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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1913

VOLUME XCIII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

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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.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1913.

STATE, EX REL. GRANT G. MARTIN, ATTORNEY GENERAL, APPELLANT, V. FARMERS & MERCHANTS BANK OF OAKLAND, APPELLEE.

FILED JANUARY 16, 1913. No. 17,505.

1. Statutes: AMENDMENT. Section 11, art. III of the constitution, "No law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," required that the section as amended shall contain all that is substituted for the original section, and the original section shall be entirely repealed.

2. Banks: "BANKING ACT": CONSTITUTIONALITY. The proviso to section 45 of the banking law, as amended by the act of 1911 (Laws 1911, ch. 8), and the proviso to the repealing clause of that act which attempt to keep the amended sections in force as to such banks as change to national banks before a specified time, and to repeal the amended sections as to all other state banks, violate the clause of amendment XIV of the federal constitution which guarantees the equal protection of the laws, and are void; but this does not affect the validity of the remainder of the act, since these provisos cannot be regarded as inducement to its passage.

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

Grant G. Martin, Attorney General, and *E. J. Clements,* for appellant.

Stout & Rose, contra.

SEDGWICK, J.

In 1909 the legislature enacted a statute entitled "An act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation." Laws 1909, ch. 10. Section 45 provided for statements to the state banking board once in six months showing the average daily deposits for the period subsequent to the next preceding statement, and that the state banking board shall within 30 days after such statement levy assessments thereon, the first four assessments to be one-fourth of one per cent. of the average daily deposits, and afterwards one-twentieth of one per cent. It was provided that the first statement should be made within 30 days after the act took effect, and the second on the 1st day of December, 1909. Section 46 of the act, as originally enacted, provided that as soon as the assessments were made the bank should "set apart, keep and maintain in their said banks the amount thus levied against them," and that the amount so kept should constitute a "depositors' guaranty fund," payable to the state banking fund on demand for the uses and purposes hereinafter provided. Section 47 of the original act provided that if the funds from any cause prior to July 1, 1910, should be reduced to an amount less than one-half of the one per cent. of the average daily deposits, or after that date should be reduced to an amount less than one per cent. of the average daily deposits, a special assessment should be levied to cover such deficiency not exceeding one per cent. of the average daily deposit in any one year. All proceedings under the act were enjoined by the federal courts. The injunctions were continued in force until the supreme court of the United States determined that the act did not violate any provision of the federal constitution. *Shallenberger v. First State Bank*, 219 U. S. 114. The mandate of the supreme court reversing the decision of the lower court was received and filed in the circuit court on the 30th day of March, 1911. Thereupon the

legislature of 1911 enacted chapter 8 of the laws of that year, entitled "An act to amend sections * * * 45, 46, 47 and 58 of chapter 8 of the Compiled Statutes of 1909 (being sections 45, 46, 47 of the act of 1909 above quoted, and other sections) * * * and to repeal said original sections * * * as the same now exist, and to declare an emergency." As amended by the act of 1911, section 45 provides that the first statement should be made on the 1st day of June, 1911, and every six months thereafter, and that the assessment should be made on the first day of the month next succeeding the statement. There was no other change made in the section, except that the proviso hereinafter quoted was added thereto. Section 47, as it now is by the act of 1911, substituted the date July 1, 1912, for July 1, 1910, as it was before the amendment. Otherwise the section is unchanged. Nothing had been done under the act while its operation was suspended during the litigation in the federal courts, and the plain purpose of the legislature in amending these two sections was to postpone the commencement of proceeding under the act; that is, to make the statute express the result that had already been brought about by the action of the federal court. This respondent, prior to the year 1909, was a corporation organized under the laws of this state and doing a general banking business, and continued until on the 26th day of May, 1911, when it surrendered its state charter and became a national bank under the act of congress.

In October, 1911, the attorney general began this action in the district court for Burt county to procure a writ of mandamus to compel the respondent to file with the state banking board a statement "showing the average daily deposits in the Farmers & Merchants Bank of Oakland, Nebraska, for the six months next preceding the 25th day of June, 1909; for the six months next preceding the 1st day of December, 1909; for the six months next preceding the 1st day of June, 1910; for the six months next preceding the 1st day of December, 1910; and for the period between the 1st day of December, 1910, and the 26th day of May,

1911, exclusive of public money otherwise secured." The district court refused the writ and dismissed the action, and the relator has appealed.

By the act of 1911 the following proviso was added to section 45: "Provided, however, that if any bank now operating under a charter issued by the state desires to go into voluntary liquidation or change to a national bank before the assessments provided for in this section become due and payable, the provisions of this section shall not release said bank from the payment of any assessments now due from it to the depositors' guaranty fund as provided for in chapter 8 of the Compiled Statutes for 1909. In the event that any bank now operating under a charter issued by this state voluntarily liquidates or changes to a national bank before the assessments provided for in this section become due and payable, the provisions of chapter 8 of the Compiled Statutes for 1909, shall, in so far as said banks are concerned, be in full force and effect and shall govern and control, and in the event said bank goes into voluntary liquidation or changes to a national bank before the assessments provided for in this section become due and payable, the provisions of chapter 8 of the Compiled Statutes for 1909 shall be and remain in full force and effect, and the amount due from said bank on the assessment provided for in chapter 8 of the Compiled Statutes for 1909 shall be paid by said bank to the secretary of the banking board; said amount shall be by the secretary of the banking board placed on deposit to the credit of the depositors' guaranty fund in any bank to be designated by the secretary of the banking board, said funds to be subject to the order of the banking board." Also the act of 1911 (laws 1911, sec. 2, p. 85) repealed all of the aforesaid sections "as the same now exist," and to the repealing clause added the following proviso: "Provided, however, that nothing in this act contained, repealing any part of chapter 8 of the Compiled Statutes for 1909, shall be construed to release any chartered bank in this state that goes into voluntary liquidation or changes

from a state to a national bank before the assessments provided for in this act become due and payable, and in the event any bank operating under a charter voluntarily liquidates or changes from a state to a national bank before the assessments provided for in this section become due and payable, then the provisions of chapter 8 of the Compiled Statutes for 1909, in so far as they affect said bank, shall be in full force and effect and are not repealed by this repealing clause." The purpose of these two provisos and the effect thereof, if they are valid, was to classify state banks, putting those which should continue as state banks after July 1, 1911, into one class, and those which should become national banks or cease to do business as state banks, before that date, into another class, and requiring the one class to pay into the banking fund the amount of all assessments that would have been made under the original act prior to the 1st day of July, 1911, if the operation of that act had not been suspended, and relieving the other class from the obligation to make such payments.

1. The respondent insists that the original sections were entirely repealed by the act of 1911, and that no liability can be predicated thereon; that the provision of section 11, art. III of the constitution, that "no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," requires the legislature to repeal the whole section when it is amended, and that it is incompetent to repeal it in part only. The relator insists that, if the constitution forbids such repeal, then the whole act of 1911 is invalid, and the defendant is liable under the original act. He cites *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, upon this proposition. In that case it was held: "A repeal of Tex. act 1889, permitting foreign corporations to do business in the state, does not result from the provision of Tex. act 1895, exempting labor organizations, on the ground that this provision is unconstitutional, since, if it were so, the entire act would

be void and could not operate as a repeal of the former act." (44 L. ed. 657.) The court in that case, however, was considering the fourteenth amendment to the federal constitution. It was not considering, and had no occasion to declare, the force and effect of the clause of our constitution above quoted. The meaning of this provision is that the section as amended shall contain all that is substituted for the original section, and the original section shall be entirely repealed. The legislature could, of course, repeal the original section, and then so frame the amended section as to contain such parts of the original section as desired. If we consider that the proviso, which is a part of the section as amended, re-enacts the former law, so far as it relates to banks which nationalized before July 1, 1911, and that the whole of the former sections specified in the repealing clause are repealed, and so evade the provision of our constitution in that regard, the question still is, whether, in connection with the other proviso quoted, it is valid legislation.

2. Can banks be classified upon such basis for such a purpose? Amendment XIV to the federal constitution extends the equal protection of the laws to banks and individuals interested in banks. It is contended that to distinguish between banks that continue as state banks and those that become national banks would be allowable for some purposes under the authorities, and that when so classified they may be subjected to different restrictions. The basis for classification must have some relation to the purpose for which the classification is made. Banks may be classified upon the basis of the amount of their capital stock for some purposes. Our statute so classifies them. A bank with a capital stock of $25,000, or more, may be located in towns and villages of 1,000 inhabitants, but banks with less capital stock cannot. A statute that provided that banks with a capital stock of $25,000 should be exempt from assessments for the guaranty fund while participating in the benefits thereof, but banks with a less capital should not be exempt from such assessments, would

not afford the small banks the equal protection of the laws. The federal statute authorizes banks to become national banks and provides the manner of so doing. The statute cannot prevent such action, nor add to the qualifications or conditions prescribed by the general government. Our statute prescribes a penalty of $50 for each day that the statement of average daily deposits is delayed. If the time fixed for making these statements has not been changed as to banks that nationalized prior to July 1, 1911, it would seem that they are liable to this penalty also, as well as for the specified assessments. If such legislation is valid, banks would be effectually deterred from making such a change. It seems clear that banks cannot be classified upon such a basis for the purpose of subjecting one class to such burdens from which the other class is relieved. It would manifestly refuse the banks so burdened the equal protection of the law. These provisos cannot be considered as an inducement to the passage of the act. It cannot be supposed that so reasonable and necessary legislation, relieving state banks in general from such unconscionable burdens, would not be enacted if banks which became national banks, while the operation of the former act was suspended, were also relieved.

The judgment of the district court is

AFFIRMED.

CHARLES A. CURRIER, APPELLEE, V. SETTY SCHMIDEKE TESKE ET AL., APPELLANTS.

FILED JANUARY 16, 1913. Nos. 16,859, 16,862.

1. **Mortgages**: FORECLOSURE SALE: INTEREST CONVEYED. The sale of an interest in real estate on foreclosure of a mortgage can only convey the interest of the mortgage debtor, and where he only owns a life estate that is all that is sold, although the purchaser may have supposed he bought and acquired the whole title.

2. Ejectment: LIMITATIONS: REMAINDERMAN. When the mortgage debtor whose life estate had been sold at the mortgage foreclosure died, the title vested in the purchaser at the mortgage foreclosure sale terminated, and the remainderman owning the fee was then entitled to bring his action in ejectment for possession.

3. Mortgages: FORECLOSURE SALE: RIGHTS OF PURCHASER. Where the decree in a case of mortgage foreclosure upon real estate is against the mortgage debtor and his interest in the premises is sold under the decree to satisfy the same, the purchaser at the foreclosure sale will not be deemed to have purchased any greater interest in the premises than that which was appraised and offered for sale; and, where the mortgage sale satisfied only the mortgagor's debt, the purchaser will not be deemed to have acquired any right against an interest in the land which belonged to another who was not made a party to the suit.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

John J. Sullivan and *M. D. Tyler,* for appellants.

William V. Allen and *Willis E. Reed, contra.*

HAMER, J.

This is not the original case reported in 82 Neb. 315, and on rehearing in 84 Neb. 60, although the facts were the same, with one exception hereafter stated. That case was an action of ejectment, and this case is an action of ejectment, and the names in each case are the same; but that case was brought by the plaintiff in this case during the lifetime of Eugene R. Currier, the plaintiff's father, and Eugene R. Currier's interest had been sold under foreclosure proceedings, which are set out in the case referred to. He had owned a life estate in the property in controversy, which the defendants in that case purchased, and the interest which they held expired when Eugene R. Currier died, October 17, 1901. In that case it was held that the action of ejectment was prematurely brought, for the reason that when it was commenced Eugene R. Currier was still alive.

In the instant case the plaintiff and appellee, Charles A. Currier, who is also cross-appellant, brought ejectment in the district court to secure possession of the N. W. ¼, section 30, township 21 N., range 1 W., in Madison county. The petition was filed April 17, 1909. Before February 10, 1874, Eugene R. Currier entered the land above described, and on that day received the patent for the same. On the 20th day of September of the year before, he conveyed the land by deed to his wife, Mary J. Currier, in consideration of the sum of $1. They occupied the land together as their homestead. October 2, 1873, she and her husband, Eugene R. Currier, mortgaged the land to one John Campbell to secure a promissory note for $300. The note was not paid, and about March 2, 1881, Campbell began an action to foreclose this mortgage. Before this time the owner of the fee, Mary J. Currier, had died. In the foreclosure suit her son, Charles A. Currier, the plaintiff herein, was not made a party defendant, but Eugene R. Currier, the survivor of Mary J. Currier, was made a party defendant, and service upon him was had by publication, and a decree of foreclosure against him was rendered for $367.87. An order of sale was issued under this decree January 14, 1881, and the "interest of Eugene R. Currier, defendant," was appraised at $740.07, after deducting taxes as per county treasurer's certificate of $59.93. This appraisement of the "interest of Eugene R. Currier, defendant," was made July 5, 1881, under an order of sale directed against the land described, "taken as the property of Eugene R. Currier to satisfy a judgment * * * against the said Eugene R. Currier and in favor of John Campbell." The note sued on is described in the petition as signed by Mary J. Currier and E. R. Currier, and the petition recites the following condition alleged to be in the mortgage: "That, whereas said Eugene R. Currier has executed and delivered to John Campbell one promissory note for the payment of $300; now, if the said Eugene R. Currier shall pay to said John Campbell said sum of money or to his heirs and assigns when the same shall be-

come due, according to the terms and effect of said note, then these presents shall be null and void, otherwise to be and remain in full force." The petition also alleged that "the defendant (Eugene R. Currier) has not paid the amount secured by said mortgage as required by the conditions thereof, whereby said mortgage deed has become absolute." The prayer is "that said defendant may be foreclosed of all equity of redemption or other interest in said mortgaged premises." The legal notice published in the newspaper is addressed "to Eugene Currier, nonresident." It undertakes to notify the "defendant" that plaintiff "prays for decree that defendant be required to pay," etc. The judgment is against "Eugene Currier." The confirmation of sale is against "Eugene Currier." There was a default upon the part of Eugene Currier to pay his debt. In consequence of this default, the decree was rendered against him. The order of sale was issued because he did not pay and satisfy the decree. Under the order of sale it was "the interest of Eugene Currier" in the land that was appraised and sold. That interest was Eugene Currier's life estate. It sold for $500 to John Campbell, by his agent, F. W. Barnes. If Eugene Currier's life estate in the land sold for enough to pay Eugene Currier's debt as evidenced by the decree, then is there any debt? Seemingly it sold for enough to pay the debt. When the plaintiff's mother died, he inherited the fee from her because she owned the land at the time of her death. When John Campbell purchased the life estate of Eugene Currier at the sheriff's sale, Eugene Currier was thereby divested of such life estate, and the interest sold would have become John Campbell's property but for the fact that the title was taken in the name of Herman Schmideke, through an arrangement with Barnes and Tyler by which they furnished the $500 for Schmideke, and he apparently was substituted for John Campbell, probably by John Campbell's consent, and by the acquiescence of everybody, but not by an order of the court, and the sheriff's deed was then made to Herman Schmideke and John Campbell

has made no objections since that time. This sheriff's deed bears date November 28, 1881, and by it Herman Schmideke then became entitled to the possession of the land during the life of Eugene Currier, who, as already said, died October 17, 1901, and his debt should have terminated the right of possession of Herman Schmideke as to the plaintiff, who had been the owner of the legal title since his mother's death, and he, by the death of his father, then became entitled to the possession of the land. The return of the sheriff must have advised the court that the bid made by Campbell was confirmed, and a fair inference from the facts is that Schmideke was substituted in his place by consent of the parties as the purchaser, and that he paid the amount of Campbell's bid, because his name appears in the sheriff's deed as grantee. It would seem that the judgment was then extinguished by what was done.

In *Currier v. Teske,* 84 Neb. 60, it was held: "That the sale on foreclosure could only convey the life estate of the defendant, even though the purchaser may have believed he acquired the whole title." This would seem to be too apparent to require a decision. In any event it was so determined in that case. In the same case it was also held: "That an assignment of the bid and purchase will be presumed, and the sheriff's deed will be held sufficient to pass all the rights of the original purchaser to the grantee." It was also said by Judge LETTON, delivering the opinion of the court: "Eugene Currier died October 17, 1901. The defendants' estate and right of possession were contemporaneous with Currier's life, and died with him. This action in ejectment (the old action) was begun nearly ten months before the death of Eugene Currier, and while the defendants were fully entitled to possession of the land. Proper service was had upon all the defendants except Walter Schmideke. As to him, the first service was quashed, and a new summons was served in 1906 after the termination of the life estate." The judgment of the district court in

the former ejectment case brought by Charles A. Currier was in favor of the defendants, and properly so, because Eugene R. Currier was still living, and it was his interest, a life estate, that was purchased under the original foreclosure proceedings. Of course, until Eugene R. Currier died, it must be taken that Charles A. Currier could not successfully maintain his action of ejectment. *Hobson v. Huxtable,* 79 Neb. 340. The present action was brought after Eugene R. Currier died.

Judge LETTON, in the opinion, discusses the effect of the sale that took place, and he says: "The proceeds of the defendants' interest, therefore, paid the mortgage debt and extinguished the lien on the 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." He further says: "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." The doctrine here laid down in the former case would seem to dispose of the present case. The former case was about the same land, between the same parties, and it failed simply because Eugene R. Currier was still living, and therefore the estate of the defendants was not yet terminated, being contemporaneous with the life of Eugene R. Currier.

In the same case Judge LETTON says: "The evidence indicates that one Frank Barnes of Madison had been acting as Mr. Campbell's agent in the matter of the mortgage, and that prior to the sale he had also been negotiating with Mr. Schmideke for the sale of the land to him. Mrs. Teske says he was to buy the land for her then husband, Schmideke, and that Barnes procured the sheriff's deed to Schmideke and delivered it to him. The sheriff's deed recites that Schmideke was the purchaser at the sale. Under these circumstances, after the lapse of so many years, and considering that Campbell never made any claim that the deed was void, and through his agent accepted and re-

tained the purchase money and caused the deed to be made to Schmideke, it will be considered that he became by equitable assignment the owner of Campbell's interest in the bid, that the deed was made pursuant to such assignment, and that he thereby became vested with all interests that Campbell then had." In the same case Judge LETTON says, referring to the district court: "The court did not err in directing a verdict for such defendants. This, however, does not constitute a bar to an action brought within the statute of limitations to recover the possession of the land." It will be seen that this court, in disposing of the former case, took occasion to declare that what was then being done would not constitute a bar to a subsequent action by Charles A. Currier to recover possession of the land. As the writer understands, what has heretofore been done in this case leaves an open field for the plaintiff to assert his right to the land and to recover possession of it.

We will consider some of the contentions made by the appellants.

1. It is contended that the right of Charles A. Currier was the right to redeem; that he was the owner of the remainder in the premises after the termination of his father's life estate; that upon the whole estate there was a valid mortgage, and that the burden of keeping down the interest upon this mortgage rested upon the owner of the life estate, but that the burden of paying the mortgage itself rested upon the owner of the remainder. *Tindall v. Peterson,* 71 Neb. 160, 166, and *Downing v. Hartshorn,* 69 Neb. 364, are cited in support of this contention, as, also, 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 1223. In *Tindall v. Peterson, supra,* there was an appeal from a decree quieting title in the plaintiffs. One Thomas Tindall had died intestate seized in fee of the land in controversy, subject to two mortgages. At the time of his death the land was occupied as a homestead by himself and his family. When the widow applied to the district court for a license to sell the homestead, or so much thereof as

might be necessary to pay the mortgage debt, and such order was granted and the homestead was sold, it was held that the proceedings were void—"that a sale of the homestead by an administrator, under a license for the payment of debts, is without authority of law." In *Downing v. Hartshorn, supra,* there was also a consideration of the homestead question. The cases cited are unlike the case at bar, because in the instant case the debt was the debt of Eugene R. Currier, and the purchaser at the mortgage sale was bound to take notice of what he purchased. He knew that he only purchased Eugene R. Currier's life estate, and that he was not purchasing the legal title held in the first instance by Mary J. Currier, and after her death by her son, Charles A. Currier. If there was an obligation upon the part of the owner of a life estate to pay the mortgage, and he has paid the same through foreclosure, his grantee through foreclosure is entitled to nothing more than what he bought. This court said in *Tindall v. Peterson, supra:* "We are of opinion that justice, as complete as possible, will be done between the parties, by so modifying the former decision of this court as to charge the appellants, as of the date when the first mortgage was paid off, with a sum equal to the then present value of the amount of interest the life tenant, the mother, would have been required to pay during the actual continuance of her life, as shown by the record." The material difference between the cases cited and the instant case is that, in the instant case, the owner of the life estate was also a debtor. He was directly indebted to the plaintiff, John Campbell, in the mortgage foreclosure case, and the mortgage was foreclosed against him, Eugene R. Currier, and not against any one else, and the title of the owner of the fee was freed from the lien of the mortgage by such foreclosure. When Eugene R. Currier's life estate was sold, it was sold to pay his own debt. It was sold to pay a judgment against him. Eugene R. Currier did not object to paying his own debt. Can anybody object for him, when he himself neglects to object?

2. It is also contended that Charles A. Currier, the plaintiff, cannot assail the title of the defendants obtained through the foreclosure without first redeeming, or offering to redeem, and in support of this proposition *Loney v. Courtnay,* 24 Neb. 580, is cited. In that case it was said: "Where a sale was had under a void foreclosure of a mortgage of real estate, and a sheriff's deed executed, *held,* that the mortgagor in an action to cancel the deed as a cloud upon his title must offer to do equity by paying what is equitably due under the decree, with interest and taxes." In that case the foreclosure was void, or voidable, and there was a sale under a void or voidable decree. In the instant case the foreclosure is not void. It is valid. But it covered only the life estate of Eugene R. Currier, and that only was sold, therefore *Loney v. Courtnay* is not in point. *Hall v. Hooper,* 47 Neb. 111, is also cited. In that case the foreclosure is against a deceased person. The mortgagee was in possession under a void foreclosure sale. In *Stull v. Masilonka,* 74 Neb. 309, it was held that if a valid real estate mortgage has been foreclosed, even though the proceedings are void, the mortgagor will not be heard to question the title acquired thereby, unless he pays or tenders the amount of the debt and interest. But in that case the purchasers under the foreclosure, or their grantee, were in possession. The extent to which these cases go is that the foreclosure, though void or voidable, operates as an assignment of the mortgage foreclosed, and that the mortgagor cannot question the regularity of the decree as to one in possession under such foreclosure, without attempting to redeem. Along the same line is *McCabe v. Equitable Land Co.,* 88 Neb. 453. But the cases cited are not analogous to the instant case. In the instant case the foreclosure was valid in so far as it sold the life estate of Eugene R. Currier. That was all that was attempted to be foreclosed. But it was not claimed that the foreclosure was void for any reason. It was valid in any event as to Eugene R. Currier. The owner of the legal title, Charles A. Currier, did

not have to be made a party in order that there should be a legal foreclosure of the life estate held by him, and Charles A. Currier was not made a party and his ownership of the legal title to the land was not sought to be foreclosed. In all the cases cited, the debt under which the foreclosure proceedings were had was not the direct debt of the mortgagor under which only his property was foreclosed and sold, leaving no claim against any other property, as in this case. *Kelso v. Norton,* 65 Kan. 778, 70 Pac. 896, is also cited. In that case it was held that when the mortgagor surrenders possession of the premises to a purchaser at a void foreclosure sale, and the purchaser enters into possession believing himself to be the owner of the premises, the mortgagor will be deemed to have waived his legal right to retain possession and to have assented to the possession thus taken, and the purchaser will henceforth be deemed to be "a mortgagee in possession." But that case is not at all parallel with this one. In the instant case there was no foreclosure against Charles A. Currier. He has all the rights that he ever had. He could have waived nothing, because he was not brought into court, and is not shown to have had any knowledge whatever of the proceedings. Neither can it be said that Charles A. Currier was a debtor to the plaintiff in the mortgage foreclosure proceedings. Eugene R. Currier was a debtor, and the proceeding was against him, and his property properly paid the debt after a decree had been rendered against him, and he never complained about it.

3. It is also contended that Herman Schmideke became the owner or transferee of every right and interest of all the parties to the suit. In support of this proposition *Young v. Brand,* 15 Neb. 601, is cited, and it is alleged: "The purchaser under a decree of foreclosure of a mortgage obtains the title of all the parties to the suit, whether their title be that which is set forth in the pleadings or not." To this it may be said that Charles A. Currier was not a party to the suit brought against Eugene R. Currier.

It would not seem that it ought to be seriously contended that a purchaser under a decree of foreclosure obtains the title to that which is not sold or attempted to be sold. Charles A. Currier's inherited title to the land was not sold or attempted to be sold. Some other cases are cited along this line, but they do not seem to be analogous. No greater interest could be sold than the court got jurisdiction of. The thing which the court got jurisdiction of was the life estate of Eugene R. Currier. When the decree was rendered against him it became a lien on the interest which he had in the premises, and at the sale all the interest he had in the premises was sold to John Campbell. When the return of the sheriff showed the sale to John Campbell and the payment of the money, John Campbell was placed in a position where the deed from the sheriff might be made to him, but by his willingness, and because of the fact that Schmideke paid in the $500 out of which John Campbell received enough to pay the debt which Eugene R. Currier owed to him, the debt and mortgage were extinguished, and Herman Schmideke's name was substituted in the sheriff's deed instead of John Campbell's. Of course, if John Campbell had insisted in court that the deed should be made to him, the court would have so directed the sheriff, but in that event John Campbell would not have received the money. Suppose that after John Campbell received the money he had insisted that the deed should be made to him, would the court have directed the sheriff to so make the deed, and would the court have allowed John Campbell to hold both the interest in the land and the money? Appellants are contending in this case that Schmideke purchased more than John Campbell had to sell if the deed had been made to Campbell instead of being made to Schmideke. This would hardly seem to be a reasonable position.

4. It is said on behalf of the defendants that Charles A. Currier will not be permitted to redeem because his right to redeem is barred; that he became 21 years of

age in December, 1890, and that he could have commenced an action at that time to redeem. To this the answer is that if under the decree against the father, Eugene R. Currier, his interest in the property was sold and paid the debt, there is no necessity for redemption because there is no debt to redeem from.

5. It is said in appellants' brief that Schmideke went into open, notorious and adverse possession of the premises in 1881, and through himself and his heirs has been in such possession ever since. It is then contended that Charles A. Currier might have maintained an action to redeem at any time after he became of age. He certainly did not have to redeem if the mortgage had been satisfied in a proceeding against his father and by a sale of his father's life estate in the premises. But there is a discussion of the right of redemption, and it is claimed that there is a bar to any proceeding upon the part of Charles A. Currier, the plaintiff. The action which Charles A. Currier brings is ejectment. He inherited the title from his mother. No proceedings have been had against him by which that title has become divested. The statute did not begin to run against him as to the right to maintain ejectment until his father died. The statutory ten years necessary to constitute a bar have not elapsed. There is therefore no bar to his maintaining the action brought. In *Hobson v. Huxtable*, 79 Neb. 340, this 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."

6. It is next contended "that, as the legal title to an undivided one-half interest in the premises was in William V. Allen and Willis E. Reed, the plaintiff could recover only an undivided one-half interest. This was right. The record shows conclusively that Charles A. Currier has deeded an undivided one-half interest in the premises to Allen and Reed, and that this deed stands of record in

Madison county." Charles A. Currier testifies: "I have deeded away a half interest in the land to cover the costs of this suit and attorney fees." Further on it appears from his evidence that, if Allen and Reed should be paid a sum of money equal to one-half the value of the land, they would reconvey the land to the plaintiff. The conveyance was therefore made to secure fees, expenses and costs.

In the recent case of *Helming v. Forrester,* 92 Neb. 284, this court held, as announced in the syllabus: "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." In that case there was the same objection to a judgment for the plaintiffs that there is in the instant case. They had executed to their attorneys a quitclaim deed "to an undivided one-half of the land in controversy." This was held in effect to be a mortgage, and not a bar to a judgment for the plaintiffs. In the concurring opinion in that case it was said: "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 defendant should be allowed to have it considered as an absolute conveyance contrary to the intention of the parties to it."

7. It is said in the brief of counsel for appellants: "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"—citing *Hart v. Beardsley,* 67 Neb. 145, and *Arterburn v. Beard,* 86 Neb. 733. That Charles A. Currier was not a party to the action brought against Eugene R. Currier disposes of the contention. Nothing belonging to Charles A. Currier could be sold, or was sold, in the

proceeding to which he was not a party, and in a case where the judgment was against another.

