he was guilty of manslaughter. The question of the degree of his guilt does not appear to have been very fully presented to the jury.

The defendant induced his brother to come to the defendant's place, without first informing him of the knowledge which he had of the existing conditions, and when his brother arrived the defendant took him to a small shed where the defendant had placed his double-barrel shotgun, and, after closing the door, took his shotgun in his hands and asked his brother if he knew why he called him there. He had represented that he had called him there for the purpose of helping him with some of his calves. When the defendant acknowledged that he called him there because of his relations with the defendant's wife, and inquired what he, Charles, was going to do about it, on being asked what he, the defendant, wanted him to do, the defendant told him that he wanted him to leave the country and never show himself in that part of the country again. This Charles refused to do, but said that he would agree to never come again to the defendant's place. This was not satisfactory to the defendant, and the defendant testified that he then showed Charles the statement which the defendant's wife had written and proposed that they call her. They both then left the shed, the defendant carrying his gun. There is evidence that the defendant afterwards

stated to several witnesses that when his wife came to them she inquired of him: "Can't this be settled * * * will you take money?" He laughed and said: "Yes." "Will you take $10,000?" she asked. He answered: "Yes." The defendant, upon the witness-stand, testified that he there said to them: "You need not think that I want any of your dirty money." If he answered as these witnesses testified that he stated out of court he did, that $10,000 would adjust it, it might be construed that he was seeking to get money from his brother, or it might be construed that he considered the sum named so far beyond the reach of either or both of them that it amounted to a declaration that the money settlement was out of the question. However that may be, it would appear from the evidence of the defendant and his wife, and also from the statements which the defendant is alleged to have made out of court, that his brother Charles then began to treat the matter lightly, and sneeringly accused the defendant of calling him over there to get money out of him, and finally said: "Shoot, why don't you shoot?" Thereupon, the defendant did shoot, and killed him instantly.

The theory of the defense is that the defendant was so exasperated by existing conditions, and the conduct of his brother at the time, that he was unable to control himself, and was not responsible for his act nor able to distinguish between right and wrong with reference to what he did. This presents the question as to the mental condition of the defendant at the time of the act, a matter always difficult to determine, and particularly so in this case, a question not for the court, but peculiarly one for the jury. If that question has been submitted to the jury without violating the substantial rights of the defendant, their verdict must be regarded as final; it cannot be interfered with by the court. The defendant called an expert witness, a member of the medical profession and of apparently good standing, who has had experience in treating diseases of the mind and had thoroughly examined the defendant. In answer to a hypothetical question which

substantially recited the facts as testified to by the defendant and his witnesses, including evidence showing that the defendant from the time that he learned of these criminal relations between his brother and his wife was so affected mentally and physically that he was unable to perform his regular duties or even to control his own conduct and conversation, this witness testified that, in his opinion, the defendant was irresponsible at the time and was unable to distinguish between right and wrong with reference to the act which he did. In rebuttal the state produced Dr. Hildreth as a witness, who had for some time, perhaps four or five years, been the family physician of the defendant, and who had in that capacity on various occasions treated the defendant himself, and questioned him as to defendant's sanity. The defendant's counsel duly objected to the calling of this witness, on the ground that he was the defendant's physician and the information that he gained in that capacity was privileged.

1. The attorneys for the state insist that the defendant waived this privilege by answering upon his cross-examination various questions in regard to Dr. Hildreth's examination and treatment of him. Some decisions are cited which appear to hold, as maintained by Professor Wigmore, that if the person entitled to the privilege introduces evidence in regard to his physical condition at the time, it is competent to call his physician to rebut that testimony. Professor Wigmore says: "Certainly it is a spectacle fit to increase the laymen's traditional contempt for the chicanery of the law, when a plaintiff describes at length to the jury and a crowded court-room the details of his supposed ailment and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege." 4 Wigmore, Evidence, sec. 2389. He says, however: "This is generally not conceded in the judicial rulings." Sec. 2390. He appears to derive his conclusion from his reasoning, and not from the language of the statute. He is discussing what the statute ought to be, and not what it really is. Sec-

tion 333 of the code is as follows: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." The provision that "no * * * physician * * * shall be allowed, in giving testimony, to disclose any confidential communication," appears to be absolute, and it is doubtful whether the next section, which provides that this privilege shall not obtain where the party "waives the right thereby conferred," was intended to prevent a party from testifying to his physical condition, without at the same time consenting that his physician may at any time reveal his confidential communications. The question is an important one and is a question of construction of the intention of the legislature. If it is wise to introduce such an innovation into our law, it would seem to be the province of the legislature to do so. The ground upon which this waiver in this case is urged by the state is a little different from that stated by Mr. Wigmore, and perhaps a little more substantial. It is said that the defendant himself gave testimony of Dr. Hildreth's examination and treatment. If the defendant had offered these matters as evidence in his own behalf, the position of the state would be unassailable. He did not, however, do so. These matters were drawn from him by the state's attorney on cross-examination and only in answer to direct questions. It seems clear that the state ought not to be allowed to compel the witness to waive his privilege in this manner. It is said that the witness was not compelled to answer these questions, but might then have insisted upon his privilege; but this suggestion does not answer the objection. If the defendant's privilege would extend so far as to exempt him from cross-examination as to conversations and transactions he had had with others, including his physician, the state

ought not now to be allowed to urge that fact after having introduced the evidence which assumed that the defendant was compelled to answer.

2. The witness was asked this question by the state: "Doctor, based on your observations and your conversations and the different matters that you have detailed here that took place and which you have stated here which took place other than in a professional way, I will ask you, in your opinion, whether or not the defendant on that 3d day of October, 1911—what his condition was as to being sane or insane?" Defendant then was allowed to cross-examine the witness as to his qualifications, from which it appeared that the witness had been the family physician for the family of the defendant, and had treated the defendant personally in that capacity during the several years last past, and the witness stated that, if he gave him an opinion as to his mental condition, it would be based in part on what he saw of him on that day of the tragedy and what he had known of him for years, and in part on the knowledge of what he had acquired respecting him which he had acquired while waiting on him as his family physician. After the cross-examination of Dr. Hildreth, the state propounded to him this question: "You can separate the conclusions which you drew from your professional calls * * * and your observations that day? You can give an opinion on that alone?" He answered: "I can." He was then asked: "Doctor, based on your observations and your conversations and the different matters that you have detailed here that took place and which you have stated here which took place other than in a professional way, I will ask you, in your opinion, whether or not the defendant on that 3d day of October, 1911—what his condition was as to being sane or insane?" The objection interposed, that the question was leading and called for a privileged communication and the witness is incompetent, was overruled. The witness then inquired: "I am to base my answer on observations outside of my professional capacity?" The state's attorney stated:

"Yes, sir; not to use any knowledge you acquired in a professional occupation. This question refers to that day —on the 3d day of October, 1911." The witness then gave his answer to the question as follows: "I have never seen any time that I have known Frank Larson but that I had any question as to his mental competency." On motion this was stricken out as not responsive to the question. The question was repeated, and the witness answered it as follows: "I saw nothing to indicate to me but what he was competent and sane." A motion to strike out this answer because it was incompetent, irrelevant and immaterial, and no proper foundation was laid for it, and it called for a privileged communication, and that the witness was incompetent, was overruled, and to this ruling the defendant excepted.

Under the conditions of this case as it then appeared to the jury, the evidence of this witness must have been regarded by the jury as of great importance. The witness had been the family physician of the defendant, and on the day of the defendant's arrest the defendant and his wife went into the office of the witness, and in the presence of the witness discussed the conditions that confronted them, apparently relying upon the relation that had existed between the witness and the defendant; the witness had not stated what circumstances and conditions he relied upon in forming his opinion, and the court had upon careful consideration decided in the presence of the jury that the evidence was proper, so that the jury would naturally rely upon the conclusions reached by the witness. If the evidence was properly received, it must be because the witness was qualified as an expert, because as a nonexpert his evidence was clearly incompetent under well-established rules in such cases. He made no attempt to relate to the jury the facts and circumstances and conditions upon which he based his opinion, and his testimony does not show sufficient familiarity with defendant to give any real value to his opinion.

Many courts have held that such evidence would be in-

competent on account of the relationship existing between the witness and the defendant. It has been many times said by the courts that the human mind is not competent to separate the facts of which it is cognizant into two classes—those that were obtained professionally and those facts coming within the observation of the witness not so obtained—and distinguish an opinion derived from one series of facts from an opinion derived from another. It has been suggested by some that the witness might not be competent to determine as a matter of law how far the rule of personal privilege extends, and so be able to determine what facts the law would regard as having come to him through his professional capacity. The line of questioning here seems to require the witness himself to determine these questions, and it may well be considered difficult, if not impossible, for him to do so.

However that may be, we think the evidence was incompetent for another reason. The question propounded to him did not suggest anything in regard to the defendant's situation, nor in regard to his mental condition preceding or at the time of the tragedy. If he confined himself to what he himself had observed in a social way and in casually meeting defendant, as he assumed to do, his answer would not take into consideration the most material part of existing conditions. His answers show clearly that he did not consider that he was sufficiently informed in regard to existing conditions to give a valuable opinion on the questions propounded. He does not say what his opinion as an expert would be, but says that from these casual observations of the defendant he did not see anything that would lead him to the conclusion that the defendant was insane. The jury had no means of knowing what or how much the witness had seen unprofessionally that would be of any value in determining the question. So far as his answer to the question goes, he may not have observed and remembered enough to enable him to come to any conclusion upon the question. When he was asked if he could give an opinion as to defendant's

sanity or insanity, based upon matters that came to his knowledge "other than in a professional way," he answered: "As far as that observation would go outside of my professional capacity I could. * * * I should have to have an opinion; I should have to have an opinion separate." Why would he "have to have an opinion"? Surely he would not be obliged to have an opinion as an expert without sufficient data from which to form it. His answer implies that he did not consider that his "observation * * * outside of my professional capacity" was sufficient upon which to form an expert opinion. The opinion he formed from this observation was simply the tentative opinion of the average citizen who has heard or seen only a part of the facts or transactions, and feels constrained to make a guess. He testified that during the year then last past he had seen the defendant "possibly three or four times a month. * * * It would be a very uncertain and indefinite opinion. I could not say how often I saw him." He was allowed to testify, not what his opinion was as to the sanity or insanity of defendant, but that he had not observed enough to lead him to the conclusion that the defendant was insane. This evidence we think was incompetent, and was plainly very prejudicial to the defendant.

3. It is insisted upon behalf of the defendant that the court erred in allowing the daughter of the deceased to testify to the contents of a postal card received by him. It was assumed in the question that the postal card came from the defendant, and the witness testified, over the objections of defendant, that the substance of the card was a request to the deceased to "come over in the morning and help me with the calves." There was no evidence that this card was written by the defendant. The handwriting had not been identified, and it was error to receive it in evidence. This error was clearly without prejudice to the defendant. The defendant himself, upon the witness-stand, testified that he sent this postal card to the deceased, and himself stated the contents of the card substantially as stated by the witness, and there was no ques-

tion in the case but that deceased came to defendant's place in answer to this card and other similar requests over the telephone. Surely the defendant cannot now urge that he was prejudiced by the evidence complained of.

4. In the eighth instruction given to the jury, after reciting the facts necessary to be proved in order to find the defendant guilty of murder in the first degree, the court told the jury: "If, however, the state has failed to establish each and every of the above and foregoing propositions beyond a reasonable doubt, then you should acquit the defendant of the charge of murder in the first degree." It is said that the law is that, if the state has failed to establish any one of the necessary propositions beyond a reasonable doubt, he should be acquitted. We fail to understand the reasoning of defendant's attorney in regard to this instruction, and cannot see that the instruction as given by the court was erroneous. The same objection appears to be urged to the court's instruction in regard to the crime of murder in the second degree and in regard to the crime of manslaughter.

5. In the fourteenth instruction the court, after defining the defense of insanity, uses this language: "If upon consideration of the whole testimony you are satisfied beyond a reasonable doubt that at the time of the alleged shooting the defendant was sane, then you should find against him on the issue of his insanity." It is urged that the court should have said that, unless they were so satisfied, they should find the defendant not guilty, and not merely inform the jury that they should find for or against him on the issue of insanity. There might be some merit in this objection if it were not for the fact that in several other instructions the court plainly told the jury that, unless they found beyond a reasonable doubt that the defendant was sane at the time of the shooting, they must find him not guilty. Taking the whole instruction together upon this point, the jury could not have been misled.

6. Several of the defendant's requests for instructions were refused, and this is now complained of. On examination we find that the instructions given by the court upon its own motion contained all of these matters that the defendant was entitled to and were necessary to a proper understanding of the facts presented in evidence.

7. Upon the trial the prosecutor produced the hat worn by the deceased at the time of the shooting. There is no controversy in the case as to the action of the defendant nor as to the death of the deceased. This exhibition of the torn and blood-stained hat would have no purpose except to arouse the passion of the jurors. When, however, it was offered in evidence and objected to, the offer was withdrawn, and it was not put in evidence. If this evidence had been received over the objection of the defendant, it might have constituted reversible error, as held in *McKay v. State*, 91 Neb. 281. If the prosecuting attorney, knowing that such evidence was incompetent, had purposely exhibited the hat to the jury with the intention of thereby prejudicing them against the defendant, it might have constituted such misconduct as to have required a reversal, but we do not find evidence in the case justifying the conclusion that the prosecuting attorney was in this case guilty of such misconduct.

Other questions discussed will not probably arise upon another trial.

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

REVERSED.

LETTON, J.

I think the defendant is entitled to a new trial on other grounds; therefore I concur in the conclusion only.

FAWCETT, J., concurring.

I concur in the judgment of reversal, but not upon the grounds assigned in the opinion. I prefer to base my conclusion upon the ground that defendant has not had an

unprejudiced trial. He had been grievously wronged. His home had been invaded and ruined by one who by every tie of kindred should have been ready to fight, if need be, in its defense, and for its sacred preservation. When the destroyer was confronted by his hapless victim, instead of humbly imploring forgiveness, he met his just accuser with taunting language which I do not think one man in a hundred, under the circumstances, could have resisted. I am not defending the "unwritten law." But I am not willing to hold that the killing of a man under the circumstances shown in this case is murder in the first degree. To hold that it is a greater crime than manslaughter is to shut our eyes to the laws of nature and the irresistible inborn tendencies of man. That the jury found the defendant guilty of murder in the first degree forces the conclusion in my mind that they were either influenced by prejudice, or did not fully comprehend their duties as outlined in the instructions of the court. In either case the defendant should be given the opportunity of presenting his cause to another jury.

ROSE, J., dissenting.

My understanding of the evidence and of the law applicable thereto is radically different from that of the majority. Defendant shot and killed his brother, October 3, 1911. This fact cannot be successfully controverted, and there is no attempt to do so. Unless the jury could have found from the evidence that defendant, at the time of the homicide, was insane within the meaning of the criminal law, there was no justification whatever for a verdict of acquittal. After defendant had adduced testimony tending to show he was insane, the state called in rebuttal Dr. Hildreth, who answered a question as follows: "I saw nothing to indicate to me but what he was competent and sane." The refusal of the trial court to strike this answer out of the record on motion of defendant is, according to the opinion, an error; and a reason given for setting aside the verdict of the jury is as fol-

lows: "This evidence we think was incompetent, and was plainly very prejudicial to the defendant." The majority neither hold that the answer quoted was incompetent, nor that Dr. Hildreth was an incompetent witness, because his testimony violated the statute forbidding the disclosure of privileged communications. In testing the competency of his answer from the standpoint of the majority, therefore, his professional capacity must be considered in connection with other proofs. The following facts are proved: Dr. Hildreth was a graduate of Rush Medical College, Chicago. He was a duly licensed physician. He had been practicing his profession in the vicinity of the homicide for 31 years. He had known defendant about 15 years, and had been fairly well acquainted with him for 5 years; saw him a great deal not in a professional way—possibly three or four times a month. Saw him in town; saw him frequently when he was not attending him professionally. In a room adjoining Dr. Hildreth's office an inquest was held the day of the homicide. Defendant was there. For two hours he was closely observed by Dr. Hildreth, who heard him talking and answering questions, and observed the tone of his voice and his manner of speech. Dr. Hildreth testified, in substance, that he observed defendant's general conditions, and he told what they were, and that he had heard a conversation between defendant and his wife, and he stated the substance of it. Later in his examination the witness was asked: "You can separate the conclusions which you drew from your professional calls on him, and from knowledge which you had of him, and acquaintance with him formed outside of your professional calls, and your observations that day? You can give an opinion on that alone?" The answer was: "I can." He was also asked: "Doctor, based on your observations and your conversations and the different matters that you have detailed here that took place and which you have stated here which took place other than in a professional way, I will ask you, in your opinion, whether or not the defendant on that 3d day of October, 1911—what his con-

dition was as to being sane or insane?" The question was answered: "I saw nothing to indicate to me but what he was competent and sane." The clear import of the testimony of Dr. Hildreth is that an opinion as to defendant's sanity was forced upon him by observed conditions and facts. The record, therefore, answers the question: "Why would he 'have to have an opinion' "? When the existing facts and conditions were impressed on his mind by observations, the mental operations resulting in the opinion that nothing was disclosed to indicate insanity were neither unnatural nor suspicious. The testimony condemned by the majority, if considered as the evidence of a nonexpert witness, is clearly competent, unless a former opinion of this court is overruled. *In re Estate of Wilson*, 78 Neb. 758. Considered as expert evidence of a physician not disqualified as a witness, the testimony criticised by the majority is competent under well-established rules. The contrary holding, under the facts as they exist, will, in my opinion, introduce into the criminal law of the state a new technicality which will prove to be confusing to the courts as well as dangerous to society. I do not think any sufficient reason for setting aside the judgment has been suggested in the opinion of the majority.

WILLIAM F. SMITH, APPELLEE, V. DAVID G. POTTER ET AL., APPELLEES; WALTER V. HOAGLAND, APPELLANT.*

FILED SETEMBER 28, 1912. No. 16,314.

1. **Taxation: FORECLOSURE OF LIEN: SALE: RIGHT OF REDEMPTION.** In a tax foreclosure proceeding by a county to recover delinquent taxes on the land without making a prior administrative sale, where service is obtained by publication and the premises are sold under the decree of foreclosure, the purchaser at the foreclosure sale buys subject to the right of one having a valid lien upon the premises to redeem from such sale, and the party claiming the lien cannot be barred without a hearing, if he answers setting up his defense and demands such hearing.

* Opinion modified. See opinion, p. 63, *post*.

2. ———: ———: PUBLICATION OF NOTICE. Proof of publication of notice for constructive service re-examined, and, as a preponderance of the evidence tends to show that the notice was published for the time required by statute, the former opinion is modified to correspond with this view.

REHEARING of case reported in 90 Neb. 298. *Former opinion modified, and judgment of district court reversed.*

HAMER, J.

This is an appeal from a judgment of the district court for Lincoln county quieting title in the plaintiff to a tract of land in that county. The plaintiff's title is derived by a sheriff's deed which was issued in a tax foreclosure suit brought by Lincoln county against David G. Potter and his wife and others. This case was before this court at a prior term. See 90 Neb. 298. For a more complete statement of the facts in the case we refer to the opinion heretofore published. The defendant in the court below, David G. Potter, received a patent to the land in controversy in 1887. Afterwards, in 1892, he executed and delivered a note and mortgage to A. D. Buckworth to secure the payment of a note for $389. This note was indorsed to the North Platte National Bank, of which Buckworth was president. That bank became insolvent, and one Doolittle, who was appointed the receiver of the bank, sold the note and mortgage as such receiver. The defendant Hoagland claims to own this note and mortgage and a decree of foreclosure based upon the same, and he now claims the right to redeem from the tax lien because he owns this note and mortgage and the decree mentioned, and because the tax foreclosure proceedings upon which the plaintiff's title to the land depends are invalid. He filed an answer and a cross-petition. He claims in the answer and cross-petition the right to redeem. Lincoln county obtained a decree of foreclosure for the delinquent taxes on the land without making a prior administrative sale. Service was had by publication and the land was sold to satisfy the decree. The land was purchased at sheriff's sale by the defendant

Wilcox in 1902, and the plaintiff, Smith, receives his title through Wilcox. The plaintiff Smith denies the ownership of the decree by Hoagland, and alleges that the receiver abandoned that indebtedness.

It is claimed that Potter and his wife executed and delivered to the North Platte National Bank renewals of the note executed and delivered to Buckworth. The last of these renewal notes is claimed to have been executed in January, 1894. It is claimed that the receiver of the bank, by virtue of an order of the comptroller of the currency, advertised all of the assets of the bank remaining in his hands to be disposed of, and that he held the sale on or about the 1st day of January, 1900; that on or about the 18th day of January, 1900, he offered the notes and indebtedness secured by the mortgage and covered by the decree for sale at public auction and sold the same to one A. H. Davis, and that he delivered the notes to Davis. There was an affidavit for service by publication in the tax foreclosure proceedings. It is claimed that no valid service by publication could be had upon Potter and his wife because of the fact that they were all the time residents of the state of Nebraska and that the affidavit for service by publication was untrue. Buckworth was a resident of Lincoln county until he died in the year 1894, or thereabouts. In the tax foreclosure proceedings it is alleged that no personal service of summons was had upon Potter and his wife and upon Buckworth. This court reversed the judgment of the district court quieting title in Smith. The appellees Wilcox, Dikeman and Smith have filed a motion to vacate the judgment of reversal entered by this court, and the question is whether the judgment of this court reversing the judgment of the court below shall stand or whether a new judgment shall be rendered.

This court bases its finding that the appellant Hoagland is the owner of the note and mortgage in controversy on the opinion in the case of *McCabe v. Reed,* 88 Neb. 457. In the former opinion this court quotes from the opinion

in *McCabe v. Reed,* and say: "If the defendant in an action to cancel a mortgage produces the notes secured thereby, and it appears that he has controlled and had undisputed possession of the instruments for many years under a claim of title thereto, these facts will sustain a finding that he is the owner thereof, notwithstanding they are indorsed payable to the order of a third person." This court then ventures the opinion that the testimony of the witness Davis is not sufficient to overcome Hoagland's testimony, supported and corroborated as Hoagland's testimony was by his possession and production of the papers. As Hoagland has no rights in the premises unless he is the owner of the notes and mortgage, that is one of the first things to determine. This court said in *McCabe v. Reed:* "The delivery of a negotiable promissory note indorsed to the order of a third person will not in itself transfer title to the note (*Gaylord v. Nebraska Savings & Exchange Bank,* 54 Neb. 104), but an equitable assignment will result from the sale and delivery of the note without an indorsement, and the equitable owner may maintain an action thereon in his own name (*Greeley State Bank v. Line,* 50 Neb. 434). And the possession of an unindorsed negotiable promissory note by some person other than the payee or indorsee may sustain a finding that the equitable title followed the possession. *Cather v. Damerell,* 5 Neb. (Unof.) 175." This court further said in that case that the original note and mortgage were produced in the tax foreclosure case by the intervener, and that they had remained in his custody for more than six years, and that no other person asserted title or ownership to the same, and that *prima facie* there was proof of title in the intervener in the tax case. *Sanford v. Litchenberger,* 62 Neb. 501. It would therefore seem from the evidence that Hoagland should be treated as the owner of the note, mortgage and decree.

It is next claimed that the publication was insufficient. The publication was in a semi-weekly newspaper issued on Tuesdays and Fridays of each week. The first publication

seems to have been on the 28th of August, 1900, and the next on the 31st of August; that would make one week. The succeeding publications are on September 4 and 7, September 11 and 14, and September 18 and 21; the last making the fourth week. It would therefore seem that this objection is not well taken. In the former opinion it was held that the court acquired no jurisdiction because the notice in the tax foreclosure proceedings was not published the required length of time. The end of the four weeks was the 22d of September, 1900. The notice published required the defendants to answer five days before that time. In other words, when the service was complete the time within which defendants were to answer had expired five days before. If it shall be said that the time expired with the last publication, then the defendants were required to answer four days before that time, to wit, on the 17th of September, 1900. In conclusion, touching this matter, the answer day arrived when there had been publication for only three weeks. Section 79 of the code provides that the notice must be made four consecutive weeks, and, among other things, that it must "notify the person or persons thus to be served, when they are required to answer." Of course, this is not done in this case because the time had expired when the answer was to be made according to the language of the notice before the service was complete. Because of this defect in the notice and the time of its publication, we may well doubt whether jurisdiction was acquired, but we do not decide that question, because, while it is apparent by an examination of the case, the question is not raised or discussed by counsel, and we do not have the benefit of their research and argument, and without this no appellate court should determine the question shown by the record.

The next proposition is that the affidavit for publication states that the defendants are nonresidents of the state of Nebraska and service of summons cannot be had on them or either of them. It is said that this is insufficient, and it is argued that the affidavit should allege that service

cannot be made upon them within this state. It is claimed that Buckworth was a resident of Lincoln county until his death. It is claimed that the Potters have always been residents of the state of Nebraska and that service of summons could be made upon them in this state. If that is true, the tax foreclosure is without jurisdiction.

It is argued that the rule should be applied in this case which is said to have been established in *Britton v. Larson*, 23 Neb. 806. That was in an action of ejectment. There was a trial in the district court resulting in a verdict and judgment in favor of the defendant. The record in that case showed that in April, 1875, one Harry Brownson was the owner of the real estate in question; that on March 8, 1871, he and his wife executed and delivered to the First National Bank of Omaha a mortgage on the real estate. On the 16th of April, 1875, a summons was issued to the sheriff of Wayne county directing him and notifying the said Harry Brownson and Jennie Brownson of the institution of an action to foreclose the mortgage. A summons was returned on the day of its issue not served, the defendants not being found in Wayne county. On the next day an affidavit was filed showing the nonresidence of the Brownsons. Service was had by publication. August 24, 1874, a decree of foreclosure was rendered, and the land was sold under the order of the court, and September 20, 1876, the same was confirmed and the sheriff directed to execute the usual deed to the purchaser. On the 18th of February, 1885, Brownson and wife conveyed the land in question by a quitclaim deed to the plaintiff. The plaintiff insisted that the district court was without jurisdiction to render the decree because there was a defect in the affidavit showing the nonresidence of the Brownsons. The affidavit did not describe the property mortgaged. There was no attempted description of it. It was not described by numbers; nor was it alleged to be in Wayne county.

It was also objected that the affidavit did not show that the Brownsons could not be served with summons within the state, and therefore that the affidavit did not comply

with the requirements of sections 77 and 78 of the code. Section 78 of the code provided that, before service could be made by publication, an affidavit should be filed alleging that service could not be made on the defendants in the state. Section 78 of the code, as it was then and as it is now, reads: "Before service can be made by publication, an affidavit must be filed, that service of a summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication." In *Britton v. Larson, supra,* there was cited *Carey v. Reeves,* 32 Kan. 718, to the effect that district courts are courts of general jurisdiction and presumed to have jurisdiction to render any order which they do in fact make. In its widest latitude this doctrine would not require an affidavit to be made. All the court would have to do would be to go ahead and then say: "It will be presumed that we have not made an order unless we had jurisdiction to make it." There was a motion to amend the proof of service in the Kansas case. The amended affidavit is not set out in the opinion. Perhaps it is only fair to the Kansas court that the amended affidavit should be set out before any criticism is attempted.

The affidavit for publication in the instant tax foreclosure case sets up that H. S. Ridgley is the attorney for the county of Lincoln, the plaintiff in the action, and that on the 25th of June, 1900, the plaintiff filed its petition in the district court for Lincoln county, Nebraska, against David G. Potter, ——— Potter, his wife, first name unknown, Central Nebraska Loan & Trust Company, A. D. Buckworth, first name unknown, J. I. Case Threshing Machine Company, and John Doe, true name unknown, defendants; that the object and prayer are to foreclose the tax liens mentioned in said cause of action; that "the plaintiff seeks to foreclose a tax lien upon the southeast quarter of section 24, in township 15 north, of range 33 west of the sixth principal meridian, in said county, and there is now

due on said tax liens the sum of $71.26. That the defendants, David G. Potter, ——— Potter, his wife, first name unknown, Central Nebraska Loan & Trust Company, A. D. Buckworth, first name unknown, J. I. Case Threshing Machine Company, and John Doe, true name unknown, are nonresidents of the state of Nebraska, and service of summons cannot be had on them or either of them. (Signed) H. S. Ridgley." The affidavit purports to have been signed on the 7th of August, 1900, before the deputy clerk of the district court. It will be noticed that the Potters, the Central Nebraska Loan & Trust Company, A. D. Buckworth, the J. I. Case Threshing Machine Company and John Doe are alleged to be nonresidents of the state of Nebraska. It is also alleged that service of summons cannot be had on them or either of them. This is a general statement. It is not alleged, as section 78 of the code provides, "that service of a summons cannot be made within this state."

It will also be seen that there is no description in the notice of the tax liens to be foreclosed. It does not appear what years they are for, nor the amount of each. There is a statement of the aggregate. Section 79 of the code provided that the notice must contain a "summary statement of the object and prayer of the petition." In *Scarborough v. Myrick*, 47 Neb. 794, it was stated in the seventh paragraph of the syllabus: "Plaintiff's cause of action is not required to be set forth in an affidavit for service by publication. It is sufficient if such affidavit states that the defendant is a nonresident of this state, and that service of summons cannot be had upon him therein, and facts showing the action to be one of those mentioned in section 77 of the code, in which constructive service is authorized." In the body of the opinion in that case it was said: "It was not necessary that the affidavit should disclose plaintiff's title to the property in controversy. He was not required to state his cause of action in the affidavit, but in his petition. *Grebe v. Jones*, 15 Neb. 312. The affidavit shows that the nature or char-

acter of the suit is one in which the statute authorizes service by publication to be had, and that is sufficient so far as that point is concerned. *Fouts v. Mann,* 15 Neb. 172; *Taylor v. Coots,* 32 Neb. 30."

The petition filed to foreclose the alleged liens is brought by the county of Lincoln against the defendants above named. It alleges taxes against the land for the years 1892 to 1898, inclusive; that the taxes for each year became delinquent in each of the years following; that the premises described were advertised and offered for sale, and returned not sold for want of bidders. The item of tax for each year is given. It is alleged of the defendant Potter that David G. Potter claims to be the owner of the premises, and that ——— Potter is his wife; that the defendant, the Central Nebraska Loan & Trust Company, claims an interest in the premises by virtue of a mortgage lien; that A. D. Buckworth claims an interest in the premises by virtue of a mortgage lien; that the defendant, the J. I. Case Threshing Machine Company, claims an interest in the premises by virtue of a mortgage lien. It is claimed that the interest of the defendants is inferior to the lien of the plaintiff by virtue of the assessment and levy of the taxes. The prayer is that an accounting be had, and the amount due the plaintiff on account of the taxes, interest and penalties be decreed a first lien upon the premises; that the defendants and all persons, except the plaintiff, be fore- ·d and barred from all right, title and interest in and to the premises; that the premises be sold under a decree of the court and the proceeds applied toward the payment of taxes, interest, penalties and costs of the action; that, upon the confirmation of the sale, the sheriff be ordered to make the purchaser of said premises a good and sufficient deed, and that he put the purchaser in possession. The decree seems to have been rendered on the 2d of December, 1901. The assignment of Milton Doolittle as receiver of the North Platte National Bank to A. H. Davis seems to have been on the 8th of January, 1900.

On the 28th of March, 1908, David G. Potter and Lydia

A. Potter, defendants in the original tax foreclosure case, entered their special appearances in the instant case in the district court for Lincoln county, and allege that they appear for the purpose of objecting to the jurisdiction of the district court for Lincoln county over them, for the reason that no service of a summons had been served upon them in this action; that no attempt to serve any summons upon these defendants in this action was made, except by publishing notices in the North Platte Telegraph during the months of December, 1906, and January, 1907, as shown by the proof of publication on file; that at the time of the commencement of this action, and ever since said date, these defendants have been and are residents of Dawes county, in the state of Nebraska, and at no time since the commencement of this action have these defendants been nonresidents of the state of Nebraska. In support of this, David G. Potter files his affidavit alleging that he and his wife, Lydia A. Potter, are residents of Dawes county, where they have been residing near the town of Crawford; that no service of summons had been made upon them.

On the trial of the instant case before the Honorable W. H. Westover, sitting as judge of the district court, there was a finding that no service of summons was had in this action upon defendants David G. Potter and Lydia A. Potter, and "that special appearances of said David G. Potter and Lydia A. Potter were sustained by the court, and this action was and has been dismissed" as to the said David G. Potter and Lydia A. Potter. The court further finds that the Central Nebraska Loan & Trust Company and the J. I. Case Threshing Machine Company have been served with processes upon plaintiff's petition by publication, and the court further finds that the Central Nebraska Loan & Trust Company is a corporation, organized under the laws of the state of Nebraska, and that service upon said defendant by publication was and is invalid. A. D. Buckworth is shown by the evidence to have been a resident of Lincoln county, Nebraska, until he died.

Hoagland testified that he and Davis did the bidding, and that he and Hoagland were to divide. Hoagland testifies: "In the settlement between Davis and I about that time, Davis turned over to me all of the Potter papers, notes and mortgage and assignment which he had procured, being the assignment which is offered in evidence here, the assignment of mortgage and notes which were offered in evidence, together with another note that has not been offered in evidence." He further testified that Davis paid Doolittle, and then that he and Davis adjusted matters between them, and that Davis paid him (Hoagland) the difference in cash. He goes into the details with respect to what they said. "Q. Can you give the date of this settlement between you and Davis? A. Davis paid me the cash on January 8, 1900. He paid me the difference in cash. I am satisfied it was some time after that when we made our complete settlement and divided up the papers." He then testifies that the Potter papers have since that time been in his safe and in his possession. "Q. State if you made an examination as to service of notice of publication thereof in the case of Lincoln County against Potter *et al.* that is involved in this action. If so, when? A. Immediately after I saw the notice in the paper, I then examined the files of the court proceedings here in this office. Then, after investigating the case of the county against Potter, the tax case, I went to the office of the North Platte Telegraph. * * * I called for the files of the paper for that year. Mr. Kelly was not present, but his clerk, Miss Brown, assisted me in looking through the files. We found the files in the same condition then as they were in today when they were examined here in court. Q. That is, the same condition as to lead pencil marks and erasures? A. Yes, sir; exactly. I never examined the files of the paper for this case prior to that time, and never saw them after that time until I was preparing here for this trial in this case, when I went to Mr. Kelly and called his attention to it." He then states that was some time last fall. "Q. Do you

know what it was that you gave Davis for this asset—this note and mortgage? A. Not for this particular one; we divided up all of them, and this one came to me. Q. Do you know what you gave him at that time? A. I do not remember."

Hoagland testifies to the details concerning the property that he turned over to Davis. "Q. I asked you what it was you gave Davis for the property you had bid in? A. C. O. Davis asset, $3.25; O. E. and W. C. Elder asset, $80; S. E. 18-10-30. * * * Q. Tell me what Davis turned over to you that he bid in? A. The only memorandum I have here is the D. G. Potter property." He then testifies that one evening at home he saw in the North Platte paper William Smith against Potter, describing this land, and that he said he believed he was interested in the land, and the next morning he went down and investigated. He found the notes and mortgage and assignment in his safe. He was unable to tell why he did not get an assignment from Davis, but thought he had overlooked it. "Q. You did not get any assignment of the decree? A. Not unless the assignment of these papers carried it. Q. As a matter of fact you and Davis had no talk about the decree, did you, when you made this transfer? * * * As a matter of fact you didn't know then that this was in decree at that time? A. I would not say that I knew it was in decree at that time, we bought the notes. Q. You would not say; you have no recollection about it now? A. No; I did investigate some of the assets of the bank prior to that time, but whether or not I learned this was in decree, I don't know."

He then testifies that he discovered the matter was in decree before he saw the notice in the newspaper of Smith against Potter. He seems to have at once written a letter to Mr. Davis immediately after the lawsuit was commenced. As soon as the case was started he wrote Davis for an assignment of the decree. He wrote Davis that he (Davis) had neglected in the transfer of the papers the assignment of the mortgage. "Q. From the time that

you ascertained that there was a decree in this case, which you say you saw within six months from the time you bought these securities, what did you do toward enforcing or collecting it, up to the time you filed your cross-petition in this case? A. I took no steps in court, but I did write a number of letters trying to find out where Mr. Potter was. I wrote some letters which were returned." It seems that Hoagland sent an assignment to Davis to be executed by him, and that Davis refused to execute it. Hoagland so testifies.

Davis, when called as a witness, controverted Hoagland's testimony, but his testimony is evasive and unsatisfactory. "Q. Was there ever any talk between you and him by which he was to have these instruments? A. No; after Mr. Hoagland and I had our settlement, I got these papers after that, I was supposed to have got them. Q. What are the facts as to whether or not you and Hoagland had some kind of an arrangement or agreement at the receiver's sale?" To this question the witness testified that they agreed between themselves that when one bid on a piece of property the other would not, and that they were to divide the assets, and that Davis was to have a half section of land to be bid in for him by Hoagland, and that Hoagland was to have the Lewis mortgage for whatever it could be bid in at. Davis says: "We bought a number of assets, and among them were these two which I mentioned. We did not get a settlement between us at the time. We had Mr. Doolittle make a memorandum on his sale book of what Hoagland bought and what I bought and we were afterwards, when we got together, to put them down and see what each one was to have and to let him (Doolittle) know, so he could put them on his book and make the assignments regular. I think it was a week probably afterwards that Hoagland and I agreed on settlement of the assets, and we settled. Hoagland took them down and made a list of them, of what I was to have and what he was to have. I went to Doolittle's office across the street, and Hoagland wrote Doolittle what

assets was coming to me and what assets were to go to W. V. Hoagland, and he instructed him to make the assignments in accordance with the statement, and Doolittle put them on his book that way. We figured up the amount, and I think I paid Hoagland, and Hoagland paid Doolittle, if I remember right. Among the assets which came to me was the land over south, with a number of others, among which was this assignment of the Potter mortgage." Davis then testifies that at the time he and Hoagland went to see Doolittle they had not determined how the property was to be divided, but he says that Doolittle assigned them and turned them over. Davis admits that Hoagland wrote him the letters which Hoagland says he wrote. Davis says he does not remember anything about the decree until about the time he received Hoagland's letter.

On cross-examination, Davis admits that he got a letter from Hoagland after he moved to Grand Junction. "Q. How did it come that you sent this to Mr. Wilcox as soon as you received this from me? A. I do not recollect ever having assigned to you this Potter matter at all, and I did not know what I had done with that or what become of it. I made a hunt through a bundle of those old assets, with a number of others, to see if I had any Potter assets, and I found I did not have. I immediately wrote Mr. Wilcox and told him to investigate and see what there was in it, that it was probably of value to you; if it belonged to you, you were entitled to it, and, if it belonged to me, I wanted it. Q. Have you ever made any demand upon me for it? A. No, sir. Q. Did you get the list from the receiver at the time you bought these assets, a list of what you had bought? A. No; I made a memorandum of what I bought and what you bought. Q. What you bought? A. What we bought together." He then testifies that he does not know what he did with the list. He does not know whether the receiver gave him a list. Davis in his testimony corroborates the testimony of Hoagland as to the material things. He corroborates

Hoagland as to the fact that they acted together, and that they had a division, and that Hoagland took the papers. There is an attempted denial of Hoagland's rights based upon the fact that there was an assignment of the decree.

We think the evidence fully establishes the fact that Hoagland is the owner of the note, mortgage and decree, and that he has been the owner of the same ever since the sale by Doolittle, the receiver of the bank. As Hoagland was not made a party defendant, or any one representing him, and the owner of the note, mortgage and decree was not brought into court at any time, it would seem that the claim in question is not barred, unless the statutes and decisions affecting the matter created such bar. That every man is entitled to his day in court expresses a primary principle concerning the disposition of property and the enforcement and guaranty of property rights.

Sections 1-11, laws 1875, p. 107, entitled "An act to provide a method of foreclosing tax liens upon real estate in certain cases," furnish a method of foreclosure under which the premises in this case were sold. Section 1 provides that the tax lien upon real property may be enforced "by an action in the nature of a foreclosure of a mortgage." Section 3 provides that all petitions for the foreclosure of such tax liens "shall be filed in the district court in chancery, where the lands are situated." Section 4 provides: "Service of process in causes instituted under this chapter, shall be the same as provided by law in similar causes in the district courts, and where the *owner of the land is not known,* the action may be brought *against the land itself,* but in such cases the service must be as in the case of a nonresident." Section 9 provides: "All lands sold by the sheriff by virtue of this act shall be appraised, advertised and sold as upon execution, and the title conferred by his deed shall be entitled to all the presumptions of any judicial sale." Section 4 of the act contemplates proceedings the same as provided by law in similar causes in the district courts, and, where the owner

of the land *is not known,* then that the action may be brought against the *land itself,* but in such cases the service must be as in the case of a nonresident. The purpose in any event is to give notice. The proceedings are clearly *in personam,* unless brought against the land itself. In this case the parties interested were sought to be brought into court, but were not. This was *not a case against the land.* It was directed against the parties interested. Section 6 of the act makes the deed a bar where the land is made a defendant in the suit, but that is not this case. The Potters, who made the mortgage, were not brought into court; Buckworth, to whom the mortgage was made, was not brought into court; neither was the North Platte National Bank to which he assigned it; neither was the receiver of the bank brought into court. It is claimed that there is no necessity for bringing these parties before the court. The statute itself would seem to dispose of the matter. The action to foreclose a tax lien is to be "in the nature of a foreclosure of a mortgage." In the case under consideration there was no allegation that the *owner of the land was unknown.* The action was fairly a personal action. There was no order, as the act provides, to have the land substituted as a defendant. No attempt of any kind was made to get service against the land.

In *Carman v. Harris,* 61 Neb. 635, the court said: "The decree, of course, could only bind the parties to the suit, and those claiming under them, and could not affect third parties." In *Alexander v. Thacker,* 30 Neb. 614, the court said: "In a suit to foreclose a lien for taxes, all parties having an interest in the real estate are proper parties, and the person holding the equity of redemption is an indispensable party." In *Carson v. Dundas,* 39 Neb. 503, the fourth paragraph of the syllabus reads: "A sale to satisfy tax liens, when the action was brought *in personam* and not against the land itself, passes only the title of the parties to the action and their privies in estate. It does not divest the title of strangers." In *Merriam v. Goodlett,* 36 Neb. 384, the court said: "As

the mortgagee was not a party, if the mortgage lien is not barred, no doubt he could proceed in an action to redeem by setting up the necessary facts to entitle him to such relief."

In *Selby v. Pueppke,* 73 Neb. 179, there was a suit in equity brought by the grantee of the original owner to redeem land sold for taxes at a judicial sale. There was a general demurrer to the plaintiff's petition, which was sustained by the court. The plaintiff elected not to plead further, and from a judgment of dismissal brought error to this court. There had been a sale for taxes by the sheriff of Rock county upon a decree of foreclosure entered at a suit of Rock county as plaintiff. There had been no adminstrative sale for taxes. Rock county undertook to foreclose a tax lien without resorting to a sale. It procured the premises to be sold to the defendant's grantor and the sale was confirmed, and a sheriff's deed was issued upon the order of confirmation. Afterwards this title was conveyed to the defendant. The owner at the time of the assessment of the taxes afterwards conveyed to the plaintiff, and the plaintiff brought his action to redeem from the taxes, alleging that the foreclosure proceedings were all void, for the reason that the petition in that action showed that there had been no prior sale of the premises for taxes. The petition also urged that the constitution of the state allowed a redemption within two years from any tax sale. In favor of the alleged judgment, it was urged that the fact that a petition was demurrable did not make the decree of a competent court subject to collateral attack where the parties were before it and the subject matter was one of which the court had cognizance. To the claim of the plaintiff that two years' time for redemption from a sale for taxes had not run, it was replied that the decree of confirmation was as conclusive as to the sale as that of foreclosure is to the lien and the right to sell under it. It was urged that to permit a redemption was to allow a collateral attack upon the decree of confirmation. Com-

missioner HASTINGS, speaking for this court, said: "So far as plaintiff's first contention is concerned it would seem that defendant's claim is good." It should be said on behalf of this court, however, that it reversed the decree of the district court upon the ground that the second contention of the plaintiff, that he had a right of redemption, was good. The court said: "The terms of the constitution are very sweeping. Art. IX, sec. 3. A right of redemption is given from all sales of real estate for the nonpayment of taxes for two years after the sale. This provision has been held to be self-executing. *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109. It has also been declared to apply to judicial sales as well as administrative sales. *Logan County v. Carnahan,* 66 Neb. 685." The court then said: "The confirmation applied only to the regularity of the proceeding. It held the sale valid and regular, but in no way adjudicated the right of redemption from it. The latter existed by virtue of a self-executing constitutional provision independent of the court."

Judge DUFFIE, as commissioner of this court, delivered the opinion in *Clifford v. Thun,* 74 Neb. 831. In speaking of *Selby v. Pueppka, supra,* he says: "In that case it was urged that the confirmation of the sale and the making of a deed cut off the owner's right to redeem," but he does not say that was the decision. As we have just seen, it was not. In that case Clifford, who was the plaintiff in error, filed his petition for the foreclosure of a mortgage on 80 acres of land made to the Globe Investment Company by Henry Thun and his wife. The petition was filed February 21, 1903, and September 5, 1903, he filed an amended petition, in which he alleged that on August 6, 1901, the land covered by his mortgage was sold for the delinquent taxes due thereon for the years 1895-1900, both inclusive; that one Skillman was the purchaser at said sale, and that Skillman on August 21, 1901, commenced an action to foreclose his tax certificate, making various parties defendants; that a decree was entered fore-

closing tax liens held by Skillman and one Toy, and that on December 24, 1901, all the real estate was sold to satisfy the decree, and that Thun became the purchaser; that the plaintiff was the owner and holder of a mortgage made by Thun to the Globe Investment Company covering the premises in controversy, and that the same was due, and he prayed to be allowed to redeem the premises from the tax sale foreclosure, and for the foreclosure of his mortgage. Henry Thun demurred to this amended petition, alleging it did not state facts sufficient to constitute a cause of action. The right to redeem alleged in the amended petition was in addition to the matter contained in the original petition. It was urged that the plaintiff owning the mortgage at the time of the foreclosure of the tax certificate was not made a party defendant and that his right of redemption was not extinguished by the decree. Judge DUFFIE then says: "The plaintiff by his bill is seeking to enforce a *right* of redemption as distinguished from an *equity* of redemption, a right based upon a provision of the constitution and the statutes of the state, and it is by these provisions that his right is to be measured and determined, and not by the decree entered by the district court in the tax foreclosure action, which, as before stated, did not attempt to determine or cut off the privilege awarded him by the laws of the state to redeem from the tax sale within two years from its date. The difficulty under which he labors is that this right was not asserted within the time limited, and his right to redeem has been barred by lapse of time, not by the decree, but by statute." The judgment of the court below was affirmed.

An examination of these cases show that there was no discussion of the act in question. The trouble about these cases is that the lawyers and judges neglected to hunt up the statute and discuss it. More than that, the court attempted to and did bar the rights of the plaintiff without an examination of the facts of the case. It is rather difficult to understand why he would refuse to consider the foreclosure of the mortgage.

Commissioners DUFFIE and HASTINGS seem to hold in the cases above mentioned that, because one who is a party to the foreclosure may still redeem at any time within two years after the sale under the foreclosure, therefore that when he is not a party he is also barred. In *Hall v. Moore,* 75 Neb. 693, there is no discussion of the statute under consideration. That was an action to foreclose certain tax liens. The appellant, Maud M. Keck, procured an assignment to herself of the mortgage in the case. In disposing of this case Commissioner AMES said: "In the opinion of the writer there is much reason to doubt whether a mortgagee is even a proper party to such a suit, but he is certainly not a necessary one." The question was not before the court in any way and what he said was a mere dictum. To do what the learned commissioner seems to have contemplated would be a clear violation of section 3, art. IX, and sec. 13, art. I of the constitution. It would also be in violation of the act. "The suit authorized by statute is one not merely to establish the right to redeem from a tax sale, but to effect a redemption." 2 Desty, Taxation, p. 891. "In any judicial proceeding the court which assumes to act must have that authority of law for the purpose, which is called jurisdiction. This consists in, *first,* authority over the subject matter; and, *second,* authority over the parties concerned. The first comes from the statutory law, which designates the particular proceeding as one of which the court may take cognizance when the parties are properly before it; the second comes from the proper institution of proceedings, and the service of process upon the parties concerned, or something which is by the statute made equivalent to such service." Jurisdiction of the subject matter "must come wholly from the constitution or statutes of the state." 2 Cooley, Taxation (3d ed.) p. 879.

That the tax lien is to be enforced "by an action in the nature of a foreclosure of a mortgage" means that the procedure shall be similar to the foreclosure of a mortgage, and there should be no severity unusual to that

sort of procedure. The act seems to contemplate the bringing of the parties before the court in the same way that they are brought before it when a mortgage is foreclosed. There should be no attempts by the courts to add to the statute by providing harsh measures that are penal in their character.

The notice was published in August and September, 1900. It was directed to "David G. Potter, and ——— Potter, his wife, * * * Central Nebraska Loan & Trust Company, A. D. Buckworth, first name unknown, J. I. Case Threshing Machine Company." An examination of the record leaves the matter perhaps in some doubt as to whether Potter and his wife were residing in Nebraska or South Dakota at that time, and Dr. Buckworth, it seems, was dead, having died about that time at North Platte, in Lincoln county. He was the president of the North Platte National Bank up to the time that it failed. The Potters and Buckworth should have been served with a summons so that the court might have jurisdiction. The Potters made the mortgage to Buckworth, and Buckworth or his legal representatives should have been served with a summons. Buckworth might have turned the note and mortgage over to the bank, but, if so, the bank should have been brought in. Under the evidence and the rule in *McCabe v. Reed*, 88 Neb. 457, Hoagland was shown to be the owner of the note, mortgage and decree.

While there may be some doubt about the facts, as the pleadings are very long and much involved, and the testimony voluminous, we are constrained, after a somewhat careful examination of the record, to modify our former opinion touching the length of time the notice for constructive service was published, and to hold that it was published the required length of time, four weeks, but we adhere to our former views as stated in the opinion filed November 28, 1911, that the testimony of the witness Davis is not sufficient to overcome that of Hoagland, supported as it was by his possession and production of the papers, and that Hoagland is not barred by the foreclosure

proceedings, which were so far void as to fail to convey title to Wilcox, and that he, said Hoagland, should be allowed to redeem from the tax lien by virtue of his ownership of the note and mortgage and decree of foreclosure based thereon, and by reason of the invalidity of the tax foreclosure proceedings upon which plaintiff's alleged title to the land is based.

As thus modified, we adhere to our former opinion, and the judgment of the district court for Lincoln county stands

REVERSED.

SEDGWICK, J.

I concur only in the result reversing the judgment of the district court.

LETTON, J., dissenting.

The evidence shows that Potter, the owner of the land, was a nonresident and that he was served by publication. Since the conclusion therefore rests upon that portion of the opinion which holds that a mortgagee is a necessary and indispensable party in an action to foreclose a tax lien under the statute of 1875, I am compelled to dissent. This is a new doctrine in this state and directly overrules what has heretofore been considered to be settled law. Moreover, the former cases are not specifically overruled. Since it is probable that lands have been purchased in reliance upon titles acquired under proceedings based upon the ruling formerly announced, the doctrine has become a rule of property which should not be interfered with. Neither do I agree to the proposition that such an action is purely one *in personam*. Its only purpose is to subject to sale a specific tract of land upon which the county and state have already acquired a lien, in order to pay the taxes levied and assessed against that particular tract. No personal judgment can be rendered and no deficiency enforced. It is an action *quasi in rem* and not purely *in personam*.

It is a settled rule in this state that a tax lien is superior to the lien of all other incumbrances, whether created before or after the inception of the lien. *Eddy v. Kimmerer,* 61 Neb. 498; *Merriam v. Goodlett,* 36 Neb. 384; *Mutual Benefit Life Ins. Co. v. Siefken,* 1 Neb. (Unof.) 860. A valid tax sale creates an independent title unconnected with and superior to all other interests. In administrative sales notice to the owner or occupant of the land is sufficient under the statute to bind all persons claiming interests therein. This is the general rule of other states. *Parker v. Baxter,* 68 Mass. 185; Black, Tax Titles (2d ed.) secs. 338, 340, 341.

We have held that the word "owner" in the 1875 statute, under which the foreclosure action was brought, means the same as when used in the general revenue law. In *Leigh v. Greene,* 62 Neb. 344, a like case to this, which held that one Patrick, a mortgagee, was not a necessary party, in the opinion by ALBERT, C., after reciting a number of provisions of the revenue law in which the word "owner" appears, it is said: "These, and many other provisions of the revenue act, clearly indicate that the legislature used the word 'owner' in the popular sense, the sense in which it is understood by the people at large; and having employed it in that sense in the other parts of the act, the inference is warranted that they used it in the same sense in the sections providing for the foreclosure of tax liens. *Tracy v. Reed,* 38 Fed. 69. At first sight, it may seem anomalous that a person should be concluded by a proceeding to which he was not a party and of which he had no notice. But it must be kept in mind that the procedure providing for the foreclosure of a tax lien is a part of the revenue system of the state, and that the necessities of a government will not always permit an overscrupulous regard for private rights. * * * In our opinion, Patrick was not the owner within the meaning of the statute, and the proceedings for the foreclosure of the tax lien were in substantial compliance with the statute, and conclusive against the whole world." This

case was appealed to the supreme court of the United States (193 U. S. 79), and affirmed upon another ground, but the holding of the opinion quoted, and in the same case on rehearing (64 Neb. 533), as shown in the fourth paragraph of the syllabus, as to the meaning of the word "owner" in this statute, has never been overruled or receded from by this court, and has several times been reaffirmed. *Clifford v. Thun*, 74 Neb. 831; *Hall v. Moore*, 75 Neb. 693.

It is certainly more in consonance with the proper conduct of the public business and the collection of money with which to carry on the affairs of government that the holder of a mortgage on a tract of land should be charged with the duty of protecting his lien by seeing, either that the taxes are paid by the owner of the equity of redemption, or by paying them himself, rather than by compelling the tax collector or the holder of the tax lien to search the records or to look for hidden liens, all of which by statute are subject and inferior to the lien of the taxes. The tax in this state is not levied upon the person owning the land or upon the lien holder. It is not a personal tax, and cannot be collected except from the land. It is the land itself that is charged with the payment. If the owner or occupant alone are entitled to notice in administrative sales, and a mere lien holder is bound to take notice of the statute, why is he not equally bound to take notice of other proceedings to enforce a tax which has been delinquent for years? I believe the former doctrine reaffirmed so recently by the court should be upheld. Even if the present construction might have been adopted at first, a rule of practice long approved should not be lightly set aside, especially when titles to land depend upon it. It is such vacillation that breeds litigation, since no lawyer can safely advise his client, when the court itself does not adhere to settled rules.

ROSE, J., concurs in this dissent.

The following opinion on motion for rehearing was filed December 18, 1912. *Rehearing denied; former opinion modified:*

PER CURIAM.

A motion in the alternative for a rehearing, or for a modification of our former opinion by striking out of the statement in the opinion, "and that Hoagland is not barred by the foreclosure proceedings, which were so far void as to fail to convey title to Wilcox," the latter clause of said statement. Upon a reconsideration of the case, it is *held* that the motion for rehearing be denied, and the motion to modify sustained. The words, "which were so far void as to fail to convey title to Wilcox," are therefore stricken out of our said opinion.

FORMER OPINION MODIFIED.

FRANK C. MARSH ET AL., APPELLEES, V. VILLAGE OF TRENTON, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,663.

1. **Municipal Corporations:** DETACHING TERRITORY: REVIEW. Upon an appeal from the judgment of the district court under section 8978, Ann. St. 1907, to detach territory from a village, the judgment of the district court will be affirmed, unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law. *Bisenius v. City of Randolph*, 82 Neb. 520; *Gregory v. Village of Franklin*, 77 Neb. 62; *Michaelson v. Village of Tilden*, 72 Neb. 744.
2. **Evidence** examined and found to sustain the judgment of the district court.

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

W. S. Morlan, for appellant.

C. E. Eldred and *J. W. Cole, contra.*

HAMER, J.

The appellees, Frank C. Marsh, John C. Stalter, George Hirschfield and five other persons, filed their petition in the office of the clerk of the district court for Hitchcock county, seeking to have certain territory therein described detached from the village of Trenton in said county. In addition to the allegations that they are legal voters, except as to a part, and the exclusive owners and in possession of said territory, they say in their petition (*a*) that when the village was incorporated large tracts of wild, grazing and purely agricultural lands "in all directions from and outside of the platted lots, blocks, streets and alleys of said village," including the lands and territory sought to be detached, were incorporated in said village; (*b*) that the lands and territory sought to be detached are purely agricultural, and are used by the owners "for farming, grazing and stock-raising, and as rural residences, and no part is laid out into village blocks, or lots, and there are no streets, alleys or thoroughfares except the public highway "on the section line dividing section 2, township 2, range 33, from section 35, township 3, range 33," and which road was laid out by the county commissioners and extends many miles east; and (*c*) that the case was submitted on the petition of the plaintiffs, Frank C. Marsh, John C. Stalter, George Hirschfield, John H. Brown, Ralph S. Otis, Nannie Marsh and Mattie Stalter, the amended answer of the defendant, the village of Trenton, and the reply, and the evidence; and that the court found in favor of the said plaintiffs named (the name of the plaintiff Thornhill being omitted from the list) and the territory disconnected by the judgment of the district court includes only the tracts indicated on plat "exhibit A" as the Hirschfield, Stalter, Marsh and Brown tracts,

leaving the Thornhill tract, including what had been a part of Wayne street and an unplatted tract west of it, between the Brown tract and the village, and also leaving between the Hirschfield tract and the village three small unplatted tracts and the park and a part of that territory formerly platted as "Wayne street of the village of Tren ton," all the land east of the village and between the Brown tract and the Hirschfield tract being left out of the judgment detaching the territory, and Wayne street seems to have been vacated after the proceedings were begun, and therefore an uncertain quantity of land, approximating 40 acres more or less, has been left unplatted between the village and the land sought to be retained in the village, and the east line of sections 35 and 2 are now the east boundary line of the corporate limits of the village of Trenton; (*d*) that the territory sought to be detached is no part of the village, does not conduce to the welfare of the village or its citizens, except that its retention in the village would enable the raising of more revenue, but that the assessment, levy and collection thereof would be unjust and inequitable. The plat filed with the petition shows the relative size of the several tracts sought to be detached. The amended answer admits the incorporation of the village, and that the plaintiffs respectively reside on and own the lands described in their petition, also alleges the lien of $6,000 in bonds upon all lands included in the village. The reply is a general denial. The land detached by the judgment of the court is as follows: Nannie Marsh's land, 5 acres; John H. Brown's land, 8.75 acres; Mattie Stalter's land, 300 feet by 634 feet; George Hirschfield's land, 300 feet by 300 feet. The land in question is shown by the plat attached to the record.

It is urged in the appellant's brief that these parties carry on business in the village or perform their official duties at the court-house in Trenton as county officers; that they and their families get their mail at the village post office; that they trade at the village stores, and send their children to the village school, and use the village

streets, and enjoy the convenience of having their purchases delivered by the merchants, and that they partake equally of all the benefits and advantages of village organization and government, along with the other inhabitants of the place. It is also said that the tracts are used chiefly as residences, but that they have small orchards, gardens and alfalfa patches, and keep domestic animals in the way of horses, hogs and cows. The judgment of the district court granted the petition of the plaintiffs, except as to the plaintiff Thornhill whose name is dropped from the proceedings.

It is contended by the appellant, the village, (1) that the petition does not state facts sufficient to constitute a cause of action; (2) that the finding and decree of the court is not sustained by sufficient evidence, and that the testimony introduced by the applicants clearly establishes the fact that the village could "reach out and connect the territory," and for that reason that the district court should not have granted the petition. It is urged that the petitioners "should not be allowed to secede over the objections of their fellow villagers." Section 8978, Ann. St. 1909, provides, among other things: "If the court find in favor of the petitioners, and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly." The case of the *Village of Hartington v. Luge*, 33 Neb. 623, is cited in support of the appellant's contention that the land might be annexed to the village, and therefore that it should not be disconnected. In the opinion in that case it is said: "It will be seen that to justify the annexation of territory it must appear that such territory, or some part, would receive material benefit from the annexation, or that justice and equity require such annexation. Unless one of these conditions exist, there is no authority in a village board or the district court to annex territory;" but, in the opinion it is said: "If this action could be sustained upon the facts pleaded and prayed, then a village might annex a whole township or county, as such

annexation could be placed upon the same grounds as it is sought to predicate this action upon. This cannot be permitted." It may be a little difficult to determine exactly what "justice and equity" require in this sort of case. In *City of Wahoo v. Dickinson,* 23 Neb. 426, it was held that the court had power, in a proceeding instituted for the annexation of territory to a municipality, to consider and determine whether that real estate would receive material benefits, and also whether justice and equity required such annexation.

In *Bisenius v. City of Randolph,* 82 Neb. 520, it is said by Mr. Justice ROOT, speaking for this court: "In *State v. Dimond,* 44 Neb. 154, * * * we adopted from the opinion of Mr. Justice Mitchell in *State v. Village of Minnetonka,* 57 Minn. 526, a definition of the conditions essential to vest county commissioners with power to incorporate territory within a municipality; that is, such lands must 'have some unity of interest with the platted portion, in the maintenance of a village government.'" Mr. Justice POST is quoted as saying in the opinion in *State v. Dimond, supra,* "that the rule applied is not only reasonable, but safe and logical." This court has said, in the third paragraph of the syllabus in *Bisenius v. City of Randolph, supra:* "Upon an appeal in an action under said statute (sec. 8978), the judgment of the district court will be affirmed, unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." It would seem that the foregoing rule disposes of this case. In that case Judge ROOT, in the body of the opinion, says: "Plaintiff's realty forms two compact tracts of farm land aggregating over 200 acres, separated only by a road; that not only is this land not platted, but there intervenes between it and the platted portion of defendant unplatted real estate used for pasturage." In the instant case there is an unplatted tract between the village and the land sought to be detached; also the land detached is not cut up into lots and blocks and streets and alleys. Judge

ROOT in the case cited further says: "None of the municipal improvements extend to plaintiff's said property, and he devotes said real estate to farming purposes exclusively." All that is said in the case cited touching the failure of municipal improvements to extend to the plaintiff's property applies to the instant case. In the case cited it was alleged and proved that the village was ready to furnish the plaintiff with electric lights. Notwithstanding that fact, this court, through Judge ROOT, say: "Notwithstanding this evidence, we are of opinion that the land under consideration does not have a unity of interest with the platted part of said city in the maintenance of municipal government, and that the district court ruled correctly in so finding. We are bound by those findings, unless it appears that the trial judge committed an important mistake of fact or an erroneous inference of fact or of law, and that he has not done." The opinion cites *Michaelson v. Village of Tilden*, 72 Neb. 744, and *Gregory v. Village of Franklin*, 77 Neb. 62. The authorities cited sustain the position taken.

In *Michaelson v. Village of Tilden*, this court held that a judgment of the district court in a proceeding under the statute to detach territory from a municipal corporation would not be impeached upon appeal, in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of fact or of law. The foregoing is substantially the syllabus adopted in that case. The case seems to be on a parallel with the instant case. The action was a proceeding by the owners in severalty of contiguous tracts of land to procure their detachment from the village of Tilden. Commissioner AMES wrote, in the body of the opinion: "In the absence of evidence of any specific fact or circumstances tending to impeach the justice of the decree, we do not see how we can intelligibly revise it." He says that the trial judge was probably personally familiar with the land and with the village and with the situation and surroundings, and that his judgment may have been influenced "by evidence

of the most weighty character. * * * If the record disclosed anything from which it might be contended that the judge committed an important mistake of fact, or had made an erroneous inference of fact or of law, the case would be other than it now is, and might call for a review, and a reversal or affirmation of his findings." The learned commissioner concludes: "We do not see how his determination can be impeached for want of equity, in the absence of apparent error in some of the respects named."

In *Gregory v. Village of Franklin*, 77 Neb. 62, it was held: "A judgment of the district court in a proceeding under the statute, * * * to detach territory from a municipal corporation, will not be impeached upon appeal, in the absence of a showing that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." The former case of *Michaelson v. Village of Tilden*, 72 Neb. 744, was followed and approved. In that case the village contended that at the time of its incorporation it had a population of 290, and that its population had increased until the village contained 900 inhabitants; that the plaintiffs became severally owners of said land a long time after the incorporation, with full knowledge that the land was included within the corporate limits of the village. It was admitted that the land was used for agricultural purposes, but alleged that it was adapted to being cut up into residence lots. Commissioner OLDHAM, in writing the opinion of this court in the case last cited, emphasizes the holding of the court in *Michaelson v. Village of Tilden*, 72 Neb. 744, to the effect that a judgment in a proceeding under the statute "to detach territory from a municipal corporation will not be impeached upon appeal, in the absence of a showing that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." He says: "There is certainly nothing before us in this record that shows either a mistake of law or fact by the trial judge. The right to have unplatted farm lands disconnected from the corporate limits of cities and villages has been asserted

by this court in actions entirely independent of this section of the statute." He concludes with the statement that "there is nothing in the answer of the village which interposes an equitable objection to the prayer of the petition." The judgment of the district court was affirmed.

In *Village of Wakefield v. Utecht,* 90 Neb. 252, section 8977, Ann. St. 1909, was construed and was "held broad enough to permit a village located upon the border of one county, in a proper case, to annex contiguous territory situated in an adjacent county," but it was held that the burden of proof "in an action to annex additional territory to a village * * * is upon the village to establish by sufficient averments and evidence that the territory sought to be annexed will be benefited by the annexation, or that justice and equity require that such territory be annexed." It was held that the evidence was insufficient to sustain the decree which annexed certain territory to the village of Wakefield.

In *Winkler v. City of Hastings,* 85 Neb. 212, it was held: "Where legislative power to detach territory from a city has been delegated by statute to the mayor and council, an appeal from the action of that body in refusing to disconnect particular tracts cannot be made the means of transferring such power to the district court." In that case the court cited the *City of Hastings v. Hansen,* 44 Neb. 704, where it was held that "the power to create municipal corporations and the power to enlarge or restrict their boundaries are legislative powers; and it has been doubted if the legislature can pass a valid act giving courts jurisdiction to disconnect by decree any part of the territory of a municipal corporation of the state merely at the suit of the owner thereof." Judge ROSE, in delivering the opinion of this court in *Winkler v. City of Hastings,* said that the form in which the act amending section 4 of the charter in that case was passed conferred upon the mayor and council authority to detach territory by ordinance, and that the same was legislative; that, "in attempting to confer the same power upon the district court by direct appeal

from the action of the mayor and council if they refuse to pass an ordinance detaching territory on demand of a landowner, the legislature did not observe the following provisions of the constitution: * * * Const., art. II, sec. 1. This section of the constitution prohibits the judicial department from exercising any power properly belonging to the legislative department, and the effort to confer upon the district court legislative authority to sever agricultural and horticultural lands from the city of Hastings in the manner described invalidates the amendment to section 4 of the Hastings charter." In the opinion he distinguishes between the principle involved in the instant case and the *City of Hastings v. Hansen* and *Winkler v. City of Hastings, supra.* Section 1, art. III, ch. 13, Comp. St. 1901, provides that cities having more than 5,000 and less than 25,000 inhabitants shall be governed by the provisions of this act and be known as cities of the first class. Section 4 provides that the corporate limits of such city shall remain as heretofore, and the mayor and council may by ordinance include therein all the territory contiguous or adjacent which has been subdivided into parcels containing not more than five acres, and in the same way may compel the owners of lands so brought within the corporate limits to lay out streets, ways and alleys, and may vacate any public road to secure regularity in the system. Section 5 provides that land shall be deemed contiguous to such city though a stream, embankment or strip of land not more than 200 feet in width lies between said land and the corporate limits of the city. Section 6 authorizes the proprietor of land within the corporate limits, or continguous to the same, to lay out and plat into lots and blocks and streets and alleys, and to acknowledge the instrument before an officer, and to dedicate the streets and alleys to the use of the public, and to file and record the instrument in the office of the register of deeds, when it shall have the effect of a deed in fee simple conveying the same from the proprietor to the city. Power is given the city, through its mayor and council, by ordinance

to vacate any plat or addition as the city may deem for its best interests, the power to be exercised upon the petition of the owner. It was this power directly conferred by statute upon cities of the first class, to which Hastings belongs, that gives such cities exclusive jurisdiction to detach territory and to vacate platted parts of the city. This authority does not belong to towns and villages.

Under the rule laid down in *Bisenius v. City of Randolph, supra*, and the decisions of this court upon which the opinion in that case is based, the judgment of the district court was properly exercised, and there appears to be no reason for setting aside its judgment. As announced in *Bisenius v. City of Randolph, Michaelson v. Village of Tilden*, and *Gregory v. Village of Franklin, supra*, a judgment in a proceeding under the statute "to detach territory from a municipal corporation will not be impeached upon appeal, in the absence of a showing that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." There is no such showing, and the judgment of the district court seems to be fully warranted.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J.

I concur only with result affirming the judgment of the district court.

ROSE, J., dissents.

JONATHAN HEYWOOD ET AL., APPELLANTS, V. JOSEPH HEYWOOD ET AL., APPELLEES.

FILED SEPTEMBER 28, 1912. No. 16,665.

1. **Wills:** CONSTRUCTION. The provisions of a will, like all other contracts, must be construed with a view of carrying out the intention of the testator, and unless there is something in it con-

trary to the law of the state, or in contravention of public policy, it will not be declared invalid. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796.

2. ———: ———: AMBIGUITY. The testator was the owner of a 240-acre farm "in Pleasant Valley township," otherwise described as the west half of the northwest quarter of section 13, and the south half of the northeast quarter, and the east half of the southeast quarter of section 14, all in township 19, of range 5 east of the sixth principal meridian, in Dodge county, on which resided his two sons, Joseph Heywood and Thomas J. Heywood, who were farming the same, and to whom he desired to devise the said farm subject to the life estate of his wife, Katherine Heywood, and he so informed the witness who drafted the will, and who then made a rough draft of the proposed will from which he shortly afterwards prepared the will itself, leaving out of it one of the three eighties which constituted the farm; at the time the will was made the testator only owned one farm "in Pleasant Valley township," and he owned in township 19, of range 5 east, the 240 acres of land above described and no other land in that township, so that the land is identified with the particular farm intended to be devised to the two particular sons so named in the will.

3. ———: ———: EXTRINSIC EVIDENCE. Where the intention of the testator is to be gathered from the will itself and from the extrinsic evidence of facts surrounding its execution, such extrinsic evidence is admissible for the purpose of ascertaining whether a state of facts existed at the time the will was written which corresponded with the words used and the aim of the testator. Such evidence may not be admitted to vary the terms of the will or to add anything to it so as to arrive at an intention not expressed in it, but to harmonize the language used by the testator with the facts referred to, and thus to arrive at the testator's intention as expressed in the will, and a ruling which makes the will and the facts inconsistent is not to be adopted.

4. Evidence examined and found to sustain the judgment of the district court.

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

F. W. Button, for appellants.

A. H. Briggs, contra.

HAMER, J.

This is an appeal from a judgment of the district court for Dodge county construing a will and quieting title in Joseph Heywood and Thomas J. Heywood, subject to the life estate of Katherine Heywood, in 240 acres of land described as the west half of the northwest quarter of section 13, and the south half of the northeast quarter and the east half of the southeast quarter of section 14, all in township 19, of range 5 east of the sixth principal meridian, in Dodge county. It is claimed by the appellants that the evidence is insufficient to support the decree. It is urged that the 80-acre tract in section 13 was not included in the will, and therefore that it descends to the heirs. Omitting the formal part of the will it reads: "First. I order and direct that my executrix, hereinafter named, pay all my just debts and funeral expenses as soon after my decease as conveniently may be. Second. After the payment of such funeral expenses and debts, I give, devise and bequeath my entire estate, both real and personal, to my beloved wife Katherine Heywood, she to have and to hold the same as long as she may live. Third. After the death of my said wife, to be divided as follows, to wit: To my son Jonathan Heywood, the sum of ($100.00) one hundred dollars. To my son Joseph Heywood, the undivided one-half of the 240-acre tract in section 14, township 19, range 5, Dodge Co., Nebraska. To my son Thomas Heywood, the undivided one-half of the 240-acre tract of land in section 14, township 19, range 5, Dodge county, Nebraska. To my son Barney Heywood, the southeast quarter S. E. ¼ sec. 10, township 19, range 6. To my son Edward Heywood, the east half of southwest quarter of section 10, and the east half of the northwest quarter of section 15, all in township 19, range 6, Dodge county, Neb. To my son Nick Heywood, the east half of the northwest quarter section 10, township 19, range 6, and the south half of the southwest quarter of the southwest quarter of section 15, township 18, range 6,

Dodge county, Neb. Fourth. Each one of my sons is to pay whatever incumbrance there may be against the tract of land he is to receive. Fifth. To my daughter Annie Metschke, the sum of five hundred dollars ($500.00) shall be paid. Sixth. I direct that all personal property remaining after the death of my said wife, shall be sold, and from the proceeds the bequests heretofore named, to my son Jonathan Heywood and my daughter Annie Metschke, as well as all other debts shall be paid, and should anything remain, same shall be divided share and share alike amongst my seven children or their heirs."

It will be seen that there is no mention in the will of the 80-acre tract of land in section 13 above mentioned. The evidence shows that the testator at the time of making the will was the owner of the 80-acre tract above described, and that it was a part of his farm "in Pleasant Valley township." He owned a 240-acre farm in township 19 north of range 5 east, and that was his farm "in Pleasant Valley township." The two sons, Thomas and Joseph, were in possession of this 240-acre tract and were farming it together. The three 80-acre tracts joined, and together made the one body of land. The witness who drafted the will testified that he made a rough draft of the proposed will according to the wishes of the testator, and then from that draft prepared the will itself. This witness testified that the testator stated to him that he wished to give to his sons, Joseph and Thomas, "the land in Pleasant Valley township." They were to have 240 acres of land in that township, each to receive an undivided one-half. The record shows that the testator only owned in township 19 of range 5 the 240 acres of land above described. There is uncertainty because the 80-acre tract is omitted from the will. The testator owned only one farm in "Pleasant Valley" township, and that farm was occupied by the two sons mentioned. The parol evidence would seem to remove all uncertainty concerning the intention of the testator. His purpose was to give the two sons mentioned the land in "Pleasant Valley," subject to the rights of the widow, Katherine Heywood.

The case of *Lomax v. Lomax*, 218 Ill. 629, 6 L. R. A. n. s. 942, cited in appellant's brief, would not seem to be in point, because the testator in that case owned many tracts of land, some of which he did not include in the will or attempt to devise. "It is a rule, in construing deeds or wills, that the intention of the grantor or testator, as manifested by the words of the writing in connection with surrounding circumstances, must be carried into effect, provided in so doing no rule of law is violated or sound policy disturbed." *Pool v. Blakie*, 53 Ill. 495. This rule was adopted by this court in *McCulloch v. Valentine*, 24 Neb. 215, and in *Lesiur v. Sipherd*, 84 Neb. 296. The language used in the syllabus in *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, is: "The provisions of a will, like all other contracts, must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, it will not be declared invalid." In *Daugherty v. Rogers*, 119 Ind. 254, 3 L. R. A. 847, the will contained: "I will, devise and bequeath to Philo Rogers, the young man I raised, in addition to what I have already given him, the further sum of $500." At the time this will was executed the testator held six notes against the legatee named, calling in the aggregate for the payment of $6,000. Suit was brought on the notes by the administrator. In the opinion rendered the court quotes the maxim of Lord Bacon concerning what he defined to be an ambiguity: "That which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." The court also cites *Hawkins v. Garland's Adm'r*, 76 Va. 149, 44 Am. Rep. 158. In discussing the matter of ambiguity the Indiana court said: "Whenever, therefore, in applying a will to the objects or subjects therein referred to, extrinsic facts appear which produce or develop a latent ambiguity, not apparent upon the face of the will itself, since the ambiguity is disclosed by the introduction of extrinsic

facts, the court may inquire into every other material extrinsic fact or circumstance to which the will certainly refers, as well as to the relation occupied by the testator to those facts, to the end that a correct interpretation of the language actually employed by the testator in his will be arrived at." In stating affirmatively the purpose for which extrinsic evidence may be admitted, the court say it is "to connect the instrument with the extrinsic facts therein referred to, and to place the court, as nearly as may be, in the situation occupied by the testator, so that his intention may be determined from the language of the instrument, as it is explained by the extrinsic facts and circumstances. *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328, 336, and cases cited." A large number of American and English cases are referred to in the opinion. The court continues: "Thus, where a devise was to the children of the testator, upon inquiry it was discovered that he had no children, but there were other persons concerning whom he had always, or habitually, spoken as his children, and it was held that they were the persons intended. This brings us to a point where the general principles above stated may be applied to the case under consideration. Looking at the will, it is at once apparent that the object of the testator's bounty, so far as the subjects herein involved are concerned, is the young man he had raised; that primarily the subject of disposition was the further sum of $500, and that the intention of the testator respecting the object and subject was, that the young man he had raised should receive a legacy of $500, in addition to what he had heretofore given him." It was held that the administrator could not recover, and that the purpose of the devise was to give the devisee the $6,000 included in the notes. The doctrine laid down in the cases above cited is sustained by *Wootton v. Redd's Ex'r*, 53 Va. 196. It seems reasonable, and sustains the lower court.

The judgment of the district court for Dodge county is

AFFIRMED.

ROSE and SEDGWICK, JJ., concur in the result affirming the judgment of the district court.

LULA BOXA, APPELLANT, V. GEORGE BOXA, APPELLEE.

FILED SEPTEMBER 28, 1912. No. 17,010.

1. **Divorce:** EVIDENCE. The evidence examined, and is *held* to justify a decree of divorce upon the grounds of extreme cruelty and habitual drunkenness.
2. ———: CUSTODY OF CHILDREN. It is also *held* that the plaintiff is the only proper custodian of the two children who at the time of the trial were one and three years old, respectively.
3. ———: ALIMONY. Where the situation of the parties and the possible contingencies are such that the amount of alimony to be paid cannot be placed in a lump sum without danger of hardship to the defendant, and uncertainty as to the plaintiff, the court should provide for the payment of a stated sum of money to be divided and distributed over fixed periods of time.

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

Brown & Venrick, for appellant.

B. F. Good, E. E. Placek, Charles H. Sloan, Frank W. Sloan and *J. J. Burke, contra.*

HAMER, J.

Lula Boxa brought an action against George Boxa in the district court for Saline county praying a divorce from the bonds of matrimony on the grounds of extreme cruelty and habitual drunkenness. She also asked for the custody of the minor children born of the marriage, and an allowance for the maintenance of the children, and alimony and attorneys' fees. The husband, Boxa, denied the allegations made by his wife, and asked for a restoration of his

family relations. There was a reply filed to the answer, and upon the trial the court found generally for the plaintiff upon the allegation of habitual drunkenness, and entered a decree granting the divorce as prayed, awarding the custody of one child to plaintiff and one to defendant, giving plaintiff judgment for $700 alimony, $300 attorneys' fees, and directing the defendant to pay $200 per annum for support of Julia Boxa, the minor child awarded the plaintiff, until the amount paid should amount to $2,000, upon condition that the child lives and plaintiff keeps the custody thereof.

An appeal is taken by the plaintiff upon the grounds: (1) That the custody of both children should have been awarded to her; and (2) that she should have been awarded a greater sum as alimony and for maintenance of the children. The children are two little girls. At the time of the trial one was three years old and the other was one year old. The custody of the elder child was awarded to the defendant, and the custody of the younger was awarded to the plaintiff.

In the determination of questions touching the custody of a minor child, the policy of our law is to make such a disposition of the child as is for the child's best interest, with due regard to any superior legal right of custody supposed to exist in either parent. Comp. St. 1911, ch. 25, sec. 15; *Sturtevant v. State,* 15 Neb. 459; *Giles v. Giles,* 30 Neb. 624; *State v. Schroeder,* 37 Neb. 571; *In re Burdick,* 91 Neb. 639. There is no question of the fitness of the plaintiff for the custody of her children. The defendant himself testified that she was a good woman, and that she was conscientious in the performance of her duties.

The defendant is found by the court to be an habitual drunkard, and counsel for the defendant concede the correctness of the conclusion of the court in this particular upon the record. In addition, it appears that the defendant has been guilty of many acts of cruelty towards his wife, and he has been guilty of other acts which show that he is a man of vicious habits, and coarse and violent in his

nature. The exhibition of these habits and tendencies has been of frequent occurrence about the home. The evidence shows that he would go to town and get drunk, but he was not satisfied with that, he would come home and be drunk and abusive about the house. The plaintiff testified that her husband frequently struck her and abused her, and called her vile and vulgar names. He did not confine his drunkenness to occasional sprees, but at times he would get drunk every day and abuse his family every day.

Under the circumstances, the best interest of the child awarded to the defendant would seem to demand that her custody be awarded to the plaintiff. The defendant is the owner of a farm of 240 acres, worth from $17,600 to $20,400, subject to an incumbrance of $3,300. He also has considerable personal property, although the value of it is not in evidence. It is at least sufficient to enable the defendant to cultivate and care for his land. The court awarded the plaintiff $700 alimony, and required the payment of $300 for plaintiff's attorney fee and $200 a year for maintenance of the child awarded to the plaintiff.

While no hard and fast rule can be laid down for computing the amount of alimony to be awarded, it is the endeavor of the court to award such an amount as is just and equitable, taking into consideration the duration of the married relation, the amount contributed by each party, the amount of the estate, and the earning capacity of the defendant. The defendant is a young man, strong and vigorous, and the possessor of a good farm of 240 acres, 80 acres of which farm was acquired during the existence of the marriage. Considering his years, his earning capacity, and the labor of his wife, the amount awarded seems to be insufficient. We therefore modify the decree by adding to the award to the plaintiff the custody of the child Helen, and the alimony to be paid by the defendant to the plaintiff is increased to $3,500, of which there shall be payable January 1, 1913, $1,200, payable January 1, 1914, $1,200, and payable January 1, 1915, $1,100, and in addition the defendant shall pay to the plaintiff for the maintenance of

the children $300 a year during their minority, beginning on the 1st day of June, 1913, and, as modified, the decree is affirmed.

AFFIRMED AS MODIFIED.

FREDERICK GEORGE, APPELLEE, V. MARY PRACHEIL ET AL., APPELLEES; JOSEPH VRBSKY, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 17,033.

Judicial Sales: SALE BY REFEREE: COMPLETION OF BID. Where a bidder at a referee's sale, shortly before the sale was closed, claimed that a railroad company owned and occupied a right of way across the tract offered which reduced the number of acres to be conveyed, and so should reduce the aggregate of the sum to be paid; *held*, (1) under the evidence, that the alleged ownership and the occupation of such right of way strip by the railroad company constituted merely an easement likely to be divested under the terms of the deed if it abandoned the road or changed its track therefrom, and that the court authorized the sale of the tract as a whole, and that the purchaser could not impose terms upon the referee or make a bargain with him unauthorized by the court; (2) that, the court having authorized the sale of the tract as a whole, the purchaser took such rights only as the referee could convey to him, which included the whole tract, subject to the easement of the railroad company; (3) that a bid at a referee's sale is only a proposal to buy, which may be withdrawn by the bidder at any time before the crier signifies his acceptance thereof (*Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281), but, appellant's bid in this case having been accepted without any intimation of withdrawal, he is liable at the rate per acre bid by him for the entire 80-acre tract offered for sale by the referee.

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

Bartos & Bartos, for appellant.

J. G. Beeler, contra.

HAMER, J.

Joseph Vrbsky was the purchaser at a referee's sale of the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 34, in township 7 north, of range 4 east of the 6th P. M., in Saline county. At a hearing in the district court for Lincoln county an order was made that the purchaser, Vrbsky, pay to the referee $524.60 as a balance of the purchase price of a tract of 80 acres of land sold at a public sale held by a referee under an order of the district court for Lincoln county. The court found: "That said land was offered in a tract of 80 acres. * * * That said Joseph Vrbsky offered therefor $86 per acre for the tract, and that his bid was accepted; that just prior to the time that his bid was accepted, and just before the sale was closed, a question was raised by said bidder as to whether said tract contained 80 acres, and it was claimed that the railroad had a deed for 6.10 acres through said tract; that after some negotiations between the parties, some understanding was arrived at, upon which the evidence is conflicting, the referee claiming that said Joseph Vrbsky was to pay $86 per acre for 80 acres, and said Joseph Vrbsky claiming *that the court should determine the title by which the railroad sold its strip through said premises.*" The court then found that the deed to the railroad company contains language as follows: "Do hereby grant and convey unto the said railroad company and to their successors and assigns forever the following piece or parcel of land, situate in the county of Saline, state of Nebraska, to wit: A strip of land through the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) and the southeast quarter (S. E. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) of section thirty-four (34), in township seven (7) north, of range four (4) east, according to the survey and located line of said railroad company, one hundred (100) feet in width, being fifty (50) feet on either side of the center line of the road of said company as located or to be

located by the engineer of the said railroad company for the construction of the same from the city of Omaha, in Douglas county, in said state, to such point as may be herein designated, to have and to hold the same unto the said railroad company and to their successors and assigns forever, provided that in case said railroad company do not construct their road through said tract, or shall after construction permanently abandon the route through said tract of land, then the same shall revert to and become reinvested in the said grantors, heirs and assigns." It is further found that Vrbsky paid to the referee on the day of sale $1,061.65, and that he has since paid $5,293.75, making a total of $6 355.40, and that these payments were made with the knowledge upon the part of the said Vrbsky that the said railroad crossed said land, and with the knowledge of the provisions of said deed. The court further found that the said railroad company took only an easement in the land occupied by its railroad, and that the intention of the grantors and of the grantee, the Omaha & Northwestern Railroad Company, was that only an easement should be created by the deed, and that such easement should be used for the construction of this line of railroad through said lands, and should revert to the said grantors, their heirs and assigns, if said railroad company did not construct their road through said tract, or should after construction permanently abandon the road. The court then found it unnecessary to pass upon the question as to just what arrangements were made between the referee and said Vrbsky, as the above finding of the court as to the said strip of land through said described premises being an easement made said Vrbsky liable for the payment of $86 per acre, making the total sum to be paid $6,880, upon which said Vrbsky had paid $6,355.40, leaving a balance unpaid of $524.60. The court then adjudged that said Vrbsky pay to the referee the said remainder unpaid, with interest at 7 per cent., and that the referee deliver to him upon such payment a deed for the premises.