At the same time it is proper to call attention to the fact that the cases cited have nothing in common with the instant case. In *Hart v. Beardsley, supra,* the mortgagor, Hart, had made two mortgages. One was for $1,800 and one was for $500, and the latter mortgage recited that it was "subject and second to a mortgage hereinafter to be given for $1,800." In the decree of foreclosure the $1,800 mortgage was declared a first lien, but in selling the property the appraisers erroneously deducted the $500 mortgage from the appraised value of the premises sold. The decree itself showed that the $1,800 mortgage was a prior lien, and therefore the $500 supposed lien should not have been deducted. In *Arterburn v. Beard, supra,* this court held that, where property had been sold and the defendants at the time of the sale were in full possession of an easement relating to irrigation, and the plaintiff purchased the premises, he took the property with notice of the easement, and that he did not purchase the right of action which belonged to the former owner, and that the same did not pass by the deed. As we view the case, the contention of counsel for the appellants, if successful, would enable the heirs to real estate to be sold out and dispossessed of every interest, without being made parties and without being brought into court in any way.

In *Tindall v. Peterson,* 71 Neb. 166, it is suggested: "That the right of contribution is personal to the life tenant and expires with the termination of her estate, or, at most, survives to her personal representative, and cannot be availed of by her successors in the possession of the premises." It is assumed by the opinion that this is true. If it is, the appellants have no standing. But, whether true or not, it is unnecessary to discuss the question. If the life tenant was the debtor, and the judgment was against the life tenant, and it was extinguished by the sale of the life tenant's interest in the premises, the

life tenant himself or his successor in interest may not complain. The contention made seems to ignore the actual condition of the case.

This is a consolidation of numbers 16,859 and 16,862. There is only one bill of exceptions and one abstract and one set of briefs for the two cases. The petition in No. 16,862 is shown by the abstract and transcript to have been filed on the 17th day of April, 1909, and the petition in No. 16,859 seems from the transcript to have been filed on the same day. The cases seem to have been tried together in the district court. The same judgment is shown by the abstract to have been rendered in each case. The journal entry in the district court shows that one of these cases in that court was numbered 3,185 and the other was numbered 3,907, and that they came on for hearing upon the motion to consolidate both cases, and by agreement of parties in open court they were consolidated; No. 3,185 being consolidated with No. 3,907. At the close of the evidence in the trial in the district court, the plaintiff moved to enter judgment in favor of the plaintiff, awarding him possession of the land in suit and the damages as shown by the testimony and stipulation of the parties, and to find that he had a legal estate in the land in controversy and was entitled to the present and immediate possession thereof. The motion was overruled. There seems to have been no controversy over the fact that the plaintiff was the son of Mary J. Currier, and therefore he must have inherited whatever interest she had. She is shown by the record to have owned the fee to the land, subject only to the life estate of her husband. When she died the plaintiff immediately became the owner of the land, subject to the termination of the life estate of Eugene R. Currier, which had been purchased by Herman Schmideke at the mortgage foreclosure sale.

We think that, since the testimony was undisputed that the conveyance to Allen and Reed was intended as a mortgage and was a mere lien or security on the land for the payment of fees and expenses, the district court erred in

submitting that question to the jury. The verdict was wrong in giving only an undivided one-half interest in the premises to the plaintiff. The plaintiff seems to be entitled to recover possession of the whole of the premises according to the prayer of the petition. The judgment of the district court is reversed and the case is remanded for further proceedings in accordance with this opinion.

REVERSED.

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

SEDGWICK, J., dissenting.

The purchaser of land at a sale upon foreclosure of a mortgage takes the interest of the plaintiff as well as the defendant. If one who is not a party to the suit has an equity of redemption, that equity is subject to all the rights that the purchaser has by his purchase, including the lien of the mortgage foreclosed. In such case, if the purchaser takes possession of the land, he becomes a mortgagee in possession. As against the holder of the equity of redemption he must apply the rents and profits of the land in satisfaction of the mortgage and interest thereon. The statute of limitations will run against an action to redeem. Ejectment cannot be maintained against a mortgagee in possession.

The petition in foreclosure described the land. The order of sale directed the sheriff to sell the land itself, and not a life estate. The sheriff published the notice that he intended to sell the land, and reported that he had done so. The court ordered that the sheriff "convey to the purchaser, John Campbell, by deed in fee simple, the lands and tenements so sold." The sheriff's deed described and conveyed the land itself, and not a life estate. The conclusion that the life estate of Eugene R. Currier alone was sold is derived entirely from the statement in the appraisement that "the interest of Eugene R. Currier, defendant, we value at $740.07." The appraisement describes the land, and says that the land is valued at the

sum of $800; that the taxes thereon are $59.93. They deducted these taxes from the total value of the land, and appraised the remainder as the interest of Eugene R. Currier; that is, they appraised the land itself as the land of Eugene R. Currier. They were clearly justifiable in doing this, as there was nothing in the record of foreclosure indicating that Eugene R. Currier had only a life estate in the land. They considered that the land belonged to Eugene R. Currier, and therefore his interest was the value of the land, less the taxes due thereon.

The attempt was to foreclose the mortgage and sell the land, and, so far as they sold anything, it was the land itself. This sale did not foreclose the plaintiff's equity of redemption, because he was not a party to the proceeding. His right to redeem remained after the sale the same as it was before, and he might have exercised that right at any time within the statute of limitations.

If the defendant in the foreclosure had held a mortgage upon the land, or a quitclaim deed of an undivided portion, the reasoning of the majority opinion would have led to the same erroneous conclusion.

FAWCETT, J., concurs in the above dissent.

CHARLES A. CURRIER, APPELLEE, V. SETTY SCHMIDEKE TESKE ET AL., APPELLANTS.

FILED JANUARY 16, 1913. No. 16,859.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

John J. Sullivan and *M. D. Tyler,* for appellants.

William V. Allen and *Willis E. Reed, contra.*

HAMER, J.

The opinion in *Currier v. Teske, ante,* p. 7, is also the opinion in this case, the two cases being heard and determined together in this court.

REVERSED.

SEDGWICK and FAWCETT, JJ., dissent.

BARNES, J., took no part in this case.

DANIEL B. TAYLOR, APPELLEE, V. AMERICAN RADIATOR COMPANY, APPELLANT.

FILED JANUARY 16, 1913. No. 17,100.

1. **Contracts:** PERFORMANCE: STATUTE OF FRAUDS. An oral contract for personal services which have been performed for almost the full time of the period for which they were engaged cannot be successfully questioned after they have been performed, because alleged to be within the statute of frauds.

2. **Appeal:** CONFLICTING EVIDENCE. The length of plaintiff's service was made to depend upon whether he "made good"; if he made good his employment was to continue for a period of three years, and he was retained in service three years lacking ten days, and increased compensation was voluntarily paid him after the first year. *Held,* That, in view of the conflicting evidence, the jury were authorized in reaching the verdict announced, and that it would not be set aside where it was within the limit permitted by the testimony of the witnesses.

3. **Trial:** INSTRUCTIONS. The instruction complained of in appellant's brief examined, and *held* not to be prejudicially erroneous.

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

Sullivan & Rait, for appellant.

G. W. Shields and *Robert J. Shields, contra.*

HAMER, J.

The plaintiff, Daniel B. Taylor, sues to recover an alleged remainder due for wages. He claims to have been employed by the defendant, the American Radiator Company, as a traveling salesman. He alleges that he began work on the 15th of January, 1906. The evidence seems to show that he worked for the defendant three years lacking ten days. He alleges he was to receive for the first year a salary of $75 a month and expenses; for the second year a salary of $100 a month and expenses; and for the third year a salary of $125 a month and expenses. There are also some items of alleged extra expense money. The plaintiff also sets up that the defendant holds his note for $79.17, and prays to recover a balance of $555.85, and interest from January 15, 1909, and costs.

The radiator company answered, admitting the employment of the plaintiff, and alleging that he continued in the employ of the defendant at the rate of $75 a month from the 15th day of January, 1906, to the 1st day of June, 1907; that from January 15, 1906, to June 1, 1907, the defendant paid the plaintiff $1,237.50, being the sum of $75 a month for each month during that period; that on the 1st day of June, 1907, it was agreed between the plaintiff and the defendant that the plaintiff should be paid $91.66 a month, and that the plaintiff entered upon said employment for the sum of $91.66 a month, and continued in it from the 1st day of June, 1907, until the 1st day of January, 1909; that from the 1st day of June, 1907, to the 1st day of January, 1909, the defendant paid the plaintiff $1,741.75, or $91.66 for each month during that period; that on the 5th day of January, 1909, it was agreed between the plaintiff and the defendant that the plaintiff's employment should terminate, and that the plaintiff should not thereafter be employed by the defendant in any capacity whatever; that on the 5th day of January, 1909, plaintiff and defendant had a settlement, and that at the time of the settlement it was agreed that the plaintiff was

indebted to the defendant in the sum of $125 because of loans and advancements made to him; that on said 5th day of January, 1909, it was agreed that the plaintiff should have a credit in the sum of $45.83, being one-half of a month's salary, and that the said sum would be received by the plaintiff in full settlement of all services rendered; that the plaintiff, after receiving credit for said sum of $45.83, was still owing the defendant a balance of $79.17; that on said January 5, 1909, the plaintiff executed and delivered his note to the defendant for the sum of $79.17, and the same was received as a full and complete settlement; that the note was dated January 5, 1909, and was made payable on demand; that there never was any agreement that the defendant should pay the plaintiff $100 a month and expenses for the second year; that it was never agreed that the defendant should pay $125 a month and expenses for the third year; and the defendant denies that the plaintiff expended $10.75 for its benefit on the 10th day of October, 1909; and also denies that the plaintiff spent for its benefit $3.25 on the 1st day of January, 1909. The defendant alleges that it is the holder and owner of plaintiff's note for $79.17; that it has demanded payment thereof and the same has been refused; and it prays judgment against the plaintiff for $79.17, with interest at 7 per cent. per annum from the 5th day of January, 1909, and costs.

The reply denies each allegation of new matter; denies that any new contract was entered into on June 1, 1907; and denies that the plaintiff ever entered into a contract to receive $91.66 a month after June 1, 1907; and denies that he continued in the employ of the company for that sum a month, and also makes other denials. The plaintiff admits making the note for $79.17 set forth in the defendant's answer.

Mr. Arthur H. Williamson testified that he succeeded Crary as the Nebraska manager of the defendant company; and also that he dismissed Taylor from the service of the company, and that the note was given in payment

for the balance of a loan made to Taylor, "plus a certain traveling fund." Whether this note was given in final settlement of a balance admitted to be due from the plaintiff to the defendant might well be in doubt but for the testimony of the witness Williamson, who confines it to a part of the transaction. He testified on cross-examination: "We simply settled up those two notes by taking this other note. *That is all we settled.*" This would seem to exclude any claim of actual final settlement between the parties. Crary seems to have been in charge of *the affairs of the radiator company.* Herman I. Lund testified that Crary said that he would pay $75 a month the first year, and give Taylor a raise to $100 a month for the second, and $125 a month the third year, provided that he made good; that after Taylor had been working there a while Crary told him that Taylor was doing his work well. The plaintiff testified that, before entering upon his employment with the company, Crary told him that there was an opportunity for him if he would work. "He told me it was not an easy job; that if I *made good* the first year he agreed to pay me so much; if I didn't he could not use me." The plaintiff also testified that Crary told him that if he did not make good he would soon find it out. He also testified that he saw James Sheahan and explained the agreement with Crary, and that as yet he had not been paid the money, and that Sheahan told him: "You are worth more money and you are going to get it."

It is perhaps apparent that the plaintiff "made good," because the defendant (1) kept him in his employ three years lacking only 10 days, (2) voluntarily began to pay him more money, and (3) because Crary, who employed him on behalf of the company, recommended in a letter to Sheahan an increase in his pay, and (4) it is not denied that James Sheahan told Taylor: "You are worth more money and you are going to get it." But this was for the jury under the instructions. On a conflict of evidence the verdict of the jury, under proper instructions, should be allowed to stand.

Part of the first instruction is quoted by the appellant in its brief, and it is said that this instruction, in connection with the ruling of the court touching the value of the services rendered, constitutes error. That part of the instruction quoted reads: "Should you find from the evidence that the plaintiff entered the defendant's employ, under a contract for $100 per month for the second year of service, and of $125 per month for the third year of service, and that said contract was still in force at the end of the plaintiff's work during the third year of service, and had not been changed by the attitude of the parties, then you will find for the plaintiff on said claim of service, and fix the amount of his recovery at the difference between what he actually did receive and what his contract called for during the time of the service, together with interest at the rate of 7 per cent. on his balance from the termination of the contract time to the day of the verdict; otherwise, you will find for the defendant, as to said last claim." Counsel do not point out the error in this instruction. It is also said that the jury disregarded this instruction, and as evidence of the fact their alleged written communication to the court, claimed to have been returned with the verdict, is quoted in affiant's brief:

"A party cannot predicate error in the giving of an instruction upon the ground that the same is not sufficiently explicit and particular, unless he has first called the attention to the court to such defect, and the court has refused to correct the same." *Henry v. Omaha Packing Co.*, 81 Neb. 237; *Olmsted v. Noll*, 82 Neb. 147. Our attention is not challenged by appellant's brief to any disregard of this rule by the trial court. Defendant is not shown to have presented to the trial court a proposed instruction in place of the instruction sought to be criticised. As to the method by which it is claimed in appellant's brief that the jury reached their conclusion, the affidavit of Mr. Rait is not made a part of the bill of exceptions, allowed by the court, and it is not referred to in the motion for a new trial. The record therefore does not disclose that the at-

tention of the trial court was called to the affidavit. Neither is the matter sought to be reviewed properly before us, because it is not in the bill of exceptions. For these reasons, it cannot be considered. To obtain a review in the supreme court, the parties seeking such review must have presented the questions of law to the lower court. *Gibson v. Arnold,* 5 Neb. 186; *Courtnay v. Price,* 12 Neb. 188; *Chicago, St. P., M. & O. R. Co. v. Lundstrom,* 16 Neb. 254; *Norton v. Nebraska Loan & Trust Co,* 40 Neb. 394; *Dunham v. Courtnay,* 24 Neb. 627; *Batty v. City of Hastings,* 69 Neb. 511.

It is next claimed that the court erred in overruling the defendant's motion for a directed verdict. It is undisputed that the plaintiff did the work. He was to be kept in the employ of the company if he made good. That he made good is perhaps settled by what the company itself did. It kept him. It also voluntarily gave him more after a time than it gave him when he began. If the company did not want him and he was unsatisfactory, it could have discharged him, instead of keeping him three years lacking ten days only. We think there was abundant evidence to submit to the jury. We are unable to discover error in the instructions. The verdict of the jury is conclusive.

It is not the province of this court to reverse a judgment of the district court, where the verdict is rendered upon conflicting evidence and under proper instructions. It follows that the judgment of the district court is

AFFIRMED.

N. J. MAXWELL ET AL., APPELLANTS, V. WILLIAM STEEN, APPELLEE.

FILED JANUARY 16, 1913. No. 17,656.

1. **Intoxicating Liquors: LICENSE: APPEAL: RECORD.** Where, on appeal to this court from a judgment of the district court affirming the action of a village board in granting a liquor license, the record

is silent on the question as to whether or not the granting of the license was by authority of an existing ordinance, this court will not indulge the presumption that there was no such ordinance.

2. ———: ———: SUFFICIENCY OF PETITION. The remonstrance against the issuance of a liquor license recited: "The names to the said petition are not, and were not freeholders in any sense at the time of the filing of said petition, * * * and, if freeholders, were made freeholders for the only and express purpose of permitting them to sign the said petition for the said license." *Held* an admission that the signers to the petition were freeholders, and, there being no evidence that they were not freeholders in good faith, the license was properly issued.

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

A. M. Post and *R. P. Drake,* for appellants.

Albert & Wagner, contra.

HAMER, J.

This is an appeal from an order of the district court for Platte county finding in favor of the applicant, William Steen, for a liquor license.

The appellants, who are remonstrants, make the contention that the judgment of the district court should be reversed because it does not appear from the record that there was a valid village ordinance authorizing the issuance of the license.

In *Foley v. State,* 42 Neb. 233, we held that municipal corporations will take notice of their own ordinances, since they stand in the same relation to the municipal laws as do courts of general jurisdiction towards the general laws of the state; and that, on appeal from a judgment of conviction before a police judge for the violation of a city ordinance, the district court will, upon a trial *de novo,* take notice of whatever facts the former could have noticed judicially before the removal of the cause. Counsel for appellants, recognizing the rule there announced, seek to escape its application by citing *Steiner v. State,* 78 Neb.

147, where, after quoting the above holding, we said: "But a different rule will prevail with respect to this court, where such matters are not triable *de novo.*" But in that connection we also said: "This court cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, or in some manner present them as a part of the record." Taking these two cases together, we think the rule is fairly deducible that the village board could take judicial notice of the ordinances of the village, and that the district court may have properly considered that, when the village board issued the license, it did so because authorized to do so by an ordinance of the village, and, the record being silent on the question of the existence of an ordinance, this court will not presume that there was no such ordinance. If the district court erred in taking judicial notice of an ordinance which did not exist, it was the duty of the remonstrants to present some evidence of that fact in the record, which was not done. We cannot therefore indulge the presumption that the district court erred in that respect. As further said in *Steiner v. State, supra:* "A party relying upon such matters must make them a part of the bill of exceptions, or in some manner present them as a part of the record."

The remonstrants further objected to the issuance of a license, upon the jurisdictional ground that the petition was not signed by the requisite number of freeholders. The remonstrance recites: "The names to the said petition are not, and were not, freeholders in any sense at the time of the filing of said petition, so made and constituted for the purpose of becoming signers to said petition, and, if freeholders, were made freeholders for the only and express purpose of permitting them to sign the said petition for the said license." Under the oft-repeated holdings of this court, the above language amounts to an admission that the signers were freeholders, and an allegation that

they were made freeholders for the only and express purpose of permitting them to sign the petition for a license. This was, in substance, an allegation of a fraudulent attempt on the part of the applicant to obtain a license by investing certain persons with a mere nominal title to real estate, for the purpose of enabling them to sign his petition; an act which we have condemned and held is insufficient to qualify such persons as signers. We are not unmindful of the fact that remonstrances to the granting of liquor license are often prepared by persons not learned in the law, and freely concede that the strict rule of pleadings should not be applied to them. No formality of language should be required in such cases, but they should be required to point out in reasonably plain language, informal though it may be, the persons whom they claim have been fraudulently or in bad faith made freeholders, and support their allegation with evidence, so that the applicant may meet the charge with proof to the contrary, if he is able so to do. In the record before us, there is an entire absence of proof to sustain the charge as to any of the signers of the petition of the applicant.

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

AFFIRMED.

IN RE ESTATE OF SARAH E. WALKUP.

JOSEPH H. WALKUP, APPELLANT, V. ISABEL CORNELL, APPELLEE.

FILED JANUARY 31, 1913. No. 17,931.

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

John M. Macfarland and *Charles E. Foster,* for appellant.

John P. Breen, contra.

PER CURIAM.

When an appeal to this court is manifestly frivolous, the record presenting no debatable question, it will be dismissed upon motion.

Upon full hearing, all parties being represented, judgment was entered in the district court for Douglas county upon the pleadings. It appears from the pleadings that in the settlement of an estate of a deceased person in the probate court, while the matter was pending upon a motion for final distribution, the court was about to consider a deed conveying the interest of one heir to another, and an objection was filed to the deed on the ground that it was obtained by fraud. In the objection it was suggested that the objector intended to bring an action in the proper court to set aside the deed. Afterwards, the court having considered the matter from time to time for about three months and no action having been begun in a court having jurisdiction to set aside the deed, the probate court refused to delay the matter longer and entered an order of distribution. From that order the objector appealed to the district court. The above facts appear from his pleading, and upon the hearing a judgment was entered against the objector upon the pleadings. No one will contend that the probate court had jurisdiction to set aside the conveyance on the ground that it was obtained by fraud, and if the probate court had no such jurisdiction the district court could not obtain it by appeal. The district court therefore manifestly did right in entering judgment upon the pleadings. The objector appealed to this court, and a motion is now presented to dismiss his appeal, which, for the reason above given, is sustained, and the appeal

DISMISSED.

CLINTON JOY SUTPHEN, APPELLANT, V. GEORGE A. JOSLYN, APPELLEE.

FILED JANUARY 31, 1913. No. 16,634.

1. Judgment: CONCLUSIVENESS: INFANTS. If an action is properly and regularly brought to quiet title in real estate, and some of the defendants are minors, and service is made as the statute requires, a guardian *ad litem* being appointed for such minors who performs all duties required by the statute, and in good faith presents and protects their rights, the decree rendered upon regular proceedings and trial determines the rights of the minors as well as those of adults.

2. ———: ———: FRAUD. J. contracted to purchase land from S., and paid a part of the purchase price. He then discovered that the title of S. in the land had been questioned and refused to complete the purchase. It was then agreed between the parties that S. should bring an action to quiet his title, and, if successful, J. should complete the purchase. *Held*, That, there being no evidence of bad faith in the matter, such agreement did not render the decree in the action so brought invalid as constructively fraudulent.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, LEE S. ESTELLE and WILLIS G. SEARS, JUDGES. *Affirmed.*

Rich, O'Neill & Gilbert, for appellant.

John C. Cowin and *J. J. Sullivan, contra.*

BARNES, J.

The plaintiff in the court below, now the appellant, commenced this proceeding to have vacated and set aside a certain decree of the district court for Douglas county rendered on the 10th day of July, 1893, against the plaintiff and others, then minors, in an action brought by DeWitt C. Sutphen and Charles D. Sutphen, grandfather and father of the plaintiff, respectively, against George A. Joslyn, seeking to compel Joslyn to specifically perform his contract of purchase from the Sutphens of a certain

five-acre tract of land situated in the city of Omaha, now occupied by Joslyn as his residence. It appears that in the suit in question, it became necessary to determine whether the plaintiffs in that case, the grandfather and father of the plaintiff herein, or this plaintiff, together with his minor brother and sister, held the fee title to the property above mentioned. This question in turn necessitated the construction of a certain will of Emily M. Sutphen, the grandmother of this plaintiff, and the wife and mother, respectively, of the plaintiff in the former suit. It further appears that this plaintiff and his minor brother and sister were made defendants in that action, and a guardian *ad litem* was duly appointed to defend them. The proper answer was filed for them, and the questions involved were duly litigated. The district court decided that the plaintiffs in that suit, under the will above mentioned, took the fee simple title to the land in question, that this plaintiff and his brother and sister took nothing, and thereupon decreed a specific performance of the contract of sale between the elder Sutphens and the defendant Joslyn.

The plaintiff in the present action, more than one year after having attained his majority, brought this suit in the nature of an original bill in equity to have that decree set aside, and for a new trial. Upon a trial of the issues joined the district court dismissed the plaintiff's petition, and from that judgment the plaintiff has prosecuted this appeal.

It is argued that there was fraud in procuring the decree of July 10, 1893. In the present action the district court found specifically that there was no fraud in the decree in question, and from a careful reading of the record we are of opinion that no other finding could have been made.

It appears, without dispute, that on the 1st day of April, 1893, the elder Sutphens entered into a contract with the defendant Joslyn for the sale and purchase of the five-acre tract of land now in question; that the considera-

tion to be paid was a conveyance to the Sutphens of defendant's home in Kountz Place in the city of Omaha, valued at the sum of $30,000, and $20,000 in money, $10,000 of which was to be cash in hand, the remaining payment to be deferred and secured by a mortgage on the premises; that on the 5th day of April, following, the sale had progressed so far that the elder Sutphens made a deed of the premises in question and tendered the same to the defendant Joslyn; that it was then discovered that whatever title the elder Sutphens possessed came to them through the will of one Emily M. Sutphen, and it was suggested by Joslyn that perhaps the elder Sutphens took only a life estate in the premises, and for that reason he absolutely and positively refused to carry out his contract and pay the balance of the purchase price. The matter was thereupon submitted to the consideration of legal counsel, who advised that by the terms of the will the elder Sutphens took the fee to the premises in question and could convey the same to Joslyn free of any right or claim thereto on the part of the minor children of Charles D. Sutphen. But, notwithstanding such advice, defendant Joslyn refused to further proceed until that question was determined by a court of competent jurisdiction. Thereupon the elder Sutphens commenced the action in which the decree of July 10, 1893, was rendered. The action took the form of a petition by the elder Sutphens against the defendant Joslyn to compel the specific performance of the contract on his part. To this petition Joslyn filed an answer, alleging, in substance, that he was willing to specifically perform his part of the contract, provided the elder Sutphens could make him a good title to the premises. He set out in full the provisions of the will of Emily M. Sutphen, and alleged that by the terms of that instrument the elder Sutphens took only a life estate in the premises; that the fee was in the minor children of the plaintiff, Charles D. Sutphen, and that therefore the minors were necessary and proper parties to the proceeding; and prayed that they be brought into the

suit by proper pleadings, and be required to answer and set forth their rights in the premises. By the order of the district court, the minor children were made parties, were required to answer, and a guardian *ad litem* was duly appointed to represent them. The guardian *ad litem* filed the usual and customary answer in such cases, and there was thus presented for the adjudication of the district court the precise question as to who was the fee owner of the premises in question, and what interest, if any, therein was possessed by the minor defendants under the will of their grandmother, Emily M. Sutphen. That the action was thus brought in good faith, and without any concealment or collusion, there can be no question. We are therefore of opinion that there was no actual fraud in the proceedings of which the plaintiff now complains.

Upon the question as to whether the transaction amounted to constructive fraud: The finding of the district court set forth in an able and exhaustive opinion contained in the record herein is, in substance, as follows: The next question is, did that which was done in fact, no matter from what motive, constitute constructive fraud or fraud in law? And we are again impelled to the same conclusion upon this point, and to hold that it did not. There was undoubtedly a *bona fide* intention between the parties to this sale, on the part of the one to buy, and on the part of the other to sell, and after the discovery of what the purchaser deemed was an obstruction to the title there seemed to be the same good faith desire on the part of both to test its legal significance in the only way in which it could be effectively tested—in a court of justice. Now, it seems to us, if this be true, it could not matter to any one concerned how they agreed to formulate the suit by which this question could be tested, so long as no one concerned was, or could be, in any manner prejudiced thereby. There was no concealment from any one of any material fact; there was no disputed fact; no material fact was involved over which there could be a dispute. There was simply prepared and presented to the

court a single, pure, unmixed question of law, upon the mere statement of which its prominence and significance would be at once appreciated by the court. As we view the record, the above finding of the district court was correct, and it is therefore adopted, in substance, as our own.

It is argued, however, that the proceeding was simply a moot suit. This argument is not persuasive. The transaction out of which it became necessary to institute a suit did not originate in sham or collusion. Surely the elder Sutphens had a right to know and have judicially determined what was the extent of their interest in the property in question by virtue of the will of Emily M. Sutphen. Likewise defendant Joslyn, after the execution of the contract of purchase, and he had become the equitable owner of the land, had a right to know the state of the title he was to receive, and to accomplish that purpose a construction of the will was required. That was virtually what the suit was, so far as the rights of the minors were concerned. Again, the Sutphens might have brought suit at any time against the minors to have a construction of that instrument. The minors themselves through a guardian *ad litem* or next friend might have instituted such a suit against the elder Sutphens for the same purpose. The actual facts as they existed were fully set forth to the court. The district court which pronounced the decree in question had jurisdiction of the parties and of the subject matter. It assumed to exercise it, and granted the relief requested. At most, the decree may have been erroneous, but it was not void.

It is suggested that making the minors parties to the suit for specific performance had the effect of depriving them of a trial by jury. This is not so, for under no circumstances could the rights of the minors ever have been a question for a jury. It was a pure, unmixed question of law at all times, and under all circumstances to be determined by the court. If it were made to appear that there was involved in the hearing of that case so much as a single disputed fact, a determination of which would

affect, or even tend to affect, a proper decision of the question of law submitted to the court, there might be room for argument; but such is not the case. It is urged, however, that it was the duty of the guardian *ad litem* to have prosecuted an appeal from the decree in question. It is true that the guardian *ad litem* might have prosecuted such an appeal, and the district court could have directed him so to do; but it is evident from the undisputed facts contained in this record that at the time the decree was rendered the court and counsel for both parties were of the unanimous opinion that the law was correctly determined thereby; that under the will the children took nothing, and therefore to appeal would be a work of supererogation.