This case is an appeal from this order of the district court. There is no notice to be taken of the original partition suit, and there is no question of the regularity of the proceedings in any way. There is only the question as to whether the purchaser shall pay for the 6.10 acres of land occupied by the railroad track. It is said in appellant's brief that "it must be conceded, we think, that if said deed is merely an easement, then the appellant herein, being charged, as the court has found, with notice thereof, must fail in his appeal." Counsel cite numerous cases showing that the violation by the grantee of a condition touching forfeiture causes the land to revert to the original grantor or his heirs. The court will look at the entire deed for the purpose of ascertaining what the grantor and grantee intended. The use of the word "forever" in connection with the provision that, if the railroad company did not construct its line through the tract and should abandon its route, then the same shall revert to and become reinvested in the grantors and their heirs and assigns, is not inconsistent with the purchaser's contention that the grantor permanently disposed of his interest. The intention of the grantor and grantee would seem to be that if the road is not built the title shall revert, or if it is abandoned then the title shall revert. The conveyance is apparently for the purpose only of enabling the road to occupy the strip for right of way alone, and that can give no more than an easement. It is beyond the power of the purchaser to compel the court to try title to the land purchased by him before he buys and pays for it. The purchaser can only take such title as the referee has to give him, and only so much land as the referee has to sell, and when the referee sold the tract described he did not warrant title to the strip. It was the duty of the referee to sell that strip along with the other land included in the government subdivisions which he was selling. A sale made by a referee is a sale by the court. It is analogous to a sale made under the direction of the court in a case of mortgage foreclosure under order of sale, or a sale of

real estate under an execution. The action of the referee or of the sheriff or other administrative officer of the court is simply a sale of what there is to offer, and no more and no less. We do not believe that the purchaser may impose terms or conditions of any kind upon the referee or the sheriff or other person authorized to conduct the sale. If so, then the purchaser can substitute the condition of his bid for the conditions of the decree.

In the case of the *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, it was held (*a*) that a judicial sale must be made in accordance with the decree of the court, and its terms cannot be changed by agreement of parties or counsel not incorporated into the record; and (*b*) the officer conducting the sale is not required to entertain any bids coupled with conditions not in conformity with the terms of the decree. In that case there was a proposed purchaser bidding more than the purchaser who obtained for itself the order of confirmation, but if the bid was higher it was "subject to all prior liens except $1,568.70." In that case it was the contention of the agent of the purchaser that the decree in the case was rendered in pursuance of a stipulation which was entered into to the effect that the trust company creditor would be satisfied with the collection of the $1,568.70. It was the contention of the debtor, the Nebraska Land, Stock Growing & Investment Company, that upon the payment of this $1,568.70 it was entitled to have the decree set aside, and the bids of the proposed purchaser, or at least some of them, were made with that purpose in view. The affidavits on file in that case are said by the opinion to show that the condition attached to the bids of the prospective purchaser was for the purpose of enforcing the understanding had between the Nebraska Land, Stock Growing & Investment Company and the creditor, the Nebraska Loan & Trust Company. In that case Commissioner IRVINE, delivering the opinion of this court, cited *Swope v. Ardery*, 5 Ind. 213, to the effect that the bid was wholly inadmissible, and, also, *Moore v. Owsley*, 37 Tex. 603, where it was held:

"We understand the law governing sales at public auction to be, where the sale is advertised to be on specific and restricted terms, any bid made at that sale not in strict conformity with the terms advertised is no bid at all, and the crier is not bound to notice the same."

Counsel for appellant say in their brief: "The court held that the said condition in said deed was in law a condition subsequent, and that the failure on the part of the railroad company to comply therewith operated as a forfeiture of the estate conveyed." *Hamel v. Minneapolis, St. P. & S. S. M. R. Co.*, 97 Minn. 334; *Jetter v. Lyon*, 70 Neb. 429; *Louisville & N. R. Co. v. Corington*, 65 Ky. 526. An examination of these authorities seems to justify the conclusion reached by counsel. This conclusion, fully expressed, would seem to be that whatever title, right or interest in the land has been conveyed to the railroad company reverts to the original grantor, his heirs or assigns, if there is a forfeiture depending upon the condition of the deed being broken, and the same is broken.

In *Hamel v. Minneapolis, St. P. & S. S. M. R. Co., supra*, the plaintiff had conveyed a strip of land for right of way purposes across his farm and two strips adjoining thereto, one on the north and one on the south, for yard and station purposes to the Minneapolis & Pacific Railway Company, subject to all the rights and liabilities to which the defendant had succeeded. The consideration for the conveyance was: "'If said second and third strips shall not be used for station purposes for the period of one year at any one time, the same and said first strip shall revert to and revert in the the party of the first part.' *Held*, (*a*) that the condition was in law a condition subsequent, and that a failure on the part of the railroad company to comply therewith operated as a forfeiture of the estate conveyed; (*b*) that the words 'station purposes,' as used in the contract, were intended by the parties to mean to refer to a regularly operated railroad station, at which business might be conducted with the railroad company as at its other stations; and (*c*) that, as defendant has

failed to comply with the conditions by maintaining such a station, title to the property in question reverted to plaintiff."

In *Jetter v. Lyon, supra,* it was held: "A condition in a deed conveying real estate, by which it is provided 'that no malt, spirituous or vinous liquors shall be kept or disposed of on the premises conveyed, and that any violation of this condition, either by the grantee or any person claiming rights under him or her, shall render the conveyance void, and cause the premises to revert to the grantors, his heirs and assigns,' is a valid condition subsequent which, until broken, runs with the land. On a breach of such condition the grantor, if living, or, if dead, his heirs, may claim a reversion of the estate and can maintain an action in ejectment to recover it." The opinion in that case was delivered by Judge BARNES who was then one of the commissioners. It is said on page 433 of the opinion: "The provisions of the deeds in question constituted a condition subsequent. The title to the property vested in the several grantees, and, finally, in Jetter, conditionally, to be divested on his failure to comply with the conditions by which it was provided that he should hold it. * * * The condition was a valid one, and in all of the adjudicated cases has been held to be a condition subsequent which runs with the land, until broken." Numerous authorities are cited, including, among others, *Smith v. Smith,* 64 Neb. 563. It is further said in the opinion: "The provisions of the deed seem plain to us, beyond all question. There can be no doubt as to what was intended by the parties thereto. And, while its language clearly shows it was intended that Ramey should be bound by a personal covenant never to sell, or permit to be sold, intoxicating liquors on the premises, yet, it still more clearly shows it was further intended that the estate in the premises should be conveyed merely upon the condition that neither Ramey, nor any one holding under him, should ever do any act prohibited by the covenant. * * * We hold that, by the language contained in the deed from Lyon to

Ramey, a valid condition subsequent was created upon the continued observance of which, by the grantee and those claiming under him, the estate conveyed to them depended; and that, whenever either of them committed a breach of the conditions, the grantor, if living, or, if dead, his heirs were at liberty to claim the estate and could maintain a suit in ejectment to recover it."

In *Louisville & N. R. Co. v. Covington, supra,* the Louisville and Nashville road had come into possession of the Portage railroad company and all its rights of way by purchase. It took up part of the track and ceased to use a certain other part. In a suit brought by the heirs for the entire right of way conveyed by E. M. Covington, alleging that the right of way had been abandoned and that the Louisville and Nashville road had no right to purchase or hold any part of it, *held* "that the law imposed the additional condition upon the conveyance that the right of way should continue to be used for the purposes contemplated, and that a reversion would result from abandonment or nonuser; that, as to that part of the right of way from Adams street to the town terminus, the abandonment was complete, and plaintiffs were entitled to recover it, but, as to the remainder of the right of way, which has continued to be, and is still, used for a railway, as contemplated in the conveyance, there is no forfeiture or abandonment."

"A partition sale is a judicial sale." *Kazebeer v. Nunemaker,* 82 Neb. 732.

"All sales made by order or decree under the direction of the court and requiring confirmation by the court are judicial sales." *Kazebeer v. Nunemaker,* 82 Neb. 732. "The purchaser at a judicial sale upon the foreclosure of a mortgage upon confirmation acquires the title of all the parties to the action, and nothing more." *Kerr v. McCreary,* 84 Neb. 315. It is not the land itself that is sold at the judicial sale, but only the interests of the parties to the suit. *Currier v. Teske,* 84 Neb. 60. At the foreclosure sale the bidder was John Campbell, the owner of

the mortgage deed and the plaintiff in that action, and the sale was confirmed "to the purchaser, John Campbell. * * * The sheriff's deed recites that Schmideke was the purchaser at the sale. Under these circumstances, after the lapse of so many years, and considering that Campbell never made any claim that the deed was void, and through his agent accepted and retained the purchase money and caused the deed to be executed to Schmideke, it will be considered that he became by equitable assignment the owner of Campbell's interest in the bid, that the deed was made pursuant to such assignment, and that he thereby became vested with all interests that Campbell then had. The purchaser at a foreclosure sale buys all the interests of all the parties to the suit. Code, sec. 853; *Young v. Brand,* 15 Neb. 601; *Dodge v. Omaha & S. W. R. Co.,* 20 Neb. 276; *Buchanan v. Griggs,* 18 Neb. 121. That which was sold, therefore, was the life estate of Eugene Currier and Campbell's unforeclosed mortgage on the plaintiff's equity of redemption. At the sale the interest of the defendant sold for $500, while the amount of the decree was $367.87. The proceeds of the defendant's interest, therefore, paid the mortgage debt and extinguished the lien on plaintiff's equity of redemption. So that, when Campbell sold to Schmideke, he sold the life estate which he had foreclosed upon and purchased, and that alone. * * * The defendants assert that it was 'the land itself' that was sold, and not the life estate, but this cannot be true. The interests alone of the parties to the suit were sold. To hold otherwise would be to deprive one of property without due process of law. The purchaser at a foreclosure sale must advise himself of the title he buys, and when the real owner of the fee is not made a party he cannot deprive him of any of his rights by the purchase." "A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all the parties to the action." *Arterburn v. Beard,* 86 Neb. 733. The bid only amounts to a proposal to buy, and until the crier of the

sale, by the fall of the hammer or other recognized act of acceptance, signifies assent to the proposal there is no contract, and the proposal may be withdrawn. *Nebraska Loan & Trust Co. v. Hamer,* 40 Neb. 281; *Fisher v. Seltzer,* 23 Pa. St. 308; *Blossom v. Railroad Co.,* 3 Wall. (U. S.) 196; *Payne v. Cave,* 3 T. R. (Eng.) 148. Before the purchaser paid any money he knew what the facts were. He knew that the railroad occupied the strip. He therefore bought with his eyes open. It was his business to see what his legal rights were before he paid any money down on the purchase. In *Fisher v. Seltzer, supra,* it was said: "The brief interval between the bid and its acceptance is the reasonable time which the law allows for inquiry, consideration, correction of mistakes, and retraction. This privilege is of vital importance in sheriff's sales, where the rule of *caveat emptor* operates with all its vigor."

Under the evidence and the authorities cited, we conclude, first, that the whole tract of land offered, being 80 acres and including the strip of land across it occupied by the railroad company as its right of way, was included in the sale, and that the alleged ownership of the railroad company and its occupation of the right of way constituted merely an easement, likely to be divested if the railroad company abandoned its road or changed its track therefrom; second, that the purchaser could not impose terms upon the referee or make a bargain with him which was unauthorized by the court; that the court authorized the sale of the 80-acre tract as a whole, including the right of way of the railroad company, and that the purchaser took such rights only to the land as the referee had and could convey to him under the order of the court; third, that the bidder was not obliged to take the land because of his bid, and that the bid only amounted to a proposal to buy which might be withdrawn at any time until the crier signified his assent to the proposal, but as he did not withdraw his bid, and the same having been accepted without any intimation of withdrawal, appellant is liable at the rate per acre ($86) bid by him for the entire 80-acre tract offered for sale by the referee, including the right of way.

The judgment of the district court is sustained by the evidence and the decisions of this court, and it is

AFFIRMED.

ROSE, J.

I concur in affirmance.

SEDGWICK, J.

I concur in the result affirming the judgment.

KATE M. HOLLADAY, APPELLANT, V. WILLIAM HENRY RICH ET AL., APPELLEES.

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1. **Deeds:** EQUITABLE TITLE. Where the plaintiff was the daughter of the decedent, and became possessed of $300 by devise, and gave the same to her father toward his support, and also turned over to him her earnings during many years as a teacher, for the same purpose, and after her marriage she became, by a conveyance from her husband, the owner of certain village lots, and sold the same for $500, and her father collected the money and retained it in his possession by her consent, except $125, and the daughter also became the owner of 320 acres of land by a gift from her husband, and the father was permitted by the daughter to collect the rents from the same, and the money collected as rent and that reserved from the sale of the lots was used by the father, with the daughter's consent, in paying off a mortgage upon the farm occupied by the father, and the plaintiff, with her husband's assistance, further helped the father by paying taxes on the said farm, and also continued to contribute to her father's support, and prior to and during the time the said money was being so furnished and so used the father promised to convey the farm to the daughter, without other consideration than that he had received from the daughter, and made improvements upon the farm, saying that the farm was for the daughter and that the improvements were made for her, and he also joined her name with his as lessor of the farm in making yearly leases to the farm tenant who cultivated the same in crops, and the father also conveyed the land (his wife joining

him) to the daughter by an absolute deed of conveyance, and the deed was delivered to her, although subsequently returned to the father for correction, and was then not returned to the daughter, it will be *held*, in a suit by the daughter to quiet title to the premises in herself, that she had, at the time that the deed was so returned to her father and kept by him, an equitable claim against the said premises and an inchoate title thereto which might be enforced against the father and his grantees with notice of the daughter's rights.

2. **Mortgages: VALIDITY.** And where, upon the death of the decedent's first wife, who was the mother of the plaintiff, and who joined with the decedent in the execution and delivery of said deed to the daughter, and who had joined with the father in the promise to convey to the daughter, the father married a second wife, and the father, while in ill health, being much enfeebled in body and mind and apparently addicted to the use of opiates and apparently having only a short time to live, being about 80 years old, was induced by the second wife, who was to be in part benefited thereby, and one M. B. K., who was a traveling preacher, to execute and deliver to one Rich a conveyance absolute to said farm, under an arrangement whereby said Rich was to make certain notes and a mortgage upon the farm, amounting to $7,000, being the full purchase price thereof as agreed, and then the notes and mortgage were to be delivered to a college in Wisconsin which was being conducted under the auspices of a church association to which the said traveling preacher belonged, and without other consideration than the promise in writing upon the part of the college to pay to the father during his life the interest as it fell due according to the notes given, and after his death to the widow until her decease, and then the notes and mortgage were to be the exclusive property of the college, and this arrangement was consummated and the deed was made to Rich by the father and his wife, the plaintiff's stepmother, and the notes and mortgage were duly executed by Rich to the father, and were then delivered by the father to M. B. K., the traveling preacher, and then were turned over to the college by the preacher, it will be *held*, first, that the notes and mortgage were obtained by undue influence of the wife and M. B. K. upon the father of the plaintiff, and that the college received them without paying any valid consideration therefor; and it further appearing that the wife and M. B. K. knew of the daughter's interest in the premises, *held*, that the college could not be, and was not, an innocent holder of the notes and mortgage, and that the legal title to the premises was held by the defendant Rich in trust for the plaintiff, and that the notes and mortgage held by the college were held in trust for the plaintiff, and that the

deed, notes and mortgage should be canceled and title to the premises quieted in the plaintiff.

3. **Quieting Title:** EVIDENCE. An examination of the evidence discloses that, after the making and delivery to the daughter of the deed for the premises above set forth, the father sent for the deed, representing that he wished to correct it, and when the deed was returned to him he retained it, and it was subsequently arranged between the father and the daughter that the daughter should come upon the premises and occupy the same as a home for herself and her husband and children, providing for the father and his wife, the stepmother, and the daughter then came from Kansas City, where she resided, to her father's house, and was then ready to occupy the premises and to proceed with the agreement, and when she did so the father then claimed that he had rented the land to said Rich the day before, and seemed unwilling just then to proceed with the agreement; that the evidence shows an attempted evasion of the terms of the contract induced by the undue influence of the plaintiff's stepmother and others who were seeking to procure a gift of the property or its value to the college in question.

APPEAL from the district court for Valley county: JAMES N. PAUL, JUDGE. *Reversed, and decree entered.*

E. J. Babcock, A. Norman and *O. A. Abbott,* for appellant.

Clements Bros., E. J. Clements, R. L. Staple and *Ray W. Clark, contra.*

HAMER, J.

This is an appeal from a judgment of the district court for Valley county dismissing the petition of the plaintiff, who brought her bill in equity to quiet title to the northwest quarter of section 33, in township 18 north, of range 13 west of the 6th P. M., in Valley county, Nebraska, alleging that she was the daughter of Charles Badger, deceased, and that he had died in December, 1906, and that at the time of his death Mary B. S. Badger was his surviving widow, and that Milton College of Milton, Wisconsin, was a corporation organized under the laws of the state of

Wisconsin; that while she was a member of her father's family she became possessed of the sum of $300 by devise, and that she gave this money to her father; that she was a teacher, and that she also turned over her earnings as a teacher to her father, and that after her marriage she and her husband both contributed to the support and maintenance of the father; that they assisted him in paying his taxes, debts, and otherwise; that the plaintiff was the owner of 320 acres of land in Valley county, and that she permitted the use of this land to her father for a number of years, and allowed him to retain all the receipts therefrom; that she also owned lots 3, 4, 5 and 6, in block 23, in an addition to the village of North Loup, in Valley county; that the plaintiff became the owner of this property by a conveyance made to her by her husband; that she sold the lots above mentioned for the sum of 500, and that her father collected the money, and gave her the sum of $125 out of the $500, and she permitted him to retain the remainder; that the remaining sum of $375 retained by her father was used in the payment of a mortgage upon the said northwest quarter of section 33, township 18 north, of range 13 west of the 6th P. M., in Valley county, Nebraska, being the land in controversy in this action; that title to said land last above described was by said decree of the district court for Valley county quieted in the defendant William Henry Rich, subject to the lien of the mortgage hereinafter described and held by the defendant Milton College, and which decree quieted and confirmed the title of said Milton College in the said mortgage and the notes which it secured, being the notes made by William Henry Rich to Charles Badger, and by said Charles Badger transferred to the said defendant Milton College.

The father was a doctor on the frontier, and he seems to have always been in poor financial circumstances. After the plaintiff's marriage, she and her husband went to Kansas City to live, but they made frequent trips to Nebraska, and were not unmindful of the father. They helped him pay his debts, and they helped him to live, and seem

to have been devoted and loyal. There seems to have been an unwritten agreement between the father and daughter by which he was to have the use of the 320 acres of land that belonged to the daughter, and he was to use the money realized from the use of this half section in paying off the mortgage on the land in controversy, and also toward his own support. About the year 1901 the father and the mother of the plaintiff executed a conveyance to her, but subsequently the father desired to have it returned to him so that he might put her husband's name in the deed, and she sent it to him, but he kept the deed and did not afterwards deliver it to her. There seems to have been no trouble of any kind until after the first wife of the deceased died. She was the mother of the plaintiff, and after the first wife died the deceased married the defendant Mary B. S. Badger about September, 1899. After the marriage of the deceased to the defendant Mary B. S. Badger, the plaintiff was induced to trade one of her tracts of land to the said Mary B. S. Badger for another tract of land of less value, and there seems to have been an understanding that she was to be recompensed for the difference in value, but this was not done. About April 13, 1905, the deceased, Charles Badger, and the defendant Mary B. S. Badger executed, acknowledged and delivered a deed to the defendant William Henry Rich for the said northwest quarter of section 33, and Rich executed and delivered to the said Charles Badger a mortgage upon the said land for $7,000 securing notes of various size to that amount, the first due November 1, 1905, and the last due April 1, 1913, all notes bearing interest at the rate of 6 per cent. per annum. Rich paid no money and gave no consideration for the land except the notes and mortgage. The conveyance to Rich and the mortgage made by Rich to the deceased were executed and delivered in pursuance of an agreement for a gift to the defendant Milton College. Milton College seems to be an educational institution at Milton, Wisconsin, and is run under the auspices of the Seventh Day Adventists. It was one of their preachers

who seems to have been active in procuring the gift to be made. He was temporarily stationed at that time at North Loup, and seems to have been a traveling evangelist. The defendant Mary B. S. Badger seems also to have been active in procuring this gift to be made, and the evidence would seem to show that she became a beneficiary at or about the same time the gift was made. She was ten years younger than her husband at the time the conveyance to Rich was made. The testimony discloses that the deceased at the time of the execution of the deed to Rich was quite feeble, and that he was infirm in mind and body, being unable much of the time to remember and recognize his neighbors whom he frequently met. He seems also to have been in the habit of taking a white powder, which may or may not have been morphine, but the testimony seems to indicate that it was. He was greatly addicted to the use of it. He died within about 18 months after the execution and delivery of the deed to Rich. It was apparent at the time that he executed the deed that he did not have long to live. Of course, the traveling preacher who received the mortgage and notes made by Rich was aware of that fact when he received them and sent them to Milton College. Milton College agreed to pay interest on the notes to the time of the death of the deceased, and after that to his widow until her decease. Of course, if Rich paid the interest to the college, then the college would not be out any money. It was a gift to the college. In his testimony M. B. Kelly, the traveling preacher, testified: "I had something to do with it between the college and the doctor." He says: "He asked me to do the writing for him, which I agreed to do, as corresponding worried him." He says of himself that he resided at Milton for two years. "I was an evangelist, a traveling preacher of the gospel, holding revival meetings." He testified that his headquarters were at Milton, but that he was not there much. The reasonable inference is that he was out traveling in his business as an evangelist. On cross-examination the preacher says of Badger's condition: "He was

in what we would call in a decrepitude of age." He says that he (Kelly) wrote to the president of Milton College, but, with an appearance of being disinterested, he says: "I am not sure it was *before* or *after* deed was made." He also says: "I don't remember whether I asked the president to write him. *Possibly I may have in regard to this business,* I don't remember any such thing in the correspondence, deed, the notes, and mortgage made at the same time." Again he says: "This correspondence with Milton College in reference to acceptance of this donation and what they would do *nearly all transpired through me.* I am rather of the opinion the doctor wrote some letters himself. I am not sure. He told me he contemplated writing, or had written, or something to that effect. The agreement was sent to me, and I handed it to the doctor. I think I forwarded the notes and mortgage *as a matter of correspondence.* I am not sure." The two letters of the evangelist to the president of the college read like songs of triumph: "I have the pleasure of sending you in this mail the mortgage and notes for $8,000 assigned this day to Milton College by Dr. Charles Badger and Mary B. S. Badger, his wife. You will doubtless be agreeably surprised to find it $8,000 instead of $5,000. But the more they thought it over the more they felt they should give their means to Milton College, so here it is. * * * I hope the contract to be executed and returned by you will be attended to very promptly as the doctor will not rest easily until the last thing is attended to. It has been a great anxiety upon his mind of late, and in his declining health he should be freed from all such anxiety." May 22, 1905, three days before sending the letter to the president from which the foregoing excerpts are made, the preacher wrote him a letter from which the following is taken: "I have the honor to tell you that, after reading your letter to Dr. and Mrs. Badger and talking the matter over with them, they readily accepted your suggestion, and expect this week to make a direct transfer of five of the one-thousand dollar notes to Milton College with the

understanding that the trustees are to execute an agreement to pay him six per cent. interest on the same till his death, and afterwards to Mrs. Badger (should she survive him) as long as she lives. * * * Had your first letter reached Dr. Badger a few days sooner, Milton College would have received the entire $8,000. * * * Hoping this will all be satisfactory to you and rejoicing in the privilege of *bearing even a small part* in this worthy transaction, I remain, very sincerely yours, M. B. Kelly."

The president of the college testified that he had seen the doctor at North Loup in 1904, and that he first learned of the doctor's intentions in the spring of 1905 *through a letter written by his pastor, Rev. M. B. Kelly.* He also testified, in substance, that he was *relying upon Kelly to carry the negotiations through.* "Q. Well, then you relied on Mr. Kelly to see that the transaction was carried through? A. Certainly in that sense I did." The defendant, Mary B. S. Badger, testified that she was married to the doctor July 20, 1898, and lived with him 8 or 9 years. She had been at Milton, Wisconsin, she says, "visiting and doing business;" that she resided with the doctor the rest of the time. The deed made by Charles Badger and Mary B. S. Badger to William Henry Rich for the land in controversy is dated April 13, 1905. It is an ordinary warranty deed. It is acknowledged before R. L. Staple, notary public. The mortgage is for $7,000, is of the same date, and was also acknowledged before R. L. Staple, notary public. The assignment of the mortgage and notes by Charles Badger to Milton College bears date May 25, 1905, and was acknowledged before R. L. Staple, notary public. All three of these instruments seem to have been executed in the presence of M. B. Kelly. The deed and mortgage were executed and witnessed in the presence of, and witnessed by, M. B. Kelly and Kate T. Kelly, while M. B. Kelly and R. L. Staple witnessed the assignment.

Mary B. S. Badger was interested in getting the property or its value into Milton College for the reason, first, that she would get interest on the value of the property

from the college after the doctor's death. If the property had been transferred to the daughter, Mrs. Holladay, then Mary B. S. Badger would have received no benefit from it. The mother of the plaintiff, who was the first wife of Dr. Badger, died in June, 1897. The next year the doctor married the defendant Mary B. S. Badger. Milton College claims to be an innocent holder of the mortgage, but sets up a contract between Charles Badger and Mary B. S. Badger, of the one part, and the plaintiff and her husband, of the other part, by which the plaintiff and her husband agree to farm and manage in a workmanlike manner the land in question, and to pay all taxes and make all improvements, and to furnish said Badger and wife "all they may need for their home and support, also feed for one horse, one cow, one pig, and a few chickens on the above described farm." The instrument also provides that "at the death of the said Charles Badger and wife, Mary B. S. Badger, the said Kate M. Holladay and husband, William J. Holladay, shall come into full and immediate possession of said property; and this lease put on record shall be to the said Holladays a full and complete title to said property free and clear from all incumbrance of every form and kind." This instrument is dated August 8, 1902. On the 15th of June, 1903, William J. Holladay and Kate M. Holladay, his wife, seem to have executed a quitclaim deed to Charles Badger and Mary B. S. Badger by which they released the land from the foregoing contract. Milton College, by its president and secretary, executed an instrument by which it undertook to pay interest at 6 per cent. per annum on the $7,000 Rich notes and mortgage.

An examination of the record discloses the fact that Milton College gave nothing for the $7,000 mortgage and notes except a guaranty that the interest would be paid. Of course, if Rich paid the interest, the college would be out nothing. The college received the notes and mortgage and assignment under circumstances which were such as to compel it to take notice of the rights of the plaintiff.

The defendant William Henry Rich was not called as a witness, but he knew Dr. Badger and the plaintiff, and he was farming the land, and undoubtedly knew the circumstances, and he so testifies in his deposition taken in support of the plaintiff's motion for a new trial: "Have lived in vicinity 12 years. Have been acquainted with Dr. Badger since I lived here—10 or 12 years. * * * I rented the place I live on now from the doctor one year before I bought it. I bought it April 5 next year after I rented it. Don't remember the year. Deed was delivered to me at Dr. Badger's house. I delivered to the doctor a mortgage same day. Mr. Staple was present and drew it up, and Dr. Badger and his wife, preacher Kelly and his wife, all there. *No money was paid by me at that time.* The deed was delivered to me, and he says, 'Take that deed and get it recorded as soon as you can.' Don't remember that anything was said at that time about a former deed to Kate M. Holladay. 'Well, he told me once that he gave them a deed and it wasn't just right and he wrote to have it sent back.' * * * Q. Did you see anything he claimed was the deed? A. Well, he had some papers there that day, I could not tell whether it was a deed or not. * * * Q. Did you know what he did with that deed that day? A. Well, I don't remember whether it was the deed, or what, but he had a handful of papers, and asked Mr. Staple if he would need those any more, and Mr. Staple said, 'I don't think so,' and he put them in the stove. I don't think he showed the papers to Mr. Staple at that time. I don't know, I don't think Mr. Staple examined them. I didn't hear any remarks at that time about Mrs. Holladay having failed to keep her engagements. Q. Did you ever hear any remark of that kind? A. Well, when they moved up to take possession of that land, they moved up in the fall before. At that time I was in possession of that farm. Yes, sir; I lived on it, and had it leased for that year, and a verbal contract for the next year, but no lease. Q. And a verbal agreement for the renting of it next year, and at the time this verbal agreement was made, was that

the time he spoke about the deed? A. What deed? Q. The deed he sent for? A. Oh, no, no; he always spoke of the place when he spoke of the place as *Kate's place*. Q. How often did he speak of it as Kate's place? A. Oh, whenever he wanted to make a change or fix it up. Q. He then spoke of it as Kate's? A. Yes, sir. Q. Do you remember whether your lease was signed by him as agent, or by both their names? A. It was always signed by agent. Q. By him as agent? A. Yes, sir. * * * A. No, sir; I never saw this deed he spoke about. I don't remember that he told me it hadn't been recorded. No; I don't think he did. No; not to me he didn't say it was no good because it had not been recorded. I couldn't tell how long before the deed was made to me that he spoke about the deed and having gotten it to have changes made. I have no idea. No; he never told me what changes were to be made in it or why he had it sent back. Q. Did he have reference to that deed when he took those papers and put them in the stove? A. I couldn't say, but he made that remark that he didn't think he would have any more use for those papers and put them in the stove. * * * Q. And it was while you were in possession of it the second year? A. I had had my contract fixed up before that occurred. She came up here and wanted him to put me off so she could have it, and he said, 'Why, I have rented it for another year to Mr. Rich and I couldn't do that,' and I felt like I was in the soup until I got the contract renewed. Q. That was the verbal contract? A. No; we was to make out the contract later on, and I took the contract down and had it renewed, so he wouldn't change his mind. Q. Was she present when you talked with the doctor about getting possession of the property? A. No; I was down there one time, and I had a piece of fall wheat in, and they had notified me before, and I told them there was the pasture and I would like to keep that. Q. You mean what cultivated ground there was he wanted? A. Yes; there was 50 acres broke out, and I wanted to keep the pasture. No, sir; I never saw this deed he said he had. No, sir; I

wouldn't know. I couldn't tell whether the paper he burned was a deed or mortgage. He had the lease and I had a copy. No; I couldn't say it was the lease he burned. Mr. Staple said he didn't think there was any use keeping them any more, and then he said to me, 'Be sure and have yours recorded right away.' No, sir; nothing said about a deed not being good unless it was recorded that I remember."

From the foregoing it would seem that, when Mrs. Holladay went up to North Loup to live on the land, she was ready to take possession, and her father was keeping her out of the possession, and this man Rich was helping him to do it. That the doctor intended the land for his daughter, the plaintiff, is shown by the testimony of many persons. Seventeen witnesses in varying phraseology testify that they heard the doctor say that the farm was for his daughter, Kate. He would say that whatever was done on the farm was done for Kate. He seems to have delighted to tell his neighbors about the farm that he intended it for his daughter.

Clement Meyers and his brothers had rented the farm in controversy from 1896 to 1902. The leases were signed Kate Holladay by himself. "Q. Had you any talk with him about this farm in connection with his daughter, Kate? A. He always said it was her farm. * * * When we were making the last contract, he reserved the stalks, said his daughter and Mr. Holladay were coming up, and he even reserved the straw. When they enlarged the cellar, he said they were making that improvement so that, when they came up, they could have a decent house (the Holladays). When we put on a windmill, Mr. Holladay was there at the time. He asked Mr. Holladay where he wanted the windmill. * * * Q. And when was it you heard the doctor say the Holladays were coming up to occupy the premises? A. I heard him say that a thousand times probably. Well, every time we had any conversation with him, he would say they was coming up, or that this is their house. Occurred all the years we occupied it." He says of the leases which he made with the doctor for th-

land that they made a new lease every year. "I think Kate M. Holladay and Dr. Badger's names signed to all of them."

Harry Meyers: "Yes; he always mentioned Kate Holladay in connection with the place. There was no one like her. We were on good terms most of the time. Yes; at the last. I took him some meat while he was sick abed. Well, he would lots of times mention that he was going to fix this for Kate; that they were coming pretty soon, and this and that, and everything that was done was for Kate. Well, I helped put down a foundation around the cellar, and it was fixed for the Holladays, and about fixing the windmill."

Lynn Holladay: His grandfather gave him the deed for the farm to take to his mother. At that time the doctor said: "This deed to my farm I want you to take to Katie so that when I am dead she will have it."

The witnesses for the defense do not deny the statements made by the witnesses for the plaintiff concerning the fact that the farm was Kate's farm, or was to be Kate's farm. They do not deny that the specific things were said to which the witnesses testify.

It is urged by the appellees that the husband of the plaintiff was disqualified to testify under section 329 of the code because he had a direct legal interest in the result. It is urged that the plaintiff's husband would be liable for the costs because he was once a party plaintiff in the action. It is hardly necessary to discuss this question, as the testimony of the other witnesses abundantly establishes the plaintiff's case.

William J. Holladay, in 1904, while his wife, the plaintiff, was up at North Loup visiting Dr. Badger, turned the 320-acre farm over to Everingim, the agent of his wife and himself. And the arrangement was made that the Holladays were to take charge of the quarter section in controversy that fall. The doctor had himself said that he was unable to attend to the farm any longer. Then Mrs. Kate Holladay, the plaintiff, went from Kansas City to

North Loup in August, 1904, to take possession of the farm in controversy, and when she got there she found out from her father that he had rented the land to the defendant Rich the day before she arrived. It seems that he did not then want her to have the land. Her daughter was with her, and they were ready to go on with the arrangement to take care of the old folks, but, as the land was rented to Rich and they could not get possession of it, they went back to Kansas City.

Dr. Badger's Condition.

Oscar Babcock saw him every day. He had a farm back of the doctor's house 8 or 10 rods. He worked every day. He testified that the doctor said he could not keep up without medicine; that the doctor said to him, "'I can't leave it alone, I can't live without it.' Said he used the purest article he could get, didn't buy it there in town. He said he could get a better article by sending away for it, and he said, 'I sent away a while ago,' to Chicago, I think, can't remember places, but he said he bought $4 worth at one time, and he regretted that he had to use it. Said, 'I can't keep up without it.'"

H. A. Watts testified that he met him in 1905, after being away, and noticed that he had failed physically and mentally. "He was very childish when I was working for him. One day he would tell me how to do a thing, and in an hour say it would be some other way, and when he got through started right back and had to ask how to write my name. I would meet him on the street, and talk to him, and he would say, 'I don't know you,' and I would tell him, and he would say, 'By jolly, I didn't know you.'"

E. S. Sears testified: "When I first became acquainted with him, he was a remarkably bright and vigorous man, and the last few years he got very bad physically, and his mind got weak, of course. * * * In spite of the fact that we had been intimately acquainted for the past years, if I would meet him on the street and speak to him, he would say, 'I can't call your name,' and I would tell him who it was, and he wouldn't seem to be able to place me,

and the last year I didn't speak to him at all. * * * Toward the last the increase became very marked."

W. A. Prentice testified: "I passed the doctor and Mrs. Badger in the vestibule, and, as usual, reached out my hand. He barely touched it, looked up, saw who it was, and immediately jerked his hand away and went away. Nothing like that ever occurred before, not to my knowledge. Well, in connection with the same incident, just a few days after I met him on the street, and he failed to recognize me. I spoke. He made no reply. I stepped right in front of him, and said, 'Doctor, what is the matter, have I ever injured you in any way, shape, or manner? If I have, I don't know it.' He said, 'Only by inference, Mr. Prentice, only by inference.' I said, 'Doctor, if I have ever laid a straw in your way, I don't know it.' He reached out his hand, and said, 'If that is the way, everything is just like it was.' I noticed he was just breaking down physically and mentally. I am not a medical man. I have never seen him, to my knowledge, take any medicine in all the years I have known him, except I have seen him occasionally take a powder from his pocket and take it." This witness testified that the doctor wanted to trade him a farm worth $2,000 for a little residence in the village worth, perhaps, $450. He seems to have wanted to trade even. He says that he would have traded with the doctor only he didn't consider that he was competent to do business. "From my knowledge and observation of persons addicted to opium, it has always been my opinion that the doctor was addicted to opiates, and it has increased. From my observation and experience he was not capable of transacting business in 1905."

G. L. Larken was a plasterer and brick mason. "The doctor called me to tear down his chimney. He thought a brick had fallen in, and wanted me to tear down the chimney and get it out. I went out and looked at it. No brick had fallen from the top. Got down and looked inside, and didn't see anything, and didn't fix it. Well, sir, the reason why I didn't fix it was because I didn't think it

needed it, and one time when I was there he called me in, and his wife showed me the door, or he went in another room, and she said, 'I don't think it needs it, I wouldn't pay any more attention to it.' * * * I thought there was nothing the matter with it, and thought he was kind of childish about it."

E. J. Babcock: He knew that Dr. Badger was over 80 when he died. He visited the doctor. He told Babcock that he had given his library to a Dr. Wilson of North Loup, also that he wanted to give away his household goods and furniture because he would not need them much longer. He found him "growing old and getting exceedingly infirm, and about the time the first wife died he didn't know me. When I would tell him who I was, he would say, 'Ah, yes.' It kept getting a little more and a little more marked. I would see him generally when he was around doing chores. Sometimes he would seem more dazed than others. He would start to town so we all noticed it. There was a telephone pole there or a tree, and he would commence running as though he would fall and would catch hold of that. One time I started to catch him and help him, and a good many times he would not know me, and those times kept growing."

The witnesses for the defense concerning the condition of Dr. Badger do not deny that he was weak and feeble. They only failed to see evidence of the fact that he used opiates. He gave the evangelist preacher Kelly his horse and buggy. He afterwards took from Kelly a paper which was so intangible that Kelly does not remember whether it was a promise to pay money, and, if so, how much. He says of it: "This was a transaction I did not consider of great importance. It did not weigh heavy on my mind." In a letter dated March 3, 1904, Mrs. Mary B. S. Badger describes the doctor at that time as being very nervous, and very much worn out, and not fit to do any business, and so forgetful as to be unable to remember "while he is turning around." In that letter she says that he "cannot hold out many years longer." In another letter she de-

scribes the doctor as "not fit to do business of any kind," and also says: "I can see his memory fail every day. * * * There is no question but what his brain is bad, and heart also."

One of the witnesses for the defense in this case is Mr. Theodore L. Gardiner, whose deposition was taken. He is shown to have resided at North Loup from September, 1906, to August, 1907. He had been the pastor of the Seventh Day Baptist Church of North Loup. He was at one time president of Salem College. At the time he testified he was the editor of Sabbath Record. He testified to going to Ord, the county seat of Valley county, to get a deed which had been made to him in trust for Mary B. S. Badger, one of the defendants in this case. He describes the deed as a conveyance of the house the doctor lived in, and one-half the lot. He says: "The deed I referred to was made to me in trust for his wife's use while she lived, and at her death to sell it and pay Milton College $1,000 out of the proceeds thereof." He testified: "The paper I went to the county seat for was the deed to me." He says of the deed it was a regular deed. The abstract of the evidence does not go fully into the details of this deed and the $1,000, but there is a reference in the testimony of Albert Whitford, who describes himself as treasurer of Milton College at Milton, Wisconsin. He says in his evidence:

"I knew of the transaction between Dr. Badger and Milton College. The notes and mortgage assigned to the Milton College came to my hands. I have had them since. I have made payments to Dr. Badger as follows:

"Jan. 17, '06.....$240
"Apr. 2, '06.....$240
"Apr. 22, '06.....$240

"$210 on account of his mortgage, and $30 on account of his wife, her mortgage for $1,000.

"(Receipts are shown on Bill Ex., page 348.)

"Since Badger's death I have paid Mary Badger as follows:

"Apr. 5, '07—$240; Oct. 17, '07—$240; Apr. 17, '08—

$240; Oct. 14, '08—$240. I have received from Mr. Rich $1,030.86 in all ($430.86 int.; $600 principal)."

These entries point to an additional interest which the defendant Mary B. S. Badger had in the transaction. She acted with Milton College in procuring mortgages and notes to be made. After the husband died she would get the interest payments from the college, and, in addition, there was another $1,000 that was a lien upon the house and lot upon which they lived. She got an additional benefit out of that. It was probably not very difficult for the traveling evangelist and this second wife to control the old doctor in his sickness and his feebleness.

In a recent case of *In re Estate of Paisley*, 91 Neb. 139, this court was called upon to determine the condition of the testator at the time he executed a will in favor of the proponent. The reasons in that case for setting aside the will and guarding the interests of the relatives of the testator are very like the reasons which exist in this case as to whether the deed to William Henry Rich and the mortgage made by him should stand. The judgment of the lower court in the *Paisley* case was reversed because of the feebleness of the testator at the time the will was made, and because of the undue influence of the proponent and her sister and brother-in-law. In the instant case, Dr. Badger seems to have been naturally frail and delicate physically, and his powers of mind seem to have been reduced by long continued illness and old age, for he was beyond 80, and he was without means to resist the importunities and influence of his younger and stronger wife, and the rather adroit Mr. Kelly, who was seemingly anxious to commend himself to the college corporation for his efficient services in procuring financial aid. Our view concerning the condition of the grantor at the time of making the deed and mortgage and the exercise of an undue influence in making the deed and consummating the thing does seem to be sustained by the following cases: *In re Estate of Frederick*, 83 Neb. 318, 321; *Orchardson v. Cofield*, 171 Ill. 14, 40 L. R. A. 256, 63 Am. St. Rep. 211;

Purdy v. Hall, 134 Ill. 298; *Hampson v. Guy,* 64 L. T. Rep. n. s. (Eng.) 778; *Hegney v. Head,* 126 Mo. 619, 29 S. W. 587; *Bennett v. Bennett,* 65 Neb. 432, 441. The case last cited is instructive and fully sets forth the views of this court. Among other things held are the following: "Although mental weakness may fall short of entire incompetency to transact business, if it is taken advantage of to procure a conveyance by inequitable means the conveyance may be set aside." Also: "A court of equity will scrutinize jealously a transaction as to which there is ground for holding that influence has been acquired over a person of weak mind and has been abused." In support of the first point the court cited *Loder v. Loder,* 34 Neb. 824; *Kleeman v. Peltzer,* 17 Neb. 381; 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 947.

An examination of the evidence shows that the deceased, Charles Badger, at the time of the execution and delivery of the deed to the defendant William Henry Rich, was feeble and infirm in body and mind, and also at the time he delivered the said notes and mortgage to the defendant Milton College, through M. B. Kelly, that he was unduly influenced and overpersuaded by the said M. B. Kelly and his wife, Mary B. S. Badger, and that the said conveyance to the defendant William Henry Rich and the said notes and mortgage delivered to the said defendant Milton College were so executed and delivered without consideration.

The judgment of the district court is reversed, and the conveyance of the land by deed to William Henry Rich is set aside and canceled, as also the notes and the mortgage executed by said Rich and delivered to the said Milton College, and title to the land in controversy, to wit, the northwest quarter of section 33, in township 18 north, of range 13 west of the 6th P. M., in Valley county, Nebraska, is forever quieted in the appellant, Kate M. Holladay.

REVERSED.

SEDGWICK, J.

I concur only in the result reversing the judgment of the district court.

ROSE, J., dissents.

GEORGE THRASHER V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1912. No. 17,503.

1. **Rape:** EVIDENCE. The unquestioned proof that a female child of the age of 17 years was pregnant and dies from the effects of an abortion is sufficient evidence of the fact that some one had had sexual intercourse with her at the time of age which is prohibited by statute.

2. ———: ———. The evidence by which it was sought to prove the guilt of the defendant of the crime of statutory rape was largely circumstantial, although not wholly so. The facts testified to are examined and found to be sufficient to be submitted to the trial jury.

3. ———: ———: PRIVILEGED COMMUNICATIONS. In a trial of a charge of statutory rape, where the female child died from the effects of an abortion criminally produced, evidence by the physicians who attended her in her last illness, and who were present at the time of the miscarriage, as to what they discovered upon an examination of the patient during such attendance is not prohibited by the law of this state.

4. **Instructions,** both given and refused, are examined, though not set out in the opinion, and no reversible error is found in them.

5. **Criminal Law:** NEW TRIAL: DISCRETION OF COURT. Where misconduct on the part of a bailiff in charge of a trial jury during their deliberations is alleged in a motion for a new trial, and the issue is submitted upon conflicting affidavits, the decision of the district court thereon will not be reversed unless found to be clearly wrong.

ERROR to the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Affirmed.*

M. S. McInnich and *L. L. Raymond,* for plaintiff in error.

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

REESE, C. J.

An information was filed in the district court for Scott's Bluff county, accusing plaintiff in error, George Thrasher, who will be referred to as the defendant, of the crime of statutory rape committed upon one Edith Perry on the 15th day of April, 1911, in said county; the said Edith Perry being at said time but 16 years of age and not previously unchaste. A plea of not guilty was duly entered and a jury trial had which resulted in a verdict of guilty. A motion for a new trial was filed and overruled, when defendant was sentenced to imprisonment in the penitentiary for the term of eight years. He alleges error, and brings the case to this court for review.

The evidence shows that on or about the 25th day of August, 1911, the said Edith Perry died from the effects of an abortion, criminally produced, and that at the time of her decease she was 17 years of age. These facts being undisputed, it is settled beyond controversy that some one had illicit relations with her at an unlawful age at or about the time alleged. The fact that defendant was over 18 years of age at the time of the alleged intercourse was also established. So far as the evidence is concerned, the case is narrowed down to the one question of the identity of defendant as the guilty person.

Upon the trial he became a witness in his own behalf, and testified that he had never at any time had sexual relations with the decedent. She being dead, of course her testimony could not be had. The evidence on the part of the state was therefore largely circumstantial. There were many phases of the case in which the evidence was conflicting. These conflicts were, in almost all instances,

between the testimony of the state's witnesses and that of defendant, consisting in the main of his denial of their statements as to his conversations and conduct. The former personal chastity of the decedent was not directly attacked, and the evidence in its support was sufficient for its submission to the jury. The evidence tended to prove that for perhaps a year or more defendant and Miss Perry were often together, he waiting upon her as a close associate, if not a suitor; that he frequently visited her at her home, on one or two occasions remaining with her in the parlor or sitting room all night; that they were often seen upon the streets of the village where they resided, both by day and night, and at one time were in the store, where defendant was employed as a clerk, after night and without a light. She was employed in a hotel, where her last sickness came upon her, and from where she was removed to her home a short time before her death. While she was sick at the hotel he visited her and appeared to be interested in her case and in the physicians employed. One physician testified that some six weeks before her death defendant applied to him for "medicine to cause a girl to come around;" that he said to the physician the girl was pregnant, and the request was refused. The father of the decedent testified that at the time of the arrest of defendant they had a conversation in which defendant requested the father to help him out of his trouble, and in which he admitted the illicit relations, but denied having taken any part in causing the abortion which resulted in the death of Edith. There was other evidence of a more or less criminating character, but which we need not recount. Practically all of the alleged admissions and statements were denied by defendant upon the witness-stand, but the matter of the truth or falsity of the testimony was for decision by the jury, and with that feature of the case we can have nothing to do; the evidence being sufficient to submit to them.

The physicians who attended the decedent in her last sickness were called as witnesses, and testified as to her

condition at that time and the cause of her death. Their testimony was objected to on the ground that it violated the law of privileged communications. The contention is probably based on the provisions of sections 333 and 334 of the code, which prohibit the disclosure of confidential communications to a physician, etc. The physicians testified to the physical facts discovered by them in their treatment of the decedent, and as to their course of treatment. We had never understood that the rule extended so far as is claimed by defendant. The testimony had no reference to him, and there was nothing for him to waive. The prohibitions of the section were not in his "favor." So far as we are aware, the provisions of the section have never been held to apply to cases of this kind. No authorities so holding are cited. Communications between patient and physician were not privileged at common law, but depend alone upon the statute. It is to be applied only as between them, and is for the protection of the patient. 1 Wharton, Criminal Evidence (10th ed.) sec. 516; *Hauk v. State,* 148 Ind. 238, 260; *Boyle v. Northwestern Mutual Relief Ass'n,* 95 Wis. 312, 322; *Pierson v. People,* 79 N. Y. 424, 433. In Underhill, Criminal Evidence (2d ed.) sec. 180, it is said: "A construction, which would operate to convert a statutory provision, intended to protect a patient from damaging or objectionable disclosure, into a protection for a person accused of the murder of the patient, cannot be admitted, nor can we believe that such was the legislative intent"—citing *People v. Harris,* 136 N. Y. 423; *Hauk v. State,* 148 Ind. 238. We are unable to see that the same class of evidence is inadmissible in cases of this kind. There was no error in the admission of the physicians' testimony.

Some objection is made to the action of the court in refusing to give the jury certain instructions requested by defendant, and in giving instructions by the court upon its own motion. We have examined all with care, and are unable to detect any error in the matters named. The principles involved in the instructions refused were suffi-

ciently included in those given, and we find no prejudicial error in any instructions given and complained of. We have examined all instructions, both given and refused, and are persuaded that the cause was fairly and fully submitted by the instructions given. An analysis of each would extend this opinion to an unwarrantable length without the accomplishment of any compensating results.

Upon the close of the state's evidence, and also after the evidence had all been given, the defendant moved the court for a directed verdict in his favor. The motions were both overruled, and to which defendant excepted. The action of the court thereon is now assigned as error. Since our conclusion upon the whole case necessarily covers the questions presented by the motions, they will not be specifically noticed nor separately discussed.

Complaint is made of the alleged action of the bailiff in charge of the jurors during their deliberations. It is claimed by the state that the affidavits upon which the matter was submitted to the court are not preserved in the bill of exceptions, although set out in the abstract. We do not pass upon the question of their preservation, for the reason that, were the facts as stated in defendant's affidavits true, we would hesitate to set the verdict aside on that ground alone. But they are contradicted by other affidavits, thus presenting a question of fact, and we cannot say that the decision of the court thereon was wrong.

With a full appreciation of the importance of this case to defendant, we have examined the evidence adduced upon the trial, and are satisfied that the questions presented were properly submitted to the jury and were for their determination.

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

AFFIRMED.

ARTHUR W. NIXON V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1912. No. 17,546.

1. **Intoxicating Liquors:** ILLEGAL SALE: EVIDENCE. In a prosecution for the sale of spirituous and intoxicating liquor called whiskey, in violation of chapter 50, Comp. St. 1911, evidence that the liquor sold, without a license, to the prosecuting witnesses was intoxicating, that it looked like whiskey, and tasted like whiskey, is sufficient to sustain a conviction. *White v. State*, 88 Neb. 177.

2. ———: ———: INSTRUCTIONS. In such a prosecution, if the evidence is conflicting, the court should submit the case to the jury under proper instructions, and an instruction that "the law of Nebraska provides that all persons who shall sell any spirituous liquors or any intoxicating drinks without first having obtained a license for selling such liquors shall be deemed guilty of a misdemeanor" is without error.

3. ———: ———: ———. Other instructions examined, the substance thereof stated in the opinion, and *held* to be without error.

4. ———: ———: EVIDENCE. On the trial of such a case, it is not error to permit the state to introduce in evidence the federal liquor license issued to the defendant, where the sole objection to its introduction is that it was obtained from him by stealth.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Edwin Falloon, for plaintiff in error.

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

BARNES, J.

The plaintiff in error, hereafter called the defendant, was tried in the district court for Richardson county on an information containing four counts, in each of which he was charged with the crime of selling spirituous and intoxicating liquors called whiskey without a license. He was found not guilty on the first two counts, and guilty

as charged in the third and fourth counts of the information. He was sentenced to pay a fine of $300 on each count, together with the costs of prosecution, and to stand committed until the fines and costs were paid. To reverse the judgment of the district court he has brought the case here by a petition in error.

Defendant's first contention is that the evidence is wholly insufficient to sustain the verdict. It appears that the third count of the information charged that defendant did, on or about the 26th day of March, 1911, in the county of Richardson, state of Nebraska, unlawfully and wilfully sell to one Robert Ankrom certain spirituous and intoxicating liquors, to wit, one gill of whiskey, without having obtained a license therefor. The abstract, record and briefs show that upon the trial Ankrom testified, in substance, that he was living in Barada on the 27th day of March, 1911, where he had always lived; that he was acquainted with the defendant, Arthur Nixon; that he did not remember whether he was in there on the 26th day of March of that year, but that he visited Nixon's place of business very frequently and frequently drank there. He said: "I can't say I remember of drinking whiskey. I can't tell what it was. If a man drank enough of it, it would intoxicate him. I didn't buy the drink. I drank in there with James Graham on or about the 1st of March. I can't say what I drank, but it was within the last 18 months. I drank with Al Davis. I don't think anybody paid for it. I don't remember what we called for. I don't remember the number. I don't think it was over four. I took one drink with Mr. Davis. I was satisfied with that. I took a drink with Al Davis. The drink was colored like whiskey. I didn't smell it. I tasted it, and it tasted like whiskey. I only took one drink. I suppose the graduate was half full. At the time I drank with Davis, Davis called me up and Nixon waited on me. I have not purchased within the last 12 months any liquor that looked like whiskey. It was the same color. I usually paid 10 cents for a drink. I never bought any by the

bottle. I never bought any by the jug. Within the last 12 months I think I have bought something that looked like whiskey and tasted like whiskey, and paid 10 cents for it. I never became intoxicated on it within the last 12 months." The witness also testified on cross-examination that he never bought any whiskey at Nixon's place of business within the last 18 months. "I don't know whether Nixon treated us or not, but I don't think the drink was paid for, not that I know of. I can't swear that this treat was whiskey." On redirect examination the witness further said: "This stuff that I have been drinking at Nixon's place I would not swear it was whiskey. If one drank enough of it he might become intoxicated. I didn't get any of this stuff at Nixon's place in March of this year, nor April. I might of bought some in May. I don't remember the time of the month of May I bought it. I think, if I bought it at all, it was about the middle of the month. I called for medicine. I suppose he understood me. We went into the back room and took it from a bottle. It looked like one of those patent medicine bottles, a square bottle. Sometimes he poured it out, and sometimes I did. Sometimes I paid for it, and sometimes I didn't. I usually paid 10 cents. I didn't tell what particular ailment I wanted the medicine for. I can't tell the jury what it was. He gave me medicine for headache, for dyspepsia, for the appetite, an appetizer. It kind of braced a fellow up."

The fourth count of the information charged that the defendant, in the county of Richardson, and state of Nebraska, on or about the 28th day of March, 1911, did unlawfully and wilfully sell to one Albert Davis certain spirituous and intoxicating liquors, to wit, one gill of whiskey, without having first complied with the laws of the state of Nebraska, and obtained a license therefor. To support that count of the information Albert Davis testified, in substance, as follows: I live north, just across the line of Nemaha county. Was living there during the month of last March. I was in Barada nearly every day along through March, at least three times a

week. Am acquainted with Arthur Nixon, and have been in his place of business. I have purchased of him groceries, some hardware and drugs. On or about the 25th day of March I bought something I suppose was whiskey. It was red looking stuff. It was a poor article of stuff whatever it was. It tasted to me like it might have been whiskey, a poor grade of whiskey. Well, if a man would drink enough of it I suppose it would make him crazy. I bought this stuff of him. I paid all kinds of prices, from 10 cents up. I usually paid 10 cents a drink. When I bought it by the bottle I paid from 25 cents to $1, owing to the size I bought. When I got this liquor I called for booze. I drank with Bob Ankrom at the time he would not pay the assessment. We drank red-eye booze, and I paid for it. We drank it out of a small like glass, I think it was a wine glass, as well as I remember.

It appears, without dispute, that the defendant was engaged in the business of selling hardware, groceries and drugs in the village of Barada, in Richardson county, Nebraska, at the several times mentioned in the information. The defendant positively denied on oath that he sold any whiskey to Robert Ankrom or Albert Davis at any time within 18 months before the time alleged in the information. Defendant also produced three witnesses to impeach the testimony of Albert Davis, each of whom testified that on a certain day in a saloon conducted by one Hunker, while drinking with the defendant Nixon, and at his expense, Albert Davis said, in substance, that he never bought any whiskey of the defendant. Davis, however, denied that he had ever made such a statement.

The foregoing is the substance of the evidence on which the case was submitted to the jury. The probative effect of this evidence was a question for the jury, and, notwithstanding the witnesses for the state avoided stating in clear and direct language that they knew the liquor that they purchased of the defendant was whiskey, still the jury, taking into consideration their reluctance to testify against one who had thus favored them, might well have

concluded that the liquor was what one of the witnesses said seemed to be a poor quality of whiskey. In any event, in the light of this testimony, it cannot be said that the liquor was not intoxicating. We are therefore of opinion that the evidence was sufficient to sustain the verdict, and we would be invading the province of the jury to hold otherwise. *White v. State,* 88 Neb. 177.

Defendant also contends that the court erred in giving and refusing instructions. By the third instruction the court charged the jury that "the law of Nebraska provides that all persons who shall sell any spirituous liquors or any intoxicating drinks without first having obtained a license for selling such liquors shall be deemed guilty of a misdemeanor." It is argued that this instruction is erroneous because under its direction the jury could convict for the sale of spirituous liquors or any intoxicating drink. We think this instruction contains a fair statement of the law, as we understand it, and the district court did not err in giving it.

By the fourth instruction the court charged the jury as follows: "You are instructed that it is not necessary that any witness testify positively as to the particular name of the liquor. It is sufficient, if you are satisfied from all the facts and circumstances in evidence that the liquor so sold, if any, was intoxicating liquor of the kind generally known as whiskey. The name or lack of name given to such liquor is not material, if the kind and character of such liquor is shown by the evidence to be as alleged in the information." We think this instruction is correct, and is fairly within the rule announced in *White v. State, supra.*

At the request of the state, the court instructed the jury that the beverage commonly known as whiskey is an intoxicating liquor, and, if you believe from the evidence beyond a reasonable doubt that the defendant sold whiskey as charged in the information, your verdict should be guilty. The jury were also told in the same instruction that it was not necessary for the state to prove the com-

ponent parts of the beverage alleged to have been sold, or make a chemical analysis of the same; that it was sufficient if they were satisfied from the evidence beyond a reasonable doubt that the defendant sold the beverage commonly called and generally known as whiskey as charged in the information, and that the beverage so sold was intoxicating. From an examination of the authorities, both in this and other jurisdictions, we are satisfied that this instruction is without error.

Complaint is made because the court refused to instruct the jury that a conviction could not be had upon mere suspicion, however strong. An examination of the instructions given by the court upon his own motion, and the one requested by the defendant and given by the court, in which it was clearly stated that it was incumbent upon the state to prove beyond a reasonable doubt all the material allegations of any or all counts of the information; that the material allegations of the counts of the information are that the beverages charged as sold are whiskey; that they were sold, if at all, to the persons named in the information, and that any or all of the sales, if made, were made within 18 months next preceding the commencement of this prosecution (June 15, 1911); that the charge in the information that the sales were made without a license is material—obviated any necessity for instructing the jury that they could not convict the defendant upon mere suspicion. As we view the record, the case was fairly tried, and the instructions are without error.

Finally, it is contended that the court erred in permitting the state to introduce in evidence the federal liquor license issued to the defendant, because it had been obtained by the state by stealth. In *Younger v. State*, 80 Neb. 201, objection was made to the introduction of defendant's shoes, upon the ground that they were taken from him by force, and it was held that, where matters are offered in evidence on the trial of the case which are pertinent to the issue, they should be admitted, and the court will not take notice of how they are obtained. To

the same effect are *Geiger v. State,* 6 Neb. 545; *Russell v. State,* 66 Neb. 497; *Williams v. State,* 100 Ga. 511, 39 L. R. A. 269; 1 Bishop, New Criminal Procedure (4th ed.), secs. 210-212. As defendant cites no authority in support of this contention, and in view of the authorities above mentioned, we are of opinion that the receiving of the federal license in evidence presents no ground for a reversal of the judgment.

The evidence clearly shows that the defendant, in the back room of his store, in Barada, Richardson county, Nebraska, at or about the time charged in the information, sold intoxicating liquors, which the witnesses say looked and tasted like whiskey, to the persons charged in the information. It was admitted that he had no license to make such sales, therefore the judgment of the district court should be, and is,

AFFIRMED.

ENTERPRISE IRRIGATION DISTRICT ET AL., APPELLEES, V. TRI-STATE LAND COMPANY ET AL., APPELLANTS.

FILED OCTOBER 18, 1912. No. 17,522.

1. **Waters: IRRIGATION: APPROPRIATION OF WATER.** Before the 1911 amendment to section 18, ch. 69, laws 1895, and under the irrigation act of 1889 (laws 1889, ch. 68), one who has constructed a canal for the purpose of carrying water for hire to be used upon the lands of others, and is ready and willing to furnish the water to such landowners as will take it, has made the only application of water to a beneficial use that he can make, and his right to an appropriation continues as a developing right until all lands along the canal for which the water was originally appropriated use the same; provided, formerly, that the water be applied to the land within a reasonable time, and, now, within the time limited by statute.

2. **Statutes: IRRIGATION ACT: CONSTITUTIONALITY.** The constitutionality of the irrigation act of 1895 and of the provisions thereof creating the state board of irrigation and conferring on the board the right to determine priorities, reaffirmed—following *Crawford*

Co. v. Hathaway, 60 Neb. 754, 61 Neb. 317, 67 Neb. 325, and *McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 115.

3. ———: ———: DUE PROCESS OF LAW. Where a statute authorizes a proceeding under the police power of the state affecting property rights, and does not expressly provide for notice to be given to the property owner, the right to notice is implied, and where a proper notice has been given, under a procedure authorized by the legislature, and the party interested has appeared, he has not been deprived of any of his rights without due process of law.

4. ———: ———: ———. The legislature has power to delegate the duty of formulating rules of procedure before the state board of irrigation, and the fact that the method of procedure is not embodied in the statute does not render due process lacking in the proceedings of the board.

5. Waters: IRRIGATION: APPROPRIATION OF WATER: PRIORITIES. In determining priorities of appropriation under the act of 1895, the transcripts of posted and recorded notices transmitted by the county clerk to the state board of irrigation constitute the "claims" for adjudication.

6. ———: ———: ———: ISSUANCE OF CERTIFICATE: LIMITATIONS. The limitation of 30 days within which to issue a certificate by the board of irrigation, under section 21 of the 1895 act, is merely directory. Such certificate does not constitute the adjudication, but is merely evidence thereof.

7. ———: ———: ———: POWER OF STATE BOARD OF IRRIGATION. In determining priorities under sections 15-27 of the act of 1895, the board of irrigation, although it might recognize and determine existing conditions and limitations, was without power to impose new.

8. ———: ———: ———: ABANDONMENT. Under the facts set forth in the opinion, *held*, that the right of the Tri-State Land Company to an appropriation, as successor in interest of the Farmers Canal Company and Roberts Walker, was not lost by lack of diligence, nonuser or abandonment.

9. ———: ———: ———: NOTICE OF CLAIM: RECORD. The posting and recording of notices of "claims" to the waters of the state, under the laws of 1889, ch. 68, *held* to be a public record, of which all parties interested were bound to take notice, and with knowledge of which they were chargeable.

10. ———: ———: ———: ESTOPPEL. After it had been adjudged that Roberts Walker had a valid appropriation to 1,142 6-7 cubic feet of water per second of time from the North Platte river,

with priority dating from September 16, 1887, the Tri-State Land Company purchased all his rights in the appropriation and canal. It immediately began the expenditure of large sums of money in the enlargement and completion of the canal, and carried the same forward with diligence from year to year until it had expended nearly $2,000,000. In 1906 it applied to and received leave from the state board of irrigation to construct a needle dam in the river for the purpose of conducting water into its headgate, and thereafter erected the same at large expense. There being insufficient water in the river during the months of July, August, and September to supply the amount claimed by the Tri-State Land Company and also to supply the amount to which the plaintiffs are entitled, plaintiffs began this action in 1909 for the purpose of adjudicating priorities of the respective water users in the river, and procuring a decree that their rights are superior to those of the Tri-State Land Company except as to about 28 second feet, and for an injunction to restrain the use or diversion of more than that quantity of water by the defendants. *Held*, That since the plaintiffs stood by for more than four years with full notice and knowledge of the "claims" of the defendants to an appropriation of 1,142 6-7 second feet, and permitted defendants to expend nearly $2,000,000 without objection or without notice of their claims to a prior appropriation, and without beginning an action to restrain the diversion of the water in excess of the amount which they concede defendants are entitled to, they are estopped, after the substantial completion of the canal and works, to maintain this action.

APPEAL from the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Reversed and dismissed.*

C. C. Flansburg and *Wright & Duffie,* for appellants.

Morrow & Morrow, Harry N. Haynes, Wilcox & Halligan, G. J. Hunt and *W. W. White, contra.*

LETTON, J.

This action was begun on August 23, 1909, by the Enterprise Irrigation District claiming an appropriation of water from the North Platte river, under a claim made by the Enterprise Ditch Company in March, 1889, to whose rights the plaintiff has succeeded by purchase. A large number of other persons and corporations claiming ap-

propriations of water from the North Platte river in Scott's Bluff and Cheyenne counties are made parties defendant. When the issues were finally made up, it appeared that plaintiff and each of the defendants except the Tri-State Land Company and the Farmers Mutual Canal Company were interested in having the prayer of the petition granted, and that practically the same relief is sought by each of them against two defendants named. There is one exception to this general statement, which will be hereafter noted. Throughout the opinion therefore, for convenience, the two latter-named companies will be designated as defendants and all the other parties as plaintiffs. The state board of irrigation and the secretary of the state board will be hereafter termed the state board or the secretary, as the case may be.

The pleadings are exceedingly lengthy and involved, therefore no attempt will be made to set them out in detail. The cause was tried upon the pleadings and upon an agreed stipulation of facts, so that the questions presented are practically questions of law.

The dispute may be summarized thus: The defendants claim an appropriation of water to the extent of 1,142 6-7 cubic feet prior in point of time to an appropriation by any of the plaintiffs, and an adjudication in their favor by the state board to this extent. The plaintiffs' claim is that an appropriation to the extent of more than 28 feet never actually vested in the Farmers Canal Company or its successors, and that by the actual beneficial use of water by the plaintiffs before the water had been put to beneficial use by the defendants, and before the canals of defendants had been constructed, plaintiffs acquired a prior right to all but 28 second feet of the water claimed by defendants. They further contend that, if the Farmers Canal Company ever acquired an appropriation for the full amount, it had lost the same by nonuser. The defendants assert the validity of their appropriation, that it is prior in point of time to that of any of the plaintiffs, and deny its loss by nonuser or abandonment. They also plead

an estoppel by reason of plaintiffs standing by with knowledge of their claims for years and allowing them to expend vast sums of money in the carrying out of their enterprise, without notice of any hostile or adverse claim of superior right until after the works were practically completed. At the close of the trial the court found for each and all of the plaintiffs and cross-petitioners, except the Mitchell Irrigation District, and rendered a decree which ascertained and adjudged the respective appropriations to which the parties were entitled and established their respective priorities, without reference to the action of the state board in 1896 and 1897. The Tri-State Land Company and the Farmers Mutual Canal Company were adjudged to have an appropriation of 28.57 cubic feet per second only, instead of 1,142 6-7 second feet as claimed, with priority dating from September 16, 1887. As to any excess over this amount, if an appropriation was ever acquired, it had become lost by a failure to apply the same to a beneficial use for a continuous period of more than ten years. As to the Mitchell Irrigation District, the court found that, because its canal heads in the state of Wyoming and the water is diverted into it in that state, the court had no jurisdiction of the subject matter of its cross-petition, and the same was dismissed.

Much abbreviated, but preserving those facts we consider material to the controversy, the stipulation of facts upon which the case was submitted shows that the lands are in the valley of the North Platte river, and that the amount of water flowing in the bed varies greatly at different times in the year. During April, May and June the amount usually has been sufficient to supply all water necessary for irrigation to the canals thus far constructed. There are no tributaries between the headgate of defendants' canal and the headgate of the canals of any of the plaintiffs. If no water were diverted at defendants' headgate, the quantity of water flowing would not be materially increased or diminished when it reached the headgate of the lowest canal, belonging to a party to this suit. On the

16th of September, 1887, the Farmers Canal Company, a corporation, posted a notice at the proposed point of diversion of its intention to divert from the North Platte river for the purpose of irrigation a quantity of water sufficient to fill a canal 40 feet wide on the bottom and carry water to a depth of 4 feet, and on the same day notice was duly filed and recorded in the office of the county clerk of Cheyenne county which at that time included the territory now embraced in Scott's Bluff county. In March, 1888, the Farmers Canal Company commenced the construction of the canal, and continued work on it until about the year 1890, at which time it was constructed a distance of about 10 miles. The ditch was then about 12 feet wide on the bottom just below the headgate. The first mile was about 6 feet deep, and was capable of carrying water to a depth of 2 feet. There were not more than 1,500 acres susceptible of irrigation from the canal as then constructed, and the capacity of the canal was not sufficient to carry water for more than 1,000 to 1,200 acres of land. On November 17, 1890, this company posted at the headgate, and filed for record in the office of the county clerk of Scott's Bluff county, a notice of its intention to divert water, in addition to its former claim, to the amount of 200,000 miner's or statutory inches. The notice also specified that the canal shall be 80 feet wide on the bottom, with a slope of one to one, and a depth of 8.84 feet at the point of the diversion, with an average grade of not more than 2 feet per mile. In 1891 the canal company issued bonds secured by mortgage upon all its property, and sold about $80,000 worth. In the spring of 1892 it resumed work on the canal with the proceeds of the sale, constructed a substantial headgate costing about $8,000, and excavated the canal to a width of about 100 feet to a point 500 feet below the headgate, and from there to a point about 4,000 feet below to a width of 60 feet on the bottom, and from there to a point about 19 miles below to a width of 30 feet on the bottom, and water was conducted from the river therein. The canal as constructed was

capable of carrying water to a depth of 6 feet, and was of sufficient capacity to irrigate 30,000 acres of land. Twenty-five miles of the canal from a point below the 19 miles mentioned had been opened up at various places to the full width, and nearly one-quarter of the work thereon had been performed in detached sections, but had not been connected up with the 19 miles above. All this work was accomplished by June 1, 1893, at a total expenditure of about $96,000, when the company ceased work on the canal because of inability to procure funds, except that it kept one team employed which continued excavation work until October, 1895. From that time the Farmers Canal Company did no further work upon the canal. As then constructed there were 5,661.5 acres of land susceptible of irrigation from the canal, and other lands lying under the Enterprise and Ramshorn ditches to the amount of 2,540 acres which were also susceptible of irrigation from this canal, had not the Enterprise and Ramshorn ditches been built to irrigate such lands. Prior to 1897 not more than 500 acres had been irrigated annually from the canal; prior to 1907 not more than 2,000 acres; in 1907, 5,000 acres; in 1908, 7,000 acres; in 1909, 10,000 acres; and in 1910, 20,000 acres of land were irrigated from the canal. In 1897 and 1898 work was done by the company and users of water with its consent in repairing the canal and protecting its banks and headgate. After work ceased, the company endeavored to sell its bonds and to exchange bonds with different contractors for the purpose of building a canal, which negotiations continued until after the mortgage upon the property was foreclosed.

The stipulation sets out with much particularity that, at various dates in a period extending from January 14, 1888, until the 1895 act took effect, the other plaintiffs or their grantors, except the Steamboat Ditch Company and the Gering Irrigation District, each posted notices and duly filed and recorded the same, claiming various amounts of water from the river, and that each constructed canals and appropriated the amounts of water it now claims in

the petition and cross-petitions. The Steamboat Ditch Company made application to the state board under the 1895 act on October 22, 1895, and the Gering Irrigation District on March 15, 1897, for permits to appropriate water. Permits were granted, their canals were constructed, proofs filed with the state board as to each of said claims, and a certificate was issued to the Gering Irrigation District, the priority dating from March 5, 1897. In May, 1895, the county clerks of the two counties in which the lands irrigated lie made transcripts of the notices of appropriation on file in their respective offices and transmitted them to the secretary of the state board in whose office they were filed on May 31, 1895. After the transcript was filed the secretary sent to each of the claimants named in the notices a blank claim to be filled out. A copy of this blank is attached to the stipulation. This blank is in form an affidavit, and sets forth the name of the claimant; the purpose for which water is claimed; the name adopted for the ditch; the source of the appropriation; its amount; the location of the headgate; the length of the ditch; the sections of land through which the canal passes; together with a plat showing the same; the portions of the canal completed or not completed; the dimensions of the uncompleted portions; total excavation; length of fluming required; material removed and fluming completed; estimated cost; expenditure thus far incurred; land to be irrigated; time of beginning work; when works were or will be completed; whether claims are made on account of application of the water to a beneficial use without objection or by posting notice and filing the same; when water was or will be turned into the ditch; acres actually irrigated and estimated to be irrigated; and the relation which the affiant bears to the ditch, canal or other work.

On August 20, 1895, the state board adopted resolutions providing and establishing at large and in detail the procedure and practice of the board in ascertaining and adjudicating water rights already vested, and for the con-

sideration of new applications for the use of water. It also provided for practice and procedure in case of the contest of claims. These rules provided for notice, and for hearings, rehearings, and appeals. Prior to June 5, 1896, the rules adopted by the state board were printed in full in pamphlet form, and, as so established and published, were accepted by the state board and its secretary in matters of procedure thereafter. On the 5th of June, 1896, the secretary mailed a notice with a copy of the rules to each and all of the parties to this suit or their predecessors in interest. This notice was as follows: "Office of State Board of Irrigation. Lincoln, Nebr., June 5, 1896. Notice. Notice is hereby given that the hearing in the matter of adjudicating rights to the use of water claimed prior to April 4, 1895, within the water-shed of the North Platte and Platte rivers, will be held for the several counties therein, by an officer of the state board of irrigation at the places and upon the dates indicated, as follows: (Omitting other counties.) For Cheyenne and Banner counties, in Bayard, on Tuesday and Wednesday, July 14 and 15, 1896. For Scott's Bluff and Sioux counties, in Gering, on Friday, July 17, 1896, at office of O. W. Gardner. Claimants are expected to attend at hearings for their respective counties in order to furnish to the officer presiding at said hearing the necessary proofs, if any be required, to sustain their claims; otherwise said claims will be dismissed. State Board of Irrigation. W. R. Akers, State Engineer, Secretary." This was the only notice forwarded by the board or its secretary to any of the parties to this action. On and prior to the 17th day of July, 1895, the owners of the Brown's Creek, Chimney Rock, Castle Rock, and Alliance ditches procured to be filled out, verified and filed with the secretary, by some of the officers of their respective companies, the blank forms sent out by the secretary. On July 14 and 15 the secretary at Bayard, Nebraska, made inquiries and took evidence as to the claims of the owners of Chimney Rock, Nine Mile,

Alliance and Logan canals, and the claim of the Belmont canal was submitted on the record, without evidence. On July 17 the secretary made inquiries and took evidence at the office of O. W. Gardner, in Gering, Nebraska, in reference to the claims of Yorick Nichols and Carrol Nichols and the owners of the Enterprise, Castle Rock, Minatare, Central and Farmers canals. No contest was made as to any of the claims. The evidence was reduced to writing and made a matter of record in the office of the secretary.

The stipulation then sets out the evidence offered in behalf of the Farmers Canal Company. This shows, in addition to the facts already stipulated, that the cash investment was something over $100,000, and that the canal was designed to irrigate 80,000 acres; that the canal did not strike the large bodies of land until the lower end, and that the company expected to resume work in the near future and were still negotiating in order to procure money. At this time the secretary allowed the company 30 days in which to file a claim setting out specifically the lands they expected to water. No other hearing with reference to the above claims or either of them was ever applied for, ordered, or held, except that the Steamboat, Castle Rock, Belmont and Alliance ditches had rehearings on their respective applications subsequent to April 7, 1897, without notice to other claimants. The Farmers Canal Company, through an officer, filled out the blank claim affidavit, and filed the same on September 19, 1896, claiming 1,142 6-7 cubic feet per second of time, with priority from September 16, 1887. On January 7, 1897, the secretary rendered an opinion on the claim of the Farmers Canal Company, made the same a matter of record in his office, and forwarded a copy to the company, but no copy or notice of the opinion was sent or given to any of the other claimants for water. On the same day the secretary filed written opinions allowing the claims of the Enterprise, Minatare, Castle Rock and Central ditches, and at various dates from January 8, 1897, to January 28, 1897, opinions were filed allowing the claims of the Nine Mile,

Winter's Creek, Ramshorn and Brown's Creek ditches and adjudicating their respective priorities. On April 7, 1897, the state board, without notice other than may be imputed by law, caused a resolution to be entered upon its record affirming the findings of the secretary as to the claims of these parties, except Castle Rock, which was finally approved on September 22, 1897. None of the claimants were notified within 30 days of the adoption of this resolution, none of the plaintiffs acquired any knowledge or information concerning the same for several years after the adoption thereof. At various dates in August and September, 1898, other written opinions were filed as to the claims of the Belmont, Alliance and Chimney Rock Ditch companies, and on January 2, 1897, these opinions were affirmed by resolution as in the former claims. None of the opinions or resolutions, and no certificates as to priorities, nor any other information with reference to claims was ever transmitted to the county clerk of the respective counties, nor were any of such documents ever filed or recorded, except the opinion with reference to the claim of the Farmers Canal Company which was filed and recorded in the office of the county clerk of Scott's Bluff county on the 27th of December, 1905.

The stipulation then sets forth at length the default of the Farmers Canal Company upon its bonds; the foreclosure of the trust deed; and the purchase at the foreclosure sale of all the property of the company by Roberts Walker on December 23, 1901. It also recites the filing of an application in the office of the secretary on April 14, 1902, by one William Frank to appropriate water for a canal to be built along substantially the same line; the filing of protests by that company; intervention by the Farmers Irrigation District (which had also filed an application in June, 1902, for water to cover a part of the same territory); that a hearing was had, and the applications denied; that appeal was taken to the district court, which reversed the board, and that on appeal to the supreme court of the state of Nebraska its decision was

affirmed. It is also shown that by the final judgment of the district court the findings of the state board, "in so far as it finds the said Roberts Walker as the successor in interest of the Farmers Canal Company entitled to an amount of water from the North Platte river not to exceed 1,142 6-7 cubic feet per second of time, are hereby ratified and affirmed."

In 1904 the Tri-State Land Company was organized, and in February, 1904, it entered into an agreement with Roberts Walker for the purchase of the property conveyed to him under the decree of foreclosure, by which agreement $60,000 was to be paid to him for the property in the event that the adjudication of the state board should be confirmed by the supreme court, and $21,000 should be paid for the property if the judgment of the district court in the *Frank* case should be affirmed. After the judgment of the supreme court it received deeds and conveyances from Roberts Walker and from the Farmers Canal Company to the property. In August, 1905, the Tri-State Company began the reconstruction and enlargement of the canal, and also began to excavate, reconstruct and enlarge that portion of the canal lying below the 19-mile portion through which water had been theretofore conducted. In 1905 it expended in resurvey, reconstruction, machinery, tools and labor, $133,066.46; in 1906 and 1907 work was prosecuted so that in the spring of 1907 the canal was constructed full size to a distance of 40 miles below the headgate. In September, 1906, application was made to the state board for leave to construct a needle dam across the river, which was granted in October, 1906, work begun, and $8,000 expended thereon. In that year the company expended in enlargement, construction, deepening and widening, $499,491.87; in 1907 the amount expended on dams, waste way, construction, etc., amounted to $323,386.87, and the canal at the close of that year was completed for 60 miles and was capable of irrigating 60,000 acres of land. In 1908, $52,410.67 was expended, and in 1909 $464,535.13 was expended, and at the

close of that year the canal was capable of irrigating all of the land described in the opinion of the secretary and the claim of the Farmers Canal Company. The amount expended in 1910 is also set forth, but this we deem immaterial under the issues. Before this action was begun the Tri-State Land Company sold and conveyed to the Farmers Mutual Canal Company all of its property, taking in payment therefor the stock of said latter company. It now controls a majority of the stock, but has sold parties under its canal some 25,000 shares.

The average flow of the North Platte river during the last half of July and in August, September and October, at or near the headgate of the canal of the Tri-State Company, does not exceed 800 second feet, and frequently runs as low as 300 second feet; that in those months in 1910 the Tri-State Company diverted from 300 to 400 second feet, and during portions of the time this diversion exceeded all the water flowing in the bed of the river at that point; that, while the Tri-State was diverting all the water flowing in the river at its headgate, water had come to the surface below and was flowing in the river so that some of the plaintiffs received a specified part of the water they were entitled to. In July, 1910, the state board caused the headgates of the canals of all the parties to this action except the Tri-State Company to be closed, in order to allow the water to flow to an alleged prior appropriator whose canal is located near North Platte, Nebraska. Because of the rendition of the opinion on the claim of the Farmers Canal Company and the resolution of the state board, said board refused to close the headgate on the canal of the Tri-State, and the board claims that the Tri-State has a prior right to any of the parties to this action to divert 1,142 6-7 second feet as needed; that, unless restrained, the Tri-State Company will, under the direction and permission of the state board, divert the full amount of water claimed by it, even though the diversion consumes all the water flowing in the river. The irrigated lands have been used for the raising of diversi-

fied crops, but certain crops require irrigation during July, August and September; that the crops which require irrigation during these months are most profitable and remunerative; that, in case any of the lands under the ditches do not receive water during these months, the owners will be compelled to raise less remunerative crops, or will be compelled to procure reservoir water at an added expense. This terminates the stipulation of facts.

The questions involved in this case are of the deepest importance, not only to the parties actually before the court, but to every owner of irrigated land in the state of Nebraska, since the plaintiffs challenge all right and authority of the state board to adjudicate priorities of appropriation under the act of 1895. If this contention be upheld, then more than 1,000 adjudications of prior claims which have been made by that board since the time of its first organization until today, a period of over 16 years, are absolutely void. Moreover, whatever the conclusion of the court may be, it is almost inevitable under the peculiar circumstances of the case that one party or the other will suffer serious loss. It is, therefore, with a deep sense of responsibility and a keen appreciation of the serious results, not only to the parties before the court, but to a vast number of water users in the state of Nebraska, that we approach the consideration of the questions involved.

The appellants contend, first, that the district court had no jurisdiction to establish priorities, that being exclusively for the state board; second, that the rights of the defendants were fixed and determined by the state board in the *Frank* case as affirmed by the supreme court, and that any attack thereon in a collateral proceeding can be of no avail; third, that there was no forfeiture; fourth, that by their own conduct the plaintiffs are estopped to assert any right as against the defendants' claim.

On the other hand, plaintiffs contend that defendants never acquired an appropriation for more than the amount of water allowed by the district court, for the reason that,

although the preliminary steps—the posting and recording of notice—were taken and the intention to apply water for beneficial use existed, yet the work was not prosecuted to completion with diligence, and water in excess of the amount allowed was not conducted to the place of intended use and applied within a reasonable time. It is also contended that the Farmers Canal Company had no vested appropriation at the time the irrigation act of 1889 was passed.

With reference to the claimed adjudication by the state board, it is argued, first, that that board never made a final adjudication or an adjudication intended to be final; second, that the board does not possess power or jurisdiction to enter an order or decree conclusively establishing rights acquired prior to the act of 1895, for the reasons that the entry of such an order would require the exercise of purely judicial powers, which such board does not and cannot possess, and, further, that if it is possessed of judicial powers the method provided by the statute for adjudicating such rights does not constitute due process of law; third, that the manner in which the board proceeded did not constitute due process of law, and its proceedings so far as they purport to be conclusive adjudications are absolutely void. It is also contended that the opinion in the Farmers Canal Company claim is void because it attempted to award an appropriation in excess of the claim made. The plaintiffs also deny that this proceeding is a collateral attack upon the adjudication of the board, and maintain that this is a direct attack upon an order made in excess of jurisdiction, and that the proceedings of the board were erroneous to the extent that it would be unconscionable to permit them to stand. It is further contended that, if any appropriation in excess of 28 second feet of water was ever acquired by the defendants, the same has been lost and forfeited by nonuser. And, as to the claim of estoppel, it is argued that the mere fact that plaintiffs remained silent and did not assert any hostile claim is entirely insufficient to constitute an estoppel. It

is also maintained that the opinion of the state board in the Farmers Canal Company claim did not purport to adjudicate a vested and completed appropriation for any definite quantity of water, and that the right of that company was limited by the opinion to water acquired for such lands as should be irrigated prior to September 1, 1905; that the limitation of the appropriation, if construed to be in excess of the jurisdiction of the board, if excised from the opinion, radically reconstructs it and would render it either void or make it reach a result contrary to what was intended and declared; that, if construed as an attempt to adjudicate and perfect an appropriation of more than 7.15 second feet, such excess is unsupported by any recorded statement of claim or evidence, and was beyond the jurisdiction of the board; that, if it be assumed that the adjudication was valid, then the nonuser of any water in excess of 28.57 second feet, together with the use during ten years by the other parties of all water in the river during low stages, has occasioned by prescription a loss to defendants and a corresponding gain to plaintiffs in the order of their priority.

Much of the argument in behalf of some of the plaintiffs discusses the question as to what constitutes an appropriation, and it is maintained with much force that there can be no valid and vested appropriation until the water diverted has been actually applied to a beneficial use. Many decisions of the courts of Colorado and other states are cited to uphold this contention. A different view is taken in the brief of counsel appearing for the Belmont Company and Alliance Irrigation District. Quoting and construing the statutes of 1889, he says: "The legislature never meant to encourage any one to invest their money in an enterprise, supposedly for a public good, and then to take away from him or them their appropriation simply because the landowner did not take the water within a specified time. That was a provision of subsequent legislation. The principle of the application of water to land before the absolute vesting of the appropriation was not

of the essence of the act. * * * There is nothing in the act that in anywise indicates that water must be applied to land in order to make the appropriation absolute. The act provides that, within a certain time after the posting of the notice, actual work of construction must be begun and in good faith carried forward to completion, and that by 'completion' is meant conducting the water to the place of intended use—to such place on the line of the canal as the landowner desires to receive it into and carry it through his laterals. * * * The act of 1895 (section 28) speaks of the application of water to a beneficial use, or for beneficial purposes, but the act of 1889 nowhere does. After a canal was constructed under the prior act, therefore, and the water conducted through the same, if the owner at all times stood ready and willing to carry water for such landowners as would take it, he made all and the only application that he could make, and all that the act expected him to make, and his right to his appropriation continued as a developing right until all lands under the canal were using water, and thereupon ripened into a complete appropriation." Counsel for other plaintiffs also concedes that "in some states, by statute, an appropriation is treated as effected when all the works are completed, the water is available for use, and there are lands reached by the system ready to be tilled by its occupants. In other states, by statute, the appropriation is not deemed complete until the beneficial use of water occurs. Such was the rule prior to legislation." See, also, sections 8-10, ch. 68, laws 1889, defining appropriation and completion of work. This subject is also considered to some extent in the monographic note to *Nevada Ditch Co. v. Bennett,* 60 Am. St. Rep. 777, 816 (30 Or. 59), where the commentator says: "The appropriation of water for sale to others is authorized by the statutes of the states in which it is valuable for that purpose, and, in many instances, the chief, and even the sole, object of an appropriator is not that of any use by him in and upon his own lands or mines, but the sale of the water to others who have mines to be worked

or lands to be irrigated. In cases of appropriation for the purpose of supplying water to others, we do not understand how it can be said that the use of the water is an essential element of its appropriation. If the intended appropriator constructs the works and appliances necessary for the diversion of the water and the carrying of it to points where its use is desirable and profitable, and has actually carried it there, or is ready and willing to do so, and offers it to all persons who are willing to pay for its use, we apprehend that his appropriation is complete, though the persons to whom it is thus offered refuse to receive or use it. They certainly cannot thus defeat the rights of the diverter." What the rights of the canal owner or of subsequent takers may be in such case it is unnecessary here to consider. A discussion as to this point may be found in *Sowards v. Meagher,* 37 Utah, 212, 108 Pac. 1112. This court has repeatedly said that a canal company is to a certain extent a public service corporation; that it does not own the water that it carries, but acquires by appropriation the right to divert the same and to charge a reasonable fee for the carriage of the same to the lands upon which it was designed to be used. *Paxton & Hershey I. C. & L. Co. v. Farmers & Merchants I. & L. Co.,* 45 Neb. 884; *Castle Rock I. C. & W. P. Co. v. Jurisch,* 67 Neb. 377; *McCook Irrigation & W. P. Co. v. Crews,* 70 Neb. 115. Without further discussion, we are content to adopt the views as to what constitutes an appropriation under the act of 1889 thus stated by counsel, so far as relates to appropriation by a canal owner who is a carrier of water to be applied to a beneficial use upon land owned by others, with the reservation, however, that the water, formerly, must have been applied within a reasonable time in order to retain the first right to take it from the river, and, now, it must be applied within the time limited by the statute. Comp. St. 1911, ch. 93*a*, art. II, sec. 18.