From the foregoing, we conclude that the findings of the district court upon the question of fraud are amply sustained by the evidence. Having reached that conclusion, it is unnecessary for us to determine any of the other points urged by counsel. Finding no error in the record, the judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

HAMER, J., dissenting.

No extended effort will be made to criticise the opinions. The opinions are delivered in Nos. 16,634 (*ante*, p. 34) and 17,236 (p. 45, *post*). I am compelled to dissent in these cases because I believe the course pursued in the district court for Douglas county in the original case was in disregard of the rights of the heirs. The grandmother intended the property for her grandchildren. No attention was paid to her wishes in the matter. While there was no evil intent—no intent to deprive the grandchildren of their inheritance—the district judge and counsel sought an opportunity to apply the property otherwise than it was intended. If that sort of thing may be done in these cases, it may be done in any case. Hereafter, what-

ever the disposition of the ancestor toward his grandchildren, he may feel no certainty that the property which he intends for them will ever reach the objects of his bounty. The case made was apparently a sham case. The guardian *ad litem* apparently made no effort to succeed, and there was no appeal. Those who were next to the children did not take care of them. There may have been no evil intent, but there was an utter disregard of the purpose of the grandmother. The district judge was used as a mere convenience, however honestly he may have intended to act.

GLADYS E. KIPLINGER, APPELLEE, V. GEORGE A. JOSLYN, APPELLANT.

FILED JANUARY 31, 1913. No. 16,827.

1. **Infants:** DISABILITIES. Under the statutes of this state, the disabilities of a female, as a minor, are ended when she becomes 18 years of age, and she may thereafter bring suits in her own name, and transact business generally. *Parker v. Starr*, 21 Neb. 680.

2. **Judgment:** VACATION: INFANTS: LIMITATIONS. To entitle a female to maintain an action, under the provisions of section 602 of the code, to vacate an order or decree, and for a new trial of an action in the district court, her suit must be commenced within two years after she becomes 18 years of age. If plaintiff relies on the provisions of section 442 of the code, the action must be commenced within one year after arriving at full age.

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

John C. Cowin and *John J. Sullivan*, for appellant.

Rich, O'Neill & Gilbert, contra.

BARNES, J.

The plaintiff in this action, after she became 21 years

of age, filed her petition in equity in the district court for Douglas county to set aside the decree of that court attacked by Clinton Joy Sutphen in *Sutphen v. Joslyn, ante*, p. 34. The grounds set forth in her petition were the same as those assigned in the action above mentioned. Upon the issues joined the district court found and decreed that the action was seasonably commenced in point of time, and the plaintiff as one of the heirs of Charles D. Sutphen had a good defense to the action of her father and grandfather against the defendant, George A. Joslyn, for specific performance of the contract which was decreed to be enforced in that action. The decree was set aside, and she was awarded a new trial. From that judgment defendant Joslyn has appealed.

The appellant contends that the district court erred in holding that the action was seasonably commenced, and awarding the plaintiff a new trial. This action was brought under section 602 of the code, which provides: "A district court shall have power to vacate or modify its own judgments or orders, after the term at which such judgment or order was made, * * * by granting a new trial. * * * Fourth. For fraud practiced by the successful party in obtaining the judgment or order. Fifth. For erroneous proceedings against an infant, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings." Section 609 of the code provides: "Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions 4, 5, and 7 of section 602, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or person of unsound mind, and then within two years after removal of such disability." By section 5371, Ann. St. 1911, it is provided: "All male children under twenty-one and all females under eighteen years of age are declared to be minors; but, in case a female marries between the ages of sixteen and eighteen, her minority ends."

In *Parker v. Starr*, 21 Neb. 680, it was held that a female 18 years of age may bring suit in her own name, and transact business generally. It follows that under our statutes the plaintiff's disability ended when she became 18 years of age. It must be observed that the plaintiff commenced this action more than three years after her disability ended. But counsel for the plaintiff contend that section 442 of the code, which provides that "it shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining full age; but in any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such order or judgment," has the effect of granting the plaintiff a period of four years after she became 18 years of age in which to commence her action. Considering the several sections of our statutes bearing upon this question together, we are of opinion that section 442 does not have the effect for which the plaintiff contends. It seems clear that, in order to maintain her action, plaintiff must have commenced it within one year after she became 18 years of age.

In view of the rule announced in *Sutphen v. Joslyn, supra,* where it was held that there was neither actual nor constructive fraud in the action in which the decree of July 10, 1893, was rendered, and that the decree was binding upon the minors as well as the adult defendants therein, we are of opinion that the plaintiff could not maintain this action. The judgment of the district court is therefore reversed, and the plaintiff's action is dismissed.

REVERSED AND DISMISSED.

FAWCETT, J., not sitting.

WILLIAM H. INNESS, APPELLEE, V. JOHN H. MEYER, APPELLANT.

FILED JANUARY 31, 1913. No. 16,939.

1. Parent and Child: ACTION FOR SERVICES OF INFANT. As a general rule, the right of action for the services or earnings of an unemancipated minor is in the parent, and this is invariably true where the contract of employment was made by the parent.
2. Appeal: TRIAL BY COURT: FINDINGS. Where a question of fact in an action at law is submitted to the court, without a jury, upon competent evidence, the judgment of the court is entitled to the same weight and consideration as the verdict of a jury; and the finding and judgment will not be disturbed on appeal, although the evidence was conflicting, unless it can be said that the finding is clearly wrong.

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

G. N. Anderson, for appellant.

J. R. Swain and *T. D. Meese, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Wheeler county. It appears that the plaintiff and defendant entered into an agreement by which plaintiff's son, a boy about 15 years of age, who was living with and being supported by his father, was to herd cattle for the defendant, and defendant agreed to pay plaintiff for the services of his son $18 a month. The services were performed, as claimed by the plaintiff, for a period of four months and fourteen days. On defendant's refusal to pay for the services in question, plaintiff brought an action in justice court of Wheeler county, and recovered a judgment against the defendant for the sum of $81.69. The defendant appealed to the district court, and on a trial, without the intervention of a jury, plaintiff again had judgment for $80.33. To reverse that judgment the defendant has prosecuted this appeal.

Two grounds for a reversal are assigned, which may be stated as follows: First. The defendant was not the real party in interest, and had not the legal capacity to maintain this action. Second. The judgment is not sustained by sufficient evidence.

In support of defendant's first assignment, it is argued that plaintiff's minor son was the real party in interest, and the action could only be maintained by him through or by his next friend. The testimony discloses that the plaintiff had not emancipated his son, but, on the contrary, claimed his wages; that the contract with defendant was made by plaintiff, and not by the minor son, who made no claim for his services. In such a case, it cannot be said that the minor son of the plaintiff was the real party in interest. As a general rule, the right of action for the services or earnings of an unemancipated minor is in the parent. This is invariably true where the contract of employment was made by the parent. 29 Cyc. 1631. As shown by the evidence in this case, plaintiff was the real party in interest, was the proper party to bring this action, and defendant's contention cannot be sustained.

In support of the second assignment of error, it is argued that the evidence is insufficient to support the judgment, for the reason that the plaintiff was entitled to receive compensation at the rate of $18 a month, counting 30 days as a month, instead of 26 days, as claimed by the plaintiff. The plaintiff testified that it was the custom among cattlemen to pay for such services at the rate of 26 days, instead of 30 days, a month; that this was the understanding between plaintiff and defendant at the time the services in question were contracted for; that on a former occasion defendant had paid plaintiff for like services at the rate of 26 days a month, and this testimony was not denied by the plaintiff. The defendant now insists, however, that he was entitled to receive the services of the plaintiff's son for full 30 days for each month during which he was employed. That question, however, was

submitted to the court upon competent evidence, and, even if it was somewhat conflicting, the finding of the trial court is entitled to the same weight as the verdict of a jury, and such finding and judgment of the trial court will not be disturbed on appeal.

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

AFFIRMED.

DEWITT C. SUTPHEN ET AL., APPELLEES, V. GEORGE A. JOSLYN, APPELLANT; GLADYS E. KIPLINGER, APPELLEE.

FILED JANUARY 31, 1913. No. 17,236.

Appeal: RELIEF. Where it appears that the district court has erroneously vacated a former judgment and granted a new trial of an action in that court, the former judgment should be reinstated and affirmed.

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

John C. Cowin and *J. J. Sullivan,* for appellant.

Rich, Gilbert & Nolan, contra.

BARNES, J.

Gladys E. Kiplinger, formerly Gladys E. Sutphen, by her petition in equity, obtained an order setting aside a decree for the specific performance of a contract for the sale of certain real estate, and for a new trial; she having been a minor when the decree was rendered against her. By that decree it was adjudged that her father and grandfather took the fee title to the land in question therein under the will of her grandmother, Emily M. Sutphen; that as such fee owners they could convey a good title thereto; and the defendant Joslyn was required to spe-

cifically perform his contract of purchase thereof. After the new trial was granted she filed a demurrer to the answer and cross-petition of defendant Joslyn; the grounds of her demurrer being: First. That the court had no jurisdiction over the person of the defendant, or the subject matter of the action. Second. That several causes of action are improperly joined. Third. The cross-petition did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, and dismissed the answer and cross-petition. From that judgment defendant Joslyn has appealed. This case, therefore, presents for our determination the identical question decided in *Sutphen v. Joslyn, ante,* p. 34, wherein it was held that by the decree of July 10, 1893, which is the one in question, the plaintiffs in that action took the fee to the land in question, and that their deed conveyed a good title to the defendant Joslyn.

For the reasons stated in our opinion in *Sutphen v. Joslyn, ante,* p. 34, we conclude that Joslyn's answer and cross-petition stated a good defense to the claims of the minor heirs of Charles D. Sutphen, of whom the appellee herein is one; that the trial court erred in sustaining the demurrer and vacating its former decree.

The judgment of the district court is therefore reversed, and the decree of July 10, 1893, is reinstated and affirmed.

JUDGMENT ACCORDINGLY.

FAWCETT, J., not sitting.

STATE, EX REL. COUNTY OF DOUGLAS, APPELLEE, V. FELIX J. MCSHANE, JR., SHERIFF, APPELLANT.

FILED JANUARY 31, 1913. No. 17,653.

Statutes: CONSTITUTIONALITY. So much of chapter 53, laws 1907, as authorizes the county board of counties having more than

100,000 inhabitants to contract with the lowest and best bidder for feeding prisoners in the county jail is violative of the provisions of section 11, art. III of the constitution.

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

Arthur F. Mullen, for appellant.

James P. English, Albert S. Ritchie and *Charles L. Fritscher, Jr., contra.*

BARNES, J.

The relator brought this action in the district court for Douglas county for a writ of mandamus to compel the respondent, as sheriff of that county, to allow the relator and the firm of Garnipee & Flannigan admission to the jail of Douglas county in order to furnish meals to the prisoners confined therein for and during the year 1912 under a contract entered into for that purpose between the county commissioners and said firm under the provisions of section 5, ch. 28, Comp. St. 1905, as amended by chapter 53, laws 1907. The respondent filed an answer to the alternative writ. The district court held that the answer stated no defense, the writ of mandamus was allowed as prayed, and the respondent has appealed.

The appellant assigns error in overruling and disregarding his answer, and awarding a writ of mandamus as prayed, and contends that so much of the amendatory act of 1907 as provides that "it shall be the duty of the board of county commissioners to advertise on or before December 1, 1907, and annually thereafter, for proposals for furnishing meals to prisoners in the county jail according to specifications set forth in said advertisement, and on or before the first day of January in each year to contract with the lowest and best bidder for feeding prisoners in the county jail," is unconstitutional and void: First. Because the amendatory act is violative of the provisions of section 11, art. III of the constitution, which says: "No bill shall contain more than one subject, and the same

shall be clearly expressed in its title." Second. The amendatory act is broader than its title. Third. The act, both directly and by implication, amends several sections of the general laws of the state relating to the powers and duties of the county board and the powers and duties of the sheriff without expressly repealing such sections and reenacting them. Fourth. That the act is local and special legislation, and is violative of section 15, art. III of the constitution, which provides: "The legislature shall not pass local or special laws, * * * where a general law can be made applicable, no special law shall be enacted."

On the first proposition it may be said that the act in question purports to amend section 5, ch. 28, Comp. St. 1905, entitled "Fees," and, in so far as it treats of that subject, it may be said to be germane to the section amended. It appears, however, that the act provides that for boarding prisoners the sheriff shall receive 50 cents per day, "provided that in counties having by the last preceding national or state census a population in excess of 100,000 the sheriff shall receive for boarding prisoners, including jail supplies, 39 cents per prisoner per day until January 1, 1908, and it shall be the duty of the board of county commissioners to advertise on or before December 1, 1907, and annually thereafter, for proposals for furnishing meals to prisoners in the county jail according to specifications set forth in said advertisement, and on or before the first day of January in each year to contract with the lowest and best bidder for feeding prisoners in the county jail; provided, further, that the sheriff shall, on the first Tuesday in January, April, July and October of each year, make a report to the board of county commissioners or supervisors under oath, showing the items of fees except mileage collected or earned, from whom, at what time and for what service, and the total amount of fees collected or earned by such officer since the last report, and also the amount collected or earned for the current year, and he shall then pay all fees earned to the county treasurer."

It must be said that section 5, ch. 28, Comp. St. 1905, dealt exclusively with the subject of sheriff's fees, and fixed the amount of fees he was to receive for official acts performed by him; that that part of the proposed amendment which is claimed to be unconstitutional does not deal with the subject of fees, but deals with matters entirely foreign to the subject matter of the original section, and refers specifically to the powers and duties of the county board. It attempts to take the control of feeding prisoners away from the sheriff and place it with the county board, which is a matter regulated by a distinct section of the statute. The subjects are not closely related, and are not germane to each other.

In *West Point W. P. & L. I. Co. v. State,* 49 Neb. 223, the court construed an amendatory act passed by the legislature of 1887 (laws 1887, ch. 107) by which it was attempted to include in the amendment a provision for the construction and maintenance of suitable fishways for the passage of fish over and around milldams. The title to the act amended was "an act to prohibit the catching of game fish in certain seasons," and the court held that so much of the act as related to the construction and maintenance of fishways was foreign to the subject of the title of the original and amendatory acts, and was therefore void. In *Trumble v. Trumble,* 37 Neb. 340, it was held that the attempted amendments of the legislature to the decedent law of Nebraska providing a new method for the disposition of homesteads, and containing, among other things, a provision whereby homesteads should be appraised upon proceedings instituted by the county judge, were invalid and unconstitutional. In the opinion in that case the authorities are collected and discussed, and among them are *Smails v. White,* 4 Neb. 353, *State v. Lancaster County,* 6 Neb. 474, *State v. Lancaster County,* 17 Neb. 85, *Touzalin v. City of Omaha,* 25 Neb. 817, *Strickett v. State,* 31 Neb. 674, and many other cases, which clearly support the respondent's contention.

It is contended by the relator, however, that section 5,

ch. 28, Comp. St. 1905, was a part of the Revised Statutes of 1866, and the limitations prescribed in section 11, art. III of the constitution of 1875, do not apply to any laws that were passed prior to its adoption. It was decided, however, in *Armstrong v. Mayer,* 60 Neb. 423, that the legislature, when amending a section of a statute, must comply with the provisions of our present constitution, regardless of the time when the statute was enacted. *Preston v. Stover,* 70 Neb. 632; *Knight v. Lancaster County,* 74 Neb. 82. It may be fairly said that the part of the section above quoted was not within the title to either the original or amendatory acts, and was not germane to the subject of either of those acts. We are therefore of opinion that so much of the amendatory act as refers to the powers and duties of the board of county commissioners is unconstitutional and void. Having reached this conclusion, the other points urged by respondent will not be considered.

A careful reading of the amendatory act satisfies us that, after eliminating the unconstitutional portion of it, the remainder of the act is complete in itself, and capable of enforcement. It has been repeatedly held that, if the unconstitutional and constitutional provisions of an act can be separated and leave the remainder of it capable of enforcement, the unconstitutional provisions will be stricken out, and the constitutional provisions will be preserved. *Scott v. Flowers,* 61 Neb. 620; *Trumble v. Trumble, supra; Stricklett v. State, supra; State v. Stuht,* 52 Neb. 209.

From the foregoing, it follows that the contract upon which the relator bases its right to the writ of mandamus was not authorized by law, and the district court erred in overruling and disregarding the respondent's answer and awarding the writ as prayed. The judgment of the district court is therefore reversed, and the action is dismissed.

REVERSED AND DISMISSED.

JOHN F. PIPER, APPELLEE, V. JOHN NEYLON, APPELLANT.

FILED JANUARY 31, 1913. No. 17,803.

1. **Bills and Notes:** TRIAL. DIRECTING VERDICT. In a suit on an unpaid, past-due negotiable promissory note, it is the duty of the trial court to direct a verdict in favor of the plaintiff, where the uncontradicted evidence of witnesses whose credibility is not questioned shows that the plaintiff is a *bona fide* holder of the note; that he purchased it for value before maturity, without knowledge of any infirmity therein, or of any facts indicating bad faith in taking it. *Piper v. Neylon*, 88 Neb. 253.

2. **Appeal:** LAW OF THE CASE. Rulings of the supreme court on the admissibility of evidence become the law of the case, and will be adhered to on a subsequent appeal, unless such rulings are shown to have been clearly wrong.

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

Shepherd & Ripley and *J. B. Strode*, for appellant.

Burkett, Wilson & Brown, contra.

BARNES, J.

This case is before the court on a third appeal. As was stated in *Piper v. Neylon*, 88 Neb. 253: "This is a suit on a promissory note for $700 dated December 26, 1901, and due July 1, 1903. The petition contains a copy of the note, and in substance states: It was executed by John Neylon, defendant, and was delivered to Lee Parker, payee, from whom John F. Piper, plaintiff, purchased it before maturity for value in the regular course of business, without notice of any equities between the maker and the payee. It was indorsed 'Lee Parker, without recourse,' May 1, 1903, and delivered to plaintiff the same day. After maturity it was placed with the Farmers Bank of Lyons and the First National Bank of Lincoln for collection. Upon defendant's failure to make payment, the note was returned to plaintiff. Defendant in his an-

swer admitted the execution of the note, but stated that it was given in payment of a worthless stallion, which defendant, by false and fraudulent representations of Parker, was induced to buy for breeding purposes alone. The answer further alleges: 'The plaintiff is not an innocent purchaser and *bona fide* holder of said note, having had at all times full notice and knowledge of the equities between the parties and of the terms of the said sale, and of the representations inducing the same, and that, as defendant is informed and believes, he is not, in fact, the owner of said note, but merely a cover and shield for the said Lee Parker in his attempt to collect the same.' The reply was a general denial. A judgment in favor of defendant was reversed here on a former appeal. *Piper v. Neylon*, 81 Neb. 481. The case was retried, and at the second trial defendant again prevailed." On appeal that judgment was reversed for the refusal of the trial court to direct the jury to return a verdict for the plaintiff. On the third trial the district court directed such a verdict, and from a judgment thereon the defendant has prosecuted this appeal.

Defendant contends that the trial court erred in excluding certain evidence from the consideration of the jury. The competency and materiality of all of this evidence was considered upon the last appeal, and it was held that it should have been excluded. We adhere to what was said in that opinion, and defendant's contention on that point must fail.

It is also argued that the court erred in sustaining a motion to strike out the indorsement found on the back of the note in question. It is a sufficient answer to this argument that the indorsement was held by our former opinion to have been improperly received in evidence.

It is further contended that the plaintiff was not an innocent purchaser of the note: First, because he obtained it at a discount; second, it is claimed that he heard the representations as to the quality of the horse at the time of the sale; and, third, that there is testimony tend-

ing to show that he was once the owner of the horse. The evidence on the first two points above mentioned was before this court on the last appeal, where it was held that the trial court should have instructed the jury to return a verdict for the plaintiff. Upon the first proposition it may be said, however, that the fact that plaintiff purchased the note in controversy for less than its face value would not prevent his recovery as a *bona fide* holder. *Cannon v. Canfield,* 11 Neb. 506; *Citizens Bank v. Ryman,* 12 Neb. 541. In *Sully v. Goldsmith,* 32 Ia. 397, it was shown that the plaintiff bought the note in question for two-thirds of its value. There was a verdict for the defendant, and the supreme court of Iowa reversed the judgment and set aside the verdict. It appears in the instant case that plaintiff received the note from Parker as part payment for a house, and there was nothing in the transaction tending to show a want of *bona fides* on his part.

Finally, it is conceded in appellant's brief that the only evidence in this record that was not before the court on the former appeal is a statement that plaintiff was once the owner of the horse in question. Neylon testified that Piper said to a stranger in Neylon's barn that he once owned the horse. This was denied by Piper. That fact, however, if true, is immaterial, and would not require the trial court to submit the question of the *bona fides* of plaintiff's purchase of the note to the jury. It must be observed that neither the time when plaintiff is alleged to have owned the horse, nor how long he owned him, if at all, was stated; and nothing was shown inconsistent with the fact that, if he owned the horse at all, it was when he was a mere colt and his qualities could not have been known. To entitle the defendant to a submission of his case to the jury, it was necessary for him to show to the court that the testimony in question would have a material bearing upon the question of the good faith of the plaintiff's purchase of the note.

As we view the record, it contains no additional evidence which would entitle the defendant to a submission

of his case to the jury. It follows that the district court did not err in directing the jury to return a verdict for the plaintiff, and the judgment of the district court is

AFFIRMED.

FELIX J. MCSHANE, JR., SHERIFF, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED JANUARY 31, 1913. No. 17,844.

Sheriffs: COMPENSATION. The question decided in this case is identical with the one determined in *State v. McShane*, *ante*, p. 46.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Arthur F. Mullen, for appellant.

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

BARNES, J.

This is an appeal from a judgment of the district court sustaining the action of the auditor of public accounts in disallowing a portion of a claim presented by plaintiff to the auditor of public accounts for allowance against the state.

It appears that plaintiff, as the sheriff of Douglas county, presented the claim in question to the auditor on or about the 1st day of September, 1912. There was contained in that claim the following item: "Board of prisoners from date of conviction, August 27, 1912, to August 30, 1912, 4 days, at 50c a day, $2." All of the other items of the claim were allowed except the one specifically described, which was allowed at only 19 cents a day. From the allowance of the claim and the disallowance of a

part of the item above set forth, the plaintiff appealed to the district court for Lancaster county. Plaintiff filed a petition in the usual form. To this petition the state filed a general demurrer, which was sustained, and judgment was rendered against the plaintiff dismissing the action, and for costs. From that judgment the plaintiff has prosecuted this appeal.

The record contains a stipulation that the question presented for determination in this case is identical with the one recently decided by this court in *State v. McShane*, *ante*, p. 46, and the two cases have been consolidated and argued as one. In disposing of this question, it is sufficient to say that in that case it was held that the provision contained in chapter 53, laws 1907, by which the legislature attempted to authorize the county commissioners in counties having more than 100,000 inhabitants to let contracts for feeding prisoners in the county jail to the lowest and best bidder, is unconstitutional and void. It follows, therefore, that the plaintiff was not bound by the terms of the contract between the county board of Douglas county and Garnipee & Flannigan, which was upheld by the district court; and, plaintiff having furnished the meals in question to a state's prisoner, which fact was admitted by the demurrer, he was clearly entitled to the compensation mentioned in that part of chapter 53 remaining in force, by which it is declared that the sheriff shall receive the sum of 50 cents a day for furnishing meals to such a prisoner.

We are therefore of opinion that the court erred in sustaining the demurrer to plaintiff's petition, and in dismissing his action. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

CHAMPION IRON COMPANY, APPELLANT, V. CITY OF SOUTH OMAHA, APPELLEE.

FILED JANUARY 31, 1913. No. 16,960.

1. **Municipal Corporations:** PUBLIC BUILDINGS: ACCESSORIES. The installation of cells in a "city hall," to be used in connection with a police court held in the building, is incidental to, and not inconsistent with, the general purpose for which such a building may be erected.
2. ———: ———: AUTHORIZATION. It is impossible to lay down an exact definition of the term "city hall." If separate buildings for different departments of city administration are erected upon the same site, so related to each other and to the main structure as to form practically a part of the same general plan, each of the buildings would be authorized by a vote conferring power to issue bonds "to purchase a site and erect a city hall thereon."
3. ———: ———: ———. Under the facts recited in the opinion, *held* that the erection of cells in the police court building should be considered as forming a part of the general plan for a city hall, and that the cost thereof is properly payable out of the money appropriated by the vote upon the issuance of bonds for the purchase of a site and erection of a city hall thereon.

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

Lambert & Winters, for appellant.

John P. Breen and *A. H. Murdock, contra.*

LETTON, J.

This is an action to recover a balance due upon a written contract for installing cell work in a building erected by the city of South Omaha. The city defends upon the ground that it was without power or authority to make and enter into the contract sued upon, for the reason that no appropriation had previously been made by the city either to construct the building or to install the cell work as a part thereof, and that there were no funds available

for that purpose in the city treasury. At the close of plaintiff's testimony the court directed a verdict in favor of the city, and from a judgment dismissing the action the plaintiff has appealed.

The evidence shows that a petition was presented to the city council, asking it to call an election for the purpose of submitting to the voters of the city the question of issuing bonds to the amount of $70,000 for the purpose of purchasing ground and erecting a city hall thereon for the use of the city. An ordinance was passed in conformity to the prayer of the petition, and a special election held under a call which submitted to the voters the question of issuing the bonds, the proceeds to be used "to purchase a site and erect a city hall thereon for the use of the city." The proposition for the issuance of the bonds carried at the election, and an ordinance was afterwards passed providing for the issuance of the bonds, and declaring that "the funds derived from the sale of said bonds shall be devoted exclusively to the purchase of a site and the erection thereon of a city hall for the use of the city." The evidence further shows that a site was purchased, a city hall erected, and another building erected upon a portion of the site purchased.

The section of the charter governing the issuance of bonds, so far as pertinent, is as follows (Ann. St. 1907, sec. 8410): "The mayor and council may purchase the necessary grounds and erect thereon a city hall and other buildings that may be necessary for the use of the city. For the purpose of paying the cost thereof, the mayor and council are authorized to issue bonds in any sum not exceeding $100,000." This is followed by a provision regulating the issuance of bonds. Sections 8290, 8291, and 8292 provide, in substance, that the city council shall pass an ordinance to be termed "Annual Appropriation Bill," which shall specify the object and purpose for which appropriations are to be made; that an estimate shall be prepared before the appropriation is made each year; and that the mayor and council shall have no power to issue

or draw any order or warrants for the payment of money, unless the same shall have been appropriated or ordered by ordinance, or the claim has been allowed and the appropriation out of which such claim is payable has been made as provided in the annual appropriation bill. Section 8304, in substance, provides that no contract shall be made and no expense incurred, "unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

The plaintiff contends that the provision of section 8410 giving power to erect a city hall and other buildings, and for issuing bonds for the purpose of paying for the same, is of itself an appropriation of the funds derived from the sale of the bonds to the purpose for which they are voted, and that the provision with reference to annual appropriation bills applies only to money derived from taxation and other sources. This seems to be conceded. Plaintiff also contends that, under the authorization to purchase a site and erect a city hall, the city and council were given power to make the contract sued upon. The stipulation of facts shows that after the sale of the bonds a site was purchased, 100 feet square, and an architect was employed to prepare plans and specifications for a city hall; that bids were called for for the construction of a city hall and jail building pursuant to the plans and specifications prepared by the architect; that bids were received and a contract let for the "construction and completion of the new city hall and jail for the sum of $43,770, containing a separate bid upon a coping or boundary wall connecting the two buildings, in the sum of $225;" that the contract for the two buildings included the installation of a heating plant (the same plant covering the heating of each building), and the contract included the electrical wiring and plumbing fixtures in each, and also the building of a coping wall between the buildings which extends from one building to the other. It is further stipulated that the plaintiff is claiming under an entirely separate and different contract from that of the builders; plaintiff's contract being "for

the installation of jail fixtures and cell work in the building devoted to the police court." At the time the contract was made there was sufficient money unexpended out of the $70,000 from the issuance of bonds to pay the full amount of the contract with the plaintiff, and there were no other funds available or appropriated for that purpose. The plaintiff called a witness and offered to prove that the cell work in the city jail building was constructed in accordance with the plans and specifications, except as to the alterations directed by the city officials and the architect, and that it was completed and taken possession of by the city before the action was begun. This testimony was objected to for the reason that there was no appropriation made other than the money received by the sale of the city hall bonds, and that there being no legal contract, and the action being upon the contract, the offer was irrelevant, incompetent and immaterial. The objection was sustained. The offer to show the amount or balance remaining unpaid upon the original contract was also denied upon the same ground. Further offers of proof were refused for the same reason, and the jury directed as stated.