One of the principal questions argued in the case is with respect to the validity and effect of the proceedings of the state board when it undertook to adjudicate priori-

ties under the command of section 16, ch. 69, laws 1895 (Ann. St. 1909, sec. 6795). We deem it unnecessary here to set out at length the provisions of the statute with reference to the adjudication of priorities, or the order which was made upon the claim of the Farmers Canal Company by the state board. These are all set out at length in the opinion in *Farmers Canal Co. v. Frank*, 72 Neb. 136. In that case it was held: "The powers of the state board of irrigation exercised under section 16, art. II, ch. 93*a* of the irrigation act of 1895, are *quasi*-judicial in their nature, and an adjudication by it of a right of priority of appropriation of water made before taking effect of the act of 1895, after proper notice, is final, unless appealed from, and cannot be collaterally attacked." That case was an appeal from an order of the board refusing two applications for appropriations on the ground that appropriations already were in existence for the same lands. The court decided in effect that, in a matter properly before it, the board had allowed an appropriation as claimed, and that it was concluded by its own prior order and adjudication. We are asked by the plaintiff to reexamine this doctrine, which it is earnestly contended is entirely erroneous and is based upon a misconception of the powers and duties of that board. In view of the fact that only a few pages of the briefs in that case were devoted to the discussion of this question, and that, as the writer recalls, but a short time was spent in oral argument, we have considered the learned and exhaustive arguments presented at this time and will endeavor to discuss them as succinctly as we may.

It is first contended that the state board does not possess power or jurisdiction to enter such an order or decree. It is argued that under the constitution the government of the state is divided into three distinct departments, the legislative, the executive, and judicial, and no person or collection of persons being one of these parties shall exercise any powers belonging to either of the others, except as heretofore expressly directed or permitted. The

same contention was first made in this court in the case of *Crawford Co. v. Hathaway*, 60 Neb. 754. The case was decided on another ground, but on this question, in the opinion by NORVAL, C. J., it is said: "It is conceded by appellant that any right it may have in the premises arises out of the irrigation act of 1895 (Comp. St. 1897, ch. 93*a*), and that without that act neither the appellant nor the numerous cross-petitioners have any right to the waters by them sought to be appropriated, unless the act of 1877 may have abrogated the common law rights of riparian owners, a question to which we will advert later. If this irrigation act of 1895 is valid and constitutional, the trial court properly refused to try and determine the right of priority between these litigants for the reason that the board of irrigation provided by that act is thereby given exclusive original jurisdiction to try those questions, and the same had not been by it heard or in anywise determined. Appellant admits the truth of this proposition, but seeks to avoid it by contending that that portion of the act which erects a board of irrigation, giving it exclusive judicial powers, is in derogation of section 1, art. VI of the constitution, in that the legislature by said act sought to erect a new judicial tribunal in place of one of the regularly constituted courts of the state. Without deciding that that portion of the act is unconstitutional, we will assume its invalidity for the purposes of this case, for a cursory examination of the act will convince any one that the board of irrigation was one of the inducements for its passage, and it is so interwoven with the whole act as to make it impossible to declare this portion thereof invalid without also effecting the destruction of the remainder of the act." On motion for rehearing an additional opinion was written by NORVAL, C. J., 61 Neb. 317. The opinion discusses, at length, at pages 325 to 328, inclusive, the question as to whether the act is unconstitutional for the reason that judicial powers are conferred upon the board. The writer, though evidently of the opinion that if the provisions with reference to the board fall the whole

act would fall with them, and implying, at least, that the act is valid, says the court expressly refused to decide this question because it "is not involved in the case at bar," and "it merely decides that, if the act in question is valid, plaintiff proceeded in the wrong forum." And it was said that, if unconstitutional with respect to the judicial powers of the board, it is void as a whole. A rehearing was had, and in an opinion prepared by HOLCOMB, J., the purpose of the act was stated more fully. 67 Neb. 325. It seems that the action was brought by the plaintiff below to have adjudicated the rights of 12 persons to the use of water flowing in the White river, and to enjoin Hall, a riparian owner, from interfering with the headgates and works connected with an irrigating canal being constructed by the plaintiff. The trial court refused to try the case on its merits for the reason that the water rights of the respective parties had not first been determined by the state board of irrigation. This court took a different view as to the rights of riparian owners, and the judgment was reversed and the cause remanded, with directions to try the case. The opinion of Judge HOLCOMB, after considering the question at some length, says at page 367: "Powers of the same general nature and character are conferred upon almost every administrative body known to the statute, and regarding which it has frequently been decided are of a *quasi*-judicial nature, and yet such bodies are invariably held to be administrative, and to in no way conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. The state board of transportation, as heretofore organized in this state, the constitutionality of which has been invariably upheld when attacked, in all respects, save as to the manner of passing the law providing for its creation, is a fair illustration of the validity of legislation of this character. Numerous other boards and offices created by statutes, of an administrative character, and yet possessing powers of a *quasi*-judicial nature, might also be referred to if thought to

serve any useful purpose. For the reasons given, we are of the opinion that the sections of the act in question are not obnoxious to the constitution on the objections raised by counsel, and that the authority of the board of irrigation to make the determinations contemplated by the act, and the requirement of its approval as a condition to the right of appropriation under the provisions of the act, is a valid exercise of leglislative power"—citing *Farm Investment Co. v. Carpenter,* 9 Wyo. 110. As to this point Judge SEDGWICK concurred, saying: "Those parts of the irrigation act of 1895 which provide for a board of irrigation, and the adoption of the rule of ownership of water by appropriation, are constitutional." In *McCook Irrigation & W. P. Co. v. Crews,* 70 Neb. 115, the constitutionality of the irrigation act of 1895 was again challenged, but the law was again sustained by the court.

In the face of these decisions it hardly seems necessary to again consider the question, but we have done so, and have examined further authorities. It is a matter of common knowledge that both in the administration of the laws of the United States and of the several states, boards or individuals, for the purpose of exercising executive or administrative functions, are often compelled to inquire into and determine questions requiring the exercise of powers judicial in their nature. Some of such determinations are often, by virtue of the statutes defining the functions and power of the tribunal, final and decisive, and others are made reviewable by appeal to the courts. For example, the determination of the general land office with respect to controversies over claims to the public lands; the action of boards of medical examiners in granting or refusing diplomas to persons seeking to practice medicine; the determination by boards of county commissioners in this state that the formation of a drainage district will be conducive to public health, or that the establishment of a highway is necessary; the judgment of a commission created by congress to pass upon the validity of private land claims in territory ceded to the United States. Number-

less other instances may be adduced. Whether reviewable by the courts or not, the exercise of such powers by tribunals of this nature has seldom been held to be a violation of the constitution in this respect. McGehee, Due Process of Law, 162, 368; *Reetz v. Michigan,* 188 U. S. 505; *Gardner v. Bonestell,* 180 U. S. 362; *Bates & Guild Co. v. Payne,* 194 U. S. 106; *People v. Simon,* 176 Ill. 165; *Farm Investment Co. v. Carpenter,* 9 Wyo. 110; *State v. Thorne,* 112 Wis. 81, 55 L. R. A. 956; *Gee Wo v. State,* 36 Neb. 241; *Lincoln Medical College v. Poynter,* 60 Neb. 228. We are satisfied with the conclusion reached by this court in the cases cited, which were followed in *Farmers Canal Co. v. Frank,* 72 Neb. 136, and see no reason to change our conclusion in this respect.

On the point that the action of the board in adjudicating priorities does not constitute due process of law for the reason that the statute does not specifically provide for notice to the parties, we are of opinion that where a statute under the police power of the state authorizes a proceeding affecting the property rights of any person, and does not expressly provide for notice to be given, the right to notice is implied, and that where a proper notice has been given, under a procedure authorized by the legislature, and a party has appeared, he has not been deprived of any of his rights without due process of law. And this is more especially the case where the proceedings are not in the nature of proceedings at law or in equity. The constitution and the statute will be construed together as one law. *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.,* 17 W. Va. 812, 835; *Paulsen v. Portland,* 149 U. S. 30; *Kentucky Railroad Tax Cases,* 115 U. S. 321, 334. See, also, McGehee, Due Process of Law, 82, and cases cited in note to *Sterritt v. Young,* 4 L. R. A. n. s. 169 (14 Wyo. 146), beginning with page 173. Plaintiffs cite *McGavock v. City of Omaha,* 40 Neb. 64, to sustain their proposition. Although the writer of the opinion in that case seems to think that the authorities preponderate in favor of the view that notice must be prescribed in a statute in order

that it be valid, the court expressly confines the holding to the proposition that, if notice is not given in condemnation proceedings, the right to bring an action for damages is not barred. This case, therefore, is no authority in support of the proposition.

By the act of 1895 the legislature committed the duty of prescribing the method of procedure with respect to such adjudications to the state board. That board formulated rules providing for notice, and allowing for hearings and appeals. We think the legislature had power to delegate this duty to that body, and that the fact that the method of procedure was not embodied in the statute does not render due process lacking in the proceedings.

It is contended that the opinion of the secretary was void because it was in excess of the claim filed by the company. It is assumed by the plaintiffs that the "claim" adjudicated by the board was the affidavit filed by the Farmers Canal Company, but in this we think they are in serious error. The "claim" which the board investigated, and which the statute mentions, is "the claim for appropriation *now on record*" (section 16), and it is as to this claim, and other claims based upon actual use without posting, that "the method of determining the priority and amount of appropriations shall be determined by said state board." Moreover, in the 1889 report of the state board the method of adjudicating claims is set forth, and it is shown that the copies of notices posted and filed, transmitted by the county clerks, and the claims presented to the board by parties who neglected to post notices, but who had previous to 1895 appropriated and used water, constituted, according to its practice, the claims to be adjudicated. We are of opinion that, even if no blank claim affidavit had ever been filed by the company, as in fact none was filed until long after the hearing had been had, the board would still have had power and jurisdiction to determine the validity and priority of claims "now on record." The rules of the board clearly show that the affidavit filed by claimants under recorded notices was

intended to be taken as evidence, and not as a pleading. The opinion shows that "the claim * * * is made by virtue of posting three notices of appropriation at the proposed point of diversion," setting forth specifically the time of posting and recording each notice. The authorities cited to sustain the proposition that a judgment in excess of the claim made in the petition is void are, therefore, inapplicable, and the finding was not in excess of the claim made. In this connection plaintiffs' counsel say: "If we assume that the board had jurisdiction to hear and determine the claim of the Farmers Canal Company as against other claimants to the use of water from said river, then we are perfectly willing to concede that, *if the board made an adjudication that the Farmers Canal Company was entitled to an appropriation greater than it was possessed of at that time, it would be final,* provided that said company claimed an appropriation to the extent of its allowance by the state board, and other claimants had knowledge thereof; but we do not concede that, if a claimant only asks for an appropriation of 10 cubic feet of water, the state board has jurisdiction to grant to him 1,000 cubic feet of water; or, if he makes application for a permit to appropriate or claims an inchoate or incomplete appropriation, that the state board has jurisdiction to allow a completed appropriation." By this concession in the brief it would seem that plaintiffs themselves take the same view as this court did in the *Frank* case, since by the several notices, which were matters of public record of which the plaintiffs were charged with notice, the Farmers Canal Company claimed an amount of water greatly in excess of the allowance made to it by the state board. The fallacy in the argument of plaintiffs' counsel is that the posted and recorded claims, which under the statute were the basis and the moving cause for the action of the board, are treated as of no force or effect, and the claim affidavit subsequently filed is assumed to be a pleading by which the authority of the board is limited.

It is insisted that because the act of 1895 (section 19) provides that "when the adjudication of a stream shall have been completed it will be the duty of the state board to make and cause to be entered of record in its office an order determining and establishing the several priorities," etc., the action of the board upon the claim of the Farmers Canal Company was void, for the reason that the adjudication on the stream had not been completed when the opinion was filed and affirmed. It is shown, however, that hearings had been had upon all the claims to the water from the North Platte river; that the secretary proceeded to examine and render opinions upon each claim; that on January 7, 1897, opinions were rendered by him upon the claims of the Farmers Canal Company, and others, and from time to time opinions were rendered on other claims. On April 7, 1897, the opinions upon these and other claims, from which appeals were not taken, were affirmed by resolution of the board. A hearing was had as to the claims of several of the plaintiffs, and a subsequent resolution adopted on January 2, 1899, affirming the opinions rendered on rehearing. It would seem that, while the secretary filed his opinion on each claim as soon as he had reached a conclusion with regard to its validity and priority, the board itself took no action in the matter until the investigation was completed, when it affirmed the opinions *en masse*. The fact that rehearings were granted in a few cases could not operate to divest the board of the power it possessed and had already exercised. Even if the decision was premature, we are inclined to the view that it would be a mere irregularity, and not a void act.

Plaintiffs also argue that rule 3 of the board implies that the adjudication provided for was not intended to be final, because it provides that "the first adjudication of the rights of claimants shall be conducted for the purpose of determining the validity of claims," etc. This was what was actually done, that is, the validity of the claims, evidenced by the posted and recorded notices claiming water in specified quantities with priorities dating from the

posting and recording thereof, were actually determined, and, when this was done, no further adjudication upon this point could be had. It appears also from an examination of the entire body of rules that no other hearing or adjudication is provided for thereby, except in cases of contests or rehearings before the secretary or the board.

It is also contended that, because no certificate was issued within 30 days after the determination of the board, its adjudication was not final and there was nothing from which any of the parties could have appealed to the district court. The limitation of 30 days in which to issue the certificate we think is merely directory. The certificate required by the statute does not constitute the adjudication, but is merely evidence thereof.

It is next insisted that the language of the opinions themselves shows that they were not intended as final adjudications, that the board and its secretary followed the practice which seems to have prevailed in the courts of Colorado, by which in proceedings to settle water rights decrees may be rendered, both final and interlocutory in their nature; final and conclusive as to water which the court found had already been applied to a beneficial use, and conditional or interlocutory in that they recognized and declared the capacity of the canal and the quantity of water required for future use and decreed a right to the same, contingent upon the exercise of diligence in constructing the ditch and applying the water from the same to a beneficial use. It is not improbable that the board of irrigation had the Colorado practice in mind. There is no statute in this state authorizing such conditional decrees in a proceeding brought before the state board to ascertain and adjudicate priorities. The statutory duty of the board in this connection was to ascertain the rights which had become vested before the taking effect of the act of 1895 and the extent of such rights. Their powers were special and limited, and could not exceed the statutory grant. After the taking effect of the act of 1895, all water in the streams of the state, the right

to appropriate which had not already vested, could only be set apart to individuals by obtaining a permit from the state board under the manner of procedure specified in sections 28 to 31, inclusive, of the act. In so far, therefore, as the board attempted to make a conditional order in such a proceeding, its action was unauthorized and nugatory. But it is contended that the holding in the *Frank* case that the adjudication may be upheld with the *ultra vires* conditions eliminated is erroneous and should be set aside. In *Shaw v. Kellogg*, 170 U. S. 312, the controversy was one with respect to the title to a large tract of land in New Mexico; it being contended it was mineral land subject to entry. A congressional grant provided that the land should be selected by the grantees, and that it should be vacant and nonmineral. The land was settled by the claimants, and the selection reported to the land department by the surveyor general of New Mexico, whose duty it was to make the survey and see that the lands were such as the grantees were entitled to select. The land department approved the survey, field notes, and plat, and noted on its maps that the land had been segregated, but the certificate of approval entered upon the plat filed in the land department by the surveyor general, under the directions of that department, made the approval "subject to the conditions and provisions of section 6 of the act of congress, approved June 21, 1860." This is the act making the grant and providing that the land shall be "not mineral" in character. The court held that the limitation was beyond the power of the land department to impose, and that the title was valid and not affected by the limitation, saying: "What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the land department. Its duty was to decide and not to decline to decide, to execute and not to refuse to execute the will of congress. It could not deal

with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the land department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time." See, also, *Deffeback v. Hawke,* 115 U. S. 392, 406, where it is said: "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions it prescribed." By a parity of reasoning, the only authority which the state board had was to adjudicate the validity of the claims filed and determine their priority, under sections 15 to 27, inclusive, of the act. This being done, its powers and duties in the matter before it were ended, and it had no power to impose conditions, no application for unappropriated water being before it for consideration.

Much is said in the plaintiffs' briefs upon the proposition that the powers and duties of the board are administrative in character, and the point is sought to be made that controversies between rival appropriators are not within the scope of its powers and duties. This may be granted, and, yet, it cannot help the plaintiffs here. The board was authorized under the statute to fix a time for determining the claims of all persons to the waters of the North Platte river which had become vested prior to April, 1895. Notice was given of the time and place of

the hearing. All the parties to this suit or their predecessors in interest appeared. The board examined their claims, passed upon their validity, and fixed their priorities. This was absolutely essential for its own information in order that it might administer and distribute the unappropriated waters. By its rules it provided for the contest of claims made, and for a hearing upon the same, and for appeals from the decision of the secretary and board upon such contests. No contests being made as to the rights of any claimant, and no appeal being taken as to the amount and priority of appropriations, the matter became settled, so far as the board was concerned, and in its future dealings with the waters of the river it was bound to follow the adjudications made and distribute the same in accordance therewith. The supreme court of Wyoming in *Ryan v. Tutty*, 13 Wyo. 122, 78 Pac. 661, in passing upon the statute of that state, which grants powers to water commissioners and superintendents to regulate the use of waters by different appropriators according to their priorities, and provides that from the decision of such officers an appeal lies to the state engineer, and from his decision to the circuit court, while holding that a decision of the commissioner and superintendent as to the right or use of water, although not appealed from, is not an adjudication conclusive on the courts, say: "But it is to be observed that the statute clearly contemplates that such official action shall be based *upon a record of adjudicated priorities.* They (the officers) are not vested with arbitrary control, but are required to divide the water according to the prior rights of the interested parties. * * * Primarily, the commissioner is authorized, whenever legally called upon, and it is his duty, to see that the water of a particular stream is diverted *in accordance with the established priorities, and* to prevent any one from taking more water than he is entitled to take to the injury of others. He is not authorized to determine priorities. * * * The only object of his inquiry is that he may justly and fairly make a temporary distribution of

the water *in conformity with the adjudicated priorities.*" (The italics are ours.) It will be seen, therefore, that the question involved here is not decided in that case adversely to the views of this court, though it is cited by plaintiffs as upholding their contention. *Boulder & Left Hand Ditch Co. v. Hoover,* 48 Colo. 343, 110 Pac. 75. The same principle was announced by this court in *Farmers & Merchants Irrigation Co. v. Cozad Irrigation Co.,* 65 Neb. 3.

In considering whether the appropriation had been lost by lack of diligence, by nonuser or abandonment these facts must be considered. The stipulation shows that prior to June 1, 1893, about $96,000 had been expended upon the canal. It was then of sufficient capacity to irrigate 30,000 acres of land within a distance of 19 miles from the headgate. The 25 miles below the 19 miles mentioned had been opened up at various places to a full depth, and nearly one-fourth of the construction work performed, but had not been connected up with the 19-mile section in which water was flowing. The canal was kept in repair until in 1898 by the Farmers Canal Company, and thereafter by landowners along the canal with the consent of that company, until it was taken possession of by the Tri-State Land Company. Up to the time of the foreclosure of the trust deed the company endeavored to sell additional bonds or to exchange them with different contractors for the purpose of extending and finishing the canal. The action to foreclose the trust deed securing the bonds was commenced in 1898, on December 23, 1901, the property was sold, and the sale was confirmed in February, 1902. On April 14, 1902, Frank filed his claim, which, if allowed, would have destroyed the appropriation except for water sufficient to irrigate 5,000 acres. This was followed by the claim and intervention of the Farmers Irrigation District, which, if allowed, would have had the same effect. Protests against Frank's application were filed on behalf of Roberts Walker claiming the prior appropriation. These proceedings before the board and by

appeal to the district and supreme courts continued until November 18, 1904, when they were terminated by the judgment of the district court in pursuance of the mandate. This recites: "The findings and jurisdiction of the state board of irrigation, in so far as it finds the said Roberts Walker as the successor in interest of the Farmers Canal Company entitled to an amount of water from the North Platte river not to exceed 1,142 6-7 cubic feet per second of time, is hereby ratified and affirmed." And it was adjudged that Roberts Walker "has appropriated and is entitled to divert from the North Platte river for irrigation purposes 1,142 6-7 cubic feet of water per second of time, and has a vested, subsisting right in and to said appropriation." The Tri-State Company was organized in January, 1904. In February, 1904, it made a contract with Roberts Walker to purchase the Canal Company's property, the amount to be paid depending upon the result of the litigation. Relying upon the judgment, the Tri-State Company paid the full amount stipulated for the rights of Roberts Walker, and received a conveyance of the property, which was recorded on February 21, 1905, in the office of the register of deeds in Scott's Bluff county. It immediately began the enlargement and construction of the canal, expending over $100,000 that year. It pursued this work in 1906, and diligently and actively prosecuted the work until its completion, so that the canal is now capable of furnishing water for the entire 80,000 acres of land which it was constructed to serve. On September 13, 1906, it made an application to the state board for leave to construct a needle dam across the river below the headgate of its canal. That it had a valid existing right was recognized by the state board at that time, when it granted leave to construct a needle dam in the river below its headgate for the purpose of diverting sufficient water into its canal, and this right has been since recognized by that body in its administration of water from the river.

It seems evident that the purpose to carry on the enter-

prise and construct the canal in its entirety was never abandoned by the owners, and it has now been carried to completion. It is probably true that no actual construction work was performed upon the canal for about 10 years; but, from the time that the foreclosure suit was begun until the final decision in the *Frank* case, the title to the property and right to the appropriation were in such hazardous and uncertain condition that few men would have had the temerity to invest money to any extent in the further development of the plan. The enterprise was of such a nature as to require large expenditures and years of effort. While recognizing the rule that in the final analysis it is the application of water to a beneficial use within a reasonable time that conditions the power of the appropriator to retain his right to carry water, and that an appropriator of water to be carried to be used by others must carry on his works with diligence or lose his priority, we are convinced that, under all the facts in this case, it would be highly inequitable and unjust at this time to enforce a forfeiture on the ground of lack of diligence, nonuser or abandonment. We are aware that it has been said that pecuniary difficulties are no excuse for failure to carry on such work, but an examination of the cases in which this doctrine has been laid down shows that the facts are so dissimilar from the case at bar that we do not feel justified in adopting them as forceful authority in this case. This precise question may never arise again in this state, for by an amendment made in 1911 to section 18, ch. 93*a*, Comp. St., a time is specifically limited for the application of water, and a method of procedure established by which the question of nonuser or lack of diligence is determined.

Upon the question whether, even if the other questions be decided in favor of plaintiffs and against defendants, plaintiffs are entitled to the aid of a court of equity and are not estopped by reason of their own conduct, it is necessary to examine the facts as admitted by the pleadings and the evidence. All parties who took any part in

the hearing knew, or were charged with knowledge, that notices had been posted by the Farmers Canal Company and recorded in the office of the county clerk prior to the taking effect of the act of 1895. The act of 1889, by authorizing such filing and recording, constituted the same a public record, of which all persons interested were bound to take notice. These notices showed that the Farmers Canal Company, by the first, claimed a quantity of water sufficient to fill a canal 40 feet wide on the bottom and to carry water to a depth of 4 feet, and, by the others, water in addition to its former claim to the amount of 200,000 miner's inches, the canal to be 80 feet wide and 8.84 feet deep at point of divergence, slope 1 to 1, with an average grade not greater than 2 feet to the mile. Under section 32 of the act of 1895, 50 miner's inches shall be deemed equivalent to a cubic foot of water per second, so that in the aggregate the waters claimed largely exceeded in quantity the 1,142 6-7 cubic feet per second which were allowed. Indeed, we find no specific denial of this knowledge either in the pleadings or the evidence. After denying knowledge of the filing of the claim of the Farmers Canal Company with the board, of the hearing thereon, and of the opinion and resolution, the petition alleges: "Nor did the plaintiff herein or its grantor acquire any knowledge whatever of *the above mentioned transactions of said board* and its secretary for several years *after they had taken place.*" This is not a negation of knowledge of the claims of the Farmers Canal Company, but only of knowledge of the transactions of the board. It also amounts to an admission that it acquired knowledge "several years after" 1896 and 1897, when the transactions mentioned took place. The expression "several years after" is vague and indefinite, and, since the language used must be construed most strongly against the pleader, it cannot we think be taken to mean a space of about nine years from July, 1896, when the hearing was had, and January, 1897, when the resolution passed, and the time when the defendants began the work of recon-

struction and enlargement on a large scale in August, 1905. So that there is no denial of want of knowledge even of the board's action before the latter time.

The petition alleges that the defendants "have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte river to the extent of 1,142 6-7 cubic feet per second of time * * * which is prior to the right of appropriation acquired by this plaintiff." The time at which these declarations were made is not disclosed. But, if only recently made, the pleader would, no doubt, have taken advantage of the fact. The evidence also shows the mailing of notices and of printed rules of procedure to the plaintiffs, and that at different dates from June 24 to October, 1895, the plaintiff's grantor and ten other claimants, including the Farmers Canal Company, filed claims before the state board, and that on July 17, 1896, another claim was filed by the owners of the Minatare ditch. On the same day that the opinion on Farmers Canal Company was filed by the secretary, he also filed opinions in the claim of the Enterprise Ditch Company, plaintiff's grantor, and in those of three of the other plaintiffs. It is apparent, therefore, that all claimants who filed claims with or produced evidence before the board had notice of its transactions, at least to the extent of being aware that a hearing would be had, and were also charged with notice of the rules of practice adopted by the board. The evidence also shows that some rehearings, presumably on request, were had upon claims. In April, 1902, the Frank application was filed with the state board. In June, 1902, the Farmers Irrigation District also filed a like application. These applications were contested before the board, appeal was taken to the district court and supreme court. Judgment was rendered on June 9, 1904, in favor of the Farmers Canal Company upholding its prior right to the appropriation it claims. In 1905 the Tri-State Land Company expended $133,066.46 in their work on the canal. In August, 1906, it began work on the

enlargement of the 19-mile portion of the canal. In the spring of 1907 the canal was constructed to its full size for a distance of 40 miles below the headgate. In September, 1906, it was given leave by the state board to construct a needle dam across the river below the headgate, and this work was begun in October of that year. In all there was expended in 1906 in these operations the sum of $499,491.87. In 1907 a new headgate was built and the canal further extended at an aggregate cost of $323,386.87. In 1908 the work was continued at a cost of $52,410.67. In 1909 $464,535.13 was expended in extension and improvement. In 1910 work was continued on the headgates, needle dam, and waste gate at a total cost of $198,529.70. The total amount expended by the Tri-State Company in construction from February, 1905, to October 31, 1910, was $1,651,138.41, of which amount over $950,000 was expended before the original petition in this case was filed.

The question is whether the plaintiffs could stand idly by while the defendants, openly claiming a prior right to water sufficient to water the lands for which the appropriation had been allowed by the state board, expended nearly a million dollars in the work, and then after the work was practically finished enjoin the use of the water which the works were constructed to carry. Under section 10 of the act of 1895, the state board is required to prepare and render to the governor biennially full reports touching all the matters and duties devolving upon the board by virtue of its office, and it is provided that 2,000 copies of the report should be printed and distributed according to the provision of the law providing for the printing of other state reports. This report is a public document of which we take judicial notice. The report for the years 1897 and 1898 contains a table showing the appropriations from the various streams of the state which had been allowed by the board since its organization in 1895, with the date of priority, and the amount adjudged to each appropriator. This table shows

that the Farmers Canal Company of Omaha had been granted an appropriation of 1,142.87 second feet, with headgate located on section 3, town 2, range 58, Scott's Bluff county, with priority of September 16, 1887, with the conditions mentioned, and also shows the amount and priorities awarded other parties to this suit. This table is carried forward in each report published, so that the information therein contained has been available to all parties interested ever since early in the year 1900 until the present time. With all these facts before us, we must find that plaintiffs had knowledge of the posted and recorded claims of the Farmers Canal Company; of the passage of the law of 1895, and of its provisions requiring the state board at its first meeting to make arrangements for adjudicating the priorities of all "claims for appropriation now on record;" of the notice to appear before the secretary, and of the rules prescribed by the board as to rehearing, appeals, and contents; of the practice of the board in deciding claims by written opinions, copies of which were mailed to each claimant; of the fact admitted in its reply that ever since the Tri-State Land Company became the owner of the canal, "it claimed and still claims the right to 1,142 6-7 cubic feet per second;" of the vast undertaking of the defendants in the completion of the canal; of the extensive works of the Tri-State Company in building dams and headgates, and in excavation, comparable only to the construction of a railroad; and of the expenditure of hundreds of thousands of dollars in a sparsely settled country. Furthermore, the claims of all the parties except two originated by posting notices on the bank of the stream and recording copies in the office of the county clerk. When the state sought to determine for its own purposes the rights to the use of water which had vested, so that it might apportion that which still flowed in the river bed subject to appropriation, it gave all of these claimants an equal opportunity to assert their claims. They all took advantage of this privilege, their rights were determined, and they all

acquiesced. Opportunity for contests of the claims of others which might interfere with the amount of water each claimed was afforded each of them under the rules adopted which were brought to their attention. They filed no contests, took no appeals, but remained apparently content to recognize the authority of the board. Relying on these conditions, as well as upon the adjudication, the defendants purchased the canal, worked upon it for years, and spent vast sums of money in its completion so as to irrigate the specific land which it was originally designated to reclaim. During all these years no claim of superior right to this water seems to have been made, though it must be said that, when the supply was short and while the defendants were not using the water, it was used by some of the plaintiffs, but this is customary, right and proper when water is flowing in the stream unused. If a prior appropriator for carriage is not ready to use water, the use of it by another is not equivalent to an adverse user which of itself would give notice of a hostile claim. *Smith v. Duff*, 39 Mont. 374, 102 Pac. 981; *Featherman v. Hennessy*, 42 Mont. 535, 113 Pac. 751; *Ison v. Sturgill*, 57 Or. 109, 109 Pac. 579; *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143. Under these circumstances, and having this knowledge, it would be contrary to the plainest principles of equity if plaintiffs might stand silently by, seeing the defendants engage in such a monumental work under claim of right, and utter no word of warning as to their own claims, which, if eventually established, would deprive defendants of the water which the canal was built to carry, condemn the whole enterprise to failure, and result in the absolute loss of the money expended. It would be manifestly inequitable and unjust to allow the plaintiffs, after the works were practically finished and the money expended, to insist upon claims which, had they been asserted in good time, would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined.

In *Fremont Ferry & Bridge Co. v. Dodge County,* 6 Neb. 18, the facts were that the company sought to enjoin the county from erecting a bridge which would take away tolls from a bridge built by plaintiffs. It was shown by the answer that a bridge had been erected by the county, a part of which was out of repair, and which it was about to repair. The court said: "The silence of the plaintiff when knowing its own rights, and having full knowledge of the steps taken by the defendants to build the bridge, will estop it after the completion of the work, or after large expenditures of money in construction had been made; for such silence lulls to rest instead of warning to danger, and, in the language of the books, it becomes a fraud." In a case where a mill owner entitled to the use of water as a riparian owner remained quiescent while an irrigation company expended large sums in constructing its canal, this court refused to grant an injunction against the use of the water for irrigation, saying: "It is clearly established by the proofs that the construction of the irrigating ditch was undertaken and carried out by the defendant company in good faith in accordance with the purpose of its creation, at a cost of many thousands of dollars, and in the belief on the part of its promoters and managing officers that it was entitled to divert the water of the Republican river. It is also practically undisputed that the plaintiff was from the first fully advised of both the undertaking and the purpose of the defendant, and it is certain that he interposed no objection thereto until after the substantial completion of the work. The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact there is no principle more firmly established in the jurisprudence of this country than that a suitor who has by his laches made it impossible to restrain the completion or use of public works without great injury to his adversary or the public will be left to pursue his ordinary legal remedies." *Clark v.*

Cambridge & Arapahoe I. & I. Co., 45 Neb. 798. See, also, cases cited in each of these opinions. *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. Rep. 592. We think the cases cited by plaintiffs are so different in the facts before the court that they do not furnish any guide in this case. Whether the original adjudication was more than a mere administrative proceeding for the information of the board or not, and even if it should be held that the right to the full appropriation was lost by nonuser before the Tri-State Land Company fully constructed its canal, we agree that the plaintiffs are estopped to maintain this action.

In concluding, we may remark that the evidence shows that at the time the state board made the determinations agriculture by irrigation was in its infancy in this state. The volume of water flowing in the North Platte river at various seasons of the year had not been definitely ascertained, and the actual flow was largely a matter of conjecture. A number of the determinations made, therefore, were for water in excess of the actual amount which experience has shown was available for the respective enterprises and which the works could convey. Perhaps this fact should be considered by the state board in times of scarcity, but this question was not presented, and is not decided. The true test of ultimate right to the water is its actual application to a beneficial use. The spirit and the letter of the statute compels the most rigid economy in the use of water so that the full benefit of it may be derived. If not in use by prior appropriators, others may use it. No dog in the manger policy can apply. If the nonuse is continued for the statutory time the right ceases, may be forfeited, as the statute provides, and more diligent users may acquire the right to its use under the authority of the board. A landowner taking more than he is entitled to is liable in damages to those injured. No appropriator is entitled to more than can be beneficially used, or more than the least amount which experience indicates is necessary for the production of crops in the exercise of good husbandry.

We find it unnecessary to consider the questions presented as to the rights of the plaintiffs and cross-petitioners between each other, since the result reached eliminates the same.

The judgment of the district court is reversed and the cause dismissed, but without prejudice as to any controversy between the plaintiffs and cross-petitioners.

REVERSED AND DISMISSED.

HAMER, J., concurring in part, and dissenting in part.

I concur in the opinion so far as it reverses the judgment of the district court, and no further. I am unwilling to adopt the views expressed in the opinion, and dissent from them. I am unwilling that the case shall be dismissed, and dissent from so much of the opinion as directs its dismissal. Only that amount of water should be adjudged to the main ditch which can be applied to a beneficial use. The amount of water applied should be with due regard to the rights of other appropriators, and where the first appropriator fails to apply all the water within the limits of his appropriation to a beneficial use, and there is an excess of water which is not applied, the same shall be for the use of the next appropriator in the order of priority, and there should be no appropriation except for an actual beneficial use. The ditch should not be held entitled to appropriate water over and above that which is intended for an immediate beneficial use, and water not so diverted and used should belong to the next appropriators in order of priority. As between ditches, there should be a *pro rata* distribution of water based upon the amount each ditch has lawfully appropriated and applied to a beneficial use, and not exceeding the limit of each appropriation.

ROBERT B. DUNCAN, ADMINISTRATOR, APPELLEE, V. NEBRASKA SANITARIUM & BENEVOLENT ASSOCIATION, APPELLANT.

FILED OCTOBER 18, 1912. No. 17,086.

1. **Charities:** HOSPITALS: LIABILITY: NELIGENCE OF NURSES. A charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses.

2. ———: ———: ———: ———. A charitable institution conducting a hospital does not, by accepting compensation from a patient who is able to pay for room, board and care, incur liability to such patient for the negligence of nurses.

3. ———: ———: ———: ———. A charitable institution conducting a hospital for benevolent purposes alone does not necessarily incur liability in damages for the death of an insane patient who committed suicide when alone in a room, though pay for the patient's room and care was accepted under an oral agreement to keep a nurse in constant attendance.

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

John M. Stewart and *T. F. A. Williams,* for appellant.

Charles O. Whedon and *C. P. Peterson, contra.*

ROSE, J.

When Sadie Duncan was occupying a room in defendant's hospital, she committed suicide in absence of a nurse or other attendant, and this is an action by her husband as administrator of her estate to recover from defendant damages for negligently causing her death. Plaintiff alleges that, in consideration of $45 a week, she was accepted as an inmate under a verbal agreement by defendant to give her necessary medical attention and to furnish a trained nurse to be in constant attendance upon her. In the petition it is also alleged that her death was

due solely to the wrongful act, neglect, default and carelessness of defendant in leaving her alone and unattended. The right of plaintiff to a recovery was resisted on the ground that defendant is exempt from liability to its inmates for the negligence of nurses and other attendants, because it is a charitable institution, conducted solely for philanthropic and benevolent purposes. From a judgment in favor of plaintiff for $3,275, defendant has appealed.

After giving a number of instructions the trial court charged the jury as follows: "The undisputed evidence further shows that the defendant is a charitable institution maintained for philanthropic and charitable and benevolent purposes, and in no manner directly or indirectly for private profit or dividend-paying to any one." This instruction was fully justified by the evidence, and was properly given. In stating the law applicable, however, the trial court said: "You are instructed that if you find from the evidence that said Sadie Duncan was in any sense a charitable patient, or, in other words, a beneficiary of any bounty at the hands of the defendant, and the amount paid does not make full pecuniary compensation for the services rendered, then the deceased's representative, the plaintiff herein, cannot recover, and your verdict must be for the defendant. On the other hand, if you find from the evidence that the deceased was received as a patient on full pay, full pecuniary compensation, and without being the recipient of any charity or bounty at the hands of the defendant, then the defendant would be liable for any negligence of its agents or servants which proximately contributed to the deceased's death."

This instruction is assailed as erroneous. It contains two propositions of law, and the first seems to be correct. It is a well-established doctrine that a charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses. Some courts say that one accepting the

benefits of such a charity exempts his benefactor from liability for the negligent acts of servants. Others assert that non-liability is based on the ground that trust funds created for benevolent purposes should not be diverted therefrom to pay damages arising from the torts of servants. Exemption from liability is frequently sanctioned on the ground that public policy encourages the support and maintenance of charitable institutions and protects their funds from the maw of litigation. While there is a diversity of opinion as to the reasons for the rule, the doctrine itself is firmly established. *Thornton v. Franklin Square House,* 200 Mass. 465, 22 L. R. A. n. s. 486; *Farrigan v. Pevear,* 193 Mass. 147, 7 L. R. A. n. s. 481; *Powers v. Massachusetts Homœopathic Hospital,* 101 Fed. 896, 65 L. R. A. 372; *Downes v. Harper Hospital,* 101 Mich. 555; *Parks v. Northwestern University,* 121 Ill. App. 512, 218 Ill. 381; *Joel v. Woman's Hospital,* 89 Hun (N. Y.) 73; *Ward v. St. Vincent's Hospital,* 50 N. Y. Supp. 466; *Conner v. Sisters of Poor,* 7 Ohio N. P. 514; *Abston v. Waldon Academy,* 118 Tenn. 24, 102 S. W. 351; *Adams v. University Hospital,* 122 Mo. App. 675; *Hearns v. Waterbury Hospital,* 66 Conn. 98, 31 L. R. A. 224. In applying the law thus established the trial court was right.

The second proposition stated in the instruction last quoted, however, is erroneous. It permits the jury to find in favor of plaintiff, if full compensation was paid to defendant. The uncontradicted evidence is that the agreed rate as pleaded by plaintiff was not paid. On the contrary, a reduced rate was paid and accepted. Even if full compensation had been paid, it would not necessarily follow that the patient received no benefit from charity. She occupied a room in a building maintained in part at least by donated funds intended for benevolent purposes. Necessary care, skill and food came from the same source. On the record as made, the jury should not have been permitted to find that the inmate had received no benefit from charity. A charitable institution

conducting a hospital does not, by accepting compensation from a patient who is able to pay for room, board and care, incur liability to such patient for the negligence of nurses. *Jensen v. Maine Eye & Ear Infirmary,* 107 Me. 408, 33 L. R. A. n. s. 141; *Cunningham v. The Sheltering Arms,* 135 App. Div. (N. Y.) 178; *Gable v. Sisters of St. Francis,* 227 Pa. St. 254; *McDonald v. Massachusetts General Hospital,* 120 Mass. 432; *Powers v. Massachusetts Homœopathic Hospital,* 101 Fed. 896; 65 L. R. A. 372; *Downes v. Harper Hospital,* 101 Mich. 555; *Parks v. Northwestern University,* 121 Ill. App. 512, 218 Ill. 381; *Ward v. St. Vincent's Hospital,* 50 N. Y. Supp. 466; *Conner v. Sisters of Poor,* 7 Ohio N. P. 514; *Taylor v. Protestant Hospital Ass'n,* 85 Ohio St. 90. Money accepted from patients who are able to pay it does not go to persons who may be trustees, directors, founders, or incorporators of the institution, and is not a source of pecuniary gain to private individuals, but is devoted to the general purposes of the charity.

To justify the recovery, plaintiff ably argues that defendant is liable for damages because, for a valuable consideration, it entered into a verbal contract to keep a nurse in constant attendance upon the inmate, because that duty rested on defendant itself and could not be delegated to servants, because the agreement was violated and because the negligent breach of the contract resulted in the death of the inmate. The right to recover damages for the causing of death by a wrongful act is created by statute. Comp. St. 1911, ch. 21, secs. 1, 2. It is based on tort, and not on contract. It does not exist independently of statute. A charitable institution conducting a hospital for benevolent purposes alone does not necessarily incur liability in damages for the death of an insane patient who committed suicide when alone in a room, though pay for the patient's room and care was accepted under an oral agreement to keep a nurse in constant attendance. *Downes v. Harper Hospital,* 101 Mich. 555; *Taylor v. Protestant Hospital Ass'n,* 85 Ohio

St. 90; *Lewis' Adm'r v. Taylor Coal Co.*, 112 Ky. 845, 66 S. W. 1044; *Duncan v. St. Luke's Hospital*, 98 N. Y. Supp. 867. The report of the last case cited shows that an insane woman was kept in a hospital under contract to keep a guard in constant attendance for $7 a day, that the agreement was violated, and that, in absence of a guard, the inmate killed herself. The facts were fully pleaded. The existence and violation of contractual obligations were invoked to sustain a cause of action. In the opinion it was said: "The contract was to keep a constant watch and guard. It was not to prevent the unfortunate patient from committing suicide. Nor could it fairly be held to be within the reasonable intendment of this contract that the hospital agreed to pay to the husband the value of his wife's life to him in case she did commit suicide. There has been no case cited to us, nor have we been able to find one, which allows a recovery upon such a complaint or such a state of facts. Nor can we see any reason why there should be any difference in the rule where the tortious act which caused death is alleged to be a breach of an express contract than where it is alleged to be a breach of an implied contract, or where no contractual relation at all existed."

This reasoning is applicable to the present case. In permitting the jury to find in favor of plaintiff, if defendant received full compensation, the trial court was in error. As the case stood when submitted to the jury, there should have been a peremptory instruction for defendant. The judgment is therefore reversed and the cause remanded.

REVERSED.

LETTON, J.

I concur in the result on the ground that full payment for service is not the test of liability, and the instruction to that effect is erroneous.

NELS PETERSON, APPELLEE, V. LINCOLN COUNTY; ALBERT JOHNSON, INTERVENER, APPELLANT.

FILED OCTOBER 18, 1912. No. 16,731.

1. **Appeal:** AMENDMENT. Under section 144 of the code, power is given the court to conform the pleadings to the proof, in an appellate court, only "when the amendment does not change substantially the claim or defense."
2. ———: ———. The power of the supreme court to permit an amendment of a pleading to conform to the proof is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice.
3. ———: AFFIRMANCE. The record examined, and *held* that the decree of the district court is sustained by the pleadings and proof upon which it was based.

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

John A. Sheean and *Halleck F. Rose*, for appellant.

E. H. Evans, L. E. Roach and *Hoagland & Hoagland, contra.*

FAWCETT, J.

This suit was instituted in the district court for Lincoln county to quiet plaintiff's title to certain lands in that county, described in plaintiff's petition. Defendant William Robb was holding as grantee of the defendant county, under a title obtained in a tax foreclosure proceeding which was void by reason of the fact that in such proceeding service was had by publication upon the then record owner as a nonresident, when in fact he was an actual resident of this state. Albert Johnson, whom we will hereinafter designate as defendant, intervened, and as an answer and cross-petition to plaintiff's petition alleged, substantially, that he purchased the land in con-

troversy in 1893, and rented the same to plaintiff for that year and the year following; that, on account of a lack of rainfall and of hot winds during those years, no crops were raised, and that plaintiff moved off without paying any rent, and defendant, being unable to obtain a renter, was unable to procure the money with which to pay taxes; that a few years thereafter plaintiff returned to Saunders county, where defendant resided, and represented to defendant that the land was valueless and advised him not to attempt to redeem the same; that defendant had no further knowledge or information concerning the land until about a month prior to filing his answer and cross-petition, but still believed the land to be valueless and not worth the taxes assessed against it; that some time prior to March 6, 1909, plaintiff made a trip to Lincoln county, visited the land, and saw that said county was enjoying a heavy annual rainfall; that good crops were being raised, and that the land was worth the sum of $3,000; that upon his return from Lincoln county he asked defendant if he still owned the land, and, upon receiving an affirmative answer, suggested that he was going back to Lincoln county and would look up the land in controversy, "at the same time informing this defendant that he understood land was 'picking up' a little, and, if it was worth the taxes against it, he would make this defendant an offer on it;" that at that time plaintiff was fully aware of the value of the land, but, in order to mislead and defraud defendant, led defendant to believe that he knew nothing of it; that a short time thereafter he came to defendant and represented that he was intending to move out to Lincoln county and take "a bunch of horses" with him; that he would need some place for them to run in, and that under those conditions he believed he could afford to pay off the taxes on the land and give defendant $100 for a deed to the same; that it was risky to pay that much for it; that perhaps it would be impossible to redeem, but, as he needed a place to run his horses, he would do it; that defendant asked time to think it over,

but plaintiff insisted that unless he could make the deal at once he would not buy; that he was buying only because he was moving out and wanted the land to run his horses on; that defendant had not seen the property since 1893, was not aware of the changed climatic conditions, believed the land was valueless; relied upon the assertions of plaintiff, and, being financially unable to make the trip out to see the land, and not being able financially to redeem the taxes, he agreed to accept the sum of $100 for the deed, which he executed on March 6, 1909; that the representations of plaintiff were false and known to be false when made; that the same were falsely and fraudulently made for the purpose of misleading the defendant and causing him to convey a valuable right for practically nothing; that the land was well worth $2,500 in excess of the taxes and assessments, and that defendant Robb had no valid title to said property, all of which was well known by plaintiff. Defendant then tenders plaintiff a return of $100 received by him for the deed, ending with a prayer that defendant Robb take nothing, and that the deed from defendant and his wife to plaintiff be canceled, and that his title be quieted.

For reply to the answer and for answer to the cross-petition of defendant Johnson, plaintiff traversed the allegations in such answer and cross-petition with general and specific denials, and alleged that by the deed of March 6 he purchased whatever unlitigated equity defendant had in the premises; that at that time defendant Robb was claiming to be the owner, was in possession under the proceedings referred to, was denying that Johnson had any right or title or any right of redemption; that, while plaintiff believed that Johnson had an equity in the premises and the right of redemption, yet such rights of Johnson could only be enforced by extended litigation in the courts; that prior to the execution and delivery of the deed plaintiff fully informed defendant, both by himself and his agent, L. E. Roach, as to the full rights that said Johnson had in the premises; that Johnson was fully in-

formed that plaintiff and his attorney believed that he, Johnson, could enforce his title to said premises, and, after being fully informed as to all of the facts and circumstances, defendant, without any misrepresentation or concealment of any kind on the part of plaintiff, made the contract and executed and delivered the deed; that the deed was not made and executed until after Johnson had fully considered the matter for several weeks and had made investigation as to his interest and rights in the premises; that, after plaintiff had instituted this suit, Johnson for a time assisted him in the prosecution of the same, and that, with full knowledge of all of the facts, Johnson never complained to plaintiff in any manner with reference to his contract or deed until his answer and cross-petition was filed in this suit; that Johnson had not tendered to plaintiff any part of the moneys which plaintiff had paid for the deed, and had not offered to reimburse plaintiff for any portion of his expenses and liabilities which he had incurred with reference to the premises.

The district court found that the tax foreclosure proceeding was void and vested no title in defendants Robb; that they were entitled to nothing more than the return of the money which they had paid to the defendant county, and for subsequent taxes, with interest and penalties, which sum the court found to be $215. The court further found upon the issues joined between plaintiff and Johnson that for about 30 days prior to the making of the deed in controversy Johnson had knowledge of the condition of the property and title, and had every opportunity to make investigation concerning the same; that there were no fiduciary relations existing between Peterson and Johnson with reference to said transaction, found the issues in favor of Peterson as against Johnson, and dismissed the petition of intervention. From this decree defendant Johnson, alone, has appealed, and the only question for our consideration is the one presented by his cross-petition, viz., his right to have his deed to plaintiff set aside upon the grounds alleged in his answer and cross-petition

above set out. Plaintiff filed a motion to dismiss the appeal for various reason set out in his motion. As the case must be affirmed upon the record, we have not considered the merits of this motion, but overrule the same *pro forma*.

While not expressly, it is practically conceded in the briefs of counsel for defendant that upon the pleadings above outlined, and the evidence, the decree of the trial court cannot be disturbed. They seek to avoid this disastrous result by now tendering and asking leave to file in this court an amended answer and cross-petition "to conform to the proofs adduced upon the trial in the district court," in which, in addition to what was alleged in their original answer and cross-petition, they alleged that plaintiff and L. E. Roach, a practicing attorney at North Platte, entered into a collusive agreement to defraud defendant out of his land, worth, as they alleged, over $3,000, for the mere pittance of $100; that in furtherance of such collusive agreement plaintiff induced defendant to write to Roach for information respecting his land and legal rights, and to employ him as defendant's attorney in that behalf; that Roach accepted the retainer, but, in violation of his duty as such attorney, he concealed from defendant all information as to the value of the lands, and entered into a collusive agreement with plaintiff to assist plaintiff in obtaining title thereto for a pittance, in which event plaintiff and Roach were to divide the profits made from such transaction. Plaintiff vigorously assails the right of defendant to file such amendment, upon the ground that it constitutes a material change of defendant's claim or defense, and, if permissible at all, the leave should have been sought and obtained in the trial court; that, while an appellate court may, and occasionally does, permit the amendment of pleadings to conform to the proofs, for the purpose of sustaining a judgment of an inferior court, it never permits such amendment for the purpose of reversing a judgment.

Defendant made no request in the court below, either

before or after judgment, for leave to file this amended pleading. The decree recites: "This cause came on for trial before the court upon the petition of the plaintiff, the answer of the defendant Robb, and reply of the plaintiff, and upon the answer and cross-petition of the intervener, Albert Johnson, and the answer of plaintiff to cross-petition of the intervener, Albert Johnson, and reply of intervener, Albert Johnson, and the evidence, and this cause is submitted to the court upon the pleadings and evidence, and the cause is taken by the court under advisement." Four days later the court made its findings and entered the decree. These recitals clearly advised counsel that the court was basing its decree upon the pleadings then on file, and, if after the decree was entered, any amendment of the pleadings was deemed necessary, or desired, the trial court was entitled to be advised thereof, so that it might correct its decree, if such amendment made a correction necessary. It would be sanctioning a very loose practice and be unfair to the trial court to permit an amendment here under such circumstances. Section 144 of the code is relied upon by defendant, but we do not think it is sufficient to entitle him to the relief now sought. The section provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." That the amendment tendered "substantially" changes "the claim or defense" of defendant is clear. This provision of the code is found substantially in this same form in most, if not all, of the states in the Union, and, so far as we have observed, it is construed liberally when relief under it is sought in the trial court, but when appealed to in an appellate court it is construed

much more strictly. As said in Boone, Code Pleading, sec. 234: "Amendments after trial are very cautiously allowed, and the general rule is that a party who has not sought to amend until after he has been nonsuited is too late to ask for a new trial and an amendment." The proposition thus stated is in accord with the views of other writers, and has received our approval in *Scott v. Spencer*, 44 Neb. 93.

Upon the point under consideration, section 723 of the New York code is identical with our section 144. In *Alden v. Clark*, 86 Hun (N. Y.) 357, the first paragraph of the syllabus holds: "Under the provisions of section 723 of the code of civil procedure, power is given the court to conform the pleadings to the proof only in a case 'where the amendment does not change substantially the claim or defense.'" In the opinion it is said: "By section 723 of the code of civil procedure power is only given to conform the pleadings to the proof in a case 'where the amendment does not change substantially the claim or defense.' Apparently, under the evidence given, Clark claimed that he had through his purchase from Butler an absolute title to the safe. As his answer stood, it was insufficient as a defense. The amendment sought, if it amounted to anything, would substantially change the defense set up in the pleading and so would not be admissible." In *Fitch v. Mayor*, 88 N. Y. 500, it is said: "As the case stood before the trial court, it was its duty to dismiss the complaint, for the alleged cause of action had not been made out. It is not necessary to restate the grounds of this conclusion, for in regard to them we concur with the learned court below. The appellant, however, desires us to amend the complaint so that the plaintiff shall be designated as 'record clerk of the court of special sessions,' and supposes that this may be done under section 723 of the code of civil procedure. If the section applies to this court, the power should not be exercised unless it is plain that no substantial right of the adverse party would be affected. Here the case has been

tried upon a different issue, and without amendment disposed of by the general term. The application should have been to that court, or the trial court." We concur in the holdings in the two cases cited, and, for the reasons therein given, we hold that defendant's application is not within the scope of section 144; that the proposed amendment clearly changes the claim or defense of defendant; that the application should have been made in the district court, and cannot be allowed here.

The reason assigned by plaintiff why the amendment should not be permitted in this court, viz., that this court will in a proper case permit an amendment to conform a pleading to the proofs for the purpose of sustaining a judgment, but will never grant such permission to defeat a judgment, is also fatal to defendant's right to this amendment. We turn again to the New York decisions. In *McGinniss v. Mayor,* 6 Daly (N. Y.) 416, it is said: "No motion was made on the trial to conform the pleadings to the facts proved, or to amend the answer. It is now too late to do either. The power of the general term to amend a pleading, or to conform the pleadings to the proof, is only exercised to support or sustain the judgment—never to reverse it." In *Steinam v. Strauss,* 18 N. Y. Supp. 48, it is said: "Two questions are raised upon this appeal. The first is whether the judgment was void upon its face; and the second, whether, as matter of fact, and from proof of extraneous circumstances, it was invalid. The latter proposition it is not necessary to consider. No such issue was presented by the complaint, and although evidence was taken in respect thereto, and the learned judge seems to have passed upon the same, yet, as it was not within the scope of the pleadings, and they never having been amended for the purpose of conforming the pleadings to the proof, this question was improperly considered by the court, and the result of the decision it is not necessary to review here. If it may be said that the court should amend the pleadings to conform the same to the proof, the proof having been taken without objection, it may be suggested,

in the first place, that objections appear as to some of the proof, and also that a complaint is never amended for the purpose of reversing a judgment, although such amendments are made in some instances for the purpose of sustaining a judgment." In *Weems v. Shaughnessy,* 70 Hun (N. Y.) 175, the last paragraph of the syllabus reads: "Pleadings will not be conformed to the proof for the purpose of reversing a judgment." In the opinion, on page 177, it is said: "But, although pleadings are sometimes made to conform to the proof in order to support a judgment, we have not yet heard of a case where such a practice was resorted to for the purpose of reversing a judgment." The court of appeals has also spoken on the subject. In *Volkening v. De Graaf,* 81 N. Y. 268, the last paragraph of the syllabus reads: "The pleadings in an action will not be amended on appeal to this court for the purpose of reversing a judgment." In the opinion by Mr. Chief Justice Folger, on page 272, it is said: "It is urged that as the averments of the answer show the true contract between the parties, as shown by the proofs, the complaint may now on appeal be amended so as to conform to the proofs, and judgment be given thereon for the plaintiff; and *Bate v. Graham,* 11 N. Y. 237, *Pratt v. Hudson R. R. Co.,* 21 N. Y. 305, and *Haddow v. Lundy,* 59 N. Y. 320, are cited. Those were cases of a recovery by the plaintiffs below and an appeal by defendant to this court. We may not amend the pleadings on appeal so that we may reverse a judgment."

The supreme court of Vermont has had the same question under consideration, and in *Chaffee v. Rutland R. Co.,* 71 Vt. 384, it is said: "An amendment is not allowed if it introduces a new cause of action. An amendment in the case before us is only permitted in order that the pleadings may conform to the proof, and for the purpose of sustaining the judgment, not reversing it (1 Ency. Pl. & Pr. 582); for, as said by Redfield, C. J., in *White River Bank v. Downer,* 29 Vt. 332, 'an amendment will cure error, but cannot create it.'"

Upon this branch of the case counsel for defendant cite *Humphries v. Spafford,* 14 Neb. 488; *Homan v. Steele,* 18 Neb. 652, and *Bennett v. Baum,* 90 Neb. 320. In *Humphries v. Spafford, supra,* the suit was for the foreclosure of a mortgage. In the petition plaintiff appears to have made a mistake in stating the amount due upon the notes, and this court held: "If the amount actually due on the two notes be, as we infer from the brief of counsel, greater than is alleged, if she desire it, the plaintiff may take leave to amend her petition so as to correct the mistake, upon the terms of paying all accrued costs, and have the case remanded to the district court to make the amendment, and for further proceedings. We have no doubt whatever that an amendment at this stage of the case is in harmony with section 144 of the code, where the ends of justice seem to demand it. But, if no amendment be desired, for the reasons stated the judgment will have to be affirmed." The ruling there, if justifiable at all, is under the clause of section 144, "or by correcting a mistake in the name of a party, or a mistake in any other respect." The case has no reference to the clause of section 144 under which relief is sought here. In *Homan v. Steele, supra,* the plaintiff recovered, and, in considering the case, MAXWELL, J., said: "It is claimed that the action should have been to recover on a *quantum meruit,* and not upon the contract. * * * The few days which elapsed after the time fixed for the completion and occupation of the building and the time in which it was actually completed and occupied do not in our view affect the right to recover. The defendant's attorneys in their brief virtually admit this, but say the action should not have been upon the contract. This objection should have been made on the trial to be available here. Where proof has been introduced without objection which would entitle a plaintiff to recover, this court would, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for that purpose." In other words, if in that case it had been necessary in

order to sustain plaintiff's judgment (not to reverse it), the court would have permitted an amendment of the petition to conform to the proof, or would have remanded the cause to the district court "for that purpose," but not for a new trial. In *Bennett v. Baum, supra,* counsel rely upon the tenth paragraph of the syllabus, which reads: "Where it is clear that all of the evidence to sustain or defeat an issue was adduced by the respective litigants in an equitable action in the district court, it is competent on an appeal for this court in the interests of justice to permit amended pleadings to be filed so as to conform to that proof." Even under this syllabus defendant would not be entitled to the amendment tendered, for the reason that it is not clear in this case that all the evidence to sustain or defeat an issue was adduced "by the respective litigants." On the contrary, it is urged by plaintiff here that, if the proposed amendment had been made in the court below, they could have met and overcome it. Whether this be true or not, the fact is they did not have the opportunity to meet it upon the trial below, nor did the trial court have any opportunity to pass upon it. But let us see why the amendment was permitted in *Bennett v. Baum.* In the opinion on page 337, ROOT, J., said: "But, however liberal we may desire to be in affirming a judgment, we cannot sustain a finding which is not responsive to any allegation in the pleadings, nor to a theory mutually adopted by the litigants in the district court. We have the authority to permit amendments in this court. We therefore shall permit the plaintiffs, if they are so advised by counsel, to amend their petition so as to allege such facts *as will justify us in sustaining the decree* quieting title in the Bennett Company to all of the real estate described in the referee's report, and to a decree for a specific performance of their contract for one-fifth of the $200,000 capital stock of the Bennett Company. Ordinarily such amendments would not be permitted. In the instant case counsel for the defendants strenuously objected to the introduction of all evidence touching title

to this real estate. We are confident, however, that the defendants will not be prejudiced by the amendments, because all features of the transactions touching those subjects have been testified to by the only persons having knowledge thereof, and this litigation should cease at as early a day as possible." It will be seen that there is nothing in any one of the three cases cited which conflicts with the holdings of the New York and Vermont courts, herein adopted by us. The amendment tendered is not for the purpose of sustaining a judgment, but for the purpose of reversing it; not to cure error, but to create it. In the opinion of the writer, in which he is not alone, such a request should never be allowed in this court; but a majority of the court are of the opinion that we should not go further than to hold that: "The power of the supreme court to permit an amendment of a pleading to conform to the proofs is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice." As this case does not present such a situation, the request of defendant to file the amended pleading tendered is denied.

The only question left is: Is the decree of the district court sustained by the pleadings and proofs upon which it was based? After a careful reading of the entire record, we feel that that question must be answered in the affirmative.

The judgment of the district court is therefore

AFFIRMED.

ROSE, J., took no part.

LETTON, J., dissenting in part.

I do not agree with the proposition that the proposed amendment changes the "claim." The action is based on fraud. The tendered amendment merely adds another specification of fact tending to establish the same. Otherwise, I concur.

SEDGWICK, J., dissenting.

The majority opinion announces two new propositions of law, neither of which have been so determined heretofore by this court.

1. The first proposition is that, in an action for fraud where facts constituting the alleged fraud are stated, an amendment which alleges additional facts constituting the same fraudulent transaction changes substantially the claim or defense, so that such an amendment cannot be allowed in any case after judgment. Section 144 of the code contains the language: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading * * * when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." What does the statute mean by the words "change substantially the claim"? In one sense of these words, any change of a petition which would admit of a different decision than could be supported by the original petition would of course be a substantial change, but unless such a change can be made—that is, unless a pleading can be amended so as to support a different judgment—there would never be any object in making the amendment. The purpose of allowing the amendment is to support a judgment that otherwise would not be supported, and this of course, in the ordinary sense of the word, is a very substantial change. We have, however, generally held that to change "the claim" is to substitute a new cause of action for the former one or to add a new cause of action to the former one, and I suppose that the purpose of this proviso in the statute is to prevent an amendment that would allege a new cause of action, and not to prevent any change or amendment that would add to or make more certain the cause of action upon which the suit was based. And then, again, to change substantially the claim is not limited to changing the claim alleged in the original pleading, but under the liberal practice of our code must be

held to mean the claim actually tried in the lower court, whether it was in the pleadings or not. I think that the opinion gives the wrong construction to the language of the statute in that regard.

2. I am still more strongly opposed to the new construction which is given to the statute in another respect. The second paragraph of the syllabus is: "The power of the supreme court to permit an amendment of a pleading to conform to the proof is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice." There are many decisions of this court in which it is held that a pleading may be amended after judgment to conform to the proofs, and in all of them the language is general and no distinction made as to whether such amendment will sustain or reverse the judgment of the trial court. The first case cited and reviewed in the majority opinion is *Humphries v. Spafford,* 14 Neb. 488. The opinion was by Chief Justice LAKE. The petition in foreclosure failed to allege that no payments had been made on the note, the allegation being that no payments were made at the particular time when the notes fell due. The petition also failed to allege that the defendant failed to pay interest "within ten days after due." The allegation was that he failed to pay it on the particular day on which it came due. The trial court therefore held that one of the notes was not due and refused to give the plaintiff judgment thereon. The plaintiff appealed, and the supreme court held that upon appeal her petition might be amended in accordance with the evidence upon the trial, and that the case would be remanded to the trial court for that purpose, if she decided to so amend. This was a direct holding that the pleadings would be amended for the purpose of reversing the judgment of the trial court. In regard to this case the opinion says: "The ruling there, if justifiable at all, is under the clause of section 144, 'or by correcting a mistake in the name of a party, or a mistake in any other

respect.'" But section 144 of the code provides that a pleading may be amended "by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case.". Inserting other allegations material to the case is precisely upon the same basis in the section as correcting a mistake in the name of the party, or a mistake in any other respect, and the fact that the pleading may be amended by inserting other allegations "material to the case" shows clearly that the next clause, that amendments may be made when they do not "change substantially the claim," means that they may be made unless a new cause of action or defense is stated that has not been tried below. The opinion cites early cases, mostly from inferior courts, that hold that amendments will never be allowed for the purpose of reversing a case, but I think that those cases are hostile to the language of the statute, which does not limit the allowing of amendments to supporting the judgment, but requires them to be made when it is "in furtherance of justice" to have them made. In *Humphries v. Spafford, supra*, the leading case above referred to, it was in the interest of justice to the plaintiff to allow her to amend her petition to conform to the proofs which were made upon the trial, and reverse the judgment of the district court refusing to allow her to recover upon both of her notes, and I think the decision was right. It has never been criticised by this court, but has been apparently universally followed and ought to be adhered to. Suppose that in an action to foreclose a mortgage the plaintiff failed to make the technical allegation that there had been no proceedings at law to recover the debt, both the plaintiff and the defendant, as well as the court, supposed that that allegation was in the petition and tried the case fully upon that theory, the proof showing plainly that there had been no proceedings at law, but the trial court for some unaccountable reason refused to enter judgment for the plaintiff and the plaintiff appeals to this court, and for the first time it is ascertained that the

allegation that no proceeding at law had been had was omitted from the petition, would this court refuse to allow such amendment and refuse to allow the plaintiff to recover, that being the only possible legal objection to such recovery?

Unless the case has been tried in the lower court as though the proposed amendment was already in the pleadings, the amendment is never allowed in this court either to sustain or to reverse the judgment. If it was so tried, and no objection was made to the evidence because of the defect in the pleading and the court or jury determined the issue as tried, the amendment will be allowed in this court, if necessary, to make the pleadings conform to the case actually tried, or the case will be disposed of as though the amendment had been made. Lawsuits were not invented to afford sparring matches to exhibit the cuteness of attorneys at the expense of justice to litigants, at least they are not so regarded in modern times in this state. The courts are not looking for immaterial technicalities to defeat justice.

The second paragraph of the syllabus, which is also quoted in the opinion as the view of the majority of the court, does not harmonize with the discussion in the opinion, and I think that discussion is misleading in view of the quotations made from the early cases in other jurisdictions, which quotations do not fully present the real point decided by those courts. The second paragraph of the syllabus makes an unnecessary and incorrect distinction in amendments in this court. The true test is, are they in furtherance of justice? And that depends upon how the case was tried in the court below. If the parties, without any suggestion of defect in the pleadings, have fully and fairly tried the cause, the pleadings in this court should be made to state the cause actually so tried, or the cause should be disposed of here as though that had been done.

HAMER, J., concurs in this dissent.

ISAAC WARD, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 18, 1912. No. 17,065.

1. Negligence: "ACT OF GOD." "A snow storm of such violence as to prevent the moving of trains is an act of God." *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197.

2. ———: EVIDENCE. In an action for damages on account of negligence, the negligence must be established by direct proof, or by showing facts and circumstances from which negligence may reasonably be inferred.

3. Evidence examined and referred to in the opinion *held* clearly insufficient to sustain the verdict and judgment.

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

Mapes & Hazen and *B. H. Dunham,* for appellant.

R. J. Millard, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Cedar county to recover for the death of two hogs and the crippling of two others, through the negligence of defendant, while the same were being shipped over defendant's line. From a judgment in his favor defendant appeals.

The evidence shows: That the hogs were shipped from Coleridge, Nebraska, to Sioux City, Iowa; that the line of defendant's road from Coleridge to Wakefield is what might be termed a stub line. Plaintiff's shipment consisted of 71 head of hogs. They were loaded at and left Coleridge between 1 and 2 o'clock in the morning of February 9, 1909, on train No. 44. Freight for Sioux City arriving at Wakefield on No. 44 is transferred at that point to the main line and carried to Sioux City either on No. 56 or No. 14. When the train, of which plaintiff's

car formed a part, reached Wakefield, a snow storm of great severity was blowing and the weather was extremely cold. No. 14 was at that time stalled at Norfolk, some distance west of Wakefield, and No. 56 was stalled on the passing track east of the depot.

The conductor of No. 44 testified: That he had been in defendant's employ for 20 years; that he remembered the storm of February 9; that during the trip they had a little delay at Laurel on account of the high storm; that the storm was fierce at Laurel and he lost one of his men; that when he reached Wakefield the storm was as bad as he had "ever lived in;" that there was a high wind with falling snow and it was bitter cold; that when they reached Wakefield they got as far as the tank and "could not get on the line because the train stalled. The Bloomfield train, bound for Sioux City, was stalled on the passing track east of the depot at Wakefield; they could not get through the drifts on the track, about 200 yards from us. I didn't know they were stalled there until we worked our way to the station and found them. They went as far as they could to the side track while we got tied there. Their engine died next morning about the time ours did. I could have gone 20 or 30 yards farther. There was a drift at the main switch. The only reasonable thing to do was to stop at the water tank, with hopes of doing something after the storm was over. I kept my engine alive until 8 or 9 o'clock the next morning, when she died on us. We had to kill her to keep her from freezing up. It stormed all day Tuesday and Tuesday night, and abated some time Wednesday. When the storm abated everything was blocked wherever snow could lie; side tracks were full of snow; yard was full of snow, deep drifts, perhaps some ten feet right in front of the station; stockyards were level full of snow; snow in box cars and everything; had a regular mountain of ice around our engine. * * * This car of stock got out of Wakefield some time Thursday evening, and went out on the first train. We did everything that we could do to pro-

tect the stock. The storm was so fierce one could not see his hands before his face. It was absolutely impossible to get the cars off on Tuesday morning. * * * Q. Was it possible any time after you reached the water tank on Tuesday morning of your arrival at Wakefield until the track was opened up Thursday afternoon for you to reach the chutes at the stockyards? A. No, sir. Utterly impossible. Q. And why? A. Because of the drifts, deep drifts between there and the stockyards."

Mr. Severance, another witness for the defendant, testified: That he was a freight conductor on defendant railway; that he was at Wakefield on the morning of February 9; was conductor of No. 56; that "it was blowing very hard, a blizzard, you couldn't see anything with distinctness six feet in front of you. The storm first struck us at Wayne, where we had trouble, and it continued getting worse. When we arrived at Wakefield the tracks were covered with snow so it was almost impossible to move without going ahead and shoveling the snow off the tracks so that the sand would take a hold and keep the wheels from slipping. When we struck the yards at Wakefield we first stopped at the water tank. Then we pulled up to the main line, and headed in on the passing track. It took considerable time to get in there on account of the snow. We took the passing track to wait for 14, but 14 did not arrive. It is the train from Norfolk; 44 then came in and stopped at the water tank. We did not go out on account of the blizzard. We tried to get out, made several attempts, made one attempt to get Mr. Hoider's engine (the engine on No. 44) up there coupled onto ours, in order to proceed double headed, but we couldn't do anything. After it cleared up we started to buck snow to clear the road toward Sioux City, and went as far as Emerson, I think we got there between 4 and 5 o'clock on Thursday. We then returned to Wakefield, picked up the stock, including the cars mentioned, and went on to Sioux City. That was the first train that went through from the time the storm began. * * * Q. Was there any time Mr.

Hoider (conductor of No. 44) could have transferred his car of stock from his train to your train that morning? A. No, sir. Q. Was no time he could do that until after they got the road bucked, as you spoke of? A. No, sir." The testimony of these two witnesses is fully corroborated by defendant's station agent at Wakefield.

As against this testimony on behalf of the defendant, plaintiff testified: "Q. Do you know whether or not the company could have moved your hogs on from Wakefield without this delay you speak of? A. Yes, sir. Q. Could they? A. They could when we got to Wakefield. Could went right along with us; was no storm to bother us, no drifts, because I was out all through there." On cross-examination he shows that he knew the train he shipped on would not go beyond Wakefield; that it goes there and turns around and returns, and is not scheduled to run to Sioux City. He also testified: "I went to Sioux City on the first train that came through after the storm. This was about 10 o'clock Thursday evening. No freight trains had gone through before that time."

The witness Beig testified: That he shipped a car of hogs from Coleridge at the same time plaintiff shipped; that they left Coleridge about 1 o'clock Tuesday morning, and arrived at Wakefield about 4 in the morning; that it was snowing pretty hard. On cross-examination he testified: "The hogs were shipped in open stock cars. It was snowing, and got colder as it stormed. We stayed up to the hotel all day Tuesday, Wednesday and Thursday." On being recalled, plaintiff testified: That they stopped at Laurel en route to Wakefield about 25 minutes. "It was snowing at that time, but wasn't blowing. When we got to Wakefield, Beig and I got out of the caboose and walked up to the depot, and there wasn't a drift between there and the depot. It was snowing quite hard, but the wind wasn't blowing to amount to anything. I had a conversation with Hoider, in which he said that he was holding train for Norfolk train—that was the one that took the stock on—waiting for that one to double engines, and

this other engineer and our conductors wanted to double engines and take us to Sioux City. I was not down around the chutes that night. The Norfolk train hadn't arrived while we were there." The witness Beig, referred to by plaintiff, testified: "When we arrived at Wakefield we walked down to the depot. It was not drifted." On cross-examination he testified: "When we got out of the caboose it was blowing some and there was snow on the ground. It was snowing pretty hard and the wind was blowing."

The testimony of defendant's witnesses that train No. 14 was stalled at Norfolk, and No. 56 on the passing track east of the depot at Wakefield, is not denied. The severity of the storm is not denied, except by the statements of plaintiff and Beig that when No. 44 reached Wakefield they got out of the caboose and walked to the depot, and that there were no drifts between the train and the depot. We have read the abstract of the testimony carefully, and are unable to find anything in it which even tends to show any negligence on the part of the defendant in failing to get plaintiff's stock through to Sioux City any sooner than was done. In the face of the severity of the weather and the immense quantities of snow, the defendant's agents in charge of the trains at Wakefield were the only ones qualified to determine whether or not it was wise to attempt to move the stock in controversy from Wakefield to Sioux City on that morning. We think it is clear that, if they had attempted to do so, the train would have been unable to reach even the next station, and would in all probability have been stalled out in the country, where it would have been next to impossible to feed and care for the stock; in which event we think, under the evidence in this case, plaintiff would have had reason to complain of their having made such a foolhardy attempt. That "a snow storm of such violence as to prevent the moving of trains is an act of God" was decided by this court in *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197. That the snow storm of February 9, 1909, was such a storm is clear.

The only testimony as to the death and crippling of the hogs is the following given by plaintiff: "I didn't see anything wrong with the hogs until Wednesday, about 10 or 11 o'clock, I saw two dead. There was two crippled when I got to Sioux City. I think they crippled them transferring. They ran a wagon box from one car to another, and got the cars as close as they could get them together, and drove them across. This was Wednesday night." It is clear from the record before us that plaintiff was accompanying his shipment of hogs, yet he does not attempt to relate any circumstance tending to show what caused the death of the two hogs, nor does he account for the crippled condition of the other two any further than to say, "I think they crippled them transferring." There is no claim that any of the hogs were dead or crippled when they reached Wakefield.

For aught that appears in the record, the two hogs may have died from disease, or may have been trampled to death by the other hogs in the car. One thing is certain, they were not killed by any bumping or rough handling of the car, for it had not been moved from its position near the water tank up to the time plaintiff says he saw them dead. There is an entire absence of evidence to show that their death was the result of any negligence on the part of defendant. In like manner, there is no testimony to show how the other two hogs became crippled, beyond the statement of plaintiff that "I think they crippled them transferring." By this he meant the transferring of the hogs from the car in which they arrived at Wakefield to the one in which they were finally taken to Sioux City, which transfer was made Wednesday night. There is nothing in his testimony, nor in the record, from which it can even be inferred that the method of making the transfer, testified to by him, was not as safe as any that defendant could have used; nor is there any testimony to show that, while making the transfer, the hogs were so handled that the crippling of the two might reasonably be inferred therefrom. There must be some-

thing more than a mere suspicion to sustain a charge of negligence. In an action for damages on account of negligence, the negligence must be established by direct proof, or by showing facts and circumstances from which negligence may reasonably be inferred.

REVERSED AND REMANDED.

FLORA M. MARSH ET AL., APPELLEES, V. EDITH V. MARSH ET AL., APPELLANTS.

FILED OCTOBER 18, 1912. No. 16,891.

1. **Wills:** CONSTRUCTION. When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one meaning must be so construed, if reasonably practicable, as to harmonize with the plain provisions of the will.

2. ———: ———: "LEGAL REPRESENTATIVES." In wills and other written instruments, the words "legal representatives" are frequently used to mean the persons who succeed beneficially to the property or interest of the deceased. Whether in any given case they are so used, or the executor or administrator is intended, must be determined from a consideration of all of the provisions of the will.

3. ———: ———: "HEIRS AND LEGAL REPRESENTATIVES." The use of the expression, "heirs and legal representatives," instead of "heirs, executors and administrators," may, under some circumcumstances, raise the presumption that those who are beneficially interested and succeed to the property and rights of the decedent are intended.

4. **Husband and Wife:** DISPOSITION OF PROPERTY: REMOVAL OF DISABILITIES. Our statute has taken away the common-law power of a husband to dispose of his wife's property. A married woman has the same power to dispose of her property and property rights that a married man has to dispose of his.

5. ———: CONTRACTS OF MARRIED WOMEN. In this state the contract of a married woman must be with reference to her separate estate or property. If she provides in her contract that she intends to bind her separate estate thereby, without describing any

property or property rights, it binds only the property and estate which she has at the time of making the contract, and the proceeds thereof, or substitute therefor. If she assigns specific property or rights, such contract is "with reference to her separate estate."

6. Quaere. Whether a remainder limited to the heirs of one living at the time it is granted is assignable, *quære.*

7. Husband and Wife: DISABILITIES OF COVERTURE: ASSIGNMENT: ESTOPPEL. The defense of coverture is based upon lack of power. When the power to act is entirely wanting, no estoppel can arise from an attempt to perform such act. But when a contingent interest in property is so remote as to be incapable of sale or assignment, an attempt to assign it upon adequate consideration and subsequent conduct continued until after the title of the assignor has become perfect, there being no lack of power, may create an estoppel to deny the validity of the assignment.

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

Francis A. Brogan, for appellants.

T. J. Mahoney, H. C. Brome and *William J. Coad, contra.*

SEDGWICK, J.

William W. Marsh of Omaha died April 2, 1901, leaving an estate of about $625,000. He left a widow, Flora M. Marsh, and four sons, Charles, Frank, William, and Allan A. Marsh. Charles Marsh died in 1909. The defendant Edith V. Marsh is his widow, and the defendant Gertrude J. Marsh is their minor daughter. About a year before his death William W. Marsh executed a will, in which he appointed his widow and his four sons trustees of his estate, with large powers and discretion in the control and management thereof. The will was duly probated, and the trustees named assumed the trust and took control of and administered the estate. The plaintiffs Flora M. Marsh, Frank Marsh, William Marsh, and Allan

A. Marsh, as trustees under the will, brought this action in the district court for Douglas county to obtain a construction of the will. Charles Marsh, at the time of his death, was indebted to the defendant the United States National Bank of Omaha upon several promissory notes, and the bank answered in the action, and alleged that to secure this indebtedness Charles Marsh had assigned to the bank his interest in the estate of his father, and that the defendant Edith V. Marsh had joined in the assignment, and the bank asked that the administratrix of the estate of Charles Marsh be required to pay the claim of the bank out of the estate of Charles Marsh. Edith V. Marsh contested the right of the bank under the assignment, and contended that, as Charles died before January 1, 1910, he had no interest to assign, and that her assignment was void because of her coverture, and because her interest was contingent and not assignable.

The will contained the following provisions:

"Third. All the residue and remainder of my estate, both real and personal, of every kind and nature whatsoever, and not heretofore given and bequeathed to my beloved wife Flora M. Marsh, I hereby give and bequeath in trust in manner and for the purposes, to wit: To my wife Flora M. Marsh, Charles Marsh, Frank Marsh, William Marsh and Allan A. Marsh, my sons, I give and bequeath all of said residue and remainder of my estate, both real and personal, in trust, to be held and managed by them as trustees, until the first day of January, A. D. nineteen hundred and ten (1910), hereby authorizing and empowering them to invest, re-invest and keep said property so that it will produce an annual income, using their best judgment and care in the management thereof, and in the discharge of said trust, I hereby authorize and empower my said trustees, while they shall have and hold said residue and remainder or any part thereof in trust as aforesaid, to sell, convey and dispose of the same or any part thereof at public or private sale, at such times and upon such terms and conditions, and in such a manner as

to them shall seem best and proper, and to re-invest the proceeds of such sale or sales in other property or securities to be held by them upon the terms and conditions of said trust, hereby authorizing and empowering my said trustees to make any, all and any deeds, conveyances and transfers, and execute the same, judged by them necessary and proper to carry out the purposes of this trust or their duties as such trustees. And I further direct and authorize that it shall not be essential for said trustees to act unanimously, but a majority of said trustees are authorized and empowered to do any and all acts and to execute any and all powers required to be done in said trust, and in the event that either or any of said trustees shall resign, die, or for any cause fail to accept this trusteeship, then in such case the majority of such of said trustees as are then acting as trustees at the time any act or thing is done or performed, may do or perform said act or thing as fully and legally as all of said trustees could or might do or perform the same unanimously."

"Sixth. After paying all expenses and all taxes and other charges including the payments to be made to my sister Stella M. Champlin, and my beloved wife Flora M. Marsh, I will and direct that the balance of the rents, profits and income annually derived from said property so held in trust, shall be divided equally between my said wife Flora M. Marsh, Charles Marsh, Frank Marsh, William Marsh and Allan A. Marsh, and in the event of the death of either of my said sons, his part shall go to his heirs or legal representatives as provided by the laws of the state, and said balance of said income so to be divided and paid to my said wife and sons under this sixth division of my will shall be paid quarterly."

"Eighth. I will and direct that on the first day of January, A. D. 1910, all of said property held in trust, as aforesaid, shall vest in and be disposed of as follows, to wit: To my sister, Stella M. Champlin, if she shall then be living I give the use of and income of ten thousand dollars during her natural life, the said income to be

paid to her annually, and for the purpose of carrying out this gift and provision to my said sister, I direct that my said trustees shall invest the sum of ten thousand dollars ($10,000) in some suitable investment the income thereof to be paid annually to her as above directed, and the payments to her of the annual sum of six hundred dollars hereinbefore directed shall cease and be at an end on January 1st, 1910.

"Ninth. I will and direct that all of my estate both real and personal and so held in trust, by my said trustees, shall vest in and go, on the said first day of January, nineteen hundred and ten (1910), subject to the provisions for my sister Stella, in the eighth division of this my last will and testament as follows, to wit: To my beloved wife Flora M. Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in her own right; to my beloved son Charles Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right; to my beloved son Frank Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right; to my beloved son William Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right; and to my beloved son Allan A. Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right. Should my beloved wife Flora M. Marsh not be living at the time of my death I will and direct that the property given and bequeathed to her in second division of this will shall go to my said trustees to be held in trust upon the terms and conditions of the other property held in trust and shall go at the expiration of said trust to wit, January 1st, 1910, as the other property goes, except such as may be worn out or consumed in the use or become worthless by age, and loss, to my said sons. And I further will and direct that if either or any of my sons shall not be living at my death to take under this will, then I give and be-

queath that part of the income going to him or them, to his or their heirs and legal representatives to go as provided by law. And at the death of my sister Stella on or after the first day of January, A. D. 1910, the said ten thousand dollars shall go as follows: I will and direct that said ten thousand dollars shall be equally divided between my wife and sons in the same manner and under the same conditions as the said residue and remainder on the said January 1st, A. D. 1910.

"Tenth. I will and direct that the title and ownership to said property devised in this last will and testament in trust shall not vest in my said wife and sons or either of them, except as trustees, until the 1st day of January, A. D. 1910. And in the event that my said wife or either or any of my said sons shall die prior to the 1st day of January, A. D. 1910, then in such case the property or that part thereof that would have gone to her, him or them shall go to her, his or their heirs and legal representatives according to law as the case may be."

"Twelfth. I will and direct that at the expiration of this trust, January 1st, A. D. 1910, said trustees shall turn over to the parties then entitled thereto the property which such persons are entitled to, and in the discharge of the duties under this trust I direct that no bond be required of either or any of said trustees, as I rely upon the sound discretion and good faith of each and all in the performance of their duties herein."

It is said in the briefs that three principal questions are presented: First, would the bequest to Charles Marsh vest in him an estate in his lifetime and subject to his debts, or was his interest under the will contingent upon his living until the 1st day of January, 1910? Second, if the estate was contingent and, he having died before that time, was not subject to his debts, who took the estate under the terms of the will, his wife and child as his heirs, or the administrator of the estate as his legal representative? Third, if his widow and child took the estate as his heirs, did the interest of the widow, Edith V.

Marsh, go to the bank under the assignment which she executed?

The trial court held, under the first proposition, that the estate of Charles Marsh was a contingent one, and, under the second proposition, that under the terms of the will it went to the administrator of the estate of Charles Marsh, and directed that it be applied by the administrator to the payment of his debts. From this decree the defendants Edith V. Marsh and Gertrude J. Marsh have appealed.

It must be conceded that the questions thus presented to this court are not free from difficulty. There is a variety of expressions in the will apparently bearing upon the matters in dispute, and, if taken literally as such words are ordinarily used, they appear in some instances to be inconsistent.