From this statement it will be seen that but one question is presented, which is, whether a contract to furnish cell work for a building used in connection with the city hall for the police court of the city may be legally made under a vote authorizing the city officials "to purchase a site and erect a city hall thereon for the use of the city." The question is not free from difficulty. It is clear that the city authorities have no power or authority to use the money derived from the sale of bonds under this statute for purposes foreign to that for which the money was voted, but it is equally clear that a reasonable discretion must be vested in such officers as to the manner in which the building shall be constructed in order to serve the purpose of its erection. The photographs in evidence show two buildings near each other. The larger seems to be the city hall building, and the adjacent building bearing the tablet "Police Court" seems to be occupied by offices

or courtrooms in the second story, and by the jail on the ground floor. The buildings are connected at the street end by a wall without an opening therein. Each building has upon the side facing the other a door opening at the ground level, and a walk extending from the door in the one to the door in the other. Both from the stipulation of facts and from these photographs it appears that the building in which the cells are placed is also occupied by the police court of the city.

It is the contention of the city that because the statutes authorize it to erect hospitals, workhouses, houses of correction, jails, station houses, market houses, and marketing places, and to provide for the erection of other usual and necessary buildings, the city had no power to divert a part of the funds voted by the people for the construction of a city hall to the erection of any of the other buildings named in the statute. We think, however, that this is too narrow an interpretation to be placed upon the law. There is no restriction upon the power of the city to use a building for more than one purpose. The uses of a city hall building may be manifold. If such a building could in conformity with and incidental to the proper carrying out of the main purpose of its construction be used for more than one related purpose, we see no reason why this should not be done. It is a matter of public knowledge of which we take judicial notice that in some cities the administration of the police, fire and water departments is carried on in offices in the city hall, while in other cities the police department and fire department are cared for in buildings entirely separate and distinct, and which from their situation could not in any view be considered as forming a part of the city hall. If the council chamber, the mayor's office, the revenue department, the police department, and the police court had all been housed in one building, and if the authorities of the city had considered it to be necessary and proper for the dispatch of the police business of the city that cells should be set up in the basement of the same building, could it with reason be said that it was beyond

the powers of the city to contract for such cells? The accommodation of a police court is one of the ordinary purposes to which a city hall is devoted, and we think that an equipment of cells to be used in connection with and for the purpose of the police court could with propriety be housed under the same roof and be considered as a part of a city hall and equipment. If the buildings had been under one roof, therefore, we think there could be no question as to the power of the city to contract. Does the fact that both buildings are not under the same roof, although both are erected upon the site purchased for city hall purposes, and neither is used exclusively for a jail, change the result? It is not infrequent in the construction of hospitals or prisons that a central administration building is erected, with separate buildings for different purposes connected with the general plan. We think it has never been contended that such separate buildings used in connection with the main building and incidental to the general plan and purpose required a special authorization for their erection. If in the construction of a penitentiary the authorities should believe that a separate building should be used for a workshop or for a prison kitchen and dining room, could this render such separate building any less a part of the prison? Or, if it were deemed proper that the city should operate a separate lighting plant for the lighting of its city hall, could it not properly be erected upon the same site and in a separate building, as a part of the general purpose? In perhaps a majority of instances large public buildings are heated from separate buildings on the same site. But the heating plant is usually considered a part of the general plan, and therefore authorized. We are of opinion that it is not an essential requisite to the validity of a contract under bonds voted for the erection of a city hall that the same roof cover every department of the city administration. If the architect should with the approval of the city authorities distribute the city departments, executive, judicial, and administrative, into separate buildings on the site which has been devoted to

city hall purposes as a part of the same general plan, and in connection with and in relation to each other, we think there is nothing in the statute to forbid. It is impossible to lay down an exact definition of the term "city hall." It is sufficient to say that where the buildings and appurtenances provided for are upon the same site, and are so related to each other and to the main purpose of the erection as to form practically a part of the same general plan, they may each and all be included within that category.

Defendant argues that, when the governing board of a municipality is authorized by the vote of the people to incur a debt for a particular purpose, such purpose must be strictly followed, and the terms of the authority granted must be strictly and fully performed, citing *Tukey v. City of Omaha,* 54 Neb. 370. There is nothing inconsistent with this in the view taken here. In that case it was sought to erect a market house in a public park after bonds had been authorized to purchase a site therefor and to erect the building on the site. The taking of the park was not contemplated by the voter as a consequence of his ballot in favor of the bonds.

We are convinced that the city authorities had the power to enter into the contract in question, and that the money required to be paid by its terms was sufficiently appropriated by the proceedings leading up to the issuance and sale of the bonds.

For the reasons stated, the district court erred in holding that the contract was void. Its judgment is therefore

REVERSED.

ALBERT S. RITCHIE, APPELLEE, V. J. V. STEGER, APPELLANT.

FILED JANUARY 31, 1913. No. 16,952.

1. Appeal: INSTRUCTIONS. In an instruction defining the issues, a statement that an undenied, immaterial allegation of the petition may be regarded as a fact is not a ground of reversal in a record which does not affirmatively show prejudice to appellant.

2. ———: EXCESSIVE VERDICT: FAILURE TO OBJECT. In a reviewing court, excessive recovery is not a ground for reversing the judgment, where the amount of the verdict is not challenged below by an available assignment of error.

3. ———: INSTRUCTIONS: REVIEW. On appeal, instructions correctly stating the law applicable to the issues raised by the pleadings cannot be successfully assailed by defendant on the ground that such instructions are inapplicable to evidence tending to support a defense not pleaded.

4. Trial: VERDICT: IMPEACHMENT. Matters inhering in the verdict of a jury cannot be assailed by affidavits of jurors.

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

John L. Webster, for appellant.

Carl E. Herring and *Albert S. Ritchie, contra.*

ROSE, J.

This is an action to recover compensation in the sum of $1,999.99 for professional services alleged to have been rendered during a period of years by plaintiff as attorney for defendant. From judgment on a verdict in favor of plaintiff for $1,500, defendant has appealed.

In the first assignment of error the trial court's statement of the issues to the jury is assailed for directing, in substance, that plaintiff alleges "the defendant is the proprietor, with his sons, of the largest piano factories in the world, located at Steger, Illinois, said town receiving its name from the defendant on account of the large interests of defendant located there;" that defendant in his

answer admits this allegation; that the court's statement of the issues is merely a summary of the claims made by the respective parties, and is intended to assist the jury in considering the evidence, but, except as to admissions, is not to be taken as a recital of facts. The issues raised by the answer were the employment of plaintiff as attorney, the performance of professional services for defendant, and the amount of compensation, if any. The criticisms of the instruction are that defendant's proprietorship of the largest piano factories in the world was not material to the issues; that in calling the jury's attention to the undenied allegation mentioned defendant was prejudiced; that the implied charge to consider the admission as a recital of fact was improper; and that attention should not have been directed to defendant's wealth. There is abundant reason why the judgment should not be reversed for the giving of the instruction criticised. Defendant in his answer did not deny the allegation in regard to his factories. If it could not truthfully be denied, and was immaterial, and if defendant did not want it considered by the court or the jury, or made the subject of comment, he had his remedy by motion to strike it out of the petition. He did not see fit to pursue that course. In allowing the averment to remain in the record, he acquiesced with plaintiff in putting it there; and it ought to be assumed, under the circumstances, that he hoped to receive a benefit from the prominence it gave him. It was not a reflection upon him, and it does not affirmatively appear that he was prejudiced by it. It was not evidence from which the jury could infer that he had employed defendant or had been advised by him. If, however, it could be held prejudicial, it would only affect the amount of recovery, and of that no available complaint is made in the assignments of error.

Other instructions are challenged as amounting to a declaration that plaintiff had a right to enter defendant's employ, though the evidence shows, so it is said, that he had previously entered into contracts which obligated him,

as an attorney, to assume on behalf of others an attitude hostile to defendant and inconsistent with professional relations with the latter, and that plaintiff received from others compensation for professional services antagonistic to the interests of defendant. This assignment of error cannot be sustained for the following reasons: As abstract propositions of law the instructions assailed are not open to serious criticism. In giving them the trial court charged the jury on the law applicable to the issues raised by the pleadings. Those issues were: Did defendant employ plaintiff as attorney? Did plaintiff perform services as attorney for defendant? If these questions are answered in the affirmative, what is the amount of plaintiff's compensation? In his brief defendant frankly states that these are the issues. That plaintiff's former retainers prevented him from serving defendant professionally was not pleaded as a defense. No effort was made to amend the answer either to include that issue or to conform the pleadings to the proof. If plaintiff accepted compensation from defendant's adversaries, the verdict is not properly assailed as excessive. On this particular feature of the case defendant did not request instructions containing his theory of the law. The record presented, therefore, does not in this respect contain an error available to defendant.

Misconduct of jurors is also a subject of complaint, but it is based on an attack made in violation of the rule that matters inhering in the verdict of a jury cannot be assailed by affidavits of jurors. *Iman v. Inkster,* 90 Neb. 704.

No reversible error has been found, and the judgment of the district court is

AFFIRMED.

HAMER, J., dissents.

WILLIAM G. KORAB V. STATE OF NEBRASKA.

FILED JANUARY 31, 1913. No. 17,615.

Information: SUFFICIENCY: ARREST OF JUDGMENT. An information for receiving stolen property does not state facts constituting an offense, where the property is described only as "the personal property of John Lightfoot of the value of $48, then lately before stolen;" and, after a verdict of guilty on such an information, it is error to overrule a motion in arrest of judgment.

ERROR to the district court for Boyd county: R. R. DICKSON, JUDGE. *Reversed.*

W. T. Wills and *M. F. Harrington,* for plaintiff in error.

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

ROSE, J.

In a prosecution by the state, William G. Korab, defendant, was convicted of receiving stolen property valued by the jury at $38, and for that offense was sentenced to serve in the penitentiary a term of not less than one nor more than seven years. As plaintiff in error he now seeks a reversal of his conviction.

The information was made by the county attorney of Boyd county, Nebraska, and charged: "William G. Korab, late of the county aforesaid, on the 14th day of March, A. D. 1912, in the county of Boyd and the state of Nebraska, aforesaid, unlawfully and feloniously did receive the personal property of John Lightfoot of the value of $48, then lately before stolen, taken and carried away, with the intent of him, the said William G. Korab, to defraud said John Lightfoot, he then and there well knowing the said personal property to have been stolen."

Defendant did not bring up a bill of exceptions. The only assignment of error available to him here is the overruling of a motion in arrest of judgment. "That the facts

stated in the indictment do not constitute an offense" is a statutory ground for sustaining such a motion. Criminal code, sec. 493. Were the facts stated sufficient to charge a felony? The inquiry is directed to the description of the property. It is described in the information as "the personal property of John Lightfoot of the value of $48, then lately before stolen." The prosecutor intended to charge defendant with violating the following statutory provisions: "If any person shall receive or buy any goods or chattels of the value of thirty-five dollars or upwards, that shall be stolen or taken by robbers, with intent to defraud the owner, or shall harbor or conceal any robber or thief guilty of felony, knowing him or her to be such, every person so offending shall be imprisoned in the penitentiary no more than seven years, nor less than one year." Criminal code, sec. 116.

An information for larceny may contain also a count for receiving the stolen property. Criminal code, sec. 419. Since both offenses may be charged in the same information, the rules for determining the sufficiency of the description in charging larceny apply substantially in a prosecution for the single offense of receiving stolen property. In this state the law has been stated thus: "In an indictment or information for larceny the property alleged to have been stolen should be described with sufficient particularity to enable the court to determine that such property is the subject of larceny; to advise the accused with reasonable certainty of the property meant, and enable him to make the needful preparations to meet such charge at the trial." *Barnes v. State,* 40 Neb. 545. This is the general rule. An eminent text-writer says: "As in larceny, so in receiving, the transaction is identified by the description of the stolen things, and their ownership; namely, the thing stolen must be described in the same manner as in larceny." 2 Bishop, New Criminal Procedure (4th ed.) sec. 982.

In the present case the description, "personal property of John Lightfoot of the value of $48," did not enable the

court to determine that the property was the subject of larceny, nor advise defendant with reasonable certainty of the property meant, so as to enable him to make the needful preparation to meet the charge at the trial. The information, according to the correct rule and the one supported by the weight of authority, was insufficient to charge defendant with the felony denounced by the statute. *Merwin v. People,* 26 Mich. 298; *State v. Kosky,* 191 Mo. 1; *Gabriel v. State,* 44 Fla. 57; *Brown v. State,* 116 Ga. 559; *Wells v. State,* 90 Miss. 516. The facts stated in the information being insufficient to charge an offense, the motion in arrest of judgment should have been sustained. It necessarily follows that the sentence must be reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., not sitting.

NEBRASKA POWER COMPANY, APPELLEE, V. ARNOLD C. KOENIG ET AL., APPELLANTS.

FILED JANUARY 31, 1913. No. 17,743.

1. Trusts: CONSTRUCTIVE TRUSTS: ENFORCEMENT IN EQUITY. A court of equity may acquire jurisdiction to decree that a trustee filed in his own name for the beneficiary an application to divert water from a river, though he asserts he acted for himself alone, and shows that, for the purpose of canceling prior, adverse applications of the beneficiary, he instituted a contest which is pending before the state board of irrigation.

2. Corporations: DIRECTORS. A director of a corporation is a fiduciary and is treated by courts of equity as a trustee.

3. Trusts: CONSTRUCTIVE TRUSTS. The rules of equity which determine the consequences of acts performed by a fiduciary extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or authority or influence arises from the fiduciary relation.

4. ———: ———. A person gratuitously or officiously assuming as

agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid.

5. ———: ———: ABANDONMENT OF RELATION. A fiduciary by abandoning his trust and by assuming toward the beneficiary a hostile attitude cannot change the legal consequences of former relations and conduct.

6. ———: ———: OBLIGATION OF TRUSTEE. Means and knowledge acquired by a fiduciary in performing the duties of his trust cannot be used by him to gain a personal advantage at the expense of the beneficiary.

7. ———: ———: ———. Outside of proper compensation and expenses, any advantage gained by a trustee, either in performing his duty or in betraying his trust, inures to the benefit of the beneficiary.

8. ———: ———: RESTORATION OF BENEFITS. The benefit arising from an application to divert water from a stream for power is one which may be restored by a court of equity to the beneficiary, if acquired and held by a trustee in his own name in violation of his duties.

9. ———: ———: ———. A fiduciary, engaged as such in the work of establishing water rights, cannot acquire and hold for himself new, adverse rights, and justify his conduct by asserting that prior holdings of his principal were subject to forfeiture; and, if he attempts to do so, he will be held accountable as a trustee.

10. **Foreign Corporations:** POWERS: ACTS OF DIRECTOR: ESTOPPEL. Where a director of a nonresident corporation, which is authorized by its charter to acquire water rights for an electric power plant, asserts and exercises such rights on behalf of the corporation, he is estopped to deny it has that authority, when called to account as a fiduciary for making in his own name applications for adverse water rights.

11. ———: FILING ARTICLES. The prosecuting of a suit is not transacting business, within the meaning of the statutes requiring a corporation to file its articles of incorporation with the secretary of state, before transacting business in Nebraska.

12. ———: HOLDING REAL ESTATE: DIRECTORS: ESTOPPEL. To procure an advantage personal to himself, a director of a nonresident corporation cannot urge its statutory disability to hold real estate, where it is authorized to do so by its articles of incorporation.

APPEAL from the district court for Platte county: CONRAD HOLLENBECK and GEORGE H. THOMAS, JUDGES. *Affirmed.*

Field, Ricketts & Ricketts, C. C. Flansburg and *E. J. Hainer*, for appellants.

A. M. Post, Jesse L. Root, E. C. Strode and *M. V. Beghtol, contra.*

ROSE, J.

This is a suit for an injunction. The parties are rival claimants to rights growing out of an application to divert from the Loup river 3,200 cubic feet of water a second for the purpose of operating a hydro-electric power plant. The application was filed with the state board of irrigation by defendant Koenig. His codefendants are his transferees. Plaintiff is a corporation for which Koenig had been a director and an engineer. It pleads facts under which it asserts that it acquired prior rights to the use of waters of the same stream; that earlier applications had been transferred to it; that Koenig was its fiduciary or trustee, by reason of his directorate and his employment as engineer; that his filing inured to its benefit; that it is the beneficial owner of whatever rights arose from the filing of the application by Koenig, and that he wrongfully instituted before the state board of irrigation a contest of plaintiff's prior applications; that his contest is based on the false assertion that he is individually entitled to the benefits of his application for water rights instead of plaintiff. Koenig claims that he is not answerable as trustee; that in making his application he properly acted in his own behalf; and that he became the legal owner of accruing rights. The principal questions litigated may be stated thus: In equity, did Koenig file the application for plaintiff? Who is entitled to the benefit of Koenig's

preliminary step in filing his application to acquire water rights? The facts on which the parties rely are fully pleaded. A vast amount of testimony was adduced on both sides. The trial court found that Koenig and his codefendants held the application in trust for plaintiff, and enjoined them from using it to contest the earlier applications which had been transferred to plaintiff. Defendants have appealed.

The injunction is first challenged as an interference with the exclusive original jurisdiction of the state board of irrigation to allot and administer the waters of the state. The argument on this point is unsound for the following reasons: The issues presented to the trial court did not involve the allotting or the administering of any of the waters of the state. Neither the priority nor the validity of any application for water was adjudicated. No such application was sustained or disallowed. It was not decided that the filing made by Koenig was valid or invalid. All subjects over which the state board of irrigation had exclusive original jurisdiction were left open. On issues properly raised, it was found that Koenig made the application as a fiduciary, and that any interest arising therefrom belonged to plaintiff. This was a proper subject of judicial inquiry, and, in making it, the exclusive province of the administrative board was not invaded. The contest of earlier applications was based on the filing of Koenig. If he acted for plaintiff, and if inuring interests were plaintiff's, why should not a court of equity say so and restore the legal title to the beneficial owner? As between plaintiff and its fiduciary, why was not the former entitled to legal evidence of its ownership in the form of a decree in equity? If the rights growing out of the Koenig application belonged to plaintiff, why should Koenig, a trustee, be allowed to make use of the claim of plaintiff to contest its earlier applications? These are questions into which the court of equity below inquired, and, in doing so, it kept within its jurisdiction, and did not improperly interfere with that of the state board of

irrigation. The issues and the decree will admit of no other interpretation.

On the merits of the case, defendants concede the fundamental question to be: Was the Koenig application held in trust for plaintiff? Though the entire record, voluminous as it is, and all observations of counsel have been carefully considered, references to the facts must necessarily be brief. Beginning August 24, 1895, and ending July 30, 1906, H. E. Babcock, a resident of Ord, Nebraska, filed with the state board of irrigation a number of applications to divert water from the Loup river for irrigation and power. His filings were made for the benefit of the Central Irrigation Company, a Nebraska corporation, of which he was the president and a director. The interests, rights and property acquired by him were transferred to plaintiff, a corporation organized under the laws of Delaware. Babcock is plaintiff's president, and is also a member of its board of directors. In promoting the enterprises initiated in the manner stated, plaintiff and its predecessors have invested a large amount of capital. A number of surveys were made, and valuable engineering data were collected. Some canals were dug, and other work was started. During the years 1910 and 1911 plaintiff's officers sought capital to complete and carry on the work begun. To this end Babcock tried to interest Henry L. Doherty, a promoter of New York City, and furnished him information in regard to conditions and prospects. A like service on behalf of plaintiff was undertaken by Fritz Jaeggi, who appealed to G. Wegmann, a resident and capitalist of Zurich, Switzerland. Jaeggi was plaintiff's principal stockholder, and was also a director. He had been a resident of Switzerland, and had formed intimate business relations with Wegmann. The latter asked for technical information, including reports of engineers. Babcock and Jaeggi worked in harmony in the interests of plaintiff to unite Doherty and Wegmann in a plan to finance its power project. For services as an engineer, Koenig accepted capital stock issued by plaintiff, and be-

came a director in 1910. As such, he attended meetings of the board of directors, and otherwise participated actively in the affairs of the corporation. Under employment by president Babcock, he performed services as engineer in connection with the power enterprise in 1909. He had access to plaintiff's records. He used the engineering data collected by former engineers. He conferred with Doherty and sought employment from Wegmann. The latter asked him to make reports and to furnish technical information in regard to the matter with a view to investing a large amount of capital. In complying with Wegmann's wishes, Koenig not only used the work of the engineers who had formerly been in the service of plaintiff, but discussed in his correspondence his directorate and the validity of plaintiff's applications to use the water of the Loup River. After Koenig had been thus engaged, he made the application in controversy while he was one of plaintiff's directors. It was filed September 30, 1910. His point of diversion from the Loup River is a short distance above that upon which plaintiff chiefly relies. If Koenig procures and exercises the rights demanded in his application, plaintiff's power project will be injured, if not destroyed. Some of plaintiff's officers testified they understood from what Koenig had said in regard to his purposes that he made the filing for the benefit of plaintiff. In any event, he did not obtain from plaintiff permission to make the application in his own behalf. Claiming for himself all benefits arising from the application which he had filed in his own name, he resigned his directorate in March, 1912, and early in the following month instituted before the state board of irrigation a contest in which he prayed for the cancelation of all prior applications on which the success of plaintiff's power project depended.

The facts and conclusions thus briefly stated are proper deductions from the evidence, though defendants assert, and argue there is testimony to prove, that Koenig assumed no obligation to procure water rights for plaintiff; that he practiced no fraud or deception; that he violated

no obligation or duty to plaintiff; that he informed plaintiff of his doings; that he advised plaintiff its old applications had lapsed for failure to comply with statutory requirements; that he entered the employ of Wegmann with the knowledge and consent of plaintiff; that, in addition to his work, he expended thousands of dollars in the course of his employment; that, after receiving the benefit of his services, Wegmann and plaintiff refused to make new filings to protect itself or him from the forfeiture of the other applications; that on account of the surveys he had made, the report and plans he had worked out, and the expenses he had incurred, he was obliged for his own protection to make the application in controversy; and that he was not a constructive trustee whose filing was made for plaintiff.

In equity, for whom did Koenig act when he filed the application to take from the Loup river above plaintiff's point of diversion 3,200 cubic feet of water a second? That amount of water will practically exhaust the supply during a considerable part of the year. If the filing was intended for the individual benefit of Koenig, it was an act of distinct hostility to plaintiff. It brought on a contest, which, if successful, would result in the cancelation of every right of plaintiff to take water from the Loup river for irrigation or power. In addition to being a director, Koenig had been employed as an engineer to perform special services for which his skill and training had prepared him. It does not appear, however, that it was any part of his duty to determine that the early applications had been forfeited. Counsel took a different view of the law, and so advised plaintiff. The value of the right to divert 3,200 cubic feet of water a second from the Loup river for power was learned, in part at least, through his special employment while he was performing his duties to plaintiff and examining engineering data collected by other specialists formerly engaged in the same project. Koenig's directorate alone made him plaintiff's fiduciary.

Judge Thompson in his work on Corporations says:

"The rule is thoroughly embedded in the general jurisprudence of both America and England that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders, and are treated by courts of equity as trustees. Courts hold the directors of a corporation to the strictest accountability. Conduct inconsistent with any duty is condemned. The fiduciary relation is so vital that directors are not only prohibited from making profit out of corporate contracts, and from dealing with the corporation except upon the most open and on the fairest terms, but the rule of accountability is so strict that they are not permitted to anticipate the corporation in the acquisition of property reasonably necessary for carrying out the corporate purposes or conducting the corporate business." 2 Thompson, Corporations (2d ed.) secs. 1215, 1246.

To the confidential relation created by the office of director, there is added in the present case the duties and obligations growing out of the fiduciary's employment as an engineer and the knowledge and influence acquired in that capacity. In *Wright v. Smith,* 23 N. J. Eq. 106, the chancellor said: "Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others." The rules of equity which determine the consequences of acts performed by a fiduciary are not restricted to attorney and client, nor to similar conventional relations, but extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or authority or influence arises from any cause. *McCormick v. Malin,* 5 Blackf. (Ind.) *509.

A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid. *Wright v. Smith,* 23 N. J. Eq. 106. Koenig, by resigning his directorate in March, 1912, and by instituting his contest a few days later, did not change the legal con-

sequences of his former relations and conduct. A fiduciary who enters upon the performance of duties growing out of his confidential relations is not permitted to abandon his trust at pleasure to the injury of the principal or the beneficiary. *Tisdale v. Tisdale,* 2 Sneed (Tenn.) 595, 64 Am. Dec. 775.

Among the principles enforced by courts of equity in dealing with conduct growing out of relations of trust and confidence are the following: Means and knowledge acquired by a trusted representative in performing the duties of his trust cannot be used by him to gain an individual advantage at the expense of his employer. *Cottom v. Holliday,* 59 Ill. 176. In matters relating to the subject of an agency or a trust, the fiduciary acts for his principal alone. *Porter v. Woodruff,* 36 N. J. Eq. 174. Outside of proper compensation and expenses, any advantage gained by a trustee, either by performing his duty or by betraying his trust, inures to the benefit of the beneficiary or principal. *Dodd v. Wakeman,* 26 N. J. Eq. 484; *Lafferty v. Jelley,* 22 Ind. 471; *Moinett v. Days,* 60 Tenn. 431. The purpose of the law in dealing with relations of trust and confidence is to raise the trustee above the temptation to violate his duties to his employer or to the beneficiary. *Porter v. Woodruff,* 36 N. J. Eq. 174.

It is firmly established, both by English and American courts, that a trustee is bound to perform faithfully the duties relating to his trust, and that in doing so he cannot allow his own interests to interfere. If he unites his personal and representative capacities, he confuses transactions which the law requires him to keep separate and distinct. If he attempts to acquire an individual interest in the subject matter of his trust or agency, he creates a temptation to serve himself at the expense of the beneficiary or principal, and enters a realm where his secret purposes with reference to trust property or interests may escape judicial scrutiny. To prevent evil consequences from growing out of the advantages which his position gives him, it will be presumed that what he does in rela-

tion to the interests or property involved in the trust or agency is done in a representative capacity. For the same reason, any advantage beyond proper expenses and compensation belongs to the *cestui que trust.* Adherence to these doctrines keeps personal and representative transactions free from entanglement, removes from the fiduciary the temptation to gain an undue advantage, and permits courts of equity to enforce the rights of the beneficiary. The philosophy on which these rules of law and equity rest came down through the centuries from the Chancellor of Galilee. The wisdom and necessity of such doctrines become more apparent as the forms in which property is held multiply under new conditions, and as earning capital in the custody and control of agents or trustees follows new enterprises over the world, where it is not under the watchful eye of the owner. Courts of equity do not set bounds to the principles which control the conduct and fix the accountability of trustees. The elasticity of these rules extends their applicability to all of the devices invented by unfaithful fiduciaries to evade their obligations or to defeat the imperative demands of business integrity and sound public policy.

Though Koenig in making the application in his own name, and in asserting individual rights arising therefrom, may not have been prompted by any evil design, and though he may justify his conduct according to his own standards of business rectitude, equity will nevertheless enforce upon his conscience his implied obligation to refrain from all acts inconsistent with his duties to plaintiff, will deprive him of the illicit reward by which he was tempted to assume an attitude hostile to the interests he had undertaken to promote, and will restore to plaintiff the title in dispute.

Another argument advanced to defeat the injunction is that the mere filing of an application to use water of the Loup river for power does not create property which can be made the subject of a trust. Whatever right arose from that act has been made the subject of acrimonious litiga-

tion and vehement advocacy in this case. The assignability of such a right has resulted in negotiations by all parties to the suit, if it has not in fact been asserted in their contracts. For the purposes of the present inquiry, the nature of the right is immaterial. It arises from the preliminary step in what may become property of great value. The enterprises which may be developed through the use of water power are encouraged by statute. The steps essential to the acquiring of water rights are statutory, and do not of themselves involve immoral conduct or violate the public policy of the state. As a director it was the duty of Koenig to take part in procuring the water rights essential to the operation of a power plant. His fiduciary relation prevented him from acquiring adverse rights to waters of the same stream. Such a relation is not limited to a person in control of real property, but extends to confidential relations affecting other rights and interests. *Murphey v. Sloan,* 24 Miss. 658. For reasons already stated, equity will operate upon the conscience of Koenig and restore to plaintiff the benefits of his hostile acts, without regard to the nature of the adverse interests he attempted to acquire. The principle which binds him is indicated by the following doctrine announced by the supreme court of the United States: "If an agent discover a defect in the title of his principal to land, he cannot misuse it, to acquire a title for himself; and, if he does, he will be held as a trustee holding for his principal." *Ringo v. Binns,* 10 Pet. (U. S.) *269; Story, Agency (9th ed.) sec. 211.

Defendants argue, further, that plaintiff is a foreign corporation, without any right to transact business in Nebraska, and that therefore it is not entitled to the relief granted. The prosecuting of this suit is not doing business, within the meaning of the statute requiring a nonresident corporation to become a domestic corporation, before transacting business in Nebraska. Comp. St. 1911, ch. 16, secs. 126, 215; *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.,* 244 Ill. 354; *General Conference*

of Free Baptists v. Berkey, 156 Cal. 466. It follows that, in this respect, plaintiff, as a condition of obtaining relief, was not required to prove it had become a domestic corporation.

To show that the injunction was improperly granted, defendants contend that plaintiff, because it is a nonresident corporation, is forbidden by statute to acquire a water right in Nebraska, and that such a right, when perfected, is real estate, the title to which a nonresident corporation is without capacity to receive or hold. Koenig was one of plaintiff's stockholders. As an engineer he examined its engineering data and made independent investigations and surveys. He assumed to know its status and prospects. He advised capitalists to invest large amounts of money in its chief project. As a director he asserted its capacity to acquire and hold water rights. Acting jointly with other directors he assumed and exercised such capacity. Shall he now be permitted to deny that power in a court of equity, after having exercised it, and use his denial to establish a personal claim hostile to the very interests he had as a fiduciary solemnly undertaken to promote? The answer is that he will not. Estoppel prevents him from assuming that attitude here. *Macfarland v. West Side Improvement Ass'n,* 53 Neb. 417; *Centre & K. T. R. Co. v. M'Conaby,* 16 Serg. & Rawle (Pa.) 140; 3 Thompson, Corporations (2d ed.) sec. 2849; *Omnium Investment Co. v. North American Trust Co.,* 65 Kan. 50.

By statute the legislature has invited the investment of foreign capital in projects to utilize the waters of public streams. Corporations organized in other states may become domestic corporations. Comp. St. 1911, ch. 16, sec. 215. The charter of plaintiff authorizes the enterprises undertaken by it in this state, and permits it to hold title to realty. Statutory disability to take title does not make plaintiff an outlaw. Contracts under which it holds real estate essential to the purposes of its existence are at most voidable at the suit of the state, and cannot be

challenged by the corporation's fiduciary to avoid the lawful consequences of his conduct in that capacity. 5 Thompson, Corporations (2d ed.) sec. 6688; *Missouri Valley Land Co. v. Bushnell,* 11 Neb. 192; *Carlow v. Aultman & Co.,* 28 Neb. 672; *Myers v. McGavock,* 39 Neb. 843; *Hanlon v. Union P. R. Co.,* 40 Neb. 52; *Kerfoot v. Farmers & Merchants Bank,* 218 U. S. 281; *Seymour v. Slide & Spur Gold Mines,* 153 U. S. 523; *National Bank v. Matthews,* 98 U. S. 621; *Fritts v. Palmer,* 132 U. S. 282. Koenig is estopped to raise this question, and his transferees are in no better situation.

There is no error in the decree, and it is

AFFIRMED.

IN RE ESTATE OF HIRAM C. NICHOLS.

EUPHEMIA C. CRANDELL, EXECUTRIX, APPELLEE, V. JAMES W. NICHOLS ET AL., APPELLANTS.

FILED JANUARY 31, 1913. No. 16,945.

1. **Wills: CONSTRUCTION.** The will set out in the opinion construed, and *held* to vest in the widow of testator the use of the personal estate for life, with the right to consume the body of such estate, if reasonably necessary, in the protection and improvement of the real estate and for the support of herself and children.
2. **Executors and Administrators: ACCOUNTING.** The use of the body of the personal estate by the widow, as shown in the opinion, approved.

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

W. A. Stewart, for appellants.

E. A. Cook, contra.

FAWCETT, J.

Hiram C. Nichols, a resident of Dawson county, died testate, leaving surviving him his widow, Euphemia C. Nichols (now Crandell), and a number of children, four of whom, James W., William E., Hiram C., and Roy, are appellants here. The inventory shows that the deceased left something over 700 acres of land, estimated to be worth $7,205, and personal property consisting of horses, cattle, farm implements, and cash aggregating $2,794.65. The will consists of two paragraphs as follows:

"First. I direct that all of my funeral charges and all of my debts be paid out of my personal property.

"Second. I give, devise and bequeath, to my dearly beloved wife, Euphemia C. Nichols, all of my property, both real and personal, wherever found, for and during her natural life, and at her death the remainder of the personal property, and all of the real estate shall vest in my children, share and share alike, and to them and their heirs and assigns forever. I also hereby appoint my wife, Euphemia C. Nichols, executrix of this my last will and testament, and request that no other bond be required of her as such executrix except her own personal obligations."

It is conceded by both sides that the only question involved here is the construction of the second paragraph of the will. The widow qualified as executrix and assumed the custody of the assets and control of the estate. It appears that several years after the death of Mr. Nichols the county court, evidently desiring to keep the records of his office in proper shape, called upon the executrix for a report. The report was furnished and is in the record. From this it appears that, after the death of Mr. Nichols, the executrix sold all of the personal property, and that her total receipts therefrom, including the cash on hand at the time of Mr. Nichols' death, amounted to $4,008.70. As against this she reports expenditures for doctor's bills, funeral expenses, court costs, monument, and other

sundry items, amounting to $855.60; for living expenses for herself and family during the first year after the death of Mr. Nichols, $849; cash paid for a team given to the son Roy, $235; harness for Roy, $45; team and harness given to the son Clinton (evidently Hiram C.), $275; team and harness given to the son William, $225; a piano to a daughter Hazel, $225; for lumber, making a well, and sundry items of repairs on the buildings, $712.65; for taxes and insurance upon both the real and personal property, $438.41; making a total amount expended by her of $3,860.66, leaving a balance of cash on hand of $148.04. The appellants appeared in the county court and objected to the report, basing their objection upon the second paragraph of the will, which they insist gave their mother a life estate only in both the real and personal property, and did not give her any right to consume the body of the personal estate or any part thereof. In other words, that if she converted any of the personal property into money she was bound by the terms of the will to preserve the whole of the fund intact. The county court construed the will otherwise, treated the report as a final report, approved it and discharged the executrix.

The district court, on appeal thereto, found that the will gave to appellee "all the personal property to be used by her as she should deem proper and necessary, and that she should not be required to account to the objectors (naming appellants) for the personal property or any part thereof, and that said objectors have no interest in any of said personal property left by the said Hiram C. Nichols, except such, if any, as may remain at the time of the death of the said petitioner Euphemia C. Crandell." The court further found that the report should be approved and the executrix discharged. A decree was entered in accordance with the above findings, and the objecting heirs appealed.

We think the construction given the will by the district court is sound. By the second paragraph the testator gives all of his property, both real and personal, to his

wife "for and during her natural life, and at her death the remainder of the personal property, and all of the real estate," shall be vested in the children, share and share alike. It seems clear to us that the intention of the testator was that the real estate should be preserved intact, and at his death should "all" go to his children, but that, as to the personal property, only such portion thereof should go to the children as remained at the death of his wife, their mother. The word "remainder" has no application to what is left after a compliance with the first paragraph of the will, viz., the payment of the funeral charges and debts. It is clear that it applies to the time of the decease of the testator's wife. The words, "at her death the remainder of the personal property, and all of the real estate shall vest" in the children, are susceptible to no other construction than that put upon them by the district court.

AFFIRMED.

WILLIAM P. CONN ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JANUARY 31, 1913. No. 17,602.

1. Trial: DIRECTING VERDICT. "The trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it." *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8.
2. Evidence examined and set out in the opinion. *Held*, That a verdict for defendant should have been directed.

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

Byron Clark, for appellant.

Burr, Greene & Greene, contra.

FAWCETT, J.

This case is before us a second time. Our opinion upon the former hearing will be found reported in 88 Neb. 732. Reference is made to that opinion for a full and accurate statement of the case. When the case was remanded, it was retried without change in the issues, and again resulted in a verdict and judgment for plaintiffs. Defendant appeals.

The only question presented by this appeal, which we deem it necessary to consider, is one question of fact, viz.: Was the culvert, referred to in our former opinion, and to which the evidence as to the liability or nonliability on the part of the defendant was directed at the last trial, sufficient to drain plaintiff's land? This culvert was what is termed a box culvert, four feet wide by one and a half feet deep, and the question is: Was it set low enough to carry off such surface water as gathered upon plaintiff's land after hard or continued rains? There is no complaint as to the size of the culvert. After heavy rains the whole tract is flooded to the height of the embankments of both the county road and the railroad, the water at times running over both embankments. No complaint is made of that, however; the claim being that after each rain the water will all run off down to the level of the bottom of the culvert. The issue is well defined. Plaintiff's claim is that the culvert is higher than his land, and that after the water has all passed through to the level of the bottom of the culvert the rest of it remains upon his land until it passes away by absorption and evaporation. Defendant's claim is that the bottom of the culvert is six inches lower than the lowest point on plaintiff's land. If the evidence is sufficient to sustain plaintiff's claim, the judgment should be affirmed. If it is not, then the judgment should be reversed.

Plaintiff Conn testified: "Q. Do you know how this culvert compared in elevation with the flooded part of your field? A. Why, yes; I know. Q. Was it higher or

lower than the flooded part of your field. A. It was higher. * * * I know that the bottom of the culvert across the public highway was higher than the low part of my ground. If it had been as low as the low part of my ground, the water would have run through it. After the water quit running out, it would be standing right up to it against it. The culvert was not in a ditch. It was in a road, the public highway. The railroad kept it up. * * * The ditch along the public highway to the culvert was lower than the culvert. The water would stand in my field clear up to this public highway; right up to the highway and the ditch standing full. The bottom of the culvert was just low enough to take the water off of the grade, to protect the public highway." It seems that there was a ditch along the west side of the public road. That is, the plaintiff called it a ditch. Some of the witnesses spoke of it as a borrow-pit, made when the public road was being constructed. We do not think any note should be taken of this so-called ditch. It was not a ditch at all in the sense that it was constructed for any such purpose, and, even if water stood in it at times, plaintiff would have no cause for complaint, as it is not claimed that the ditch was upon his land or that he sustained any damage by reason of its being filled with water. While being examined as to the rains in 1908, plaintiff testified: "I could not get out there to measure how deep the water was. It came from most all over the country. Some of it came from the south. It ran over the grade. The Nemaha Valley got up and flooded right up on top of the grade and off on to my ground. After it quit running, the water did not stand up to the bottom of the culvert all over my ground. It was over part up to the bottom of the culvert, and it was that area of ground that this damage occurred to. The water stood clear out to the public highway and on to it and filled up the ditch, and down at the corner it was up to the bottom of the culvert."

Anthony Bouwens, whose name appears as a coplaintiff

with plaintiff Conn, the latter being referred to throughout the trial as if he were *the* plaintiff, testified: That he and his son owned the land, and that plaintiff Conn farmed it in 1907 and 1908; that he saw the land in 1907, first when it was planted, and again "a couple or three weeks after. It was just about level under the water, which came clear from the north, from the hill and to the bottom from the other quarter, and then it went on close to the road, and then it could not go any further and had to stay there. I went to the railroad where the water went through and tried to get out, but it could not get out there on account of the culvert was not big enough and too high. It was the only way to get it through that little culvert, and that was too small to take the water off in that time when I saw it. I saw the corn after the water had gotten off, it was just cooked and baked." On being recalled, he testified: "The water standing on this 19 acres would just come up to the bottom of the culvert and stand there, it was the standing water that did the damage."

It is urged that the foregoing testimony by the two plaintiffs was sufficient to take the case to the jury and to sustain their verdict. The trouble with the contention is that plaintiffs themselves disproved this testimony, which rested upon their ocular estimates of elevation, by introducing as a witness an experienced engineer whom they had employed to make a survey of the land and take the levels necessary to determine the elevation of the land and of the culvert. Plaintiff Conn testified: "I never took any levels to see whether the culvert was higher than my low ground. I was present when some were taken. Mr. Scott, county surveyor of Lancaster county, took them. He was surveying for me, and I went with him. I told him what I wanted done, showed him where I wanted levels taken, told him what I wanted. Had him take levels across from the east and west road to the north and south road across the right of way, and then the level of this 19-acre field. I do not just remember

where the lowest place was—the lowest place was in the ditch right opposite this culvert. The lowest part of the ground lays right along the public highway just north. You will have to ask Mr. Scott how far from the railroad grade." It will be seen that plaintiff Conn selected Mr. Scott as his expert engineer to make a survey and take the necessary levels to enable him to furnish accurate testimony with reference to the land, the embankments, and the culvert. He followed this up by introducing Mr. Scott as a witness, thereby vouching for his competency; and, judging from Mr. Scott's testimony, we do not think plaintiff made any mistake in selecting him, as he appears to have understood the nature and extent of his commission and to have intelligently executed it. Mr. Scott testified: "The lowest elevation on the land north away from the railroad and river is 113.2. The highest on this piece of land was 116. * * * The lowest point on the 19 acres is 113.2, right at the end of the two parallel lines near the center of the 19 acres, and it would be an exact level of this bank. The culvert is 112.7. The lowest point on the 19 acres would be 6 inches above the bottom of the culvert; that is, the bottom of the culvert now is 6 inches lower than the lowest point on the 19 acres. From that point to the bottom of the culvert is about 450 or 500 feet. There would be a fall of water from the lowest point on this land to the culvert of 6 inches in about 500 feet. * * * The slope is plenty for the water to flow down there. Q. Then, if the water that did the damage to the land, that stood there, was below that point, what would obstruct it, or why wasn't there sufficient room for the water to get away? A. Well, the bottom of that little ravine shows it to be 2 or 3 inches higher between the low point on the land and the culvert. Q. What little ravine? A. The little ravine shown by these parallel lines. Q. Where? A. That drains out to here (indicating). Q. About where is that low point of which you speak, in that ravine? A. I said the points in the ravine were 2 or 3 inches higher than the low points on

the 19 acres. Q. Oh, they are. Where is that? A. Here is a point 113.5. Q. Yes; that is up on the 19— A. About 3 inches higher than the 113.2. Q. But that point is on the 19 acres, isn't it? A. Yes, sir. Q. And what is the next one? A. The next one is 113. Q. That would be .2 lower? A. .2 lower than the high, or 6 inches than the point here (indicating). Q. That being true, the water held at this low point would be held by reason of the rise in the ground from the 19 acres itself, would it not? A. It would hold it 3 inches in depth up here. Q. Would the railroad grade add anything to that? A. It would depend upon the depth of the water on the 19 acres. If it would be deeper than that, then, of course, the railroad grade would help to hold it back." Continuing in narrative form, Mr. Scott testified: "Next to the railroad grade I took the surface of the ground at the fence. The next lowest point to the railroad right of way was 114.5, which would show a line of ground there higher than this out where the elevation in the 19 acres was taken. The water would be held back of this low point by reason of the natural surface of the ground next to the right of way along the fence. It did not reach the grade unless it was deeper than a foot or one and one-half feet lower there. Immediately south of this 19 acres the water could be a foot and a half on there, and yet not get next to the surface of the ground at the right of way. That would be clear down to the first elevation west to the public highway on the north side of the right of way where it was 114.5. The natural surface of the ground there along the fence would be that high, as I found it. Q. Now, then, when you get down then to the public highway, is it not a fact that the water is clear down to that point by reason of the working of this public highway and the throwing up of a slight grade which stops the water in its course east? A. The water is carried down through this ditch. I presume that was made partially anyway to get dirt to fill in the road. This fill would stop the water from going east up as high as the road was, whatever that might be.

Q. So that this public highway is really the thing that deflects the water and flows it off along the public highway? A. Yes; still you could not cross that. Q. And when it gets down to the point and reaches our culvert, then the bottom of our culvert is 6 inches lower than the lowest point on this land; that is true, is it not? A. Yes, sir. Q. So that the water that stood on that 19 acres could get through our culvert, couldn't it, in point of time? A. Yes; in point of time it could." No other testimony was offered by plaintiff with reference to the relative elevation of the land and the culvert. If, as Mr. Scott clearly shows, the bottom of the culvert was 6 inches lower than the lowest point on plaintiff's land, and "the slope is plenty for the water to flow down there," then it is a physical impossibility that plaintiff's damage was the result of any negligence on the part of defendant in the construction and maintenance of the culvert. The simple fact that plaintiffs Conn and Bouwens testified as shown above should not be permitted to weigh against the clear and positive testimony of a competent engineer, whom they introduced, and whose testimony is based upon actual levels and measurements. When plaintiff rested, defendant moved for a directed verdict. The motion was overruled.

"The trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it." *Chicago, R. I. & P. R. Co. v. Sporer,* 69 Neb. 8. The case at bar comes clearly within that rule. No jury would be warranted in basing a verdict for the plaintiff upon the evidence above outlined. It follows that the trial court erred in not sustaining defendant's motion. For this error, the judgment must be reversed. As plaintiff's case clearly appears to be without merit, it should not be permitted to longer vex the courts.

The judgment of the district court is therefore reversed, and the action dismissed, at plaintiff's costs.

REVERSED AND DISMISSED.

REESE, C. J., dissents.

IN RE ESTATE OF JOHN A. CREIGHTON.

FILED JANUARY 31, 1913. Nos. 16,775, 16,776.

Attorney's Fee: TRUST FUND. Attorneys who are duly authorized by parties interested in a fund in controversy to represent them and defend and preserve the fund are entitled to compensation out of the fund in controversy, at least for such services as resulted in the increase and preservation of the fund.

APPLICATION for allowance of attorneys' fees in case reported in 91 Neb. 654. *Application allowed.*

SEDGWICK, J.

After this case was determined in this court (91 Neb. 654), Messrs. Smyth, Smith & Schall, of Omaha, a firm of attorneys and members of the bar of this state, filed an application in this court for an allowance of attorneys' fees out of the funds involved in the litigation. The attorneys for the executors objected to the allowance, and the matter was presented upon briefs and oral argument.

It appears from the record that these applicants were consulted by parties interested in the charity whose right under the will was contested. The right of these parties to appear and be represented by counsel was challenged on the ground that they had no financial interest in the bequest, and perhaps for other reasons. The matter was then brought to the attention of the governor and attorney general of the state, and they considered that the charity in question was a public charity, and authorized these applicants to appear in the name of the attorney general of the state to procure a construction of the will favorable to the establishment of the charity. The county court of Douglas county had construed the will against the bequest for the charity; and, an appeal being in contemplation, a proposition of adjustment was submitted to the executors by the collateral heirs of the deceased not named in the will, by which the sum of $75,000 would be devoted to the

establishment of the proposed charity. This proposition was by the executors submitted to the county court for instruction as to completing the proposed compromise. In the meantime an appeal had been taken to the district court from the decision of the county court. The applicants, in behalf of the charity and in the name of the attorney general, appeared in the district court, and upon trial in that court it was ordered that the executors devote the sum of $75,000 to the proposed charity, and these applicants, believing that the bequest carried a much larger amount, appealed to this court.

Under the decision of this court, the amount secured for the charity was $160,000 and interest thereon, so that on account of the services of these attorneys there had been secured for this fund, over and above the amount that could have been realized on the proposed settlement, the sum of $85,000 and interest. It has already been determined in the opinion above cited that the bequest in question established a public charity and the state is interested; and the attorney general, on the advice of the governor, was authorized to represent the public interest in the controversy, and for that purpose to employ attorneys. The executors contend that, under such circumstances, the attorneys employed must look to the state or the attorney general for their compensation, and cannot be compensated out of the fund in litigation. It appears that these applicants were informed by the attorney general that the state would not compensate them for their services, and that if they received any compensation it must be from the fund in controversy. These attorneys then volunteered to accept the employment without other compensation than might be allowed them out of such amount, if any, as they might succeed in preserving for the proposed charity.

In *Stone v. Omaha Fire Ins. Co.*, 61 Neb. 834, it was held: "The expenses of procuring a receivership of an insolvent corporation, including services of an attorney in consultations, preparing papers and procuring the ap-

pointment of a receiver, are properly chargeable against the fund so brought into the court's control;" and in the opinion the same principle, which we think is everywhere recognized, is quoted from *Trustees v. Greenough,* 105 U. S. 527, 532: "Where one of many parties having a common interest in a trust fund, at his own expense, takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement." This principle seems to be applicable to this case. These attorneys were not themselves interested in the trust funds, but the state was, and, in his official capacity, was also the attorney general. These attorneys then represented parties interested in the trust fund, without any legal means of obtaining compensation except from that fund; and it seems clear that, so far as their services have increased the fund thus preserved, they should be compensated. It is alleged in the application, which is duly verified, that these attorneys rendered services in the matter in at least the value of 25 per cent. of the amount preserved to the fund as a result of those services. A history of the litigation and of the services rendered therein by these attorneys is set out quite in detail in the application, and it is alleged that these funds have been upon interest at 3½ per cent. from the 20th day of October, 1909. Counsel for the executors have filed objections to this allowance in the form of a brief giving the ground of their objection; but the allegations of fact in the application and of the value of the services are not denied. There being no issue of fact tendered by the executors, a reference to take evidence is not called for. The allegations of the applicants as to the extent and value of the services rendered will not justify the amount suggested by them. We think that under the circumstances of this case a fee of 10 per cent. of the amount preserved to the fund by those services is a reasonable fee. The interest on $85,000 from the date and at the rate specified would amount to something over $9,000. We think therefore that the reasonable value of

the services rendered is $9,400, and it is ordered that the executors pay to these applicants the said sum from that fund now in their hands.

APPLICATION ALLOWED.

FAWCETT, J., not sitting.

GEORGE B. DARR, APPELLANT, V. DAWSON COUNTY, APPELLEE.

FILED JANUARY 31, 1913. No. 16,780.

1. **Taxation**: LEVY: INJUNCTION. When a tax is not void as assessed without authority of law, sections 162 and 163 of the revenue law (Comp. St. 1911, ch. 77, art. I) apply, and collection thereof cannot be enjoined, unless the tax was levied "for an illegal or unauthorized purpose," and those sections provide a remedy in other cases in which injunctions were formerly allowed.

2. ———: ILLEGAL ASSESSMENT: REMEDY. The remedy provided for the taxpayer by the first subdivision of section 162 is available only when the property was wrongfully assessed, either because exempt from taxation or because the tax levied had already been assessed thereon and paid:

3. ———: ———: ———. The remedy given by the first subdivision is not available to correct overvaluation, or mistake in estimating the amount of the money of the taxpayer on hand liable to assessment or the value thereof.

4. ———: ———: ———. Under the second subdivision of section 162, the tax must be paid "in all respects as though the same was legal and valid." Protest is not necessary, nor allowed. The taxpayer must, within 30 days after paying the tax, "demand the same in writing from the treasurer of the state, of the county, city, village, township, district, or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied." The treasurer of such political subdivision, when such demand is made, must transmit a copy thereof "to the authorities authorized by law to audit and pay accounts against" the political subdivision which has received the illegal tax, and, if payment is refused, the taxpayer may sue such county, city, or other corporation.

5. ———: ASSESSMENT: REMEDY. Questions of valuation and of

amount and value of money or other personal property to be assessed are not provided for by sections 162 and 163 of the revenue law, and must be presented to the proper board of equalization.

6. ———: RULES GOVERNING. The assessment and levy and collection of taxes are not equitable proceedings. They must necessarily be governed by rules which in many respects may be considered arbitrary. The taxing powers and the taxpayers must comply with these rules.

7. ———: ASSESSMENT: RELIEF. The taxpayer is entitled to a copy of the assessment when completed by the assessor. He may waive this and ascertain the amount of his assessment from the records before the meeting of the board of equalization, and, if dissatisfied with his assessment, he may appeal to that board and have it corrected. If he fails to do so, he cannot for that reason avail himself of the special remedies provided by sections 162 and 163 of the revenue law.

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

Warrington & Stewart, for appellant.

E. A. Cook, contra.

SEDGWICK, J.

Plaintiff seeks to recover from Dawson county $402 paid by him under protest for taxes. He filed his claim with the county board, and, from an order disallowing it, appealed to the district court. In his petition in the district court, he alleged that in the month of April, 1908, his personal property was assessed for taxation by the deputy assessor of Lexington precinct, Dawson county, Nebraska; that he entered all his personal property that was liable to be assessed to him for that year on the schedule furnished him by the said deputy assessor for that purpose; "that plaintiff verified and signed said schedule as required by law, and returned said schedule to said deputy assessor; that (on) said schedule of assessment plaintiff entered his cash on hand at $465, the same being all the cash plaintiff had on the 1st day of April, 1908, and the said item ap-

peared on said schedule when it was returned to said deputy assessor by plaintiff as aforesaid; that, after said schedule had been so made and returned to the assessor, some person, unknown to the plaintiff, and without the knowledge or consent of the plaintiff, and without notice to him, wrongfully changed the said item of cash, $465, so that it read $30,465, and thereafter plaintiff was taxed on said item upon the basis of $30,465, instead of on the basis of $465, as returned by plaintiff aforesaid, whereby plaintiff was wrongfully assessed on one-fifth of said $30,000 in the sum of $402; that the plaintiff was absent from the state of Nebraska from about the 15th day of April, 1908, until about the 1st day of November, 1908, and had no notice or knowledge of said wrongful change in his assessment or schedule until after his return to the state as aforesaid; that on the 15th day of April, 1909, plaintiff, being absent from Dawson county, caused said taxes to be paid under protest, for the reasons aforesaid, as to the taxes so wrongfully levied on the one-fifth of the said $30,000, and thereafter filed his application with the board of county commissioners of said county, asking that said taxes so wrongfuly assessed against him be refunded, which application was by the said board of commissioners rejected." The trial court sustained a demurrer to the foregoing petition, and from a dismissal of the proceeding plaintiff has appealed to this court.

It is not contended that the tax was levied for an illegal or unauthorized purpose. The allegation is that, after the plaintiff had made out his schedule of personal property, and had stated thereon an item of $465, some person, unknown to plaintiff, had changed the item to $30,465, without the knowledge of the plaintiff. The question is whether plaintiff is entitled to relief under sections 162 and 163 of the revenue law. The sections are as follows:

Section 162. "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof hereafter levied, nor to restrain the sale of any property for the nonpayment of any

such tax, except such tax or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose; nor shall any person be permitted to recover by replevin, or other process, any property taken or restrained by the county treasurer for the nonpayment of any tax except such tax be levied or assessed for illegal or unauthorized purpose; but in every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, who shall pay the same to the county treasurer, may proceed in the following manner, viz.: First. If such person claim a tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that said property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the county treasurer, or other proper authority, and it shall be the duty of the treasurer, or other proper authority receiving such tax, to give a receipt therefor, stating thereon that they were paid under protest, and the grounds of such protest, whether or not taxable or twice assessed, and taxes paid thereon. If such taxes are paid to the proper authority, other than the county treasurer, such persons so receiving them shall, within ten days thereafter, deliver such taxes, or such part thereof as are paid under protest to the county treasurer, together with a copy of the receipt given for the same, and the county treasurer shall retain the money so paid under the protest until otherwise directed by order of the county board. Within thirty days after paying such taxes the person paying them shall file a statement in writing, duly verified, with the county board, setting forth the amount of tax paid under protest, the grounds of such protest, and shall attach thereto the receipt taken for said taxes. Whereupon at the first meeting of the county board thereafter, they shall inquire into the matter and if they shall find either that the property upon which taxes were levied was not liable for taxation, or that it had been twice assessed in the same year, and taxes paid thereon, they shall issue an order to the county

treasurer to refund said taxes, stating therein what sum shall be refunded, and if they shall find that the grounds of such protest are not true, they shall issue an order to the county treasurer to dispose of said money in the same manner, as though it had not been paid under protest. Appeals may be taken from such decisions in the same manner and within the times as appeals are now taken from the action of the county board in allowance or disallowance of claims against the county; and if such an appeal be taken the county treasurer shall retain such taxes until the case is finally determined. Provided, that he shall in all cases retain said money until the time for an appeal shall have elapsed. If an appeal from the decision of the county board be taken, and upon the final determination thereof their decision be affirmed, the treasurer shall at once carry the order of said board into effect; but if their decision be reversed, they shall issue a new order to the treasurer conforming to the decree of the court finally determining the case. In all cases where the treasurer shall refund such taxes he shall write opposite such taxes in the tax list the words, 'Erroneously taxed—refunded.' Second. If such person claim the tax or any part thereof to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason except as hereinbefore set forth, when he shall have paid the same to the treasurer, or other proper authority, in all respects as though the same was legal and valid, he may, at any time, within thirty days after such payment, demand the same in writing from the treasurer of the state, of the county, city, village, township, district, or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded within ninety days thereafter, may sue such county, city, village, township, district, or other subdivision, for the amount so demanded; and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any

reason invalid, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases."