1. We are inclined to agree with the trial court upon the first proposition determined. The object is to ascertain, if possible, the purpose and meaning of the testator. When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be so construed, if reasonably practicable, as to harmonize with the plain provisions of the will. The statement in the eighth paragraph of the will, "that on the first day of January, A. D. 1910, all of said property held in trust, as aforesaid, *shall vest in and be disposed of* as follows, to wit:" and in the next paragraph the words, "shall vest in and go, on the said first day of January nineteen hundred and ten (1910) * * * as follows, to wit: * * * to my beloved son Charles Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right," and also in the tenth paragraph, "I will and direct that the title and ownership to said property devised in this last will and testament in trust shall not vest in my said wife and sons or either of them, except as trustees, until the 1st day of January, A. D. 1910," appear to be positive and unequivocal, and no doubtful or ambiguous expressions should be allowed to

override them. The language quoted above from the tenth paragraph of the will appears to have been used for the express purpose of determining this question. The title to the property, it is of course conceded, is vested in the trustees named in the will; and to leave no question of his intention the testator says that not only this title but the ownership of the property shall not vest in his wife and sons or either of them, except as trustees, until the time fixed in the will for that purpose.

2. The next question presented is a more difficult one. Charles having died before the property vested in him, who took the property under the terms of the will? In the able and exhaustive argument presented upon both sides of this question, it is made to turn largely upon the construction of the words "legal representatives" in the tenth paragraph of the will: "In such case the property or that part thereof that would have gone to her, him or them shall go to her, his or their heirs and legal representatives according to law as the case may be." In statutes, contracts and wills, the words "legal representatives" are undoubtedly more often than otherwise used to designate the executors of the will or the administrators of the estate. These words are, however, frequently used to designate the party or parties who succeed to the property or interests of the deceased, who stand in his place, and so represent his rights. In what sense these words were used in this will must be determined from a consideration of all of the provisions of the will. The income of the property, by the sixth paragraph of the will, was to be distributed as it accrued to the beneficiaries named, and it was provided that, "in the event of the death of either of my said sons, his part shall go to his heirs or legal representatives as provided by the laws of the state." The use of the conjunction "or" in this provision and the conjunction "and" in the corresponding provision in paragraph 10 was apparently inadvertent, and has no significance.

In the first place, if the testator had intended that, in

the event of the death of one of the beneficiaries before the property vested in him, it should go to his executor or his administrator, it would have been easy, and perhaps natural, to have used those words instead of the words "legal representatives." The testator appears to have had confidence in his sons; they are made trustees, and the power and discretion given them in the use and control of the property is but very little restricted. They were not required to give bond, and, if some of them became disqualified or declined to act, no others were to be selected in their places. Under the provision of this will, Charles might have become sole trustee without bond. The object of placing this property in trust is stated in the will, and is for business purposes to keep the estate intact and enhance the value; but the sole purpose of the tenth paragraph of the will is to prevent the estate from vesting in the beneficiaries until the specified time, and to provide for the contingency of the death of one or more of the beneficiaries before that time. We cannot discover any purpose that could have been in the mind of the testator in inserting this tenth clause in his will that would not be effectually thwarted by providing that, in case of the death of one of the beneficiaries before the time specified, his share should go to the executor or administrator of his estate. In construing this tenth paragraph of the will, we are required, if possible, to give some meaning to the words "according to law as the case may be." The right of succession to the property of decedents is regulated by statute. These statutes determine the person to whom the property shall descend. Changes in that regard are not infrequent; indeed, radical changes have been introduced into our law since the execution of this will and the death of the decedent, in regard to the persons entitled to inherit and the manner of descent of property. If the testator intended that, in the event of the death of his son within the time stated, his portion of the property should go to the persons to whom the law, as it existed at the termination of the trusteeship, would give it, under the cir-

cumstances and conditions that should then exist, the words "according to law as the case may be" might have been used for that purpose. No other use for these words has been suggested.

Some of the conditions and surrounding circumstances at the time of the execution of the will might indicate a different intention on the part of the testator. As an illustration of this last thought, it may be noted that Charles was indebted to his father in a considerable amount at the time of the making of the will and continuously until his father's death. Did the testator intend that, in case of Charles' death before the 1st day of January, 1910, his portion of the property should go to his widow and children, and his indebtedness to his father's estate should remain unpaid? If the relations between Charles and his father had been those of ordinary debtor and creditor, this suggestion would have weight. Mr. Marsh, after the execution of the will, advanced money to Charles with which to meet his existing liabilities, and perhaps for speculative purposes, and, although he took Charles' note for the amount so advanced, it is not clear whether he expected to enforce collection of the note, or regarded it as substantially a gift to his son. At all events, the circumstance that he made no provision for the collection of the note in the remote contingency of the death of his son before he came into his inheritance is not of sufficient weight to determine the question presented. The briefs contain exhaustive and admirable arguments upon both sides of this question, and, if time would permit, it would be interesting to pursue the discussion further, but in the end the solution of the riddle would still be in doubt, and no good purpose served by prolonging this opinion. If our construction of the will is somewhat technical, it must be conceded that there is no substantial basis for a broader construction.

We have concluded that the necessary construction of the will as a whole, under all of the circumstances, is that it gave the share which Charles would have taken, if he

had lived to the time specified, to the persons to whom, at that time, it would descend under the law as it should then be.

3. Charles Marsh assigned his interest in certain securities belonging to the estate to secure an indebtedness now held by the defendant bank. His wife, Edith V. Marsh, joined in the execution of the assignment, which contained the following provision: "I, Edith V. Marsh, do hereby consent to join in the above assignment, it being understood that said assignment is of all interest, present and prospective, actual or contingent, of either said Charles Marsh or myself in or to said bonds." Also to secure the same indebtedness, they executed another assignment covering both the income that was coming to Charles Marsh and his interest in the principal of the property in the hands of the trustees. This assignment provided: "The intention hereby being to assign so much of the income and principal due, or to become due to either of the undersigned in the assets of said estate, whether present or future, actual or contingent, to fully pay and satisfy the interest and principal of the aforesaid notes." It is contended that these assignments were ineffectual to transfer the interest of the defendant Edith V. Marsh in the estate. The first contention in this regard is that, Edith V. Marsh being then a married woman, she was incompetent to convey such interest. The first and second sections of our married women's act (Comp. St. 1911, ch. 53) are as follows:

"Section 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts"—with a proviso as to family necessaries.

"Section 2. A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property."

Formerly at the common law the personal property of a married woman was subject to sale and disposal by her husband. The first section of the act above quoted took this power over the personal property of the wife away from the husband. The language of the section is broad enough to cover any interest whatever that the wife might have in any property. As the power to dispose of property must exist, it is manifest that the intention of the legislature in these two sections was to transfer the power of disposal of the wife's property from the husband to the wife, and we have no doubt that under our statutes a married woman may dispose of her property "to the same extent and with like effect" as a married man may dispose of his. *Levi v. Earl,* 30 Ohio St. 147; *Ankeney v. Hannon,* 147 U. S. 118, and similar cases were decided under statutes very different from ours. Some of the language used in those cases, and apparently relied upon here, is not applicable.

The question frequently arises whether the contract of a married woman has reference to her separate estate. If she provides in the contract that she intends to bind her separate estate, without describing it, it is usually construed to mean her separate estate at the time of entering into the contract, and property afterwards coming to her by gift or will, and not from her husband, is not affected by such contract. This was so held in *Lee v. Cohick,* 39 Mo. App. 672. The question was whether the contract of a married woman for legal services, with an agreement in general terms that the contract should bind her separate estate, but without describing or naming any property right or interest, would create an indebtedness that could be collected from after-acquired property. It was

held that it would not, and that is the meaning of the rule stated in the syllabus: "A married woman can by her contract only charge a separate estate held by her at the date of such contract, or the subsequent substitute therefor." If she executes a promissory note, and it is attempted to enforce it against her property generally, this question becomes important. It has been generally held by this court that, if a married woman has no separate property at the time of entering into a contract, it cannot be said that the contract is with reference to her separate estate; but, if she has an interest in property and contracts that interest to another, no such question arises. If she assigns the property right, the contract must be with reference to that right. In *Tyler v. Winder*, 89 Neb. 409, it was held: "A married woman who has no separate estate may employ an attorney to begin and prosecute or defend an action for divorce, and make a valid contract to compensate the attorney for his service in such action." In the opinion *Kocher v. Cornell,* 59 Neb. 315, and other cases are referred to, in which it is held that, "when a married woman signs a note as surety, and has no separate estate or property at the time of signing, it will be presumed that she did not contract with reference to her property or business." And it is said: "If she has rights to protect or enforce, and makes contracts reasonably appropriate to enforce or protect them, the case is entirely different."

The next contention is as to the character of the interest of Mrs. Marsh of which she attempted to dispose. Is such an interest assignable? Was the subject of this assignment property, or an interest in property that could be assigned? The testator was deceased at the time of the assignment. There was a portion of the estate that would go to the husband or wife if either of them lived until 1910. If the husband lived until that time, his assignment alone would be sufficient to transfer that portion. He had no interest that he could have assigned if he died before that time. The same condition existed in *Taylor*

v. Taylor, 118 Ia. 407. In that case the will gave the widow of the testator a life estate, and afterwards to his son or his heirs. The court construed this language to mean that, if the son lived to the termination of the particular estate, the property went to him; but, if not, it went to his heirs then living. It was held that the will gave the son a contingent remainder, which could not be levied upon and sold on execution, but which was assignable. Under the authority of this case, and indeed under the authorities generally, there seems to be no doubt of the validity of the assignment of Charles Marsh, so far as any interest which he had in the property was concerned. It was not necessary to consider whether the presumptive heirs of the son of the testator had an assignable interest in the estate. There is in the opinion a quotation from 2 Washburn, Real Property (6th ed.) sec. 1557, p. 527, in which that author says: "But if the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, there is no one who can make an effectual grant or devise of the remainder." If Edith V. Marsh had an assignable interest, it was because she was a presumptive heir of one alive at the time of the grant; and, under this statement of Mr. Washburn, it would seem that she could not make an effectual grant of that interest. The authorities, however, especially the more recent ones, are not united on this proposition. If the rule is supported by the weight of authorities, we think it ought not to be applied in this case. The bank might have enforced the assignment of Charles Marsh, so far as it related to the income which he was receiving from the estate. The indebtedness continued for many years, but the bank renewed it from time to time on the strength of these assignments. The interest in the estate described in these assignments amounted to much more than the claim of the bank, so that if these assignments were valid the claim of the bank was amply secured. By the execution of these assignments the collection of the claim was postponed from time to time, and the husband enjoyed the

income from the estate which, but for its reliance upon these securities, the bank might have applied upon his indebtedness.

Our statute provides: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Comp. St. 1911, ch. 73, sec. 50. If one sells an article of personal property of which he has no title or possession at the time, but a contingent right, and afterwards acquires the title and possession, he ought not to be allowed to urge his want of title at the time of his contract to enable him to avoid his contract. When Edith V. Marsh executed these assignments it was known by all parties that the right of her husband to assign this interest in the estate might be defeated, as it subsequently was, and she executed these assignments to supply this defect in her husband's right to convey. She knew that if the bank allowed them to enjoy the income from the estate it did so relying upon the validity of these assignments. She ought not now to repudiate them. But her counsel urges that the defense of coverture is the want of power, and that, where there is no power to contract, the attempt to do so will not constitute an estoppel, and it is so held in *Whitlock v. Gosson*, 35 Neb. 829, in which it is said: "Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law." If, however, we are right in the conclusion that married women have the same power to convey their real and personal property that married men have to convey theirs, then the invalidity of these assignments, so far as her interests are concerned, was not for want of power in her to convey; but, if they were invalid at all, it was because of the character of the thing attempted to be assigned. In such case the principle of estoppel applies in full force. We conclude that the interest of Edith V. Marsh in the funds in the hands of the trustees is subject to the claim of the defendant bank.

The judgment of the district court is reversed and the

cause remanded, with instructions to enter a decree in accordance with the view herein expressed.

REVERSED.

FAWCETT, J., took no part.

LETTON, J., concurring.

The question presented relates to an interest in certain specified personal property. I concur in the view that, under the terms of the will, the title to the bonds assigned never vested in Charles Marsh, but eventually passed by the will to his heirs and legal representatives. I also think the opinion correct as to the meaning of the words "heirs and legal representatives" in this will. The case of *Shackley v. Homer*, 87 Neb. 146, is easily distinguishable. The interest of Mrs. Marsh in the property was contingent upon the death of Charles Marsh before the time when the title would vest in him, and her survival. In equity such contingent interests in chattel property are both devisable and assignable. 1 Fearne, Remainders, 368, 548; *Higden v. Williamson*, 3 Cox's P. W. (Eng.) 131; *Seawen v. Blunt*, 7 Ves. Jr. (Eng.) *294; *Hinkle v. Wanzer*, 17 How. (U. S.) *353. This being the case, the contingent interest of Mrs. Marsh in the bonds passed by her assignment and became effectual by estoppel when the trust estate determined.

PETER FREDERICK, SR., APPELLANT, V. MARY GEHLING, APPELLEE.

FILED OCTOBER 18, 1912. No. 17,624.

1. **Judicial Sales: VACATION.** Ordinarily judicial sales will not be set aside for inadequacy of the price paid, in the absence of fraud or mistake, when the purchaser pays two-thirds of the appraised value of the defendant's interest in the land.

2. **Liens**: FORECLOSURE: GOOD FAITH. When two parties have liens on the same land, and the land is of sufficient value to pay all liens, there should be entire good faith between the lienholders to realize sufficient to satisfy both liens.

3. **Subrogation**. The right of subrogation must depend upon the facts and equities of the particular case in which it is asserted.

4. ———: LIENS. F. bought land at execution sale upon a judgment owned by him. The certificate of liens showed several mortgages prior to the lien of his judgment. The land sold for more than two-thirds of the appraised value, but much less than its actual value. The prior mortgages had in fact been paid. *Held*, That a mortgagee whose mortgage was on record before the execution sale, and was given to secure a loan with which the prior mortgages were paid, upon an understanding with the mortgagor that it should be a first lien, is entitled to subrogation to the lien of the prior mortgages.

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

Isham Reavis and *Albert W. Crites*, for appellant.

Edwin Falloon and *J. H. Edmunds, contra.*

SEDGWICK, J.

When this case was here before (89 Neb. 93), it was determined upon a general demurrer to the defendant's answer. The character of the case is stated in the former opinion, and the controlling allegations of the answer demurred to are also stated. The principal defense then insisted upon was that, in the sale upon the judgment under which the plaintiff claims title, the prior mortgages were in fact deducted as liens in the appraisement of the land. It was clearly and positively alleged in the answer "that these liens were deducted from the value of said premises, and said premises were appraised by said appraisers after said liens had been deducted at the sum of $500." And again: "That at the time said sale was made said liens were still of record and in force on said land and deducted from its appraised value." It was held, as

against a general demurrer to the answer, that these allegations were sufficient to charge the plaintiff with these prior liens as a part of the purchase price of the land at the sale. The cause has been retried, and is now presented upon the question of the sufficiency of the evidence; the trial court having held that the defendant was entitled to have her mortgage subrogated to the lien of the prior mortgage. The principal question now presented upon this appeal is as to this defense, which was also included in the answer, and upon which the trial court has now found in favor of the defendant.

It appears now from the pleadings and evidence that when the plaintiff purchased the land at sheriff's sale under his judgment he was not personally present at the sale, and had no actual knowledge that the prior mortgage had not been released of record, nor that the defendant's mortgage had been duly recorded. It seems, so far as he is personally concerned, that he purchased the judgment against Buckminster and also the land at the execution sale in good faith. This defendant also acted in good faith in loaning the money for which her mortgage was given and with which the prior incumbrance was paid. The trial court found that the land, at the time of the trial, was worth $1,600. The plaintiff's judgment at that time, with interest and costs, amounted to less than $300. The defendant's mortgage was for $600 and some interest. The value of the land then was amply sufficient to pay both claims. Under such circumstances there should be perfect good faith between the parties. The appraisers at the sheriff's sale appear to have valued the land at $500, and the plaintiff purchased it at the sale for $333.35, which was more than two-thirds of its appraised value. It is insisted that under these circumstances the existence of prior liens and the fact that they are shown upon the appraisement are immaterial, and in ordinary cases of judicial sale this is the rule.

It will be remembered that Buckminster was the owner of this land and had given this plaintiff two mortgages

thereon. One of these mortgages included also some land in Richardson county. The plaintiff began an action in the district court for Richardson county to foreclose the last-mentioned mortgage and obtained a judgment of foreclosure therein. Thereupon Buckminster's brother loaned him $425 with which to pay to the plaintiff the amount of the said judgment in foreclosure, with interest and costs, together with the plaintiff's other mortgage, which covered only the land in question. It is conceded in the briefs that Buckminster's brother, while he held his mortgage on this land, would have been entitled to subrogation to the prior liens held by the plaintiff as against the owner of the land and the plaintiff also. The mortgage, under which the defendant claims, was given by Buckminster to the defendant to secure the money which he borrowed with which to pay this prior mortgage. Some time before either of these two last-named mortgages was given the plaintiff purchased a judgment in justice court of Richardson county against Buckminster, and caused the same to be duly transcripted and docketed in Sheridan county as a lien upon the lands of Buckminster. Plaintiff caused an execution to be issued upon that judgment and levied upon this land. In the meantime, and before the execution sale, the defendant's mortgage was duly recorded in Sheridan county. The appraisers at the execution sale included both the defendant's mortgage and the $425 mortgage to Buckminster's brother in the statement of liens certified by them to be prior to the lien of the plaintiff's judgment. The plaintiff obtained his title through the acts of the sheriff and appraisers, and is therefore bound by those acts, so far as they affect his title. For the purposes of this action, then, he must be held to have known that the appraisers certified and returned to the court that there were liens upon the land prior to his own, amounting to $1,182.30. The plaintiff by his purchase took only such title as his judgment debtor, Buckminster, had in the land.

The evidence in many respects is not very clear and

satisfactory, but it appears from the record that the release of the prior mortgage and the execution of the defendant's mortgage were on the same day, and, in the absence of any other evidence upon that point, it must be presumed that the payment of the prior mortgage and the giving of the defendant's mortgage were at the same time and a part of the same transaction. Under these circumstances was the trial court right in holding the defendant's mortgage prior to the plaintiff's title? It must be conceded that, in view of the very many decisions of this court in regard to the right of subrogation, this question is not free from difficulty. The evidence does not show that there was an express agreement by either the mortgagor or mortgagee in the prior mortgage that this defendant should have that right of subrogation. Her mortgage, however, conveys her "an absolute title in fee simple, including all the rights of homestead, to have and to hold the premises above described, with all the appurtenances thereunto belonging, unto the said Mary Gehling and to her heirs and assigns forever." In *Meeker v. Larsen*, 65 Neb. 158, it is said there must be an agreement or understanding to that effect with one of the parties to the prior lien, or the right of subrogation will not exist. An equivalent expression is used in many other of our decisions; but in other cases it is assumed at least, if not decided, that there must be an express contract, in the absence of any special equities in favor of the subrogation. In *Rice v. Winters*, 45 Neb. 517, the mortgage was given to procure a loan with which to pay off and discharge a prior mortgage, and the mortgagor agreed to secure the loan by a first mortgage, and it was held that the mortgagee in the later mortgage was not entitled to subrogation as against a mechanic's lien intervening between the two mortgages. In a later case, in an opinion by the same commissioner, it was held that a mortgagee whose mortgage was given to secure money with which to pay a prior mortgage, together with taxes and other claims against the land, was entitled to subrogation to

the mortgage and other claims so paid as against the heirs of the mortgagor. *Arlington State Bank v. Paulsen*, 57 Neb. 717, 747. It was said in the opinion: "Only the creditors of the beneficiaries are objecting, but their claims upon the interests of the beneficiaries were subordinate to the debts of the testator against his entire estate; and if the corporations be subrogated, the creditors of the beneficiaries have not been deprived of any right." In the opinion some 15 of our prior decisions are cited as holding this doctrine. In that case the heirs of the mortgagor were resisting the subrogation. In this case it is the purchaser at execution sale of the mortgagor's interest, and the principle would seem to be the same.

The plaintiff cites and relies upon *Bohn Sash & Door Co. v. Case*, 42 Neb. 281, in which it was said: "The mere fact that with the proceeds of a later mortgage prior mortgages have been paid that the lien of them might be removed affords no ground for subrogation thereto." But it is also said in the opinion: "The real question in all such cases is whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him, or whether it was made with the expectation of being substituted in the place of a creditor. If the former is the case, he is not entitled to subrogation; if the latter, he is."

In *Boevink v. Christiaanse*, 69 Neb. 256, the court, in an opinion prepared by Mr. Commissioner HASTINGS, said: "In the recent case of *Cumberland Building & Loan Ass'n v. Sparks*, 49 C. C. A. 510, a loaner who had furnished money to pay off a prior mortgage, under an agreement that it should have a first lien, and had taken an invalid mortgage for its security, was held entitled to subrogation, not only against the mortgagor, but against another lienholder who had notice of the facts"—and that the supreme court of Illinois in *Home Savings Bank v. Bierstadt*, 168 Ill. 618, held that " 'conventional subrogation' will always be decreed, where it is in accordance with the understanding of the parties, and there is no gross negli-

gence, and no injurious result to third parties." It is further said: "Both of these cases are abundantly fortified by other decisions," and that "there is no showing of any injurious change in the devisees' position because of plaintiff's paying the mortgage."

In this case the plaintiff is claiming the land. He is not injured by substituting the new mortgage for the prior mortgage, which was superior to his lien. The language of this court quoted above from the opinion last cited is applicable. The land is of sufficient value to pay both his lien and the defendant's mortgage. There is perhaps a presumption that it would have brought sufficient at the sheriff's sale for that purpose if the prior mortgage had not been certified as an existing lien. There is no doubt, as against the original mortgagor, the defendant's equities are superior. The plaintiff has purchased only the rights of the original mortgagor. Through the mistake of those acting for the plaintiff, the title conveyed by the sheriff's sale was discredited. The plaintiff has brought the matter into a court of equity, and he should do equity by the defendant. In this case the defendant took her mortgage at the same time that the prior mortgage was paid with the money that she loaned; and there is no doubt, under this evidence, that both she herself and the mortgagor expected and understood that she would have the first lien upon the land, instead of the mortgage which was paid with her money.

The plaintiff's petition was framed upon the theory that he took the entire title by his purchase at sheriff's sale, and the prayer was that the defendant's mortgage be canceled. The court decreed that the defendant's mortgage should be canceled upon payment by the plaintiff of the amount secured thereby, and so directly answers the petition and the prayer thereof. Under the facts alleged in the defendant's answer she would be entitled to a foreclosure of her mortgage, and the prayer of her answer was for general equitable relief. There ought not to be any further litigation in regard to this matter. A court

of equity should, if practicable, enter such decree as will dispose of all the matters involved in the litigation. Defendant's mortgage should be allowed as first lien in the amount paid to redeem the land from the prior mortgage, and interest thereon at the rate prescribed in that mortgage to the date of entering the decree. The trial court allowed her the full amount of her mortgage, which was somewhat more than the amount to which she was entitled as a prior lien upon the land.

The trial court found that there was no merit in the claim of the intervener, and the intervener has taken no cross-appeal. It is contended, however, in the brief that the intervener is entitled to a decree on the ground that the land was his homestead at the time the plaintiff's judgment is alleged to have become a lien thereon. The evidence does not show that the land was a homestead, and the decree of the district court in that regard is correct.

The judgment of the district court is reversed and the cause remanded, with directions to enter a decree foreclosing the defendant's mortgage in the amount of the prior mortgage, $425, and interest, and allowing the plaintiff a reasonable time to redeem therefrom, and quieting the plaintiff's title in the land, subject to the defendant's lien.

REVERSED.

LETTON, J.

I concur in the result only. The maxim, "He who seeks equity must do equity," applies.

MELS GOLDSBERRY V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1912. No. 17,639.

1. **Criminal Law: IMPANELING GRAND JURY: OBJECTIONS: REVIEW.** Objections to the impaneling of the grand jury may be presented by plea in abatement. If such a plea is made and there is no rul-

ing or refusal to rule thereon by the trial court the objection is waived. The objection cannot be taken by motion in arrest of judgment.

2. Indictment: REQUISITES: SIGNATURE. An indictment must be indorsed and the indorsement subscribed by the foreman of the grand jury. Signing of an indictment by the prosecuting attorney is unnecessary and immaterial.

3. Embezzlement: INDICTMENT: PRINCIPAL. An indictment under section 121 of the criminal code should show whether the principal whose agent is charged with embezzlement is a private person. If the principal is described as "Lillian Casey," a private person, when first named in the indictment, and afterwards designated as the "said Lillian Casey," the description is sufficient.

4. Criminal Law: APPOINTMENT OF ASSISTANT PROSECUTOR. An assistant for the county attorney in felony cases may be selected by him under the direction of the court. Such assistant cannot be selected by private persons interested in the prosecution. A member of the bar of another state may be selected by the county attorney if the court is satisfied that such selection is proper and so directs. Such assistant must be qualified as directed by section 3, ch. 7, Comp. St. 1911.

5. ———: ———: PRESUMPTIONS. It will not be presumed that the trial court has neglected its duty in directing the selection of assistant for the prosecuting attorney. Unless the record shows affirmatively that such assistant did not take the oath prescribed by statute, such omission will not be presumed. The recital in defendant's affidavit filed with motion for new trial that the oath was not taken will not be regarded by this court as establishing that fact. Whether an assistant who has been properly procured under the direction of the court will afterwards be disqualified by receiving additional compensation from private persons is not decided.

6. ———: MISCONDUCT OF PROSECUTOR: OBJECTIONS: REVIEW. Objection that the prosecuting attorney is guilty of misconduct at the trial prejudicial to defendant must be taken at the time. It is primarily a question for the trial court. It is too late to make the objection for the first time in the motion for a new trial.

7. Embezzlement: AGENCY: EVIDENCE. If an agent receives a draft from his principal with instructions to purchase certain property therewith, and the agent pursuant to that employment obtains the money on the draft and afterwards converts the money, the jury will be justified in finding that he obtained and had the money as agent of the person from whom he received the draft.

8. **Criminal Law**: INSTRUCTIONS: ADMISSIONS. It is without prejudice to the defendant if the court instructs the jury in a trial for felony that certain facts stand admitted, when the defendant himself and other witnesses have testified to the facts stated, and there is no evidence to the contrary.

9. ———: ———: VENUE. If the court submits the question as to the place of the commission of the alleged crime fully and fairly to the jury, it will not be held prejudicial error to tell the jury that they have nothing to do with the law question involved in determining the proper venue.

10. ———: ———: OBJECTIONS. If the defendant desires instruction upon matters not mentioned by the court in its instructions, he should request the same. An objection in this court that important matters were omitted from the instructions, without specifying what those matters were, will not ordinarily be considered.

11. **Embezzlement**: EVIDENCE. The evidence is found to be sufficient to support the conviction.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Burr, Greene & Greene, for plaintiff in error.

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

SEDGWICK, J.

The defendant, who is plaintiff in error here, was convicted in the district court for Lancaster county of the crime of embezzlement. He urges several grounds on which he thinks he is entitled to a reversal of the judgment.

1. The first objection is as to the impaneling of the grand jury which found the indictment. It is said that the jury which was impaneled for the first term of the year 1911 was selected from the old list prepared during the preceding year. It appears that a plea in abatement was filed upon this ground, but the record does not show that any action was taken by the court upon this plea. After

the verdict, a motion was filed in arrest of judgment upon this ground, and it is now insisted that the court erred in overruling this motion. Section 493 of the criminal code provides that a motion in arrest of judgment may be granted by the court when the offense charged is not within the jurisdiction of the court, and when the facts stated in the indictment do not constitute an offense. Section 444 provides that all defects which may be excepted to by a plea in abatement shall be taken to be waived by pleading in bar or the general issue. The question here presented is properly raised by plea in abatement, and, the court not having ruled upon that plea, nor refused to make such ruling, the objection now taken is waived. *Dodge v. People*, 4 Neb. 220; *Leisenberg v. State*, 60 Neb. 628.

2. The next objection is that the indictment is not subscribed by the foreman of the grand jury, but is subscribed by the county attorney. Section 408 of the criminal code provides that, when indictment is found, the "foreman shall indorse on such indictment the words, 'A true bill,' and subscribe his name thereto as foreman." This was done in this case, and was all the signature necessary, and the signature of the county attorney, it appears, neither adds to nor detracts from the force of the indictment.

3. It is contended that the indictment "does not state facts sufficient to constitute an offense under the laws of the state of Nebraska." The indictment is drawn under section 121 of the criminal code. Under that section the agent of any private person or any copartnership or any incorporated company or any joint stock company who shall do certain things shall be guilty of embezzlement. It is contended that the indictment does not allege that this defendant was the agent of any of these. It alleges that "the defendant (naming him), * * * then and there being the agent of one Lillian Casey, a private person, * * * did * * * receive from said Lillian Casey a certain draft." The indictment describes the principal for whom the defendant was acting (as agent) as a private person, and afterwards in every instance refers to her as

the "said Lillian Casey," and we think thereby it sufficiently identifies her as a private person. This objection to the indictment therefore is not well taken.

4. The next objection is that the court erred "in appointing an unsworn, nonresident attorney to aid in the prosecution." The county attorney under the direction of the court procured one Robinson to assist in the prosecution. Mr. Robinson was a resident of Kansas City, Missouri, and appears to be a member of the bar of that state. It is objected that the attorney so selected was not a member of the bar of this state, and had never taken the oath required of an attorney who practices in this state. In *McKay v. State*, 90 Neb. 63, our statute authorizing the county attorney to procure assistance in the trial of felony cases is quoted and construed. The former decisions of this court, both those rendered before the enactment of the present statute and the later decisions, are reviewed, and it is held that the county attorney may procure such assistance under the direction of the court, but that private individuals who are interested in the prosecution are not allowed to select such assistant for the county attorney. Section 3, ch. 7, Comp. St. 1911, provides: "Any practicing attorney in the courts of record of another state or territory, having professional business in either the supreme or district courts, may, on motion, be admitted to practice (for the purpose of said business only) in either of said courts, upon taking the oath aforesaid." No doubt the statute authorizing the county attorney to procure assistance in the trial of criminal cases contemplates that his assistant shall be a duly qualified attorney, and the selection of such an assistant must be under the direction of the trial court who will see that he is duly authorized to appear as an attorney at law. If the attorney so selected is a member of the bar of this state, he will realize the importance of the duties he is to perform under the provisions of our statute, and under his oath as a member of the bar will have continually in mind the duties of that important office as prescribed in section 5

and other provisions of the said chapter. If not a member of the bar of the state, he will qualify himself to practice in the particular case for which he is selected under the provisions of section 3 above quoted.

The abstract in this case shows that counsel for the defendant in the motions and objections made in the trial of the case recited that Mr. Robinson was a nonresident and was unsworn, but these recitals do not establish the fact, and the abstract does not show, that section 3 above quoted was not complied with by the court. The presumption is that the court performed its duty in that regard. It is further insisted that Mr. Robinson had been retained by private individuals to prosecute this case, and that he had been by them paid at least in part for his services. The abstract shows that Mr. Robinson renounced any employment by private individuals, and returned all fees that they had paid him for his services in this case. Whether an attorney who had been procured by the county attorney, under the direction of the court, to assist in the prosecution, for compensation to be paid by the county, would be disqualified by receiving additional compensation from private individuals was not considered or determined in *McKay v. State, supra*, and it is not necessary to determine that question in this case for the reason above stated. It is the duty of the trial court to see that proper selection is made in the interest of the state, and for the promotion of justice in determining the guilt or innocence of the accused, and the presumption is that the trial court has properly exercised its discretion in that regard.

5. It is objected that the evidence is not sufficient to justify the conviction. The indictment charged that the defendant, being the agent of one Lillian Casey, a private person, "did by virtue of such employment as agent * * * receive from said Lillian Casey a certain draft, the property of said Lillian Casey" (setting it out in full); that the draft was indorsed by the said Lillian Casey, and that the defendant afterwards, "in the county

of Lancaster, Nebraska, then and there being, did indorse said draft and receive thereon from the First National Bank, of Lincoln, Nebraska, and take into his possession, the sum of $800 in good and lawful money of the United States of America, of the value of $800, the property of the said Lillian Casey, his principal, and did then and there fraudulently, unlawfully and feloniously convert to his own use and embezzle said money without the consent of the said Lillian Casey, his principal." The defendant was a witness in his own behalf, and from his testimony and that of the complaining witness, Lillian Casey, and others, it is shown without contradiction that the draft described was the property of Lillian Casey, and that the defendant received it from her and obtained the money on the draft in Lincoln, as charged in the indictment. The defendant testified that he was asked by Lillian Casey "to cash the draft because she could not be identified and did not care to be known to certain people." It is conceded that he afterwards received and cashed a draft of $1,000 for Miss Casey, and he testified that he retained $100 to make himself whole "for the expense of exchange, and money actually advanced" to Miss Casey, and that he paid her $1,700 at a certain time and place named by him, in the presence of several witnesses. He claims that under these circumstances, if he embezzled anything, it was the draft, and not the money as alleged in the indictment. This evidence does not necessarily establish that he was entrusted with the draft for the purpose of disposing of it without converting it into money. The jury might find from this evidence that his employment by Miss Casey contemplated that he would obtain the money upon the paper which she gave him, and that the money, when so obtained, would be her money and in the defendant's hands as her agent. The suggestion in the brief that he was employed merely as an errand boy is without force. An errand boy is an agent within the meaning of this statute, and is liable as such if he embezzles the money entrusted to his care. Surely an

errand boy sent to the bank with a draft would be guilty of embezzlement under this statute, if, after cashing the draft as directed, he converts the money to his own use with intent to deprive his employer of it. This question was fairly presented to the jury, and upon this point their verdict is undoubtedly justified by the evidence. The evidence as to the payment of the $1,700 was conflicting, and this question also was properly submitted to the jury.

6. It is contended in the brief that Mr. Robinson, while assisting the county attorney, was guilty of misconduct prejudicing the defendant and requiring a reversal. This question of misconduct of the prosecuting attorney was, so far as the abstract shows, first presented to the trial court in an affidavit of the defendant filed in support of his motion for a new trial. This, of course, was too late to raise such objections as these. If the prosecuting attorney attempted to take any unfair advantage of the defendant in the course of the trial, the matter should at once be called to the attention of the court. The trial court has ample power to protect the defendant in his rights, and the presumption is that, if requested, this would be done. This affidavit, filed upon the motion for a new trial, states that the prosecuting attorney, "when admonished by the court at the request of defendant, emphasized the misconduct and later desisted from it." This statement of itself would prevent the defendant from now urging the conduct of the prosecuting attorney as ground for a new trial. How or to what extent he "emphasized the misconduct" is not stated, and, if he "desisted from it" when admonished, the remedy which the law gives the defendant appears to have been effective. Very much, if not all, of the language of the prosecuting attorney now complained of appears to be such as is generally supposed to be within the line of legitimate argument.

7. Several instructions given by the court are complained of. It is said that instruction No. 2, which states "the material ingredients of the offense," fails to state

"the essential one, that the money was received in a fiduciary capacity." We do not think this instruction merits this criticism. The court told the jury that one of the material allegations was that at the time and place alleged in the indictment the defendant was the agent of one Lillian Casey, and that by virtue of such employment as agent he received from her the draft as alleged in the indictment; that the draft was her property, and that upon indorsing the draft he had received the $800, as alleged in the indictment, "the same being the property of the said Lillian Casey, his principal." It seems to be contended that if the jury found that he received the draft from her as her agent with instructions to use the proceeds for a certain purpose, but without definite instructions to obtain the money upon the draft, that in obtaining the money he was not acting in a fiduciary capacity. There does not seem to be any merit in this contention, especially in view of the defendant's own testimony above referred to.

In instruction No. 3 the court stated that "it stands admitted" that certain things took place, reciting them, and it is contended that this was error on the part of the court; but we cannot see that the defendant was prejudiced thereby, since he himself testified to the things that the court stated to the jury were admitted, and he was corroborated in this regard by other witnesses, and not disputed by any. Of course, the plea of not guilty put some of these facts in issue, but we cannot see that the instruction was prejudicial in view of the condition of the evidence in the record.

It is complained that the sixth instruction "takes from the jury the facts with reference to venue." In that instruction the court told the jury: "Whether or not this county and state is the proper place for the prosecution of this action is a question of law with which the jury has nothing to do, and you should not consider it." In the third instruction the jury are told: "Whether or not at the time and place alleged in the indictment he converted

the said money to his own use and embezzled the same * * * are questions of fact you have to consider and determine from all the facts and circumstances of the case as shown by the evidence." The fourth instruction given by the court was as follows: "You should consider whether in receiving the money on the draft he received it intending to hold and use it for the purposes for which the money was held by him as her agent as shown by all the evidence, or whether, on the other hand, he took it with the felonious intent of converting the same to his own use and depriving her of the same. You should consider all the evidence as it may bear upon the question how, as between the defendant and Lillian Casey, he held the money, and how he used it, and his intent in the use he made of it."

If the jury found that the defendant converted the money which he received upon the draft to his own use, and formed the intention then and there to deprive the owner of the same, and all this was done at the time and place as alleged, then the action was rightly brought in Lancaster county, and the jury would not be justified in rendering a verdict of not guilty because they thought the law ought not to allow the action to be brought in that county. In the light of these three instructions, this appears to be the idea of the court, and it seems clear that the jury must have so understood it, although the clause quoted above from the sixth instruction is perhaps unusual.

It is urged that the instructions are incomplete; that "something has been left out, * * * the one thing that would entitle the defendant to any relief whatever in the hands of the jury." It is not even stated in the brief what this one thing is. There is no claim that it was stated to the trial court, much less that an instruction was presented and asked that would cure the defect. The abstract shows that the court gave eight several instructions to the jury besides a complete statement of the allegations of the indictment. If it was desired that there should be

instructions upon other matters, a request to that effect should have been made to the trial court. No instruction was requested except the general one to instruct the jury to find the defendant not guilty.

Not finding any error requiring a reversal, the judgment of the district court is

AFFIRMED.

EMMA C. TYLER, APPELLEE, V. A. L. HOOVER, APPELLANT.

FILED OCTOBER 18, 1912. No. 16,617.

1. Highways: USE BY AUTOMOBILES. The law does not denounce the use of an automobile on a public highway, and the appellant is not guilty of negligence because he used one on the streets of the city of Lincoln.

2. ———: ———. It is improper to say that the driver of a horse attached to a carriage has rights in the road superior to the rights of the driver of the automobile, as both have a right to go upon the public highway, and each is restricted in the exercise of his rights by the corresponding rights of the other, and each is entitled to regulate his use of the public streets and roads by the observance towards others on the road of ordinary prudence and care under all the circumstances.

3. ———: ———: CARE REQUIRED. The restrictions which the law imposes on all modes of travel on the highways are such as tend to secure to the general public the largest enjoyment thereof, and must be observed and borne by all alike upon the broad ground that all have an equal right to travel in safety; and, when accidents happen as incidents to reasonable use and reasonable care, the law affords no redress.

4. ———: ———: ———. If the driver of an automobile sees that a horse driven to a carriage is restive and frightened, he should take such course to avoid inflicting an injury as the dictates of ordinary prudence may demand. He should reduce the speed of his vehicle, or stop it, if requested to do so, or if he sees that it is necessary to avoid an accident; but he is not relieved from the duty of exercising ordinary care to prevent injury to those he may meet or overtake upon the highway.

5. ———: ———: ———. The fact that a horse becomes frightened by an automobile upon the highway does not render the operator of such vehicle liable for resulting injury, as the horse has no paramount or exclusive right to the road; and the fact that a horse takes fright at a vehicle run by new and improved methods, and smashes things, does not of itself give the injured party a cause of action.

6. Appeal: QUESTIONS OF FACT. The rule is well established that, where there is a conflict of evidence upon the material facts touching the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict of a jury or the findings and judgment of the trial court (*O'Chander v. Dakota County*, 90 Neb. 3); but, where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside (*Garfield v. Hodges & Baldwin*, 90 Neb. 122), as, also, will the findings and judgment of the trial court, where they are clearly against the weight of evidence (*Roberts v. City of Lincoln*, 6 Neb. 352; *Southard v. Behrns*, 52 Neb. 486; *American Fire Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 52 Neb. 676; *Symns Grocery Co. v. Snow Bros.*, 58 Neb. 516; *Frerking v. Thomas*, 64 Neb. 193).

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

Hall & Bishop, for appellant.

Charles O. Whedon, contra.

HAMER, J.

This is an appeal by the defendant from the judgment of the district court for Lancaster county. The plaintiff brought an action to recover damages for personal injuries alleged to have been caused by the careless, negligent and unlawful manner in which the appellant, on the 19th day of July, 1908, ran, handled, and managed an automobile, so that, as alleged in the petition, it struck and overturned the carriage in which the plaintiff was then riding with her husband, son and daughter, and threw the plaintiff, with violence, out of said carriage

upon a paved street in the city of Lincoln, and against the iron inlet guard to the city sewer, severely lacerating the plaintiff's right ear and scalp and bruising and wounding her, and thereby causing her physical pain and mental suffering, and rendering her unable to perform her household duties, and putting her to expense in procuring medicines, physicians and nurses. The petition also alleged that the defendant was running said automobile on the left side of the street at the rate of more than 12 miles an hour, and that he gave no sound or warning as he approached the intersection of Eleventh and L streets, as required by rules 2 and 7 of the General Revised and Consolidated Ordinances and Special Ordinances of Lincoln, Nebraska, being a part of chapter 120 of said ordinances. The answer admits the collision, but alleges that the horse attached to the carriage was wild, fractious and unsafe, and that the driver, who was the appellee's son, was unable to manage and control him, and that the horse took fright and ran into the automobile at the intersection of Eleventh and L streets, in Lincoln, and that the automobile, which before that time had been running at a rate of speed not to exceed 3 or 4 miles an hour as it approached said intersection from the north on Eleventh street, being under a complete state of control, was at once slowed up and was standing still when run into by the plaintiff's horse and carriage, and that the horse and carriage left the car after running into it, and that the carriage upset a short distance east of the point of collision, and that the injuries resulting therefrom were caused by the wild and fractious character of the horse and the carelessness and negligence of the driver and his inability to handle and control the horse, and that the appellant used every care and precaution possible, and in no way contributed to the injuries; that the plaintiff, by reason of the vicious character of the horse and the carelessness and negligence of the driver, who was her son, and his inability to manage the horse, caused the injuries complained of. The reply was a general denial of new

matter in the answer. Appellant claims that the evidence fails to prove the cause of action, and attempts to show that the injuries sustained were so sustained because the horse was vicious and unmanageable, and because the plaintiff's driver was unable to control him. Errors at the trial are also alleged.

The horse and carriage were going east on L street at the time the automobile was going south on Eleventh street. The son of the appellant, who had gone to the depot for his mother, and who was driving the family horse and carriage, puts the horse and carriage, by his testimony, half way across Eleventh street at the time he first saw the automobile coming along Eleventh street from the north, and then distant from the carriage he was driving about 400 feet. He was driving on a trot. As Eleventh street is 70 feet between curbs, he had only 35 feet to drive, if he went on straight ahead towards the east, before he would be across Eleventh street and out of the way of the automobile going south. According to his statement, the automobile had more than ten times as far to go as the horse and buggy before it would collide with them if they went straight east across Eleventh street. The husband of the appellee corroborates the son as to the whipping of the horse by the son, and he, by his evidence, puts the horse and carriage about two-thirds of the way across Eleventh street when he first saw the automobile coming, and it was then distant from him about 250 feet, according to his opinion. The daughter of the appellee was riding in the carriage, at the time of the collision, with her brother, at the left of him and on the front seat, and the father and mother were in the back seat of the carriage. The daughter, by her testimony, puts the carriage two-thirds of the way across Eleventh street when she first saw the automobile, which was then in front of the grocery store referred to by the father in his testimony, and about 250 feet north.

Mrs. Roy Young lived at 310 South Eleventh street, over Pfeiff's grocery store, north of the point of collision,

and about one-half way between the alley and M street. She saw the automobile going south past her window. "Q. He was going at a moderate rate of speed, was he not? A. Well, very slow; not very fast. Q. He was going very slow? A. Yes, sir." If the right hind wheel of the carriage struck the automobile, this could have been done, it would seem, by the carriage turning and going northeast with its right hind wheel next to the automobile. The latter theory is supported by the testimony of De Vore, Spain, Mrs. Herpolsheimer, Mrs. Hoover and the defendant, Dr. Hoover. The defendant, Dr. Hoover, corroborated the statement of Mrs. Young as to the speed of the automobile. He testified that he turned on the brake and stopped the car before the collision occurred, and just as the horse started towards him. Before that he was running slowly. He says that if the horse, attached to the carriage, had gone straight across Eleventh street he would have missed the car by from six to ten feet, but that the horse turned south on Eleventh street, and "all at once the horse wheeled around and made a lunge and came down at an angle as though he was going to plunge right into the car, and, as he got right up close to the car, then he swung right around to the left, kind of doubled around the car, and struck the car; and I had brought my car to a standstill, when his carriage struck me, and, as I say, that he kind of swung around the car, and then ran on—the distance was probably 30 or 35 feet—and the horse started off then a little to the right, again to the south, and there the carriage, it seemed to me, collided with the curb, and the horse went down, and the carriage upset and spilled them all out there." This tends to show that the frightened horse was unmanageable, and that he attempted to, and probably did, go north, and in that way brought the right hind wheel of the carriage in contact with the automobile on the west side of the automobile, and then went around the automobile, perhaps behind it, and turned and went south to the southeast corner of the

intersection space of the two streets, where the carriage went down. It is in testimony that there were marks on the car.

Lottridge testified that the hind wheel of the buggy ran over the wheel of the automobile and that the buggy did not tip over until it struck the curbstone, which was about 35 feet from where it ran into the automobile. Leslie Keizer testified that when he first saw the automobile it was at the intersection of Eleventh and L streets, and going slow, and that the horse and buggy at first were going east on L street, and all at once the horse turned south on Eleventh street, and then that he turned around towards the automobile, and was going northeast at the time of the collision. He says that when the carriage struck the car it seemed to sway around to the south, and then hit the curb on the corner, and then the carriage turned over; that the right hind wheel of the carriage broke when it hit the curbing or basin. De Vore testified that the horse and carriage were going east on L street, and then that the horse turned south on Eleventh street, and then reared and turned around northeast towards the automobile as though he was going to run into it; that the appellant stopped the car, and the horse sprang around to the south; that the horse was rearing and plunging, and the carriage turned over, and the horse fell near the corner of Eleventh and L, and that the automobile was standing still when struck by the carriage; that the driver was trying to hold the horse, but did not have control of it, and that the horse was rearing and running. Mrs. Louise Herpolsheimer, the appellant's daughter, testified that she was in the automobile, and that the horse was going on a swift trot, and that as he reached the southwest corner of Eleventh and L he broke into a run; that the automobile had been slowed down, and that the car was stopped when the horse broke and ran, and that the horse seemed to run straight for the car, and that when the carriage struck the car it was standing still; that the horse then went to the southeast

corner, where he fell and the carriage upset; that the carriage did not upset when it struck the car; that the carriage struck the right front wheel of the car. The appellant's wife, Mrs. Della J. Hoover, testified that as the horse struck Eleventh street he made a turn as though going south, and then the driver suddenly lost control of him; that the husband slowed down the car, and that the carriage hit the car, and that the horse ran, with the driver trying to hold him; that when he reached the corner he fell, and the carriage went down.

The horse seems to have been badly frightened, and ran when he was whipped, and reared and plunged, and finally went down, and the carriage upset. The right side of the carriage and the automobile were brought together. That the right hind wheel of the carriage was injured and that there were marks on the right front wheel of the automobile tends to corroborate the testimony of the foregoing witnesses for the defendant as to the manner in which the injuries occurred. There is also testimony which tends to show that the horse was skittish and easily frightened, and it is shown that he had before been frightened by a street car which struck him, and the same buggy was overturned and the same woman was injured.

The weight of the evidence clearly shows that immediately upon the horse entering upon the intersection space of the two streets he started south on Eleventh street, apparently to avoid the automobile, then moving south, but the driver began whipping him, and apparently pulled him around until he faced the automobile, which was then northeast of him, and, as the whip was applied, the horse began to plunge and rear, and finally dashed by the automobile, probably on the west side and close enough to it so that the right wheel of the carriage came in contact with the right-hand front wheel of the automobile, and ran over it; the horse and carriage going around the automobile, probably behind it, and then going south 30 or 35 feet to the southeast corner of the intersection space, where the horse fell and the carriage went down and the

plaintiff was hurt. All the witnesses say the horse went south immediately after entering Eleventh street, except the Tylers; and nearly all, including the driver, say the horse faced northeast towards the automobile immediately before the collision.

The driver, Edward G. Tyler, testified: "I was going northeasterly, would hit the alley back of the Odd Fellows Hall." Lottridge testified that the horse got six or eight feet into Eleventh street, "and made a little turn, as though he was going south. Well, the man that was driving pulled the horse back. That turned him down this way, * * * down northeast, yes. Yes; that would be northeast. Well, the automobile by that time came along here, and the consequence was the buggy ran into the automobile." Leslie Keizer testified: "Well, at first the horse, it was going east on L street, and when it got over by the little fountain it looked like it was going straight across, and all of a sudden it turned. Q. Turned which way? A. South; gave a short turn, and then turned around again and swung over. Q. Towards the automobile? A. Towards the automobile. * * * Q. And in which direction was the horse going at the time of the collision? A. It was going northeast." J. S. De Vore testified: "We were going south on Eleventh street, and Mr. Tyler was on L street, coming into Eleventh, and as the horse came into Eleventh he turned south; he was going south, and then he reared up, and swung right around, and came right kind of northeast, I should think right towards the automomible, as though he was going to run right onto it. * * * Q. The carriage struck the front wheel of what? A. The automobile. Q. What do you say happened to the carriage? A. That wheeled the carriage to the front. The horse was rearing and plunging, and fell down, just when they got over about the corner of Eleventh and L, and then the carriage turned over." A. J. Spain testified: "Well, I was standing on the northeast corner next to the Odd Fellows Block, with my little boy, and I saw the machine coming up Eleventh

street, and I also noticed a horse and buggy—a horse and carriage—coming east on L street, and I noticed the carriage as it came to the corner. I noticed the horse make a sort of a turn south. He was going south on Eleventh street. * * * Mr. Hoover turned the wheels of the automobile to the east in order to let the buggy slide by. * * * The buggy did not tip clear over until it struck the east side of the crossing or the curbstone, and I ran right to Mrs. Tyler, and I was the first one to her, excepting Mr. Tyler." Mrs. Herpolsheimer testified: "Well, we were going south on Eleventh, on the west side of the street. As we approached L street, we were going at a moderate rate of speed. As we approached L, the horse and carriage in question was seen coming from L, going east. * * * When the horse broke and ran, the car was stopped. The horse then made straight for it. When the horse and carriage struck the automobile, the automobile was still. The carriage was not upset. On the contrary, the horse then went on back to the southeast corner. There the horse fell right at the crossing, and the carriage with it, and they spilled out. * * * Q. What would you say as to the horse being scared or unmanageable? A. He was certainly frightened, and I think he must have been unmanageable, or he would not have come into the car. Q. What did the horse do just before he came to the car? A. Plunged. Q. I know; but what direction did he take? A. Northeast. Q. He did not jump into the car, did he? A. Well, he ran right for it. Q. I know, but what did he do when he got to the car? Where did he go with reference to the car? A. Why, he went right around the front end of the car, and a little bit to the north, and then, of course, they pulled him around the other way. Q. So that the horse missed the car? A. I don't think that the horse struck the car, but the carriage did. * * * Q. Which wheel of the automobile did the carriage collide with? A. The right-hand front wheel. That would be on the west side." Mrs. Della J. Hoover testified: "As we came up Eleventh street nearly to L—

I could not say just the distance—I noticed Mr. Tyler's carriage coming east, and, as they struck Eleventh street, the horse made a little turn, as though he was going to go south. My husband saw the horse there and the way he was doing, and really we though he was going south, and then he made a sudden turn. It looked to me as though he was going south, and then he suddenly dashed around, and I think the horse—the young man lost control of it. * * * My husband slowed the car down; and it came to me—it looked as though they were going to dash right into the car. I was very much frightened. Well, it came out, and they did strike us, and we had stopped. They struck us, hit the car, and then the horse ran on. The young man was holding on and trying to control him, and they went across the street to the corner. They went several feet. Now, I can't tell you how many feet; but they went over there. The horse fell, the carriage went down, and the occupants were all spilled out, of course." Dr. A. L. Hoover, the defendant, testified: "The horse seemed to be excited, and I grabbed the lever of my car. * * * I grabbed the lever so as to control my car, slowed it down, and watched what they were going to do, and as their horse came onto Eleventh street he turned south. He was going to turn south on Eleventh street, made quite a decided turn, and all at once the horse wheeled around and made a lunge and came down at an angle as though he was going to plunge right into the car; and, as he got right up close to the car, then he swung right around to the left, kind of doubled around the car, and struck the car, and I had brought my car to a standstill when his carriage struck me, and, as I say, that he kind of swung around the car, and then ran on. The distance was probably 30 to 35 feet, and the horse started off then a little to the right, again to the south, and there the carriage, it seemed to me, collided with the curb, and the horse went down, and the carriage upset and spilled them all out there."

The great weight of the evidence is that the defendant

was proceeding slowly on Eleventh street, and that immediately after entering upon the intersection space of Eleventh and L streets he stopped his machine, which was standing still a little west of the center line of Eleventh street, with the front near the center line of L street, when the collision occurred. The machine was not in motion when the carriage collided with it. The horse was apparently badly frightened and was very unmanageable. The defendant contends that the cause of the collision and injuries was the unmanageable character and conduct of the horse, together with his driver's lack of skill and strength or judgment, and that he drove northeast towards the automobile, instead of keeping away from it, or he permitted the horse to go in that direction, and so the collision was brought about.

If equally capable men, carefully considering the evidence, may honestly differ as to the facts of the case, then it is one peculiarly adapted to the jury, and their verdict should stand, even though this court should unanimously conclude that a different verdict ought to have been reached, but is at the same time of the opinion that the verdict is not against the weight of the evidence. It may sometimes seem to be a narrow and uncertain line which determines the reviewing court to follow after the weight of evidence, instead of following that which seems to barely preponderate; but this line should at all times be visible to a discriminating and courageous court, willing to limit itself to its own proper province, and not to invade that field of inquiry which relates only to finding the facts by ascertaining a preponderance of the evidence, and which belongs, and should belong, exclusively to the jury. If a careful examination of the evidence shows that the material contentions of the plaintiff are clearly not sustained, the verdict and judgment cannot be right, and are therefore wrong, and the judgment should be set aside.

This court has recently said, in *O'Chander v. Dakota County*, 90 Neb. 3: "The rule is well established that

where, as in the case at bar, there is a conflict of evidence upon the material facts, touching the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict of a jury or the findings and judgment of a trial court." And in *Smith v. McKay*, 90 Neb. 703, the first paragraph in the syllabus reads: "The finding of a jury on conflicting evidence will not be disturbed on appeal unless manifestly wrong." In *Kafka v. Union Stock Yards Co.*, 87 Neb. 331, this court adhered to the view that, " 'if different minds may reasonably draw different conclusions or inferences from the state of facts established by the evidence in a cause, whether such facts show negligence or contributory negligence is not a question of law for the court, but must be submitted to the jury. *Omaha Street R. Co. v. Lochneisen*, 40 Neb. 37, followed.' *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 729; *Shirley v. City of Minden*, 84 Neb. 544; *Hair v. Chicago, B. & Q. R. Co.*, 84 Neb. 398; *Crabtree v. Missouri P. R. Co.*, 86 Neb. 33." In *Kafka v. Union Stock Yards Co.* the opinion contains liberal quotations from the evidence taken, and shows that this court most carefully looked into the evidence to ascertain what the facts really were, and made its determination after it ascertained that there was clearly a conflict of the evidence on the material questions involved in the case. The opinion was delivered by Judge LETTON.

In *Garfield v. Hodges & Baldwin*, 90 Neb. 122, this court declared in the first paragraph of the syllabus: "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial ordered." That case originated in a tombstone business, where every man employed by the business seems to have been his own boss. There was a large stone, which was denominated A, and it was nearly evenly balanced upon a supporting stone with a sharp edge, and being steadied against the west side of a large post. Another stone, de-

nominated B and weighing about a ton, was placed on top of the stone A. There was nothing to prevent this stone from toppling and falling to the west if only a small amount of weight was placed on the west half of either of said stones. The deceased was in the employ of the defendants, and in the course of his duties went to the yard to get a stone weighing several tons, and denominated C, and lying immediately south of and adjacent to the two stones A and B. The deceased and his brother were lifting the stone C by means of a chain around the same and attached to a traveling crane and a rope running over a pulley. Both were on the north side of C and immediately west of A and B. After C had been lifted to a certain height, the deceased, to obtain a better hold upon the rope, stepped upon the stones A and B, and they, being in a balanced condition, were by his weight tipped downwards to the west, and the upper stone sliding off its blocks fell over and upon the deceased, crushing his leg and inflicting injuries which caused his death. Plaintiff claimed that the defendants permitted the two stones A and B to remain in the dangerous condition set forth for five or six weeks, and that the deceased was injured through their negligence, and through no fault of his own. There was a failure to prove the specific acts alleged. This court said: "When he went out that morning to get stone C, he went on his own initiative; he was right beside and had a plain view of stone A; and, if stone B was then resting upon stone A, the dangerous condition of the two stones could be plainly seen by him. * * * The deceased was in duty bound to have noted their dangerous condition and to have guarded against it. * * * He could not carelessly and negligently shut his eyes to or ignore the dangerous situation which confronted him, and charge the defendants with his own negligent act. Having elected to proceed with his work in the face of the dangerous situation or conditions from which his injury resulted, we know of no theory upon which his administratix can recover. * * * The rule is well settled in

this state that, where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside and a new trial granted." In that case, Judge FAWCETT, delivering the opinion of this court, seems to have made a careful examination of the evidence, and the opinion shows, as does the opinion in the case of *Kafka v. Union Stock Yards Co., supra,* that this court will carefully analyze the testimony with a view to ascertaining whether there is a mere conflict of evidence, or whether the verdict and judgment are sustained by the evidence

In *Christensen v. Tate,* 87 Neb. 848, the question was whether the plaintiff should recover damages for personal injuries and for damage done to his horse and buggy because of the negligence of the defendant in driving his automobile along one of the streets of Fremont. In that case the defendant testified that he (the defendant) turned around a bill board while driving his machine, and, as he did so, he noticed the horse "looked up, as though he was going to be frightened," and that he then turned out into the ditch, and gave the plaintiff the full road, and stopped his machine, but the plaintiff denied that the defendant stopped his car at all. This court said, Judge SEDGWICK delivering the opinion: "It was fully shown by many witnesses that at the place of the meeting in question 10 or 12 miles an hour would be a highly dangerous rate of speed. In view of the fact that the defendant was a witness in his own behalf and did not testify as to the rate of speed he was driving when he met the plaintiff, we cannot say that the finding of the jury is unsupported by the evidence." In the syllabus, the sixth paragraph reads: "It is found upon examination of the record that the evidence is sufficient to support the verdict and judgment." The fair implication is that the reviewing court will look into the evidence, and, if there is simply a conflict of evidence, the verdict and judgment will be allowed to stand, but not where they are clearly against the weight of the evidence.

The automobile furnishes an improved method of travel. It is to be welcomed as a saver of time and a protection to man's favorite domestic animal, the horse, against long drives. It is said to be in use in all civilized countries, and it has come to stay. We are told that there are 750,000 automobiles in use in the United States alone. The law therefore does not denounce the use of an automobile on a public highway, and the appellant is not guilty of negligence because he used one on the streets of the city of Lincoln. It would be improper to say that the driver of a horse attached to a carriage has rights in the road superior to the rights of the driver of the automobile, as both have a right to go upon the public highway, and each is restricted in the exercise of his rights by the corresponding rights of the other, and each is entitled to regulate his use of the public streets and roads by observance of ordinary prudence under all circumstances. If the driver of an automobile sees that a horse driven to a carriage is restive and frightened, it would seem that he should take such course to avoid inflicting an injury as the dictates of ordinary prudence may demand. He should reduce the speed of his vehicle, or stop it, if requested to do so, or if he sees that this is necessary to avoid an accident. *Indiana Springs Co. v. Brown,* 165 Ind. 465, 1 L. R. A. n. s. 238; *Gue v. Wilson,* 87 S. Car. 144, 69 S. E. 99. In this case the defendant was not requested by the driver of the horse to stop, and therefore was not bound to do so, unless ordinary prudence required it; but he was not relieved from the duty of exercising ordinary care to prevent injury to the occupants of the carriage.

The restrictions which the law imposes upon all modes of travel upon the highways are such as tend to secure to the general public the largest enjoyment thereof, and must be observed and borne by all alike upon the broad ground that all have an equal right to travel in safety; and, when accidents happen as incidents to reasonable use and reasonable care, the law affords no redress. The fact that a horse becomes frightened by a motor vehicle

upon the highway does not render the operator of such vehicle liable for resulting injury, as the horse has no paramount or exclusive right to the road; and the fact that a horse takes fright at a vehicle run by a new and improved method, and smashes things, does not of itself give the injured party a cause of action. Davids, Law of Motor Vehicles, sec. 125.

In *Nason v. West*, 65 N. Y. Supp. 651, it is said, among other things: "Horses may take fright at conveyances that have become obsolete, as well as at those which are novel; but this is one of the dangers incident to the driving of horses, and the fact cannot be interposed as a barrier to retrogression or progress in the method of locomotion. Bicycles used to frighten horses, but no right of action accrued. * * * Electric street cars have caused many runaways. Automobiles operated without steam, by storage batteries or by gasoline explosive engines, running at a moderate speed, may cause fright to horses unused to them; yet the horses must get used to them, or the driver take his chances."

It is contended by the defendant that he was driving in his automobile at the rate of from four to six miles an hour, and that he slowed up as soon as the horse and carriage entered the intersection space of the two streets, and that he has been guilty of no negligence. A careful reading of all the evidence in the case compels us to find that the verdict is clearly against the weight of evidence. Our supreme court reports contain many hundred cases where the verdict and judgment have been set aside because of the insufficiency of the evidence. The most recent of these cases are *Rockwell v. State*, 90 Neb. 744; *In re Estate of Paisley*, 91 Neb. 139; *Bartels v. State*, 91 Neb. 575; *Carlos v. Hastings Independent Telephone Co.*, 91 Neb. 538; *Fitzgerald v. State*, 91 Neb. 481; *Gering v. Leyda*, 91 Neb. 430.

The seventh instruction given by the court upon its own motion reads: "If you determine from the evidence and under these instructions that the defendant was

negligent in one of the respects alleged in plaintiff's petition, as set out in the first paragraph of these instructions, and if you further determine from the evidence that the defendant's said negligence proximately contributed to the injuries of the plaintiff, then you should direct your attention, among other things, to the claim of the defendant that the plaintiff was guilty of contributory negligence, or, in other words, that the plaintiff by her negligence proximately contributed to the injuries done her. Contributory negligence is a part of the defendant's case, and the burden of proof is upon the defendant, unless you find that plaintiff in making her own case has shown such contributory negligence, to prove by a preponderance of the evidence that the plaintiff was guilty of such contributory negligence. In this particular, you are further instructed that if the horse which, at the time of the accident, was being driven by plaintiff's son was a fractious, dangerous and unsafe animal, and that the plaintiff's injuries were proximately caused, even in part, because of that fact, then that would constitute contributory negligence on the plaintiff's part. On the other hand, any negligence of plaintiff's son in the management of the horse would not constitute negligence on the plaintiff's part, and she would not be responsible therefor. In any event, if you find that plaintiff was guilty of contributory negligence, which proximately contributed to her injuries, she cannot recover in this action."

The jury must have been misled by the following sentence contained in the instruction above quoted: "On the other hand, any negligence of plaintiff's son in the management of the horse would not constitute negligence on the plaintiff's part, and she would not be responsible therefor." The foregoing sentence would seem to be clearly wrong and misleading and in a high degree prejudicial to the defendant. The plaintiff's son, with plaintiff's consent, was driving the family horse and carriage. All the members of the family were with him. Presumably he was driving as the plaintiff and her husband desired him

to drive, because they were with him. If the plaintiff had herself driven the horse and buggy in such a negligent and careless way as to bring about the collision and the injury, she would be the direct cause of the injuries suffered, and she could not recover damages because of her own carelessness and negligence. The plaintiff's son, for the time being, was the plaintiff's servant. He had gone to her stable and got out the family horse and buggy to bring her from the railroad station. It was her journey that was being made. It was made by her by and with the assistance of her son and husband. Suppose that she herself had driven the horse and buggy against the automobile, and that the horse then turned and ran until it fell, would it be possible under these circumstances that anybody could seriously think that she ought to recover for her carelessness, negligence or inability to control a fractious or an exceedingly timid horse? The all-important question to be determined is: Who is to blame for the collision and injuries which are the direct result thereof? If the thing which happened would not have happened except for what the plaintiff did through her son, then she certainly cannot recover. What her son did must be attributed to her, because he was her servant or agent, and it is immaterial which he was. The plaintiff was herself guilty of negligence, and therefore should not recover. *Hajsek v. Chicago, B. & Q. R. Co.*, 5 Neb. (Unof.) 67; *Aurelius v. Lake Erie & W. R. Co.*, 19 Ind. App. 584; *Cunningham v. City of Thief River Falls*, 84 Minn. 21; *Wosika v. St. Paul City R. Co.*, 80 Minn. 364; *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16; *Brickell v. New York C. & H. R. R. Co.*, 120 N. Y. 290; *Chicago Union Traction Co. v. Leach*, 215 Ill. 184; Beach, Contributory Negligence (3d ed.) sec. 115.

If the plaintiff's son drove into the automobile of defendant, then the defendant is not liable, because he is not responsible for the collision. There is no liability of the defendant, whether the act done is regarded as the act of the plaintiff or the act of her son. She cannot be held

free from responsibility for the negligence of the driver, and the instruction is most misleading. *Koplitz v. City of St. Paul,* 86 Minn. 373; *Cunningham v. City of Thief River Falls,* 84 Minn. 21; *Wosika v. St. Paul City R. Co.,* 80 Minn. 364; *Town of Knightstown v. Musgrove,* 116 Ind. 121; *Kessler v. Brooklyn Heights R. Co.,* 3 App. Div. (N. Y.) 426; Beach, Contributory Negligence (3d ed.) sec. 115*a;* 29 Cyc. 543.

It is urged by appellant that the verdict is the product of bias and prejudice upon the part of the jury, and in support thereof it is stated that it appears from the affidavits of three of the jurors that they understood from the remarks of the court, urging the jury to agree upon a verdict, if possible, and from the conduct of the attorneys of the respective parties, whom the trial judge called to his desk, and with whom he held a private consultation, that it was the desire, both of the court and the attorneys, that there should be no disagreement, and that a verdict of some kind should be returned, and therefore, solely by reason of that fact, they consented to join in the verdict rendered; that they would not have done so but for the reason that they were influenced by the remarks of the court and what took place between the court and the attorneys. We do not pass upon this question, because compelled to grant a new trial for the reasons above specified.

The judgment of the district court is

REVERSED.

SEDGWICK, J.

I concur in the result reversing the judgment.

FAWCETT, J., concurring in part.

I concur in so much of the opinion as holds that the evidence does not establish negligence on the part of defendant. This being true, there is no question of contributory negligence in the case. There cannot be such a thing as contributory negligence by one party where there is no negligence by the other.

LETTON, J., concurring in part.

I concur in the view that the judgment should be reversed as unsupported by the evidence. It is my view, however, that the duties of the driver of a motor vehicle with respect to meeting or passing horse-drawn vehicles are laid down in sections 6235, 6236, Ann. St. 1911 (Comp. St. 1911, ch. 78, secs. 146, 147), and that, unless the accident is caused in some other manner than by a violation of these rules, the court is bound by the police regulations established by the legislature and should adhere to the same. As to other points decided I express no opinion.

ROSE, J., dissenting.

It seems to me there is sufficient evidence of defendant's negligence to justify the action of the trial court in submitting that issue to the jury. I do not concur in the reversal for any reason given in the opinion, and therefore dissent.

REESE, C. J., dissenting.

The evidence in this case is conflicting, although seemingly preponderating in favor of defendant. It is my view that the question of the weight of the testimony is for consideration and decision by the trial jury, and not for this court. While, had I been called upon to determine the case upon the preponderance of the evidence, I probably could not have agreed to the verdict, it is the well-settled law that in such cases the verdict of a trial jury should close the inquiry.

MARY F. L. PAGE, APPELLANT, V. CHARLES P. BRESEE ET AL., APPELLEES.

FILED NOVEMBER 1, 1912. No. 16,779.

1. Mortgages: FORECLOSURE: MISNOMER. By actual personal service of summons upon the mortgagor, who is also the owner of the equity of redemption, in an action to foreclose a mortgage, the court obtains jurisdiction; and a mistake in the name of the defendant, which is not brought to the attention of the court by motion or plea in abatement, does not deprive the court of its jurisdiction, or render a decree foreclosing the mortgage subject to collateral attack.

2. Taxation: FORECLOSURE OF LIEN: UNKNOWN HEIRS: CONSTRUCTIVE SERVICE. In an action for the foreclosure of a tax lien against unknown heirs, a substantial compliance with the provisions of section 83 of the code, an order of the court for service by publication upon such unknown heirs, and a legal publication of summons thereunder, is sufficient to confer jurisdiction upon the court to render a decree of foreclosure.

3. ———: ———: CONSTRUCTIVE SERVICE: AFFIDAVIT. In an action by a county against unknown heirs to foreclose its tax lien, the affidavit for service by publication, as provided by section 83 of the code, may be made by the county attorney.

4. ———: ———: IRREGULARITIES. Where the court has obtained jurisdiction, mere informalities of procedure will not subject the decree of foreclosure to collateral attack.

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

Albert W. Crites, for appellant.

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

BARNES, J.

Action to redeem the southeast quarter of section 10, township 33 north, range 44 west, situated in Sheridan county, from tax sale under a decree of foreclosure, in

which the county of Sheridan was plaintiff, and the unknown heirs of one Charles J. Chapman, deceased, were defendants, and quiet the title thereto in the plaintiff. It appears that one Charles J. Chapman had previously, in his lifetime, obtained title to the land in question under a decree of the district court for Sheridan county foreclosing a mortgage on the premises. The plaintiff, Mary F. L. Page, claimed title thereto by a deed from the original entryman, one Johann F. M. Laue, while defendant Bresee derived his title under the tax decree of foreclosure above mentioned; and defendant Walter Morse claimed an interest in the premises as mortgagee. On the trial the district court for Sheridan county found generally for defendant Bresee, and dismissed the plaintiff's action. From that judgment the plaintiff has appealed.

1. Plaintiff's first attack is centered upon the mortgage foreclosure decree, under which Charles J. Chapman obtained his title to the premises in question. It is claimed that that decree was void for the reason that the mortgagor was sued by the wrong name. It appears that title to the mortgaged premises was obtained by one Johann F. M. Laue from the United States government; that his entry and final receiver's receipt described him as "John F. M. Lowe;" that he thereafter executed the mortgage on which the foreclosure was based, and in which he was named as "John F. M. Lowe," but which he signed in German script as Johann F. M. Laue. It further appears that personal service of summons was duly made upon both Laue and his wife in the mortgage foreclosure suit; that they failed and neglected to appear or answer or in any manner direct the attention of the court to the alleged misnomer. It follows that the decree of foreclosure was not void, and therefore is not subject to collateral attack. *Smelt v. Knapp*, 16 Neb. 53; *Kronski v. Missouri P. R. Co.*, 77 Mo. 362; *Whitcomb v. Hooper*, 81 Fed. 946; *Davis v. Jennings*, 78 Neb. 462. We are of opinion that Charles J. Chapman obtained title to the premises in question by the sheriff's deed based on the foreclosure decree.

2. Plaintiff attacks the decree foreclosing the tax lien upon the premises in question, and contends that the decree was void for reasons hereinafter stated. It appears, however, that when that suit was commenced Charles J. Chapman was made the defendant as owner of the land, and the fact of his death was not ascertained until after a decree of foreclosure was rendered; that when that fact was ascertained the decree was set aside and held for naught. The petition was thereupon amended by making the unknown heirs of Charles J. Chapman the defendants therein; that the plaintiff, by its county attorney, made an affidavit and filed the same in compliance with the provisions of section 83 of the code, which provides that in actions where it shall be necessary to make the heirs of any deceased person defendants, and it shall appear by affidavit of the plaintiff annexed to his petition that the names of such heirs and their residence are unknown to the plaintiff, proceedings may be had against such unknown heirs without naming them, and the court shall make such order respecting service as may be deemed proper. If service by publication be ordered, the publication shall not be less than four weeks; that upon the filing of the affidavit the district court continued the cause, and ordered service of summons by publication upon the unknown heirs of Charles J. Chapman, deceased. It is claimed that the county attorney was not authorized by any statutory provision to make such an affidavit; that it was not annexed to the original petition; that it was not sufficient in form and substance to authorize the court to order service by publication upon unknown heirs; that the order of the court in that behalf was defective and insufficient; that the decree based upon the service thus ordered was void; and that the purchaser under the decree obtained no title to the land in question. In support of this argument plaintiff cites *Stull v. Masilonka*, 74 Neb. 322, where it was said: "Where a defendant is sought to be brought into court by some method prescribed by a statute, other than personal service, which notice may or

may not reach him, and which is more or less unsatisfactory, the statutory provisions relating to such service are construed with strictness, and it is incumbent that all steps in the process required to be taken shall be followed with substantial accuracy." In that case, however, the decree of foreclosure was sustained on the ground that there was a substantial compliance with the provisions of the statute authorizing service by publication. In the instant case there was an attempted compliance with every requirement of section 83, and, while the proceedings were in some respects somewhat informal, still we are of opinion that there was a substantial compliance with the terms of the statute.

3. It is contended that the county attorney of Sheridan county, who made affidavit for service of summons upon the unknown heirs of Charles J. Champan, deceased, could not make such affidavit. We think, however, that the words "appear by the affidavit of the plaintiff," as found in section 83 of the code, are not to be taken so literally as is contended by plaintiff. Such a construction would prevent a corporation or partnership from maintaining the action. We are of opinion that the plaintiff may make it appear by his own affidavit, or from the affidavit of an attorney, especially in cases where the plaintiff is a corporation, as in this case, and could not make such an affidavit. We therefore hold that the affidavit may be made by the county attorney, who is the official law officer of the county.

There having been a substantial compliance with all statutory provisions in the tax foreclosure suit, the decree rendered therein is not subject to collateral attack. The effect of that decree, as declared by statute, was to create a new and independent title to the land in question. It divested the heirs of Charles J. Chapman of all their interest therein, and transferred the same by such independent title to the defendant who was the purchaser at the foreclosure sale.

4. Finally, it appears that the defendant by his answer

properly pleaded the statute of limitations as one of his defenses, and the record discloses that the sale under the decree foreclosing the tax lien was confirmed on the 6th day of September, 1901, and the sheriff thereupon made a deed to the defendant as such purchaser. By the provisions of our revenue laws, the right of redemption from a decree foreclosing a tax lien is barred after the expiration of two years from the confirmation of sale. The fact that the plaintiff also prays for a decree quieting title does not of itself toll the statute. It is quite probable that the district court was of opinion that the plaintiff's cause of action, which was commenced on the 3d day of April, 1908, was barred by the statute of limitations. There was a general finding for the defendant, and an examination of the record satisfies us that the evidence was sufficient to warrant such a finding and sustain the decree appealed from.

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

AFFIRMED.

FAWCETT, J., not sitting.

HANS CHRISTENSEN, APPELLEE, V. OMAHA ICE & COLD STORAGE COMPANY, APPELLANT.

FILED NOVEMBER 1, 1912. No. 16,784.

1. Waters: DRAINAGE: ACTION FOR DAMAGES. It is the duty of one who uses, maintains and controls a ditch for the purpose of lowering the waters of a lake or pond to a navigable river to erect and maintain a dam at the outlet of the ditch sufficient to prevent the flood-waters of the river from entering it and overflowing the lands owned by other persons adjacent thereto.

2. ———: ———: ———. Where such dam is negligently constructed or maintained, and by reason thereof farm lands in the vicinity of the ditch are overflowed, and crops growing and personal property situated thereon are injured and destroyed, the person or corporation having the control, management and use of such ditch and dam is liable for the damages caused thereby.

3. ———: ———: ———: LIMITATIONS. In such a case, the cause of action arises when the damages are sustained.

4. ———: ———: ———: DEFENSES. The fact that the ditch and dam are situated upon lands owned by persons other than the defendant is no defense to such an action, where it is shown that defendant freely exercises the use, control, operation and management thereof in the prosecution of his own private business.

5. Instructions. The substance of instructions given and refused by the trial court are stated in the opinion, and the rulings thereon are *held* to be without error.

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

Brown, Baxter & Van Dusen, for appellant.

Benjamin S. Baker and *S. A. Searle, contra.*

BARNES, J.

Action by plaintiff, the lessee of a tract of farm land situated between what is known as Cut-off lake and the Missouri river near to and east of the city of Omaha, for damages to his growing crops and personal property caused by the flood-waters of the river alleged to have been thrown upon the premises by failure of the defendant to properly maintain a ditch leading from the lake to the river for drainage purposes, and a dam constructed therein to prevent the flood-waters of the river from flowing from that stream into the lake. On the trial in the district court for Douglas county the plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that about the year 1898 David Talbot and E. W. Lamoreaux, who were the incorporators of the defendant company, were conducting the business of cutting and storing ice on the banks of Cut-off lake; that at times of high water in the lake their ice houses were partly submerged, and the ice stored therein was destroyed; that, to obviate that trouble, they constructed a ditch in an

easterly direction from the lake to the Missouri river, and cut the same through the high bank of that stream, which had theretofore been a safe and sure barrier to its flood-waters, and had prevented them from reaching the land between the river and the lake; that when the water in the river was low the ditch drained the lake and lowered the stage of the water sufficiently to protect the ice houses above mentioned; that when that purpose was accomplished a dam was constructed across the ditch near its mouth sufficient to prevent the flood-waters of the river from entering the ditch in question; that when it again became necessary to lower the water in the lake the ditch was cleaned out and the dam removed, and when the lake was sufficiently lowered the dam was replaced. It also appears that the defendant was incorporated in December, 1901, and took over the property rights and business of the former owners, who were thereafter members, officers and managers of the corporation; that from thence to and including the year 1905 the defendant company conducted its business in relation to the management of the ditch and dam above described in the same manner as it had theretofore been conducted; and there is sufficient evidence in the record to sustain a finding that the defendant had frequently cleaned out the ditch, taken out the dam, drained the lake, and thereafter on each occasion had replaced that structure. It also appears that in July, 1905, the flood-waters of the Missouri river, by reason of the negligent reconstruction and maintenance of the dam, broke through and washed away that structure, and flowed back through the ditch in such volume as to overflow its banks and flood the plaintiff's premises, destroying his growing crops, together with a large amount of his personal property.

1. It is strenuously argued that the evidence is not sufficient to sustain the judgment because it does not show that defendant reconstructed the dam at the outlet of the ditch in question in the year 1904. In disposing of this contention, it is sufficient to say that the evidence clearly

shows that the defendant company cleaned out the ditch and used it to drain the lake in 1903 and 1904. To do this necessarily required the removal of the dam. It appears that it was negligently replaced by some one; and, in any event, it was the plain duty of the defendant to reconstruct it in such a manner as to protect the lands adjacent to the ditch from inundation by the flood-waters of the Missouri river. A failure to perform that duty rendered defendant liable for resulting damages.

2. It is also contended that defendant was not the owner of the land through which the ditch was dug and on which the dam was constructed, but was a trespasser thereon, and therefore it was not liable for its failure to properly maintain the ditch and reconstruct the dam after using them for the protection of their ice houses. We find nothing in the record showing, or tending to show, that defendant was denied the right to construct the ditch and dam in question by the owner or owners of the land on which they were situated. But, on the contrary, it appears that defendant has at all times exercised the right to enter upon the premises when it became necessary to do so for the protection of its own property. If defendant could exercise such right, it necessarily assumed the duty of so exercising it as not to thereby injure the property of others. We are therefore of opinion that this contention cannot be sustained. *Reams v. Clopine*, 78 Neb. 166.

3. It is also contended that the right of action, if any existed for defendant's acts, accrued when the ditch was dug and the dam was first constructed in 1898, and was therefore barred by the statute of limitations. This defense was not pleaded, and, if it had been made an issue, could not have been maintained. The action was not one for permanent injury to the land, leased by plaintiff, but was one for damages to his growing crops and personal property, caused by the negligent reconstruction and the maintenance of the ditch and dam; and the plaintiff's right of action accrued when his property was injured and de-

stroyed. *Chicago, R. I. & P. R. Co. v. Andreesen,* 62 Neb. 456. In that case it was said: "The right to damages for an obstruction of a stream by an insufficient culvert or drain does not accrue when the railroad is built, but when the overflow actually results."

4. The defendant requested the district court to instruct the jury, in substance, that there was no evidence that the David Talbot Ice Company, which constructed the ditch and dam in question, sold or transferred any right thereto or therein to the defendant; that there was no evidence produced as to who were the associates of David Talbot; that they having constructed the ditch and dam in 1898, some years before the organization of the defendant company, the defendant could not be held responsible for the acts of David Talbot and his associates in digging the ditch in question.

For the reasons heretofore stated, it is apparent that the court did not err in refusing defendant's instructions. It seems equally clear that the district court properly refused to instruct the jury to return a verdict for the defendant at the conclusion of all of the evidence.

5. It is contended that the court erred in giving paragraph four of the instructions upon his own motion. An examination of that instruction discloses that it fairly and clearly stated the issues presented by the pleadings, and informed the jury that, if they found the plaintiff had proved all of the allegations of his petition, enumerating and describing them, by a preponderance of the evidence, their verdict should be for the plaintiff. In this there was no error.

Finally, it appears from a careful examination of the whole record that the case was fairly tried, that the evidence is sufficient to sustain the verdict, and, no error appearing in the record, the judgment of the district court is

AFFIRMED.

ROY CROWDER, APPELLEE, V. TOLERTON & WARFIELD COMPANY, APPELLANT.

FILED NOVEMBER 1, 1912. No. 16,810.

1. **Sales:** OFFER: ACCEPTANCE. An order for goods, wares or merchandise sent to a wholesale or jobbing house, at the solicitation of its traveling salesman, which provides in express terms that it is subject to the approval of the home office, does not become a binding contract until it is approved and accepted.
2. ———: RESCISSION. Where the person making the order, upon being notified of its nonacceptance, demands and receives a repayment of the money forwarded therewith, he thereby rescinds his order, and cannot maintain an action thereon for damages for its nonacceptance.

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

Albert W. Crites, for appellant.

J. E. Porter, contra.

BARNES, J.

Action to recover damages for an alleged breach of contract for the sale of a soda fountain. The action was commenced in the justice court of Dawes county, where plaintiff had the judgment. Defendant appealed to the district court, where, on a trial without a jury, the plaintiff again had judgment for the sum of $120, and to reverse that judgment the defendant has appealed to this court.

It appears that on the 9th day of March, 1908, at Crawford, Nebraska, plaintiff gave an order for a soda fountain to one J. H. Meyer, defendant's traveling salesman, which reads as follows: "Crawford, Neb., 3-9, 1908. Manufacturers of and Dealers in Soda Water Apparatus & Supplies. Tolerton & Warfield Co. Please furnish the following goods on the terms and conditions mentioned below: Title to said goods to remain with ——— until

all payments are made. Ship on or about April 1st, 1908, via C. & N. W. & Burlington, to Roy Crowder, town—Crawford, State—Neb. As evidence of good faith, I herewith make a cash payment of $25.00, receipt of which is hereby acknowledged, and upon receipt of bill of lading or tender of goods, I will honor sight draft or other demand for $——, and the balance I promise to pay in monthly sums as follows: $10.00 each month beginning May 1st, 1908, privilege of paying full amount at a discount of 5% by Jan. 1st, 1909, with interest at 6 per cent. on each payment from date of shipment, and for such balance and interest will execute and deliver contract notes of like tenor and form to the one printed on the back of this order and maturing as above set forth, and will execute such other papers as may be necessary under the laws of this state to protect your title to said goods. The delivery of said apparatus, etc., to be conditional upon the compliance with the above terms and conditions. There are no other conditions with your salesman except as herein stated. All goods f. o. b. Decatur, Ill. All orders and contracts secured by any representative of this company are subject to approval by the home office, and contingent on labor difficulties, fires or other unavoidable delays." There followed a description of the fountain and fixtures, and the price thereof was stated to be $300. The order was signed by the plaintiff, who thereafter forwarded it, together with his check for $25, to the defendant, and stated in his letter that, according to the agreement, the fountain was to be in Crawford by the 15th or 20th of April.

On receipt of the order, the defendant refused to accept it for several reasons, among which was that the price should have been $350 for the fountain, instead of $300, as named in the order, and wrote a letter to their salesman, Meyer, telling him that they could not accept the order, and asked him to take the matter up personally with plaintiff, and readjust the matter in conformity with a copy of an order which they inclosed to him.

It appears that Meyer called upon the plaintiff and informed him that he, Meyer, had "balled" the order all up, and asked plaintiff to make out a new order; that the defendant, on the 8th day of April, 1908, forwarded to the plaintiff a new order, in which the price of the soda fountain was fixed at $350. On receipt of the new order, the plaintiff refused to sign the same, and sent the following telegram to the defendant: "Crawford, Neb., April 8, 1908. Tolerton & Warfield, Sioux City, Ia. Ship goods ordered or return check. Wire particulars. Something must be done. Waited long enough. (Signed) Roy Crowder."

On April 10, 1908, plaintiff wrote a letter to the defendant, in which, among other things, he said: "Now, if you want to sell me this fountain, I want to know what I am getting. Do I get a steel fount with this complete outfit? If I get this I will order this outfit on receipt of message from you to-morrow. If not, return my check at once, as I think you have had it long enough, I have another place. This fountain is to get here by 1st of May. (Signed) Roy Crowder."

Upon receipt of this letter, the defendant, having cashed plaintiff's check for $25 pending negotiations, sent the plaintiff a draft for $25 in a letter apologizing to him for the mistakes and misunderstandings between them, and informing him that they would have Mr. Meyer take the matter up with him again on his next trip to Crawford. Defendant also stated in the letter that it always had the option of whether to ship goods or not when an order was taken by its salesmen, and that it had exercised that privilege for the reason that it could not afford to sell him a $350 outfit for $300. We have not stated all of the correspondence that passed between the parties, but have given the substance of it. When the plaintiff received the draft for $25 in repayment of his check, he wrote the defendant, stating that he refused to accept it, but would sue for damages for failing to comply with the terms of his order. It appears that he kept and cashed the draft, and

claimed upon the trial that he had credited the amount of it on his claim for damages. It appears that this was done, however, without the consent of the defendant.

The evidence contained in the bill of exceptions is in nowise conflicting, and clearly establishes the facts above stated. It is contended, among other things, that defendant was entitled to a judgment dismissing plaintiff's action because the evidence fails to show an acceptance of the plaintiff's order by the home office. It appears by a clause contained in the order itself that all such orders were subject to the approval of the defendant. The evidence clearly shows that the defendant disapproved of the order, and notified the plaintiff of that fact. In the negotiations for a change of the order, plaintiff was told the reasons why defendant could not fill it. The clause in the order was a reasonable and proper one, and was made for the protection of the defendant. No approval from delay can be inferred, and the plaintiff, by his acceptance of the draft for $25, in effect rescinded his order, and he was not entitled thereafter to maintain an action against the defendant for a failure to accept the same and comply with its terms.

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

REVERSED.

CITY OF GRAND ISLAND, APPELLEE, V. POSTAL TELEGRAPH CABLE COMPANY, APPELLANT.

FILED NOVEMBER 1, 1912. No. 16,840.

1. Licenses: OCCUPATION TAX: CITIES. Under subdivision 9, sec. 48, art. III, ch. 13, Comp. St. 1911, each city of the first class having more than 5,000 and less than 25,000 inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said section.

2. ———: ———: CONSTITUTIONALITY. A city of the above class may lawfully enact an ordinance imposing on telegraph companies

a license tax of a reasonable sum per annum for the privilege of transacting the business of telegraphy within the city, and, where such ordinance imposes a tax equal in amount upon all such telegraph companies, it is not obnoxious to the rule of uniformity and equality under sections 1, 6, art. IX, of the constitution.

3. ———: ———: ———. The amount of an occupation tax is not to be measured by the profits of the business taxed, but should be considered as one incident to local self-government, and when thus considered it appears *prima facie* reasonable in amount, courts of justice should not declare the ordinance void, unless and until it is clearly shown by competent evidence that the license charge is in fact unreasonable or confiscatory.

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

O. A. Abbott and *W. W. Cook*, for appellant.

Arthur C. Mayer and *W. A. Prince, contra.*

BARNES, J.

This action was commenced by the plaintiff, the city of Grand Island, against the defendant, the Postal Telegraph Cable Company, to recover an anual occupation tax for the years 1904, 1905, 1906, 1907, 1908 and 1909, amounting to $240, with interest thereon, which was alleged to be due the plaintiff under an ordinance of that city by which it was provided: "That there is hereby levied an occupation tax upon each and every occupation and business carried on within the limits of this city, in this section hereinafter enumerated, to raise revenue thereby in the several different sums on the several different occupations hereinafter specified, and that each and every person or persons, firm, association or corporation carrying on the occupation or business herein mentioned within the limits of the city of Grand Island, shall pay into the city treasury annually the sum named as hereinafter provided as a tax upon said occupation, and for the purpose of raising revenue thereby."

It was further provided by section 3 of the ordinance as follows: "Under the provisions of this ordinance and the authority vested in the city council aforesaid, there is levied upon each and every person or persons, firm, association or corporation carrying on business in the city of Grand Island, Nebraska, an occupation tax as follows, to wit:

"Article 1. The sum of forty dollars per year on the business and occupation of receiving messages in this city from persons in the city and transmitting the same by telegraph from this city to persons and places within this state, and receiving in this city messages by telegraph transmitted within this state from persons and places within this state to persons in this city, and delivering the same to persons in this city, except the receipt, transmission and delivery of any such message to any firm, department or agency or agent of the United States, and the receipt, transmission and delivery of any such which are interstate commerce. The business and occupation of receiving, transmitting and delivery of messages herein excepted are not to be taxed hereby."

The ordinance further provides: "Whenever the treasurer shall deem himself unable to collect any tax by this ordinance levied after the same is due and payable, he shall so report to the city attorney, and the city attorney shall therein bring an action in the name of the city in any court or before any justice of the peace, having jurisdiction, to the amount of the sum sought to be recovered by said action; the remedies hereby prescribed are not exclusive, but cumulative, and may be prosecuted at the same time."

Upon the trial in the district court for Hall county, without the intervention of a jury, there was a finding and judgment for the plaintiff for the sum of $245, and costs of suit, and from that judgment the defendant has appealed.

The defendant has assigned and argued three grounds in support of its contention that the judgment of the dis-

trict court should be reversed: First, the tax demanded is unreasonable and confiscatory; second, the tax violates the rule of uniformity and equality under sections 1 and 6 of article IX of the state constitution; third, the occupation tax in question trenches upon the commerce clause of the constitution and laws of the United States.

We are of opinion that the second and third assignments of error are fully answered by *Western Union Telegraph Co. v. City of Fremont,* 39 Neb. 692. It seems to be conceded that the occupation tax ordinance in that case and the one in the case at bar are practically the same in form and substance. After citing the principal leading cases upon those questions and discussing the effect thereof, it was there held: "Under section 52, ch. 14, art. II, Comp. St. 1891, each city of the second class having more than 5,000 inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said action." It was further held: "Where a telegraph company is engaged in both interstate and intrastate business, an ordinance levying an occupation tax on that portion of such business which is carried on wholly within the state is not repugnant to section 8, art. I of the constitution of the United States, since it in no way interferes with, or regulates, interstate commerce;" and that "an occupation tax may be collected by ordinary suit, where the ordinance imposing the tax so provides." On a rehearing of that case (43 Neb. 499) the opinion was adhered to by consideration, and on the strength of *Postal Telegraph Cable Co. v. Charleston,* 153 U. S. 692, where it was said: "A city ordinance, made under power conferred by a state statute, imposing a license of five hundred dollars upon a telegraph company, which had accepted the provisions of the act of July 24, 1866, c. 230, 14 Stat. 221, upon business done exclusively within the city and not including any business done to or from points without the state, and not including any business done for the govern-

ment of the United States, its officers or agents, is an exercise of the police power, and is not an interference with interstate commerce." It follows that defendant's last two assignments of error cannot be sustained.

In considering the first assignment, that the tax in question is unreasonable and confiscatory, we find from the record that defendant maintains an office in the city of Grand Island, where it conducts a large amount of interstate business and considerable intrastate business, but neglects and refuses to pay the occupation tax; that defendant's receipts for intrastate business for the years in question herein were $1,333.17, and that the total tax sought to be collected for those years under the terms of the ordinance was $240. It further appears that, by a system of accounting or bookkeeping adopted by the defendant, it was attempted to be shown that for some of the years in question the expense of conducting the intrastate business reduced the gross receipts to a trifle less than enough to pay the tax of those years. It was not shown, however, that the method of apportioning the expenses of defendant's entire business was the correct method, or that such apportionment was either just or equitable, and therefore we conclude that the evidence was insufficient to warrant a court of justice in finding arbitrarily that the tax was either unreasonable or confiscatory. The city clearly had the power to tax the business in question. The tax was uniform, in that it operated alike on all persons or corporations engaged in that business, and we are not aware of any case which holds that when the business transacted by one person or corporation of a class has proved largely remunerative, and the business of another of the same class was less remunerative, or was in fact conducted at a loss, a court of justice can for that reason declare an occupation tax ordinance void. We think no court should say as a matter of law that an occupation tax of $40 a year upon each and every telegraph company doing business within the limits of the city of Grand Island is manifestly unreasonable and confiscatory. It

may be said that the charge is *prima facie* reasonable. *Western Union Telegraph Co. v. Borough of New Hope*, 187 U. S. 419. The amount of an occupation tax is not to be measured by the profits of the business, but should be considered as one incident to local self-government—to supervision, to the expense incident to the issuing of the license, to the probable expense of inspection, regulation and such police surveillance as the municipal authorities can lawfully give to the location, erection and maintenance of poles and wires as provided by ordinance. In the absence of evidence which clearly shows that the license charge, in general effect, is such as to make it confiscatory, the ordinance must be upheld.

It follows that none of the defendant's contentions can be sustained, and the judgment of the district court is

AFFIRMED.

EDWARD OWEN ET AL., APPELLEES, V. D. C. MAIN ET AL., APPELLANTS.

FILED NOVEMBER 1, 1912. No. 17,029.

1. **Statutes**: CONSTRUCTION. Where the language of a statute is clear and unambiguous, it must be interpreted in its ordinary sense, even though it lead to an injustice; but, if the language is doubtful or obscure, and it is susceptible of an interpretation which will cause a forfeiture or perpetrate an injustice, while another interpretation will avoid such a result, that which is in furtherance of justice will prevail.

2. **Agricultural Societies**: COUNTY AID: TITLE TO PROPERTY. A statute authorized county boards in counties where county agricultural societies have purchased or shall purchase real estate for fair grounds to pay out of the county treasury the same amount of money for the purchase and improvement of such sites as paid by such agricultural societies or individuals, and provided, further, that when such agricultural societies should "be dissolved or cease to exist in any county where payments have been made for real estate or improvements upon such real estate, for the

use of any agricultural society, then all such real estate and improvements shall vest in fee simple to the county making such payment." The latter provision is construed; and it is *held* that the words "all such real estate and improvements" refer only to the real estate purchased and improvements made by the money paid out of the county treasury.

3. ———: ———: DEFAULT: RECOVERY BY COUNTY. The amendment of section 14 made by the laws of 1879, p. 400, providing that a county board may pay to a county agricultural society owning a certain quantity of real estate for fair grounds a specified amount of money "to be expended by such society in fitting up such fair grounds, but for no other purpose," made no change with respect to the right of the county to recover back the amount of its contribution in case the society defaulted as specified in the statute.

4. ———: ———. The purpose of the legislature was to allow such a society formed to aid in the extension of agricultural education the use of the funds of the county to a limited extent, in trust, and to prevent the diversion of public funds to private use if the society fails to carry out the purpose of its organization.

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

James Britton, *William V. Allen* and *William L. Dowling*, for appellants.

A. R. Davis and *R. E. Evans, contra.*

LETTON, J.

In 1885 the Wayne County Agricultural Society was incorporated under the procedure provided for in the general incorporation laws of the state. Stock was issued and subscribed for by the incorporators. Prior to the holding of the first annual fair, which was held in September of that year, it purchased 25 acres of land, and fitted up the same for fair purposes by preparing a race track, and building fences, grand stands, and other structures necessary for the carrying on of the purposes of its organization. It realized from stock subscriptions the sum of $1,641, of which $922 was expended in the purchase of land for the fair grounds.

In September, 1885, the association applied to the board of county commissioners of Wayne county for an appropriation of money to aid the society in fitting up its grounds. A bill was presented for $300, which was allowed, and on January 4, 1886, a warrant upon the general fund for that amount was paid by the county. The evidence shows that by the middle of January, 1886, $1,806.25 had been paid for real estate and improvements thereon, apparently from the proceeds of the sale of stock and from the appropriations made by the county. The land had been bought and paid for before any money was received from the county. Premiums and other expenses were paid from other sources. For a number of years between 1885 and 1889 the society held fairs, and received aid from the county board under the provisions of section 12, ch. 2, Comp. St. 1881, upon filing the necessary certificate under the act. It held its last fair in September, 1901. On April 25, 1905, the society was dissolved by legal proceedings, and the defendants Main, Bressler, and French appointed trustees for the creditors and stockholders. This action was brought on behalf of the county against the trustees and certain persons claiming under them. Its purpose was, as the prayer shows, to procure a decree "that the aforesaid real estate acquired by said Wayne County Agricultural Society and used for its fair grounds and all improvements by it made thereon has vested in fee simple in said county of Wayne; that the defendants and each of them have no right or title or interest in said real estate; that the title of the said county of Wayne to the said real estate be quieted against the claims of the defendants; that the said plaintiffs be put in possession of said real estate; and for such other and further relief as may be just and equitable."

A number of defenses are pleaded: The statute of limitations; that the real estate is private property of the corporation and of the individual stockholders; that the provisions of the statute upon which the plaintiffs rely is violative of the provisions of the constitution of the state

of Nebraska and of the federal constitution and of the fifth and fourteenth amendments thereto; and a denial that any part of the money appropriated was expended in the purchase or improvement of the real estate. The reply practically amounts to a general denial of the new matter in the answer, coupled with a demurrer to the same.

The arguments have taken a wide range, but we think it unnecessary to consider them at length. The plaintiffs' theory, summarily stated, is that the society is a public or quasi-public corporation, formed to carry on a public enterprise, and authorized under the statute to receive aid from the county; that it, quoting from the brief, "acting under the statute, presented its application for public funds to improve the property already dedicated to the public, and, by virtue of such application and the payment by the county from the public funds of the sum applied for, the county is authorized and charged to hold the land in trust for the inhabitants of the county for county fair purposes. It has by the act of contribution been vested with the right and duty to become an actor in the preservation of the public land dedicated to the purposes prescribed by the articles of incorporation. By the incorporation and purchase of the land, there was a dedication to the public of Wayne county. By the application for and receipt of funds to improve or fit up the grounds, there was a contract that the county should assume the duty of keeping the land for the purpose to which it was dedicated." On the other hand, the defendants insist that the society is a private corporation carrying on a work for the benefit of the public, but having the right to own as its private property the real estate and other property necessary for its proper purposes which had been donated to it or was purchased by its private funds; that, as to such property, there was no dedication to the public, and that the provisions as to title vesting in the county on dissolution only apply to property for which payment has been made by the county.

Quite a little testimony was taken as to the payment of money by the county in successive years under the provisions of the statute allowing a sum equal to three cents for each inhabitant of the county to be paid to any agricultural society which has raised and paid in by voluntary subscription, or by fees imposed upon its members, in each year not less than $50; but, since the condition expressed in the statute with reference to the real estate and improvements vesting in fee simple in the county applies only "where payments shall have been made for real estate or improvements upon such real estate," we think none of this evidence has any direct bearing upon the question at issue, except as it tends to show the quasi-public character of the corporation.

The decision of this case depends solely upon the interpretation of a statute. In order to ascertain the meaning of the legislature, a survey of the evolution of the particular provisions involved is needful. The first act in Nebraska relating to county agricultural societies was passed by the territorial legislature in 1858. 1 Complete Session Laws, p. 530. After providing for the organization of county societies and a territorial board of agriculture, and specifying the respective duties of these organizations, section 8 declared: "That all county agricultural societies which may be organized under this act be and the same are hereby declared bodies corporate and politic, and as such shall be capable of suing and being sued, and capable of holding in fee simple such real estate as they may purchase or receive by donation, not to exceed eighty acres of land and the buildings thereon." Section 9 provides, in substance, that conveyances made to such societies shall vest a title in fee simple. Sections 10 and 11 are as follows:

"Section 10. In all cases when such county agricultural societies shall purchase real estate as sites whereon to hold fairs, the county commissioners of such counties may, if they think it for the interest of the counties and societies, pay out of the county treasuries of such counties

the same amount of money for the purchase and improvements of such sites as shall have been, or shall hereafter be, paid by said agricultural societies or individuals for such purpose.

"Section 11. In all cases when agricultural societies shall be dissolved or cease to exist in any county where payments have been made for real estate or improvements upon such real estate, for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple to the county making such payment."

Though the law was amended in other particulars, these provisions seem to have been carried forward with the language unaltered until 1879, when these sections were changed to read as follows (Laws 1879, p. 400, secs. 13, 14, 15):

"Section 13. Each county society may purchase and hold in fee simple such real estate as they may deem necessary, not exceeding 160 acres of land, for the purpose of holding county fairs.

"Section 14. Whenever any county agricultural society, organized by law, shall have procured in fee simple, free from incumbrance, land for fair grounds not less than ten acres in extent, the county board of said county may, in their discretion, if the finances of the county will admit, appropriate and pay to such society a sum not exceeding one hundred dollars for every thousand inhabitants in said county, to be expended by such society in fitting up such fair grounds, but for no other purpose; but not more than one thousand dollars shall in the aggregate be appropriated in any one county.

"Section 15. Each society receiving such appropriation shall, through its secretary, make to the county board a detailed statement, with vouchers showing the legal disbursement of all the moneys received. And in all cases, when such county agricultural societies shall be dissolved, or neglect, for the space of two years, to discharge the duties devolving upon them by law, or cease to exist, in any county where payments have been made for real

estate, or improvements upon such real estate, for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple in the county making such payment, and the district court of said county, upon proof thereof, shall, upon petition of said county board, make a proper decree vesting the title to such property in said county."

No further amendment was made until 1905, but we think the changes then made were immaterial as affecting the questions here presented. Sections 8 to 11, inclusive, of the Nebraska act of 1858 are almost a verbatim copy of an act of the Ohio legislature, passed February 15, 1853. 1 Rev. St. (Ohio) S. & C., ch. 2, p. 66 *et seq.* Several other states have statutes of a similar nature conferring the power upon public authorities to appropriate money in aid of such societies. Some of these statutes make no provision for the return of the money or the reversion of the property for which it was expended if the society dissolves or fails to carry out the purpose of its organization; while others provide for the retention of an interest in the grant to the extent that it shall revert in case of such a failure. Among the latter class are the Ohio statute referred to; Laws Washington, 1909, ch. 62; Laws Maryland, 1904, ch. 141; Supp. to Code of Iowa, 1907, sec. 1660; Gen. St. Kansas, 1868, ch. 2. By the Kansas act the county commissioners, if the voters so authorize, may appropriate money to be expended under the direction of the county agricultural society in the purchase and improvement of fair grounds for the use of the society, and the statute provides that all such property shall be held in trust by the board of county commissioners for the use and benefit of the society.

The Iowa law permits the county authorities to appropriate and pay a sum in proportion to population to such societies, "to be expended by it in fitting up or purchasing such fair grounds, but for no other purpose," and, if authorized by a vote of the people, to purchase real estate for fair purposes. "The title of such real estate when

purchased to be taken in the name of the county," and placed under the control and management of an incorporated county society.

Coming now to a consideration of the Nebraska act: It will be seen that section 10 of the original act did not in terms authorize the county commissioners to pay any money to county agricultural societies, but it authorizes the board, "if they think it for the interest of the counties and societies," to "pay out of the county treasuries * * * the same amount of money for the purchase and improvements of such sites as shall have been, or shall hereafter be, paid by said agricultural societies or individuals for such purpose;" and that by section 11 it is provided that when such societies "shall be dissolved or cease to exist in any county where payments have been made for real estate or improvements upon such real estate, for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple to the county making such payment." There is no direction to whom the money should be paid or as to how the title should be taken. It might be paid by the county to the landowner and the title taken to the society, or the title might be taken to the county, as trustee, "for the use of the society," as the statute says. The money might be paid through the society and the title taken in either way equally as well.

It is a principle of statutory interpretation that, where the language of a statute is clear and unambiguous, it must be interpreted in its ordinary sense, even though it lead to mischief and injustice; but it is also a principle that, if the language of a statute is doubtful or obscure, and it is susceptible of an unreasonable interpretation, or one which will lead to a forfeiture or to an injustice, while another interpretation will avoid such a result, that which leads to a reasonable and just result will prevail. Beal, Cardinal Rules of Legal Interpretation (2d ed.) p. 324; 2 Sutherland (Lewis) Statutory Construction (2d ed.) secs. 408, 490, 541.

It seems to the writer impossible to believe the legislature

intended that, where public spirited citizens had engaged in a voluntary enterprise for the public benefit and in aid of agriculture, the county might, by contributing perhaps a small amount in proportion to the whole amount invested, on the expiration of the corporate charter, or on the cessation of the undertaking for any other cause, not only reclaim the amount of its own contribution, but take by the strong hand that which had been invested by others. Such a construction should not be adopted, even if constitutional, unless no other reasonable meaning can be imputed to the statute.

The language of section 11 is that "such real estate and improvements" shall vest in the county. What real estate and improvements does this refer to? Plainly that for which payments had been made by the county for the use of the society. If the county has taken the title in its own name for the use of the society, when the society dissolves or ceases to exist the trust relation ends; and under the statute the title to the real estate and improvements vests in the county in fee simple, without further proceedings. The result would be the same if the county had purchased through the society and the title had been taken in the name of the society. The use of the property and its control would be in the society, which would hold the legal title in trust for the county, and upon the specified contingency of the society dissolving or ceasing to exist title to such property would vest in the county. The intent that runs through this class of statutes seems to be to preserve that property for the public the use of which it has given to the society, and in this way to prevent the diversion of public funds, either directly or indirectly, to private purposes.

These considerations apply to the statute as it stood before the amendment of 1879. The amendment to section 14, then made, changed the law in the respect that it provided that money might be appropriated and paid to the society only, and to no other person; not, as before, for the purchase of real estate or improvements, but for "fitting

up such fair grounds, but for no other purpose." Section 15, however, was unaffected in so far as it provided that on the happening of the specified contingency, "where payments have been made for real estate or improvements * * * for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple in the county making such payment." Of course, it was necessary to retain these provisions in order to preserve the right of recaption by counties having money invested in fair grounds. The new restrictions in section 14 cannot apply to any such counties.

It is argued that the rapid depreciation in value of improvements of a certain class, and the difficulty of separating other improvements, of the nature of trees, fences, roads, race-tracks, etc., from the real estate, in case of a necessity arising, should prevent such a construction of the statute. It is true that conditions may arise which render the statute difficult of application; but, if the evident purpose of the legislature to preserve for the public the money which had been converted into real estate or improvments is kept in mind, we believe the powers of a court of equity are sufficient to properly guard public interest. On the other hand, if the construction contended for by the county is adopted, it will be possible that a county, by making a contribution of a few dollars for improvements on valuable real estate belonging to an association of this class, on its failure to hold a fair through unavoidable circumstances, or upon the dissolution of its charter either by lapse of time or from other causes, may sequester such property without compensation. Such a consequence shocks the conscience.

To conclude, it seems to us that the intention of the legislature was to preserve the public funds, while at the same time aiding in the extension of agricultural education. We will not lightly impute to that body an intention to take something for nothing from the progressive citizen who, in common with the county, advanced funds for the general welfare.

The improvements made with the county money are not distinguishable and severable from those made by the society from its own funds. The defendants offered in open court to pay the sum advanced with legal interest. That the public should receive back its own if the enterprise fails is just and right, and we think this is all that the county can justly claim.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment in behalf of plaintiff for $300, with interest from the date of payment at 7 per cent. per annum, and to deny the plaintiff's prayer for a decree quieting title to the real estate involved.

REVERSED.

ROSE, J., dissenting.

The Wayne County Agricultural Society was a creature of statute. It came into existence for a definite purpose. It was not a money-making corporation. It was above the aim of pecuniary individual enterprise. Its field of influence was in a farming community. Its object was the promotion of agriculture, stock-raising, horticulture, and the mechanical arts. Its principal duties were necessarily of a public nature, and it was properly the object of public solicitude. The legislature provided for its organization and maintenance. Its technical status is immaterial, since in any view it was in some aspect an agency of government. The county was authorized to appropriate public money for its benefit. Grounds and improvements for holding annual fairs were purchased by joint contributions of private individuals and the public. Some of the expenses of holding fairs were derived from the same source. There was no reason why public-spirited citizens who were interested in the improvement of a farming community should not be allowed to make voluntary contributions for that purpose upon terms prescribed by statute. Every item so contributed was, under the statute, voluntary. In making them, each

contributor entered into a contract with the public to participate in a public agency, and the statutes were by construction parts of the agreements so made. The statute was an open book. Every contributor knew the terms prescribed by law and agreed to them. He knew before generosity prompted him to join in the creation of a public fund that the property purchased with it would be held in trust for the county, after abandonment of its use for the purposes of a fair. The statute said so, and that provision remained in force during the entire existence of the society named. There is no question of forfeiture or confiscation in the case. The Wayne County Agricultural Society held fairs from 1885 until 1901. Later it abandoned the purposes of its existence and was dissolved. The trust property, consisting of the fair grounds and improvements, became valuable. What shall be done with it? That was the question to be considered.

It seems clear to my mind that the question is answered in unequivocal terms by the statute, which is by construction embodied in all the contracts between the public and those who voluntarily created the fund with which the real estate in controversy was purchased and improved. "In all cases, when such county agricultural societies shall be dissolved, or neglect, for the space of two years, to discharge the duties devolving upon them by law, or cease to exist," says the statute, "in any county where payments have been made for real estate, or improvements upon such real estate, for the use of any agricultural society, then *all such real estate and improvements shall vest in fee simple in the county making such payment*, and the district court of said county, upon proof thereof, shall, upon petition of said county board, make a proper decree vesting the title to such property in said county." In my opinion, this language is too plain for construction. It means, as applied to the facts of this case, that the "real estate and improvements" constituting the fair grounds is in equity the property of the county. If any ground for construction existed, however, the interpretation of the majority is

erroneous. The statute as a whole shows that the funds with which the fair grounds were purchased and improved were intended for a public purpose. The fund originally contributed by the county for improvements became, for the purposes of holding fairs, as much a part of the real estate as the land itself. When the society and those acting for it appealed to the county for aid, they proclaimed the public character of the undertaking. When the county contributed funds, it asserted the same fact. When the funds were received from the county, they were accepted as public funds. They could not be lawfully collected from taxpayers for a private purpose. The real estate being in fact public property held in trust for the county, it should be decreed to be the county's property upon the extinguishment of the trust by abandonment. The statute, as I read it, says so; but, conceding the language quoted to be ambiguous, all the legislation on the subject indicates an abiding purpose on the part of the lawmakers to keep public property used for agricultural purposes under the control of a public agency, and to transfer the title to the public after the original use terminates. The legislature so understood its own enactments, and that intention is shown by the amendment of 1905. Laws 1905, ch. 2.

A manifest purpose of the statute is the perpetuation of agricultural societies. The act should be construed with this end in view. Increase in the value of land used for fairs was inevitable. If the title is held in trust for the incorporators or stockholders of agricultural societies, there will be a temptation to abandon the fairs, sell the fair grounds, and distribute the profits among themselves. This would defeat the evident purposes of legislation. To prevent such a result and to continue the public agency established to promote the interests of agriculture, the legislature wisely made provision for decreeing the land to be the property of the county. It is apparent, therefore, that the construction of the majority defeats the legislative will.

Even if the construction of the majority were correct, however, no sufficient reason can be given for allowing the county to recover the amount contributed by it, with interest, while the shareholders are allowed to distribute among themselves the profits on their contributions. In a suit in equity involving property rights, the same rules should be applied to all the parties, though one of them is a county. I do not approve the doctrine which gives the public what it contributed to a common fund, with statutory interest, and distributes the remainder with accruing profits, to individual contributors.

ANDREW M. MORRISSEY, APPELLANT, V. ADDISON WAIT, SECRETARY OF STATE, APPELLEE.

FILED NOVEMBER 1, 1912. No. 17,839.

1. Elections: NEW PARTIES: FORMATION. Under the provisions of section 45, ch. 52, laws 1907, providing for the formation of new political parties, it is not essential that the 500 electors who must be present at a mass state convention to form a new party shall be the identical 500 electors who are required to sign an agreement to form such new party and support its nominees at the next election.

2. ———: NOMINATIONS: NEW PARTIES. Sections 39, 40, ch. 52, laws 1907, providing for the nomination of candidates by a convention or committee of a political party, apply to nominations by new parties for general elections, as well as to nominations made by previously organized parties to be filled at special elections, and for offices excepted from the provisions of the act.

3. ———: ———: ———: FILING CERTIFICATE. Where a new party is formed after the time fixed by the statutes for the holding of the regular primary elections, nominations for candidates of such party may be made by mass convention held under the provisions of section 45, ch. 52, laws 1907, and certificates of nomination of such candidates may be filed with the proper officer at the time specified in section 40 of the same act.

4. ———: ———: STATUTES: CONSTRUCTION. In construing statutes relating to the exercise of the elective franchise and to the nom-

ination of candidates by political parties, either at primaries or by conventions or committees, the court should construe doubtful or ambiguous statutes in the light of the constitutional provision that "all elections shall be free; and there shall be no hindrance or impediment to the right of the qualified voter to exercise the elective franchise." Const., art. I, sec. 22.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Andrew M. Morrissey and *Morning & Ledwith,* for appellant.

Grant G. Martin, Attorney General, Jesse L. Root and *C. C. Flansburg, contra.*

LETTON, J.

This is an appeal from a judgment of the district court for Lancaster county sustaining the right of the candidates of the Progressive party to have their names printed on the official ballots for the general election in 1912. The facts seem to be as follows: A mass convention to form a new party was held in Lincoln on September 3, 1912. On the afternoon of that day the meeting was adjourned until evening, at which time Governor Johnson of California was advertised to speak. A large number of people gathered and were present at the evening meeting. The chairman of the meeting read the proposed Progressive party platform, which was adopted by a *viva voce* vote. After the address of Governor Johnson had been delivered and a number of persons had left the hall, the persons whose rights are in dispute in this case were nominated as candidates of the Progressive party. On September 13, 1912, there were filed in the office of the secretary of state five separate documents, each bearing the following heading: "We, the undersigned qualified electors of the state of Nebraska, in mass convention assembled, do hereby associate ourselves together, and agree to form a new political party, to be designated the 'Progressive' party, and we do

hereby agree to affiliate with said party, and to support its nominees at the next general election." These papers were bound together and filed with the secretary of state as one document. The total number of signatures thereon exceed 500 in number. There was also attached an affidavit by one Van Meter in substance stating that he is a qualified elector; that at the mass convention, at which the Progressive party was organized as a new party, he had charge of and witnessed the signatures, and saw the electors sign the same and agree to support its nominees at the next general election, and that he verily believes them all to be qualified electors of the state. On the same day a certificate of nomination and oath in proper form were filed in the office of the secretary of state, signed by Arthur G. Wray, as chairman, and John C. Sprecher, as secretary of the convention. Within three days after the filing of this certificate of nomination, the plaintiff, who is a candidate for the office of attorney general on the ticket of the Democratic party, filed written objections challenging the legality of the formation of the new party and the validity of the certificate of nomination. The secretary of state fixed a time and place for a hearing, and notified the several candidates. At the hearing evidence was taken, and the objections were overruled. A bill of exceptions was prepared and an appeal taken to the district court for Lancaster county, which affirmed and sustained the action of the secretary of state.

At the hearing before the secretary of state, it was contended that the Progressive party was not legally organized, because the 500 persons who signed the agreement to form a new party were not identified as being members of the mass convention, but this contention was virtually waived at the argument before this court. There is no definite proof that 500 electors were not present at the convention. The evidence is conflicting on this point, but seems to preponderate in favor of the decision of the secretary of state. Furthermore, there is no requirement

in the statute that the 500 electors who sign the agreement must be the identical persons who were present at the convention. Appellant concedes that the primary law of 1907 is in force, except as modified by chapter 46, laws 1911, but argues that the Progressive party is not entitled to a place upon the ballot at the 1912 election, for the reason that section 45, ch. 52, laws 1907, provides: "Such new party shall be entitled to have a separate party ballot at the next primary election held thereafter." He says in this connection that "the legislature did not intend that such new party shall be entitled to a party ticket at the next *general* election," but that it would be entitled to a party ticket *"at the first primary held thereafter,"* and that, if the party was not organized in time to get its ticket in the field by means of a primary election before the general election, it must wait until the next primary, so that it may get its ticket in the field through the regular channel. This view would bar these candidates from the 1912 election.

The provision for the organization of new parties is contained in section 45, ch. 52, laws 1907 (Ann. St. 1911, sec. 5905, Comp. St. 1911, ch. 26, sec. 118*s*), which is a part of the law relating to primary elections. The section is lengthy and will not be copied here in full. It contains the requirements hereinbefore referred to that there shall be 500 electors present at a mass state convention, and the same number of signers to an agreement to form a new party. It also contains the foregoing quotation that "such new party shall be entitled to have a separate party ballot at the next primary," etc. This section, when considered with the requirement of the statute that all nominations be made by primary elections, might justify the thought that mass conventions can only form a new political organization, and that its candidates must be named at the next primary; but a view of other sections of the statute leads to a different conclusion. Section 39 of the same act provides: "All nominations for candidates of any political party for office to be filled at

a special election or any other office to be filled by the electors, excepted from the provisions of this act, shall be nominated by a convention or committee of their political party," etc.; and provides, further: "It is the intention that the manner provided in this section for the nomination of officers named herein, by a convention or committee, shall apply only where such officers are to be chosen at a special election," etc. Section 40, in substance, provides that, when nominations are made by a convention or committee as provided for in section 39, the certificates of nomination to be filed with the secretary of state shall be filed not less than 25 days before the election; but it provides, further: *"Certificates of nomination for a new party* may be filed with the secretary of state or the county or municipal clerk twenty-five or twenty or fifteen days before the election, as the case may require."

Construing the several sections of the statute together, it seems clear that the "certificate of nomination for a new party" mentioned in section 40 applies to the necessary certificate when a nomination is made by convention, and cannot possibly apply to a nomination made by a primary election, as shown by the returns thereof, in which latter case no nominating certificate is required. The limit within which such nominating certificate may be filed with the secretary of state is much later in point of time than that fixed for canvassing the returns and for the certification to the secretary of state of the results of a primary election. It seems clear, therefore, that a new party may be formed after the time when it is possible for it to participate in the regular primary election It is proper to say that it is the duty of the courts, in construing statutes providing for printing the names of candidates of both old and new political organizations upon the ballot, to do so in the light of the constitutional requirement that "all elections shall be free; and there shall be no hindrance or impediment to the right of the qualified voter to exercise the elective franchise." Const.,

art. I, sec. 22. The legislature may regulate the manner of nomination of candidates whose names shall be printed at public expense upon the official ballot. It may, and patently does, recognize the existence of political parties, and the formation of new parties in this connection. Its regulations in this respect are within its powers, provided that they are reasonable and do not unnecessarily hamper or impede the right of a voter to vote for whomsoever he pleases at the general election.

We are of opinion that, under the plain provisions of the sections of the statute referred to, the candidates of the Progressive party are entitled to a place upon the official ballot. The opinion of the secretary of state and the judgment of the district court are

AFFIRMED.

HAMER, J., concurring.

On the 28th day of September, 1912, the appellant, Andrew M. Morrissey, filed his petition in the district court for Lancaster county alleging that he was a qualified elector of Nebraska, eligible to the office of attorney general, and nominated at the primary election, April 19, 1912, as the democratic candidate for said office, and that he received his certificate of nomination and is entitled to have his name printed on the official ballot; that the defendant, Addison Wait, is the secretary of state, and that it is his duty as secretary to certify to the several county clerks the nominations of all candidates named by the political parties, in order that the names may be printed on the official ballot to be used at the November election; that at the time he was nominated there was no political party in Nebraska known as the Progressive party; that on September 13, 1912, there were filed in the office of the secretary of state certain documents, reading: "Agreement to Form New Party. We, the undersigned qualified electors of the state of Nebraska, in mass convention assembled, do hereby associate ourselves together, and agree to form a new political party, to be

designated the 'Progressive' party, and we do hereby agree to affiliate with said party, and to support its nominees at the next general election;" that there was appended to the said documents the affidavit of G. O. Van Meter, setting forth "that he is a qualified elector of this state, and that at the mass convention held in the city of Lincoln on September 3, 1912, at which the Progressive party was formed and organized as a new party, he had charge of and witnessed the signatures, and saw the electors preceding sign the agreement to form said new party and to support its nominees at the next general election, and that he verily believes them all to be qualified electors in the state;" that on said 13th day of September, at the time of filing the said alleged agreements, there was also filed in the office of the secretary of state a document purporting to be a certificate of nomination for the several state offices involved and for presidential electors and for United States senator, and designating said several candidates. The certificate of nomination certifies that at a mass convention held in the city of Lincoln, September 3, 1912, a new party was then and there organized under the name of the "Progressive Party," and that not less than 500 electors participated in the convention. It was further alleged that there was a less number than 500, and that they were composed of persons of both sexes.

It is objected by Mr. Morrissey that there is no legal authority to hold political conventions to nominate candidates for any of said offices, and that the laws of the state prohibit the making of nominations for said offices by political conventions; that said pretended convention did not represent a political party casting 1 per cent. of the votes at the last general election; that the purpose of holding said convention was to disorganize existing political parties, and to impair the value of the several nominations given to candidates for said several offices. It was further objected that the names of said candidates so claimed to be nominated should not be certified to the county clerks of the several counties as candidates of said

Progressive party, and he objected to any certificate being made by the secretary of state; that, upon the filing of said objections, the secretary of state fixed a time for the hearing at 2 o'clock in the afternoon of September 18, 1912, and at said time and place the objector appeared in person and by attorneys, and said candidates also appered by attorneys, and evidence was introduced, and the matter was argued to the secretary of state, who thereupon entered an order overruling said objections, and filed a written opinion assigning his reasons therefor; that on the 2d day of October said cause was presented for review before the Honorable P. James Cosgrave, one of the judges of the district court for Lancaster county, who, after argument, entered an order sustaining the action of the secretary of state and denying the relief prayed for in the petition; that it was found upon the stipulation and agreement between the parties that the Progressive party was duly organized and its nominees duly nominated and legally certified to the secretary of state, and that they are entitled to a place on the official ballot as the candidates of the Progressive party. It was therefore ordered, considered and adjudged that the said order of the secretary of state be in all things confirmed and approved, and that the proceedings of the said objector, Andrew M. Morrissey, be dismissed.

The case comes to this court to review the judgment rendered in the district court. It is contended that the judgment of the district court should have been in favor of said Morrissey and against the defendant, Wait, and that an order should have been entered enjoining the secretary of state from certifying the names of said candidates to the several county clerks to be placed upon the official ballot.

It appears from an examination of the record that there was a mass convention held in Lincoln at the city Auditorium, September 3, 1912, and that more than 500 electors were in attendance and participating. It is contended that in the afternoon there were less than 250

voters present in the auditorium, but it further appears that later in the evening there was an immense audience. It is alleged that the electors came for the purpose of hearing Governor Johnson of California deliver a speech. It must be admitted that, if a large number of electors were there, they may have been there for the purpose of participating in the convention, as also for the purpose of hearing the speech. It being admitted that a large audience had assembled, it is impossible to say for what particular purpose they were there. It is contended that the papers signed were in five separate parts, although they all read, in substance, the same way. It would not be expected that 578 names would all be placed on one long paper, when it would be much more convenient to put them on five papers. This objection is purely technical and without merit.

A consideration of the statute would seem to dispose of the questions presented. Section 118*s*, ch. 26, Comp. St. 1911, would seem to furnish statutory authority for organizing a new party in the state. It provides: "Electors may form a new party. * * * In order to form a new party there shall be present at a mass convention electors to the number of at least five hundred (500) in a state convention." Section 117*f*, ch. 26, Comp St. 1911, provides: "The name of no candidate shall be printed upon an official primary ballot unless at least thirty (30) days prior to such primary" nomination papers be filed. It is provided by section 118*n*, ch. 26, Comp. St. 1911: "Certificates of nomination for a new party may be filed with the secretary of state or the county or municipal clerk twenty-five or twenty or fifteen days before the election, as the case may require." The foregoing section provides that this may be done in nominations that are made by convention or committee. The foregoing sections seem to dispose of the matter. It would seem not to be the intention of the primary act to abrogate the right of electors to form a new party; but apparently the thing contemplated is to perpetuate the right to form

new parties. Whether it is essential that the particular 500 electors who must be present at a mass state convention to form a new party shall be the identical electors who are contemplated by the act as necessary to sign an agreement to form such new party may be debatable. Section 45, ch. 52, laws 1907, provides, among other things, that "in order to form a new party there shall be present at a mass convention electors to the number of at least five hundred (500) in a state convention," and electors to "at least the number specified shall sign an agreement to form such new party and support its nominees at the next election;" but the act does not say the same 500 at the convention shall sign the agreement. It would be a harsh construction of the act to say that the same 500 who attend the convention shall also sign the agreement.

There is a contention made that the purpose of forming the new party is not to bear immediate fruit, and that the new party is not to have recognition until after it has voted at a primary. This is not according to the American idea, and it would be eminently unjust. It would be directly in conflict with section 22 of the Nebraska bill of rights, which provides: "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."

Secretary of State Wait acted upon the evidence brought before him. His conclusion seems to have been a proper one. It was sustained by the district court for Lancaster county. It would be unfair to many thousand electors of the state of Nebraska to prevent them from voting for the candidates of their choice.

FANNIE CUSICK, APPELLEE, V. NATHAN BRODSKY ET AL., APPELLANTS.

FILED NOVEMBER 1, 1912. No. 16,783.

Judgment: SUIT TO VACATE: EVIDENCE. Evidence examined and set out in the opinion, *held* sufficient to sustain the finding and decree of the district court.

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

J. E. von Dorn, for appellants.

J. J. O'Connor, contra.

FAWCETT, J.

Defendant Brodsky was a retail grocer in Omaha. Among his customers was one Charles W. Ellis, whose wife is a sister of plaintiff. The Ellis family traded with defendant for a number of years. As a result of such trading the Ellises finally became indebted to defendant in the sum of about $140. Defendant appears to have sold out his business and placed his accounts in the hands of a collector. Suit was brought in justice court upon the Ellis account against plaintiff, and service of summons was made upon her. At the time set for hearing neither plaintiff nor defendant appeared at the justice court. Judgment was entered against plaintiff. Upon the judgment thus entered defendant subsequently had an execution issued, and was about to levy upon property of plaintiff, when she brought this suit to restrain proceedings under the execution, and to set aside the judgment upon the ground that she was in no manner indebted to defendant, and that after bringing the suit against her defendant told her that it was brought against her by mistake; that she need not pay any attention to the suit, as he would withdraw it; that she relied upon his statements, and for that

reason did not appear at the time set for trial; that she never knew that any further steps had been taken in the matter until defendant was about to enforce his judgment by the execution above referred to. There was a trial to the district court for Douglas county, which resulted in a finding in favor of plaintiff and a decree restraining the enforcement of the execution, vacating the judgment of the justice, and ordering that the parties appear before the said justice on March 14, 1910, or before some other justice if the case should be removed, for the purpose of trying the cause of action upon the account upon its merits. From this decree defendant Brodsky appeals.

The only reason assigned for asking a reversal of the decree of the district court is the statement in the brief of defendant that the judgment of the district court is not supported "by that preponderance of evidence necessary to sustain an injunction enjoining the enforcement of a judgment at law, where, as is disclosed in this case, the plaintiff had proper notice of the commencement of the suit in which the judgment, which the plaintiff herein seeks to enjoin, was rendered." After a careful reading of the entire bill of exceptions we are unable to agree with counsel. Plaintiff testifies unequivocally that when the summons in the justice suit was served upon her she called defendant, with whom she was well acquainted, by telephone, and asked him why he had sued her for this account; that he told her he had gone out of business, and the bills were all put in a bunch together; that "he didn't intend for that to go in. * * * He said he would call it off, and not to pay any more attention to it; he would go down and see this lawyer, and call it off." It is true defendant denies having made this statement, and says that what he told her was: "If the bill will be paid we wouldn't sue it. That is all I said." Mrs. Ellis testified that she went to see him about the suit, and asked him why he had brought suit against her sister; that he said: "O, Mrs. Ellis, I will call it off." The evidence does not show that this statement to Mrs. Ellis was communicated to plaintiff before the day

set for the trial. Defendant's argument is therefore sound that the statement by defendant to Mrs. Ellis, even if made, which defendant denies, would not afford any excuse for the failure of plaintiff to attend at the time of the trial. But there is one circumstance shown by defendant's own testimony which tends strongly to corroborate plaintiff that he had agreed to call the case off. While upon the stand as a witness in his own behalf, he testified that he did not attend the trial himself, and does not know who made proofs of the account. The record does not enlighten us upon that point beyond the statement by counsel for defendant upon the stand that he made proof. Just how he made it is not shown.

Upon the question as to whether or not plaintiff had any meritorious defense to the action if she had attended at the time of the trial, the evidence is not very satisfactory. There is no dispute but what the debt sued for was the debt of the Ellises. It is conceded that plaintiff never agreed in writing to be responsible for the debt, but defendant and his wife say that, when the account of the Ellises began to grow, they were not willing to continue increasing it, and that plaintiff then came to them and told them to let Mrs. Ellis have what she needed, and that she, plaintiff, would see that the goods were paid for. This, plaintiff unequivocally denies. Defendant places the time when this pledge was made by plaintiff as some two or three years prior to the hearing of this suit, yet he furnishes no evidence that plaintiff had ever paid him anything during all of that time on account of the Ellises, except one item of $50, which plaintiff admits having made, but testifies that when she made it she told defendant that she was making the payment on account of her sister as a Christmas present. She denies ever having become security or ever having acknowledged that she was in any manner liable for the debts of the Ellises. Whether she did or not, however, is a question which can be determined when the law action is finally tried in justice court under the decree rendered by the district court in

this case. Without pursuing the matter further, we think the evidence is sufficient to sustain the decree as entered by the district court.

AFFIRMED.

CHARLES G. HELMING ET AL., APPELLEES, V. EMIL O. FORRESTER ET AL., APPELLANTS.

FILED NOVEMBER 1, 1912. No. 17,372.

1. **Ejectment:** PARTIES. Where parties entitled to the possession of land, in arranging for the commencement of an action to recover such possession, execute to their attorneys a quitclaim deed to an undivided half of such land under an agreement that such deed is to be held as security only for the services to be rendered by such attorneys in their behalf, such deed is in effect a mortgage, and does not render it necessary to join the grantees therein named as plaintiffs in such action.

2. **Appeal:** LAW OF THE CASE. "The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated." *Anheuser-Busch Brewing Ass'n v. Hier*, 61 Neb. 582.

3. **Trial:** DIRECTING VERDICT. In the trial of an action in ejectment, where the undisputed evidence clearly establishes the right of possession to be in one of the parties to such action, it is not error for the court to direct the verdict.

4. ———: INSTRUCTION. The instruction given by the trial court examined, and *held* to have properly submitted to the jury the only controverted question of fact in the case.

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

E. A. Cook, for appellants.

Douglas Deremore, F. J. Mack, Edwin Vail and *C. E. Spear, contra.*

FAWCETT, J.

This case was advanced under our rules; it being its second appearance in this court. Our former opinion will be found reported in 87 Neb. 438. The facts are therein stated, and need not be repeated here. After the case was remanded, the petition was amended by adding the averment, "that said plaintiffs have a legal estate in and are entitled to the possession of said described premises, and said defendants since the 25th day of December, 1901, have unlawfully kept, and still unlawfully keep, the plaintiffs out of the possession of said premises." A jury was impaneled, and the trial proceeded upon the theory that it was an action in ejectment.

The interest of Minnie C. Helming and of her heirs, defendants herein, the void character of the decree of the county court, the right of the plaintiffs to prosecute the action for possession, and the defense of the statute of limitations are all disposed of by our former opinion, which is now the law of the case. The only questions presented here, which were not disposed of there, are: (1) The plea of a defect of parties plaintiff. (2) Did the district court err in declining to submit to the jury more than the single question as to the value of the rents and profits of the land in dispute for the years 1905 to 1908, inclusive?

The contention that there is a defect of parties plaintiff is based upon the fact that about two months prior to the commencement of the action the plaintiffs executed to their attorneys a quitclaim deed to an undivided one-half of the land in controversy. The uncontradicted evidence is that the deed was made and delivered as security only for the services to be rendered by counsel under their contract of employment. The deed was in effect a mortgage, and it was not necessary to join the grantees therein named as plaintiffs.

The evidence being undisputed that the only interest defendants have in the land is as the surviving husband

and son of Minnie C. Helming, deceased, who was the surviving spouse of William F. Helming, deceased, in whom the title and ownership of the property was vested at the time of his death, and that the plaintiffs are the heirs at law of the said William F. Helming, the right of possession of the plaintiffs was so conclusively established that there was nothing upon that point to submit to the jury. In the trial of an action in ejectment, where the undisputed evidence clearly establishes the right of possession to be in one of the parties to such action, it is not error for the court to direct the verdict.

The judgment of the district court being in harmony with our former opinion, and being fully sustained by the evidence, it is

AFFIRMED.

HAMER, J., concurring in conclusion, and dissenting as to reasons given.

As stated in the main opinion, our former opinion is reported in 87 Neb. 438, and it would not be necessary to write this opinion if it were not for the fact, as the writer conceives, that material matter is left out of the main opinion. It is stated in the first opinion that William F. Helming died intestate December 5, 1889, without issue, leaving a widow, Minnie C. Helming; that his mother, Charlotte Helming, and his brothers, Charles G. Helming and Otto B. Helming, and his sister, Minnie Sill, were his only heirs; that his mother died soon thereafter, and that her interest descended to the brothers and the sister above mentioned, who were the plaintiffs in the action brought in the district court; that the widow made application to the county court under the provisions of chapter 57, laws 1889, known as the "Baker Decedent Law," to have the homestead assigned to her; that action was taken by said court setting aside and assigning to her the homestead of the deceased, consisting of 160 acres of land; that she afterwards married Emil O. Forrester, and thereafter died leaving the defendant, Paul Forrester, a

minor, as the sole issue of that marriage; that during coverture Minnie C. Helming Forrester and her husband executed a mortgage on the premises to one Leflang, which mortgage was afterwards assigned by said Leflang to said Emil O. Forrester; that the mortgage and assignment appear on the records of said Dawson county; that the said Minnie C. Helming Forrester and the defendants have held possession of the premises ever since the death of William F. Helming; that the plaintiffs brought their action alleging that they were the heirs of William F. Helming and the owners in fee of the premises, and that the proceedings by which the county court attempted to assign the title in fee to Mrs. Helming were void; that they prayed that the cloud upon the title created by the decree and the mortgage and assignment might be set aside for an accounting of the money paid by the defendants for the benefit of the estate, and for the rents and profits received, and for the possession of the premises; that the answer pleaded the decree of the county court, the passage of the curative act of April 9, 1895, the payment of certain mortgage indebtedness upon the land in reliance upon the title of Minnie C. Helming, and title by adverse possession ever since the entry of the decree in 1890, and defendants prayed that their title be quieted and for general equitable relief; that the reply alleged that the curative act was void, being in violation of the constitution of the state, and denied the other allegations in the answer; that upon the trial in the district court the court found that the defendants and Mrs. Helming had been in the adverse possession of the land since the 20th day of March, 1890; that since the date of the decree in the county court no right of plaintiffs in the real estate had been admitted or recognized by Mrs. Forrester or the defendants, and that the decree quieted the title in the defendants.

The material matter left out of the main opinion is that after the case was remanded by this court to the district court for Dawson county, and there was an amendment thereafter made to the petition by adding the averment,

"that said plaintiffs have a legal estate in and are entitled to the possession of said described premises, and said defendants since the 25th day of December, 1901, have unlawfully kept * * * the plaintiffs out of the possession of said premises;" that the judgment rendered was upon this new state of facts, and therefore the further statement contained in the second paragraph of the syllabus of the present main opinion that "the decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated," was wholly inapplicable. The old adjudication could not adjudicate a new set of facts. As the prayer to the first petition was set aside the cloud upon the title created by the decree and the mortgage and the assignment thereof, and for an accounting of the money paid by defendants for the benefit of the estate, and for the rents and profits received, and for which the plaintiffs would in equity be liable, and to enter a judgment in conformity with such findings, and the prayer of the defendants was that their title be quieted, and for general equitable relief, the case then made was one in equity to quiet title, and the amendment thereafter made was for "an execution for the delivery of the possession of said premises, and costs," and changed the nature of the case to a law action.

In the present case the defendants' answers were in effect general denials and a plea of defective parties plaintiff, and the case was tried before a jury, and proceeded apparently upon the theory that it was an action in ejectment, although it had formerly proceeded as an action to quiet title. The defendants requested an instruction submitting the ownership of the land to the jury, but the instruction was refused. The court submitted to the jury but one instruction, which was to find the value of the rents and profits of the land in dispute for the years 1905, 1906, 1907, 1908. There was a finding by the jury under the direction of the court that the

plaintiffs were entitled to and should recover possession of the land, and there was also a finding that the plaintiffs should recover $600 for rents and profits. There was a judgment on the verdict for the plaintiffs. It will be seen that the action was treated by the parties and by the court as one in ejectment. The judgment rendered is a judgment in ejectment. The main opinion is also inadvertently without a statement that the original case, upon which the former opinion of this court was founded, proceeded as an action to quiet title, while the second case after the amendment was made, and touching which the present opinion was rendered, proceeded as an action for the possession of real property.

It is contended by the defendants that it is not a question whether this court held the decree of the county court to be void, but did Mrs. Helming assert rights under the decree of the county court which were recognized by the district court, however erroneously, and of which facts the plaintiffs, or part of them, had notice at that time. It is contended by the defendants that the statute of limitations would begin to run from that time, and that, if Mrs. Helming asserted her rights by reason of the decree, her adverse possession would begin at that date, not because of the decree, but *because of the assertion of the right.* It is also contended by the defendants that the second fact which enters into their case is the transfer by the plaintiffs to two of their attorneys of one-half of the land in controversy by quitclaim deed, and before the suit was originally commenced. This seems to be the only contention of the defendants answered by the main opinion. Defendants also contend that the amended pleadings have so changed the issues from what they were at the first trial that the defendants are in no manner bound by the opinion of the court touching the former trial. They earnestly contend that title to the land is in the defendants by adverse possession.

It is contended by the defendants that the petition and answer necessary to a decree in the district court should

have been admitted in evidence. They were offered by the defendants, and their admission was denied by the trial court. It is claimed that they were competent evidence because they showed an assertion of absolute title to the land in controversy by said Minnie C. Helming under the said decree. It is claimed that by the proceedings of the district court direct knowledge was brought home to the plaintiffs that Minnie C. Helming was not claiming simply a life estate in the land, but that she was claiming an *absolute title* in fee. It is contended by the defendants that, from the time Mrs. Helming filed her answer in the district court in the case brought by Charles G. Helming for an order to sell the real estate to pay debts, the plaintiffs knew that she was holding the land claiming to be the owner in fee, and that this was sufficient to support the running of the statute of limitations in her favor, except the one concerning the quitclaim deed to counsel Derremore and Mack. These contentions of the defendants do not seem to be answered in the main opinion. There is seemingly a mistake in suggesting that they were adjudicated in the former case, because, for the reasons stated, they would not have been adjudicated. Our court has held that the statute of limitations begins to run as to the right to quiet title as soon as an action might be brought for that purpose; that such action may be brought before the expiration of a life estate and as soon as the right accrues to the remainderman. It is perhaps confusing that there should be such a distinction between the time when the statute begins to run as to the right to quiet title and when it begins to run as to the right to acquire possession. Whether this should be may be debatable. It is clear that the rule laid down by this court provides a time when the statute begins to run as to the right to quiet title, and still a different time when it begins to run as to the right to recover possession, but in each case dependent upon the time when the right accrues. In the instant case it is the opinion of the majority of the court that the statute did not begin to run

as to the right to recover possession until Minnie C. Helming died, when her life estate was extinguished. It may be contended with a degree of plausibility and force that as soon as Minnie C. Helming claimed title as against Charles G. Helming, who was trying to sell the land as an administrator, and claimed that she was the owner of the property, and that she had acquired it by decree of the county court under the Baker decedent act, and that the district court had ratified her claim, that then, because of these things, the statute of limitations should begin to run.

It is claimed that the principle announced in *Hobson v. Huxtable,* 79 Neb. 334, and on rehearing, 79 Neb. 340, should determine this case. That case involved the consideration of a petition, pleadings and evidence, showing that one Annie E. Hobson died August 17, 1888, intestate, leaving her surviving husband, John H. Hobson, and her children, John J., aged 1 year, Roy J., aged 7 years, Ida Belle, aged 14 years, and George W., aged 18 years; that at the time of her death she was "seized" of a quarter section of land upon which she had resided with her husband and family for several years preceding her death; that the land did not exceed in value, over and above incumbrances, $2,000, and constituted the family homestead, if occupying it as a family residence was a sufficient selection under the homestead law; that on October 27, 1888, one Palmer was appointed as administrator of the estate of the deceased, and in May filed his petition under the statute for license to sell lands to pay debts; that such license was granted by the district court, and the premises were sold October 24, 1890, to one Charles Huxtable, a defendant, and the sale was confirmed, and the administrator conveyed the premises to the purchaser, who went into possession under his deed, and that his wife remained in actual possession until the final judgment of the court; and the prayer of the petition was for a decree declaring the administrator's deed to be void. The defendants Ida Belle and George W. Hobson filed an answer

admitting the allegations of the petition, the death of John H. Hobson, and asserting title in themselves, and asking that their rights be investigated, and that the defendants Huxtable be ejected from the premises. Against these defendants Hobson there was a plea of the statute of limitations by the defendants Huxtable. There was a decree in the district court quieting title in the four Hobsons, subject to the lien of a mortgage which had been paid by the money received from the purchaser at the administrator's sale. The Huxtables appealed. They contended that the use of the property as a family home was insufficient to show that the homestead was selected with the consent of the wife, and as to the defendants Ida Belle Hobson and George W. Hobson it was contended by the Huxtables that more than ten years had elapsed since they became of age, and that therefore they were barred by the statute of limitations. This court held that it would be presumed from the use of the property as a homestead that the wife consented to such use, and held that upon the death of the wife the homestead descended to the husband during his life, and upon his death in fee to the children, and that the license of the administrator was void, though the proceedings were regular. It was held that section 57, ch. 73, Comp. St. 1905, provides "that an action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate," while section 59 contains the further provision that "any person or persons having an interest, remainder, or reversion in real estate shall be entitled to all the rights and benefits of this act." It was contended by the attorney for the defendants Ida Belle Hobson and George W. Hobson that the claim set up in their answer was to be considered as an action in the nature of ejectment, and that such an action could not accrue to them

during the life of John H. Hobson, the life tenant. The defendants Huxtable contended that since the Huxtables did not claim under John H. Hobson, and could not claim to be the owners of his interest for life, an action by the heirs to obtain possession could have been as well maintained before as after his death. In the first opinion this court say: "We are, however, unable to regard this suit as an action in the nature of ejectment. The plaintiff's suit was to quiet title, and, if we admit this claim of the defendants Ida Belle and George W., we are committed to the anomalous proposition that two tenants in common can join in an action which shall be on the part of one *an action to quiet title,* and on the part of the other *an action in ejectment.*" This court then further say in the first opinion that the two actions are incompatible, that they require different methods of trial and a different judgment at the end of the trial. In the first opinion, at considerable length, the court emphasizes the *impossibility* of joining two such diverse actions, but in the second opinion, delivered on the rehearing, this court said that if a remainderman, not being under disability, failed for ten years after his cause of action accrued to commence his suit, then he would be barred by the statute of limitations from maintaining his action to quiet title, and that, if the remainderman should be under a legal disability when the cause of action accrued, the statute would not commence to run against him until the disability was removed, and the court held: "The remainderman's estate in the homestead will not support an action in ejectment during the lifetime of the life tenant, and the statute of limitations will not commence to run against that possessory action until the demise of the surviving spouse." In the seventh paragraph of the syllabus in the second opinion this court announced the doctrine: "In an equitable action to set aside a deed, where the right of possession is in issue and depends upon principles of equity that must necessarily be determined by the court, it is the duty of the court to determine the right of possession,

if all parties in interest are before the court, and put the parties entitled thereto into possession." Now, in that case it was not the petition which demanded possession. That seems to have demanded that a deed be declared void, but the defendants Ida Belle Hobson and George W. Hobson in their answer and cross-petition prayed the court to put them in possession. They were in court alleging facts which entitled them to bring ejectment, and they insisted that the court should render a judgment putting them in possession. By the first opinion in the case they were denied the claim which they made and which had been granted them in the district court, and a judgment of the district court was reversed as to them and their action dismissed; the court remarking: "It is a practical as well as a legal impossibility to join two such diverse actions." In the second opinion no such difficulty was encountered, and the opinion was unanimous. The writer of the former opinion concurred in the opinion upon the rehearing. In the latter opinion it was said that more than ten years intervened between the majority of the defendants Ida Belle and George W. Hobson on the one hand, and the commencement of the action on the other, and therefore that the statute of limitations barred the action of the said defendants Hobson to quiet their title to the real estate involved (*First Nat. Bank v. Pilger,* 78 Neb. 168; *Holmes v. Mason,* 80 Neb. 448), and therefore that the district court erred in quieting their title to the said real estate; but, as they were before the court demanding the possession of their part of the land, the only relief they were entitled to, and the court had the right to award that possession, it would do so (*Albin v. Parmelee,* 70 Neb. 746); that all the allegations in the petition were admitted in the answer and cross-petition; that the claim was made by the cross-petitioners that they were entitled to the immediate possession of the land, and that they were kept out of that possession by their co-defendants, the Huxtables, and asking judgment ejecting the Huxtables; that the allegations of the petition and

cross-petition were to be considered together, and that, so considering them, the defendants Huxtable were advised of the nature and extent of the claim made by the Hobson heirs, both plaintiffs and defendants; that the plaintiffs prayed for equitable relief and possession, and the defendant heirs for possession only, and that the court would read the petition and cross-petition together, and the allegations of the first pleading might be considered to aid the lack thereof in the other. *Railway Officials & Employees Accident Ass'n v. Drummond,* 56 Neb. 235. The former opinion in this court was vacated and also the decree of the district court, and a decree was entered in this court and in conformity with the opinion rendered upon the rehearing.

Minnie C. Helming died in December, 1901, and until that event an action in ejectment could not be maintained to recover possession of the premises because she had her life estate therein as the surviving spouse of William F. Helming. As the right of any plaintiff to maintain an action for the possession of said premises could not accrue until that time, the statute of limitations did not begin to run until that time was reached. The petition in this case was filed June 25, 1908, and the amendment thereto containing the allegation concerning the plaintiffs' alleged possessory right to the premises was made by leave of the court February 28, 1911. It will therefore be seen that the ten years required for a bar against the plaintiffs' action had not expired at the time of the amendment to the petition, and the action was therefore well within the time. Under the rule in *Hobson v. Huxtable, supra,* the cause of action for the possession of the property having been brought within ten years from the termination of the life estate, it was not barred.

But, in the opinion of the writer, it is not a question of whether Mrs. Minnie C. Helming had a good title by reason of the proceedings in the county court, and by reason of the proceedings in the district court in which Charles G. Helming was prevented from obtaining a

license to sell the homestead for the payment of alleged debts against the estate. If Mrs. Helming asserted that she was the owner of the property and claimed the property by a title ever so inadequate, the statute of limitations ought to have begun running at that time, and in that event her heirs would be the owners of the property. It may be argued that, as her claim was based upon an insufficient and unauthorized proceeding, therefore everybody would take notice that she had nothing. But she did have *possession, and she was claiming the title.* As this court has construed the law in *Hobson v. Huxtable, supra,* no action for possession could be brought against Mrs. Helming as long as her life estate continued, and therefore no action could be brought for the possession of the premises. That is undoubtedly the law; but that is still not an answer to the question as to whether Mrs. Helming had no right to claim possession by reason of an inadequate and insufficient title, and, if she did exercise such a right, whether the statute would not then begin to run. There is danger that this court may have confused the existence of an actual legal right with the right of an unfounded claim of possession. Mrs. Helming forfeited nothing by reason of making her unfounded claim. The lawful claim of possession may originate in an unauthorized possession which cannot be legally defended. The running of the statute of limitations determines the right, and not the legality of the claim.

At the trial of the instant case, Charles G. Helming testified, as shown by the abstract, that "on January 4, 1908, myself, my brother and sister made a deed for an undivided one-half interest in this land to Douglas Deremore and Fred J. Mack. We made the deed as a guaranty for the attorneys' pay in this suit and a previous one. We executed and delivered the deed to them to secure the attorneys for their pay in this case; I will say in the previous case and all cases, all cases that might come up concerning this land." This testimony is not disputed in any way. It appears to be a fact that a quitclaim deed was

made to secure the attorneys their fee. This deed was made to secure the attorneys their fee in case they succeeded in winning the suit. Unless the defendants have in some way been misled to their prejudice by the quitclaim deed to Deremore and Mack, it is difficult to understand why they have any legal or moral right to shelter themselves behind the technical alleged rule which would forbid inquiry concerning what the deed actually was as between the parties and the purpose for which it was made. In *Stall v. Jones,* 47 Neb. 706, this court held: "In this state a deed absolute in form passes the legal title, although intended as security for a debt, and for most purposes treated as a mortgage." In the opinion it is said: "But in this state a deed absolute in form, although intended as security, and in general treated as a mortgage, passes the legal title to the mortgagee"—citing *Gallagher v. Giddings,* 33 Neb. 222, and *Harrington v. Birdsall,* 38 Neb. 176. But in these the question was not raised, as it is raised in this case, simply as a bar to prevent the assertion of a right otherwise considered as well founded in law and equity. In this same case of *Stall v. Jones,* Commissioner IRVINE, delivering the opinion of this court, cited *Shubert v. Stanley,* 52 Ind. 46, *Trull v. Skinner,* 17 Pick. (Mass.) 213, and *Carpenter v. Carpenter,* 70 Ill. 157, to show that, when the mortgagor voluntarily surrenders the defeasance or abandons the payment of the debt, the conveyance *then* becomes absolute and vests complete title in the mortgagee. In *Gallagher v. Giddings, supra,* there was neglect by plaintiff, after a decree in his favor permitting redemption, to pay the money due, and thereupon the petition was dismissed. It will be seen that in all these cases there is *something to be done before* the title of the mortgagee becomes absolute. Section 10855, Ann. St. 1911, reads: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." The quitclaim deed given in the instant case was treated by the parties to it as a mortgage, and was so intended by them. We know

of no reason why the defendants should be allowed to have it considered as an absolute conveyance, contrary to the intention of the parties to it. Section 29 of the code provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 32." The plaintiffs are the real parties in interest, and therefore have the right to prosecute the case.

I dissent from the second paragraph of the syllabus because the same is not applicable to this case. When the former opinion was delivered, the issues under the pleadings were not the same as they are in the instant case.

I dissent as to the time when the statute of limitations should begin to run under the possession and claim of right to possession by Mrs. Helming, but under the rule laid down in *Hobson v. Huxtable, supra,* reluctantly concur in the judgment of affirmance which will have to be rendered.

JAMES G. HARDIN V. STATE OF NEBRASKA.

FILED NOVEMBER 1, 1912. No. 17,564.

1. **Criminal Law:** PLEA IN ABATEMENT: QUESTION FOR COURT. "Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury." *Stetter v. State*, 77 Neb. 777.

2. ———: STATUTE: TITLE: "RAILROAD CAR." The act known as "Senate File 150" (laws 1905, ch. 184) examined, and *held* that the enumeration of buildings contained within section 1 of the act, which includes "railroad car," comes fairly within and is not broader than the title.

3. **Burglary:** EVIDENCE. Evidence examined and set out in the opinion, *held* sufficient to establish the *corpus delicti*.

4. ———: INFORMATION. The information examined and set out in the opinion, *held* sufficient to sustain a conviction for burglary.

5. **Criminal Law:** EVIDENCE: ADMISSIONS. The evidence as to alleged admissions made by defendant examined and set out in the

opinion, *held* insufficient to show that the admissions, if made, were obtained under threats.

6. **Burglary:** EVIDENCE. Evidence examined and set out in the opinion, *held* sufficient to sustain the conviction.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

James E. Leyda, for plaintiff in error.

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

FAWCETT, J.

Defendant was convicted in the district court for Richardson county of the burglary of a railroad car in the yards of the Missouri Pacific Railway Company, in Falls City, and sentenced to a term in the penitentiary of not less than one nor more than ten years. From such conviction he prosecutes error to this court.

Plaintiff in error, who will be designated as defendant, in his brief presents and argues five specific grounds for reversal, which we will consider in the order in which they are presented. Upon the argument at the bar, counsel argued a further ground that the evidence was insufficient to sustain the verdict. This will also be considered in its order. The information charges that defendant "did, on or about the 30th day of July, A. D. 1911, in the county of Richardson and state of Nebraska, aforesaid, then and there being, then and there a railroad car of the Missouri Pacific Railway Company, a corporation duly organized under the laws of the state of Missouri, then and there being, wilfully, maliciously, forcibly, unlawfully, burglariously, and feloniously did break and enter, with intent the goods and chattels in said railroad car contained * * * to steal," etc.

When arraigned, defendant first pleaded not guilty, but later was granted leave to withdraw this plea and file a

plea in abatement, the only allegation in which was: "Because the statute under which said information is brought is invalid, in that it was not properly passed by the legislature which is purported to have enacted it." This plea was overruled, and this ruling forms the basis of defendant's first assignment, viz., "Because there was no trial of the issue presented in the plea in abatement." Under our holding in *Stetter v. State,* 77 Neb. 777, this assignment is without merit. We there held: "Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury."

"(2) Because the Daylight Burglary Act is unconstitutional, in that it is broader than its title." The title to the act (Senate File 150, laws 1905, ch. 184) reads: "An act to provide for the punishment of persons guilty of breaking and entering buildings of all characters, with intent to commit any felony, or with intent to steal property of any value, and to repeal sections 48 and 53 of the criminal code of Nebraska, except as to offenses heretofore committed thereunder." Section 1 of the act provides: "If any person shall wilfully, maliciously and forcibly break and enter into any dwelling house, kitchen, smokehouse, * * * station-house or railroad car, with intent to * * * commit any felony, or with intent to steal property of any value, every person so offending shall be punished by imprisonment in the penitentiary," etc. It is now contended that a railroad car is not within the title to the act for the reason that it is not a building; and numerous definitions are cited in support of this contention.

Is the statute under which the prosecution is brought invalid because in violation of the provision 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?" The question is whether the *subject* of legislation is clearly expressed in the title. The subject is defined in the title of the act as "breaking and entering buildings of all characters," with intent to commit felony

or steal. Breaking and entering a railroad car is not a different subject for legislation from breaking and entering a warehouse or other permanent structure. If it were a different subject of legislation, that of itself would prevent its being united with that subject in the same act, as no act can contain more than one subject. The subject of legislation is the breaking and entering, with intent to steal or commit felony. Is it clearly expressed in the title? The argument is that, because the title limits the subject of legislation to breaking and entering "buildings of all characters," the breaking and entering of railroad cars is not included, and therefore the subject of legislation being extended in the act to cover the breaking and entering of railroad cars is not clearly expressed in the title. The title names the two former sections covering this subject and repeals them. In those sections the breaking and entering of a railroad car is included. It is manifest from the title of this act that the purpose was to enact a new law in place of the old, and to make the title general and broad. The words "of all characters" are added to the word "buildings." These words would be wholly unnecessary if it was intended to legislate only in regard to structures of a permanent character. Any one considering this title would necessarily inquire as to the purpose and force of the added words, "of all characters." The object of the constitutional provision in question is to prevent surreptitious legislation. It is intended to enable members of the legislature, and others interested, to know from the title of the act the subject of the proposed legislation. Those interested in defining the crime of breaking and entering, which was substituted for burglary of the common law, would understand that the legislation might be extended to such constructions as were included in the former acts, and which, when we consider the derivation of the word "building," are not necessarily excluded by the use of that term. The legislature considered this title sufficient to notify all parties of the subject of the proposed legislation. If we adhere to our rule that an act of the

legislature will not be held invalid as violating the constitution unless it is clearly and unavoidably so, I think we must hold that the subject of this legislation is sufficiently expressed in the title.

"(3) Because the *corpus delicti* of the crime was not proven." Defendant contends that there is no proof in the record showing that a crime was committed within the jurisdiction of the court; that is to say, that there is no proof that the car was broken into in Richardson county. The car was sealed in Kansas City, Missouri, which is about 100 miles distant from Falls City, only about four miles of that distance lying within Richardson county. It was sealed in Kansas City July 27, and reached Falls City on the evening of July 29 or the morning of July 30. The evidence of the state shows that, when the car was first observed by the agent of the railroad company, the seal was broken. Hence, it is contended that there is no evidence to show that the seal may not have been broken and the car entered before it reached Falls City. The trouble with this contention is the evidence shows that the only thing taken from the car was one box of merchandise, which was found in the weeds close to the car, and the testimony of the witness Kendrick, who was a detective in the employ of the railroad company, shows that some time along in the night following defendant's preliminary examination defendant stated to him that "Sheldon (who was jointly informed against with defendant) broke the seal with a piece of iron, and Mr. Cantley (another detective in the employ of the railway company) asked him if it was a brake shoe, and he said, 'I believe it was;'" that the witness then asked him, "What was you doing there?" and he said, "I was looking around to see if any one was coming;" that witness then said, "You were looking out, were you?" and he answered, "You can call it what you please." This testimony by the witness Kendrick is assailed upon the ground that, at the time this admission is alleged to have been made, the circumstances under which defendant is alleged to have made the ad-

missions were as follows: During the night following defendant's preliminary hearing the two railroad detectives, Kendrick and Cantley, together with the deputy sheriff and chief of police of Falls City, took defendant from the jail out into the alley between the jail and the courthouse, and there questioned defendant; that it was then that defendant is alleged to have made the admission above referred to. The testimony of Kendrick is contradicted by defendant, who testified that these parties tried to make him admit that he had assisted in breaking into the car in question; that the railroad detective had been drinking; that they had some hot words when he "denounced them as liars and perjurers;" and that the deputy sheriff then took him back to jail and locked him up. Counsel for defendant says: "Cantley is not called as a witness, and McFarland and Aldrich only corroborate Kendrick to a very slight degree." Counsel in his brief claims that the defendant asked that his attorney be called in, but no attention was paid to it, and that the railroad detective began to threaten defendant and thereby obtained from him the admission above referred to. This claim of defendant's counsel is not sustained by the evidence, as given in the abstract prepared by him, beyond the single statement that the detectives and officers referred to "tried to make him admit that he had assisted in breaking into the car in question," but no testimony is given as to any threats, nor are any facts given from which his conclusion is drawn, that they tried to make him admit his participation in the breaking. The jury saw the witnesses upon the stand and heard their testimony, and by their verdict have determined that the breaking occurred in Richardson county. The evidence of Kendrick, which, as counsel says, is corroborated "to a very slight degree" by the witnesses McFarland and Aldrich, would seem to be sufficient to sustain that finding.

"(4) Because the jury found Hardin guilty of burglary; there being no such offense in the Nebraska criminal code." Counsel relies upon *In re McVey,* 50 Neb.

481, where it was held that, "under an information against a person for the crime of burglary, he cannot be convicted of the statutory offense of breaking and entering buildings in the day-time described in section 53 of the criminal code." At the time the opinion in that case was handed down the crime of burglary was covered by section 48 of the criminal code, which limited the breaking and entering to "the night season," and, in order to obtain a conviction under that section, it was necessary to show a breaking and entering in the night-time, while section 53 covered breaking and entering in the day-time, with intent to steal or commit felony, and the court held that, under an information based upon section 48, a party could not be convicted for the offense described in section 53. By the act of 1905, sections 48 and 53 were both repealed, and Senate File No. 150, *supra*, was substituted in lieu thereof; so that the act, as we now have it, covers the breaking and entering at any time whether day or night; the words, "in the night season," having been omitted. The attempted distinction between the terms "burglary" and "breaking and entering" is, in our judgment, entirely too technical. As applied to our present criminal code, it is an attempted distinction without a difference.

"(5) Because the admissions of the defendant to the special agent of the railroad were obtained under threats." This assignment is disposed of by our discussion of assignment No. 3.

This brings us to the contention made at the bar that the verdict is not sustained by the evidence. This contention must also be held adversely to defendant. The evidence shows without question that Sheldon entered the car in the afternoon, and threw the box of merchandise out into the weeds; that during the evening of that day he and Carlson and defendant went together to the place where this box had been thrown by Sheldon; that Sheldon then took some of the property out of the box and carried it away. It is true all three of the witnesses say

that defendant took no part in rifling the box, and it is sought to show that defendant was induced to accompany Sheldon and Carlson to the yards that evening under an intimation that they had some liquor down there. It is also shown that friendly relations existed between defendant and Sheldon, so much so that, after Sheldon was arrested and locked up, defendant took some tobacco and cigarette papers to him; that while there he saw the chief of police, and asked if he could talk to Sheldon; that the chief of police asked him a few questions; that defendant told him where he worked, "and that he had come down with this fellow, meaning Sheldon, and was a friend of his." There is also the testimony of the chief of police that on the evening of July 30 he was called to the Missouri Pacific depot, where he found a box car open and some goods scattered on the ground, including a pasteboard packing box; that he took possession of the box and contents and brought them to the courthouse, including the invoice for the goods, which he checked up and found that there were missing from the box a pair of shoes, a fountain pen, and a set of knives and forks; that he afterwards found the shoes in a room occupied by Sheldon; that some days afterwards he received from one Ridley a set of knives and forks; that on the way to the depot that evening he met Sheldon and Carlson between Seventh and Eighth streets as they were coming uptown, and west of Chase street he met defendant; that it was probably a half a block or more from the car to the point where he met defendant; that when he got to the car the door was open; that he gathered up the stuff, and was starting to get a lunch when he met defendant and two Mexicans; that he stopped them, told them he was a policeman, and that defendant was under arrest. He says: "I told him to come over to me, and he came over, and I saw a box in his pocket, a pasteboard box, about the length of the knives in question." That he took the box out of defendant's pocket and shook it, told him he was under arrest and for him to stand there; that he put

the box back into defendant's pocket, "and told him to line up with the others, three or four fellows and two Mexicans and the boys who had informed him of the car being opened. That as they lined up it was dark and they couldn't see, and Mr. Hardin (defendant) stepped back of him, and when he looked back he couldn't see him, and that he looked over and saw him go at the south end of the coal shed. That was the last he saw of him that night."

The evidence as to defendant's participation in the burglary of the car, outside of his alleged admission to the witness Kendrick, is not conclusive nor very satisfactory, but, when taken in connection with the admission testified to by Kendrick, corroborated to some extent at least, as conceded, by the witnesses McFarland and Aldrich, we think it was sufficient to sustain the verdict.

Upon consideration of the whole case, we feel that the defendant is probably guilty. The jury who heard the testimony and saw the witnesses have so found. The learned trial court, who also had the advantage of observation, which is denied to us, sustained the verdict. Under these circumstances, the judgment of the district court must be, and it is,

AFFIRMED.

REESE, C. J., dissenting.

I have read the evidence in this case, and am of the opinion that it falls far short of proving plaintiff in error guilty of any crime.

LETTON, J., dissenting.

Section 251, criminal code, provides: "This code and every other law upon the subject of crime which may be enacted shall be construed according to the plain import of the language in which it is written, * * * and no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit." To call a rail-

road car of any description a building is certainly an unusual use of that term. The word "building," if construed according to its plain import, as the statute requires, would not include an inclosed railway car; because I think no lexicographer has included any type of vehicle within the meaning of the word "building." Suppose that the legislature in the same act had included carriages, street railway cars, hacks, closed delivery wagons, and automobiles with inclosed bodies, would we say that these came properly within the term "building"? The legislature evidently made an oversight. We cannot make a new definition for the word "building" in order to remedy this omission.

HAMER, J., dissenting.

I have carefully read all the evidence. There are 156 pages in the bill of exceptions besides the exhibits. After a careful consideration of the testimony, I do not find it sufficient to sustain a verdict. To understand the evidence, it is necessary to quote from the testimony.

L. L. Aldrich, the chief of police, testified to finding a box car open and goods taken out and scattered around. A pasteboard box about 2½ feet long by 15 to 18 inches wide was found broken open in the weeds close by the car. There were packages of tea and other articles in the neighborhood of the box. There was an invoice bill. "Exhibit A." When the goods were checked up according to this invoice bill, there was a shortage. The things gone were shoes, a fountain pen, and a set of knives and forks. There was a railroad bill accompanying the bill of lading. The chief of police and his assistant found shoes in the City Hotel. They were in the room occupied by Thomas Sheldon. There was a shoe box and fountain pen and a corset cover, ten boxes of tea, and other articles. When going down to the car Aldrich met "Tom Sheldon and Carlson coming up between Seventh and Eighth streets on Stone street." He testified, "As I came down

west on Chase and Seventh, I met Mr. Hardin," the defendant. Aldrich testified that Hardin was talking to a couple of Mexicans. It was 20 or 30 minutes after nine. When Aldrich first met Hardin, Hardin was going away from the direction of the car, and was not nearer to the car than half a block or more. He was then on the sidewalk. The car that had been opened was "right north of the west end of the depot," and 50 feet or more from the depot on the north side. It was on the north track nearest the tank. On the east side of the tank there is an embankment. The door of the car was open when Aldrich arrived. The car which was open was next to the north track. There were no dwellings north or east of the car until one got on the hill. East of there are the Mausts coal sheds. Aldrich told the defendant, who was then talking with the Mexicans, that he was a policeman, and to come to him. There was a pasteboard box in the defendant's pocket that had a heavy cord tied around it. Three or four men and two Mexicans were there, also the boys who told Aldrich of the car being opened. Aldrich testified that Hardin stepped back of him, that when he looked back he could not see Hardin, and when he asked where the other man was Hardin said "over there," and when Aldrich went over he found the Mexicans still there, but Hardin had gone over the south end of the coal sheds, and Aldrich saw him no more that night. East and southeast of the car were some cars and Gillespie's boarding house. There were some knives and forks which were gotten from Joe Ridley who was arrested by Aldrich. After this the defendant was arrested by Aldrich at the Missouri Pacific shops Friday afternoon. On cross-examination Aldrich testified that it might have been a block away from the car where he met the defendant; that there was no attempt to steal the stuff taken from the car; that the defendant came up afterwards to where Aldrich was at work; that the defendant went back to where Aldrich was when Aldrich was looking at the stuff; that there were seven or eight people around there; that

the defendant was not trying to run away; that he went to Gillespie's boarding house and searched the defendant's room. From the depot to the Missouri Pacific shops is a good half mile. Aldrich arrested Sheldon at the northeast corner of Fifteenth and Stone streets, about ten blocks from the depot. He arrested Carlson at John Wilson's. Aldrich did not know whether the car was broken open where it stood, or whether it was open when it came into Falls City, and did not know that the car had been broken by any of the defendants. There were with Aldrich at the car Rice McDonald, Frank Gamblin, two Mexicans, and two boys who called him down to the depot.

Joseph Ridley, a locomotive fireman, testified that when he went to get his engine that morning, and at just about the middle of the stockyards, he saw and picked up a little box containing a set of silver knives and forks. It was southeast of the Missouri Pacific depot, the direction in which the stockyards lay and where the road ran.

R. R. McNulty testified that the defendant was drunk that night; that the defendant was out in the mudhole and staggered around; that the defendant walked up to where the men were near the car that was open, and then staggered into the mudhole. It does not seem likely he would have done this if he had been guilty.

James Kendrick, the detective in the service of the railroad company, testified in a way that was unsatisfactory. He could not remember whether he was sworn at the preliminary. He seemed to have so many cases on hand that he got confused. There were three cases—Hardin, Sheldon, and Carlson. He could not remember whether he had talked with the defendant. He was not certain of anything, except that the defendant told him that he had been in the penitentiary. He was not sure what he had testified to before; and he might have testified that the defendant told him that he saw the seal broken, and then he might not. He denied testifying at the preliminary examination that the defendant had told him that "these

parties were down there; the three of them were down there together, and he started off while they broke the car, and Sheldon jumped in and took the box out, and he saw them taken out to the head of the weeds." Possibly this witness testified to that, but he did not remember whether he did or not; also he didn't remember whether he was at Judge Spraggen's court when they were trying Sheldon; but, when asked if he was there at the time they tried Carlson, he testified: "The chances are I was." When asked whether he tried to get the defendant to waive his preliminary examination, he didn't remember whether he did or not. He finally denied that he had any talk with him personally, and said his talk was with a Mr. Cantley. He could not remember the words used by Mr. Hardin at the preliminary hearing. When asked if he had not testified that the defendant said he was down there with these two people, that he met them down there, that he was standing down there, and that they went to the car and took these boxes and hid them in the weeds, he said he did not remember anything at all about it. When he was further asked about the matter he said: "I disremember the proceedings down there."

One Ruezsegger testified that he was the clerk at Kansas City, but would not undertake to say where the seal of the car was broken; that the car would stop at several points between Kansas City and Falls City.

Dennis O'Connell, the seal clerk, testified that he did not know whether the car had been in the Kansas City yards.

L. L. Aldrich was recalled as a witness for the state, and testified that the defendant said that he was there when the car was opened, and that Tom Sheldon broke the seal; and he also testified that the defendant said that Tom Sheldon took the goods out of the car.

James McFarland testified that the defendant told him that he did not break into the car, but that Sheldon broke into the car.

Thomas Sheldon testified as a witness for the defendant

that he was one of the defendants informed against along with Albert Carlson, and that he had entered a plea of guilty to the charge made against him, that of breaking and entering into this same box car, and that he saw Hardin about 7 o'clock in the evening, which was the first time that he had seen him on that day, and that the car was open when he first saw it; that he took the box and threw it down in the weeds; that Hardin saw the box out there in the weeds, and that that was the first time Hardin had seen it to the best of his knowledge; that Hardin had nothing whatever to do with breaking the car; that he, Sheldon, found the car open at 3 o'clock in the afternoon. And on cross-examination Sheldon testified that Carlson went down with him to the train that afternoon, and that Carlson took the goods out of the car, and that the defendant was not there in the afternoon; that he, Sheldon, and Carlson went down to the car and got the box and threw it in the weeds, and that they did not meet Hardin until 7:30 that night; that he, Sheldon, took the shoes that night, and with Carlson and Hardin went through the box that night, but this was after he had taken the box and had thrown it in the weeds; that when he went up town Carlson went with him; that he met Hardin at Rawlings, Wyoming, and that he afterwards met Hardin in Omaha just before coming to Falls City.

Albert Carlson testified that he and Tom Sheldon went down to the depot about 2 o'clock in the afternoon, and that Hardin was not with them, and they did not see Hardin until 7 or 8 o'clock that evening; that he (Carlson) and Hardin did not take anything from the box; that they went up town and Hardin went home; that Tom Sheldon went into the car and told him he was looking for a fine suit of clothes, and that when the stuff was taken out of the car Hardin "was not around there at all."

O. S. Larson testified that he was the gang foreman at the Pacific shops, and that the defendant worked for

him; that he ran a drill press, and that Hardin worked at the shop on the Sunday before the day of his arrest, and that he worked there all day. His testimony corroborates the testimony of Larson and Sheldon that Hardin had nothing to do with the crime of breaking into the car.

S. A. Moore testified to the same thing—that Hardin operated a drill press and worked that Sunday and up to the day of his arrest, that he worked all that Sunday in the Missouri Pacific shops.