Section 163. "When any demand to refund taxes paid is made upon any treasurer, as provided in the second method of procedure indicated in the preceding section, such treasurer shall transmit a copy of the same to the authorities authorized by law to audit and pay accounts against the state, county, city, township, village, or district, as the case may be, who shall pass upon the same as upon any other claim, but no claim for refunding such taxes shall be paid unless it appears to the satisfaction of such authorities that the sum was levied for an illegal or unauthorized purpose." Comp. St. 1911, ch. 77, art. I, secs. 162, 163.

If it is claimed that a tax is invalid because the property upon which it was levied was not liable to taxation or because the said property has been twice assessed in the same year and the tax paid thereon, the alleged invalid tax may be paid under protest, under the first subdivision of section 162.

Section 144 of the revenue act of 1879 (laws 1879, p. 334) provided that no injunction may be brought to restrain the collection of taxes on any other ground than that the tax was levied for an illegal or unauthorized purpose. It attempted to provide a statutory remedy for other cases in which taxes had been enjoined in the absence of such a statute. The remedy provided in the first act was that, when a person claimed that a tax was for any reason invalid and should pay the tax "in all respects as though the same was legal and valid," he might demand the same in writing from the treasurer of the state or political subdivision "for the benefit, or under the authority, or by the request of which the same was levied;" and if the tax was not repaid to him he might sue the county or other subdivision, as the case might be, and recover the same, if it appeared that the tax was levied for an illegal or unauthorized purpose, *"or was for any reason invalid."* The next section of that act (section 145) pro-

vided: "When any demand to refund taxes paid is made upon any treasurer, as provided in the preceding section, such treasurer shall transmit a copy of the same to the authorities authorized by law to audit and pay accounts against the state, county, city, township, district, or village, as the case may be, who shall pass upon the same as upon any other claim, but no claim for refunding such taxes shall be paid, unless it appears to the satisfaction of such authorities that the same was levied for an illegal or unauthorized purpose, or that the same property has been twice assessed in the same year, and taxes paid thereon, or that such property was not liable to taxation." One section provided that the taxpayer might recover in such case if the tax was "for any reason invalid," and the other section provided that the authorities should not refund the tax unless it was levied for an illegal or unauthorized purpose, or that the same property had been twice assessed the same year, and taxes paid thereon, or that such property was not liable to taxation, limiting the right to repay the contested tax to these three grounds.

In 1887 these two sections were amended. Laws 1887, ch. 69. The words "that the same property has been twice assessed in the same year, and taxes paid thereon, or that such property was not liable to taxation" were omitted from section 145 and placed in the first subdivision of the preceding section. The only change in section 144 of the first act was to insert the right to pay under protest and recover from the county when the property taxed was not liable to taxation, or was assessed twice and the first assessment paid. This provision appears now as the first subdivision in section 162, and the second subdivision of that section remains substantially the same as first enacted in 1879. In determining the application of the remedy provided by those sections, we should consider that they were enacted in view of the law as it was formely administered, and construe them in that light. We must consider the conditions that existed, the evil that it was proposed to remedy, and the remedy provided. In the ab-

sence of such a statute, Judge Cooley says that injunctions were allowed: (*a*) Where taxes were levied on exempt property; or (*b*) where property was doubly assessed; or (*c*) where levied without authority of law by persons having no power to make the levy; or (*d*) where there was a clear case of fraud in making the valuation. 2 Cooley, Taxation (3d ed.) 1441, 1442. It would seem that these are the only cases in which it ought to be held that taxes may be paid and recovered back under section 162. In the absence of a statute of this kind, taxes were not enjoined by courts of equity on the ground that they were illegal or erroneous. 2 Cooley, Taxation (3d ed.) 1440. The statutory remedies were considered to be sufficient for such purposes.

The legislature, having these grounds for injunction in mind, substituted the remedy supposed to be more simple, more just to the taxpayers, and more certain in its operation in the collection of the public revenues. If the property was exempt from taxation, or if it had already been assessed for that year and the tax paid, those questions were simple and could be easily determined. They are therefore referred to the county board for determination.

The plaintiff did not attempt to proceed under the second subdivision of section 162. He paid the tax under protest, and appealed to the county board for a return of the money so paid. The second subdivision does not provide for or contemplate payment under protest. It is only applicable when the taxpayer has paid the tax "in all respects as though the same was legal and valid." When so paid the tax cannot be recovered from the county, unless the tax was levied "for the benefit, or under the authority, or by the request" of the county. If any other political district or subdivision procures for its benefit a tax to be levied for an illegal or unauthorized purpose under this second subdivision, it can only be collected from such "city, village, township, district, or other subdivision," as the case may be, for which it was levied; and, under this subdivision of section 162, the taxpayer must, within 30

days after he paid the tax, "demand the same in writing" from the treasurer of the particular subdivision benefited by the tax. As none of these things were done, the plaintiff cannot claim under this second part of section 162.

It seems equally clear that his claim is not within the first remedy provided by that section. Our statute exempts certain specified property from taxation. If a tax is assessed upon property exempt and "not liable to taxation," or assessed a second time after the tax has already been paid upon the property, it may be paid under protest; and, if the proper steps are taken by the taxpayer, the money so paid is not distributed to the various political subdivisions for whose benefit taxes in general are levied and collected; it is held until the county board can ascertain whether the property taxed is exempt from taxation under the statute, if that is the ground of protest, or whether the tax upon the property had already been paid before the protested tax was collected. A second assessment after the tax has been paid is practically the same thing as an assessment on property which the statute exempts, and a tax so collected is summarily returned by the county treasurer upon order of the county board. The matter so presented for determination is entirely different in character from questions of valuation, and disputes as to the amount or value of money that the taxpayer has at the time of assessment, whether he has and should be assessed on $400, or some other amount, is not a question of exemption from taxation, nor of second assessment on the same property.

The plaintiff says that he had only $465 in money at the time this assessment was made. The assessor found that he had a much larger amount. This question could have been determined readily by the board of equalization, and it appears to be the policy of the law that all such questions should in the first instance be presented to that board. The assessment and levy and collection of taxes are not equitable proceedings. They necessarily have to be governed by rules which in many cases must be con-

sidered to be arbitrary. There is no way to avoid it, and the taxing power and the taxpayers must comply with these rules. There is no other way to do. Plain rules of law that will be readily understood by the assessing authorities and by the taxpayer are very desirable. To say that Mr. Darr has been wronged by this assessment is to say, not only that he actually had no more than the $465 in money, but also that the statute did not provide him any method of summarily disposing of the question. Whether he had $465 or $30,465 was a question of fact that was in the first instance submitted to the assessor, and if wrongly determined might be submitted to the board of equalization. The board of equalization has no power to add other property to the list returned by the individual taxpayer or increase the valuation without notice to the taxpayer. If it attempts to do so, or otherwise violates substantial provisions of the statute intended to protect the taxpayer, the tax is "levied without authority of law." They are without authority to make such levy, and the tax may be enjoined. *South Platte Land Co. v. Buffalo County,* 7 Neb. 253; *Suydam v. County of Merrick,* 19 Neb. 155; *State v. Edwards,* 26 Neb. 701. The plaintiff alleges that he does not know who added to the list as he returned it to the assessor. If the board of equalization did, it was without authority of law, because no notice was given the taxpayer, as the statute requires. In such case the tax would be void, and might be enjoined, but it could not be paid under protest and recovered again. A voluntary payment of taxes cannot be recovered, in the absence of a statute authorizing such payment and recovery. There is no statute authorizing the payment and recovery of a tax, except the first subdivision of section 162 of the revenue act, which applies only when the property is exempt from taxation, or has once been assessed for the same year and the tax paid.

If the property was added by the assessor, the plaintiff has also taken the wrong remedy. He might have required the assessor to furnish him with a copy of the assessment,

as he proposed to return it to the county authorities. This Mr. Darr neglected to do, and the assessor valued his property, and no complaint was made to the board of equalization. It is not the duty of a taxpayer to assess his own property; he lists his personal property upon the schedule, and submits to the assessor to determine the value thereof for assessment; and when the assessor has done so, if the taxpayer demands it, he must furnish to the taxpayer a copy of such valuation as he puts upon the property. Comp. St. 1911, ch. 77, art. I, sec. 110. If the taxpayer does not exercise this right and so obtain a copy of the valuation, as made by the assessor, he is allowed ample time to examine the assessor's valuation before the sitting of the board of equalization; and, if dissatisfied with his assessment, he may appeal to that board and have it corrected. This affords a simple and inexpensive method of adjusting all questions of valuation, and in most cases is found to be ample without an appeal to the courts, and without the delay in collecting the revenue involved in such appeals. There is no evidence of fraud, and no allegation in the pleadings from which fraud can be inferred. It is as reasonable to presume that Mr. Darr attempted fraud upon the public as it is to assume that the assessor perpetrated fraud upon Mr. Darr. If we imagine that Mr. Darr has been wronged, we still must avoid breaking down the revenue law in the attempt to right that wrong. We certainly cannot disregard the statute in an attempt to do what we imagine to be equity.

The judgment of the district court is

AFFIRMED.

REESE, C. J., dissenting.

It is my belief that the whole discussion by the majority is on entirely too technical grounds. It was evidently the purpose of the legislature to give a remedy in all cases of unjust taxation. To prevent the expensive and long drawn out remedy by injunction, by which the revenues of the state could be tied up, it provided that where a tax, or any

part thereof, was claimed to be illegal, the person against whom the levy was made could pay under protest, the treasurer holding the part claimed to be illegal until within the short time named in the statute; the one paying the same to have the benefit of a speedy and effective remedy at law for testing the question involved, and to recover back his money held by the treasurer, if any should be found to have been illegally demanded. It was never the intention of the legislature to set a trap by which the citizen could be robbed, yielding him no remedy, or, if one is given, to hedge it about with technicalities of procedure to such an extent as to render the protection of his rights uncertain and insecure. The holding calls to mind the ancient rule of pleading which required the plaintiff to name his case. If he gave it a wrong name, no matter what his facts nor how meritorious his demand, he was forever undone, so far as that case was concerned. I do not believe the legislature ever intended to limit the remedies of a person against whom an illegal tax was charged in any such way as is held in the majority opinion. Plaintiff's "cause of action," if he has one, consists of being wrongfully compelled to pay a tax upon property which the demurrer admits he did not have nor own, and which he did not return for taxation. If the petition is true, he is entitled to relief. The construction given to the statute is, I think, too technical and narrow, and does not give effect to the intention of the legislature. To my mind a more liberal construction should be adopted.

FAWCETT, J., concurs in the above dissent.

HAMER, J., dissenting.

I regret being unable to agree with the majority opinion. As I understand this case, there was a petition filed in the district court for Dawson county seeking to recover from the county of Dawson the amount paid by the plaintiff because an additional $30,000 had been added to his list of taxable property without his knowledge or consent, presumably by the assessor or the board of equalization,

but which it is not certain. From the brief of the appellant it appears that he made out his assessment schedule of personal property, and, after swearing to the same, delivered it to the deputy assessor for Lexington precinct, in Dawson county, in April, 1908; that in said schedule he entered as cash on hand $465, the same being all the cash he had on the 1st day of April, 1908; between the time the said schedule was delivered to the assessor and the time it was entered upon the tax list, some one, without the knowledge or consent of the plaintiff, and without notice to the plaintiff, changed the item of $465 to $30,465; that the appellant was thereupon taxed for said year upon the basis of one-fifth of the said item of $30,465, instead of upon the basis of one-fifth of the said sum of $465, as returned by the appellant in his schedule; that the appellant was absent from the state of Nebraska from the time he delivered said schedule to said deputy assessor until in October of that year, and had no knowledge or notice of the change made in said schedule until after his return to the state of Nebraska; that on the 15th day of April, 1909, appellant caused his personal taxes to be paid, and that part of them which was levied against the one-fifth of said $30,000, so added to his tax list, to be paid under protest, for the reasons aforesaid, the same being $402, and then, within the time required by law, filed an application with the county commissioners asking to have said $402 refunded to him; that said application was rejected by the board of county commissioners, and the appellant appealed from said order of the board to the district court for Dawson county; that he filed in the said district court his petition setting up the facts in the case as before set forth, and that the appellee filed a general demurrer thereto; that the district court sustained said demurrer, and the appellant elected to stand on his petition, the court dismissed the petition, and the appellant has appealed from said order of dismissal to this court. The demurrer filed by Dawson county admitted the truth of the petition; that is, it admitted that, without the knowledge of the owner, and

after the schedule had been made and had been delivered to the deputy assessor, $30,000 additional had been added to the cash set forth in the schedule. Whether this addition was by the assessor, by the board of equalization, or by some interloper, does not appear. No one may know how or why this was done.

Sections 120-124, ch. 77, art. I, Comp. St. 1911, provide for the county board of equalization, and seem to give it authority to hear cases on appeal as in equity, and without a jury to determine the questions raised before it which relate to the liability of property to assessment, or the amount thereof. The sections before referred to seem to contemplate that the board of equalization may raise the value of the property assessed or lower it, and they can add other property to that contained in the schedule; but they must do these things upon notice to the person interested, or his agent. They are also authorized by subdivision 5 of section 121 to add to the assessment roll any taxable property not included therein and these things are all to be done *upon notice to the property owner*. Subdivision 5 reads: "Also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof as the assessors should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county."

According to the statement contained in the plaintiff's petition, he was entirely without notice, and the thing must have been done by the assessor, by some unauthorized person, or by the board of equalization. The thing done was unlawfully done. On the statement as made, an additional $30,000 was added to the plaintiff's taxable property, without his knowledge or consent, and without any notice of any kind, and by some unknown person. The value of the property already there was not increased. There were $465 specified in the schedule as the money on hand; $30,000 were added to that money, just as a thousand cows might be put in a tax list; the only differ-

ence being between the use of the word "dollars" and the use of the word "cows." For anything that appears in the petition, the change may have been made after the schedule reached the board of equalization, and without notice. There should be certainty. The legislature did not contemplate that there would be any fraudulent legerdemain of any kind against the interest of the property owner. In effect, the case is like this: I own a farm. On that farm I have horses and hogs. I have no cattle. After I have made out my schedule and have presented it to the assessor, and he has looked over it and there are no cattle listed upon it, somebody adds a *thousand cows* to my schedule. I am not told by whom the addition is made. No one serves any notice upon me. I do not know whether the deputy assessor did it, whether the assessor did it, whether some unauthorized clerk did it, or whether the county board did it; but somebody does it. Does the law contemplate that I should be held to pay the tax on a thousand cows that I do not own, that are not on my farm, and never have been?

The legislature made a provision for the protection of the property of the owner. That provision requires that he shall have notice from the board before there is an increase in the amount of his property or in its value. It would seem that the judgment of the district court ought to be reversed and the case sent back to be tried. When the evidence is taken it might disclose why $30,000 was added, and by whom. In any event, if the testimony should be taken, there would probably be an opportunity to make an intelligent disposition of the case, so that everybody might know what happened, and when, and how, and why. The ingenuity of the majority opinion serves to strengthen the conviction that it is wrong.

JANNIE CALLFAS, APPELLANT, V. WORLD PUBLISHING COMPANY, APPELLEE.

FILED JANUARY 31, 1913. No. 16,785.

1. **Libel**: PLEADING. In an action for libel, if the publication complained of makes general charges against the plaintiff, an answer in general terms that the charges are true is insufficient. The facts must be stated showing that the charge made is true. If the facts are specifically stated in the charge as published, a general allegation that they are true is sufficient.

2. ———: ———. In such action if the published words are obviously defamatory, that is, libelous *per se*, it is not necessary by innuendo to allege or explain the meaning of the words published, nor to allege special damages.

3. ———: ———. If the published words are ambiguous, or are meaningless unless explained, or *prima facie* innocent, but capable of defamatory meaning, the plaintiff must specially allege and prove the defamatory meaning of the words used, and must allege and prove special damages. In such case, if no special damages are alleged and proved, there can be no recovery.

4. ———: ———. SPECIAL DAMAGES. The publication in this case not being obviously defamatory, and there being no allegation and proof of the facts from which it can be found that the plaintiff has suffered special damages for which the defendant is liable, the judgment for the defendant was the only judgment possible.

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

A. S. Churchill, for appellant.

Stout & Rose, contra.

SEDGWICK, J.

The plaintiff alleged in her petition that the defendant is a corporation with its principal place of business in Omaha, Nebraska, "engaged in publishing a newspaper generally known as the World-Herald, which has a large circulation in the cities of Omaha, South Omaha, state of Nebraska, and in various other cities and states," and

the defendant published two articles of and concerning the plaintiff, one on or about the 12th day of May, 1908, and the other on or about the 24th day of May, 1908. She alleged that these articles were libelous, and asked for damages in the sum of $25,000. Upon issue being joined and tried to the jury, there was a verdict and judgment in favor of the defendant, and the plaintiff has appealed.

The record is very large, and the plaintiff has filed a voluminous brief assigning and discussing very many alleged errors. The amended petition, with the exhibits attached, consists of more than 40 sheets of closely typewritten matter, and the evidence as contained in the bill of exceptions covers more than 1,000 sheets. It will be impracticable here to make even a synopsis of the pleadings and evidence. We will have to be content with such reference to the record as we think will illustrate some of the principal questions presented. The petition alleges that the plaintiff is a resident of the city of Omaha, and has been since the 1st day of June, 1907, and that before coming to the city of Omaha she resided in the city of St. Louis for a number of years, and that in the year 1900 she entered the Barnes University Medical Department of St. Louis, Missouri, and took the regular medical course prescribed, which continued for the full course of four school years, and that she graduated from the institution on the 3d day of May, 1904, and received a diploma which conferred upon her the degree of doctor of medicine, with all its rights, benefits, immunities, and privileges. The petition then sets out some of the provisions of the statute of Missouri regulating the practice of medicine, surgery and midwifery, which prescribe the conditions and manner of obtaining a license to practice medicine in the state, and alleges that she complied with those conditions and received a license from the state board of health of the state of Missouri, and that she was then appointed to the position of "hostess of the Temple of Fraternity, at the Louisiana Purchase Exposition held in the city of St. Louis, Missouri, during the year 1904," and was about

the same time "appointed lady physician of the same," and "employed as lady physician of a concession at said exposition known as the 'Boer War';" that "during said time the plaintiff had under treatment as such physician a very large number of patients who were afflicted with a great variety of diseases and ailments, and derived therefrom a large experience in her profession;" that at the close of the exposition she "entered upon the general practice of her profession in the city of St. Louis, and state of Missouri," and that "on or about the 15th of May, 1907, she was duly elected by the Supreme Forest Woodmen Circle, at its regular biennial session, to the position of supreme physician of the Supreme Forest Woodmen Circle, and entered upon the discharge of her duties as such supreme physician on or about the 1st day of June, 1907, and continued to perform the same until on or about the 1st day of June, 1908." She then alleges that on the 12th day of May, 1908, the defendant "published of and concerning the plaintiff a false, wanton, sensational and libelous article," as follows:

"DR. CALLFAS IS SILENT ON CASE.

"Will not Talk about the Poisoned Candy and Alludes to Charge Against Her.

"Shows the Effects of Strain and Refuses to Discuss any Details.

"Dr. Callfas, whose mysterious poisoning through a box of bonbons left on her porch May 1 has been a ten days sensation, was at her desk as usual while the meeting of the board of managers of the Woodmen Circle was in progress in the same building. She denied herself to all callers until Tuesday morning, when she talked to the World-Herald. She sat at her heavy oak desk in her beautifully appointed office, gowned in an expensive and heavy black silk.

"'When the time comes, I will make a statement,' she said, a trifle sharply. Her eyes and face showed the effects of the two weeks' strain upon her. When asked whether she would talk of the finding of the candy, she

frowned deeply and called to a stenographer in the outer room, 'Anna.' The stenographer came into the room and aimlessly leaned against the desk, pretending to open a bundle of mail. The doctor's palpable subterfuge and reluctance to talk without a witness was openly apparent.

"'The newspapers have treated me very unkindly,' she said. 'When Mrs. Manchester says repeatedly that there is no trouble, why cannot they let the matter drop. If you want to write a sensational story, go write it and print the charges the other side make against me. When the time comes, I will talk and talk plenty. There is much to be said on my side, and I will say it when I get ready. I have retained attorneys, but I refuse to tell who they are, because it is my business and no one's else.'

"'Will you attend the annual meeting today?' she was asked. Her eyes snapped and she straightened herself in her chair, gripping the sides with a jerk. 'Of course I will,' she said. 'Why not? This is merely an annual meeting and nothing but reports will be heard. If this matter of the poisoned candy is to be brought up, I have not heard of it. And if the newspapers don't look out, they may get themselves into trouble by what they print.' The determined glance with which she turned to her desk and rustled her heavy silken garments showed that, in any contest of will with her sister officials, Dr. Callfas would not depend entirely upon tact or policy in the management of her affairs.

"Dr. Callfas, the husband, is in the employ of a prominent ear specialist in this city, and is studying this line of his profession with a view of specializing. He says that his wife has never practiced medicine, and he appears to be much worried about the outcome of the matter. Both husband and wife are Canadians and middle-aged people. He is getting but a moderate salary while he studies, while his wife draws $300 a month as supreme physician of the Woodmen Circle.

"The matter had not come before the council meeting at noon, although members of the board had been in close

council with the chief of police this morning regarding the outcome of the poison case."

The petition then contains allegations showing that the Supreme Forest Woodmen Circle is a fraternal beneficiary corporation organized under the laws of Nebraska, and that its constitution provides for the election of a supreme physician of the order whose term of office shall be four years, and alleges that an executive council of the order held one of its sessions in Omaha on the day that the defendant published the said article. The defendant moved to strike out certain parts of the amended petition. The motion was overruled, and the defendant answered. The answer admitted the publication of the two articles alleged, and denied that the articles had "import and meaning as charged in said amended petition," and denied that they were published with the intention or for the purpose as claimed, and alleged that the readers of said articles did not understand them as alleged in the amended petition. It denies that it published any matters which were not true, or with malice or with the intent to in any way injure the said plaintiff or to damage her either in her social standing or relations or her profession, or in any other matters, and denies that the plaintiff suffered any damage by reason of the articles. The answer then alleges that "every matter published of and concerning said plaintiff in its said paper was and is true, and that this defendant at the time the said publication was made believed it to be true, and published the said matter of and concerning said defendant simply as a matter of common news in its said newspaper, and with good motive and for justifiable ends." The plaintiff then filed a motion which at great length asked the court to strike out many specified matters from the defendant's answer, including the general allegation that the matters published by the defendant were true. The motion also asked the court to require the defendant to make its answer more definite, and "that the defendant be required to make its fourth defense pleaded in the amended answer

more definite and certain, by setting forth the ultimate facts upon which it relies to establish the truth of the publications sued upon and admitted in the amended answer to have been published by the defendant, instead of merely its conclusions," and to make its answer more definite in many other similar respects. Upon this motion the court ordered the allegation that the defendant believed the publication to be true stricken out, and overruled the motion in all other respects. Plaintiff then filed a reply denying "each and every affirmative allegation set forth in said amended answer." The briefs discuss some of these questions presented upon the pleadings.

1. Should the court have stricken out the general allegation that the matters contained in the publication were true? "Where the charge is specific, it is sufficient to state that the alleged defamatory words set forth in the petition are true. Where the charge is general, the answer must state facts which show that the defamatory words are true. And, generally, if the answer gives the plaintiff sufficient notice of what defendant will attempt to prove, it is sufficient." *Sheibley v. Fales,* 81 Neb. 795. In an action for libel, if the petition alleges a publication in which specific charges are made against the plaintiff, it is a sufficient answer to allege that the charges against the plaintiff so specified are true; but if the publication, as alleged in the petition, makes the charge against the plaintiff in general terms, without specific allegations constituting the matter charged, it is not a sufficient answer to allege that the charge made in the publication is true. The plaintiff is entitled to know from the pleadings the specific matter that he will be called upon to meet in the trial. If the charges are specifically alleged in the publication complained of, and the answer contained allegations that the charge as published is true, the plaintiff is sufficiently informed as to what he will be called upon to meet. If the publication contained the charge that the plaintiff is a thief, and the answer merely alleges that the charge as made was true, the plaintiff could not

know what facts might be offered in evidence as tending to prove the truth of the charge. If, however, the publication stated fully the facts constituting the charge made, it would be sufficient in the answer to allege that the facts so stated in the publication were true of and concerning the plaintiff. Applying these principles to this case, the result is that, in so far as the publication in question made specific charges of and concerning the plaintiff, the answer that such charges were true is a sufficient defense; but if there is any general charge of and concerning the plaintiff in the publication, and the facts constituting that charge are not specifically stated, the answer alleging the truth thereof in general terms is insufficient.

2. The petition discusses *seriatim* the several matters contained in the published article complained of. In regard to the incident of the poisoned candy, it is alleged that "on or about the 24th day of April, 1908, she found a box of candy which had been placed upon the front porch of her residence, near her front door, and addressed to her; that the plaintiff, upon seeing said box, and not suspecting any harm therefrom, picked the same up, and after entering the house ate some of the said candy, which proved to have contained poison, which made the plaintiff sick, and by reason thereof she was detained at her home until Monday preceding the meeting of the said supreme executive council of the Supreme Forest Woodmen Circle, at which time she went to her office and resumed her duties, in the meantime having passed upon applications, as supreme physician, at her home; that the plaintiff did not know, had no means of knowing, and does not now know who it was that placed the said candy on the front porch of her home; that the statement contained in said article, wherein it is stated, 'Dr. Callfas is Silent on Case, Will not Talk about the Poisoned Candy,' relates to the incident mentioned above; and by the expression, 'and Alludes to Charge Against Her,' was intended to and does convey and mean that charges had been made

against the plaintiff arising out of her having been poisoned by eating some of the said candy which had been left on her porch as aforesaid; and by the statement, 'Shows the Effects of Strain and Refuses to Discuss any Details,' the defendant intended to and did convey the meaning that the plaintiff showed the effects of the strain arising from the eating of said poisoned candy, and that she refused to say anything in regard to the details thereof, and thereby carrying the implication that plaintiff had attempted to poison herself." The petition then continues with similar quotations from the published article and similar allegations in regard thereto.

If the published words are obviously defamatory, that is, libelous *per se,* it is not necessary in the petition to explain the meaning of the words nor to allege any special damages; the law implies damages. If the published words are ambiguous, or are meaningless unless explained, or *prima facie* innocent, but capable of defamatory meaning, it is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove special damages. The plaintiff will not be allowed to prove upon the trial a different meaning than that which she has alleged. If the words, with the meaning alleged by the plaintiff, are not libelous, or if no special damages are alleged, the petition fails to state a cause of action. The petition and the publications complained of must be considered in the light of these well-established legal principles.

3. It is stated in the publication that plaintiff's husband had said that plaintiff had not had any practice as a physician. The defendant contends that publications of this character are not actionable because she was not engaged in the practice of her profession at the time the publications were made. Of course, if she had no professional character or standing at the time, there could be no damage in that respect. If she had abandoned her profession and no longer relied upon it as an occupation and means of support, she could not be damaged profes

sionally; but this does not appear to have been the situation. She had taken the prescribed studies, and had been admitted to practice, and had actually engaged in the practice, and had accepted an official position which none but a practicing physician could hold. This was not a permanent position, but was for a definite specified term. Her official position required her to continue to practice her profession while she held it. Under these circumstances, no doubt, a successful attack upon her professional standing would be a distinct injury. The statement published was that her husband had said that she had never practiced medicine. There are, however, no facts pleaded upon which any damages can be computed or based.