The defendant Hardin testified, that he boarded at Gillespie's hotel; that he met Sheldon that night on Stone street, and that Carlson told him that "he had some stuff planted and he wanted to go and get it;" that he met Sheldon and tried to get Sheldon to pay him $5 that he owed him; that Sheldon said, "Come on, let's go down to the depot, I got some shoes down there;" that when they got down to the depot they were still arguing about the $5, and that Sheldon turned off and went down the track and went over in the weeds and got a box and broke it open; that Carlson told him not to do that; that they were not going to have anything to do with it; that he saw Sheldon put the shoes in his bosom, and that they then went to the Gillespie hotel; that he did not take any of the stuff down at the depot; that he did not stand guard there; that it was Sunday evening, and they all had their coats on; that Cantley was the drunkest; that Cantley put his leg on his and leaned over onto him, and promised that he would see the master mechanic and would see that he did not lose his job.

The defendant admitted being in the penitentiary in Wyoming for passing a fraudulent check. He seems also to have been in the penitentiary in Texas because of a shooting case, and he testified that he proved by several witnesses that the man in Texas shot the first shot at him, and that he then shot in self-defense. He was a bookkeeper in the penitentiary in Wyoming, and received his pardon for good conduct.

We think that it clearly appears from the evidence that the defendant had nothing to do with the breaking. He was not down to the depot that afternoon according to the weight of the testimony, and he had nothing whatever to do with the breaking into the car. That he is innocent of the crime charged seems to be established by the uncontroverted evidence of Larson and Moore; and their testimony corroborates the testimony of Carlson and Sheldon. The defendant may not be a good citizen, but he should not be convicted and sent to the penitentiary unless he is guilty of the crime charged against him.

STATE, EX REL. NEBRASKA REPUBLICAN STATE CENTRAL COMMITTEE ET AL., APPELLEES, V. ADDISON WAIT, SECRETARY OF STATE, APPELLANT.

FILED NOVEMBER 1, 1912. No. 17,841.

1. **Elections:** NOMINATIONS: POLITICAL PARTIES. Chapter 26, Comp. St. 1911, clearly recognizes the existence of political parties, and delegates to the members of each party the right to vote at primaries and general elections for candidates of their own party, nominated by themselves without the interference of members of any other political party.

2. ———: ———: PRESIDENTIAL ELECTORS. The preferential vote given by the voters of a political party at a primary election for a particular person as the party candidate for president, while morally binding upon the delegates of such party to the national convention, has no relation whatever to candidates nominated at such primary for presidential electors.

3. ———: ———: ———. Persons nominated by a political party at a primary election as candidates for presidential electors are nominated, not as electors to vote for any particular candidate then known, but to vote, if elected, for the persons who may subsequently be nominated by the national convention of such party as candidates for the offices of president and vice president.

4. ———: PRESIDENTIAL ELECTORS: VACANCY. It is a well-settled rule at common law that if a person, while occupying one office,

accepts another incompatible with the first, he, *ipso facto*, vacates the first office, and his title thereto is thereby terminated without any other act or proceeding.

5. ———: ———: ———. In such a case one of the tests of incompatibility is whether the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for the incumbent to retain both.

6. ———: ———: FILLING VACANCY. Where it appears that acts or events have occurred rendering an office vacant, the authority having the power to fill such vacancy may treat the office as vacant and proceed to elect or appoint, according to the form of law, another to fill it.

7. ———: RIGHTS OF VOTER: ENFORCEMENT. By the statutes of this state, every voter has the right, by a single cross, or by one manipulation of the lever of a voting machine, to vote a straight ticket for the candidates of his party; and it is the right of the governing body or committee of a political party to appeal to the court to enforce such right.

8. ———: POLITICAL PARTIES: GOVERNING BODY. Under the statutes of Nebraska, the national convention of a political party, or, when the convention is not in session, its national central committee is the supreme governing body of such party as to national affairs, and has full authority to decide which of rival conventions or committees in the state is the regular and duly authorized convention or committee of such party.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, ALBERT J. CORNISH and WILLARD E. STEWART, JUDGES. *Affirmed.*

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

John L. Webster, A. W. Jefferis, Norris Brown, Aaron Wall, Amos Thomas and *Frank M. Hall, contra.*

FAWCETT, J.

Appeal from a judgment of the district court for Lancaster county, awarding relators a peremptory writ of mandamus requiring the respondent to print upon the official ballot to be used at the general election in Novem-

ber, 1912, the names of certain persons as republican presidential electors.

This case was decided October 23, but for reasons well known to the parties the writing of the opinion was left to a later date. The intention of the writer, to whom the case fell in the regular course of assignment of cases, was to write the opinion at his leisure; but upon consultation we all agreed that the writing of the opinion should be hastened, so that the reasons for our decision may be given to the public.

Article I, sec. 22, of the constitution of Nebraska provides: "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." Article II, sec. 2, of the constitution of the United States provides for the election of presidential electors in each state, in such manner as the legislature thereof may direct, the number of electors to equal the number of the state's senators and representatives in congress. Article XII, sec. 1, provides that such electors shall meet in their respective states and vote by ballot for president and vice president, make lists of the number of persons voted for, the number of votes for each, and transmit such lists duly certified to the seat of government, directed to the president of the senate.

A large number of voters of Nebraska, regardless of party, having become dissatisfied with the old order of nominating candidates for office by delegate convention, determined, if possible, to change those conditions and secure the nomination of all officers, state, district, and county, by a direct vote of the people, and to that end secured, in 1907, the adoption of a primary law which provided for the nomination of such officers by the various political parties of the state in a state-wide primary. In 1909 the legislature conceived the idea of having an open primary, and amended the then existing law so that the members of one party might, without restraint, vote for the nomination of candidates for office in any other

party. One trial of that law satisfied all parties that it was wrong in principle, and the legislature of 1911 returned to the closed primary idea and enacted the primary and election law now in force. By the terms of that act, this case must be determined. The provisions of the law, as it now stands, will be found in chapter 26, Comp. St. 1911, and the references hereinafter made to certain sections of the law will, without so stating, be understood to be sections of that chapter.

Section 101: "Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows: 1. The resignation of the incumbent. 2. His death. 3. His removal from office. 4. The decision of a competent tribunal declaring his office vacant. * * * 7. A forfeiture of office as provided by any law of the state."

Section 117*d*, subd. sec. 1*b*: "When candidates for offices of president and vice president of the United States are to be nominated, every qualified elector of a political party subject to this act shall have opportunity to vote his preference, on his party nominating ballot, for his choice for one person to be the candidate of his political party for president, and one person to be the candidate of his political party for vice president of the United States. * * * The names of any persons shall be so printed on said ballots solely on the petition of their political supporters in Nebraska, without such persons themselves signing any petition or acceptance. The names of persons in such political party who shall be presented by petition of their supporters to be party candidates for president and vice president of the United States, shall be printed on the nominating ballot, and the ballot shall be marked, and the votes shall be counted, canvassed and returned in like manner and under the same conditions as to names, petitions and other matters, as far as the same are applicable, as the names and petitions of aspirants for the party nominations for the office of governor

are now or may be by law required to be marked, filed," etc.

Section 117*f*: "In case a nomination shall be made by electors other than the candidate, said nominee shall within five days after the date said certificate shall be filed with the officer, file a statement in writing, duly verified under oath, stating that he affiliates with the party named in said certificate, that he will abide by the results of said primary, and if elected will qualify and serve as such officer. In case said statement shall not be filed within five days, the name of the candidate in the petition shall not be placed upon the primary ballot."

Section 117*r*: "Any qualified elector desiring to vote at any primary election held under the provisions of this act shall be entitled to participate in such primary election upon presenting himself at the polling place where he is entitled to vote; but he shall not be entitled to receive a primary ballot, or be entitled to vote at such primary election, until he shall have first stated to the judges of said primary election what political party he affiliates with."

Section 118*a*: "Vacancies occurring upon any party ticket after the holding of any primary shall be filled by a majority vote of the party committee of the city, district, county or state, as the case may be, and a certificate of such nomination shall be filed as required by section 5776 of Cobbey's Annotated Statutes, 1903."

Section 118*p*: "All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of this act, shall be deemed to be valid, unless objections thereto shall be duly made in writing within three (3) days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination or in the nomination affidavits of such persons, on file in that office. Objections to the use of party name may also be

made and passed upon in the same manner as objections to certificates and nomination statements. The officer with whom the original certificate was filed, or who made an affidavit to the original nominating statement, shall, in the first instance, pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by a county court, or by a judge of the district court, or by a justice of the supreme court at chambers, on or before the second Wednesday preceding the election. Such order may be made summarily upon application of any party interested, and upon such notice as the court or judge may require."

Section 118*q*: "In case of a division of any party, the secretary of state shall give the preference of party name to the convention held at the time and place designated in the call of the regularly constituted party authorities, and if the other faction or factions shall present no other party name, the secretary of state shall select a name or title, and place the same on the ballots before the list of candidates of said faction. The action of the preceding national convention of such party, regularly called, shall determine the action of the secretary of state, or the court in its decision. The secretary of state may be compelled by peremptory order of mandamus proceedings to perform his duty in this regard."

Section 125*r*: "No voting machine shall be approved by the state board of voting machine commissioners unless it shall be so constructed as to insure every voter an opportunity to vote in secrecy; that each machine shall be so constructed as to provide facilities for voting for the candidates of at least seven parties or organizations; that a straight party ticket can be voted by the operation of a single device; * * * that the voter cannot cast more than one vote for any candidate, or vote for more than one person for the same office, unless he is lawfully entitled to vote for more than one person therefor, and in that event can vote for as many persons for that office as he is by law entitled to vote for, and no more; that the

names of the candidates for presidential electors need not appear on the ballot labels, but in lieu thereof, one ballot in each party column, or row, may contain only the words 'presidential electors' preceded by the party name, and the names of the candidates for president and vice president, and every vote registered for such ballot shall operate as a vote for all candidates of such party for presidential electors."

Section 140: "All official ballots prepared under the provisions of this act shall be white in color, six inches wide, and of a good quality of news printing paper, and the names shall be printed thereon in black ink. At the top and left side of the ballot shall be printed in black-faced capital type, not less than one-eighth of an inch high, the name of each party having candidates on the ballot; and to the right of each party name, a circle one-half inch in diameter, with leaders connecting the party name to the circle. Over the top circle shall appear the following printed instructions: 'To Vote a Straight Ticket Make a Cross Within Your Party Circle.' Every ballot shall further contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names and the name of no candidate shall appear on the ballot more than once."

That the legislature by the chapter above outlined has deliberately and clearly recognized the existence of political parties and attempted to delegate to the members of each party the right to vote at the primaries and at the general election for candidates of their own party, and nominated by themselves without interference of members of any other political party, is too clear to require discussion. In *State v. Drexel,* 74 Neb. 776, 786, Mr. Chief Justice HOLCOMB, speaking for this court, said: "It is quite true, we think, that when the legislature undertakes by laws of this character to regulate and control the internal affairs of political parties, and to determine the manner and method of making party nominations for

public offices, it must do so without discrimination and with equal consideration and benefit to all. But it is equally necessary to recognize the existence of political parties and to classify them by some convenient standard." In that opinion Judge HOLCOMB quotes with approval from *State v. Jensen,* 86 Minn. 19, as follows: "We are of the opinion that the legislature may classify political parties with reference to differences in party conditions and numerical strength, and prescribe how each class shall select its candidates; but it cannot do so arbitrarily, and confer upon one class important privileges and partisan advantages and deny them to another class, and hamper it with unfair and unnecessary burdens and restrictions in the selection of its candidates."

At the primary election in April last, the republican voters were given the opportunity to express their preference for the man whom they desired to have nominated as the candidate of the republican party for the office of president. By quite a large majority Theodore Roosevelt was named as such choice. The delegates also elected at that primary to attend the republican national convention to convene in Chicago in June following were by that vote instructed to cast the solid vote of Nebraska for Mr. Roosevelt. Beyond the sitting of that convention and the nomination of a president and vice president by republican delegates of the nation there assembled, neither the duties of such delegates, nor the expression of a preference for Mr. Roosevelt by that primary, extended. The preferential vote given for Mr. Roosevelt had no relation whatever to the candidates nominated at that primary for presidential electors. It was not and could not at that time be known who would be the nominee of the national convention.

The candidates for presidential electors were nominated, not to vote for any particular candidate then known, but to vote, if elected at the November election, for the persons who might be nominated by the national convention as the candidates of the republican party for

the offices of president and vice president. At the primary election A. V. Pease, W. J. Broatch, George S. Flory, W. E. Thorne, A. R. Davis, Allen Johnson, Wesley T. Wilcox, and Alfred C. Kennedy were nominated as republican presidential electors for the state of Nebraska, to be voted for at the ensuing general election. In behalf of each of the eight persons so nominated, there had, prior to the primary, been filed with the secretary of state a petition, wherein it was represented: "We, the undersigned qualified electors of ——— County, in the state of Nebraska, affiliating with the republican party, hereby request that the name of (each of the gentlemen above named) be placed upon the official ballot of said party for the primary election to be held on the 19th day of April, 1912, as a candidate for the office of presidential elector at large." Each of the gentlemen named filed, over his respective signature, an acceptance of his nomination, as follows: "To the Honorable Secretary of State, Lincoln, Nebraska. Dear Sir: I hereby accept the nomination for the office of presidential elector at large on the republican ticket in accordance with petition filed in your office." By the acceptance of that nomination at the hands of persons "affiliating with the republican party," they pledged themselves to discharge their duties, if elected, by voting for the candidates for president and vice president who should be subsequently nominated by the national convention of that party. We are all agreed that any other construction would be farcical. When the national convention met in Chicago, it transpired that Mr. Roosevelt was not nominated as the candidate of the republican party for president, but that Mr. Taft became the nominee of that convention for president, and Mr. Sherman became the nominee for vice president. They thereby became the candidates of the republican party for those offices, and the gentlemen named, having been nominated as presidential electors upon the republican ticket, thereby became in honor bound to vote for such nominees.

After the adjournment of the republican national convention, a new national party was organized, to be known and designated as the "Progressive Party." At a national convention of that party, subsequently called, Mr. Roosevelt became the nominee of the party for president. Acting under the statutes of this state in that behalf, more than 500 legal voters, largely from the republican party, duly organized as a new party in this state under the said name of the progressive party. That convention indorsed the nomination of Mr. Roosevelt and the platform which had been adopted by its national convention in Chicago, which platform, it is conceded by all parties to this action, is in many respects in marked variance from the platform of the republican party. The state convention of that party nominated candidates for the various state offices, and also nominated eight presidential electors, six of whom were Messrs. Pease, Broatch, Flory, Thorne, Davis and Johnson. The six gentlemen named have not declined such nomination by the progressive party, but, on the contrary, by their conduct clearly show that it is their intention, if elected, to vote for the candidates of the progressive party, to wit, Mr. Roosevelt and Mr. Johnson for president and vice president, respectively. As an attempted justification of such action on their part, it was argued by counsel at the bar that, as about 80 per cent. of the republicans who voted at the April primary expressed their preference for Mr. Roosevelt as a candidate for president, the electors were thereby in effect instructed to vote for him at the November election, and that in the course they are pursuing they are simply carrying out those instructions. It was also said there is no proof in the record that either of these gentlemen has declared an intention to vote for Mr. Roosevelt. In this counsel are in error; but, if proof from witnesses were lacking, the above declaration by counsel at the bar clearly establishes the allegation of the relator that such is their determination.

It is contended by relator that, by this action on the

part of the gentlemen named, the office of each as a candidate upon the republican ticket for presidential elector became vacant, and his right to remain upon the republican ticket as a candidate for presidential elector became forfeited as effectually as if he had resigned therefrom. We are all agreed that this contention is not only founded upon high moral grounds, but is also supported by the clear current of authorities. While a nomination as a candidate for election to an office does not make the nominee, strictly speaking, an officer, he is in his relation to the party which placed its confidence in him a *quasi* officer, and his duties are to be measured by that relation.

In *State v. Anderson,* 136 N. W. (Ia.) 128, it is said: "In *Bryan v. Cattell,* 15 Ia. 538, this court held that, in determining whether a vacancy exists in an office, we are not confined to statutory causes, but may declare it vacant if it is incompatible with the office held. It is a well-settled rule of common law that if a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' (Citing numerous cases.) The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. *Bryan v. Cattel, supra.* But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' (Citing cases.) A still different definition has been adopted by several courts. It is held that in-

compatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' (Citing numerous cases.)"

In the notes to *Attorney General v. Oakman,* 86 Am. St. Rep. 574, 578 (126 Mich. 717) it is said: "The rule is well settled at common law that if a person, while occupying one office, accepts another incompatible with the first, he, *ipso facto,* vacates the first office, and his title thereto is thereby terminated without any other act or proceeding. (Citing numerous cases.) * * * The public has a right to know which office is held and which surrendered. It should not be left to chance, or to the uncertain whim of the office-holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public. (Citing cases.)"

In *State v. Goff,* 15 R. I. 505, it is held: "An office-holder accepting a second office incompatible with the first vacates his first office." In the opinion it is said: "It is well settled that, when a person accepts an office incompatible with one which he then holds, he thereby impliedly resigns or vacates his former office."

In *Attorney General v. Common Council,* 112 Mich. 145, 168, it is held: "A person who, while occupying one office, accepts another incompatible with the first, *ipso facto* vacates the first office." In the opinion it is said: "It is the universal rule that, when such incompatibility exists, the acceptance of the latter office vacates the first. *State v. Goff,* 15 R. I. 505, 2 Am. St. Rep. 921, and authorities there cited. The authorities are in substantial agreement as to the rule of incompatibility, and Mechem states it as follows: 'This incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.'"

The situation presented in the case at bar is more than one of mere incompatibility. Here the persons who have been nominated as presidential electors, having, if elected, but a single duty to perform, viz., to vote for the candidates nominated by the party by whose votes they were themselves nominated, openly declare that they will not perform that duty, but will vote for the candidates of another and distinctly antagonistic party. This would make performance of their duty impossible, and a judicial determination of the existence of a vacancy was, therefore, unnecessary. The candidates had, by their own acts, vacated their places as republican presidential electors. This action on their part *ipso facto* created six vacancies on the republican ticket for electors. These vacancies the duly recognized republican state central committee had a right to fill, and its action in that behalf is binding, not only on the secretary of state, but on the court as well.

In *Prather v. Hart,* 17 Neb. 598, we held: "Where it appears *prima facie* that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority having the power to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, to appoint or elect, according to the form of law, a person to fill it."

In *Bell v. Templin,* 26 Neb. 249, Judge MAXWELL said: "A tribunal to determine contested elections need not be, strictly speaking, a judicial body, the powers exercised being *quasi* political and administrative."

In *State v. Drexel,* 74 Neb. 776, 788, the following language by Mr. Chief Justice HOLCOMB is instructive: "By section 19 of the act the right of an elector to vote at a primary is made to depend upon his political affiliation with the party for whose candidates he desires to cast a ballot. It is therein provided that no person shall 'be entitled to vote at such primary election until he shall have first stated to the judges of said primary election

what political party he affiliates with, and whose candidates he supported at the last election, and whose candidates he intends to support at the next election.' Provisions are also made for challenging any person offering to vote at such primary election, and for his making oath to the truth of the statements above required as to party affiliation and his support of candidates of the party with whom he is offering to vote. It is difficult to perceive any valid objection to provisions of this character, when applied to a primary election law. These laws replace party nominating conventions. The regulation of the membership of the party and of the right to participate in the nomination of its candidates, in this respect, is taken from the party and placed in the control of the legislature. The integrity of the party and the success of its principles and policies can be best maintained by the participation in its affairs of those only who are at heart in sympathy with the objects and ends to be attained by the organization, and loyal to its tenets. An indiscriminate right to vote at a primary would tend, in many instances, to thwart the purposes of the organization and destroy the party. A hindrance to one, not a member of a party, from participating in the selection of the party's delegates and candidates can in no proper sense be said to interfere with the free exercise of the elective franchise as guaranteed by the constitution. All that is required is that the party offering to vote at the primary, in order to be entitled to vote with either of the parties engaged in nominating candidates thereat, shall have affiliated with such party, supported its candidates generally at the last election, and intend to do so at the next. Open declaration of allegiance to party is absolutely essential to the proper working of any primary law. 'By his mere offer to vote for delegates to a convention of any party, the elector does, in effect, declare his intention to support the nominees of such convention, and the oath is provided for as a guaranty of the truth of the declaration already made by such offer to vote.'

Rebstock v. Superior Court, 146 Cal. 308, 316, 80 Pac. 65."

When the republican state convention assembled in July, it was found to be antagonistic to the nominees of the national convention. Therefore a considerable minority of the delegates withdrew, assembled in another room, organized as a convention, indorsed the nominees of the national convention, and selected a state central committee. A like committee was also selected by the first convention. The central committee of the second convention set actively to work for the nominees of the national convention, while the other committee devoted its energies exclusively to the republican state ticket. The republican national committee on September 18, by unanimous vote, resolved that the second convention noted "be and is hereby recognized by the national republican committee as the regular republican organization of the state of Nebraska;" and "that the republican state central committee, of which Hon. F. M. Currie is chairman, and appointed by the said republican state convention, be and is hereby recognized as the regular republican state central committee of the state of Nebraska." On September 11 the Taft committee, as we may term it, met and adopted a preamble and resolutions declaring that the six electors, Pease, Broatch, Flory, Thorne, Davis, and Johnson, had, since the holding of the primary, declared their intentions, respectively, if elected as presidential electors, to vote for the nominees of the progressive party for president and vice president, and had thereby repudiated their allegiance to the republican party, repudiated and revoked the certificate of their nomination filed with the secretary of state, repudiated their acceptance of said nomination, and had betrayed their trust as republican presidential electors; therefore it was resolved that their right to "remain candidates for presidential electors on the republican ticket has become forfeited, and is terminated and vacated." At a later meeting, on September 24, the committee nominated C.

F. Reavis, George D. Smith, W. H. Kilpatrick, O. A. Abbott, Daniel B. Jenckes, and Vac Buresh as presidential electors in place of Pease, Broatch, Flory, Thorne, Davis, and Johnson. On October 9 they presented to respondent, secretary of state, a petition and certificate of nomination, in which it was recited that Pease and others had forfeited and vacated their right to appear upon the ballots at the November election as republican presidential electors; that by reason of the premises six vacancies existed in the list of republican presidential electors; that the committee had so declared, and had nominated Reavis and others to fill such vacancies; and demanded that their names be, by the secretary, printed on the ballots for the November election as republican presidential electors. The preambles and resolutions of the two meetings of the committee were attached to and made a part of their petition and certificate. No written objections to the certificate of nominations to fill vacancies filed by the committee were filed with the secretary of state, in the manner and within the time required by section 118*p*, *supra*. The right, therefore, of the committee to act in the premises is not questioned. Their demand was refused by the secretary of state, whereupon relators applied to the district court for Lancaster county for a writ of mandamus to compel him to print the names of the persons so nominated by the committee upon the official ballot as republican presidential electors. On a hearing before the three judges of that court, a writ was awarded as prayed. We are now asked to reverse that judgment.

At the time the electors were nominated at the April primary, there were but two parties which could hope to succeed in electing a presidential ticket at the November election. Since the holding of the primary and since the national conventions of these two parties, the progressive party has been organized, and is now competing with the republican and democratic parties for the election of its candidates for president and vice president, with the

hope, and possibility, of its succeeding in so doing. We have recognized that party in *Morrissey v. Wait, ante,* p. 271. The progressive party therefore now has the same legal status before the voters of this state as either of the other two parties. Any voter who desires to cast his vote for Mr. Roosevelt for president and for the other nominees of the progressive party may do so by making a cross in the party circle of that party in precincts where the voting machine is not used, and by a single manipulation of the lever of the voting machine where such machines are used. A voter who desires to vote for the candidates of the democratic party may register his vote in the same manner. But, if the decision of the respondent be sustained, no voter can so vote for the candidates upon the republican ticket. By far the greater number of voters do not know the various candidates for electors, but they do know for whom they want to vote for president and vice president. They have been in the habit in the past of voting a straight ticket, and particularly so for presidential electors. It is rare indeed that a voter "scratches" that part of his ticket. He votes for entire strangers about whom he has never read, or made inquiry, because of the fact that they stand for the candidates whose election he desires. To deprive the voters who desire to vote a straight republican ticket of the opportunity of doing so, and at the same time afford such opportunity to the voters of the other parties named, would be repugnant to every sense of honor, and would be in defiance of the just rule that important privileges and partisan advantages cannot be conferred upon one class and denied to another class by hampering it with unfair and unnecessary burdens and restrictions.

The right of every voter, by a single cross or by one manipulation of the lever of a voting machine, to vote a straight ticket for the candidates of his party is guaranteed by sections 125*r* and 140, *supra.* Any attempt, by deception or otherwise, to deprive him of that right is a violation of both the letter and spirit of our laws. If

such an attempt is made, it is the right of the governing body or committee of his party to appeal to the courts, if necessary, to protect him; and, when it is made to appear that such an attempt is intended, it is the duty of the court to prevent it. To permit the names of the six electors, who will not vote for the candidates of the republican party for president and vice president, but will vote for the candidates of another and different party, to be printed upon the official ballot as republican electors would be a gross deception, and would, without the possibility of a doubt, cause thousands of voters in this state to cast their votes for president and vice president for candidates other than their choice, and other than the candidates for whom it is their desire to vote. We cannot permit this to be done.

The judgment of the district court is therefore

AFFIRMED.

PATRICK J. TIERNEY, APPELLEE, V. EDWIN EVANS, SHERIFF, ET AL., APPELLANTS.

FILED NOVEMBER 1, 1912. No. 16,823.

1. **Judgment:** REVIVOR. Revivor of a dormant judgment under our statute has no other effect than to reinstate the judgment and authorize execution to collect the same.

2. ———: ———: PARTIES. One not a party to the original judgment who fails to appear upon service of the conditional order of revivor is not made a party to the judgment by the final order reviving the same.

3. **Execution:** INJUNCTION. One who was not a party to the proceedings in which judgment is entered may enjoin the levy of an execution upon his property to collect such judgment.

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

France & France and *H. C. Vail,* for appellants.

F. J. Mack and *C. E. Spear, contra.*

SEDGWICK, J.

In December, 1883, the St. Paul Harvester Works recovered a judgment in the county court of Boone county against Patrick Tierney. In August, 1909, the St. Paul Harvester Works filed in that court a motion and affidavit for a revivor of the judgment. A conditional order of revivor was made by the court, which was served upon this plaintiff. The sheriff's return upon the order shows that he served it personally upon "the within named Pat Tierney." This plaintiff made no appearance in the proceedings. Upon this return an order of revivor was made by the county court. Execution was then issued upon the judgment, and, the sheriff being about to levy upon the property of this plaintiff, this action was brought in the district court for Boone county against the sheriff and the county judge to restrain them from enforcing the judgment against this plaintiff. A temporary injunction was allowed, and upon the trial the injunction was made perpetual, and the defendants have appealed.

The plaintiff upon the trial testified that at the time of the entering of the judgment he was not of legal age, and was residing in the state of Missouri; that two or three years afterwards he removed to Madison county, in this state, where he resided for 19 years, and then removed to Boone county, where he had resided about 4 years at the time the conditional order of revivor was served upon him; that he never had any transactions whatever with the St. Paul Harvester Works, and was never sued by them, and that no summons had ever been served upon him at their suit. In this testimony he was supported by several witnesses, from which it appears that this plaintiff was not the party against whom the judgment of the St. Paul Harvester Works was rendered. The defendants offered no evidence upon this question, and rested their case upon the proposition that this plaintiff was bound by the order of revivor, and was estopped to deny that the judgment was against him. This posi-

tion of the defendants is wholly untenable. A judgment against one who has not been served with process and has made no appearance is not merely voidable; it is absolutely void. As said in *McKinney v. Frankfort & State Line Co.*, 140 Ind. 95, it "is a mere nullity." The evidence clearly shows that the judgment against Patrick Tierney was not a judgment against this plaintiff, Patrick J. Tierney. This plaintiff was never sued nor served, and as against him the judgment is a nullity. The proceeding in this state to revive a dormant judgment is not a new action, but is a continuation of the old. It takes the place of the old common law writ of *scire facias* for that purpose. This was early determined in this state in *Eaton v. Hasty*, 6 Neb. 419, where the authorities are cited and the matter fully considered. In that case it was sought to make the order of revivor determine certain rights of the parties. The effect of a judgment of revivor is stated in the first paragraph of the syllabus: "A judgment of revival is merely a continuation of the original action, and continues the vitality of the original judgment with all its incidents from the time of its rendition." This conclusion was cited and approved by this court in *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170. In this latter case the court said: "It is not the commencement of a civil action, but the continuation of an action previously commenced. The object in view is not to obtain a judgment, but to obtain permission of the court to execute a judgment already in existence."

Other interesting and important questions are presented in the brief, but are not necessary to this decision. There never having been any judgment against this plaintiff, and the order of revivor having no other effect than to renew the former judgment, there was no authority to levy the execution on the property of this plaintiff, and the judgment of the district court is

AFFIRMED.

STATE, EX REL. AMY M. MURPHY ET AL., RELATORS, V. GUY T. GRAVES, JUDGE, RESPONDENT.

FILED NOVEMBER 1, 1912. No. 17,587.

1. Mandamus: VACATION OF INJUNCTION. This court has jurisdiction by mandamus to compel a judge of the district court to vacate an order of injunction, if the district court was entirely without jurisdiction to make such order.

2. District Courts: POWER TO ENJOIN JUSTICE'S JUDGMENT: QUÆRE. Whether the district court has jurisdiction in an action brought solely for that purpose to enjoin the enforcement of a judgment of a justice of the peace in forcible entry and detainer on the ground that the justice had no jurisdiction because title to real estate was drawn in question is doubted, but not determined, the case being disposed of upon other grounds.

3. Injunction: ENJOINING JUDGMENT OF FORCIBLE ENTRY AND DETAINER. The district court has jurisdiction of an action to enforce the specific performance of a contract for the sale of real estate, and in such action may enjoin the prosecution of an action of forcible entry and detainer involving the same premises and pending upon appeal from justice court, and may enjoin the enforcement of the judgment of the justice while such appeal is pending.

ORIGINAL application for a writ of mandamus to compel respondent to vacate an injunction. *Dismissed.*

Harry L. Keefe and *Hiram Chase,* for relators.

Curtis L. Day and *Brome, Ellick & Brome, contra.*

SEDGWICK, J.

The plaintiffs applied to this court in its original jurisdiction for a writ of mandamus to require the defendant to vacate an order of injunction which he had issued as judge of the district court for Thurston county. The relators Amy M. Murphy, Gertrude Murphy and Alice Murphy were the owners of the land in dispute, and the relators Leisenberg and Litchie claimed an interest in the land under a lease. The Murphys contracted to sell the

land to one Harry D. Hancock, who made a substantial payment upon the contract of purchase and assumed the mortgage upon the land, agreeing by the contract to pay the balance of the purchase money when the abstract was furnished showing title. In the meantime creditors of the Murphys attached the land, and litigation arising upon this attachment appears to have prevented the completion of their contract with Hancock. Afterwards the Murphys made a contract of lease with these other relators, whereby they agreed to lease the land for the term of three years. Hancock claims the right of possession of the land under his contract, and made a contract with one Burcham, whereby he leased the land to Burcham. Burcham obtained possession of the land through an assignment of an old lease which was about to expire, and the relators Leisenberg and Litchie, claiming the right of possession under their lease with the Murphys, began an action of forcible entry and detainer against Burcham, Hancock and others in justice court, and obtained a judgment of restitution therein. The defendants in that action took an appeal to the district court, but the plaintiffs gave bond under the statute and demanded a writ of restitution to put them in possession, notwithstanding the appeal. Harry D. Hancock then began an action in the district court for a specific performance of his contract, making the Murphys defendants, and also these relators Leisenberg and Litchie and other parties claiming to be interested. In that action the injunction complained of was issued restraining the Murphys and Leisenberg and Litchie from proceeding further with their action of forcible entry and detainer, and from obtaining possession under their judgment therein. It appears from the return to the alternative writ of mandamus that since the writ was issued the Murphys have completed their contract with Hancock and have executed to him a deed of the land in controversy. They have filed herein a dismissal of this action so far as they are concerned. The relators Leisenberg and Litchie insist that they are en-

titled to a peremptory writ requiring the respondent as judge of the district court to vacate the order of injunction so far as it interferes with their obtaining possession of the premises under their judgment in forcible entry and detainer.

If the district court was entirely without jurisdiction to grant the injunction now complained of, these relators are entitled to the relief demanded. *State v. Graves,* 66 Neb. 17.

Two reasons are urged in the briefs for refusing this writ:

First. It is said that the record shows that in the action of forcible entry and detainer the title to real estate was drawn in question, and that therefore the justice of the peace had no jurisdiction and the judgment of restitution should for that reason be enjoined. The case of *Cobbey v. Wright,* 34 Neb. 771, is relied upon to support this contention. In that case a judgment had been entered against the plaintiff as garnishee, and he brought the action to restrain its enforcement. It appeared that the plaintiff had never been served as garnishee, and had no notice of the proceedings in which judgment was rendered against him. The court, therefore, which entered the judgment had no jurisdiction over the party against whom the judgment was rendered. In this case the justice court had jurisdiction over all the parties interested. It also had jurisdiction to determine the right of possession of the real estate. If the justice found from the evidence before him that the right of possession depended upon the title to the real estate, either legal or equitable, the law required him to enter judgment for the defendant. When the question was presented to him as to whether the right of possession would depend upon the title to real estate, he must determine that question from the evidence as he determined other questions of fact. If he determined that question incorrectly, it could be remedied by appeal. It is therefore by no means clear that, if the sole purpose of the injunction was to prevent the justice from making an

incorrect finding of fact and enforcing the judgment based upon such incorrect finding, the district court would have jurisdiction to grant such a writ. The determination of this case, however, does not depend upon the solving of that question.

Second. The petition in the injunction suit and the facts admitted in this record establish that the controversy between the parties was whether Mr. Hancock was entitled to a specific performance of his contract for the purchase of the land, and that the right of possession and the action of forcible entry and detainer in which that right of possession was in controversy were ancillary to and dependent upon the contract of purchase. There can be no doubt that Mr. Hancock was entitled to bring the action in the district court to enforce the specific performance of his contract, and, when that action was brought in a court of equity with general and complete jurisdiction, it would be the duty of that court to determine all ancillary matters affecting the result of that action or necessarily involved in it. If the action in equity resulted in determining that the plaintiff was entitled to a deed of the land which would carry the right of possession with it, it would be the duty of the court in determining the plaintiff's right in the land itself to also determine and enforce his right of possession. The district court was therefore not without jurisdiction to take full possession of all matters pertaining thereto.

It follows that the relators are not entitled to the peremptory writ, and the action is

DISMISSED.

STATE, EX REL. GEORGE C. CURYEA, APPELLANT, V. HARRY E. WELLS, COUNTY CLERK, APPELLEE.

FILED NOVEMBER 1, 1912. No. 17,824.

1. Elections: NOMINATIONS. The legislature of this state in providing for the "closed primary" has adopted the policy of allowing each political party to select its own candidates.
2. ———: ———. Any one who has the statutory qualifications to fill an office may be a candidate for election to that office. If he affiliates with a political party he may become the candidate of that party, or he may become a candidate independently of all parties.
3. ———: ———. Under our primary law no political party can be compelled to present as its candidate at a general election one who does not affiliate with the party so presenting him as a candidate.
4. ———: ———: FILLING VACANCIES. If a political party at its primary makes no nomination of a candidate for election to an office, a vacancy has occurred, within the meaning of the statute, and the proper party committee may fill that vacancy.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed with directions.*

A. S. Tibbets and *Sterling F. Mutz,* for appellant.

J. B. Strode, G. E. Hager and *Whedon & Peterson, contra.*

SEDGWICK, J.

At the primary election held in April, 1912, Carl O. Johnson was a candidate on the regular republican ticket for nomination as a candidate of that party at the ensuing general election for the office of county commissioner of Lancaster county. He made the necessary filings, declaring under oath that he affiliated with the republican party, and procured his name to be printed upon the regular republican ballot as the candidate of that

party. There was no candidate named on the printed ballot of the democratic primary for nomination to that office as a candidate of the democratic party. There was a blank space left upon the ballot of the democratic party for entering the name of a candidate of that party for nomination to that office. Mr. Johnson's name was written in 62 of the democratic ballots as the candidate of that party. He did not accept the nomination as the candidate of the democratic party, nor file any statement that he affiliated with that party. There is nothing in the record to show that there is any affiliation between the republican and democratic parties for the ensuing election. The proper committee of the democratic party, considering that a vacancy had occurred upon the ticket of that party, duly certified the nomination of the relator as the candidate of the democratic party. The respondent, who is county clerk of Lancaster county, refused to enter the name of the relator upon the official ballot for the ensuing election as the candidate of the democratic party for the office of county commissioner, and the relator brought this action of mandamus in the district court for Lancaster county to compel the respondent to place his name upon the official ballot as such candidate. The district court found in favor of the respondent and refused to issue a peremptory writ, and the relator has appealed to this court.

Our statute providing for primary elections recognizes the existence of organized political parties, and their right in general to regulate and control their own organizations for the purposes for which they are created. It imposes upon them certain restrictions as to the method of presenting their candidates to the voters at the general election. In the construction of the various statutes involved, we must consider both the right of the voter and the right of the candidate. Every voter has a right to be a candidate for a public office if he possesses the qualification which the law requires. If he possesses the qualifications required to fill the office, can he be the candidate

of more than one political party, and, if so, how and under what conditions? The statute provides when and how one may be a candidate of two or more political parties. If he cannot fill the requirement so as to be the candidate of any political party, he may still be a candidate at the general election by petition. The right of the voter to vote at the general election for whom he pleases cannot be limited. Whether the legislature can limit the voter in selecting a candidate for the various parties may be a debatable question. The important question here is as to the power of the legislature to protect the various political parties in their right to present candidates at the general election who affiliate with the party that presents them. And, if the legislature has such power, has it intended to require as a qualification of the candidate of a political party that he shall be in affiliation with that party? After trial of both methods the legislature has adopted what is called the closed primary. This contemplates that each political party shall have the right to select its own candidates, and shall have such protection as the law can afford in exercising that right. To this end it was necessary, and no doubt within the power of the legislature, to prescribe certain qualifications.

It is not necessary, in order to preserve the rights of the voter at the general election, that the name of a candidate should appear on the ballot more than once, nor is it necessary that he should be described on the ballot at the general election as a member of more than one political party; and the legislature, to carry out the idea of a closed primary, may well provide that the average voter shall not be deceived by a statement on the ballot at the general election that a candidate belongs to or affiliates with two antagonistic political parties, when those parties have not affiliated, and the candidate has declared under oath that he affiliates with one of them, and has refused and neglected to state that he affiliates with the other. In every instance in which the statute, as it now is, mentions the qualifications of a candidate of a political

party at the primary election, it prescribes affiliation with the party for which he proposes to be a candidate as a necessary qualification. All provisions of the open primary law which recognize the right to become a candidate of a political party without that qualification were repealed when the closed primary was provided for. Voters must declare their party affiliation when they register, and also when they vote at the primaries, and if their right to vote is challenged they must then declare their party affiliation. If they nominate candidates to be voted for at the primary election, they must declare that they affiliate with the party whose candidate they seek to nominate, and the law requires that a record be kept of the party affiliations of the voters. Ann. St. 1911, secs. 5855, 5866, 5878-5881. In all the cases provided in the statute, the candidate for nomination at the primaries must declare his party affiliation. The right to be a candidate at the general election and to have a place upon the printed ballot for that purpose is provided for. He may be such candidate independently of all parties; or, if he affiliates with any political party, he may have his name upon the ballot at the general election as the candidate of that party. If two or more political parties are affiliated for any general election, he may, of course, affiliate with both or all of them and become their candidate accordingly. But no political party can be compelled to put forward as its candidate one who does not affiliate with it. The voter at the general election may vote for whom he pleases, but may not be deceived by false labels. It surely is within the power of the legislature to prevent such deception, and we think it as clearly appears that it has intended to do so. It is not necessary to determine in this case whether a blank space should be left upon the primary ballot for inserting the name of the voter's choice as the candidate of his party. Upon this point the court is not entirely agreed. We are determining the qualifications for nominating as the candidate of a political party, and not the right to be a candidate for election to the

office. We conclude that one of the necessary qualifications for a candidate of a political party is affiliation with that party. If two political parties have affiliated for the general election, one may affiliate with both and be the candidate of both.

It is said that no vacancy had occurred upon the democratic ballot, and therefore the committee of that party was without power to appoint the relator. The statute provides: "Vacancies occurring upon any party ticket after the holding of any primary shall be filled by a majority vote of the party committee of the city, district, county or state, as the case may be, and a certificate of such nomination shall be filed as required by section 5776 of Cobbey's Annotated Statutes 1903." Ann. St. 1911, sec. 5888.

The statute of South Dakota provided that, "if for any reason *after a nomination as a party candidate for * * * state office has been made,* a vacancy shall occur," and the supreme court of that state in construing the statute gave great force to the words "after a nomination as a party candidate has been made." It was thought that the use of these words made clear "that the main purpose of the legislature in enacting the primary law was to take the making of all nominations out of the hands of conventions and political central committees, and to require that the people themselves, by their direct votes, should name party nominees; and that the only vacancies contemplated by the legislature, to be filled by conventions or central committees, are such as may occur after *the people themselves* have made nominations, and vacancies therein have occurred by death, resignation, or otherwise." *Stewart v. Polley,* 137 N. W. (S. Dak.) 565. It would seem that this construction of their statute is reasonable, as it is difficult to see what other purpose the legislature could have in inserting the words "after a nomination as a party candidate has been made." These words do not appear in our statute, and we must give the ordinary meaning to the word "occur." Webster's New International Dictionary

defines this word as follows: "To meet one's eye; to be found or met with; to present itself; to appear; to happen; to take place; as, if opportunity *occurs;* do not let it *occur* again." This seems to be plainly the sense in which the legislature used it in our statute. A vacancy on the ballot presented itself and appeared, and it was the province of the proper committee to fill such vacancy. If the only candidate voted for had died on primary day before the votes were cast, it will be conceded that a vacancy would occur. If after the primary there is a vacancy, it has "occurred," within the meaning of the statute.

The democratic committee requested Mr. Johnson to withdraw from the ticket. This, it is urged, estops the relator to dispute his qualifications to be the candidate of the party. In the letter asking Mr. Johnson to withdraw, it was stated that he was not nominated, and could not be the candidate of the democratic party. This letter must be taken rather as a demand that he withdraw his pretentions to the position than as an admission that he was duly nominated or was entitled to remain on the ballot of that party. It cannot be relied upon as an estoppel, even against the committee, much less against this relator.

For the reasons stated, the judgment of the district court is reversed and the cause remanded, with instructions to issue a peremptory writ as prayed.

REVERSED.

ROSE, J., dissenting.

As stated in the opinion of the majority, this is an application for a peremptory writ of mandamus to compel the county clerk of Lancaster county to place upon the official ballots for the election to be held November 5, 1912, the name of relator as the democratic candidate for county commissioner from the first district. After the primary election held April 12, 1912, the democratic county central committee selected relator as the democratic candidate for

the office named. He traces to that source his right to the relief demanded. He was not nominated at the primary. As a candidate for the same office the republicans regularly nominated at the primary Carl O. Johnson, who afterward accepted the republican nomination and made oath that he affiliated with the republican party. Among the reasons given by the county clerk for refusing to insert relator's name on the official ballots for the November election are the following: At the primary election in the first commissioner district the official ballots prepared for democratic electors did not contain the name of a democratic candidate for county commissioner. On the official, printed, democratic, primary ballots, however, a blank space had been left with a view to permitting each democrat to express his choice by writing in the blank the name of his preferred candidate. In the spaces thus appearing on the democratic ballots Carl O. Johnson received 62 votes, being a majority of those cast by democrats for the nomination of a candidate for county commissioner. The returns were duly canvassed and the canvassing board certified to the county clerk that Johnson was the democratic nominee. He has not declined the nomination. No objections thereto were ever filed in the county clerk's office. Johnson is therefore entitled to a place on the official ballots for the November election as the nominee of the democratic party. The trial court sustained the county clerk's defense as thus outlined and denied the writ. Relator appeals. In my view of the law the ruling of the district court is right.

Relator argued that there is no authority to nominate candidates by writing names in blank spaces on the primary ballots and that therefore Johnson is not the democratic nominee. The primary law does not forbid the making of nominations in that manner. While it does not in the body of the act itself contain in direct terms authority to vote in blank spaces, it provides: "The official primary ballot shall be printed substantially as is required by law for official ballots used at November elections,"

with an exception not material here. Comp. St. 1911, ch. 26, sec. 117*i*. The general election law to which reference is thus made provides: "Nothing in this act contained shall prevent any voter from writing on his ballot the name of any person for whom he desires to vote, for any office, and such vote shall be counted as if printed on the ballot, and marked by the voter." Comp. St. 1911, ch. 26, sec. 139. That part of the general election law relating to the preparation of the ballots for the November election further declares: "In each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote, and whose name is not printed upon the ballot." Comp. St. 1911, ch. 26, sec. 140.

The general election law requires instructions to voters as follows: "If you wish to vote for any person whose name is not printed on the ballot, write his name in full in the blank space on the ballot under the proper office you wish him to hold, and make a cross in the square opposite the written name." Comp. St. 1911, ch. 26, sec. 159, subd. 4.

The effect of the statutory references to these provisions of the general election law is to insert them in the primary law in so far as they are applicable thereto. *Shull v. Barton,* 58 Neb. 741; *State v. Junkin,* 87 Neb. 801. In preparing the ballots for the first commissioner district, the county clerk followed the foregoing provisions of statute. A ballot with a blank space for county commissioner was available to each democratic elector. Under a liberal construction of the primary law and of the constitutional provisions relating to elections as construed in *State v. Junkin,* 85 Neb. 1, the primary ballots prepared by the county clerk and the ballots cast by democrats in favor of Johnson were lawful. Exercising the right to participate at the primary in nominating a candidate to be voted for at the November election, 62 members of the democratic party voted for him. No other person received

so many votes. There is no statute prohibiting those who affiliate with one party from nominating the candidate of another party. By voting for their choice in doing so they are not disfranchised at a primary election.

Relator further argued that there was a vacancy because Johnson failed to comply with statutory provisions requiring a candidate to accept a nomination under oath, to pay the filing fee, to declare his party affiliation and to make a statement that he would qualify and serve if elected. In this connection it is insisted that the vacancy was properly filled by the nomination of relator and that his name should be printed on the ballots for the November election. Those statutory provisions evidently apply to a candidate seeking a nomination by the political party with which he affiliates. Johnson, as a candidate of the republicans, complied with the provisions of statute. His nomination by the democratic party was voluntary. He did not decline it. As a republican candidate he paid his fee, declared his party affiliation, accepted the nomination and said he would qualify and serve if elected. That he should be required to repeat these acts in relation to a rival party and declare an affiliation having no existence, under penalty of defeating the democratic nomination lawfully made, was certainly not the intention of the legislature. The statutes should not be so construed. In this view of the law there was no vacancy when the democratic county central committee selected relator as a candidate for county commissioner instead of Johnson who had been regularly nominated at the primary by the votes of the democratic electors. In my judgment the effect of directing the county clerk to print relator's name on the official ballot is to defeat part of the action of the democratic primary which was held by democrats alone without interference from republicans, to create an artificial vacancy in the first commissioner district and to permit a political committee to set aside the regular action of the voters themselves.

GUST FREEBURG V. STATE OF NEBRASKA.

FILED NOVEMBER 1, 1912. No. 17,529.

1. **Drunkards:** INSTRUCTION. The instruction set out in the opinion is *held* to be an erroneous definition of drunkenness and a state of intoxication.
2. **Witnesses:** PHYSICIANS: PRIVILEGED COMMUNICATIONS. The doctor who was called to testify as a witness on behalf of the state, and who dressed the wounds of the defendant, was incompetent to testify to the defendant's condition, over the objection of the defendant that he was disqualified by reason of section 333 of the code.

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

James I. Rhea, for plaintiff in error.

A. J. Shafer, contra.

HAMER, J.

The plaintiff in error, Gust Freeburg, hereafter designated as the defendant, was complained against in the police court of the city of Holdrege, July 5, 1911, and was charged with the violation of an alleged ordinance in that city on July 4, 1911. The plaintiff charged that the said Gust Freeburg, "on or about the 4th day of July, A. D. 1911, in the county last named (Phelps), and within the corporate limits of the city of Holdrege, then and there being, did then and there unlawfully become drunk, and was then and there found in a state of intoxication and drunkenness, contrary to section 44 of ordinance 45, of the Compiled and Revised Ordinances of the city of Holdrege." The defendant was found guilty in the police court, and sentenced to pay a fine of $10 and costs. He appealed to the district court, and was there convicted and sentenced to pay a fine of $1 and costs. He brings the case here for review.

Upon that point there seems to be a conflict of evidence, but there is no conflict touching the fact that the defendant was going home with a Mr. Levine, and the city marshal started to arrest him, and the defendant and Levine begged him not to make the arrest. The city marshal struck the defendant over the head with his revolver, but claims in justification that the defendant and Levine objected to the arrest and finally resisted. At the time this happened they were near Levine's tailor shop, and Levine said he wanted to go in his shop to get his coat, and then they would go home together. Freeburg and Levine denied making any resistance to the arrest, and it does not appear Freeburg was in any way offensive in his conduct.

Dr. S. F. Sanders was called by the county attorney, and testified as a witness on behalf of the state, and over the objection of counsel for the defendant. He testified that he was a practicing physician in the city of Holdrege, and that on the afternoon or evening of July 4, 1911, he was called upon to dress certain wounds from which the defendant was suffering; that he found the defendant at the tailor shop of Mr. Levine, and had him removed to his (Sanders') office, which was near by, and where he treated him for the injuries which he had received. He gave as a reason for believing that the defendant was intoxicated that his breath smelled of beer, and immediately after his wounds were dressed the defendant said, "I guess it is all right." The defendant had also said something else which the witness testified he was unable to remember. The fact that Sanders was a doctor, and that he had been called to attend the defendant, and testified to his opinion concerning the condition of the accused as to intoxication, would give his testimony great weight with the jury, because of the confidential relation which he sustained to the defendant, and because as a doctor his knowledge would be supposed to be superior to that of other men.

Section 333 of the code of civil procedure provides: "No practicing attorney, counselor, physician, surgeon,

minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

The foregoing section would seem to justify the exclusion of the testimony of Dr. Sanders. We think that his testimony was clearly prejudicial. *Bryant v. Modern Woodmen of America*, 86 Neb. 372; *Sovereign Camp, W. O. W., v. Grandon*, 64 Neb. 39; *Smart v. Kansas City*, 208 Mo. 162; *Gartside v. Connecticut Mutual Life Ins. Co.*, 76 Mo. 446, 43 Am. Rep. 765; *Masonic Mutual Benefit Ass'n v. Beck*, 77 Ind. 203; *Heuston v. Simpson*, 115 Ind. 62; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274.

In the last named case the doctor was asked, "What opinion did you form, based on the general sight of the man, before you made an examination, or before you had any conversation with him?" The court held that the question was properly excluded as privileged within the statute. In the opinion it is said: "We have distinctly held in such a case that the communication to the physician's sense of sight is within the statute, and as much so as if it had been oral and reached his ear."

The Missouri statute declares a physician or surgeon incompetent to testify "concerning any information which he may have acquired, * * * and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." Rev. St. Mo. 1899, sec. 4659. The Missouri supreme court on page 183 of the opinion in *Smart v. Kansas City, supra*, said: "The meaning of this section is not veiled in doubt. It disqualifies the physician and surgeon from testifying to any information acquired by them while attending their patients in a professional capacity. The wisdom of such a law is addressed to the legislative branch of the government, and not to the judiciary; the latter has to deal with its meaning, and not the policy of the statute. That policy

is not only well grounded in this state, but is firmly rooted in the jurisprudence of a majority of the states and territories of the Union."

Counsel complain of the ninth instruction. It reads: "The court instructs you, gentlemen of the jury, that where a person is under the influence of intoxicating liquor to such an extent that it affects him mentally or physically, and that such effect resulting from the use of intoxicating liquor is visible to one observing such person, then as a matter of law said person would be in a drunken or intoxicated condition, and it is for you to determine from the evidence whether the defendant in this case was in a drunken or intoxicated condition at the time of his arrest, bearing in mind that the burden of proof is upon the state to establish such fact of drunkenness or intoxication of the defendant by the evidence beyond a reasonable doubt."

In our opinion this instruction is clearly erroneous and prejudicial. It makes the mere fact that the effect resulting from the use of intoxicating liquor *is visible* sufficient evidence that the person is drunk. To illustrate: The action of the person is excluded from the consideration of the jury. The condition of the person is also by this instruction excluded from the consideration of the jury. The only thing submitted to the jury is whether the effect "is visible."

In *Standard Life & Accident Ins. Co. v. Jones,* 94 Ala. 434, 10 So. 530, the question of what constitutes intoxication is discussed, and the court say: "To be under the influence of whiskey is not necessarily to be intoxicated. One may well be said to be under the influence of strong drink when he is to *any extent* affected by it—when he feels it; and this condition may result from potations so small as not to impair any mental or physical faculty, and when the passions are not visibly excited, nor the judgment or any physical function impaired. This is very far short of 'intoxication,' which is the synonym of 'inebriety,' 'drunkenness,' implying or evidenced by undue or abnormal excitation of the passions or feelings, or the im-

pairment of the capacity to think and act correctly and efficiently." "The word 'intoxicated' is synonymous with 'drunk,' and in the Standard Dictionary 'drunk' is defined as under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and commonly to evince a disposition to violence, quarrelsomeness and bestiality." 4 Words and Phrases, 3734. "The word 'intoxication' means an abnormal mental or physical condition due to the influence of alcoholic liquors, a visible excitation of the passions, and impairment of the judgment, or a derangement or impairment of physical functions or energies. This implies a condition which would not result from the reasonable, ordinary, and moderate use of the most intoxicating liquors." 4 Words and Phrases, 3735. *Wadsworth v. Dunnam* 98 Ala. 610, 13 So. 597. "Intoxication" is a word merely synonymous with "inebriety" or "inebriation," and is expressive of that state or condition which inevitably follows from taking into the body by swallowing or drinking excessive quantities of intoxicating liquors. *Commonwealth v. Whitney*, 65 Mass. 477. The instruction set out was erroneous and prejudicial.

The judgment of the district court is

REVERSED.

SANDWICH MANUFACTURING COMPANY ET AL., APPELLANTS, V. HEINRICH B. HUCKFELDT, APPELLEE.

FILED NOVEMBER 13, 1912. No. 16,782.

Judgment: REVIVOR: PLEA OF PAYMENT: EVIDENCE. Proceedings to revive a dormant judgment. A transcript of the judgment was filed in the office of the clerk of the district court November 3, 1884. December 29, 1884, defendant conveyed certain land to plaintiff by deed containing the usual covenants of warranty, and upon which the judgment was a lien. Plaintiff paid the judgment August 6, 1885, when it was assigned to his agent, who

subsequently assigned to him. No effort was made to collect, perpetuate, or revive the judgment until 1907. Upon an application to revive the judgment, defendant pleaded payment, and testified that at the time of the sale of the real estate $1,000 of the purchase price of the land was withheld by plaintiff, with defendant's consent, with which to pay the judgment liens. There was a general finding in favor of defendant by the trial court. The sum of $1,000 was more than sufficient to cancel the judgment liens. The judgment docket contains no record of the satisfaction of the judgment. *Held*, That, if such sum was retained by plaintiff for that purpose, it would be a complete defense to his action to revive, without reference to whether the money was applied by him to the payment or not, which was a question of fact to be decided by the trial court. The finding being in favor of defendant on conflicting evidence, but which is sufficient to support the conclusion reached, will not be disturbed.

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

John C. Stevens and *J. A. Gardiner,* for appellants.

W. F. Button and *John Snider, contra.*

REESE, C. J.

On the 27th day of October, 1884, the Sandwich Manufacturing Company recovered a judgment against appellee, Huckfeldt, for the sum of $102.20 and costs of suit taxed at $4.90. A transcript was filed in the office of the clerk of the district court on the 3d day of November, 1884. An assignment of the judgment to R. S. Langley was made August 6, 1886, and on the 6th day of November, 1886, Langley assigned the same to William Gardiner, who on the 12th day of March, 1910, assigned to J. A. Gardiner, who was substituted as appellant herein January 19, 1911. No execution was issued upon the judgment, nor was any other effort made to collect it until the 2d day of October, 1907, when, the judgment being dormant, a proceeding was instituted in the district court for its revival in the name of William Gardiner as the owner thereof. In the course of time, and on the 11th day of May, 1908, an an-

swer was filed, in which the sufficiency of the petition, or application, was denied and called in question. The rendition of the judgment, the filing of the transcript, the absence of issuance of execution, and the dormancy of the judgment were admitted. All other allegations were denied. It was alleged that after said judgment was rendered, but before the institution of the revivor proceedings, defendant satisfied and discharged the judgment by payment in full. It was further alleged that the judgment was presumed to have been paid "on account of the lapse of time." A reply denying the payment was filed. A number of dilatory motions and stipulations were filed, but none of which need be noticed at this time.

It is said, and so appears, that on the 29th day of December, 1884, defendant sold and conveyed certain land in Adams county to William Gardiner, executing to him a warranty deed, subject to a mortgage of $1,800, but otherwise containing full covenants of warranty. The transcript of the judgment being then on file, it was probably a lien on the land. On the 8th day of June, 1885, the judgment plaintiff wrote Mr. Gardiner calling his attention to the fact and expressing a purpose to hold the land liable for its payment. He then paid off the judgment, and it was assigned to his agent by Ballinger & Cherry, who executed the assignment as attorneys for Sandwich Manufacturing Company. The agent afterward assigned to William Gardiner. Prior to the trial, some question having arisen as to the authority of the attorneys to assign the judgment, a paper denominated "Disclaimer and Confirmation of Assignment" was, by leave of court, filed by the Sandwich Manufacturing Company, in which, among other recitals, the assignment of the judgment "by Ballinger & Cherry, its attorneys," was approved and confirmed. This paper was in the nature of an intervention. It was subsequently stricken from the files over the exception of plaintiff, and of which he now complains. As the only matter of importance contained in the paper was the approval of the assignment by Bal-

linger & Cherry, and as the authority to make the assignment would be subject to proof upon the trial by competent evidence, we are unable to see where the court erred in the action complained of. But, even were the ruling erroneous, it could work no prejudice, as the question of authority or subsequent ratification was not thereby foreclosed. The cause was tried to the court, the result being a general finding in favor of the defendant and a dismissal of the proceedings. Plaintiffs appeal.

A number of questions are presented in the briefs and were argued at the bar, which, in the view we take of the case, it is not necessary to decide. The answer pleads payment, and defendant testified that at the time of the closing of the sale of the real estate, in the state of Illinois, the sum of $1,000 was deducted from the purchase price of the land by plaintiff Gardiner, and was to be, and he supposed was, sent to the clerk of the district court for the purpose of satisfying any judgments which might be a lien or cloud upon the title, and that he afterward drew out of the clerk's hands the overplus. As touching one view of the case, we are deprived of the testimony of the former clerk, as he is shown to be deceased. The judgments were not satisfied upon the record, nor is there any entry showing the receipt of the $1,000 by the then clerk. But there is another view of the case, which was probably adopted by the district court. This effort to revive the judgment was, in reality, instituted by and on behalf of William Gardiner, the person who purchased the land from defendant. If defendant paid or allowed plaintiff the $1,000, as testified to, for the purpose of paying the judgment, it could make no legal difference whether plaintiff remitted the money to the clerk or not, for that, as between them, would so far work a cancelation of the judgment as to prevent its revivor at the suit of plaintiff. It is true that the evidence as to that transaction is conflicting, and this is not surprising when we remember that it occurred in 1884, and this proceeding was instituted in 1907, and the trial was had in January, 1910. While a fairly rea-

sonable excuse is given for the failure to take any steps to perpetuate the life of the judgment by the issuance of execution, or to revive it for the 23 intervening years, yet that fact, coupled with the positive testimony of defendant, and the presumption of payment, probably satisfied the mind of the trial court that the money was so paid or withheld, and upon that issue the decision was made; and we do not feel justified, in view of the evidence and all the circumstances, in reversing such finding.

The judgment of the district court is therefore

AFFIRMED.

FAWCETT, J., not sitting.

LETTON, J., concurring in result only.

I am unable to take the same view as to the evidence as is taken in the majority opinion, but concur in the result for other reasons.

WILLIAM E. WALLACE, APPELLEE, V. A. W. COX ET AL., APPELLANTS.

FILED NOVEMBER 13, 1912. No. 17,068.

1. **Replevin**: JUDGMENT FOR DEFENDANT: RETURN OF PROPERTY. Where, in an action of replevin, the property in dispute is delivered to the plaintiff upon the execution of a proper bond, and the trial results in a judgment in favor of the defendant for a return of the property to him, it is the duty of the plaintiff to return the possession of the replevied property to the defendant within a reasonable time in substantially the same condition as when taken, without deterioration in value.

2. ———: ———: ———: DAMAGES. In case the replevied property is not redelivered or tendered back within a reasonable time, and, when tendered, is greatly diminished in value by use while in the possession of plaintiff, the defendant may refuse to accept or receive the property, and bring suit on the replevin bond. The measure of damages will be the value of the replevied property as found and adjudged in the replevin action, plus the costs therein, with interest.

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

Bernard McNeny and *E. U. Overman,* for appellants.

L. H. Blackledge, contra.

REESE, C. J.

This action was instituted in the district court for Webster county. It is alleged in the petition that on the 17th day of July, 1909, the Clark Implement Company, a corporation, commenced an action in that court against the plaintiff to recover the possession of certain specific personal property, which is shown to be a threshing machine and traction engine; that an order of delivery was issued, the property of the value of $2,000 taken, when a replevin bond in the sum of $4,000 was duly executed by the plaintiff in the action; that upon the trial of said cause such proceedings were had as resulted in a finding in favor of the plaintiff in this action, assessing his damages at the sum of $404.50; that the right of property and of possession were in this plaintiff, which was of the value of $2,000; that judgment was rendered in favor of this plaintiff for the said sum of $404.50, with costs taxed at $121.60, and for a return of the property, or, in lieu of such return, the value thereof, to wit, $2,000; that "defendant has not returned nor offered to return said property in the same, or substantially the same, condition in which it was taken, and no part of said judgment has been paid;" that "an execution was issued * * * on said judgment in favor of this plaintiff, which was returned wholly unsatisfied." The action is founded on the replevin bond to recover the sum of $2,526.10, being the value of the property, damages, interest, and the costs of the former suit.

The defendants Cox and Boyd answered, admitting the averments of the petition as to the prior suit and the judgment rendered therein, but allege that, after the termina-

tion of said action, the property involved in the suit was all returned to plaintiff, and in better condition than when taken under the writ of replevin. All unadmitted allegations are denied. Defendant the Clark Implement Company filed its separate answer, but which is substantially the same as that filed by Cox and Boyd. The replies are general denials. The cause was tried to a jury; the result being a verdict and judgment in favor of plaintiff for the sum of $2,686.33. A motion for a new trial having been made, overruled, and judgment entered, defendants appeal.

Some objection is made to the above quoted part of the petition, and it is contended that the use of the word "substantially" so militates against the other averments as to render them ineffectual as an allegation that the property had not been returned. As we view the case, the objection is not of much importance, as there is no contention that the property was not returned. While it is admitted by plaintiff that the property was returned, it is insisted that it was not returned in the same condition as when taken from him under the writ, and that he refused to accept it. The theory upon which the case was tried by plaintiff was that the property was not returned within a reasonable time, and, when it was returned, it was in so badly damaged a condition as to relieve plaintiff from the duty of accepting it, and gave him the option of rejecting it and suing upon the bond for the value as found and adjudged on the trial of the replevin suit. It is contended by defendants that plaintiff has no option, but must receive the property, and could then sue for the difference in its value between what it was when taken and at the time of the return. To the extent of submitting to the jury the question of the condition of the property when returned, the court adopted plaintiff's view of the law. If the court was right in this, the language of the petition to which objection is made becomes unimportant.

The trial of the replevin case was had in November, 1909, the final judgment being rendered on the 1st day of December of that year. The action was commenced in

July, 1909, the replevin bond bearing date the 19th, at which time the property was delivered to defendants. Defendants returned the property to plaintiff on or about the 25th of February, 1910, and, when examined by plaintiff and others called by him for that purpose, he gave to defendants a notice in writing that he would not accept it. This notice is dated the 26th of February, 1910, and refers to the tender of return having been made the day before. While there is a sharp conflict in the evidence as to the condition of both the separator and engine at the time the return was tendered to plaintiff, as compared with their condition when taken under the order of replevin, there is sufficient to sustain the finding of the jury that both were very materially injured by wear and breakage, and that their value was reduced probably one-half by reason of their impaired condition. So far as is shown by the record, they had been in the possession of defendants from the 19th day of July, 1909, until the 25th day of February, 1910, and there seems to be no doubt that they had been put to use during the threshing season while in defendants' possession.

It is fundamental that, where a judgment in an action of replevin is against the plaintiff, it is his duty to return the property to the defendant within a reasonable time in substantially as good condition as when taken, and this would satisfy the judgment in so far as the return had been ordered if the property was accepted by the defendant, but it would not cancel the money judgment for damages, nor would it deprive the defendant of his action for depreciation of the value of the property while out of his possession. While this is all true, yet the duty of returning the property within a reasonable time and in substantially an unimpaired condition should be performed, and it does not lie with the plaintiff in the action, after long delay, to return property badly damaged by use or otherwise, compel the defendant to accept it, and then litigate the question of damages in another action. Our statute does not provide that the property shall be returned

in the same condition as when taken, as in some states, but the holding is practically uniform that such a statute is not necessary, as we have in effect held. Some of the authorities sustaining these views we here cite, but without quoting from any: *Eickhoff v. Eikenbary*, 52 Neb. 332; *Berry v. Hoeffner*, 56 Me. 170; *Parker v. Simonds*, 8 Met. (Mass.) 205; *Capital Lumbering Co. v. Learned*, 36 Or. 544; *Childs v. Wilkinson*, 15 Tex. Civ. App. 687; *Fair v. Citizens State Bank*, 69 Kan. 353; *Douglass v. Douglass*, 21 Wall. (U. S.) 98; *Pittsburgh Nat. Bank of Commerce v. Hall*, 107 Pa. St. 583; 34 Cyc. 1551, 1552; Cobbey, Replevin (2d ed.) sec. 1182; Wells, Replevin (2d ed.) sec. 422; Shinn, Replevin, sec. 679. In some of the cases cited, and in the citations from Wells and Shinn, it is said that the party returning may do so, even if the property is depreciated in value, and leave the one to whom the return is made to his action on the bond for the deficiency, but we apprehend that in order to secure this right, if it may be so secured, the return must be had within a reasonable time, which would be soon after the judgment. In this case the offered return could scarcely be said to be within a reasonable time.

Where the property is not returned, the plaintiff's measure of damages is its value when taken under the writ, with legal interest thereon from the date of the wrongful taking by the plaintiff in replevin, but, in that event, the successful defendant must be content with a recovery of the value at the time it was taken from him, with legal interest to the time of the trial, and he can have nothing further in the way of damages.

In *Romberg v. Hughes*, 18 Neb. 579, it is said, the late Judge MAXWELL writing the opinion of the court: "It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself, and not its value. In such

case, when the property is returned, the party to whom the return is made is entitled to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking." See, also, *Aultman, Miller & Co. v. Stichler,* 21 Neb. 72.

Since the jury in the replevin suit found the value of the property in dispute to be $2,000, and upon which the judgment was rendered, and the same was not appealed from, that must be the limit of plaintiff's recovery, with legal interest from the time the property was taken under the writ.

The judgment of the district court will therefore be reversed and the cause remanded, unless the plaintiff within 60 days from the rendition of the order hereby made remits from the judgment the sum of $404.50 as of the date of the judgment in this case. If such remittitur is filed, the judgment of the district court for the sum of $2,121.60, with interest at 7 per cent. on $2,000 from the 19th day of July, 1909, will be affirmed, but at the costs of the appellee. The effect of the affirmance of the judgment in this case, as modified, will be a satisfaction of the judgment of December 2, 1909.

AFFIRMED.

SEDGWICK, J., dissenting.

This plaintiff refused to receive a return of the property replevied. That refusal is the cause of this lawsuit. Was he justified in law in so refusing? That is the question to be answered in the opinion.

1. I think the opinion construes the statute incorrectly, as hereinafter stated; but, even as the law is stated in the opinion, the petition and the evidence both failed to make a case for the plaintiff, because they did not allege or prove that there is any other or different damage to the property than that which the jury allowed in their ver-

dict in the replevin action. The allegations of the petition in this regard are only: (*a*) That in the replevin action "judgment was rendered for the defendant in the sum of $404.50 damages." (*b*) That the property was not returned "in the same, or substantially the same, condition in which it was taken." This clearly does not state a cause of action; that is, it does not state any reason for refusing a return of the property. The allegations clearly amount to saying that, because of damages which the jury in the replevin action allowed, the property was not in the same, or substantially the same, condition in which it was taken. This is as plain as though the petition had alleged that the defendant recovered $404.50 damages, and therefore his property was not in the same condition as when it was taken. The evidence is substantially the same as the petition, and therefore there is no occasion for any liberal construction of the petition. The evidence and the rulings of the trial court show plainly that the court tried the case upon the incorrect theory that this plaintiff would be justified in refusing to receive a return of the property if he could show that the property was not in the same condition when it was returned as it was when it was replevied, without regard to the fact that he had been allowed $404.50 because of the change in the condition of the property.

2. Section 191 of the code provides that when the property replevied has been delivered to the plaintiff, and the jury finds for the defendant, "they shall assess such damages as they think right and proper for the defendant." Similar words, as to the damages to be allowed, are also found in section 190 of the code. Section 191*a* of the code, which was enacted in 1873, uses somewhat different phraseology, but there is no reason for supposing that the legislature intended thereby to change the law in regard to the measure of damages. If the property replevied is delivered to the plaintiff and the plaintiff has damaged the property in any way while so in his possession, there seems to be no doubt that the defendant may upon the

trial of the replevin action recover such damages. If the plaintiff has a judgment against him for a return of the property, he must pay the damages which the jury has awarded against him for injuries to the property while in his possession. If he fails to return the property at once, and retains it, and the property is damaged in his possession while he retains it after the judgment in replevin, a different question is presented, which is not involved in this case. In this case the plaintiff retained the property from the time it was replevied in July until the trial in the following December, and upon the trial the jury assessed damages against him in the sum of $404.50. It is stated in the verdict that this is for the use of the property while in the possession of the defendant. The defendant in replevin, who is now the plaintiff in this action, is allowed to recover these damages, and also the value of the property as it was, after it had been so damaged, and this appears to be wholly upon the ground that the plaintiff in the replevin action returned the property in a damaged condition; so it appears that the property has been damaged; that the jury has fixed the amount of the damages; the plaintiff in replevin is compelled to pay it, and was required, and, of course, was allowed, to return the property as it was, after the damages were incurred which he is required to pay. The opinion says that, "while it is admitted by plaintiff that the property was returned, it is insisted that it was not returned in the same condition as when taken from him under the writ," but, if the property is damaged while the replevin action is pending and he recovers those damages in the replevin action, he cannot refuse to receive the property because of those damages. The opinion cites numerous authorities, some of which have no relation to the law point discussed in the opinion, and others are said in the opinion itself to hold a contrary doctrine. It fails to cite *Teel v. Miles,* 51 Neb. 542, and other decisions of this court which are flatly overruled by this opinion.

3. Again, it is said in the opinion that the petition al-

leged: "Defendant has not returned nor offered to return said property in the same, or substantially the same, condition in which it was taken." The allegation is subject to criticism for duplicity. It is neither a direct allegation that the property was not returned, nor is it a direct allegation that when returned it was not in the same condition as when it was taken; and, if it could be construed as an allegation that it was not in the same condition as when taken, that allegation would be wholly immaterial, since it is conceded by everybody, and so found by the jury in the replevin action, that after it was taken it was damaged in the sum of $404.50, and that the plaintiff in the replevin action must pay that amount to the defendant therein and return the property as it was at the time of the trial in the replevin action. In the view of the law stated (I think incorrectly) in the opinion, it should be shown at least that the property was damaged more than the amount which the plaintiff in that action was required to pay him on account of the damage, and should show that that damage was not included in the verdict of the jury in the replevin action.

4. It is said in the opinion that "the offered return could scarcely be said to be within a reasonable time." There is no allegation in the petition that the return was unreasonably delayed, and there is no attempt in the evidence to sustain the action upon that ground. It is not mentioned in the brief. The judgment was entered in December, and the property was returned in the following February, less than two months. The defendant in this action testified that the roads were bad at that season of the year, and that it was returned as soon as the roads were passable. The plaintiff also testified that the property was returned as soon as the roads were good, and never at any time made any objection on account of the delay.

I think the judgment of the district court should be reversed.

MILTON W. ENSIGN, APPELLEE, V. CITIZENS INTERURBAN RAILWAY COMPANY, APPELLANT; LAURA T. FUNK ET AL., APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,829.

1. **Vendor and Purchaser:** NOTICE. A purchaser of a tract of land situated near a projected and surveyed line of street railway and boulevard is not thereby charged with notice that by a subsequent change of such projected route a part of his purchase may be taken for such public improvement.

2. **Eminent Domain:** REMEDIES. If by a subsequent change of location a part of his land is so taken, and he, without objection, acquiesces in such appropriation, he will not be permitted to regain possession by an action in ejectment, but under proper pleadings in such a suit may recover the value of his land so taken.

3. **Contracts:** RESCISSION. Where a suburban landowner, in consideration of the location, construction and dedication of an interurban railway and boulevard across his premises, enters into a written contract to convey to the street railway company a part of his land for right of way purposes, and thereafter seeks to rescind his contract on the ground of fraud or mistake, he must act promptly and make known his intention to rescind upon his discovery of the facts.

4. **Specific Performance:** CONTRACT FOR RIGHT OF WAY. If, with full knowledge of all of the facts upon which he relies for a rescission of his contract, he remains silent and acquiesces in the construction of the improvement and the dedication of the boulevard to the public use, a court of equity may require him to specifically perform his contract.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed as to appellee Ensign and reversed with directions as to appellees Funk.*

E. J. Hainer, for appellant.

Shepherd & Ripley, Greene & Greene and *George A. Adams, contra.*

BARNES, J.

This action was brought by Milton W. Ensign as a suit in ejectment to recover the possession of a strip of land which is covered by a boulevard and the right of way of the defendant, the Citizens Interurban Railway Company. The defendant by its answer alleged, in substance, that on or about the 1st day of March, 1908, one Laura T. Funk, then the owner of the land in question, described as lots 48 and 52 in the northeast quarter of section 6, township 9, range 7, being desirous of obtaining a boulevard 150 feet in width and a line of street railway from the corner of Twenty-sixth and South streets in the city of Lincoln to the village of College View, over and across her said premises, made an agreement with the defendant company for such boulevard to be constructed and dedicated as a public highway, and agreed to convey to the said company or its assigns by good and sufficient special warranty deed, from said lots 48 and 52, 7½ acres, including the right of way for its interurban railway track and boulevard; that the defendant company, in good faith, relied upon her agreement, and, in pursuance of the terms and conditions thereof, did proceed to obtain the right of way for the boulevard, and caused preliminary surveys to be made of said line or route across her land and the lands of others, and thereafter proceeded diligently with the locating, laying out, establishing, building and constructing said line, and thereby performed its part of the agreement; that plaintiff Ensign had full notice and knowledge of the contract between Mrs. Funk and the company, and was induced to purchase the premises in question by reason thereof; that the contract with Mrs. Funk rested in parol until about May 1, when the same was reduced to writing and duly executed. The defendant company prayed that Laura T. Funk and Ancil L. Funk, her husband, be required by the decree of the court to convey to the company the premises described in the agreement above mentioned; that any right, title or claim of the plaintiff Ensign in and

to any part of the public road, boulevard or strip of land 150 feet in width be declared to be subject, junior and inferior to the rights of the defendant and the public.

After the defendant company filed its answer, Laura T. Funk and her husband, Ancil L. Funk, were made parties defendant, each of whom filed separate cross-answers. In the answer of Laura T. Funk it was alleged, in substance, that the agreement set forth in the answer and cross-petition of the defendant company was procured from her by fraud and misrepresentation in this: That some months prior to May 1, 1908, she agreed, under certain conditions, to dedicate to the public and the defendant company the right of way for a boulevard and electric car line 150 feet wide, running in an easterly and westerly direction through the south half of the west 10 acres of lot 52 to the village of College View, Nebraska; that all the negotiations with reference to the agreement were conducted on her part by Ancil L. Funk, who in that particular matter acted as her agent; that she was ignorant of all matters and facts connected with the transaction, save only that she signed or authorized said Ancil L. Funk to sign the particular agreement referred to at his request; that on or about May 1, 1908, the defendant company, at a time when Ancil L. Funk was away from home, and when it was impossible for her to communicate with him, came to her at her home in the city of Lincoln with a document, probably the original contract attached to the cross-petition of defendant company, and falsely and fraudulently represented to her that said contract was, to all intents and purposes, identical with the contract theretofore made between her and the defendant company; that it referred to exactly the same land described in said contract; that it provided for the conveyance of said land to the same party described therein, and that the only difference between it and the original agreement was in matter of form; that the representations so made to her were false and untrue; that the contract was not, to all intents and purposes, identical with the agreement there-

tofore made; that it referred to different land entirely from that described in the former agreement, and provided for the conveyance to a different party from that described therein, and differed from the contract in all material respects in substance and intent; that, relying upon said representations, she executed and delivered said last named contract to the defendant company.

The reply of plaintiff, Ensign, was in the nature of a denial, and concluded with a prayer that the court determine the amount of damages he had sustained, in case it was found that he was entitled to recover. The defendant company replied to the answer and cross-bill of Laura T. Funk by a general denial. There was a trial to the court without the intervention of a jury, and a finding for plaintiff Ensign, and a judgment in his favor against the defendant company for $350. The court also found that the contract executed between the company and the Funks was obtained by fraud or mistake, and denied any relief to the defendant company. From that judgment the railway company has brought the case to this court on appeal.

From the foregoing it appears that the issues to be determined between the plaintiff, Ensign, and the defendant railway company are: First. Did the plaintiff, at the time of the purchase of his tract of land from the Funks, have notice of such circumstances as to put him on his guard, and call for an inquiry with respect as to where the company had a right to permanently locate its line upon and across the premises in question? Second. If he did not have such notice, and purchased his land in good faith, what is the reasonable value of the land taken by the company, and which he seeks in this action to recover? The issues between the defendant railway company and Laura T. Funk are: First. Was the contract sued upon obtained from her by fraud and misrepresentation? Second. Can Laura T. Funk rescind the contract executed between her and the defendant railway company on account of fraud or mistake, without having given

prompt notice of her intention to rescind it upon the discovery of the facts in relation thereto? Third. Can Laura T. Funk rescind the contract on account of fraud or mistake, after having full notice of the facts, and permitting the defendant company to expend large sums of money in locating, building, constructing, equipping and putting in operation the railway and boulevard in question?

In considering the questions at issue between the plaintiff, Ensign, and the defendant railway company, it appears that when Ensign purchased his tract of land from Mrs. Funk in April, 1908, there had been a preliminary survey of the proposed line of street railway and boulevard; that its location, as evidenced by the stakes then upon the ground, indicated that no part of the Ensign purchase would be taken for either the railway or boulevard. It appears that he obtained his deed from the Funks on April 20, 1908, and immediately filed it for record in the office of the register of deeds; that while he was absent from the state some time in the latter part of August, 1908, the line was changed; that the construction proceeded on such new line, and when completed there was taken from Ensign's tract, without his consent, about three-tenths of an acre thereof. We are of opinion that he was not required by anything contained in this record to presume or expect that when the road was constructed any part of his land would be taken for that purpose. Therefore, the finding of the district court upon that point should be sustained.

We are also of opinion that under all the circumstances, as shown by the record, Ensign should not be permitted to oust the defendant company from its possession of that part of his land actually taken and occupied for the railway and the boulevard in question, but is entitled to recover the value of his land so taken. We also find sufficient evidence in the record to sustain the judgment of $350 awarded him by the trial court; and the decree appealed from, so far as it relates to plaintiff, Ensign, is affirmed.

Upon the issues between the defendant railway company and the cross-petitioners, Laura T. and Ancil L. Funk, we find that the evidence shows, without serious dispute, that the Funks entered into a contract with the defendant railway company, which was afterwards reduced to writing, and signed by both parties, as alleged in defendant's answer and cross-petition, by which, in consideration of the construction and operation of an electric street railway and a boulevard from Twenty-sixth and South streets in the city of Lincoln to Union College in the village of College View, they agreed to convey to the defendant railway company 7½ acres of land, including a strip of 150 feet in width for the right of way of the street railway and boulevard out of lots 48 and 52, situated in the northeast quarter of section 6, township 9, range 7, in Lancaster county, Nebraska; that the written contract was not obtained by fraud, misrepresentation or mistake; that the claim that the written contract provided for a route different from the one described in the original agreement is without foundation; that the street railway and boulevard run through said tracts of land in an easterly and westerly direction, as described in their original contract; that the defendant railway has complied with and performed all of the conditions, stipulations and agreements contained in the written contract on its part; that the Funks have obtained the benefits expected therefrom, and at all times have had full knowledge of any and all changes of location, including the one finally adopted for the construction of the street railway and boulevard; that during the progress of such construction they demanded from the officers of the street railway company payment for the corn growing on the proposed right of way, and in that behalf finally received therefor the sum of $100; that they made no claim of fraud, misrepresentation or mistake, and gave no notice to the railway company of any desire on their part to rescind their contract until long after the street railway was constructed and in operation, and the boulevard was

completed and dedicated to the public as a highway. It follows that, if the Funks were induced to sign the same through fraud or mistake, by their subsequent conduct they are now estopped to rescind it.

In the case of *Gallagher v. O'Neill,* 78 Neb. 671, the following language found in *Booth v. Ryan,* 31 Wis. 45, was quoted with approval: "It is a principle which has been too long and too thoroughly established in our law to admit of any doubt or discussion, either as to the principle itself or the reasons upon which it is founded, that a party claiming to rescind a contract on the ground of fraud must do so promptly upon discovery of the facts, and that if he delays, or takes any further steps in the execution of the contract, or does any act recognizing its validity, after discovery, he loses all right to this particular form of relief."

In the case of *Grymes v. Sanders,* 93 U. S. 55, it was held: "Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose, and adhere to it." The same doctrine was announced by this court in the case of *American Building & Loan Ass'n v. Rainbolt,* 48 Neb. 434.

We therefore find that the defendants Laura T. Funk and Ancil L. Funk should be required to convey to the street railway company so much of lots 52 and 48, above described, as is now embraced in the strip of land 150 feet wide, occupied by the street railway and boulevard over and across their said lots; and as to the remainder of the $7\frac{1}{2}$ acres mentioned in their contract, if any there be, the description thereof is so indefinite that a court of equity will not require its specific performance.

It follows that the decree of the district court, so far as it relates to the issues between the defendant railway company and Laura T. Funk and Ancil L. Funk, should be, and is, reversed, and the cause is remanded to the district court, with directions to render a decree in harmony with this opinion.

JUDGMENT ACCORDINGLY.

GARWOOD H. ATTWOOD, APPELLEE, V. GEORGE M. WARNER ET AL.; JENKINS LAND & LIVE STOCK COMPANY, INTERVENER, APPELLANT.

FILED NOVEMBER 13, 1912. No. 16,851.

1. **Mortgages**: POSSESSION BY MORTGAGEE: LIABILITY FOR RENT. Where a mortgagee, without an agreement therefor, takes possession of the mortgaged premises before confirmation of a valid judicial sale, he thereby becomes liable to the mortgagor or his grantees for the amount of rents and profits which he receives, or which the land would have produced if prudently managed while he retains possession thereof.

2. ———: CONVEYANCE BY MORTGAGOR: RIGHTS OF GRANTEE. A sale and conveyance by the mortgagor or owner of the equity of redemption to a *bona fide* purchaser without any reservation vests such purchaser with the right to the rents and profits, which he may have applied upon the mortgage debt.

3. **Appeal**: REMAND FOR JUDGMENT. Where, upon consideration of the evidence, it is found that the trial court failed to credit the proper amounts of rents and profits upon the mortgage debt, the supreme court will determine such amount, and remand the cause to the district court, with directions to modify the decree accordingly.

APPEAL from the district court for Dundy county: ROBERT C. ORR, JUDGE. *Affirmed in part and reversed in part.*

W. S. Morlan, Charles T. Jenkins and *Charles A. Robbins*, for appellant.

Meeker & Hines and *C. E. Eldred, contra.*

BARNES, J.

This action, when it was commenced in the district court for Dundy county, was a suit in chancery for the foreclosure of a mortgage upon 474 acres of land situated in that county and known as the Warner ranch. The mortgage was executed by the Warners, who were the owners of the land, to the Western Farm Mortgage Trust Com-

pany, for the sum of $2,500. It was sold and assigned by that company to one Garwood H. Attwood, who was the plaintiff in the foreclosure suit, and in which the mortgagors and others were the defendants. On the 9th day of April, 1894, the plaintiff obtained a decree of foreclosure as prayed. Thereafter there was a sale of the mortgaged premises, while there was on file a request for a stay, as provided by law. On an appeal by the Jenkins Land & Live Stock Company, which had become the owner of the equity of redemption, from an order of confirmation, the sale was set aside. *Jenkins Land & Live Stock Co. v Attwood,* 80 Neb. 806. Meanwhile Attwood, by his agent, went into possession of the premises, and collected the rents and profits thereof from the date of the decree to the 27th day of April, 1908, when the Jenkins Land & Live Stock Company filed its petition for intervention in the original foreclosure suit, praying for an accounting of the rents and profits, and an application thereof to the satisfaction of the decree of foreclosure. To this petition Attwood filed an answer, and upon a trial of the issues joined the district court found that at the time of the trial there was due Attwood, on his original mortgage decree, the sum of $6,474.12; that the rents and profits, while he had been in possession of the premises as mortgagee, amounted to the sum of $2,474, which should be applied in part satisfaction of the mortgage debt; that the balance due on the decree of foreclosure, after deducting the rents and profits, was $3,999.12, and from a judgment rendered upon such findings the Jenkins Land & Live Stock Company has prosecuted this appeal.

1. It is contended by the appellant that the district court erred in his finding as to the amount of rents and profits which should have been credited on the foreclosure decree, and he insists that Attwood should be charged with such an amount of rent as the land ought to or would have produced, if prudently managed; while, on the other hand, Attwood contends that he is only liable for the amount of rent actually obtained by him while he was in

possession of the premises. This court is committed to the rule for which the appellant contends. In *White v. Atlas Lumber Co.*, 49 Neb. 82, it was held that a mortgagee in possession is liable for the net rents and profits which he has received or which he might have received by the exercise of reasonable care. This rule was followed in *Hatch v. Falconer*, 67 Neb. 249, and is supported by *Huston v. Stringham*, 21 Ia. 36. It appears that this rule was adopted by the trial court, and his conclusion on this point should be affirmed.