4. We have tried to state enough of the allegations of the petition to show generally the nature of the plaintiff's case. It was necessary that there should be allegations that the words used had a defamatory meaning, stating in direct language what the meaning was, and allegations of special damages sustained thereby. The meaning attributed by the pleading to the words used, where such allegation is attempted, is in no case obviously defamatory. Many of the facts charged are substantially admitted by the petition to be true. The published articles do not charge plaintiff with the commission of a crime, nor with any immoral act. There is no statement that, without addition or explanation, is libelous *per se,* that is, obviously defamatory; nor any statement of fact that would necessarily, without further explanation than is contained in the petition, cause plaintiff damages, that is, that could constitute a cause of action without a plea of special damages. There is no allegation in the petition of facts showing any special damages sustained. The most specific allegation of damages is at the end of the first count of the petition, as follows: "That by reason of the publication by the defendant of the foregoing false and libelous article, the plaintiff has been greatly injured and damaged in her social standing and relations, not only

with members of the order, but with others with whom she has been brought in contact, made the subject of sensational talk and comment and ridicule, as well as having been greatly injured and damaged in her professional standing in the order and in the community in which she lives, all to her great damage and injury in the sum of $10,000."

As early as 1877 this court was committed to the rule that, when the published words are not obviously defamatory, that is, not libelous *per se,* there can be no recovery, unless special damages are pleaded and proved. The rule was stated as follows: "But it is not every false charge against an individual which is sufficient to sustain an action for damages. In order to authorize a recovery the plaintiff must aver in his petition, and prove on the trial, that he has sustained some special damages from the publication of the alleged libel, unless the nature of the charge is such that the words are actionable *per se.* And where the words are not actionable *per se* it is not sufficient to simply allege that the party has sustained damages, but a party must state in his petition *wherein* he has sustained damages. * * * The petition entirely fails to show *how* the plaintiff was injured by the alleged libel, and the mere statement that she has sustained damages by the loss of friends, etc., where there is no statement of facts from which it is apparent that the defendant is liable for damages, will not sustain the action." *Geisler v. Brown,* 6 Neb. 254.

There being no allegation or proof of special damages in the case, no other judgment than the one entered was possible. It is therefore

AFFIRMED.

IN RE WILLIAM E. CONNOR.

STATE, EX REL. LUCY M. REBMAN, APPELLANT, V. ARLESS L. MACY ET AL., APPELLEES.

FILED JANUARY 31, 1913. No. 16,932.

1. **Guardian and Ward:** GUARDIAN OF MINOR: JURISDICTION TO APPOINT. The probate court in each county in this state has jurisdiction to appoint a guardian to a minor who is an inhabitant or resident in the same county, or who has property in the county and resides in another state. Comp. St. 1911, ch. 34, sec. 2.

2. ———: ———: ———. The courts of Kansas have no jurisdiction to appoint a guardian for a minor whose domicile and property are in this state. *Connell v. Moore*, 70 Kan. 88.

3. **Adoption:** APPEAL: FINDINGS. Upon appeal from the county court in the matter of an application to adopt a minor child, the findings of fact of the district court upon examination of witnesses in open court are presumed to be correct, and will not be reversed upon appeal to this court, unless upon consideration of the whole case it appears that they are clearly wrong.

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

A. C. T. Geiger and *Lambe & Butler*, for appellant.

W. S. Morlan, *W. R. Starr*, and *C. E. Eldred*, *contra.*

SEDGWICK, J.

In April, 1908, John F. Connor killed his wife, Minnie Connor. They were residing at the time, with their two infant children, upon a farm in Red Willow county, a few miles from the Kansas state line. Immediately after the murder Mr. Connor took the two infant children, a little boy and girl, to the home of his sister, Mrs. Hattie Macy, who, with her husband, was residing on an adjoining farm in Red Willow county, and requested his sister to take care of the children. He was soon after arrested, and pleaded guilty to a charge of murder in the second

degree and was sentenced to imprisonment for life. On the following day he was taken to the penitentiary, where he has since remained. In the following year Mr. and Mrs. Macy applied to the probate court of Red Willow county to adopt the boy, William E. Connor, and the appellant, Mrs. Rebman, appeared and opposed the adoption. Mr. Connor filed with the court a relinquishment of the boy and requested the court to allow Mr. and Mrs. Macy to adopt him. Upon the decision of the probate judge and an appeal to the district court for Red Willow county, Mr. and Mrs. Macy filed a petition setting up, somewhat at length, allegations of the facts and asking to be allowed to adopt the boy. Mrs. Rebman filed an answer alleging many matters in opposition thereto, and a reply was filed, in substance a general denial of the answer. A trial was had, and the court entered an order allowing the adoption, and Mrs. Rebman appealed to this court.

The answer objecting to the adoption alleges, in substance, that John F. Connor, having been convicted of murder and sentenced to imprisonment for life, had no power or authority over the children, and his relinquishment and request for the adoption by the appellees was of no force, and that the appellant is the mother of Minnie Connor and the grandmother of William E. Connor; that Mrs. Macy and her husband have seven children of their own, and have no affection for the child, William E. Connor, and are unfit to have his custody; that the other child was a little girl, a few months old, and that the Macys abused and neglected both of the children, in consequence whereof the little girl died about six months after they took her; that the Macys are not in a condition to take care of the boy; that Mr. Macy is a man of bad habits, accustomed to use bad language and the excessive use of intoxicating liquors, and with bad associations and accustomed to gambling; that both of the Macys used improper parental care of the child, and are boisterous and profane in dealing with them; that one of the children of

the Macys died of tuberculosis, and that the boy is exposed to danger of contagion and his health endangered thereby. Appellant also alleges that she is situated so as to take good care of the child, and that in July, 1909, the boy came to her house and expressed a desire to live with her, and that on that day she made application to a court of competent jurisdiction in Decatur county, Kansas, and was "regularly and legally appointed guardian over the person and property of the William E. Connor aforesaid," and so became the only person having a right to the care and custody of the boy, and that Mr. Macy took the boy away from her by force and violence, against her will. She asked for a writ of habeas corpus giving her the custody and control of the boy.

1. The first question presented is as to the validity of the appointment of the guardian of the boy. It appears from the evidence that the appellant requested that the boy be allowed to go to her house upon her representation that she wanted to have his picture taken, and that the appellees, pursuant to that request, sent the boy there, and she immediately took the boy to Oberlin, in Decatur county, the appellant then being a resident of that county, and procured her appointment as guardian. The domicile of the boy was in Red Willow county, this state, where he was born and had always resided. Under such circumstances it seems clear that the courts of Kansas had no jurisdiction to appoint a guardian, and, so far as this record shows, it also appears that the court which made the appointment was imposed upon, and did so on the supposition that the boy's domicile was in Decatur county, Kansas. The trial court did right in disregarding the alleged guardianship. Comp. St. 1911, ch. 34, sec. 2; *Connell v. Moore*, 70 Kan. 88.

2. The trial court appears to have thoroughly investigated the questions of fact presented in the pleadings as to the condition and surroundings of the respective parties, as to the character and habits of the appellees and their manner of living, and as to their treatment and care

of the boy, and his interest and welfare in their custody and control. There is nothing in the evidence that in any way reflects on the character and conduct of Mrs. Macy. There is some little evidence, mostly as it appears from interested parties, tending to reflect upon Mr. Macy's reputation; but by the clear weight of the evidence in the case these accusations are without foundation. The findings of fact by the trial court in a case like this are entitled to great consideration, and will not be reversed, unless upon the whole evidence it appears that they are clearly wrong. We do not therefore find it necessary to quote or attempt to analyze the testimony of the various witnesses.

The judgment of the trial court being abundantly supported by the evidence, it is

AFFIRMED.

FAWCETT, J., not sitting.

JONES NATIONAL BANK, APPELLEE, v. CHARLES E. YATES ET AL., APPELLANTS.

BANK OF STAPLEHURST, APPELLEE, v. CHARLES E. YATES ET AL., APPELLANTS.

UTICA BANK, APPELLEE, v. CHARLES E. YATES ET AL., APPELLANTS.

THOMAS BAILEY, APPELLEE, v. CHARLES E. YATES ET AL., APPELLANTS.

FILED JANUARY 31, 1913. NOS. 17,276, 17,277, 17,278, 17,279.

1. **Banks**: NATIONAL BANKS: LIABILITY OF DIRECTORS. The national bank act, as provided in section 5239 of the Revised Statutes of the United States, affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act, and that liability cannot

be measured by a higher standard than that which is imposed by the act.

2. ———: ———: ———: EVIDENCE. Where by the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required, and it must be shown that the violation was intentional.

3. ———: ———: ———. Where the directors of a failed national bank claim immunity under section 5239 of the Revised Statutes of the United States as to the rule of liability to be applied to them, the state courts may not create another rule than that provided by the national bank act, nor are they at liberty to disregard the rule provided by the act.

4. Courts: CONSTRUCTION OF FEDERAL STATUTES. If there is a penalty or liability enforced because of the violation or disregard of the United States statute, then the penalty is that provided by such statute, and the interpretation of the statute made by the United States supreme court must be adopted by the state courts.

5. Banks: NATIONAL BANKS: LIABILITY OF DIRECTORS: STATUTORY PROVISIONS. The civil liability of national bank directors in respect to the making and publishing of the official reports of the condition of the bank is based upon the duty enjoined by the national bank act, and the rule expressed by the statute is the exclusive rule, because of the elementary principle that, where a statute creates a duty and prescribes a penalty for its nonperformance, "the rule prescribed in the statute is the exclusive test of liability." *Yates v. Jones Nat. Bank*, 206 U. S. 158. *Farmers & Merchants Nat. Bank v. Dearing*, 91 U. S. 29.

6. ———: ———: ———: FRAUD: PLEADING AND PROOF. To render a director of a national bank personally liable to a depositor for fraud and deceit practiced by its officers, as at common law, it must be alleged and proved that the director had knowledge of, or approved of, or participated in, the fraudulent acts of which complaint is made.

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

John F. Stout, Halleck F. Rose, F. M. Hall and *Frank E. Bishop*, for appellants.

J. J. Thomas, R. S. Norval and *L. C. Burr, contra.*

HAMER, J.

The cases designated by the foregoing titles and numbers are before this court a second time. By our former decisions (74 Neb. 734) we affirmed the judgments of the district court for Seward county, in which the plaintiffs were successful. The cases were taken on error to the supreme court of the United States, where our judgments were reversed (*Yates v. Jones Nat. Bank,* 206 U. S. 158; *Yates v. Utica Bank, Yates v. Bailey,* and *Yates v. Bank of Staplehurst,* 206 U. S. 181), where it was held that plaintiffs' petitions were insufficient to charge the defendants with a common law liability for fraud and deceit. When the mandates were received by this court, the causes were remanded to the district court for Seward county for further proceedings. Thereafter plaintiffs amended their petitions by interlineations, and thereby sought to change their causes of action so as to avoid the federal question. Upon a second trial the plaintiffs again had the judgments, and from these judgments the defendants have appealed.

Defendants contend, among other things, that the amendments above mentioned were wholly insufficient to change the plaintiffs' causes of action; that they still charge a violation of the national bank act; and that question will be first considered.

An examination of the record discloses that the interlineations by which it was sought to amend the petitions consisted of some slight amplifications of the statements contained in the original petitions as theretofore amended. The amendments contain no material additional statement of facts, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments plaintiffs attempt to charge that the defendants knowingly and fraudulently, and with the intent to deceive the plaintiffs, made such statements, and

that thereby they induced the plaintiffs to become depositors in the Capital National Bank. To the petitions thus amended, each of the defendants demurred. The demurrers were overruled, and the defendants excepted. It is probable that the demurrers should have been sustained; but defendants answered over and admitted that the Capital National Bank was organized under the national banking act, but denied that they signed the statements or reports made to the comptroller as stated in the petition; alleged that they had no knowledge of the falsity or untruth of any of them, or of the true condition of the Capital National Bank at the times mentioned in the amended petition; denied that they caused the reports to be published in the newspapers; denied that they caused them to be sent out to the public or to the plaintiffs; denied that they had any knowledge that they were so sent by any of the officers or agents of the bank; they also pleaded a former adjudication, and averred that the only acts performed by them were done in compliance with the provisions of the national banking act, and that their liability, if any, was measured by the terms of that act, and not otherwise. Plaintiffs' replies were a general denial of the facts stated in the defendants' answers. Trials were had to the court without the intervention of a jury. There was a general finding for the plaintiffs, together with certain special findings as to each of the defendants, some of which are inconsistent with the general finding; and upon such findings the judgments appealed from were rendered. Defendants have renewed their objections to the sufficiency of the plaintiffs' amended petitions, and also contend that the testimony is insufficient to sustain the general finding upon which the judgments in question are predicated.

It is impracticable, considering the length of the petitions and the manner in which they were amended by interlineations, to set them forth in this opinion, and it is sufficient to say that we are of opinion that the amendments in no way changed the nature of the plaintiffs'

causes of action; and, unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank.

Coming now to the consideration of the additional evidence introduced upon the second trial of these cases, we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without dispute, that when defendants Yates and Hamer signed the reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is in fact predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Capital National Bank. It is not shown that they, or either of them, had any knowledge that any published statements or cards containing any information as to the condition of the bank were ever sent to the plaintiffs, or any of them, by any officer or agent of the bank.

It follows, therefore, that the evidence is insufficient to charge them, or either of them, with ever having knowingly made any false statement in regard to the condition of the bank, or participated in sending any advertising matter, published statements, or any of the things mentioned in the plaintiffs' petition to them, or any of them; and, having taken no part in said transactions, it cannot be said that they knowingly participated in any of them. There being nothing in the record sufficient to bring defendants Yates and Hamer within the rule of liability announced by the supreme court of the United States in these cases and others, we are of opinion that the judgment as to them must be reversed.

As to the defendant David E. Thompson, it appears from the record that he did not sign either of the statements in question. Some evidence was introduced which tends to show that before the last report was signed Thompson had notice of a letter from the comptroller of the currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution; that thereafter Thompson refused to sign any statements to the comptroller of the currency, and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent. While it may be said that for a considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain, and they do not claim that he ever had any conversation with, or made any statement whatever to, the plaintiffs, or any of them.

As we view the opinion of the supreme court of the United States in *Yates v. Jones Nat. Bank, supra*, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. As an inducement to him to act in that capacity, the law assures him that he is not to be liable except for that which he knowingly does. A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors;

neither is he liable for the frauds and wrongs of the officers of the bank, unless he has personal knowledge thereof or participates in such fraudulent acts. If it were not so, there would be great difficulty in securing men to assume the position of national bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. Such has not been the views expressed by the supreme court of the United States in any cases. The opinion of Justice White in *Yates v. Jones Nat. Bank, supra,* is based on a single proposition; that is: "Where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability." In the argument on behalf of the appellees it is said: "We sought to avoid the application of this rule for the reason that, while the national banking act expressly commanded the publication of the official report, it did not require the publication of a *true* report, and that therefore the publication of a *false* report did not violate any express mandate of the statute." *Cochran v. United States,* 157 U. S. 286. The argument was that the making of a *false* report was not a violation of the United States bank act, and that the remedy provided by section 5239 for violations of the statute did not reach the case, and therefore the contention was that there was no statutory remedy for making a false report, and that the plaintiffs in the court below could resort to their remedy at common law. This is a sort of legal refinement, and the only objection to it is that it does not seem to be along ordinary logical lines. The trouble with this contention is that it would eliminate the federal courts from a construction of the United States statutes and their enforcement. This would make a failure of bank directors to closely observe the terms of the national banking act, though acting under it, an excuse for releasing them

from all penalties to be inflicted under the act and by its provisions, and the substitution of a different liability from that imposed by the statute.

In *Briggs v. Spaulding*, 141 U. S. 132, the bill was framed upon the theory of a breach by the defendants, as directors, of their common law duty as trustees of a financial corporation, and of breaches of special restrictions and obligations of the national banking act. There plaintiffs commenced their action under the United States banking act, and claimed a liability because of a violation of the same. It was there said that plaintiffs cannot, in an action to recover because of a violation of the banking act, be allowed to recover upon some *other* theory. The plaintiff may not jumble his causes of action together and then say to the defendant: If you are not liable upon that which I have charged you with, then here is another construction that can be placed upon what I have said, and you are liable under that. It may be said, with much plausibility and reason, that it should be the duty of the directors to look into the condition of the bank of which they are directors; but that matter seems to have been determined by the supreme court of the United States in the case of *Briggs v. Spaulding, supra*, where it was said: "Persons who are elected into a board of directors of a national bank, about which there is no reason to suppose anything wrong, but which becomes bankrupt in 90 days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination." That decision holds that, if the bank directors fail to look into the condition of the bank, they are not guilty of an ordinary want of care, so far as the statute is concerned; section 5239 states in terms the nonliability of bank directors who fail to investigate the conditions of the bank. It may be that, when one deposits money in a bank or takes stock in a bank, thus putting his property in immediate control of other persons, he has a right to expect that the directors, who are supposed to manage the bank, will ex-

ercise at least ordinary care and prudence in the management of the bank's affairs; but the degree of care required rests of course with congress, which has control of the legislation.

In *Briggs v. Spaulding*, 141 U. S. 132, Chief Justice Fuller, in delivering the opinion of the court, among other things, said: "(1) Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act. (2) If any director participated in, or assented to, any violation of the law by the *board* he would be individually liable. * * * (3) It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them." (4) He cites 1 Morawetz, Private Corporations (2d ed.) sec. 556, to the effect that: "The liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. (5) The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; *but this would not render them civilly liable for damages.* (6) The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates *his authority to the damage of his principal.* * * * (7) The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. (8) They (bank directors) are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the

loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. 1 Morawetz, Private Corporations (2d ed.) sec. 551 *et seq.*, and cases. * * * (9) The relation between the corporation and them (bank directors) is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of *contract* and not of *trust*. * * * (10) There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks from the nature of their undertaking fall within the class last mentioned, while in the discharge of their ordinary duties."

The plaintiffs having failed to allege and prove that the defendants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain, it seems clear that, if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover, and the judgments of the district court should be reversed as to all of the defendants. It also is apparent that plaintiffs cannot produce any other or additional evidence which will render the defendants liable in these cases, and therefore the judgments are reversed and the actions are dismissed.

REVERSED AND DISMISSED.

REESE, C. J., not sitting.

SEDGWICK and FAWCETT, JJ., dissenting.

LETTON, J., concurring in part.

I concur in the view that the amendments made after

the remand do not change the issues, and only set out more fully a cause of action for deceit at common law. The issues, then, are the same as when the case was presented to the supreme court of the United States. A careful reading of the history of this case, set out in the opinions of this court and in those of several inferior federal courts before which the question was presented, shows that it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national banking acts. The judgment of this court which was reversed by the supreme court of the United States was based upon the theory that the pleadings contained no federal question and stated merely a common law liability. The supreme court of the United States held that a federal question was presented, and that "the measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." *Yates v. Jones Nat. Bank*, 206 U. S. 158, 178.

I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the supreme court of the United States. I am also inclined to the view that the evidence would support a judgment upon such a theory of the case. The findings of the district court are to that effect. I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained; but I have not examined the evidence so critically as would be necessary to determine this, for the reason that, under the holding of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone, I concur in the conclusion.

SEDGWICK, J., dissenting.

It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the supreme court of the United States that the action is one for deceit at common law, and for that reason cannot be maintained. The opinion says that it was held (by the supreme court of the United States) that plaintiffs' petitions were insufficient to charge the defendants with a "common law liability for fraud and deceit," whereas that court held that the action was essentially for a violation of the federal statute, and expressly holds that such actions can be maintained in the state courts, and then reverses the judgment of this court, not because of any defect in the petition, that question not being discussed or even mentioned, but because the trial court erroneously instructed the jury as to liability under the federal statute. The opinion discusses the proposition somewhat at length, and concludes that "unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank." It seems to me wonderful that any members of this court should so completely misunderstand the opinion of that court. The concurring opinion falls into the same remarkable error, as the first sentence shows: "I concur in the view that the amendments made after the remand do not change the issues, and only set out more fully a cause of action for deceit at common law." This is exactly the reverse of what the supreme court in fact decided: "Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the comptroller of the currency * * * cannot be held civilly liable to any one deceived," etc. *Yates v. Jones Nat. Bank*, 27 Sup.

Ct. Rep. 638 (206 U. S. 158). This is the decision of the merits of the case as stated in the third paragraph of the syllabus. In the opinion the court say that the basis of the assignments of error is found in the *instructions given by the trial court, and in refusals to give instructions.* These instructions and refusals are quoted by the court and they all relate to this one point. Is proof of negligence only sufficient? Must the violation of the federal statute be in effect intentional? These instructions and refusals furnish the sole ground for reversal. All other points are resolved in favor of defendant in error. The court said that it was suggested by the plaintiffs in error that the action to enforce a liability created by the federal statute was "so inherently federal" that "the state court was wholly devoid of jurisdiction, * * * and that such action could only be brought in the courts of the United States." It was thought sufficient in the opinion to say that such contentions were without merit; but the character of the action and the right to bring it in the state courts is plainly stated in the fourth paragraph of the syllabus: "State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the comptroller of the currency, the civil liability prescribed by U. S. Rev. St., sec. 5239, which * * * makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof." How is it possible that any one should suppose that the court held that the pleadings were defective or that the judgment was reversed because the action was the common law action for fraud and deceit?

It is said in the opinion which has been promulgated as the opinion of this court: "As we view the opinion of the supreme court of the United States in *Yates v. Jones Nat. Bank, supra,* there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes

of the United States (U. S. Comp. St. 1901, p. 3515), and no higher duty may be rightfully established and demanded." And this is discussed at length in the opinion. This statement is entirely outside of the case at bar. There is no attempt to establish or demand any higher duty of these directors than is enforced by the federal statute. No action against the directors of a national bank for fraud and deceit at common law can be maintained. This was decided when this case was formerly before the supreme court of the United States, and has been since emphatically decided by that court, and no such claim can be made in this case. The question is whether these directors are liable under the federal statute, and this action is prosecuted under that statute to enforce such liability. No action could be presented in any other way. No one who will take the pains to read the opinion need make such mistakes. If the instructions of the trial court had correctly stated the law as to liability under the federal statute the judgments would have been affirmed.

When the case was in this court the first time, this court followed the law announced in the earlier case of *Gerner v. Mosher,* 58 Neb. 135, 154, and held that, in signing the reports to the comptroller of the currency, the directors "by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors." This court thereupon held that the instructions given by the trial court were not erroneous. *Yates v. Jones Nat. Bank,* 74 Neb. 734. The supreme court of the United States reversed the case upon this point only, and held that, "where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional." To determine the meaning of this language of that court in this case is now the question of law for this court upon

this appeal. If there ever was any doubt of the holding of that court upon this point, that doubt has emphatically been set at rest by a later decision, where the language used by that court in this case is quoted and its meaning fully stated and made plain. *Thomas v. Taylor*, 224 U. S. 73. That case originated in a *nisi prius* court of the state of New York. It was afterwards taken to the appellate division, and to the court of appeals of that state. The court of appeals adopted the opinion of the appellate division, and the supreme court of the United States affirmed the decision of that court. It appears that the action was begun as a common law action for fraud and deceit and was substantially so prosecuted in the trial court, and when it reached the appellate division it was insisted that it could not then be considered as an action to enforce the liability imposed by the federal statute. The state court held that a common law action for fraud and deceit could not be sustained against the directors of a national bank, but that "a judgment in an action against such directors, tried and determined in accordance with common law principles for publishing a false report which induced the plaintiff to purchase stock in the bank, will not be reversed when the case, both as to pleading and proof, meets the statutory requirements, especially when defendants do not claim to have been prejudiced by the theory upon which the action was tried. A right decision will not be reversed merely because a wrong reason has been assigned therefor." 124 App. Div. (N. Y.) 53. The supreme court of the United States approved this holding, and again decided that no common law action for fraud and deceit could be maintained, and yet this court states as a reason for reversing this judgment that, "unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank." That court, in this very case, had decided that no possible

allegation can be sufficient to state such common law liability; that is, that no common law action could be sustained.

The case of *Thomas v. Taylor,* 224 U. S. 73, will leave no possible room for doubt as to the measure of liability of the directors in making these reports to the comptroller. In that case, as in the case at bar, the assets of the bank had become depleted and the reports to the comptroller misrepresented the condition of the bank. The plaintiff had not seen the reports to the comptroller, but had been informed of their contents, and purchased some of the stock of the bank relying upon the statements in those reports. On account of the false reports he was compelled to pay an assessment upon the stock which he bought, and brought his action to recover damages so sustained. In the syllabus the court stated the law as follows: "Although the common law action of deceit does not lie against directors of a national bank for making a false statement, and the measure of their responsibility is laid down in the national banking act (*Yates v. Jones Nat. Bank,* 206 U. S. 158), an action may be maintained in the state court regardless of the form of pleading if the pleading itself satisfied the rule of responsibility declared by that act. There is, in effect, an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." The opinion is devoted largely to an explanation of the holding in the case at bar when it was before that court. The court said: "The contention goes beyond what was said in *Yates v. Jones Nat. Bank.* The language there is 'that, where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness; not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one

deliberately refuses to examine that which it is his duty to examine." And, again, the court said: "There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the books and to show that the report was a true copy of them, as it was alleged in their answer to be."

The case at bar is quite similar. There is evidence that the comptroller became dissatisfied with the conditions of the bank, and wrote to the officers of the bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done, and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the bank. After this the reports were published as before, and the plaintiffs were deceived and damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it, in view of the total inadequacy of the opinion and concurring opinion to discuss, or even to state, the questions of law upon which this decision depends.

FAWCETT, J., concurs in this dissent.

PARRY MANUFACTURING COMPANY, APPELLANT, V. ROBERT O. FINK, CITY TREASURER, ET AL., APPELLEES.

FILED FEBRUARY 11, 1913. No. 17,000.

1. Taxation: LEVY: SALE. The assessment of property for taxation in the city of Omaha for the year 1905 was made in the latter part of the year 1904. M. S. & D. was a corporation engaged in the sale of implements and vehicles, and at the time of the assessment had no property of plaintiff in its possession for sale or otherwise. In December, 1905, and after the expiration of the assessment, plaintiff shipped to the corporation for M., a member thereof, under a personal contract of agency with him, five sample buggies for exhibition, and which M. stored in the place of business of M. S. & D., but which did not form any part of the

stock of goods of M. S. & D. The personal taxes of M. S. & D. for the year 1905 not having been paid, the city treasurer levied upon and sold the property of plaintiff to satisfy said taxes. *Held*, That the levy and sale were wrongful and without authority, and that the treasurer was liable for the value of the property.

2. ———: ———: ———. The return to the assessor of the list of property belonging to M. S. & D. for taxation for the year 1906 was made by that corporation May 29, 1906. Neither at that time, nor at any time thereafter, did said corporation have any property in its possession belonging to plaintiff. The property held by M. under a personal contract of agency was stored by M. in the place of business of M. S. & D., but did not enter into the body of the stock of said corporation. *Held*, That the levy upon and sale of plaintiff's property to pay the taxes due from M. S. & D. for the year 1906, with knowledge that it did not belong to M. S. & D., were without authority, and that the treasurer was liable for the value thereof.

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

De Bord, Fradenburg & Van Orsdel, for appellant.

B. S. Baker, W. C. Lambert, John A. Rine, L. J. Te Poel, H. C. Brome and *Crofoot & Scott, contra.*

REESE, C. J.

This is an action by plaintiff against the defendant Fink, as city treasurer of the city of Omaha, and two indemnity companies, his sureties, for the value of certain property levied upon and sold to satisfy the taxes for the years 1905 and 1906 as the property of a corporation, known as Magaret, Stephens & Davis, to satisfy personal taxes assessed against said corporation, but which property, it is alleged, was not the property of said corporation, but that of plaintiff. It is alleged that the property, consisting of five buggies, of various kinds, was of the value of $500. The defendants answered, admitting the levy and sale as alleged, denying generally other averments of the petition, and alleging that the property was assessed as the property of Magaret, Stephens & Davis

by the county assessor on the 27th of May, 1905, and on the 29th of May, 1906, and that the said corporation held itself out as the owner of the property to the knowledge of plaintiff, that plaintiff had at no time scheduled any property for taxation in the county or city, and is estopped to deny the ownership (of Magaret, Stephens & Davis) of the property in controversy. The answers of the indemnity companies present substantially the same issues. To each answer plaintiff replied, denying in substance the averments thereof. The cause was tried to the court without the intervention of a jury, and, the findings and judgment being in favor of defendants, plaintiff appeals.