2. It appears that one Alma E. Jewett, who was the owner of the equity of redemption, together with her husband, conveyed the land in question to the appellant, the Jenkins Land & Live Stock Company, by quitclaim deed, which contains the following provision: "By these presents do, for themselves, their heirs, executors, and administrators, remise, release, and forever quitclaim unto the said party of the second part, and to its heirs and assigns forever, all their right, title, interest, estate, claim and demand, both at law and in equity, of, in, and to all the southwest quarter (describing the mortgaged premises), together with all and singular the hereditaments and appurtenances thereunto belonging. To have and to hold the above described premises unto the said Jenkins Land & Live Stock Company, its heirs and assigns, so that neither we, the said Alma E. Jewett and Ed. Jewett, nor any person in our name and behalf, shall or will hereafter claim or demand any right or title to said premises or any part thereof, but they and every of them shall by these presents be excluded and forever barred." That afterwards Attwood, through the intervention of one Wilhelm, obtained from the Jewetts a purported assignment of the rents and profits in question; and it is argued that, by reason of that fact, the appellant is not entitled to have them applied on the foreclosure decree. We are of opinion, however, that by the quitclaim deed above mentioned the appellant obtained the right to the rents and profits, and that thereafter, when the Jewetts attempted

to assign them to Attwood, they had no interest therein. Such was the finding of the district court upon that question, and it should be affirmed.

3. It follows that the only question which remains for our determination is the one relating to the value of the rents and profits to be applied upon the mortgage debt. Upon this question the evidence is widely conflicting. Some testimony was produced by the appellant tending to show that the reasonable rental value of the premises was from $300 to $500 a year. But this, in view of the existing conditions, is in our judgment quite excessive. On the other hand, some evidence was introduced by the appellee fixing the rental value at from $75 to $125 a year. As we view the evidence, this is much less than the true rental value; and, after carefully considering all of the testimony, we find that by reasonably prudent management the ranch of 474 acres, covered by the mortgage, could have been rented for $200 a year for the 11 years of Attwood's possession. This, with interest properly computed, amounts to $2,872, which should have been applied in part satisfaction of the amount due Attwood on the foreclosure decree, and upon this question the judgment of the district court is reversed, but in all other things the decree appealed from is affirmed. The cause is therefore remanded to the district court for Dundy county, with directions to enter a decree in conformity with this opinion.

JUDGMENT ACCORDINGLY.

LONZO D. WHITFORD, GUARDIAN, APPELLANT, V. HENRY KINZEL ET AL., APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,574.

1. **Homestead: ABANDONMENT: INCOMPETENCY.** One whose mental faculties are so impaired that she is incapable of forming a clear intention to abandon her homestead will not be held to have done so merely because she departed therefrom and remained away for a short time, and until placed in an insane asylum.

2. ———: ———: BURDEN OF PROOF. All presumptions are in favor of the preservation of the homestead, and, when it is sought to show its abandonment, the burden of proof rests upon the person who attacks the homestead interest.

3. ———: WHAT CONSTITUTES. A wife owned 80 acres of land, upon which was the dwelling-house and 15 acres of cultivated land. Her husband owned the adjoining 80 acres, on which 45 acres were under cultivation. The farm was operated as a whole and rented as a whole. *Held*, No rights of creditors being involved, that the whole 160 acres constituted the family homestead.

4. **Descent and Distribution.** Where a person owning real estate dies, leaving a wife surviving, it descends, subject to his debts and the rights of homestead, one-half to the wife if there be no child, nor the issue of any deceased child or children, surviving, and, if the deceased leave relatives of his blood, the residue descends in the same manner and to the same persons as provided for the descent of real estate of deceased persons leaving no husband or wife surviving. Comp. St. 1907, ch. 23, sec. 1.

5. **Homestead:** RENTS AND PROFITS. A wife is not, by virtue of the marriage relation alone, entitled to recover the rents and profits of a portion of the family homestead owned by the husband in fee simple, either before or after an attempted conveyance by him of the premises.

6. ———: ABANDONMENT: EVIDENCE. The evidence set forth in the opinion *held* to be insufficient to establish the abandonment of a homestead.

REHEARING of case reported in 90 Neb. 573. *Former judgment of affirmance vacated, and judgment of district court reversed.*

LETTON, J.

The statement of facts found in the first paragraph of the former opinion (90 Neb. 573), so far as it goes, is correct and will not be repeated. It may be well to state, however, that at the time that Kinzel bought the property he was fully informed of the fact that Mrs. Browand was insane and under guardianship. It is also shown that Browand at first was offered $4,200 for the land, presumably with a marketable title, and that upon all the facts being disclosed, and after further negotiation, the pur-

chaser was only willing to pay the sum of $3,700, on account of the defect in the title. The deed itself, after describing the land, contained the provision: "Subject to any and all rights and interests, either legal or equitable, of my wife Frances E. Browand, and to said real estate. Subject to the taxes for the year 1906. Together with all rents from and after March 1st, 1906, with all the tenements, hereditaments and appurtenances thereunto belonging. And I, the said D. C. Browand, do hereby covenant with the said Henry Kinzel, his heirs and assigns, as follows, to wit: That I am a married man; that my wife's name is Frances E. Browand; that in the year 1886 my wife and I removed from the state of Nebraska to the state of Indiana with the intention of permanently leaving said state of Nebraska; that since the time of said removal to the said state of Indiana both of us have lived in that state and are both of us living there at the present time; that for more than fifteen years last past I have lived separate and apart from my said wife, but that we are both residents of the state of Indiana at this time and have been for over fifteen years last past; and that I am lawfully seized of said premises; that they are free from all incumbrances except as above stated," etc.

It is said in the former opinion: "The evidence is insufficient to show that at the time Mrs. Browand left Nebraska she was insane, or that her mind was so unsound or unbalanced that she was not competent to understand the nature and import of what she was doing; but it is sufficient to show that she voluntarily left her husband and abandoned her home and any right of homestead that she may have had in the lands in suit, with no intention of ever returning or of ever again asserting those rights."

Upon a careful rereading of the entire testimony, we are convinced that the first proposition quoted is sound and reflects the evidence, but the further conclusion that the evidence is sufficient to show a voluntary abandonment of her husband and her homestead rights we think is erroneous.

It is unnecessary to set forth the testimony at length. As to Mrs. Browand's mental condition, it clearly shows that at and before the time she left Nebraska she was subject to insane delusions with respect to certain subjects, but there is nothing to show that at that time she did not understand the nature and extent of her property rights, or that she was incapable of caring for herself, transacting ordinary business, or traveling alone. While there is a little uncertainty in regard to the year on the part of some of the witnesses, it seems to be established that the last time she left Nebraska was in the spring of 1886, shortly after a visit from Mr. Wright, her brother. The testimony of relatives that she visited in Indiana is that, when she came there, she merely came upon a visit, as she had done upon several occasions in previous years, that she spoke of her home in Nebraska, and that she intended to return. She tried to borrow money from her brother for that purpose. She was under a physician's care at this time. Her brother and other friends would not allow her to return to Nebraska. There is no doubt that her disease rapidly progressed after she left Nebraska, and that she gradually became more and more afflicted until it became necessary to restrain her in the asylum. For some months before she left her home, she and her husband had not lived harmoniously together. He had left the family home to board at a hotel in a town nearby. During the brother's visit, he returned to the family dwelling temporarily. After Mrs. Browand left, the husband rented the farm, stored the household goods in town, and went to Indiana. He visited with his own relatives there, and the year after his wife was committed to the asylum came back to Nebraska, sold the furniture, which had been stored, and returned to Indiana, where he continued to reside for nearly 20 years and until his death in 1908.

All presumptions should be in favor of the homestead, and, when it is sought to show an abandonment, the burden of proof should rest upon the one who attacks the homestead interest. *Union Stock Yards Nat. Bank v. Smout,*

62 Neb. 227; *Painter v. Steffen,* 87 Ia. 171; *Benbow v. Boyer,* 89 Ia. 494; *Reeseman v. Davenport,* 96 Ia. 330; *Robinson v. Charleton,* 104 Ia. 296. We are satisfied this burden has not been sustained, and that Mrs. Browand did not abandon the homestead.

Mrs. Browand owned in fee simple the west 80 acres of the quarter section, of which only 15 acres were cultivated. There were 45 acres in cultivation upon the 80 acres in dispute. The farm was operated as a whole and rented as a whole. Under these facts, the majority of the court are of the opinion that, regardless of value, the whole 160 acres constituted the homestead, following *Meisner v. Hill,* p. 435, *post.* This being so, under the rule announced in *Weatherington v. Smith,* 77 Neb. 363, the homestead right of Mrs. Browand was unimpaired by the removal of her husband while she was insane, and the deed was void in law. Adopting this construction, what are Mrs Browand's rights? Browand died without issue, but with brothers and sisters surviving. Section 1, ch. 23, Comp. St. 1907, provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance at any time during the marriage, * * * which has not been lawfully conveyed by the husband and wife while a resident of this state, or by the deceased while the husband or wife was a nonresident of this state * * * shall descend, subject to his or her debts and the rights of homestead, in the manner following: * * * Fourth. One-half to the husband or wife if there be no child, nor the issue of any deceased child or children, surviving. Fifth. If the deceased leave relatives of his or her blood, the residue of the real estate of which he or she shall die seized, in the cases above named, when not lawfully devised, shall descend subject to the rights of homestead, in the same manner and to the same persons as hereinafter provided for the descent of real estate of deceased persons leaving no husband or wife surviving." Mrs. Browand by virtue of her homestead right succeeded to a life estate in the premises upon her

husband's death, and under the foregoing provisions she inherited an undivided one-half in fee.

Browand, being the fee title holder and the head of the family, was entitled to the rents and profits until 1906 when he made the conveyance. If the conveyance was void, he was entitled to them until the time of his death in 1908. There being no proof that he failed to support his wife, she could make no claim to them as against him. This being the case, Mrs. Browand did not become entitled to the rents and profits until after Browand's death, and she takes the land subject to the duties imposed by law upon tenants for life.

The evidence shows that Mrs. Browand's guardian filed a claim against the estate of Browand for the money derived from the sale of the land, but it is not shown whether the claim was allowed. What bearing upon the rights of the parties to this suit the collection of this money from his ward's estate would have is not before us, and we express no opinion on this point. Since a considerable interval of time has elapsed since the trial, any further relevant and material facts in this connection may be brought out at another hearing. Having settled, as far as we may with the evidence before us, the legal relations of the parties, the cause is reversed and remanded to the district court for further proceedings.

REVERSED.

BARNES, FAWCETT and ROSE, JJ., dissent.

WILHELM LABS, APPELLANT, V. CHARLES LABS ET AL., APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,795.

Wills: TESTAMENTARY AGREEMENT: SPECIFIC PERFORMANCE: EVIDENCE. Where it is sought to establish an oral agreement to make a testamentary disposition of property and to set aside the provisions of a will in so far as they conflict with said alleged

agreement, the proof to establish the existence of such oral agreement must be clear, convincing and satisfactory, in order to overcome the presumption that the testator acted in good faith in the execution of the will.

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

Charles Haffke and *Thomas E. Brady,* for appellant.

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

LETTON, J.

This is an action for the specific performance of an alleged parol agreement between the plaintiff and his father, Ferdinand Labs, now deceased, that the father would make a testamentary disposition of 80 acres of land in his favor, and praying that a will executed by the father, wherein the defendants are bequeathed certain sums of money which by the will are made a charge upon the land in controversy, be set aside, that a deed executed by the father in his lifetime conveying the same premises to Ferdinand F. Labs be also set aside, and the plaintiff's title to the real estate be quieted. The district court found for the defendants and dismissed the suit. Plaintiff bases his right to recover upon the proposition that the facts in the case bring it within the rule of *Kofka v. Rosicky,* 41 Neb. 328; *Harrison v. Harrison,* 80 Neb. 103; *Peterson v. Bauer,* 83 Neb. 405; *Hespin v. Wendeln,* 85 Neb. 172; *O'Connor v. Waters,* 88 Neb. 224. Defendants assert that the evidence is wholly insufficient to establish the alleged contract. A number of questions of law as to the admission and rejection of evidence are argued in the briefs; but, owing to the view that we take with respect to the evidence, we are satisfied that, even if the district court had ruled otherwise as to the admissibility of this testimony, we would have been compelled on a view of the whole case to reach the same result. For this reason, these questions will not be considered.

Ferdinand Labs came to this country from Germany

more than 30 years ago. When he first came he became a tenant farmer in Douglas county, but finally purchased 160 acres of land, which at the time of his death was encumbered to the extent of $2,700. The land was then worth from $65 to $70 an acre. He made the will which is attacked in March, 1907, and died in July, 1909. He was the father of eight children, one of whom is the plaintiff. The others are the defendants in this case. The will, after providing for the payment of his debts, left $400 for a suitable monument and for the care of his grave. To the plaintiff, his son William, he left $1,000; to each of his sons Charles and August he left $500; to each of his three daughters he left $400; to his son Albert he devised the east one-half of the home farm of 160 acres, subject to half of the mortgage indebtedness, and charged with the payment of one-half of the debts, charges and legacies; and to his son Ferdinand F. Labs he devised the west 80 acres, subject to incumbrance, and charged to the same extent. In the interim between the making of the will and his death, Ferdinand Labs conveyed by deed to his sons Albert and Ferdinand F. the same premises which the will provided should be devised to them, subject to the same charges, and also subject to a life estate in the grantor. At the same time each son leased his portion of the land from the father, agreeing to pay $200 a year and taxes upon the property as rent for each 80-acre tract.

Coming, now, to the evidence upon which plaintiff relies: His testimony is to the effect that, when he was about 22 or 23 years of age, he and his parents went for a visit to the home of a man named Lucht, who lived near Millard; that he then heard a conversation between his father and Lucht, in the course of which Lucht asked his father what he would give William if he stayed at home, and that the father told Lucht he was going to give him an 80-acre tract if he worked for him until he got married. Plaintiff testified, further, that he continued to live upon the farm and work for his father until he was 33 years old; that his mother died about 6 years ago, and that about that time he

heard a conversation between Mr. Gehrke, the Lutheran minister, and his father; that Gehrke said, "'You better let him have the eighty now to build a house on,' and he says, 'No, you can build that after I am dead.'" He further testifies, "I asked father for wages, and he said, 'No,' he would not give me wages, but he would give me an eighty after he is dead, and that is the reason Mr. Gehrke came in there and wanted to settle between us two." On cross-examination he says that he claimed his father owed him wages from the time he was 21 years old up to that time; that he took no part in the conversation with Gehrke, and that he does not know how Gehrke came to know of the dispute; that he did not ask Gehrke to come and settle it. Other witnesses testify to statements by the father that he intended to give plaintiff 80 acres of land when William was married or that William should have 80 acres when he died, but their testimony is indefinite and does not appear to relate to any definite contract made between the father and son. On the other hand, Gehrke denies that such a conversation as William relates ever took place with the father. On cross-examination he states that, about the time spoken of by William, he had a conversation with the mother, who said that they planned to give William an eighty, but there was nothing said about any agreement having been made to that effect. Mr. Lucht was also unable to remember any such conversation as was testified to by plaintiff, and said positively none such took place.

Some other facts relating to the usage of the family and the manner in which each child was started in life by the parents cast some light upon the problem. Charles Labs was married at the age of 27. Before that time his father received the benefit of his work. Upon his marriage his father gave him $500, and by the will he is to receive $500 more, half of which is charged upon the 80 acres in controversy. August was married at the age of 22. Until that time his father received his wages. Under the will he was to receive $500, one-half of which is charged upon

this eighty. Each of the daughters went out at service, brought her wages home for the use of the family, and each at marriage received a few household goods. Under the will each will receive $400. Albert was 39 years old when the trial was had. He was married, but worked upon the home place until his father died. He received some personal property upon his marriage, and, as before stated, has received the east one-half of the quarter section, subject to the debts and charges. His inheritance will be the same as specified in the will, even if the plaintiff should recover; while Ferdinand, who turned over to the family the fruit of his labor until he was 25 years of age, at which time he was married and received some personal property, will, if the plaintiff is successful, lose his land, and will also lose $350 which he has already paid in cash in part satisfaction of the incumbrance existing upon the land at his father's death. If plaintiff prevails, one-half of all the legacies charged upon the land of Ferdinand must fail, and Ferdinand himself will lose the land. A reading of the whole record convinces us that Ferdinand Labs, who was apparently a hard-working, God-fearing, and just man, endeavored to discharge his duties to his family impartially and with justice. His conduct in this respect, subsequent to the time of the alleged making of a contract with plaintiff, seems inconsistent with plaintiff's theory.

Considering all the testimony in the record with relation to the history of the family, the conduct of each of the children with reference to the father and mother, the time each worked upon the farm, the provision made for each of them by the father when he or she married and set up housekeeping for himself or herself, and the provisions made in the will for the distribution of the property, in connection with the evidence in behalf of plaintiff, we are convinced that the plaintiff has not sustained the burden of proof by clear, convincing and satisfactory evidence, such as is required in cases of this nature.

The judgment of the district court is

AFFIRMED.

SAMUEL A. KINNEY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 13, 1912. No. 16,812.

1. **Appeal:** CONFLICTING EVIDENCE. Where the evidence is conflicting as to whether a cow that was killed by a train got on the right of way through a gate negligently left open by plaintiff or by passing through a defective right of way fence and there is sufficient evidence to support the verdict, this court will not interfere, even though it might reach a different conclusion upon the same evidence.

2. **Trial:** INSTRUCTIONS. A case will not be reversed on account of the giving of an instruction which is not based upon the evidence, where the jury has been properly instructed on the point at issue at the complainant's request, and it is not apparent that prejudice has resulted.

3. **Pleading:** ANSWER: SUFFICIENCY. An answer which admits that a railway company "is now operating" the railroad, and does not specifically deny that it was the owner of or was operating the railroad at the time of the accident, is not sufficenit to raise the issue of its ownership of or operation of the railroad at that time.

4. ———: AMENDMENT AT TRIAL: DISCRETION OF COURT. Whether defendant shall be permitted to amend an answer after a trial has been begun is a matter within the discretion of the district court, and unless abuse of such discretion is shown the action of that court will be upheld.

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

Byron Clark and *Hazlett & Jack*, for appellant.

A. D. McCandless and *Samuel Rinaker, contra.*

LETTON, J.

Plaintiff recovered a verdict and judgment against defendant upon four causes of action, the first being for the wrongful killing of a cow upon the railroad track of defendant, the others being for three separate fires in the

orchard of plaintiff, which it is alleged were caused by the negligence of defendant in operating its trains.

It is contended there is not sufficient evidence to sustain the verdict as to the first cause of action. A large number of plaintiff's cattle were on the right of way, but only one cow was killed by the train. The evidence is conflicting as to the condition of the railroad fence. On behalf of plaintiff, there is testimony that the fence was in very bad condition; that at different places the wires were off the posts for a distance of over two rods; that in another place the highest wire was only 22 inches from the ground; that at other places the wires were buried in the dirt, and at still another place the ground was washed out underneath the fence so that a person might walk beneath. Plaintiff testifies that he examined the fence on the day the cow was killed, and saw many fresh tracks where cattle had passed over it, when the wire was down, onto the right of way.

On the part of the defendant, there is testimony that the fence was in fairly good condition, although cattle could walk through at the place where the soil was washed out, but that there were no tracks there or at other points where the fence was defective. There is also proof that a gate in the fence was left open by plaintiff or his man. There is a decided conflict as to whether or not there were tracks showing that the cattle had passed through the dilapidated fence or through the gate in order to reach the right of way. The evidence being in this condition, the question of fact was for the jury to decide.

Complaint is made as to the giving and refusal of certain instructions relating to this cause of action. After stating to the jury that the law of this state required railroads to fence their tracks, and the respective claims of the plaintiff and defendant as to the manner that the cow got on the right of way, the court properly instructed the jury that, if they found she passed through the fence, the defendant was liable, but, if they believed she passed through the gate, then they should find for the defendant,

unless they found that the plaintiff was entitled to recover by reason of the negligence of the engineer. He also told the jury in instruction No. 5 "that it is the duty of the engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions upon the track, and in this case, if such a precaution would have revealed the presence of the cow on the track in time to have avoided her injury by the use of ordinary care, the railroad company was liable for injuries inflicted upon her, although she was not actually seen until too late to avoid striking her." It is said this instruction is erroneous because not applicable to any evidence in the case; that the evidence showed the cow came on the track from the borrow pit just before she was struck. The court, at defendant's request, fully instructed that, if they believed this to be true, there was no negligence in the handling of the train which would enable plaintiff to recover. We think no prejudice could be suffered under this condition of facts.

Complaint is made of the giving of instruction No. 4, for the reason that by it the jury are not required to base their findings upon the evidence in the case. We think, in view of the other instructions which were given by the court, some of them at defendant's request, in one of which the jury were expressly told they "should look wholly to the evidence for the facts," and in others they were told that, if they "found from the evidence," etc., this complaint is without merit.

Considering the entire testimony on this cause of action, the issue seems to have been fairly submitted, and we find no error therein prejudicial to defendant.

Complaint is made that the court erred in failing to submit to the jury an issue as to whether defendant in this case, the Chicago, Burlington & Quincy Railroad Company, or the Chicago, Burlington & Quincy Railway Company, was the owner of or was operating the railroad at the time stated in the petition. We think the pleadings justify the court in ignoring this so-called issue. The

answer admits that the defendant "is now operating" the railroad. It pleads that the death of the cow was caused by plaintiff's negligence, and contains a general denial as to all facts "not herein specifically admitted to be true." No specific denial of defendant's ownership of the road at the time of the accident is to be found in the answer. We think the admission that it is now operating the road carries with it, in the absence of a specific denial, the presumption that it was operating the road at the time the injuries were suffered.

It is also assigned that the court erred in refusing to permit an amendment to be made to the answer alleging negligence on the part of plaintiff in permitting weeds to stand, and rubbish to accumulate in the orchard. This amendment was proposed after the jury were impaneled for the trial. The original answer was filed on November 15, 1909. The amendment was tendered on March 3, 1910. The plaintiff's farm seems to be distant at least 15 miles from the place of trial, and any additional witnesses made necessary by the amendment would have to be summoned from that distance. Even if this amendment set up a new defense, no reason was shown why it was not tendered before the time of the trial. At such a time and under all the circumstances we think the district court was justified in refusing to permit the amendment.

Some of the witnesses for the defense testify that a number of the trees which had been damaged by the fire scorching or burning the lower limbs could be restored by pruning the injured limbs. Defendant requested an instruction that the measure of damages as to such trees "is the value of the labor of trimming off such lower limbs, as to which there is no evidence except that it would be nominal, so that for such trees you could in no event award plaintiff anything but nominal damages." We think this instruction was properly refused. It was proper for the jury to consider this testimony in arriving at their verdict as tending to mitigate the damages, but we think the tendered instruction erroneous. The jury

were instructed that the measure of plaintiff's damage was the difference in value of the trees injured or destroyed as they stood immediately before the fire and immediately after the fire, and this is the true rule, as repeatedly decided by this court.

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

AFFIRMED.

JONAS MICHAEL MUSSER, APPELLANT, V. MICHAEL P. MUSSER, APPELLEE.

FILED NOVEMBER 13, 1912. No. 17,041.

1. **Pleading**: AMENDMENT AT TRIAL: DISCRETION OF COURT. The original answer contained a plea of fraud, threats, and intimidation used to obtain the note sued upon, and also pleaded that the note was given upon a condition. The court during the trial permitted an amended answer to be filed pleading the condition, but omitting the other plea. *Held*, This was within its discretion and not erroneous.

2. **Parol Evidence**: CONDITION AFFECTING NOTE. In an action between the original parties to the instrument, it may be shown by parol that a promissory note was delivered upon a condition that it should only be payable upon a certain event. *Davis v. Sterns*, 85 Neb. 121.

3. **Bills and Notes**: CONSIDERATION. A settlement of a disputed claim may constitute a good consideration for a promissory note, provided that the claim is made by the payee in good faith and on reasonable grounds, even though he may be mistaken as to the basis of his claim.

4. ———: ———: ALTERATION OF NOTE: BURDEN OF PROOF. And when the dispute was as to whether a prior promissory note, which had been altered, was changed before or after its execution and delivery, if the claim of alteration after delivery was made upon reasonable grounds and in good faith, it was not incumbent upon the plaintiff payee to establish as a fact that the defendant maker altered the prior note after its execution.

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

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

John J. Sullivan and *C. Patterson, contra.*

LETTON, J.

This is an action upon a promissory note for $3,000, executed by the defendant in favor of the plaintiff, and due and payable one year from date at Niles, Iowa. The defendant in his original answer admitted the execution and delivery of the note, but alleged that it was without consideration, and had been procured by threats, intimidation, fraud, and undue means, and further pleaded that it had been delivered upon a condition, which is also set out in the amended answer.

The amended answer admitted the execution and delivery of the note, but alleged that it was made without consideration and that it was executed under circumstances substantially as follows: That in 1899 the plaintiff and his wife executed a note to defendant for $10,500, secured by a mortgage on land in Iowa, payable five years after date at the Citizens Bank at Rushville, Nebraska; that in 1905 defendant went to Charles City, Iowa, to collect this note; that plaintiff then asserted he had written defendant in December, 1902, to send the note and mortgage and release of the same to the bank at Charles City for payment on or before January 1, 1903, so that he could make a deed to a purchaser of the farm, and that through the negligence of defendant to forward these papers to him he had lost the sale and had been damaged in the sum of $3,000; that it was then and there agreed that defendant should execute and deliver the note sued upon, to be held in trust by plaintiff until defendant should return to his home at Rushville, Nebraska, when, if he failed to find such a letter asking him to send the papers to Charles City, then plaintiff was to return to defendant the $3,000 note. Defendant denies that plaintiff requested him to send the note and mortgage and release to Charles City, denies that he was under any obligation to do so, or

that he contributed in any way to the damages claimed by plaintiff, but admits that on January 14, 1903, plaintiff requested him by letter to send him a release of the west half of the property described in the mortgage.

The reply pleads that the mortgage securing the $10,500 note provided that, in case of the sale of the land, the whole debt should become due and payable; that about November 1, 1901, plaintiff entered into a contract of sale of a portion of the land; that he requested defendant orally and in writing to send him a release of the mortgage, so that plaintiff might pay off the same and convey the land according to his contract; that defendant orally agreed to send the release before January 1, 1903, but failed and refused to do so and to accept the money due on the mortgage; that, by reason of such failure, plaintiff lost the sale of the land, was sued by the purchaser and compelled to pay a large amount of damages; that, when defendant was in Iowa to collect the $10,500 note, plaintiff refused to pay the same, for the reason that he had been damaged by the failure to release the mortgage, and because the note had been fraudulently altered; that he then claimed $3,000 damages, and that the note sued upon was executed in settlement of this claim, and in consideration that he would pay the altered note without suit. It is also alleged that the $10,500 note was originally made payable at the Citizens National Bank at Charles City, Iowa, and that after its execution the defendant, without his knowledge or consent, altered the same so as to make it payable at the Citizens Bank, Rushville, Nebraska.

The defendant is 76 years old, lives at Rushville, Nebraska, and plaintiff is his nephew. He testified that he went to Iowa in March, 1905, to collect the $10,500 note. "I gave this note to bring about the payment of another note that I held against him for damages if it were my fault that he had damages. I told him I would pay him damages if it was my fault and if he paid me the note; and he said that if he did pay me the note he would only have my word for it, would have nothing to show; and

then I said, 'I will give you my note for $3,000, and I will pay you my note if your letters are as you state when I get home and see them.' " He also says plaintiff and his wife accused him of committing a crime by changing the place of payment of the note, and that they had written him before this that the note had been altered. He denies specifically that the place of payment of the note was changed from "Citizens National Bank, Charles City, Iowa," to "Citizens Bank, Rushville, Nebraska," after its execution and delivery, and testifies that the place of payment was changed by Judge Burr, plaintiff's attorney, who wrote the note and mortgage at his (defendant's) request, and that this was done before the note was signed. He also testifies that in the final talk at the bank in Charles City, Iowa, Mr. May, the banker, figured up the amount due on the $10,500 note, and found it to be $11,281.55. Eleven thousand dollars was paid, part in April and part in May, 1905, by remittance to Rushville from the proceeds of a loan made by plaintiff. This left $281.55 still owing. No claim was made for this until this suit was brought, and no notice was sent plaintiff that defendant had found no letter, until after the note was due. The testimony of the plaintiff and defendant agrees in most particulars as to the facts surrounding the execution and delivery of the $3,000 note, with the essential difference that plaintiff testifies that the conversation as to going home and looking for the letter had no reference to the $3,000 note, but referred to the $281.55, balance due on the $10,500 note, and that defendant agreed that, if such a letter was found, defendant was to let him have the $281.55, while, if such a letter was not found, he was to pay the full sum. Both parties testify that early in 1902 defendant knew of the sale by plaintiff of a portion of the land, deed to be made January 1, 1903, and that plaintiff desired a release of mortgage by that time, but defendant says that plaintiff was to let him know definitely in time to send it. Defendant wrote the $3,000 note himself, and, when asked why he did not write the

condition upon which he claimed it was payable into the contract, answered that it was an oversight. He also says, in substance, that he knew that, if he commenced a foreclosure action, the plaintiff, his wife and his attorney would probably testify against him that the note was changed, and, if the defense was established, his note would be void, and this influenced him in making the $3,000 note.

Sarah E. Musser, plaintiff's wife, testified that, when defendant visited the house in 1905, he was told the trouble he had caused and the damage it had been to them, and that he finally said he was willing to make it good, and that he and her husband then went to town and made a settlement. Chesta A. Musser and Mayme L. Musser, children of plaintiff, testified to the same conversation. Plaintiff testified that the place of payment of the $10,500 note was altered; that he first learned of the change when it was sent to the bank for collection in the fall of 1905; that in his opinion the words "Rushville, Nebraska" are in defendant's handwriting. He further testifies that he wrote to defendant about sending the release of mortgage about December 1, 1902; that he was unable to perform the contract of sale on account of the release not being forwarded, and that he was sued by the purchaser on this account; that afterwards the land depreciated in value so that he could not sell it; that at the time the $3,000 note was given there was a dispute as to whether the note had been changed, and also as to whether defendant had been notified to send the papers and release; that defendant finally agreed to pay $3,000 in settlement. He denies that there was a condition that defendant should not pay if he failed to find such a letter on his return to Nebraska, but that what defendant said was when he got home and looked his letters over, "If I find one letter that you wrote me that you sold that farm, I will give you the $281.55;" that, if defendant failed to find the letter, he was to let plaintiff have the $281.55, and was to notify Mr. May. If he found no letter, Mr. May was to send him the $281.55, and, if he found the letter, Mr. May was to turn the

money over to plaintiff. Mr. May testified that defendant gave him instructions to send him at Rushville $11,000 in payment of the note and mortgage; that he asked defendant what to do with the "overplus," and that he said, "I am going home, and, if I find some letters of Peep, as we call him, I shall write you to give the money to him, if the letters are the way he says they are, and, if they are as I think they are, why the money is to come to me." He also says, "I didn't hear from M. P. Musser, so I turned the money, $281, over to the plaintiff, and remitted to M. P. Musser the $11,000. M. P. Musser never wrote me in any way about the $281." He further testifies that he is intimately acquainted with the handwriting of Judge Burr, and the words "Rushville, Nebraska," in the $10,500 note are not in his handwriting.

The jury found for defendant, and a judgment of dismissal was rendered.

The first assignment of error made is that the court erred in overruling the challenge for cause of the juror David Dullaghen. We think it would have been entirely proper to have sustained the challenge to this juror, who was a director in the bank of which defendant is a director and stockholder, had known the defendant for many years, and was on intimate and friendly terms with him. The defendant was an intimate friend, and the plaintiff was a stranger. The record seems to show that defendant's peremptory challenges were exhausted before this challenge was made. While the juror seems to have been candid and honest in his replies to questions propounded, the intimate nature of his social and business relations with the defendant was such that there was a probability that, however conscientious he might be, it would be difficult for him to be entirely impartial in such a doubtful case. We think the juror should have been excused, though we would be reluctant to reverse the case and grant a new trial for the sole reason that this juror was retained.

It is next objected that the defense in the amended answer is inconsistent with that in the original answer, and

that it was such a substantial change that the court should not have permitted the same; that one who has refused to perform a contract upon an assigned ground cannot, after litigation has begun, change his defense and base it upon some other inconsistent basis. We are unable to see such a decided difference between the two answers. It is true that the first pleads that plaintiff obtained the $3,000 note by fraud, and by threats and intimidation. These words are general terms. There are no specifications, except that plaintiff falsely contended that he had sold the land and was unable to make the transfer because defendant had failed after notice to release the mortgage. It further pleads the condition which is set out in the amended answer. We think it was entirely within the discretion of the court to permit the amended answer, and that plaintiff suffered no prejudice thereby.

The next complaint is that it was erroneous to overrule the motion of plaintiff to strike out the testimony as to the condition upon which he says the note was given, because its tendency was to impeach and add to the terms of a written instrument. This, we think, also must be disregarded. We have held that, as between the original parties, a contemporaneous agreement, by the terms of which a condition was established upon which the instrument became payable, may be established by parol testimony. *Davis v. Sterns,* 85 Neb. 121; *First Nat. Bank v. Burney,* 91 Neb. 269.

The district court also committed no error in overruling a motion of plaintiff for a peremptory instruction to find in his favor. While the execution and delivery of the $3,000 note was admitted, the vital issue remained whether there was a consideration for the note, and whether it was executed and delivered upon the condition that it should only be payable in the event that defendant found a letter requesting him to send the release of mortgage before January 1, 1903.

Plaintiff complains of the giving of instruction No. 2.

We are inclined to the view that this instruction placed an undue burden upon defendant, in that it required him to establish by a preponderance of the evidence, among other things, that the place of payment of the note was at the Citizens Bank at Rushville, Nebraska. The presumption is that any alterations shown upon the face of the note were made before it was signed and delivered, and the burden of proving an alteration lies upon the person who asserts it to have been made. *Dorsey v. Conrad,* 49 Neb. 443; *Colby v. Foxworthy,* 80 Neb. 239. It is perhaps subject to criticism in some other respects, but, if error was made in giving it, it seems to us to be rather to the prejudice of defendant than plaintiff.

We are of opinion that instructions No. 4 and No. 6 are erroneous, for the reason that they make it essential to recovery that the plaintiff prove to the satisfaction of the jury that, after the plaintiff and his wife gave the $10,500 note, the defendant altered and changed the place of payment of same. Instruction No. 6 is as follows: "The jury are instructed that, if you find from the evidence that the plaintiff refused to pay said $10,500 by reason of damages alleged to have been sustained through the negligence of the defendant in failing to send a release of $10,500 mortgage to a bank in Charles City, Iowa, and the plaintiff also refused to pay said $10,500 note under the claim that the place of payment of said note had been altered and changed by the defendant, and you further find from the evidence that, after the plaintiff and his wife gave said note of $10,500, the defendant did alter and change the place of payment of said note, and there was a dispute between the plaintiff and defendant as to whether or not the plaintiff had sustained damages and the amount thereof, and that, under these circumstances and for the purpose of settling said matter, the defendant herein gave to the plaintiff the promissory note sued upon, then this would be a good and valid consideration for the making of the said note, and the plaintiff would be entitled to recover."

This instruction stated certain conditions which it became necessary for the evidence to establish in order to constitute a good and valid consideration for the making of the note and to entitle plaintiff to recover: (1) That the plaintiff refused to pay the $10,500 note by reason of the damages alleged to have been sustained; (2) that he also refused to pay, under the claim that the note had been altered; (3) that the defendant did alter and change the note; (4) that there was a dispute as to whether plaintiff had sustained damages; (5) that for the purpose of settling the matter the defendant gave the note sued upon. We think it was not essential for the plaintiff to establish the fact that the defendant altered and changed the $10,500 note. If the note showed upon its face an alteration, and the evidence is such as reasonably to justify the conclusion that the plaintiff in good faith believed that the note had been changed after it was signed and delivered, and there was an honest and well-founded difference between the parties as to whether such alteration had been made, this, in connection with the dispute between the parties as to the liability of defendant for damages incurred by reason of his failure to send a release of mortgage to plaintiff, if this claim was also made in good faith and on reasonable grounds, constituted such a controversy that a settlement of the same would constitute a good consideration. It is not the fact of alteration which is essential, it is whether or not there was a well-grounded reason for this assertion by the plaintiff, and that he made the same in good faith.

Complaint is made as to a number of other instructions asked by the defendant and refused. It is unnecessary to discuss each of these separately. Some of them are erroneous, in that they omit the element of good faith on the part of the plaintiff in making the charge that the note was altered and in making the claim for damages. Some of them, however, contain statements as to issues which should have been submitted to the jury, though perhaps not in the exact language of the requests.

The question whether, conceding that there was an adequate consideration, the note was delivered to plaintiff upon the condition that it should not be payable unless defendant on his return to Rushville found a letter written prior to January 1, 1903, requesting a release of the mortgage, seems not to have been submitted to the jury at all, except in the sixth paragraph of instruction No. 2, and, even then, in terms which were perhaps too general for the jury to extract the thought. We think that the plaintiff's side of the case should have been presented more fully.

There were really only two issues in the case: First. Was there a good consideration for the $3,000 note? Second. If there was such a consideration, was the note delivered upon a condition. We think the instructions given fail to submit these issues clearly. The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

CENTRAL NATIONAL BANK, APPELLEE, V. JOHN ERICSON, APPELLANT.

FILED NOVEMBER 13, 1912. No. 16,793.

1. **Appeal:** DIRECTING VERDICT: REVIEW. In reviewing a direction to the jury to return a verdict in favor of plaintiff, the appellate court will assume the existence of every material fact which the evidence on behalf of defendant establishes or tends to prove, and give him the benefit of proper inferences from such facts.

2. **Bills and Notes:** DEFENSE OF FRAUD: BURDEN OF PROOF. Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder.

3. ———: BONA FIDE PURCHASER: QUESTION FOR JURY. In a suit on a promissory note, a peremptory instruction in favor of plaintiff on the ground that the note was purchased from an innocent holder is erroneous, where reasonable men may properly infer from all the facts and circumstances of which there is proof that the holder in making the purchase acted on behalf of plaintiff, who had actual knowledge of valid defenses.

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

J. C. Saylor, John A. Miller and *John N. Dryden,* for appellant.

N. P. McDonald, contra.

ROSE, J.

This is a suit on a promissory note for $500, dated February 12, 1909, and due October 1, 1909. On the face of the instrument John H. Bearss is payee and John Ericson maker. The Central National Bank of Kearney is plaintiff and John Ericson, John H. Bearss and Frank E. Wilcox are defendants. *Bona fide* transfers for value before maturity without notice of defenses, from Bearss to Wilcox, from Wilcox to the State Bank of Riverdale, and from the latter to plaintiff, are alleged in the petition. For the purposes of review the defenses pleaded by Ericson may be summarized as follows: There was no consideration for the note. With others aggregating $2,000 it was given to Bearss for a one-sixth interest in a patent right for a five-horse doubletree. With the aid of Wilcox, Bearss falsely represented the article to be a new and workable invention of the value of $100,000. It would not work and was of no value. Bearss, with the aid of Wilcox, fraudulently induced Ericson to sign the note by falsely representing to him that it contained the words, "given for a patent right on a five-horse doubletree, and void if doubletree fails to work," and, "note to bear 7 per cent. interest when business pays 10 per cent." Ericson is an old man and cannot read without his glasses. He did not have them with him when he signed the note, and did not know what he was signing, but relied upon the false representations of Bearss and Wilcox as to the contents of the note. Before he signed it, they entered into an agreement with him that the notes would not be sold, but would be returned to him, if the patent right did not prove to

be beneficial. That agreement was violated. Plaintiff procured possession of the note with full knowledge of the facts constituting the defenses pleaded. The State Bank of Riverdale was not a purchaser in good faith, but had due notice of the infirmities in the note before it purchased and transferred it. After the parties had adduced their proofs on both sides of the issues raised by the pleadings, the following charge was given: "The court instructs the jury to find for plaintiff on the ground that the Riverdale bank became an innocent purchaser of the note, and plaintiff, through it, became an innocent holder." From a judgment in favor of plaintiff, Ericson has appealed.

The correctness of the peremptory instruction in favor of plaintiff is the controlling question. Since the trial court directed a verdict in favor of plaintiff, it is necessary, in reviewing that ruling, to assume the existence of every material fact which the evidence on behalf of Ericson establishes or tends to prove, and to give him the benefit of proper inferences from such facts. *Nothdurft v. City of Lincoln*, 66 Neb. 434; *Paxton v. State*, 59 Neb. 460; *Harris v. Lincoln Traction Co.*, 78 Neb. 681; *Tate & Ehrhardt v. Loney*, 85 Neb. 559.

The answer alleges, and the evidence tends to show, fraud in the inception of the note. It was incumbent on plaintiff, therefore, in making its case to comply with the following rule of law: Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder. *Wyman v. Searle*, 88 Neb. 26; *Norwood v. Bank of Commerce*, 77 Neb. 205; *Lahrman v. Bauman*, 76 Neb. 846; *Thompson v. West*, 59 Neb. 677; *National Bank of Battle Creek v. Miller*, 51 Neb. 156; *Kelman v. Calhoun*, 43 Neb. 157; *Violet v. Rose*, 39 Neb. 660; *Haggland v. Stuart*, 29 Neb. 69. This feature of the case must also be considered in reviewing the peremptory instruction.

Ericson testified that during the second week in March,

1909, he learned the notes were not drawn according to agreement, and that he then notified all the banks in Kearney, including plaintiff and its cashier, of his defenses, and warned them not to buy the notes; that plaintiff's cashier, in response to the notice, said, "I will not buy them;" that after Ericson had been notified in October, 1909, that the note in suit was in possession of plaintiff, he went into its place of business and inquired of its cashier: "Didn't I notify you last spring not to buy it?" He further testified that the cashier replied: "Yes; I don't want you to have any hard feelings against me. I haven't bought this note. I just took it as collateral from Wilcox. Bearss owed something on a threshing machine and I took them as collateral. If I can't collect from you, I will have to collect out of Wilcox." Other evidence tends to prove: The business of the State Bank of Riverdale is conducted in a little town a few miles from Kearney. Its capital stock is $5,000. Legally it cannot make an individual loan in excess of $1,000. It was a correspondent of plaintiff. It kept an account at plaintiff's bank. It bought commercial paper for plaintiff. Though Wilcox transacted business with plaintiff in Kearney at a time when it was buying such paper, he entered into correspondence with the State Bank of Riverdale and offered to sell two of Ericson's notes at a discount. The three notes, aggregating $2,000, were received by the State Bank of Riverdale March 31, 1909. The same day it sent to Wilcox its draft on plaintiff's bank for $1,650. A few hours after the purchase it sent the note in suit to plaintiff without making any indorsement thereon, and received credit on its account for the sum paid to Wilcox. The State Bank of Riverdale made no profit on the transaction, but understood in advance that the notes should be sent to plaintiff when purchased from Wilcox. No transaction showing a transfer from Wilcox to the State Bank of Riverdale was entered on its books, nor did the note itself show that the State Bank of Riverdale was a transferee. From all the facts and circumstances of which

there is proof, reasonable men might properly infer that the State Bank of Riverdale acted for plaintiff in purchasing the note in suit, when the latter had full knowledge of the defenses thereto, and that therefore plaintiff was not an innocent holder, as instructed by the trial court. In this view of the testimony the case ought to have been submitted to the jury.

Reasons for this conclusion were recently stated by the supreme court of Iowa as follows: "It is ordinarily to be expected, in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law." *Arnd v. Aylesworth*, 145 Ia. 185, 29 L. R. A. n. s. 638.

For the error in directing a verdict for plaintiff, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

HAMER, J., dissenting.

I dissent from the views expressed in the majority opin-

ion upon the ground that there was no offer upon the part of the defendant to prove that the cashier or any officer of the plaintiff bank had any knowledge of the alleged fraudulent inception of the note sued on at the time the same was delivered to the plaintiff. Nor is there sufficient evidence, as it seems to me, to prove any improper purpose upon the part of any officer of the plaintiff.

JOHN S. MOORE, APPELLANT, V. LETTA F. BRITIZUS ET AL., APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,815.

Deeds: CANCELATION: EVIDENCE. In a suit in equity to cancel a deed as having been procured by undue influence and by promise of services never performed, decree in favor of defendant affirmed as being a proper determination of the issues under the evidence.

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

H. C. Vail, for appellant.

W. L. Rose and *W. F. Critchfield, contra.*

ROSE, J.

The relief sought by plaintiff is the cancelation of a deed to a quarter-section of land in Boone county. It was executed October 17, 1900, and promptly delivered. Plaintiff was grantor, and his daughter, Letta F. Moore, now Letta F. Britizus, was grantee. At the time he was a widower, 71 years old. He had a number of children, but all were married or absent except grantee, who remained single until she was 30. In 1903 she married and moved to South Dakota. Three years later she went to California, where she still resides. In the deed grantee reserved the right to use and occupy the premises during the remainder of his life, and exercised that right nine years

before bringing suit. Plaintiff alleged, and attempted to prove, that he was infirm in body and mind, that his daughter unduly influenced him to execute the deed by promising to remain at home with him and to care for him during the remainder of his life, and that she failed to keep her promises. Grantee denied undue influence or fraud, pleaded that the deed was executed for a valuable consideration paid in other lands and in a valid note, and that the condition alleged in the petition was no part of the transaction, though she never refused to provide a home for her father. The trial resulted in a dismissal of the suit, and plaintiff has appealed.

The question presented by the record is: What does equity require under the evidence? After a careful consideration of the proofs of both parties, the conclusion is unanimous that there must be a finding in favor of grantee on all the controverted issues. It follows that the decree below is without error.

AFFIRMED.

NATIONAL ENGRAVING COMPANY, APPELLANT, V. QUEEN CITY LAUNDRY, APPELLEE.

FILED NOVEMBER 13, 1912. No. 16,818.

1. **Trial:** FINDINGS BY COURT. Where an action at law is tried in the district court without a jury, findings of fact have the same force as a verdict.

2. **Parol Evidence:** CONTRACT FOR ADVERTISING. Where a written order for advertising matter shows on its face that it does not contain the entire contract of the parties, or a description of such matter, oral warranties made by an agent and the use of a sample exhibited by him in procuring the order may, in a proper case, be shown by parol, though the order contains a provision that the principal will not be bound by terms not embodied in the written instrument.

3. **Sales:** REFUSAL TO ACCEPT. Independently of express contract, a purchaser by sample may refuse to receive the goods, when offered, if they fail to correspond to the sample.

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

J. W. James, for appellant.

Tibbets, Morey & Fuller, contra.

ROSE, J.

The amount in controversy is $41.99. At 154 Nassau street, New York, plaintiff was engaged in supplying advertising matter to merchants and others, while defendant was conducting a laundry at Hastings. This is an action to recover the agreed price of advertising matter alleged to have been furnished by plaintiff to defendant under the following contract: "It is agreed that the National Engraving Company will not be held responsible for any provisions not embodied in writing herein, and that this contract cannot be canceled without the written consent of the said company. National Engraving Company, 154 Nassau Street, New York: You are hereby authorized to furnish the undersigned one cut and reading matter weekly for our exclusive use in advertising the laundry business in the city of Hastings, state of Nebraska, only, for a term of not less than one year from commencement of service, and until notified in writing to discontinue same, for which we agree to pay to your order at New York the sum of seventy-five cents and postage for each cut at the end of each calendar month. Interchangeable base will be furnished free to subscriber. Dated Aug. 27, 1907. Queen City Laundry, R. L. Sabin, Mgr."

Plaintiff's claim is composed of 53 weekly items, beginning August 30, 1907, and ending August 29, 1908, each item being: "One cut, reading matter and postage, @ 79c," with 12 cents added to the total for extra postage. The claim was resisted on the ground that an agent for plaintiff, in procuring the order, represented and warranted the advertising matter would be the work of highly skilled artists; that it would be first class and well adapted

to defendant's business; that the cuts offered were cheap and inferior in quality, and did not in any respect comply with the agent's representations and warranties; that the agent in procuring the order displayed a sample of the cuts to be sent to defendant; that the work offered was inferior to the sample; that defendant canceled the order after two or three cuts had been received, returned them, and thereafter refused to accept any more. The action was commenced in the county court and dismissed. Upon appeal to the district court, the case was tried without a jury. There the court found in favor of defendant on all the issues, and from a judgment of dismissal plaintiff has appealed to this court.

The findings below have the same force as a verdict. Plaintiff argues, however, that the evidence is insufficient to sustain the judgment. There is testimony tending to show that, promptly after the first cut was received, defendant wrote a letter to plaintiff, and therein objected to the character of the work and to the advertising matter furnished, intimating that it was not adapted to defendant's business, and saying: "If this is a sample of the class of cuts you are turning out, you may discontinue sending me advertising matter;" that in a reply plaintiff sent another cut, recognized the right of defendant to make objections to the advertising matter furnished, and said: "We are always ready to correct any errors on our part, and in cases where the cut that we send is not suitable, we are always willing to send a new one in its place without additional charge;" that, after receiving three or four of the cuts, defendant returned them, and by letter canceled the order and thereafter refused to accept any more; that those afterward sent were returned by the post office authorities; that plaintiff's agent, in procuring the order, made the representations and warranties pleaded in the answer; that the cuts offered were not made by skilled artists, but were cheap and inferior in character; that the advertising matter was not adapted to defendant's business; that all the work offered and all the cuts

tendered were inferior to the sample, and not suitable for the purposes for which they were intended. While the testimony adduced by defendant to establish the defenses pleaded is rather weak, and while the qualifications of an expert who testified to the character of the cuts and to the unsuitability of the advertising matter rejected by defendant are not very satisfactory, the judgment below is not without support in the evidence.

To avoid the consequence of the trial court's findings, plaintiff argues that the testimony relating to the agent's warranties and sample should be disregarded, because defendant was bound by the following provision of the order: "It is agreed that the National Engraving Company will not be held responsible for any provision not embodied in writing herein, and that this contract cannot be canceled without the written consent of the said company." The point argued does not seem to be well taken, when the order itself and the interpretation of the parties to it are considered. The order shows on its face that the cut and the reading matter are not described in the contract. What defendant ordered was "one cut and reading matter weekly for our exclusive use in advertising the laundry business" in Hastings. The sample used in procuring the order is not mentioned in the contract. In replying to the letter in which the first advertising matter was condemned by defendant as unfit for that purpose, plaintiff wrote: "We are sending you today a new cut and trust that same will be to your liking. At any time that the cuts don't suit you, write to us and you will always find us ready to suit you in your demand. We can assure you that we shall do our utmost to serve you with the best during the life of the contract." The record, therefore, shows both parties understood that all of the terms of the contract were not inserted in the written instrument. Plaintiff accepted it, and sued for the entire sum due for full performance. The sample shown by the agent and the warranties made by him were instrumentalities employed in procuring the order, and are, under the circumstances of

this case, binding on the principal, notwithstanding the attempt to confine its agreement to the terms of the written instrument. *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb. 110.

It is a well-established rule that, independently of express contract, a purchaser by sample may refuse to receive the goods when offered, if they fail to correspond to the sample. *Gill v. Kaufman*, 16 Kan. 571; *Keeler v. Paulus Mfg. Co.*, 43 Tex. Civ. App. 555, 96 S. W. 1097; *Washington Hydraulic Press Brick Co. v. Sinnott*, 92 N. Y. Supp. 504.

For the reasons given, the judgment will not be set aside for insufficiency of the evidence.

AFFIRMED.

WILLIAM SHERRILL ET AL., APPELLEES, V. MARK M. COAD, APPELLANT.

FILED NOVEMBER 13, 1912. No. 16,760.

1. **Sales**: RESCISSION: RETURN OF PROPERTY. In order to entitle a vendee of a chattel to a rescission of the contract of purchase, he must allege and prove notice to the vendor of his election to rescind, and a return or an offer to return the property.

2. ———: FRAUD: MEASURE OF DAMAGES. In an action by a vendee for damages for a breach of warranty or fraudulent representations by the vendor as to the quality of personal property purchased, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented at the time the representation or warranty was made.

3. ———: RESCISSION: BREACH OF WARRANTY. "A sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded." *Mundt v. Simpkins*, 81 Neb. 1.

4. **Fraud**: PLEADING. The petition examined and set out in the opinion, *held*, insufficient to entitle plaintiffs to recover under either of the rules above announced.

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

A. W. Crites, W. J. Coad and *W. H. Herdman,* for appellant.

Justin E. Porter, Andrew M. Morrissey, Allen G. Fisher and *William P. Rooney, contra.*

FAWCETT, J.

From a judgment of the district court for Dawes county, in favor of the plaintiffs, for alleged damages by reason of the purchase of a stallion from defendant, defendant appeals.

The petition alleges that in April, 1907, plaintiffs purchased from defendant a certain stallion for the sum of $500, under an oral warranty that the horse was a fair, average foal-getter, defendant well knowing that plaintiffs proposed to stand the horse for breeding purposes; that plaintiffs had no knowledge as to the qualities of the horse in that regard, and relied upon defendant's representations and warranty; that upon a trial of the horse for an entire season, under proper care and handling in every respect, the horse proved to be utterly worthless as a breeder, and "has proved of no value whatever for the purpose purchased; that he is not and was not as warranted therein a foal-getter, and that he has proved of no value to the plaintiffs, to their damage in the sum of $500 in that regard." The petition then alleges that the time of one man was devoted to the care and handling of the horse; that the care, board, feed and nurture of the horse have been wholly lost, and that the fair and reasonable value thereof is the sum of $600. It is further alleged that plaintiffs' damages accrued through no fault or negligence of their own, but solely through the inherent defects in the horse and through his failure "to come up to the warranty aforesaid." The prayer is for judgment for $1,100,

"their damages as aforesaid," with interest on $500 from April 30, 1907, and on $600 from June 12, 1908. The answer is: First, a plea to the jurisdiction, which need not be considered here; second, it admits the sale and delivery of the horse for the agreed consideration of $500, "which stallion the said plaintiffs did receive, and have kept to this day," and denies each and every other allegation in the petition. The third averment in the answer relates to the question as to whether the horse was sold upon a written or oral agreement. It is conceded by defendant that, for the purpose of this hearing, that question is foreclosed against him by the verdict of the jury. It, therefore, will not be considered.

At the trial upon these pleadings the court instructed the jury as follows:

"No. 2. The burden of proof is upon the plaintiffs to establish by a preponderance of the evidence, as to the stallion, that they purchased said stallion for breeding purposes, at an agreed price of $500, and that they paid to defendant the said sum of $500; * * * that said stallion was entirely worthless for the purpose for which he was sold and purchased, and that the plaintiffs were damaged by reason thereof in the sum of $500."

"No. 5. The jury are instructed that, if you find in favor of the plaintiffs, then it will be your duty to allow the plaintiffs interest on the $500, being the purchase price of said stallion, from April 30, 1907, to the first day of this term of court."

"No. 5½. You are instructed that you have nothing to do with the fact as to whether or not the stallion in question would be good for other than breeding purposes. If the plaintiffs bought him for breeding purposes, and he was not of the kind of horse that the defendant warranted him to be in respect to foal-getting, then the plaintiffs are not required in law to keep the horse at his fair value for any other purposes."

It is apparent from a reading of the pleadings, in connection with these instructions, that the judgment of the

district court cannot be sustained. If the action be treated as one for rescission, the petition is clearly insufficient, in that it contains no allegation that plaintiffs ever attempted to rescind the contract, or that they ever returned or offered to return the stallion to defendant. Such an allegation is necessary to sustain an action for rescission. *McCormick Harvesting Machine Co. v. Knoll,* 57 Neb. 790; *Alfree Mfg. Co. v. Grape,* 59 Neb. 777.

If the action be treated as one for damages for a breach of warranty, the measure of plaintiffs' damages would be the difference between the actual market value of the horse at the time of its purchase by plaintiffs and its market value had it been as warranted and represented to him. *McClatchey v. Anderson,* 84 Neb. 783. The court failed to recognize either of these rules in its instructions to the jury, and the verdict returned is in excess of any sum which could be returned under either of such rules. The petition does not allege any offer to return the horse by plaintiffs, nor does it allege that the horse was of no value. The only allegation is that it was valueless for the purpose for which they purchased it. The evidence discloses that, while the horse was valueless as a breeder, plaintiffs had worked him for two or three months; that after the horse was "broke" to harness he was "a very nice buggy horse, was a fine looking individual," and a good coach horse.

It is suggested that the judgment might be sustained on the ground of fraud; and it is argued that defendant's agent at the time of the sale made representations as to the quality of the horse, which were false and therefore fraudulent; but here again the petition is defective in not containing any such averments. Moreover, in *Young v. Filley,* 19 Neb. 543, we held: "In an action for damages for a breach of warranty or fraudulent representations as to the quality of personal property sold, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it

been as represented at the time the representation or warranty was made." In the opinion by REESE, J., our present chief justice, p. 545, it is said: "It is insisted by defendant in error that the petition alleges both a breach of warranty and fraud, and for the purpose of the case we will assume that such is the fact. In either case, where there is no allegation of a rescission of the contract, the measure of damages is the difference between the value of the corn as it really was at that time and what it would have been worth had it been as represented."

It is also argued that in June, 1908, as soon as the horse was found to be valueless, plaintiffs advised defendant of such fact, and that such notice was a waiver of any claim of necessity of a tender. Upon this point also the petition is silent.

In support of their claim for $600 for the care, keeping and handling of the horse during the season following their purchase, which it may be conceded was necessary to demonstrate whether or not he was as warranted, plaintiffs contend that "it seems to be the general rule in cases of breach of warranty for special purposes, etc., the damages should be such as may fairly and reasonably be considered rising naturally, that is, according to the usual course of things from the breach, or such as may be reasonably supposed to have been within the contemplation of the parties at the time, as the probable result of the breach." Upon this point we said in *Mundt v. Simpkins,* 81 Neb. 1: "A sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded." Plaintiffs have not brought themselves within this rule by claiming a rescission and offering to restore the horse.

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

REVERSED.

HAMER, J., dissenting.

I am unable to agree with my associates in this case. I start out with the legal proposition that misrepresentation, deception and fraud in the sale of personal property resulting in damages to the vendee, if shown by competent evidence, will support a judgment in his favor whether the action be only for a breach of warranty or for fraud and deceit. Under the application of the rule stated, the evidence in this case is clearly sufficient to sustain the judgment of the trial court. The stallion in this case was sold purely for a breeder. The agent of Coad, Mr. Hall, in order to induce the purchase, said to the plaintiffs, "You can't lose nothing buying this horse. We will guarantee him. We know him to be a breeder. We have two or three colts out of him now down at Mr. Coad's ranch at Fremont." He also presented to plaintiffs a printed circular describing the horse as "Bay Billy, by W. J. Bryan, 2389, foaled May 1, 1901; he by Kadris, 284; dam, Queen, Hambletonian Mare; Bay Billy is a fine five-year-old coach stallion. He comes of good lineage, and is worthy of all good things that can be said of him, and has proved a sure foal-getter in our hands." Mr. Hall knew that these representations were false. He knew that there were no colts at the ranch from this horse, or anywhere else. There could be no case containing a greater amount of deceit than this case. The purchasers desired a good breeder and sure foal-getter. The defendant's agent told them that that was just what they were getting. To get such a horse the plaintiffs paid $500 in cash. They employed a man to take care of the horse. They were put to the expense of $600 in taking care of him. If I understand this court aright, it determines that the plaintiffs shall find Coad, if they can, and "tender" to him the horse in question; that is, they shall have a halter on the horse, and shall send him up and down the country accompanied by a caretaker until they can find Coad, and then, having the horse with them, they are to

offer him the halter strap so that he may lead the horse away. There was no contention concerning the fact that $500 had been paid as the price of the horse by the plaintiffs, and there was no serious contention but that it cost the plaintiffs $600 to keep him until the suit was brought.

It certainly is not debatable that, if Coad told the plaintiffs, or either of them, that he would not receive the horse back, that of itself would relieve the plaintiffs from attempting to return him. What was said on this subject? The parties met at Chadron. Coad was there in one of his other stallion cases. Sherrill told Coad that the horse would not breed. On cross-examination Coad admitted this talk. Coad was told by Sherrill that he could have the horse back. On cross-examination Sherrill testified: "Q. When was that? A. Why, since I have been in Chadron. Q. Who was present? A. He and Mr. Hall and Muzzey." This conversation happened at Chadron. It is not denied. In order to render the majority opinion, the other members of the court seem to shut their eyes to these facts. They do that or they ignore them. At that time the horse was at Crawford, only 28 miles distant from Chadron. Coad could not have meant by what he said anything except that *he would not receive the horse back*. Second. But, if there is any doubt upon this question, it is forever settled by the fact that Coad *answered* setting up the alleged fact that there was a bargain to the effect that, if the horse turned out *not* to be a sure foal-getter, he was to be returned to Coad at Fremont, and that Coad was to furnish the plaintiffs another stallion that would be a sure foal-getter. When Coad makes this defense, how can it reasonably be contended that Coad would receive the horse back if it was offered to him? Coad tenaciously hung on to this defense until the jury determined it against him. Why should the majority of the court refuse to listen to the evidence which determines this stubborn fact beyond all question?

Where a party intentionally and by deceit produces a false impression in order to mislead another, or to entrap

him, or to obtain an undue advantage over him, it is then a case of positive fraud in the true sense of the term. In every case where there is positive fraud, the man who perpetrates the fraud is entitled to no standing. *McCready v. Phillips*, 56 Neb. 446. Coad is no more entitled to protection against the deceitful act perpetrated, than was the criminal who "gold-bricked" a prominent banker from the central part of this state a few years ago, or Mabry and his gang, who "confidenced" victims from all classes and from all parts of the United States. Coad by his answer said: "I will not take the stallion back and give you your money. You can bring me the stallion, but you must take another stallion in place of him. I keep your money." In the face of Mr. Coad's contention, how can there be any doubt about it? No man who practices a "confidence game," and by the deception of an unsuspecting and innocent person, and without other consideration except the use of *some instrument* as the basis of such deception, should be permitted to successfully interpose the well-intentioned forms of the law adapted to ordinary commercial transactions as a shield to ill-gotten fruits of his iniquity, and such instrument, whether of a trifling or substantial value, is not entitled to special consideration at the hands of the court. Courts are in some instances called upon to lend their aid to a skillful and unprincipled wrongdoer who uses the form of the law to accomplish his wicked purpose. In *Graffam v. Burgess*, 117 U. S. 180, 186, Mr. Justice Bradley, delivering the opinion of the court, said: "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest form of law."

It is a mistake for the majority to rule that the plaintiffs shall not be allowed to recover for the injury that has been done to them through the deception practiced upon them by the defendant Coad and his agent, Hall. It

is the impractical nature of the majority opinion which makes men look askance at a "legal decision." The difficulty with the majority opinion would seem to be that it fails to take notice that there may be *three* or *more* things instead of *two*. If I may use the illustration, the opinion is along the line that all wagons must be red wagons or green ones, while I think there are no good objections to wagons of other colors. It is an idea of ancient legal learning that there can only be two suits in this class of cases; one to recover for the injury done—claimed to be the difference between the true value of the thing sold and its sale price—and the other, to recover back the price paid for the article sold, based upon a rescission of the sale. Under the first theory, the purchaser must *keep* the article which he was *deceived* into purchasing. He is bound to keep it, although he never intended to buy, and would not have bought it if he had known the actual facts surrounding it, and though induced by deception to make the purchase, he *must* sue for the *difference* in value between what it is actually worth and the sale price. The other idea is that, before there can be a recovery, there must be a rescission of the contract. I maintain that this doctrine is obsolete in all cases of wilful fraud and deception. The majority opinion is not justified by common sense as applied to business. It is a contention for overtechnical nicety. It would have done great credit to the period of 200 years ago. I am trying to make the contention that the law is something to which common sense—just ordinary business sense—may be applied, just as it may be applied to other occupations, to farming, to surgery, and to merchandizing. The great danger is that the application of the law is likely to be unnecessarily mixed with a tincture of fictitious and far-fetched learning that is, or ought to be, obsolete. In this case the purchase was clearly brought about by the misrepresentation of Hall, the agent of the defendant, Coad. What he said was wholly false. There were no colts from the horse at Fremont. The horse was unable to get foals. Hall and

Coad knew that. Coad comes into this court and asks this court to lay down the doctrine that, notwithstanding the deception which he practiced upon the purchasers, they *are bound to keep* the horse for whatever he is worth, although they did not buy him for *any other purpose* than to be a foal-getter, and he is absolutely worthless for that purpose; or, they are bound to find Coad, wherever he may be, and to "tender" the horse back. And they are bound to do this, although Coad has said that he would *not* take the horse back, and has made a long and strenuous contention attempting to prove that there was to be an exchange of stallions if the horse turned out not to be a foal-getter, and has been beaten. The majority opinion imposes upon the plaintiffs the burden of hunting up Coad, who was always a difficult man to find because he was continually going from one end of the state to the other, besides making trips into Wyoming, Colorado and Chicago. Under the majority opinion, the plaintiffs are to be forever burdened with taking the horse along with them from one end of the state to the other looking for Coad. They are always to have the horse on hand to offer him to Coad. The thing proposed to be done is impracticable and wholly unbusinesslike.

The pleadings and facts allege and show deception. The plaintiffs were defrauded out of the $500 that they paid for the horse, and they were compelled to keep the horse about a year before they could know that he was not a breeder, and that he was sterile and wholly without capacity as a breeder. The plaintiffs have lost the money which they expended in keeping the horse. It is the idea of the writer that, when the deception is alleged and proved, the plaintiffs ought to be allowed the damage that they have suffered by reason of such deception, and that it is immaterial whether they tender back the instrument used to deceive or to accomplish the deceit intended. The plaintiffs have not refused to give Coad his horse. Coad never demanded the horse. Besides they have told him that he could have the horse.

The effect of the majority opinion is to offer a premium for the practice of deception, and that premium is that the purchasers shall be compelled to keep the horse in any event if the seller, by *any sort* of misrepresentation and fraud to the purchaser, gets the horse delivered to the man he deceives. Suppose the case of one who is "gold-bricked." Suppose that by deception the swindler gets out of the purchaser $5,000 for his gold brick, and the purchaser is fortunate enough to discover the deception, and he finds the man who has deceived him, and sues him to recover the $5,000 out of which he has been defrauded. Then, suppose the defendant coolly meets the plaintiff with the proposition that the brick was actually worth $7.50; that the actual brass, copper and lead contained in it were of the value of $7.50; and then insists that there was no offer to return the brick, and he objects to the plaintiff's right of action on the ground that there has been no "tender" to him of the brick. There is no difference in principle in the actual case and the case supposed. This case is the same as any other case where confidence men secure victims by misrepresentation. It is time that our courts refused to coddle confidence men who secure victims by selling stallions that are known not to be breeders, or by selling gold bricks, or by promoting sham prize fights and sham races, after the manner of the Mabry gang. There is no good reason why the judgment of the district court should not stand. It is the judgment of a practical business judge who is a good lawyer and 12 practical business men and farmers who sat on the jury.

Section 92 of the code provides what the petition must contain: "First. The name of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant. Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. Third. A demand of the relief to which the party supposes himself entitled." The provisions of the code touching the contents of the petition permit any statement of facts to be

made which constitute the cause of action, and no form of language is required, and there is no restriction except that the story is to be told without repetition. The language used is "ordinary language." We make the point that any statement complying with the code, as above quoted, and that demands relief and is supported by sufficient evidence entitles the litigant to recover. Section 90 of the code specifically provides that the rules of pleading heretofore existing in civil actions are abolished, and that the forms and rules by which the sufficiency of a pleading is to be determined are only such forms and rules as are "prescribed by this code." There is, therefore, no reason whatever to go to any of the old forms. The pleader is simply to tell his story, and if that story is sufficient, and is supported by the evidence, then he is entitled to the relief which his story gives him. There is nothing in our code touching the pleadings in this case which compels the use of a particular form for a breach of warranty or deceit. If the "law" demands something that is not in the code, then I demand that this court shall change what it calls the "law," because there is nothing that requires this court to stand by an ancient, inappropriate, and obsolete doctrine which has been legislated out of existence. The defendant asks this court to protect him in the practice of his deception. He asks that the mode used shall be after the manner of an ox wagon or a donkey's cart, when there are carriages, beautiful horses and automobiles all about.

In *Martin v. Hutton*, 90 Neb. 34, defendant falsely represented to the plaintiff that a certain quarter section of land was not subject to entry because of a homestead filing thereon, and that he (Hutton) would secure a relinquishment of that filing for $2 an acre, or $320 all told. Hutton received the money from the plaintiff. There was no consideration for the payment of the money, because the land was all the time subject to entry, and Hutton obtained it from the plaintiff by fraud. In a suit by the plaintiff to recover the money back, the defendant

seems to have contended that the plaintiff, as a condition precedent to prosecuting the action, was required to rescind the contract. The plaintiff lived on the land. Hutton wanted him to give it up. He made the same contention Coad does, only Coad says there was no rescission of the contract, and that the horse was not tendered back to him. The contention was overruled, and there was judgment for the plaintiff for the full amount of money out of which the defendant had defrauded him.

In *Warder, Bushnell & Glessner Co. v. Myers*, 70 Neb. 15, the plaintiff undertook to repair a harvesting machine so that it would do good work, and, if it did not do good work, it was to be taken back by the plaintiff and the defendant's note surrendered. In a suit upon the note, where the defendant answered that there was a failure to repair and furnish such a machine as was agreed upon, the plaintiff objected that it was nowhere alleged in the answer that there was an offer to return the machine and rescind the contract, or any demand for the return of the note, or any notice to the plaintiff. This court said that an allegation of notice and rescission of the contract was not necessary in order to tender a valid defense, and that "the plaintiff undertook affirmatively, under the agreement, to repair the machine and to put it in good working order, or take it back and return the defendant's note. This it failed to do, and, until it had complied with the terms of the agreement, it had no cause of action on the note, the consideration of which, because of its neglect and refusal to put the machine in good working order, had, by reason thereof, failed. It was not a question of rescission of contract, but of compliance with its terms on the part of the plaintiff, in order to entitle it to a recovery on the note sued on." Applying the doctrine to the instant case, the defendant would have had no cause of action if he had brought suit upon the note given for the purchase price of the horse, and simply because he did not furnish a stallion such as he had agreed to furnish—a stallion with the breeding power to get colts

—and neither does the defendant have any defense, for the same reason.

In *Murray v. Mann,* 2 Exch. (Eng.) *538, the agent sold a horse, very much as the agent in the instant case. The agent took the horse back and refunded the purchaser the money which he had paid. If Hall had taken the stallion back and had repaid the plaintiffs the purchase price, there would have been a still stronger similarity between the cases. If Hall and the plaintiffs had together endeavored to trade back, they could have been met by the principal, Coad, with the proposition that they had no right to trade back, and that was the proposition with which the principal in the English case met his agent, the livery stable keeper. *Hammatt v. Emerson,* 27 Me. 308, 46 Am. Dec. 598, and *Eames v. Morgan,* 37 Ill. 260, seem to justify the contention I am making. Coad's evidence admits the deception.

CHARLES W. MOLINE, APPELLANT, V. EVA CHARLOTTA CARLSON; JOHN J. JOHNSON, EXECUTOR, ET AL., APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,860.

1. **Specific Performance:** PAROL CONTRACTS. The rule is now well settled in this court that a parol contract will be enforced by a court of equity where one party has wholly and the other partly performed it, and its non-fulfillment on the one hand would amount to a fraud upon the party who has fully performed it.

2. ———: AGREEMENT TO DEVISE: DEFENSE BY HEIRS. Where a husband and wife take into their family the infant child of a stranger, and either then or subsequently they jointly orally agree that, if such child will remain with them during their lives and render them faithful and obedient service as a child, they will, at their death, by will or otherwise, leave him all of the estate of which they die seized, *held,* that the statute as to homesteads cannot be pleaded by the heirs of either the husband or wife as a defense to a suit by such child for the enforcement of the parol contract.

3. **Contracts:** EVIDENCE. The evidence examined and set out in the

opinion, *held*, that the parol contract in this case possessed the elements of certainty, and the proof establishing it is sufficiently clear and satisfactory.

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

C. Petrus Peterson and *Charles H. Slama*, for appellant.

B. E. Hendricks and *Simpson & Simpson, contra.*

FAWCETT, J.

This suit was instituted in the district court for Saunders county to quiet title to the east half of the northwest quarter and the north half of the northeast quarter of the southwest quarter of section 25, township 14, range 8, in said county. The decree quieted plaintiff's title to an undivided one-half interest in the land, and dismissed the suit as to the other half. Plaintiff appeals.

Plaintiff relies upon a parol contract, which he sets out as follows: "That on September 1, 1896, and at many divers times prior and subsequent to said day, said Peter A. Carlson and his wife, the defendant Eva Charlotta Carlson, orally promised that, in consideration of the plaintiff's services and of the plaintiff remaining with them on their farm until said Carlson's death, they would leave to plaintiff, by will or otherwise, all of said Carlson's estate of which he would die seized, and that plaintiff would be made Carlson's residuary legatee; that in consideration of said promises, and relying thereon, the plaintiff yielded to the request and agreed thereto; that he refused to go with his own father, that he sacrificed all other opportunities for his own advancement, and remained with the said Peter A. Carlson, serving and obeying said Carlson in all his wishes and desires, and rendered unto said Peter A. Carlson full and faithful service in implicit reliance upon the said oral agreement; that pursuant thereto said Peter A. Carlson did execute a will

conforming to said agreement; but that thereafter said Peter A. Carlson wrongfully executed another will giving plaintiff the sum of only $400." The petition also alleges that the land belonged to Carlson in his lifetime; that Carlson died March 24, 1909; and that defendant Johnson is the duly qualified executor of the will of said Carlson, deceased.

The defendant Eva Charlotta Carlson entered her voluntary appearance in the suit, and filed her answer, in which she admits all the allegations contained in and consents to the prayer of the petition; and further alleges "that this action is brought with her consent and to satisfy her wish and desire that the agreement between this defendant's lamented husband and the plaintiff may, in justice and equity, be fulfilled, so plaintiff will be the sole residuary heir of Peter A. Carlson, deceased."

The heirs of Peter A. Carlson being all nonresidents of Saunders county and unknown to plaintiff, service was had upon them by order of the court, in accordance with the provisions of the statute in such case made and provided. After disposing of certain motions and demurrers, which we deem it unnecessary to refer to, Ida Sofia Ahlen filed her separate answer, alleging that said Carlson left as his only heirs at law and next of kin Eva Charlotta Carlson, his widow, Carl W. Carlson, a brother, and John Emil Larson, a nephew, and Ida Sofia Ahlen (herself) a niece, the last two being children of a deceased sister of said Peter A. Carlson. She further admits the death of Carlson; the appointment of Johnson as executor; that Eva Charlotta Carlson is the widow of deceased; the ownership of the land by Carlson prior to his decease; and that plaintiff has resided upon the premises as tenant of said Carlson for several years last past; alleges the execution of the last will of Carlson; that the same had been duly admitted to probate (attaching a copy of the will to her answer); alleges that Carlson and his wife resided upon the land as their home; that neither of them during said time owned or possessed any other lands,

houses or town lots; and that the real estate in controversy was the home and homestead of Carlson and his wife; and denies every other allegation. The will attached to her answer devised the lands to the widow for her life, bequeathed $400 to plaintiff, and all the rest and residue of his property, share and share alike, to his legal heirs. The answer of defendant Johnson, executor, is substantially the same as that filed by defendant Ahlen

Carl W. Carlson first appeared especially, objecting to the jurisdiction of the court over him, which objection was overruled. He thereupon answered separately; his answer in all essentials being similar to the answer of defendant Ahlen. John Emil Larson, the nephew referred to in the answers of Mrs. Ahlen and Carl W. Carlson, made no appearance.

The reply to the three answers above set out denies all allegations of such answers, except such as admit allegations in plaintiff's petition.

The decree found that, under the pleadings and answer of defendant Eva Charlotta Carlson, plaintiff is entitled to judgment against her; finds all the allegations of the three answers above set out to be true; and that as to said defendants and each of them the plaintiff has no cause of action; finds that the land in controversy was in September, 1896, occupied by Carlson and his wife as their homestead; that the same constituted their homestead at all times thereafter until the death of Peter A. Carlson; that the value of the lands in September, 1896, was $3,000; adjudged that the plaintiff is the owner of an undivided one-half of the lands, "being such interest only as the defendant Eva Charlotta Carlson had in said lands as the widow of Peter A. Carlson, deceased;" quieted in plaintiff title to such half interest, subject to any rights the executor may have for the payment of debts and expenses of administration; that as to the defendants, other than Eva Charlotta Carlson, plaintiff's action be dismissed.

The issues presented for our consideration are stated in

the brief for appellees as follows: "First. Was any oral contract entered into between Peter A. Carlson, the testator, and the appellant herein, whereby Carlson obligated himself to convey the land described in the petition to the appellant, either by will or otherwise? Second. Was the land owned by Peter A. Carlson at all times his family homestead, and not subject to his individual disposal?"

The first question is not accurately stated. It is not alleged that Carlson agreed to convey "the land described in the petition." The allegation is that he agreed to "leave to plaintiff, by will or otherwise, all of said Carlson's estate of which he should die seized." As thus modified, the question must be answered in the affirmative.

The defendant Mrs. Carlson testified, substantially, as follows: "I am 88 years old. I have lived in Saunders county about 35 years. * * * We have lived on this farm over 20 years. My husband and I had four children, but they are all dead. My oldest daughter had one child, a boy, but he died when he was two months old. All my children have been dead many years. My oldest daughter's little boy died about 16 years ago. Anyway, Charlie Moline is my son. He was four years old when he came to us. He is married and has got six children. He has lived on this farm since he was four years old. He has been in this place always until now, and I hope he will stay here too. His mother was dead, and his father asked us to take him, and I say, 'Well, if I can be mother for him I will, I don't want to take him if I cannot be like a mother.' My husband, Mr. Carlson, was there and heard that talk, and he wanted to do that too; both of us wanted to take the boy. Mr. Carlson said: 'We'll do the best we can for the little child,' and Carlson said he wanted to take him for his son. He said he would take him for his boy, and we say: 'He shall come to us and stay with us forever, and afterwards he can attend to us while we be old,' and at that time it was said that all our property should belong to Charlie Moline after

we died. Then Charlie came to live with us, and we do all we can for him, and he do everything he could do to help us. We send him to school, and he done what he could, and as he grew older he act all right, he work on the farm, and he been all right. My husband and Charlie they talk about the farm many time after Charlie got older, and when Charlie was 16 years old Carlson promised him for sure that Charlie was to have the farm. They had a talk in our house when Charlie was about 16 years old, and then Carlson promised Charlie for sure that he would get the farm. When my husband told Charlie that Charlie should have the farm, I was willing. It was all right with me. I was willing then, and I am willing now, to let him have every bit. Of course, you know, I want my board so long I live. I do not know how long I live, and then it goes to him. No child could be a better child than Charlie have been to me. My husband tell Charlie many times that he should have the farm. I couldn't tell how many times he told him, but many, many times, and he never say anything different." On cross-examination she testified: "We send him to school and clothe him. He never needed a doctor for he hardly be sick. We gave him a little spending money, a little bit, a quarter of a dollar. We furnish him clothes and treat him kindly. Yes; Mr. Carlson and Charlie had some trouble. It was pretty hard to get along with Carlson. He was hard on me, I hate to talk about it. Sometimes Carlson and Charlie didn't get along well because Carlson was drunk, and then he hardly know what he do. Once Carlson was going to choke Charlie when he was drunk, and Charlie pushed him away. They quarrel two times. They weren't friendly towards each other. Once Charlie went to see his father. I tell him to go and see him. He stay about a week. Charlie and I were friendly; he called me 'mother.' Mr. Carlson and Charlie wasn't so friendly. Mr. Carlson was sorry when Charlie was away. He said: 'I be glad if Charlie come back.' Carlson scolded Charlie and he scold me, but when Charlie was away Carlson was so

angry. 'I wish Charlie come back, I wish he come,' he say. * * * Once Carlson and I went to Wahoo, and he made a will for Charlie; he had a will drawn, and he showed it to Charlie, and afterwards Charlie said, 'You better keep the will, papa, for maybe you take better care of it than I do.' He kept this will about a year. I don't know just how long, but a year, and then Carlson burnt the will up one time when he got drunk. * * * I knew that Carlson had a brother and had a sister, but she died and left two children. I don't know anything about them. I don't know if they live or not. Charlie don't know anything about them, and he didn't know where they are. I never had anything to do with those people, never. Carlson used to write to them. 'He write a letter, and William hardly answer him, so he didn't get much love for him.' Carlson didn't write to his sister's daughter, he didn't know where she lived. He tried to find out, but couldn't. Charlie comes to see me often; he come in the morning, and he come in the noon, and he come in the evening; he comes every day. Oh, he be so kind to me. I want him to have everything. We rented the farm to Charlie since he has grown up. He pays us $300 rent; he paid that always." Redirect. "Q. How did it happen, what made the bad feeling between Mr. Carlson and Charlie? A. The brandy. Q. And who used the brandy? A. Carlson; Charlie never, and that is why I love him for, for I hate brandy; I pour many tears for it. When I sign the paper in this case it was my free will. I hope and pray God you do the best you can for me and Charlie. You know what you done for Charlie you done for me and for his poor little children."

The witness A. F. Johnson testified, substantially: "I am 70 years old, and now live at Mead; have lived there about 6 years. Before that I lived on a farm 4 miles from Peter A. Carlson's farm. Carlson and I visited back and forth a good deal. I was well acquainted with Carlson; I knew him since we were 18 years old. * * * Mr. Carlson and I talked about his farm and about Charlie

Moline. I remember that talk. It is a pretty long time ago. It must be 13 or 14 years ago. The talk was right in his house. He called me and my wife to come down there for dinner, and after dinner we go into the front room and sit down, and then he says to me, 'There is something I want to talk to you and let you know.' 'Well,' he say, 'my wife and I have agreed to promise Charlie Moline the farm and everything what we have after we is dead, and he have promised us to stay here and take care of us; he have done that before and he have promised to do that after this, so we want to make up a will for him;' and I say, 'Do you want to do that you might do that pretty quick;' and he say, 'Well, I want to talk about that before you so you know what we want to do. I am outside a good many times, and I do not know what some can help me if I may die before we make up the will, so you hear that now, you can witness that.' I remember this well. I also remember that the boy was about four years old when he was taken into the Carlson home."

The witness Reim testified that he was the assessor. "I called at Mr. Carlson's home to assess him; we talked about one thing and another, and he finally got to telling me that he received a letter from Charlie's father; that he wanted the boy back; and Carlson told me that he had made agreements now with Charlie and his father that if he stays until the old folks were dead that everything that was theirs, real and personal, was Charlie's."

The witness Baur testified that Carlson traded with him in his store; that on one occasion "we got to talking, and he told me his whole life story, how he had to go through life, and how he struggled; and, as he was coughing pretty heavy, I says, 'It's about time, old man, you prepare for death,' and one thing brought on another, and he said he has got it pretty nice and everything is all right, and I asked him who would get all the stuff he left behind, and he says, 'All is Charlie's, Charlie Moline;' he told me at one time that Charlie Moline took care of his things, and that in case something should happen that he gets his estate."

The witness Okeson testified that he had been acquainted with Carlson for 24 years; that he did work on Carlson's new house about 9 or 10 years ago; that, "while walking with Mr. Carlson on the road by his farm and near Frank Halsted's place—Mr. Halsted was married to Mr. Carlson's daughter at one time—I said to Mr. Carlson, 'Well, some times when you die Frank will come after some of your property,' and Mr. Carlson he said, 'No, everything that would be after me and my wife that will fall to Carl;' that is Carl Moline, the plaintiff; Mrs. Halsted, Carlson's daughter, had died long before that time, about 10 years before."

Five other witnesses testify to statements made by Carlson of quite similar import. It is also shown that, when plaintiff married, Carlson built a cottage on the farm, into which he and Mrs. Carlson moved, and in which they lived until the death of Mr. Carlson, and that plaintiff, with his wife, resided in the old house. Carlson and his wife retained about five acres for a garden, and plaintiff tilled the farm, paying Carlson $300 a year rent therefor. During all of the years that plaintiff worked upon the farm, up to the time of his marriage, he never received wages of any kind for his services. Every act and statement of Carlson's during the nearly 30 years of plaintiff's association with him, except the making of the last will, clearly indicate that the relations existing between him and his wife on the one side and plaintiff on the other were as claimed by plaintiff.

It is hard to see how a stronger case could be made in support of a parol agreement of the kind alleged in this case. To our minds the evidence is clear and satisfactory to the effect that Mr. and Mrs. Carlson made the agreement set out in plaintiff's petition, and that plaintiff fully performed his part of the contract. The fact that Mr. Carlson in his later years became addicted to the use of strong drink, and that while intoxicated he quarreled with the plaintiff, for no other reason, as appears from the record, except that plaintiff interfered in behalf of his

foster mother, affords no justification for a breach of the contract on the part of the deceased. Plaintiff was taken into their home when he was little more than a babe, under an assurance then made by the deceased and his wife that upon their death he should have all of their estate, and when, at the age of about 16 years, his father desired to have the boy return to him, the Carlsons again expressly agreed that, if he would remain with them until their death, he should have all of the estate. Acting under that agreement, plaintiff did not return to his father, but remained with the Carlsons and performed every duty faithfully and well. Upon this point there is no evidence to the contrary. We hold, therefore, that the contract alleged in the plaintiff's petition is fully proved.

That a parol contract of the kind set out in plaintiff's petition will be enforced where the making of the contract is sustained by clear and satisfactory proof is now so well settled in this state as to no longer require reference to our former decisions upon that point.

This brings us to the second point, viz.: "Was the land owned by Peter A. Carlson at all times his family homestead, and not subject to his individual disposal?" Upon this branch of the case counsel for defendants rely upon *Teske v. Dittberner*, 70 Neb. 544, and *Lichty v. Beale*, 75 Neb. 770. We do not think either of the cases cited is a bar to a recovery in this suit. *Lichty v. Beale* is not in point. In the *Dittberner* case the oral agreement was that the son Carl was to remain upon the particular premises in controversy, pay the taxes, keep up the place and improve it, and provide a home, board, clothing and spending money for the said Frederick Teske and his wife so long as they should live. If either the said Frederick Teske or his wife should desire to leave the home to be provided by plaintiff, then they were to receive $100 each per year in lieu of the above provisions relative to their support. In considering that contract, the court was of the opinion that it was governed by section 4, ch. 36, Comp. St. 1901, entitled "Homesteads." The difference between

that case and the one at bar is marked. The effect of the oral contract in that case was that the parents presently parted with the control of their homestead, and, instead of the son living with and serving and caring for them in their own home until their death, he was to provide a home for them; while in the case at bar no limitations whatever were put upon the right of Carlson and his wife to occupy, sell and convey, or encumber their homestead in any manner they saw fit. Their only contract was that, in consideration for the services rendered by plaintiff, he should have whatever estate remained after their death.

It will be seen, therefore, that this case does not come within the purview of section 4, *supra*, but that it is controlled by section 17, ch. 36, *supra*, which provides: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will." In the light of this statute, there can be no doubt but that, if Carlson, at the time he made the oral contract relied upon, had executed his will, devising to plaintiff all of the estate, real and personal, of which he might die seized, subject to the life estate of his wife, the will would have been valid, and could not have been assailed by any one after his death. If he could have lawfully made a will thus disposing of his property, then he could lawfully contract to make such a will, and his heirs would have no more standing in court to plead the statute as to homesteads as a defense to an action to enforce the contract than they would have to plead the same statute if the suit were based upon such a will. By the parol contract, which we have already held is established by clear and satisfactory proof, Mr. Carlson did not attempt to convey or encumber his homestead, or to defeat his wife of her life estate as his surviving spouse, if she became such. He simply agreed to do that which the section of our statutes above

quoted shows he had a legal right to do; and, having executed a will leaving his estate to persons other than the plaintiff, he has broken his contract, and plaintiff is entitled to the relief prayed. In addition to all this, it appears from the record before us that at the time Carlson made the contract, and at the time of his death, there was no one dependent upon him for support, except his wife, who joined with him in the oral contract, and who now insists upon its performance. She was the only person, except Carlson himself, who had any right of homestead, and this right she has expressly waived and relinquished by her answer in this case.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a decree quieting plaintiff's title in and to the lands in controversy, subject only to the debts, if any, of Peter A. Carlson and Eva Charlotta Carlson, and the costs of administration; the costs of the suit to be taxed against the defendants Ida Sofia Ahlen and Carl W. Carlson.

REVERSED.

INTERNATIONAL TEXT-BOOK COMPANY, APPELLANT, V. WILLIAM H. MARTIN, APPELLEE.

FILED NOVEMBER 13, 1912. No. 17,382.

1. **Former Opinion Affirmed.** Our former opinion, reported in 82 Neb. 403, re-examined and adhered to.
2. **Instruction** of the trial court, considered in the opinion, *held* erroneous, in that it is not based upon any competent testimony.
3. **Contracts: BREACH: EVIDENCE.** Evidence examined and referred to in the opinion, *held* insufficient to sustain the judgment.

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

Hall & Bishop and *David A. Harrington*, for appellant.

McGraw & Wilke, contra.

FAWCETT, J.

This case is before us a second time. Our opinion upon the former hearing may be found in 82 Neb. 403. For a statement of the controversy reference is made to that opinion. It is sufficient, for the purpose of this opinion, to state that plaintiff conducts a correspondence school; that defendant entered into a contract with it to take its course of instruction in electrical engineering, for which he was to pay $78 in monthly payments of $2, less 10 per cent., and plus $1 for a transfer fee; that he continued his monthly payments until he had paid about $50, when he ceased making such payments, and subsequently notified the agent of plaintiff that he did not intend to carry out the contract. The books and papers necessary to commence his studies were sent to him by plaintiff, and we gather from his testimony that they are still in the box in which they were shipped to him. However that may be, he never entered upon the studies.

Upon the former hearing we held that the district court erred in instructing the jury that, if plaintiff was entitled to a verdict, the measure of its recovery would be the loss of its profit on its contract, plus the value of the services it had rendered defendant. The reason given for our holding was: "It will be observed that plaintiff has not been in default in any particular in performing, so far as defendant would permit it to perform, the contract; that its undertaking is to continue its course of instruction until it has educated defendant to such a degree of proficiency as to entitle him to a diploma. No one can logically establish the period during which its teachers must send out questions and correct answers given by defendant in response thereto. The evidence indicates that plaintiff employs nearly 400 teachers, and the addition or loss of one student would hardly increase or diminish plaintiff's expense to any perceptible degree. The contract is entire, and, upon defendant's refusal to perform, and subsequent to the maturity of all of the monthly

payments, plaintiff ought to recover the consideration defendant agreed to pay it, unless defendant can show some facts that reasonably and definitely tend to mitigate plaintiff's damages." Upon the last trial in the district court, evidently influenced by the last clause of the last sentence above quoted, the court again instructed the jury that, if they should find from the evidence that the cost to plaintiff of fulfilling its contract amounts to more than the balance due from defendant on his contract, then their verdict should be for the defendant. Construing the clause from our former opinion, to which attention has been directed, to mean what the trial court evidently construed it to mean, still this instruction should not have been given, for the reason that defendant utterly failed to show by any competent evidence any "facts that reasonably and definitely tend to mitigate plaintiff's damages."

The only evidence offered upon that point is the testimony of Professor Stout, of the University of Nebraska, and Mr. Penny, an assistant in the office of the state superintendent. Professor Stout testified as follows: "Q. Do you know anything about the nature of the papers usually sent out by correspondence schools * * * in teaching electrical engineering? A. I do not recall that I have ever seen any of the electrical engineering papers. Q. Do you know the usual papers sent out to students, the class of paper, the style of questions asked, the amount of questions asked as a general thing in the papers sent out by correspondence to those students? A. Taking the question on a general basis that way, I would say that I do not know. My observation is limited to comparatively few papers. Q. Do you know how long it takes a competent person to examine the answers sent to questions asked in one of those papers? A. For an unqualified answer, I think I would have to answer no." On cross-examination, his testimony was: "I meet classes day after day in the higher branch of civil engineering. I have nothing to do with electrical engineering at all. My experience is based on the four-years' course of instruc-

tion in engineering leading to the degree of civil engineer. I have had no experience at all in correspondence schools, never taught in one, and do not know about the expense of running such a school, except as I should estimate it in comparison with my work in the university. * * * I do not know anything about the International Text-Book Company so far as their equipment and number of instructors is concerned, nor anything about the cost with which they handle the students. I don't know anything about what it costs them to handle the students of electrical engineering. * * * Q. The point is, you don't know anything about their facilities for teaching electrical engineering? A. Putting the question that way, I think my answer would be, no, I don't. I do not know the number of instructors they have in the electrical engineering, what they pay, nor how many students an instructor can attend to." Mr. Penny, upon cross-examination, testified: "I do not know anything about the cost of instruction per student in electrical engineering at the International Text-Book Company school at Scranton, nor anything about the teaching or administrative force of that school, nor anything about the expense of operating that school per student in electrical engineering at any time. Where a school makes a business of teaching by correspondence and is organized on that basis, I have no experience as to the cost per student for electrical engineering." Counsel for plaintiff moved to strike out the testimony of these witnesses. His motion was overruled. In this ruling the district court erred. Their own testimony clearly shows their incompetency. Indeed, we are unable to see how any witness could have been found who could testify to any facts which, as stated by Judge ROOT, would "definitely tend to mitigate plaintiff's damages."

In 2 Sedgwick, Damages (9th ed.) sec. 612, it is said: "In some cases the plaintiff may recover the whole contract price. A common case is that of a schoolmaster. If a scholar is removed from the school during the quarter,

the schoolmaster may recover the tuition fee for the whole quarter (citing cases). * * * The principle upon which these cases rest seems to be that the whole contract price is to be given, because it is impossible to show with the required certainty any pecuniary outlay which the plaintiff has been saved by the breach. The school must continue in session, with its entire corps of instructors, although a scholar is withdrawn. * * * If, in such a case, the plaintiff is put to the same expense in time and money as if he had fully performed, the contract price of the whole work is the measure of damages." This reasoning exactly fits the case at bar.

After having examined two records made by the parties in this case, we are unable to discover any theory upon which defendant can escape his liability to plaintiff for the balance due under his contract. The contract is entire. Plaintiff has at all times been ready, and is still ready, and willing to carry out its part. Defendant has shown no good reason why he should not do the same. The litigation should end. The judgment of the district court is therefore reversed and the cause remanded, with directions to that court to enter judgment in favor of the plaintiff for $22.50, with interest from the time of the commencement of the suit in that court.

REVERSED.

WILLIAM BOYD, SR., APPELLEE, V. LINCOLN & NORTHWESTERN RAILROAD COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 13, 1912. No. 16,468.

OPINION on motion for rehearing of case reported in 89 Neb. 840. *Rehearing denied.*

SEDGWICK, J.

A statement of the issues in the case may be found in our former opinion, 89 Neb. 840. In the argument upon the motion for rehearing the question discussed was

whether the grades of the defendant company caused the overflow on the plaintiff's land, and in determining this question it was thought that the principal, if not substantially the only, question involved was whether the water at the time the damage was caused was substantially higher on the south side than on the north side of the grade, so much so as to justify the conclusion that this grade must have caused the overflow on the plaintiff's land. The parties have submitted memoranda briefs upon this point. They have quoted the evidence from the record bearing upon it, with references to the record, and to the exhibits showing the elevations at the grade, and at the plaintiff's land and other points. While the evidence is quite voluminous, it must be conceded that upon the points so presented it is unsatisfactory and in some respects conflicting. It is impracticable to present an analysis of this testimony, and, while we might not have reached the conclusion of the jury, we cannot see that there is not sufficient substantial evidence in this record to support their verdict. The motion for rehearing is therefore

OVERRULED.

BARNES, J., dissents.

NELLIE F. MEISNER, APPELLANT, V. DORA HILL ET AL., APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,611.

1. Homestead. Our statute uses the term "homestead" in its commonly accepted meaning—the house and land where the family dwells.

2. ———: RIGHTS OF CREDITORS. The homestead is subject to execution sale upon judgments against the holder of the title if its value exceeds $2,000. This limitation is solely for the purpose of fixing the rights of the homestead claimants and the creditors, respectively.

3. ———: DESCENT. If the legal title to the homestead is in the

husband, and there are no claims of his creditors against it, upon his death the homestead vests in the widow for life, without regard to its value, and in the absence of a will of the husband his heirs take the homestead subject to the life estate of the widow. *Tyson v. Tyson*, 71 Neb. 438, overruled.

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

E. C. Calkins and *H. F. Rose*, for appellant.

John J. Sullivan and *Fred W. Ashton, contra.*

SEDGWICK, J.

George Meisner died intestate. The plaintiff is his widow and the defendants are his children by a former wife. Fourteen years before his death he had selected the northwest quarter of a section of land in Buffalo county as his family homestead, which at the time of his death was worth about $100 an acre, and built a residence thereon of about the value of $9,000. At the time of his death he owned other land adjoining the said quarter section, and other property of the value of more than a half million dollars. The plaintiff and the defendants by agreement made a division of the real estate, except the said quarter section of land. The plaintiff contended that she was entitled to the quarter section of land selected as their home and dwelling-house and improvements thereon during her life. The defendants contended that, as the home property was of greater value than $2,000, they were entitled to have it sold and the proceeds in excess of $2,000 divided among the heirs of the deceased. The parties then entered into an agreement to submit this question to the district court. The terms of their agreement were set out in writing at full length and signed by the parties, but afterwards, for some reason, the defendants declined to voluntarily submit the matter to the district court, insisting that the county court, and not the district court, had jurisdiction thereof, and the

plaintiff then brought this action in the district court asking that court to determine that the said quarter section of land "descended to this plaintiff for and during the term of her natural life," and asking for general equitable relief. The answer admitted the facts as above stated, denied the jurisdiction of the district court, and alleged "that the property descended to the defendants subject to the homestead right of the plaintiff to the extent of $2,000 for life." The court decreed that the plaintiff's interest in the premises "be limited to the right to the use of $2,000 for and during her natural life, the present value of which is the said sum of $1,464; and that she be forever barred and restrained from claiming any further or greater homestead interest therein." The plaintiff appealed.

Considering the importance and necessary discussion of the principal question involved, we conclude that the district court was the proper forum without discussion. This conclusion is justified, we think, by our former decisions.

What is a homestead? Is it the present worth of the exemption which the statute allows against the claims of creditors, or is it the family home? Section 6 of the present homestead law (Comp. St. 1911, ch. 36) requires a creditor, when he seeks to subject a homestead to the payment of his claim, to take an oath "that the value of the homestead exceeds the amount of the homestead exemption." This is a legislative declaration that the homestead is something more than, and different from, the $2,000 exemption against the claims of creditors. This distinction plainly runs through all of our legislation. It is emphatically presented in substantially the same words in sections 8 and 11 of the act.

The first territorial legislature adopted laws from the state of Iowa that fill about 100 pages of the published laws of that session. Among other subjects, it included the subject of execution and exemptions of property. After exempting public property from sale upon execu-

tion, section 478 (1 Complete Session Laws, p. 36) specifies certain articles of personal property exempt to private individuals, and section 479 provided: "If the debtor is the head of a family there is further exempt—his homestead as provided by law." That is all that is said about the homestead, and then follows specifications of other articles of personal property that shall be exempt. There was no attempt to define "homestead." The word was used in its general acceptation—the home of the family, the common law castle of the citizen. The question of value did not enter into its description. The poor and the rich were treated alike; no one was to be deprived of his home. At the same session of the territorial legislature an independent act was passed providing that the property of married women, owned by them before marriage, should be exempt from their husband's debts. 1 Complete Session Laws, p. 83. The next session of the territorial legislature enacted a general law "respecting practice and proceedings in courts of justice." This law embraces the subject of executions and exemption from sale thereon. 1 Complete Session Laws, p. 341. It contains the same language in regard to the homestead as the former act, exempting it without regard to value. It was not necessary to define it; evidently the commonly accepted definition was adopted. "Homestead" was well defined at the common law. Webster's New International Dictionary defines it as "the land and buildings thereon occupied by the owner as a home for himself and his family, if any, and more or less protected by law from the claims of creditors." Bouvier's Law Dictionary adopts the definition from the supreme court of New Hampshire: "The home place—the place where the home is. It is the home; the house and the adjoining land; where the head of the family dwells; the home farm." If a tract of land is purchased by the parties for a home, and is transferred to one of them accordingly, and is by them in good faith occupied as their home residence, the land so transferred to them, and dwelling-house and other improvements

placed thereon, become their homestead. The Revised Statutes of 1866 treated the subject of homestead and exemption under that title. Section 525 provides: "A homestead, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated town, city or village, or, instead thereof, at the option of the owner, a quantity of contiguous land, not exceeding in amount two lots, being within an incorporated town, city or village, and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of the territory, being the head of a family, shall not be subject to attachment, levy or sale, upon execution or any other process issuing out of any court within this territory, so long as the same shall be owned and occupied by the debtor as such homestead," with the proviso that the "homestead mansion," and 20 acres of land whereon the mansion is situated, and not in any corporate town, city, or village, shall be exempt, and land adjoining the mansion not exceeding $500 should also be exempt, thus defining the homestead and exempting it absolutely. The next session of the legislature amended the act so as to exempt the homestead "so long as the same shall be owned and occupied by the debtor as such homestead." 2 Complete Session Laws, p. 376. By the act of 1873 the homestead was made liable to sale upon the foreclosure of a mortgage "duly executed by the head or heads of the family." 2 Complete Session Laws, p. 711.

By the act of 1875 the exemption of the homestead was continued, with a proviso that the homestead and appurtenances so exempted from forced sale "shall not exceed $2,000 in value" (laws 1875, p. 45, sec. 1), and providing in the sixth section of the act that, if the homestead consists of a house and lot which will not bear division without manifest injury, and the "fair and reasonable rent for the same" will be more than $300 annually, such excess of rental must be paid by the debtor annually until

the debt is paid. Section 19 of the act of February 19, 1877, provides: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law." Laws 1877, p. 37. This is a very suggestive section. That part of the homestead which the creditor might take is clearly not considered the whole homestead, and when one spouse dies the other might occupy the whole homestead, unless the creditors interfere. This is the first provision for the descent of the homestead upon the death of the spouse who holds the legal title. It specifies clearly the homestead that so descends, and it is the "whole homestead," and not merely the value exempted from the claims of creditors.

In 1879 our present statute was enacted. Laws 1879, p. 57. The first section of this act provides that a homestead not exceeding in value $2,000, including the dwelling-house in which the claimant resides, etc., shall be exempt from judgment liens and from execution or forced sale. This section does not attempt to define what a homestead shall be. Its object is to continue the exemption from the claims of creditors and limit that exemption. Section 17 of the act continues the provision for the descent of the homestead. It enlarges the brief provision of section 19 of the previous act. The survivor now takes the title and possession for life, instead of the mere right of occupancy. The heirs of the deceased are declared to inherit the homestead, subject to the life estate of the surviving spouse, just as they would inherit other property of the deceased. The life estate of the surviving spouse and the inheritance of the heirs of the deceased are protected against "any debt or liability contracted by or existing against" the deceased spouse prior to his or her death, "except such as exists or has been created under the provisions of this chapter." This last clause, of course, refers to mechanic's lien, mortgages, and the claims of creditors. It is still the "whole homestead" that descends. Taxes, liens, mortgages, and claims of creditors, if they exist, may inter-

fere with the enjoyment of it, but it is not measured by such claims. The distinction between the homestead and the amount of the homestead exemption is preserved all through the statute, though in some few instances the language is indefinite. This distinction, as already stated, is especially made manifest in our present statute. We could not consistently require a citizen to swear that the value of the homestead exceeds the homestead exemption if the two are identical. If the homestead in which the surviving spouse is to have a life estate is the present worth of the amount exempted from the claims of creditors, then it could not be true that the homestead exceeds the exemption.

The whole body of our legislation upon the subject of homestead so manifestly shows what it is intended shall be the home that descends to the surviving spouse for life that repetition may be justifiable in considering the course of the legislation. Our first legislation upon the subject recognized the existence and importance of the home as it was then identified, and preserved it for the family against all claims of creditors. The same action was taken in the next legislation upon the subject. The next legislation describes the homestead as the "homestead mansion" and 20 acres of land whereon the mansion is situated, together with adjoining land of the value of $500. The homestead thus defined was absolutely exempt. The next legislation limited the exemption "so long as the same shall be owned and occupied by the debtor as such homestead." The next legislation allowed the homestead to be incumbered by a mortgage "duly executed by the head or heads of a family," and made it liable to sale upon the foreclosure of such security, but otherwise left it absolutely exempt so long as owned or occupied as a home. And, then, in the act of 1875, the $2,000 limitation on the exemption was introduced into the law of the state, but the legislature was careful to preserve the identity of the homestead as the family home, and provided a way by which the family might keep and occupy the home

against any claims of creditors. There is reason for preventing the investment of all one has in an excessively valuable homestead for the purpose of defrauding creditors. The same reasons do not exist for taking the home away from the surviving spouse for the benefit of adult heirs, still less in the interests of minor heirs who are ordinarily more benefited by preserving the family home intact. The statute provides an elaborate method for creditors in the former case, but provides no means of dividing the homestead between the heirs and the surviving spouse. This fact of itself strongly indicates that the legislature never contemplated such a division. This $2,000 limitation of the exemption against the creditors has since that time been continued in our legislation, but no statute has ever declared that the limitation in favor of creditors is the full measure of the home that the surviving spouse may occupy for life, or that the present value of the use of $2,000 for the life of the surviving spouse shall be equivalent to a home.

Next comes the act of 1877, by which the surviving spouse is given the "whole homestead" for life, unless "otherwise disposed of according to law;" that is, unless sold for taxes or for mortgage foreclosure or affected by the statute in regard to claims of creditors. This provision of the act of 1877 is continued in the seventeenth section of the act of the next legislature, which is our present law, as already suggested.

When the whole history of our legislation upon the subject is considered, there is no ground for supposing that the legislature intended that, when there were no debts, mortgages or other liens, anything less than the "whole homestead" should vest in the surviving spouse for life. There has never been any legislation that would justify the conclusion that, when the husband and wife had established a home and occupied it for years, and the one in whose name the legal title was placed should die, and the home should be of greater value than the present worth of the use of $2,000 for the life of the survivor, the

home must be sold and the proceeds divided among the heirs, and the surviving spouse must seek another home. Such legislation would be monstrous, and our lawmakers cannot be charged with it. Indeed, the present act itself repels such a conclusion. The first section does not define the homestead; it merely declares how much of it shall be exempt from the claims of creditors. The sixth section declares that creditors shall not interfere with the homestead without first swearing that it exceeds in value the homestead exemption, and the seventeenth section declares that the homestead shall vest in the survivor for life, subject only to specified liens.

It is said that the husband holding the legal title may incumber the homestead by confessing judgment, and so compel its sale. And, also, that, when husband and wife have joined in such a conveyance, the proceeds are at the disposal of the owner of the homestead title, and only $2,000 of the proceeds is exempt from levy by creditors; but a court of equity would enjoin the sale upon a judgment fraudulently confessed, and there can be no sale of a homestead without the consent of both husband and wife, which might depend upon the proposed disposition of the proceeds. In *Tyson v. Tyson,* 71 Neb. 438, it is decided that, "in a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and $2,000 in value." And in *Teske v. Dittberner,* 70 Neb. 544, *Meek v. Lange,* 65 Neb. 783, and *Wardell v. Wardell,* 71 Neb. 774, and other cases, in some of which perhaps the precise point was not involved, similar expressions have been used. The legal profession and the people of the state are entitled to know the construction that this court intends to put upon important statutes of this nature. It is with exceeding reluctance that we refuse to follow the earlier decisions. This is particularly true when the rule announced in such earlier decisions has become the rule of property. Indeed, it is generally considered that in such cases it is better

to abide by a wrong construction, and leave the remedy with the legislature, than to confuse the decisions of the court upon important questions. The decision in *Tyson v. Tyson, supra,* however, has not become a rule of property in the full meaning of that expression. The homestead estate which vests in the surviving spouse for life is an ephemeral estate. It dies with the holder of it, and in most cases its life is short. At the end of the life estate in the homestead, the heirs of the deceased holder of the legal title take the property precisely as they do any real estate not of a homestead character, with the exception that it is not, in their hands, liable, for debts of their ancestor, for which it could not have been liable in his or her lifetime. Therefore no permanent real estate title depends upon the homestead of the surviving spouse. The case of *Teske v. Dittberner, supra,* was three times considered by this court, and was very much discussed. The question in the case was whether the holder of the legal title could "make a testamentary disposition of the property in question, subject to the inchoate life estate therein of his wife," and it was held, after much discussion, as stated in the opinion (65 Neb. 167), that the right to so dispose of the property "is expressly preserved to him by the statute." We have no fault to find with this conclusion. The question as to what constitutes "the inchoate life estate therein of his wife" was not discussed in any of the opinions, but was assumed, and we are now convinced erroneously, to be only that portion of the homestead which the law exempts as against the claims of creditors. Upon this vital question, then, the case is not to be deemed authoritative. In *Meek v. Lange,* 65 Neb. 783, the question presented, as stated in the opinion, was "whether or not damages for loss of the bargain can be recovered against one who, without the assent of his wife, makes an executory contract for the sale of his family homestead, which the wife subsequently refuses to carry out." It was held that no recovery could be had "for the loss of the bargain." It was said: "Possibly

the plaintiff is entitled to nominal damages for the absolute refusal to convey any of the premises, as they were found to be worth more than $4,000. The homestead right evidently does not protect defendant as to more than $2,000 worth." In this case, also, the character and quality of the family homestead as determining the life estate of the surviving spouse were not necessarily involved in the point decided, and were not necessary to the disposition of the case. The decisions of this court as affecting directly or indirectly the question here presented have not been exactly uniform. In *Teske v. Dittberner,* 70 Neb. 544, 556, it was said: "In so far as this court has heretofore expressed itself regarding the scope and effect of our homestead statute, its decisions have generally been favorable to a liberal construction of the act, such as would grant the fullest measure of protection to the rights and interests of the homestead claimants. * * * 'The law proceeds upon the theory that both husband and wife are entitled to the benefit of the homestead act, and this right cannot be waived except by the consent of both.' *Bonorden & Ranck v. Kriz,* 13 Neb. 121; *Aultman & Taylor Co. v. Jenkins,* 19 Neb. 209. It is held in *Swift v. Dewey,* 20 Neb. 107, that a mortgage of a tract of land including a homestead, executed by a married man without the concurrence and signature of the wife, is invalid for the purpose of impairing, dismembering, or in any manner affecting such homestead or its appurtenances. To the same effect is *McCreery v. Schaffer,* 26 Neb. 173." Many other decisions of this court, more or less inconsistent with the present contentions of the defendants, are quoted from with approval. In *Clarke v. Koenig,* 36 Neb. 572, *Larson v. Butts,* 22 Neb. 370, and subsequent cases, it is held that a contract for the sale of a homestead will not be specifically enforced unless executed by both husband and wife, and when the purchaser is willing to accept that part of the real estate which exceeds $2,000 in value as a compliance with his contract, and this without regard to the value of the homestead.

Commenting upon the various decisions of this court upon the subject of homestead, the brief of appellant well says: "If it be true that the lands and tenements comprising the homestead, in so far as they exceed the pecuniary value of $2,000, are not intended to be afforded any protection or privilege by the homestead act, upon what ground, then, can the court justify its previous holdings that a sale or conveyance of such lands and tenements, when not signed and acknowledged by both husband and wife, is absolutely void, without regard to the circumstance that the value greatly exceeds $2,000? How, then, may the court justify its holdings that the executor or administrator, upon whom the right of possession of all real estate devolves by a specific provision of the decedent act, cannot dispossess the surviving husband or wife of the land previously occupied as the homestead? How, then, may the court justify its previous holdings that the sale of the homestead property under an ordinary execution is absolutely void, notwithstanding the most formal order of approval and confirmation by the district court? If the term 'homestead,' used in the act, implies in every instance a limitation of pecuniary value of $2,000, then, necessarily, the excess value of the land and tenements beyond that limitation cannot be afforded any measure of protection. Under such interpretation, a conveyance by deed or mortgage of the lands and tenements comprising the family abode, which are of the admitted value of $10,000, would not, in so far as it operated upon the excess valuation of $8,000, affect in any manner the statutory homestead. In such case, the mortgage of the owner, in which the spouse did not join, would necessarily be valid as to $8,000, and, if the amount of the mortgage covered no more than the overplus or excess value, it would be valid and enforceable in its entirety."

We conclude therefore that the decision in *Tyson v. Tyson, supra,* and similar expressions affecting rights between the surviving spouse and the heirs in *Teske v. Dittberner,* 70 Neb. 544, *Meek v. Lange,* 65 Neb. 783, and

Wardell v. Wardell, 71 Neb. 774, and other cases, ought to be overruled. This decision does not affect former holdings of this court in regard to the rights of creditors against homestead property.

The judgment of the district court is reversed and the cause remanded, with instruction to enter a decree in harmony with the views expressed in this opinion.

REVERSED.

HAMER, J., concurring.

On or about the 2d day of March, 1909, George Meisner died intestate in Buffalo county, Nebraska, leaving a widow, and the defendants who are his children by a former marriage. At the time of his death he owned a section of land near Shelton, in that county, 36-10-13, on the northwest quarter of which he and his wife then resided in a dwelling-house stipulated to be of the value of $8,000. They had lived together on this particular quarter about 14 years immediately prior to his death, and this quarter and the dwelling-house are claimed as the family homestead. The land, exclusive of the dwelling-house, is claimed to have been worth $100 an acre. In addition to this particular section, George Meisner owned many sections in the vicinity, and his estate was worth more than a million dollars. By a voluntary agreement the widow and the heirs made partition of all the real property belonging to said estate except the home place; that is, the northwest quarter of 36-10-13. The widow contended that she was entitled to the use of the dwelling for life, with so much of the land upon which it was situated as was necessary and appropriate for the reasonable enjoyment of the same as a home. The other heirs contended that the dwelling itself was of greater value than $2,000, and that they were entitled to have the same sold, and that, after paying the widow the present value of a life estate in $2,000, they were entitled to have the remainder divided among the heirs. Mrs. Meisner and the heirs entered into an agreement for the submission of the ques-

tion in dispute to the district court and for the disposition of the said home place according to their rights as they might be determined by said court. A suit was brought in the district court for Buffalo county, in which a judgment was rendered to the effect that, the home place being worth more than $2,000, the homestead right of the widow was limited to the use during her lifetime of the sum of $2,000 in money. By the judgment the present value of Mrs. Meisner's interest was found to be $1,464. The pleadings and an agreement made between the parties state the facts.

The district court found and decreed: "(1) That the plaintiff has a homestead interest in the premises described in the petition; but that said interest is limited to the use for life of the sum of $2,000. (2) That the present value of the homestead interest in said property is the sum of $1,464. It is further ordered and decreed that the plaintiff's homestead interest in the premises in the petition mentioned be limited to the right to the use of $2,000 for and during her natural life, the present value of which is the said sum of $1,464; and that she be forever barred and restrained from claiming any further or greater homestead interest therein." The plaintiff excepted to so much of said finding and decree as limited her homestead right to the sum of $2,000, and appealed to this court from the judgment rendered.

Whether there is a succession to the surviving spouse implied by the word "homestead" in the present act of 1879 is the question to be determined. We will begin with the consideration of the homestead act of 1879. Laws 1879, p. 57. Section 17 of that act reads: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, *in the survivor for life,* and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, *except the life estate of the survivor, by will.* In either case it is not subject to the payment of any debt or lia-

bility contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." The foregoing denies the power of the decedent to dispose of "the life estate of the survivor." The homestead selected from the separate property of either husband or wife vests "in the survivor for life." Afterwards it vests in the heirs of the husband or wife from whose property it has been selected. The homestead coming from the separate property of either the husband or wife vests "in the survivor for life." Section 4 of the act provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by *both husband and wife.*" This is substantially a reproduction of the substance of section 3 in the act of 1877, hereafter referred to and discussed. Seemingly the purpose of the legislature by the enactment of these sections was to protect the person who is once married from losing his or her home by any action of the spouse, or by any action of the creditors of the spouse. This may give a very substantial effect to the *succession of the homestead right* to the "survivor *for life.*"

The first legislation on the subject of the homestead in Nebraska was in 1860, when the legislature passed an act contained in 1 Complete Session Laws, p. 648. It is also in Revised Statutes 1866, sec. 525, p. 484. "A homestead, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated town, city, or village, or, instead thereof, at the option of the owner, a quantity of contiguous land, not exceeding in amount two lots, being within an incorporated town, city, or village, and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of the territory, being the head of a family, shall not be subject to attachment, levy, or

sale, upon execution or any other process issuing out of any court within this territory, so long as the same shall be owned and occupied by the debtor as such homestead. This section shall be deemed and construed to exempt such homestead in the manner aforesaid during the time it shall be occupied by any one or more of the *family* of the debtor, or by the *widow* or minor child or children of any deceased person who was, when living, entitled to the benefit of this subdivision; provided, that the homestead mansion and 20 acres of land whereon the mansion is situate, and land adjoining the same to the extent of $500 in value, all being without an incorporated town, city, or village, shall be exempted, and no more." Here is a homestead exempted as against creditors for the use of the family, and the widow or minor child of any deceased person who was entitled to the benefit of the provision may occupy the land *without any limit as to time,* because the time is "the time it shall be occupied" by any one of the persons named, and they are determined by the act to be the family.

In *Dorrington v. Myers,* 11 Neb. 388, the head of the family was a widower. This court said: "When as the head of a family he entered into possession of this homestead, he became vested, so to speak, of a homestead estate therein, which was alienable only by sale or abandonment." If this be true, then the occupant mentioned could continue indefinitely to occupy the place. This court said in the case cited: "Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law."

It will be noticed that the homestead provided for by section 525 of the code of 1866 had *no specific value.* It was a place to live. There was a limit to the value of the land adjoining the first 20 acres on which the mansion stood, but the "homestead mansion" and the 20 acres

upon which the same stood *might* be of any value. It was not in the beginning an *exemption* of *money,* it was an exemption of a *place to live.* In the body of the section it is said: "This section shall be deemed and construed to exempt such homestead in the manner aforesaid during the time it shall be occupied by any one or more of the family of the debtor, or by the widow or minor child or children of any deceased person who was, when living, entitled to the benefit of this subdivision." Here is the matter of occupation that is to be protected, and it applies to "any one" of the family of the debtor, or to his widow or minor child, or to the child or minor children of any deceased person who was, when living, entitled to the benefit of the act.

The act of 1860 was still in force on the 24th of June, 1867, when it was amended by the legislature. The amendment made section 525 of the code of civil procedure of the Revised Statutes of 1866 read: "A homestead, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated city or village, or, instead thereof, at the option of the owner, a quantity of contiguous land not exceeding two lots, being within an incorporated town, city, or village, * * * or in lieu of the above, a lot or parcel of contiguous land not exceeding 20 acres, being within the limits of an incorporated town, city, or village, the said parcel or lot of land not being laid off into streets, blocks, and lots, owned and occupied by any resident of the state, being the head of a family, shall not be subject to attachment, levy, or sale upon execution or other process issuing out of any court in the state so long as the same shall be owned and occupied by the debtor as such homestead. This section shall be deemed and construed to exempt such homestead in the manner aforesaid, as well *after* as *before* the death of the debtor, and in the event of the death of the debtor the estate in such homestead shall de-

scend to and be vested in his heirs at law or legatees, free and divested from all claims if (of) any creditors thereto." 2 Complete Session Laws, p. 376. The section as amended at that time refers to land and dwelling-house and appurtenances being a place to live, and *says nothing of valuation.* It contains an amendment which seems quite important. It is: "This section shall be deemed and construed to exempt such homestead in the manner aforesaid, as well after as before the death of the debtor, and in the event of the death of the debtor the estate in such homestead shall descend to and be vested in his heirs at law or legatees, free and divested from all claims if (of) any creditors thereto." This section 525 of the code of civil procedure as amended still remained the law of the state at the time of the publication of the General Statutes of Nebraska of 1873. This act as amended continues the homestead exemption absolutely regardless of the value of the property exempted. The original act of 1860 refers to the dwelling-house as the homestead mansion. As the law was left after it was amended June 24, 1867, the homestead was exempt without regard to its value, and it descended to the heirs divested of any claim of any creditor. The law continued in this way until the 25th of February, 1875, when a new act was passed. 2 Complete Session Laws, p. 843. It will be seen that for 15 years there was in Nebraska a homestead law for the benefit of the family which contained no provision whatever concerning the value of the property exempted. It might be $5,000, or $10,000, or any other sum of money.

By the act of February 25, 1875, there came into existence for the first time that provision that the homestead should not exceed $2,000 in value. It reads as follows: "The family homestead of each head of a family, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, shall be exempt from attachment, levy, or sale upon execution or other process issuing out of any court in the state, so long as the same shall be owned and oc-

cupied by the debtor as such homestead; *provided,* that such homestead and appurtenances situated thereon shall not exceed $2,000 in value; *provided,* that such exemption shall not apply to homesteads which have been heretofore, or which may be hereafter, mortgaged by the owners thereof." 2 Complete Session Laws, p. 843. Section 1 as above quoted was amended February 13, 1877, to read as follows: "That section one (1) of an act entitled 'An act to exempt the homestead of families from attachment, levy, or sale, upon execution or other process issuing out of any court in the state of Nebraska,' approved February 25, 1875, be amended to read as follows: Section 1. The family homestead of each head of a family, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, shall be exempt from attachment, levy, or sale, upon execution or other process issuing out of any court in the state, so long as the same shall be owned and occupied by the debtor as such homestead; *provided,* that such homestead and appurtenances situated thereon shall not exceed $2,000 in value." On the 19th of February, 1877, the homestead law was again amended and re-enacted. 2 Complete Session Laws, p. 933.

The act of 1875 heretofore mentioned was repealed by the act of 1879, along with the act of 1877, and it is the act of 1879 which remains to be discussed. In all the statutes referred to in which there is a limitation upon the exemption of $2,000, it is *against creditors,* and not against the survivor. The failure to express the same limitation upon the succession would seem to indicate that it was *not* the intention of the legislative body to impose this limitation in the matter of succession. The legislature has very carefully provided for a means to subject the excess of the value of the homestead above $2,000 to the payment of any judgment that may be rendered. Nothing is said about a $2,000 homestead. It is just simply a homestead to which "the survivor for life" succeeds. If the legislature had intended that only

$2,000 should go to the surviving husband or wife, and that any excess above that should go to the other heirs, why should it not have said so? In the event that the homestead is above $2,000 in value, it is not saved at all as against the heirs, but $2,000 in money is saved as a *homestead exemption*. It is a different homestead that is contemplated by section 17 of the act of 1879. That is a homestead to which the survivor succeeds when the husband or wife dies. It is to furnish the home for the family. It is to include the shelter which protects those who are members of the family. The courts should establish a beneficent rule by which the widow and the children, when the husband dies, will be left in the home, and, after the children are grown up, the widow should be permitted to remain in the old home where she has resided with her husband, and which she has perhaps faithfully helped to earn and save. There is no reasonable excuse for cutting down the interest of the homestead succession which should go to the *widow* and provide for her a home during her declining years. The widow ought to be permitted to live in the same house which she and her husband have occupied together, and she ought not to be punished because the bread-winner is dead.

Section 1, ch. 49, laws 1907, enacts: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance * * * shall descend subject to * * * the rights of homestead." It would seem that there is no conflict between this statute covering the succession of heirs of descendants and the law of 1879 relating to homesteads. The statute is intended as a complete protection to the family against the right of arbitrary domination by the husband or wife who happens to hold the title to the homestead estate. This is the direct provision of section 4 of the act of 1879, and the same idea was fully expressed in section 3 of the act of 1877. Section 4 of the act of 1879 reads: "The homestead of a married person cannot be conveyed or encumbered unless the instrument

by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." Laws 1879, p. 58. Section 3 of the act of 1877 reads: "A conveyance or encumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." Laws 1877, p. 34. The homestead act of 1877 protects the *homestead exemption* from the creditor to the extent of $2,000, and it protects the *homestead itself* from the improvident act of the owner of the legal title.

This record does not involve the rights of the creditors. It deals with the rights of inheritance of the heirs at law as against the widow. In *Galligher v. Smiley*, 28 Neb. 189, Chief Justice REESE, delivering the opinion of this court, said: "In its inception a homestead is a parcel of land on which the family resides, and which is to them a home." In *Palmer v. Sawyer*, 74 Neb. 108, the definition of Judge REESE was quoted with approval.

In *Palmer v. Sawyer, supra*, this court held that the man who had acquired a homestead estate during the subsistence of a family relationship was entitled to occupy the premises after the family relationship had been broken up by death and removal. In that case Albert Palmer purchased the land in controversy in the year 1898, and at that time was a widower with three minor children living with him upon the premises. One of the children died and two moved away, so that the father was left alone in the possession and occupancy of the premises. A judgment was rendered against him, and an execution was levied on the land, and there was a proceeding to enjoin the sale. The question to be determined was whether the plaintiff was entitled to claim the property as his homestead. The court held the "head of the family" to include "every person who has residing on the premises with him or her, and under his care and maintenance, either: (1) His or her minor child, or the minor child of his or her deceased wife or husband." This court then recites section 17, and in connection with the two

provisions so recited say: "It will be noticed that the provisions of these statutes reserve the homestead right to every person who is the head of a family as defined in section 15, whether married or unmarried at the time of the acquisition. When the homestead right is acquired by a married person, it cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife, under section 4." The court cite *Whitlock v. Gosson*, 35 Neb. 829, and say that this section of the statute was declared to make the conveyance of a homestead executed by the husband alone void, not only void as to the interest of the wife, but also as to the interest of the husband who executed it. When a homestead right is acquired, it can only be divested in the manner prescribed by statute. This principle is supported by a line of decisions of this court cited in the opinion, and has been subsequently followed in *Giles v. Miller*, 36 Neb. 346; *Clarke v. Koenig*, 36 Neb. 572; *Violet v. Rose*, 39 Neb. 660; *Havemeyer v. Dahn*, 48 Neb. 536. If the homestead in controversy had been selected from the lands of the deceased wife, on the death of the wife, the homestead right would have descended to the husband for life, *whether any children had been born of the marriage or not.* In *Dorrington v. Myers*, 11 Neb. 388, this court said: "Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law." In *Gallagher v. Smiley, supra*, the court held that the homestead right was beyond the reach of execution. In the above case, REESE, C. J., in the body of the opinion, says: "At the time this homestead right was acquired, by a compliance with the provisions of the law, the whole of the tract now in dispute was exempt from sale so long as its occupancy continued. While the judgments were liens, for the payment of which (if not allowed to become dor-

mant) the property was pledged, yet the homestead character could not be molested for the purpose of enforcing their payment. * * * The right could not be diminished by law without the consent of defendants. *McHugh v. Smiley,* 17 Neb. 620, 626; *DeWitt v. Sewing Machine Co.,* 17 Neb. 533. For twenty years perhaps, and during the whole time of the existence of the indebtedness, the right could not be questioned. The land was included within the corporate limits of the city by law, and without the consent or procurement of defendant. His rights could not be diminished thereby." *Bassett v. Messner,* 30 Tex. 604; *Nolan v. Reed,* 38 Tex. 425; *Barber v. Rorabeck,* 36 Mich. 399; *Ham v. Santa Rosa Bank,* 62 Cal. 125. In *Galligher v. Smiley, supra,* a 70-acre tract of land occupied as a homestead was brought within the city of Omaha by the extension of the city limits, and was attempted to be sold under execution. It was held that the homestead character of the land could not be changed without the consent of the occupant, and that the land could not be sold, although worth $200,000.

Except where it is narrowed by the qualification implied by the term "exemption," the word "homestead" is used in the act of 1879 in its popular sense to designate a *parcel of land on which the family resides.* The section under consideration enables the creditor to reach the *surplus* above $2,000. That section, therefore, is for the *benefit of the creditor,* as well as for the benefit of the head of the family who claims the "homestead exemption." It would seem that a consideration of the entire act makes it clear that the legislature intended the limitation of value to apply only in favor of creditors, and not to a homestead succession to the heirs or devisees. The court is authorized, on the petition of the creditor, to order a sale by execution only when the land "exceeds in value the amount of the homestead exemption," and prohibits the receiving of any bid "unless it *exceeds* the amount of the homestead exemption." *There can be no sale unless there is such excess.* By section 12 the sum to

be paid the claimant, where the whole tract is actually sold, is designated as "the amount of the *homestead exemption.*" In five subsequent sections of this same act of 1879 the limitation of pecuniary value of the homestead is six times referred to as the "homestead exemption." These references apply in favor of creditors only. These terms are not applied in connection with the words heirs or devisees. Sections 4 and 17 substantially re-enact the provisions of the act of 1877. Section 4 protects the homestead and the family of a married person against the domination of a husband or wife who is seized of the record title. The legislative policy implied has no necessary relation to the *separate* policy giving some measure of protection to creditors. It is entirely rational and consistent for the act to make a pecuniary limitation as to the creditors, and *no limitation as to heirs or devisees.* Because the pecuniary limitation is applied in one case is no reason whatever that it should be in the other case. The legislative policy embodied in section 4 applies with equal force seemingly to section 17. It required section 17 to completely forbid the domination of the homestead estate by the holder of the legal title. The shelter of the family becoming destroyed upon the death of the husband or wife holding the legal title, the survivor and the minor children would be subject to be dispossessed of their home, *although no rights of creditors should be involved.* There is no pecuniary limitation attaching to the provision forbidding the homestead to be conveyed or encumbered except by deed executed and acknowledged by both husband and wife, or to the provision for survivorship on the death of the person from whose property it was selected. It is not a certain amount of money which the surviving spouse gets the use of.

The former acts were repealed, and, when the legislature of 1879 drew up a permanent form of the homestead law, it used the word "homestead" in creating an absolute disqualification of the husband or wife from whose property it was selected to encumber or alienate the home-

stead by a voluntary deed or devise, and preserved in favor of *creditors* only the limitation as to value. In the mind of the legislator there is the protection of the "homestead exemption" and the homestead itself, and sections 4 and 17 of the act offer protection against the domination of the person from whose property the homestead is selected, and *without any reference whatever to its pecuniary value,* and that means the protection of the homestead itself. There are two ideas here: (1) A place for the homestead claimant where he and his family are safe as to *everybody* if the place is not worth more than $2,000; and (2), if it does exceed $2,000 in value, then safe as to everybody except the creditor. Now, in this particular case there is no creditor, and therefore the homestead is a homestead as against *everybody.* Did the legislature intend, then, to turn the widow out because the husband is dead and the children have gone? What legislature would say, "We will make a law to apply to our widows when we die, and to our sisters when they have become widows and to our mothers when our fathers are dead and buried and the mothers are left alone in the old house, and we will say that these wives as they become widows are to be turned out of the homes they have occupied and in which the children have been raised, and they must find new and strange homes in which to finish their lives, so that the other heirs may each receive a few dollars more from the immediate distribution of the estate?" If no future legislature in Nebraska would do such a thing as that, then it would seem that no Nebraska legislature has done it. The right to dispossess the widow of the homestead selected from the property of her deceased husband is not written in the statutes.

It is contended that because this court in the case of *Tyson v. Tyson,* 71 Neb. 438, rendered a decision in conflict with the doctrine announced, therefore the will of the legislature should be ignored, and that an inadvertent mistake should bind the court in the future to a doctrine by which the surviving wife or husband is to be put

out of the old homestead. In *Tyson v. Tyson, supra,* Peter Tyson died intestate in Washington county, and the plaintiff in error was the widow, and the defendant in error was the only child. The intestate died seized of a farm containing 156¾ acres. The petition which was filed in the county court alleged that Mary Ella Tyson claimed a homestead interest in said premises, and occupied the dwelling-house and buildings under her claim that the same was the homestead of the decedent and herself during the lifetime of said decedent and at the time of his death. The petition was filed by the son, who alleged that the homestead consisting of the dwelling-house and outhouses and the said land exceeded $2,000 in value, and that Mary Ella Tyson was only entitled to use and occupy said dwelling-house and outhouses with so much land upon which the same was situated as, taken together with said buildings, shall equal in value the sum of $2,000, and no more. It is also alleged that, in addition to said homestead, the said Mary Ella Tyson was entitled to dower interest in said land to the extent of one-third thereof; that, under the claim of homestead and dower, she wrongfully excluded the petitioner from said premises, and claimed the whole of said real estate as homestead and dower; that she refused to account for the rent of that portion not included in the homestead interest to which she was entitled; that said real estate was of the value of $11,750, and exceeded the homestead in value by $9,750. It was also alleged that Mary Ella Tyson claimed the right to receive from said estate the sum of $35 a month as support, and that she was drawing the same. There was a prayer for the appointment of three persons to set off the homestead and dower of the plaintiff by metes and bounds, the former not to exceed $2,000 in value. The answer of Mary Ella Tyson admitted receiving $35 a month for her support, and claimed the exclusive right to use the land; alleged said land was the homestead of Peter Tyson and Mary Ella Tyson at the time of the death of said Peter Tyson, and that said home-

stead at the death of said Peter Tyson vested in his surviving wife, and that the son, Amasa F. Tyson, had no interest in the land during the lifetime of said Mary Ella Tyson. The answer also alleged that the county court had no right or power to adjudicate the title to said land. Upon the hearing, the county court found that Mary Ella Tyson had a homestead in the premises, or in so much thereof as should not exceed in value $2,000, and was entitled to dower therein, and appointed three persons to assign her dower and homestead by metes and bounds. From the decree rendered by the county court, Mary Ella Tyson prosecuted error to the district court, where the decree of the county court was affirmed, and the case was then brought to this court by petition in error.

It will be noticed that there is a difference between this case and the *Tyson* case. (1) In the *Tyson* case there was, in addition to the consideration of any homestead claim, the claim that "the said Mary Ella Tyson is entitled to *dower* interest in said land to the extent of one-third thereof, and is entitled to have the same set aside." This was alleged in the petition as above quoted. It was also stated in the opinion that "the prayer is for the appointment of three persons to set off the homestead and dower of the plaintiff by metes and bounds." (2) In the instant case there is no claim of dower. The fact that *dower* and *homestead* and the support of $35 a month were all claimed out of this estate of 156 acres no doubt tended to confuse the issues, and perhaps to cloud the minds of all connected with the case. In the *Tyson* case, it was said in the body of the opinion: "This court held, as we have seen, that, in order to oust the jurisdiction of the county court, the right of the applicant must be disputed by presenting an *issue of fact* which, if established by proof, would defeat her claim, and such issue must be one which the county court by its organization is unable to try." It would seem to be absurd that, if the *law* ousts the jurisdiction of the county court, there should be any contention that it presented a *different* question

from an issue of fact ousting such jurisdiction. If the jurisdiction is ousted, that is enough.

The learned commissioner who writes the opinion follows up his first mistake with a second one. He proceeds to discuss the section relating to the exemption of $2,000 from judgment liens, and fails to reason upon the subject. He writes: "But it will not be claimed that, in a case of that kind, the surviving spouse would take a life estate in the excess by virtue of the homestead act. * * * Neither are we able to see that the surviving spouse has any greater rights when the claimant of the excess is an heir of the deceased instead of a creditor." What the learned commissioner says is a mere dictum. Perhaps the idea of the commissioner who wrote the opinion is derived from the fact that he may have supposed the contention made was not supported by the pleadings. One of the contentions was that a widow not owning a residence suitable to her condition in life might remain in the dwelling-house of her husband so long as she remained a widow without being chargeable with rent. He held this was not supported by the pleadings.

We are now met with a statement that, because of this opinion, this court shall continue to stand where all are agreed that it is wrong to stand. It is urged as a reason why the mistake made in *Tyson v. Tyson* should stand is that it has been the accepted idea of the bar and the judges for a number of years that the $2,000 exemption applied as well to the survivorship as to the creditor. It is said that it will make a change in the rule of property rights, and that there will be sufferers in consequence of it. The answer to that is that the woman who lives to be an old woman and loses her husband seldom marries again. The same is true of the man who lives to be an old man. It is the exception when he marries again. There is no reason that the heirs are likely to be crowded out, because at the death of the survivor the heirs go into full possession of the property. The survivor rarely has many years to live. We are all inclined to overestimate the

length of time we have to live. The pictures are hanging on the wall of most of those who have preceded us. They are gone and maintain the discussion no longer. In a few years more we shall all be gone, and there will be other occupants of our places. Perhaps no one may say with absolute certainty the number of years that the average survivor is likely to live, perhaps five, perhaps ten, not more than that. At the end of that time the heirs will come into the exclusive possession of that which he has inherited from the deceased wife or husband who has gone before the survivor. The thing contemplated as dangerous to the property rights is not dangerous at all, because it takes nothing permanently, and only maintains a meritorious use. In the interest of humanity this court should at once correct the mistake in *Tyson v. Tyson,* and declare the will of the legislature as it has been expressed. The right of homestead may survive in favor of the husband on the death of the wife, even though no children of the marriage are living (*Burns v. Keas,* 21 Ia. 257; *Ellis v. Davis,* 90 Ky. 183, 14 S. W. 74; *Roberts v. Greer,* 22 Nev. 318, 58 Am. St. Rep. 755), or though the children have removed from the homestead upon which he still resides (*Gray v. Patterson,* 65 Ark. 373, 46 S. W. 730), or though the children have attained their majority (*In re Feas' Estate,* 30 Wash. 51, 70 Pac. 270), or though he is not a housekeeper with a family.

The present value of Mrs. Meisner's homestead interest is found to be $1,464. She does not get this sum, because it is only the use of a $2,000 interest in the homestead that she gets, and, when she dies, the heirs of the deceased hold the property free and divested of any claim she may have once had. The interest on the present value, therefore, is all she may safely count on. Six per cent. on $1,464, the present value, would give her $87.84 per annum. The smallness of the matter is quite apparent from a consideration of the insignificance of this sum. From this it would seem that early in the history of the people of our state they passed a law which guaranteed to the

"family," so long as it was needed for that purpose, a homestead which shielded the young and the strong and the old and the feeble alike, and all in the interest of the home. Sections 17 and 4 of the act of 1879 contain a recognition of the principle that underlies all the legislation of the state upon the subject. It is the protection of the home, when once it is established, as long as it may be needed for any surviving husband or wife. The family is a unit of the state. The home protects it. As long as the family exists, the home should exist. This court has already said that the head of the family should be protected in the home, although the children have already grown to maturity and have left it. *Gallagher v. Smiley*, 28 Neb. 189.

The judgment of the district court should be reversed.

FAWCETT, J., dissenting.

I am unable to concur in the majority opinion, for the following reasons:

The contest in this case is between plaintiff and the daughters of deceased by a former wife. At the time of his death, Mr. Meisner was the owner of the northwest quarter of section 36, township 10, range 13, in Buffalo county, worth, exclusive of the buildings, $16,000. He had erected thereon a dwelling-house of the value of $9,000. For 14 years prior to his death, this dwelling and quarter section of land had been occupied by Mr. Meisner and plaintiff as their home. At the time of his death, he left other lands of the agreed value of $531,088. By an agreement entered into between plaintiff and the daughters, a division of all of the lands, other than the quarter section referred to, has been agreed upon. It has also been agreed between them that plaintiff shall take the quarter section in controversy at an agreed valuation of $25,000, and account for the same under the decision to be rendered in this case; that is to say, she is to be given credit for the value of her homestead interest as found by the court, and account for all in excess thereof

up to the $25,000. The question decided by the district court, and before us for review, is the construction to be placed upon sections 1 and 17 of the act approved February 26, 1879, and in force after September 1 of that year. Laws 1879, p. 57. These two sections are as follows:

"Section 1. A homestead not exceeding in value $2,000, consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or, instead thereof at the option of the claimant, a quantity of contiguous land, not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens, and from execution or forced sale, except as in this chapter provided."

"Section 17. If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter."

Succinctly stated, the question is: Does the $2,000 limitation, expressed in section 1, apply to exemptions against creditors alone, or does it also apply to the right of succession under the provisions of section 17? It is argued with great force by counsel for plaintiff that the language used in the different sections of the act indicate that the legislature had in mind what might be termed two homesteads—one, the actual homestead, and the other, the homestead which could be held as against creditors—and that the $2,000 limitation applies only to the latter.

The title to the act reads as follows: "An act to provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment, levy, or sale, upon execution or other process." It will be seen that the title recites that the act is "to provide for the selection and disposition of homesteads, and to exempt *the same*," not "the same *to the extent of $2,000*," but *"the same"*—that is to say, *the homestead*—from judgment liens, etc., indicating, I think, that the intention was to exempt the entire homestead, the selection of which the act following was to provide for, from judgment liens, etc. Section 1 of the act reads: "A homestead not exceeding in value $2,000, consisting of the dwelling-house in which the claimant resides," etc. If we read this clause of section 1 with the same punctuation appearing in the title, which would place a comma after the word "homestead," the clause would then read, "A homestead, not exceeding in value $2,000, consisting of the dwelling-house," etc. That punctuation, or reading it in that manner, would seem to indicate that the $2,000 relates to the entire homestead, and not to a subsequently to be determined portion thereof. That this is the construction which has been placed upon this act for over 30 years cannot be questioned. Estates have been divided and lands partitioned, all over the state, under that construction.

In *Meek v. Lange*, 65 Neb. 783, suit was brought to recover damages for the breach of an executory contract, made by the husband without the assent of his wife, for the sale of the homestead. In the syllabus it is held that an executory contract for the sale of the family homestead, to which the wife is not a party, is invalid, and its nonperformance does not furnish a basis for recovery of damages for the loss of the bargain. On page 788, speaking through Mr. Commissioner HASTINGS, it is said: "Doubtless, in case of bad faith, or where the action of defendant has caused special damages, a right of action would arise for such injury. But it would seem entirely inconsistent

to allow a recovery of damages for the loss of a bargain which plaintiff made in full view of evident facts with one whom those facts rendered incompetent to sell the property. As above stated, only damages for loss of the bargain were allowed in this judgment. The judgment, therefore, cannot stand. Possibly the plaintiff is entitled to nominal damages for the absolute refusal to convey any of the premises, as they were found to be worth more than $4,000. The homestead right evidently does not protect defendant as to more than $2,000 worth." It will be observed that that was not a case involving the question of exemptions against creditors, but that it involved the whole right of homestead, which right the court there said did not protect defendant as to more than $2,000.

Upon the third hearing of *Teske v. Dittberner,* 70 Neb. 544, the last two paragraphs of the syllabus read:

"(10) A parol agreement made by the husband with a third party to devise property embraced within a homestead, like an agreement to convey the reversionary estate, is in conflict with the provisions of the homestead act and is not specifically enforceable, even though substantial performance of the contract by the promissee may have taken place.

"(11) When such an agreement includes other land than that included within the homestead, the contract may be specifically enforced except as it affects the homestead property."

In the opinion, on page 550, it is said: "In speaking of the homestead, we wish to be understood as having reference to that part of the real estate in controversy which consists of the dwelling-house, in which the promisor, Frederick Teske, and his family, at the time, resided, and its appurtenances and the land on which the same are situated, not exceeding 160 acres in area, nor $2,000 in value." Here again this court, in a case where the question of the rights of creditors was not involved, limited the homestead to the dwelling-house and its appurtenances, and the land on which the same are situated, not exceeding 160 acres in area, *"nor $2,000 in value."*

In *Tyson v. Tyson,* 71 Neb. 438, the third paragraph of the syllabus reads: "In a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and $2,000 in value." In the opinion, on page 443, it is said: "Another contention of the plaintiff is that she is entitled to hold and occupy the entire tract of land as a homestead, regardless of its value, and this contention is supported by a more plausible argument than we should have thought possible in view of the plain provisions of the homestead act. A homestead within the meaning of that act, chapter 36, Compiled Statutes (Annotated Statutes 6200), is defined and limited by the first section thereof, which is as follows: (Section 1 of the act set out.) The first limitation imposed is that the homestead shall not exceed $2,000 in value; the next, that it shall not exceed 160 acres of land not in any incorporated city or village, or, in lieu thereof, not exceeding two lots within such city or village. The head of a family might actually occupy more than 160 acres of land, not in an incorporated city or village, or more than two lots in such city or village, as a family homestead. But it will not be claimed that, in a case of that kind, the surviving spouse would take a life estate in the excess by virtue of the homestead act. The limitation as to value is as certainly and positively fixed by statute as the limitation as to quantity. Neither are we able to see that the surviving spouse has any greater rights when the claimant of the excess is an heir of the deceased instead of a creditor. The homestead, which vests in such survivor for life, is the identical homestead in quantity and value defined in section 1 of the act. The statute recognizes none other." It will be seen that the question under consideration in the case at bar was squarely before the court, and was considered and squarely decided in that case.

In *Wardell v. Wardell,* 71 Neb. 774, the third paragraph of the syllabus reads: "A homestead exemption is by the law of this state limited to the value of $2,000, and

if, upon the death of a husband, the dwelling and the tract of land adjacent thereto, selected from his estate and occupied by himself and family as a homestead, exceed that value and are so situated that the dwelling together with the grounds upon which it stands, and not exceeding that value, cannot be set apart from the residue of the tract, no legal estate in the land, or in any part of it, passes to the widow and heirs under the homestead act, but in lieu thereof an equitable interest to the value of $2,000 in the entire tract does pass to them thereunder." In that case the land consisted of 120 acres, including the family dwelling-house, the whole being of the value of about $14,000. Upon the trial it was found that the value of the dwelling-house alone was $3,000, and of the buildings appurtenant to it, $3,500, and of the equitable title to the land, $7,200, and that the premises were not susceptible of division or partition, so as to permit the dwelling-house and the ground upon which it was erected, of a value not exceeding $2,000, to be set apart as a homestead. The district court thereupon decreed a sale of the entire tract and the investment of $2,000 of the proceeds thereof at interest during the life of the widow, she to receive the interest and income thereof until her death, the principal to then descend to the heirs at law of the decedent. The widow prosecuted error to this court. Her contention was that the provisions of the statute for appraisement and setting apart of the homestead during the lifetime of the person from whose estate it was selected, or the sale of it, in instances in which it is not susceptible of division, and the setting apart of $2,000 of the proceeds of the sale, are not applicable after his death, and that, hence, the statutory restriction as to the value of the exempt property ceases with that event, "and that therefrom the entire premises occupied as a homestead, to the whole extent of the territorial limits prescribed by statute, acquire the character of exemption regardless of values." In the opinion, on page 777, it is said: "We think this reasoning is at fault in overlooking the fact that that

which constitutes the homestead, and that alone, therefore, which passes to the surviving spouse, in cases of this kind, is not necessarily any defined tract of land, but only so much of a definable tract, if any, as, including the dwelling house and appurtenances, shall not exceed $2,000 in value." The judgment of the district court was affirmed. It is said that the language quoted from the last above case is *obiter dicta*, as applied to this case, for the reason that there the right of creditors was involved. The record in that case, however, shows that the creditors were general creditors of the decedent who had not obtained any lien upon the land prior to his death, and I am inclined to think that, if the right of succession is as contended for by the plaintiff here, it would have been good in *Wardell v. Wardell*, for the reason that, as insisted in that case, the right of succession attached prior to even the assertion of any debts against the decedent. But whether it be *dicta* or not, it shows the view of the learned commissioner who wrote that opinion, concurred in by his two able associates, and approved, without dissent, by the court.

In *Jerdee v. Furbush*, 115 Wis. 277, 279, 281, the court had before it the question of the rights of a grantee of a homestead under a conveyance made without the wife's signature. In the opinion the court say: "We cannot at this late day decide that as a new question. If it were otherwise, a different result of this appeal might occur than the one we have decided upon." The opinion then cites and comments upon two prior decisions of the court, and adds: "The law has thus stood for nearly a quarter of a century, and whether the court's construction of the statute was right or wrong it must now be considered the law the same as if the idea involved were literally expressed in the statute. It relates to property. It has become, by the lapse of time, a rule of property, which, by well-settled principles, can only be rightly changed by legislative enactment." In conclusion the court say: "It follows from what has been said that (naming the two

cases referred to) rule this case. To try to distinguish one case from another upon the facts, where the ruling principles in one are plainly identical with those in the other, creates uncertainty and confusion in the law. That should be avoided as to any subject, but particularly in respect to titles to real property." The reasons there given for following the former decisions appeal to me as eminently sound. The ruling principles in the four former opinions of this court are plainly identical with the present case, and to attempt now to distinguish one from another upon the facts would, as stated by the Wisconsin court, "create uncertainty and confusion in the law."

Our former holdings, together with a similar and state-wide construction of the act by the district courts for more than 30 years, should set the matter at rest. I am unwilling at this late day to disturb that which for so many years has been considered settled. I therefore conclude that the limitation of $2,000, expressed in section 1, is not restricted to exemptions against creditors, but also applies to the right of succession under the provisions of section 17, and insist that a construction of a statute, established by a line of former decisions of this court, uniformly followed by the district courts, and long acquiesced in by the bar, should not, ordinarily, be disturbed, even though the court, as subsequently constituted, might have placed a different construction upon such statute, if before it for the first time.

BARNES and LETTON, JJ., concur in above dissent.

ADOLPH LAZURE, APPELLANT, V. MAVERICK LOAN & TRUST COMPANY, APPELLEE.

FILED NOVEMBER 13, 1912. No. 16,794.

Taxation: REDEMPTION FROM SALE. Before bringing an action to redeem from tax sale and treasurer's deed, all taxes subsequent to the sale, due and payable, must be paid. If subsequent taxes

have been paid by the purchaser at tax sale, the amount so paid, with interest, should be included in the decree allowing the redemption. The landowner is not required to reimburse the purchaser at tax sale before bringing his action to redeem.

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

John Lothrop and *B. F. Gilman*, for appellant.

C. Patterson, contra.

SEDGWICK, J.

The defendant claims an interest in the land in question by virtue of an administrative sale for the taxes assessed thereon in the year 1904 and a treasurer's deed pursuant thereto. The plaintiff brought this action to redeem the land from the taxes, claiming that the treasurer's deed was void. The trial court found for the defendant, and the plaintiff has appealed.

It is conceded that the tax deed was void for several reasons, and it is contended by the defendant that he has paid all the subsequent taxes upon the land, and that the plaintiff cannot maintain this action to redeem without first reimbursing him for the taxes so paid. This does not constitute a defense to the action. Section 11111, Ann. St. 1911, provides that the owner of land sold for taxes may redeem by paying the amount of taxes for which the land was sold, with interest, "together with all other taxes subsequently paid." The taxes, according to the admissions of the parties upon the record, have all been paid, and to require the plaintiff to reimburse the defendant for subsequent taxes paid would, in the language of the supreme court of Iowa, "not be a payment of the taxes. It would be a reimbursement for taxes previously paid." *Taylor v. Ormsby Bros.*, 66 Ia. 109. Our statute requiring the payment of taxes before bringing an action to redeem was borrowed from Iowa. The construction that court put upon it is a reasonable one, and we are content to follow it.

The judgment of the district court is reversed and the cause remanded, with directions to allow the plaintiff to redeem as herein indicated.

REVERSED.

NETTIE MAJORS, APPELLANT, V. THOMAS J. MAJORS, APPELLEE.

FILED NOVEMBER 13, 1912. No. 16,806.

1. **Statute of Frauds:** PARTNERSHIP: ACCOUNTING. An agreement of settlement between partners, or between one partner and the representatives of a deceased partner, by which a division is made of all or a part of the partnership property, some of which is real estate, is not within the statute providing that no estate or interest in land shall be created, granted, assigned, surrendered, or declared, unless by operation of law, "or by a deed or conveyance in writing." Comp. St. 1911, ch. 32, sec. 3. Such agreement between partners may be oral, if upon sufficient consideration.

2. **Brokers:** SALE OF LAND: AGREEMENT BETWEEN PARTNERS. Such agreement between partners providing that one of the partners may find a purchaser for the land and have the proceeds above a certain amount is not within section 74, ch. 73, Comp. St. 1911, relating to contracts with agents or brokers to sell lands.

3. **Compromise:** CONSIDERATION. In an action upon an alleged settlement or compromise, the plaintiff must allege that there was some reasonable foundation for his claim, and that it was made in good faith; otherwise there is no consideration for the alleged agreement upon compromise.

4. ———: ACTION: PLEADING. A petition in an action to recover upon an alleged contract of settlement or compromise must show some consideration for the contract, or it will be subject to a general demurrer.

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

George A. Adams, for appellant.

T. F. Hamer and *F. M. Tyrrell, contra.*

SEDGWICK, J.

This case was decided in the district court for Lancaster county upon a general demurrer to the plaintiff's petition, and the plaintiff has appealed.

The petition alleged that the defendant and the plaintiff's husband were formerly in partnership in the mercantile business, and that they sold and disposed of the business, and took as part consideration therefor a tract of land located in Box Butte county, the title being taken in the name of the defendant, and that soon after that the plaintiff's husband died, and that the defendant took possession of the land "to wind up said business of said partnership, pay the obligations, if there were any then unpaid, reduce the assets, including the above described real estate, to money, and adjust and settle up said partnership. That the matter ran along from that time until about the months of February or March, 1907 (about 11 years), the said defendant being in possession of said real estate all the time and receiving the rents, profits and proceeds thereof, and all the time claiming he was adjusting said partnership matters;" that the plaintiff then demanded a settlement of the partnership affairs, and that the defendant account to her, for herself and her children, "for the interest of her said deceased husband in and to said partnership property;" that a controversy existed and had existed for some time as to the interest of the plaintiff and her children in the real estate, the plaintiff insisting for herself and children that they had an interest in the real estate, and the defendant insisting that they had no interest therein, and that it was agreed between the parties, the plaintiff and the defendant, "that this plaintiff should proceed to sell said real estate, and out of the sale of the same the said defendant was to have $8,000, and all over and above said sum of $8,000 was to be received by this plaintiff for the benefit of herself and the said children;" that the plaintiff found a purchaser who was ready and able and willing and offered to give $12,000 for the real estate, which the plaintiff agreed to

take, and notified the defendant, but he "refused to comply with the terms of said contract, but, on the contrary, utterly failed and completely repudiated the same and declined to execute a deed to said real estate;" that there were seven children of the plaintiff and her husband, who were minors at the time of her husband's death. The allegation that the children were minors at the time of the husband's death was not, of course, an allegation that they were minors at the time of making the alleged contract, which was 11 years later, but this perhaps is not a material consideration.

The defendant urges that an oral contract of this kind would not be valid because of the statute of frauds. There does not seem to be any merit in this objection because no estate or interest in the land was created or attempted to be created, granted, assigned, or surrendered or declared by the alleged contract.

The alleged contract would not be within the statute providing that contracts of agency for the sale of real estate must be in writing and signed by the parties, since this was not a contract of agency, but was rather an attempt to adjust matters arising out of the relation of partnership.

We think, however, the petition entirely fails to state a cause of action for other reasons. It was, of course, the duty of the surviving partner to take possession of the land, to wind up the business of the partnership, pay its obligations, to reduce the assets, including the land, into money, and adjust and settle up the partnership business, as it is alleged in the petition he was at all times attempting to do. The plaintiff's husband, if living, would have no legal claim to the proceeds of the land until all this had been done. If her husband was living, he would have had such an interest in the business as would without doubt afford a basis for a contract of settlement between himself and the defendant, adjusting their mutual rights of the assets of the partnership, and it may be that this interest would be sufficient to afford a basis for a contract

of the nature of the one alleged. The plaintiff, however, did not succeed directly to the rights of her husband in the assets of the partnership, since for the purpose of settlement between the parties such assets are regarded as personal property. She would have an interest in the proceeds of the land, provided that, after closing the partnership business, the assets of the partnership were more than sufficient to adjust the claims against the partnership, and provided, further, that the share of the estate of the deceased partner therein was, together with the other property of the estate, more than sufficient to adjust the liabilities of the estate and pay the costs of administration. She had no legal title or claim to the assets of her husband's estate, as they belonged to the administrator. She did not have any right of action against the defendant to settle or compromise. The defendant was still attempting to adjust the partnership business, and an action for an accounting and adjusting of the partner's interest could only be maintained by the administrator of the estate of the deceased partner. If she had any interest whatever in this land, it was contingent, first, upon the value of the assets of the partnership; and, second, upon the solvency of her husband's estate. She does not allege the facts in regard to either, from which it might be found that she had any probable interest. It is not necessary to determine in this case whether the plaintiff could have alleged a cause of action of the nature here attempted. It is sufficient for the determination of this case that she has not alleged any value of the assets of the partnership, nor the liabilities thereof, nor has she alleged any settlement of the estate of her deceased husband, nor the amount of the assets or liabilities of that estate. She has not alleged in general terms that she had any title or interest, legal, equitable or contingent, in this land. There was therefore no substantial interest or claim to compromise or settle, and consequently no consideration for the alleged agreement. In the absence of all these allegations, she has failed to allege that she had any

legal interest in this land to form any basis of settlement, and the demurrer to the petition was rightly sustained.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

FRANK CHALUPA ET AL., APPELLEES, V. TRI-STATE LAND COMPANY, APPELLANT.

FILED NOVEMBER 13, 1912. No. 16,809.

1. Waters: IRRIGATION: REFUSAL TO FURNISH WATER: ACTION FOR DAMAGES: PARTIES. Two of the plaintiffs, being owners and holders of a water right upon which they were entitled to water from defendant's canal for irrigation, leased land to the other plaintiff and agreed to furnish him water for irrigation thereon. The tenant duly demanded that defendant furnish the water under the water right, and defendant refused, apparently contending that the water right was for some reason invalid, but made no objection that the holders of the water right had not assigned the same to their tenant or authorized him to demand and use the water thereunder. *Held*, That, after action was brought for damages caused by refusal to furnish any water under the water right, the defendant could not defend against the claim of the tenant on the ground that his landlords had not authorized him to use the water right, and, the rent being payable in kind, the landlords and tenant were owners in common of the crops and could maintain a joint action for damages thereto.

2. ———: ———: ———: ———: DEFENSES. In such case, if the landlords and tenant have recognized the lease and the tenant has farmed the land under it, it is not a valid defense for the water company that the lease was voidable as between the parties thereto because of informalities in its execution.

3. Damages: INJURY TO CROPS: QUESTION FOR JURY. In an action for damages to growing crops, the amount of damage is peculiarly a question for the jury. The difficulty of determining the value of the crops and the exact amount of damage thereto is not a sufficient reason for denying a recovery for a wilful injury to the crops.

4. Appeal: INSTRUCTIONS: FAILURE TO REQUEST. The trial court should instruct the jury as to the burden of proof, but a failure to do so

will not require a reversal of the judgment, when no such instruction was requested by the complaining party, and no prejudice appears.

5. ———: ASSIGNMENTS OF ERROR: REVIEW. It is unnecessary in this case to decide whether a general demurrer to a petition, "so far as it attempted to state a cause of action in favor of one" of several joint plaintiffs, can be considered, since the question of law which defendant desires to raise by this demurrer is presented and determined under other assignments.

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

Wright & Duffie, for appellant.

Morrow & Morrow, contra.

SEDGWICK, J.

In 1907 Ernest M. Valentine and William C. Phillips were the owners of a school-land lease of a tract of land in Scott's Bluff county and were in possession of the land under the lease, and in March of that year they leased the land in question to the plaintiff Frank Chalupa for one year from March 1. The contract was that the rent should be paid in kind, and the lessors agreed, among other things, "that the first party shall furnish water for said premises as follows: Water for alfalfa and farm land if it can be secured, but the party of the first part shall not be held responsible for any damages accruing to the party of the second part by reason of shortage of water, or by reason of an overflowage thereof." Valentine and Phillips were the owners of a water-right contract by which the grantor of the defendant agreed to furnish 80 inches of water for irrigation purposes. The defendant succeeded to the liability to furnish this water under the contract, and no question is made upon this point. The land in question was within the territory upon which the owners of the water contract might demand the use of the water. The plaintiff Chalupa, in the summer of 1907,

had growing on the land in question crops consisting of oats, spelts, wheat and alfalfa. The defendant refused to furnish water for these crops when demanded by Chalupa, and the crops were damaged for want of water. This action was brought by said Valentine, Phillips and Chalupa to recover such damages. Afterwards, upon the death of Phillips, the action was revived in the name of Helen Phillips, administratrix of his estate. The judgment was in favor of the plaintiffs, and the defendant has appealed.

1. The defendant demurred to the petition "so far as it attempted to state a cause of action * * * in favor of the plaintiff Frank Chalupa." The demurrer was overruled, and the defendant alleges that this was erroneous. The question whether a demurrer will lie to the cause of action of one of several joint plaintiffs is discussed in the briefs, but it is not necessary to a determination of this case. If Frank Chalupa had no cause of action against the defendant under the allegation of the petition, then he had no cause of action under the evidence, as the evidence follows the petition in that regard, and the questions discussed upon the sufficiency of the petition are also discussed and necessarily raised upon the sufficiency of the evidence. These questions, then, will be considered under that assignment.

2. It is contended that there was no privity of contract between the defendant and the plaintiff Chalupa, there being no evidence that the other two plaintiffs ever assigned to Chalupa any interest in the water-right contract; that Chalupa's claim for damages, if he had any, was against his coplaintiffs, and that he could not recover directly from the defendant.

"Where land is leased and rent reserved in kind or share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops on such land during the life of the lease." *Sims v. Jones,* 54 Neb. 769. "Tenants in common may join in an action for the possession of real estate held by one without title."

Mattis v. Boggs, 19 Neb. 698. "Where land is let upon shares, the owners of crops may maintain an action against third persons for unlawful trespass upon or injury to such crops. However, one joint owner cannot alone maintain such action without joining therein the other joint owners of such property, and those refusing to join in the action as plaintiffs should be made parties defendant." 24 Cyc. 1468.

Valentine and Phillips had a valid water right which they were entitled to use upon this land. They leased the land to Chalupa and agreed with him to furnish water for the land. Chalupa demanded the water from the defendant under the contract which his landlords held. There is no evidence that his landlords used the water on any other land, or demanded that water be furnished for use upon any other land. The landlords have ratified the demand of Chalupa that the water be furnished upon this land when Chalupa demanded the water. The defendant did not object that he was not entitled to use the water right, but refused to furnish water to any one under it. They cannot now change the ground of their refusal, and it does not rest with the defendant to deny that Chalupa was authorized to demand and receive the water under the contract by his lessors.

3. The lease from Valentine and Phillips to Chalupa contained the provision "that said party of the second part shall not be entitled to the possession of said premises, nor have any interest whatever therein, until this lease is signed by him and by the president or secretary of the Lincoln Land Company and delivered to said second party." The defendant now objects that the lease was invalid, because it does not appear that it was ever signed by the president of the Lincoln Land Company. There is no merit in this objection. The evidence shows that the parties under the lease regarded it as valid; that Chalupa took possession of the land under it and farmed it in accordance with the terms of the lease; and it is immaterial to the defendant whether one of the parties

to the lease might have avoided it or not, since there was no attempt to do so.

4. It is contended that the damages allowed are excessive; that the evidence will therefore not support the verdict and judgment. Several witnesses in behalf of the plaintiff, farmers and others with experience in crops and crop values, testified to the value of the growing crops before they were injured for want of water, and to the value after the injury. Upon cross-examination by the defendant these witnesses were cross-interrogated as to their means of knowledge and as to their method of computing the values. In some cases it appears that their method of computing values was fanciful and unsubstantial. This fact goes to the importance and weight of the testimony. It is not sufficient ground for disregarding their testimony entirely by the court as a matter of law. It is difficult to estimate accurately the damages as expressed in dollars and cents to a growing crop because of lack of moisture. There are other uncertainties in regard to the result of farming and crop raising than those depending upon moisture, and it is impossible to say with certainty what would be the result if sufficient water had been furnished. The difficulty in estimating the damages, however, in such cases has never been considered sufficient ground to refuse to allow compensation for damages wilfully inflicted. It presents a question peculiarly for the jury, and where the evidence is substantially conflicting as in this case, and the law is complied with in submitting the matter to the jury, their verdict must control. The judgment in this case seems to us to be quite as much as the evidence would warrant, but it is not excessive, so that we can say as a matter of law that the verdict is clearly wrong.

5. It is complained that none of the instructions of the court in direct terms told the jury "that the plaintiff, in order to establish a case, must do so by a preponderance of the evidence." The court should have so instructed the jury, and no doubt would have given such an instruction

if it had been presented and requested. The duties of a trial court in jury trial are quite exacting, and, if the defendant discovers such an omission as this, fair dealing requires him to call the attention of the trial court to the matter. Not having done so, he ought not afterwards to be allowed to subject the parties to costs and vexation of another trial.

No substantial error appearing in the record, the judgment of the district court is

AFFIRMED.

LEVI L. CORYELL V. STATE OF NEBRASKA.

FILED NOVEMBER 13, 1912. No. 17,641.

Information: SUFFICIENCY: OPERATION OF AUTOMOBILE. An information which under three counts in reference to a single transaction charges in the first count that the defendant permitted his infant son, under 16 years of age, to operate defendant's automobile on the highway, and in the second count charges that defendant permitted said infant son to drive said automobile past a vehicle drawn by a team of horses, without reasonable caution, and without calling to or giving any sound to indicate to the driver of said horses a desire to pass the same, and in the third count charges that the defendant permitted said son to drive said automobile past said team of horses at a swift rate of speed, and return to the center of the road within less than 30 feet from said team of horses and said spring wagon, will not sustain a conviction upon either count, where the evidence clearly establishes the fact that at the time charged the defendant himself had actual control of and was operating said automobile.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

M. S. McInnich and *Ernest F. Armstrong,* for plaintiff in error.

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

HAMER, J.

The plaintiff in error, Levi L. Coryell, hereinafter

called the defendant, was informed against in the district court for Nemaha county and charged with: (1) Permitting his infant son to operate his, defendant's, automobile on the public highway. (2) Permitting his said son to drive past a team without using reasonable care. (3) Permitting his said son to drive past a team without using reasonable care, and to return to the road less than 30 feet in advance of said team. The particular acts charged against the defendant are all shown to have occurred at the same time, and therefore constitute one transaction. There was a trial to a jury, and the defendant was found guilty on each count, and was on each count sentenced to pay a fine of $5. The defendant asks a reversal of the judgment upon five distinct grounds, only one of which we deem it necessary to consider, and that is that "the verdict is contrary to the evidence."

The facts as they appear are sworn to by the defendant and his little son, Leland, and their testimony is not controverted in any material matter, so far as it relates to the operation of the automobile by the defendant himself. The little son is shown by the evidence to have been only 11 years old, and there is testimony that he had his hands on the "steering wheel"; but he testified, and no one disputes him, that "I was sitting there and I had my hands here; I was sitting here, and papa had his hand right in under my hand, he had it between these two fingers; he had the throttle, he could operate the throttle, he had it right between his fingers there." He also testifies that his father was guiding the car, and that it was not possible for him (the little boy) sitting in the automobile seat to reach the pedals. No one says it was.

The defendant testified that when he saw the team, after turning the corner, he blew the whistle several times, but "I presumed that they would (hear the whistle), and I took the right side, which placed me on the right between Whitmore's team and the fence. I proceeded along that line, thinking they would give me their right of the road, and as we proceeded, it put me in this 'V'

shape. The gutter I seen was deep. The dirt was washed in from the culvert below, and I thought I could get in the gutter; but, when I got to this gate, the ditch became immediately abrupt, I having pulled to the right, and about that time I was about even with the team, my machine was about even with the team, I either had to pull in to that gate or that ditch, or put the team over on the other side of the road. It was the only thing I could do in the emergency, and I did it. Q. State whether or not you were driving the car or Leland driving the car. A. I had my hand on the lever and a hand on the throttle, my left foot was on the pedal, my left hand was reached under the throttle, I have a device which is about the size of that pencil, beneath the wheel, I had the mechanics pin that right close to the wheel so that I could reach it and govern the throttle. My throttle is pinned so I can drive it when Leland is at the wheel. He had both hands on the wheel at the time." He then testified that his hand was under the boy's hand and that he had hold of the throttle. "Q. Tell the jury whether or not, in that condition, you can control that car. A. Yes, sir. Q. Tell the jury whether or not you were controlling that car. A. Yes, sir; I was." He then testified that the ditch became suddenly abrupt, and that he had to make a turn or go into the ditch, and that the ditch was four feet deep.

The evidence clearly seems to show that whatever was done towards the driving and control of the automobile was done by the father, and not by his little son, and therefore that the defendant is not guilty of permitting his son to do the three several acts alleged to be done in the three counts of the information. The evidence is insufficient to sustain the judgment. This court held in *Garfield v. Hodges & Baldwin*, 90 Neb. 122: "A verdict, so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded."

It may be urged that the automobile turned into the

road after passing the team less than 30 feet in advance of it, and therefore that the defendant is guilty of that offense in any event. It should be remembered, however, that there is no charge that the defendant did it. The charge is that he permitted his infant son to do it, and the evidence does not support that charge. The thing forbidden by the statute (Ann. St. 1911, sec. 6234) is permitting "a person under 16 years of age or an intoxicated person to operate a motor vehicle." The charge in the third count is: "The said Levi L. Coryell, then and there being, did wilfully and unlawfully permit his infant son, Leland Coryell, a boy under 16 years of age, to drive said automobile past the said team of horses and said spring wagon," and "wilfully and unlawfully return to the center of the road within less than 30 feet of said team of horses and said spring wagon." Seemingly the charge alleges a violation of sections 6234, 6236, Ann. St. 1911. The former relates to the permitting of one under 16 to drive, and the latter to the manner of driving. As the driving is alleged to have been done by the little boy, it is fairly to be presumed that the returning to the center of the road was intended to be alleged as done by the little boy, all under the permission of his father. If so, and it appears from the evidence that the little boy only had his hands upon the "steering wheel," and could not reach and did not touch the pedals, and that he had nothing to do with the throttle, but that the father had hold of the "steering wheel," and could and did reach the pedals, and also had his hand upon the throttle, and that he actually controlled the car, and what the little boy did was only a make believe—a sort of play or pretense—something not uncommon in the lives of children who seek to imitate the actions of their parents and others, then there is no evidence to sustain the verdict and judgment, and the same should not be allowed to stand.

The most that any of the witnesses for the state testified to in the case is that they saw Leland's hands on the "steering wheel." They did not all testify to that. No

one of them testified to seeing his feet on the pedals or his fingers on the throttle. It would seem not to be possible to operate such an automobile as this one was without doing these things. In order to operate such a car, it would seem to be necessary to have the feet on the pedals and to have hold of the throttle, and the little boy was too small, as the testimony shows, to reach the pedals with his feet while sitting in the seat. There is no dispute about the fact that the defendant was in the car at the time and sitting with his little son. Some of the witnesses were of the opinion that the defendant did not have his hand on the "steering wheel," while others said that they did not know, but they did not testify to the other necessary things to show that the defendant was not operating the machine. In operating a motor vehicle, it would seem that the person who does so has charge of the vehicle and is directing its course without the interference or control of another person. The defendant did not place his little son in charge of the car and start him out on the road. It is such an act as that that the statute is calculated to prohibit. It could not have been contemplated that a man should be punished who was driving his car, because his little boy placed his hands on the "steering wheel."

The charge in the first count is that the defendant permitted his infant son to operate his automobile on the public highway. The mere operation of the machine is itself the offense. The fact alleged that the defendant permitted his infant son to drive past a team without using reasonable care does not state something that is forbidden by law, except as the defendant is forbidden to permit his infant son to *operate* a motor vehicle. There is no penalty to be inflicted upon the defendant because he permits his infant son to drive past a team without using reasonable care. Driving past a team without using reasonable care might be charged as an offense against the defendant, but the defendant is not forbidden to allow his son to do so, except as he is forbidden to allow his son, if he be less than 16 years old, to operate his automobile. The second

count therefore charges nothing to be tried if the first count is disposed of. The third count attempts to charge, and does charge, that the defendant permitted his son to drive past a team without using reasonable care, and to return to the road less than 30 feet in advance of said team. That act is not forbidden, so far as it might prohibit the father from permitting his son to drive past a team and to return to the road less than 30 feet in advance of the team. It is only forbidden under the general provision that the father cannot permit his son to operate his automobile on the public highway. The things attempted to be charged in the second and third counts are not offenses. The thing that the father is forbidden to do is to permit his infant son to "operate a motor vehicle." Whether the infant son drives straight in the road, whether he drives past a team and whether he returns to the road less than 30 feet in advance of the team are all matters along the same line, and immaterial, except as they show, if proved, that the defendant permitted his son to operate a motor vehicle. If the father permitted his son to do the things attempted to be alleged in the second and third counts, then he is punishable because he permitted the son to *operate the automobile*, and not because of what the son did in going around the team or in returning to the road. It is the *permission* given to the son to *operate the machine* that makes the offense. It is not the *way* that the son operates the machine that makes the offense, but the mere fact that he does operate it.

Instructions 3 and 5 are possibly misleading upon the ground that the charges contained in the second and third counts do not justify them. As no complaint is made of these instructions we will not consider them. The evidence is not sufficient to sustain the verdict. The judgment is

REVERSED.

REESE, C. J., and ROSE, J., dissent upon the ground that the evidence was conflicting and the verdict of the jury should stand.