From an inspection of the evidence, we are satisfied that there can be but one conclusion as to the ownership of the property when levied upon and sold by defendant. In fact there is no material dispute upon that question. It is practically conceded that the title and ownership were in plaintiff. In December, 1905, the property was consigned to Magaret, Stephens & Davis under a personal contract with Magaret by which he was to act as agent for plaintiff in selling its manufacture of wheeled vehicles. Prior to that time Magaret, Stephens & Davis had had none of plaintiff's property in their possession, except under a contract by which, when plaintiff had taken orders through its salesmen, the goods were to be shipped to that corporation in car-load lots and by it immediately forwarded to the purchasers. The shipment by car-load lots of the goods sold by plaintiff was for the purpose of taking advantage of the reduced freight rates on such shipments. The goods were transferred to the purchasers in so short a time after receipt as to render it practically a continuous transit. Plaintiff's factory is at Indianapolis, Indiana. In the years 1902 and 1904 plaintiff's goods were sold to Magaret, Stephens & Davis, as jobbers, and plaintiff had no interest in them. That relation ceased in 1904, and there were no further dealings between the parties, except the transfer contract of re-

shipment of the goods sold to customers by plaintiff upon orders taken by it. The tax for which the property was sold was that due from Magaret, Stephens & Davis for the years 1905 and 1906, and it clearly appears that at the time of the assessment for the year 1905 plaintiff had no property in the city of Omaha, nor in Douglas county, and, in fact, it had no property there subject to taxation until the property involved in this case was shipped there about the middle of December, 1905, as sample goods. The only excuse we can discover for the levy and sale was that the property was in the warehouse of Magaret, Stephens & Davis from that time until about the time of the levy, and it was then seized to pay the taxes of that corporation. Under the laws as existed at the time of the assessment for the 1905 taxes, the assessment was made between the 15th day of September and the 15th day of November, 1904, the return to be made to the tax commissioner by the 1st day of December. In the February following, the mayor and council levied the taxes. Ann. St. 1903, sec. 7606. The tax commissioner delivered the tax list to the city treasurer by the 1st of May. Section 7611. As plaintiff had no property in Douglas county at that time, it is clear that it did not add anything to the volume of the property in the possession of Magaret, Stephens & Davis for that assessment and levy for 1905, and therefore there could be no estoppel, and the property levied upon could not have been liable for the taxes assessed to Magaret, Stephens & Davis for that year, and the levy and sale were wrongful.

The law governing the levy for 1906 was by the provisions of the act of 1905. Comp. St. 1905, ch. 12*a*. By section 160 of that act the city council was required to annually certify to the county clerk the amount of general tax required for the ensuing year. The county board then fixed the rate of tax to be levied to raise the amount so certified as assessed by the county officers, and the state board of equalization as returned by that board to the county clerk, and the taxes were entered as a part of

the consolidated tax of the county. The return for assessment for 1906 taxes by Magaret, Stephens & Davis was made May 29, 1906, and at that time that corporation had no property of plaintiff in its possession. It is true that Magaret, under his personal contract with plaintiff of September 23, 1905, may and probably did store the property in dispute in the warehouse of Magaret, Stephens & Davis, but it did not enter into nor form a part of the property of that corporation, and therefore was not taxable with nor chargeable to it, and the levy upon and sale thereof to satisfy the taxes due from Magaret, Stephens & Davis were without authority, and therefore wrongful. It is shown that, before the levy made by the deputy treasurer, he was informed that the property did not belong to the local corporation, and it was with the knowledge of that fact the levy and sale were made by him. We are unable to see how it can be said that the property was liable for the taxes due from Magaret, Stephens & Davis.

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

REVERSED.

ROSE, J., not sitting.

ELEAZER D. PEDEN, APPELLEE, V. PLATTE VALLEY FARM & CATTLE COMPANY, APPELLANT.

FILED FEBRUARY 11, 1913. No. 16,900.

1. **Waters: IRRIGATION: WATER CONTRACTS: BREACH: LIABILITY.** If a corporation engaged in the business of supplying individuals with water for the irrigation of arid or semiarid lands unlawfully and arbitrarily prevents the holder of one of its water contracts from using water for the irrigation of his growing crops, it is liable to the individual in damages.

2. ———: ———: ———: ———: **MEASURE OF DAMAGES.** In such a case the measure of damages is the value to plaintiff of the

use of said right during the time he is deprived thereof, and it is not error to instruct the jury that the measure of plaintiff's recovery is the value of the crop at the time the water was shut out of said canal, with the right to irrigate it from that time to the end of the irrigation season, less the value of the crop without the right to irrigate it from that time until the end of the season. *Clague v. Tri-State Land Co.*, 84 Neb. 499.

3. Trial: VERDICT: INSTRUCTIONS. Where it appears from a consideration of all of the evidence that the jury could have properly rendered the verdict of which complaint is made by following the instructions, an assignment of error "that the jury disregarded the instructions of the trial court" is not available as a cause for reversing the judgment rendered on the verdict.

4. Evidence examined, and found sufficient to sustain the judgment.

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

H. D. Rhea and *E. A. Cook*, for appellant.

H. M. Sinclair, W. D. Oldham and *W. A. Stewart, contra.*

BARNES, J.

Action for damages against an irrigation company by the owner of certain water rights for failure to furnish water during the irrigation season of 1907 and 1908. The petition contained nine counts or causes of action. The jury found for the plaintiff on three counts for damages to his crops in the year 1907, and for the defendant as to all of the other causes of action set forth in plaintiff's petition. From a judgment rendered upon the verdict, the defendant has appealed.

The three causes of action involved in this appeal are: First, for damages to 40 acres of oats, corn and alfalfa; second, for damages to 80 acres of corn; third, for damages to 10 acres of corn and 30 acres of alfalfa.

Appellant contends that the verdict is not sustained by the evidence, and argues that, to entitle the plaintiff to a verdict on the causes of action on which he recovered, it was incumbent upon him, not only to show a demand

for water after the payment of the annual maintenance fee according to the contract, but also to show that there was water in the Platte river which the defendant could get into its ditch in sufficient quantity to carry to the land of the plaintiff in 1907, and that his crops were damaged by reason of the failure of defendant to furnish him his share of the water flowing in the ditch. The water-right deeds in question provide that the irrigation company sells, assigns, transfers and conveys "the right to receive and use water from the canal of the said party of the first part, in an amount not exceeding one cubic foot of water per second of time for each 80 acres of the land hereinafter described; * * * provided, and so long as the said party of the second part, his heirs and assigns shall pay to the party of the first part, its successors or assigns, annually in advance, on or before the first day of October in each year, the sum of $40, in addition to the consideration above expressed, for the use of said water." The deed further contains the provision that if the grantee fails to remit the annual payments at the time they become due and payable, and such default continues for two years, the conveyance shall become null and void, and the rights of the grantee shall cease and determine. It is further provided that "the said party of the first part shall have the right, upon the failure of the party of the second part to pay the rent hereby reserved, or to comply with any of the stipulations herein contained, to immediately, or at any time during such default, refuse and cease to supply any water under this agreement."

It appears that the court instructed the jury that the provision of the contract for payment on October 1, annually, in advance, means "at the beginning of the year October 1, and before the water season begins." The jury were further instructed that, under the statutes, the water season continues from April 15 to November 1. The proof shows that the plaintiff paid the annual maintenance charge on July 26, 1907, and that defendant made no complaint as to that matter, and at no time refused to

furnish plaintiff water for the reason that payment was not made at an earlier date. The thirteenth instruction reads as follows: "You are instructed that under no circumstances under the contracts in this case can you allow plaintiff damages, if any, to his crops for failure of defendant, if any, to furnish water prior to the time plaintiff paid his water rental for the current year and demanded water." Defendant contends that the jury disregarded and failed to follow this instruction, and while appellant must necessarily concede that the instruction, if erroneous, was prejudicial to the rights of the plaintiff and not those of the defendant, still it is insisted that the refusal or failure of the jury to follow this instruction entitles the appellant to a reversal of the judgment. It is argued that the plaintiff was not entitled to demand or receive water from the defendant until July 26, 1907, for the reason that up to that time he had not paid his water rental for that year; that plaintiff's crop of oats was either ripe and ready for harvest at that time, or had in fact been harvested, and therefore the jury could allow him no damages to that crop, and therefore the jury must have disregarded the instruction above mentioned.

It appears, however, that the plaintiff had planted and cultivated 40 acres of corn upon one tract of his land, as well as 40 acres of oats; that he claimed damages to those crops to the amount of $2,000. The testimony shows conclusively that plaintiff's corn, if irrigated, would have produced from 40 to 60 bushels an acre. While, in fact, for that year he was only able to produce 15 bushels an acre, thus making a difference of 25 bushels an acre in the production for that year, or a total difference of corn production of 1,000 bushels. The testimony discloses that corn in that year was worth 40 cents a bushel, making a loss of corn upon that tract of land of $400. Upon that cause of action the jury awarded him only $316.80. In view of this situation, it seems clear that the jury allowed the defendant no damages whatever for his oat crop. It further appears that plaintiff had also planted 80 acres of

corn upon another tract of land, for which he claimed damages to the amount of $1,600. The testimony as to that 80 acres is practically the same as to the amount of corn produced per acre, and the amount which plaintiff could have produced if his corn had been irrigated. On this cause of action the jury assessed his damages at the sum of $408.

The fifth cause of action was for damages to 10 acres of corn and 30 acres of alfalfa, amounting to $500. The jury assessed plaintiff's damages upon that cause of action at the sum of $135.60.

In view of this situation, we are unable to say that the jury disregarded the instruction in question. On the other hand, they might have followed it literally, and still have found, upon a consideration of all of the evidence, that his damages, to the full amount allowed plaintiff, were in fact sustained by him after he paid the annual maintenance tax and demanded water, as shown by the testimony. We are therefore of opinion that the defendant's contention that, where the jury disregards the court's instructions, a reversal of the judgment is required, has no application to the facts of this case, for it may reasonably be said that the jury followed the instruction, and at the same time arrived at a correct and just verdict.

It appears that the court further instructed the jury, in substance, that they should allow the plaintiff damages in the sum that water, according to the contract, would add to the crop of the plaintiff between the time of the payment of the fee and demand for water to the end of the irrigating season. The appellant contends that this instruction was unnecessary, and does not present a true rule, and has no application to the evidence. We think what we have already said on this question disposes of this contention.

Coming now to the evidence: It seems to establish clearly that the plaintiff was not furnished the amount of water which his contract called for, and had from time to time asked defendant for water. The plaintiff so testified,

and his evidence was not directly disputed. The court also instructed the jury that if the plaintiff established the facts that he planted the crops as alleged, had kept his laterals in proper condition, had demanded water during the irrigating season, had paid the annual rental at the time he made demand, and that thereafter the defendant negligently refused to furnish water, as provided in the contract, and that because of such failure plaintiff sustained injury and damage to his crops, he would be entitled to damages accordingly after demand and a payment of rental; that the statutes provide that the water season for irrigating shall continue from April 15 to November 1; that under no circumstances, under the contracts in this case, could plaintiff be allowed damages for a failure to furnish water prior to the time he paid his water rental for the current year and demanded water; that the contracts provide for the payment of the rentals in advance on the 1st day of October of each year; that the term "in advance" means at the beginning of the year, October 1, and before the water season begins; that after the time the rentals are paid the defendant had no right to refuse water; that, under the contract, if there was a deficiency of water in the canal, for some cause beyond the control of defendant, or a deficiency in the source of supply, and if the water was distributed *pro rata,* then the defendant would not be liable; that if they found for the plaintiff they should allow him the net value of the crop at the time he failed to get water according to his contract, if he did so fail to get water, with the right to irrigate it from that time to the end of the season, less the net value of the crops, without the right to irrigate, according to his contract, from that time to the end of the season.

Appellant contends that these instructions relating to the measure of damages are prejudicially erroneous, and do not state the true measure of damages. It is apparent from the record that the trial court endeavored to, and did substantially, follow the rule announced in *Clague v. Tri-State Land Co.,* 84 Neb. 499. In that case it was said:

"If a corporation engaged in the business of supplying individuals with water for the irrigation of arid or semiarid lands unlawfully and arbitrarily prevents the holder of one of its water contracts from using water for the irrigation of a field of growing potatoes, it is liable to the individual in damages. In such a case the measure of damages is the value to plaintiff of the use of said right during the time he is deprived thereof, and it is not error to instruct the jury that the measure of plaintiff's recovery 'is the value of the crop at the time the water was shut out of said canal, with the right to irrigate it from that time on to the end of the season, less the value of the crop without the right to irrigate it from that time until the end of the season.'" As we view the instructions, they substantially follow this rule, and none of the rights of the defendant were prejudiced thereby.

Mention is made of *Wade v. Belmont Irrigating Canal & Water Power Co.*, 87 Neb. 732. It appears that there are two substantial reasons why the rule announced in that case has no application to the case at bar. In that case there were no crops, and no damages were claimed for the loss of crops, while in the case at bar the testimony discloses that plaintiff had planted the crops, as alleged by him, and that they were in a proper state of cultivation and in good condition up to the time when he was refused water under his contracts. From what we have said, appellant's contention that the verdict is not sustained by the evidence must fail.

As we view the record, defendant has failed to show any error prejudicial to its rights; and, while it may be conceded that in some respects the instructions were erroneous, still, upon a consideration of the entire record, we are satisfied that the case is one for the application of section 145 of the code, which provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judg-

ment shall be reversed or affected by reason of such error or defect."

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

AFFIRMED.

GEORGE L. SMITH, APPELLEE, V. SHERMAN R. SEVERN, APPELLANT.

FILED FEBRUARY 11, 1913. No. 16,971.

1. Vendor and Purchaser: CONTRACT OF SALE: DELIVERY. A contract for the sale of real estate is not binding upon the vendor until it is signed and delivered to the vendee.
2. ———: ———: UNAUTHORIZED DELIVERY. A real estate agent or broker cannot bind the vendor by an unauthorized delivery of a contract for the sale of real estate.
3. ———: ———: PERFORMANCE. The delivery by the purchaser of a check or draft to the agent or broker of the vendor, payable to the order of the broker, where the contract provides for payment of money, is not a compliance with the terms of the contract.
4. ———: ———: ———. In such a case the vendor may refuse to accept the check instead of cash, and, until cash is tendered to him as payment, may decline to proceed with the proposed sale.

APPEAL from the district court for Butler county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

E. C. Strode, Skiles & Harris and *M. V. Beghtol,* for appellant.

Arthur J. Evans, L. S. Hastings and *E. A. Coufal, contra.*

BARNES, J.

Plaintiff brought this action in the district court for Butler county to cancel a contract for the sale of the east half of section 21, and the north half of the northwest

quarter of section 22, all in township 14, range 1 west of the sixth P. M., situated in said county. The defendant filed an answer and cross-petition, by which he prayed judgment for a specific performance of the contract. The plaintiff thereupon dismissed his petition, and by an answer and cross-bill to the defendant's cross-petition resisted specific performance, and prayed for a cancelation of the contract. The defendant filed a reply to plaintiff's cross-petition, and upon the issues thus joined a trial was had which resulted in a decree for plaintiff, and the defendant has appealed.

It appears that plaintiff listed his farm, which is the land in question, with one Earle, a real estate broker; that defendant had some negotiations with Earle in November, 1909, looking to the purchase of the land in question. The negotiations failed because of some ill feeling existing between plaintiff and defendant, and thereafter one Crumbliss, another real estate broker, obtained permission from the plaintiff to sell the land in question for $47,000. Crumbliss negotiated with the defendant for the sale of the land, and induced him to make an offer therefor of $46,000. Crumbliss then informed the plaintiff that he had such an offer, but declined to give the name of the purchaser. Plaintiff finally agreed to take $46,000, and thereupon Crumbliss and plaintiff made duplicate copies of a proposed contract, but Crumbliss at that time declined to state the purchaser's name or insert it in the contract. Crumbliss then took the duplicates to the defendant, who revised them in some respects, among which was the place of payment, and signed them as thus revised. By the terms of the contract defendant agreed to pay plaintiff $6,000 when the duplicate contracts were signed, and the balance of the consideration, amounting to $40,000, was to be paid at a bank in Ulysses on the 1st day of March, 1910, and it was agreed that upon such final payment the plaintiff was to convey the premises to the purchaser by good and sufficient warranty deed. Crumbliss then took the revised contracts to the plaintiff at his

bank in Ulysses on the morning of the 10th day of December, 1909. Plaintiff approved of the alterations made therein, and signed the contracts. At that point in the negotiations a question arose between plaintiff and Crumbliss in regard to the commission. Plaintiff said he had not seen any money on the contract, and Crumbliss replied that he had a check in his pocket for $6,000. Plaintiff thereupon told Crumbliss that he would not take Severn's check for 15 cents, and demanded cash in place of a check. It appears that plaintiff was at that time about to leave for Omaha by a train which was coming into the station, and told Crumbliss to let the matter rest until his return. He left the duplicate contracts on his desk in the bank, and started for the train. After plaintiff had left the bank, Crumbliss, without authority, took the duplicate contracts into his possession, followed plaintiff and overtook him on his way to the train. Plaintiff then told Crumbliss to return the contracts to the bank, and leave them there, and let the matter rest until he returned from Omaha. Crumbliss disobeyed plaintiff's instructions, and went to Surprise, where he saw Severn, and after consultation with him took the train to David City, and after consulting an attorney placed one of the duplicate contracts on record, in accordance with his instructions from Severn. Some days later he returned the other duplicate to plaintiff's bank, where it was placed by one Patrick in a drawer, but that fact was not brought to plaintiff's attention. The matter remained in that condition for some time, and until the plaintiff contracted with another party to sell the land, when Severn wrote to plaintiff, asking him if he had sold the land, and whether or not he was going to comply with his contract. To this communication the plaintiff made no reply. On the 2d day of April, 1910, plaintiff commenced this action, and thereafter the issues were made up by the pleadings above mentioned. The cause was tried to the court, without the intervention of a jury, and resulted in the judgment from which this appeal was taken.

Appellant's brief contains no specific assignments of error, but from his argument we infer that his contention is that the decree of which he complains is not sustained by the evidence. There is but little conflict in the testimony as contained in the record. Plaintiff and his witnesses testified that the signed contracts were left by him on his desk in his bank, with instructions to Crumbliss to let the matter rest until he returned from Omaha; that later, on his way to the train, he told Crumbliss, who had taken possession of the contracts without his consent, to return them to the bank, and let the matter await his return. This was in part denied by Crumbliss. But the great weight of the evidence sustains plaintiff's contention on this point. It therefore follows that defendant failed to prove a legal delivery of the contract.

Again, the contract provides, in express terms, that defendant was to pay plaintiff the sum of $7,000 (agreed orally to be $6,000 in cash) when the contracts were signed, and it appears, without dispute, that this money was never paid or tendered to the plaintiff. Instead of such payment or tender, defendant gave Crumbliss a check or draft payable to his order for $6,000, which plaintiff refused to accept, and demanded payment in money or cash, as stated by the witnesses. Instead of complying with that demand, Crumbliss later on cashed the check or draft, and according to his own testimony left $5,600 with a rival bank to plaintiff's credit, which all agree plaintiff refused to claim or accept. So it must be said that defendant himself failed to comply with the terms of the contract which he sought to enforce.

It is claimed, however, that Crumbliss, as plaintiff's agent, had authority to accept defendant's check payable to himself as the first payment upon the contract, and also to take possession of the contracts and deliver one of them to the defendant. It appears, however, that Crumbliss was simply authorized to find a purchaser for the farm at a price and on terms of payment satisfactory to plaintiff; and the evidence entirely fails to support defendant's con-

tention on this point. It is strenuously insisted, however, that Crumbliss had apparent authority to perform the acts by which he sought to bind the plaintiff. It is a sufficient answer to this contention to say that, when defendant was informed that plaintiff refused to accept anything but cash for the $6,000 payment, he was sufficiently notified that Crumbliss was without any such authority as he now contends he possessed. It is therefore apparent that the district court, in refusing to compel plaintiff to specifically perform the contract in question, acted with the sound discretion vested in courts of equity to refuse a decree of specific performance unless, acting upon broad equitable grounds, he deems himself required to render such a decree.

As we view the record, the judgment of the district court is amply sustained by the evidence, and is therefore

AFFIRMED.

REESE, C. J., not sitting.

IN RE PHILLIPS.

U. S. ROHRER, APPELLANT, V. L. PHILLIPS, APPELLEE.

FILED FEBRUARY 11, 1913. No. 17,756.

1. **Intoxicating Liquors: APPLICATION FOR LICENSE: REMONSTRANCE: BURDEN OF PROOF.** In order to defeat an application for a saloon license on the ground that the applicant has violated the provisions of chapter 50, Comp. St. 1911, entitled "Liquors," by selling intoxicating liquor to a minor, the burden of proof is on the remonstrator to establish that fact by a preponderance of the evidence.

2. ———: ———: ———: **EVIDENCE.** The evidence contained in the bill of exceptions examined, and found sufficient to sustain the order of the licensing board, and judgment of the district court affirming such order.

APPEAL from the district court for Adams county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Benjamin F. Johnson, for appellant.

W. P. McCreary, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Adams county, affirming an order of the mayor and council of the city of Hastings granting a license to one L. Phillips to sell malt, spirituous and vinous liquors in that city for the license year, commencing May 1, 1912.

The only question presented by the record is one of fact. The remonstrance contained an allegation that Phillips, a licensed saloon-keeper, had violated the provisions of chapter 50, Comp. St. 1911, entitled "Liquors," within the preceding year by selling liquor to a minor. That issue was tried before the mayor and council, and was decided against the remonstrator. An appeal was taken to the district court, where that question was again tried upon the transcript of the evidence taken before the mayor and city council. The district court found that the remonstrator had failed to establish the charge set forth in his remonstrance, and affirmed the order of the licensing board. From that judgment the remonstrator has prosecuted this appeal.

An examination of the record discloses that one Otto Parry, a young man about 19 years of age, testified that he had bought liquor in appellee's saloon in August, October and November of the year 1911; that he was waited upon by Phillips' bartenders. He did not claim to be able to definitely fix the date of his purchases, except on one occasion, when appellee cashed a check for him for $13. He testified that at that time he bought a glass of beer, and received the balance of the check in money. On the other hand, the three persons who tended bar for Phillips testified positively that they did not know Parry, and that they never had sold him any liquor at any time. The appellee testified that he might have cashed a check for $13 at Parry's request; that he knew him; that if he cashed the

check he paid him the full amount in cash; that he sold him no liquor, and did not on any occasion of that kind wait on a customer at the bar of his saloon.

The foregoing is the substance of the evidence contained in the bill of exceptions. As we view the record, the evidence fails to sustain the charge contained in the remonstrance. The finding of the district court is sustained, and its judgment is

AFFIRMED.

REESE, C. J., not sitting.

LAURITZ NELSON, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED FEBRUARY 11, 1913. No. 16,980.

Dismissal. "The district court may, in the just exercise of its discretionary power, permit plaintiff to dismiss his case after it has been finally submitted to the court or jury." *Bee Building Co. v. Dalton*, 68 Neb. 38.

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

John O. Yeiser, for appellant.

Rich, Nolan & Woodland, contra.

LETTON, J.

This is an action to recover from a master for personal injuries. In the view we take of the record, it is unnecessary to state the facts.

After the evidence of both parties had been produced, a motion to direct a verdict for the defendant was filed on account of the insufficiency of the petition and the evidence. The journal recites: "The defendant moves that

the jury be instructed to return a verdict for the defendant, and said motion is argued and submitted. Whereupon the plaintiff asks leave to withdraw a juror; and, after due consideration, said leave is by the court granted." A juror was withdrawn and the jury discharged and the cause set for trial anew; to each of which orders the defendant excepted. Afterwards, during the same term, the defendant moved the court "to vacate and set aside its order allowing the plaintiff to withdraw a juror and setting the case for trial anew, for the reason that the motion of defendant to instruct the jury to render a verdict in favor of defendant had been duly argued by counsel and submitted to the court, as more fully appears from the record of the court, and the court was thereby without power to entertain any other motion until the said motion to instruct the jury had been either granted or denied, or to take any action whatsoever except to rule upon the said motion," and defendant further moved that the court dismiss the action with prejudice, at plaintiff's costs. This motion was argued and submitted and taken under advisement. The record shows that at the next term the motion was sustained, "for the reason that the court was about to sustain said motion to take the case from the jury when the application was made to withdraw a juror and continue the case, and the court now considers that the court was without discretion in the premises." It was then ordered that the case be dismissed according to defendant's motion at the close of the testimony.

The plaintiff contends that it was error to set aside the order granting a new trial and to dismiss the case, for the reason that the former order was within the discretion of the court, and that the evidence was sufficient to warrant its submission to the jury.

Defendant takes the position that, there being no motion for a new trial filed, this court cannot examine the evidence, and that, the case having been submitted to the court by the motion to instruct, the court had no power to allow the withdrawal of a juror, and to grant a new trial.

Both sides rely on the case of *Bee Building Co. v. Dalton,* 68 Neb. 38. In that case, after the evidence had been submitted, a motion was made by the defendant to instruct in its favor. The motion was sustained by the court. Before the court gave the required instruction, the plaintiff attempted to dismiss his cause of action without prejudice. The defendant objected to the dismissal at that time, after a motion to instruct a verdict in favor of the defendant had been sustained. The court allowed plaintiff to dismiss without prejudice. In discussing the question presented, SULLIVAN, C. J., says: "Before plaintiff moved to dismiss the action without prejudice, his case had been not only submitted to the court upon a vital issue of law, but that issue had been decided against him, and nothing remained open for contention. * * * The *record does not show* that the the court *undertook to exercise a discretionary power,* or that the situation called for the exercise of such power. The application was evidently made and *granted as a demandable right.* * * * The discretionary power of the district court to set aside a submission and receive further evidence, or to postpone the trial, or even to permit a dismissal of the case, is not doubted; but there is nothing in the present record to indicate that there was any just ground for the exercise of such power, or that there was any attempt to bring it into action. The court was evidently of the opinion that, the peremptory instruction not having been yet read to the jury, the right of plaintiff to dismiss was absolute. This was an erroneous conception, and it led to a wrong result."

Paragraphs 6 and 7 of the syllabus are as follows:

"6. The district court may, in the just exercise of its discretionary power, permit plaintiff to dismiss his case after it has been finally submitted to the court or jury.

"7. But where the discretionary power of the court is not invoked, and the application to dismiss after final submission is made and allowed as a demandable right, the order of dismissal will not be upheld, unless a denial of the application would amount to an abuse of discretion."

It will be seen that there is a marked distinction in the recorded facts between that case and this. While the motion to instruct was pending, and before it had been sustained, the plaintiff in this case asked leave to withdraw a juror. He did not attempt, as in the Dalton case, to dismiss without prejudice as a matter of right. It was within the discretion of the court at that stage of the trial to allow this to be done. The argument in defendant's motion, based upon the alleged want of power to act until the motion to instruct had either been granted or denied, is fallacious, for the reason that the rules of parliamentary procedure, whereby the chair has no right to entertain any but privileged motions while a motion is pending, do not apply to proceedings in courts of justice. We are of the opinion that the court had power, in the exercise of its discretion, to grant leave to withdraw a juror, and that, in the absence of a clear showing of an abuse of discretion, its action should be sustained.

The defendant insists that we are without power to examine the evidence to ascertain whether the plaintiff was prejudiced by the judgment of dismissal, for the reason that no motion for a new trial was filed. This was unnecessary.

The plaintiff is not here complaining that the order granting the new trial was erroneous, but merely that the later order setting aside the same on the ground of want of power was erroneous. This question is presented by the record, and does not require a consideration of the evidence, since it will be presumed that the former order was justified until it is made affirmatively to appear otherwise. We are of opinion that, since the court at plaintiff's request exercised its discretionary power in permitting a new trial of the case, and since no abuse of this discretion has been affirmatively shown, its later judgment setting aside this order and dismissing the case for the reasons stated in the order was erroneous.

The later judgment is therefore reversed and the cause remanded.

REVERSED.

MARY MORAN ET AL., APPELLANTS, V. WILLIAM CATLETT ET AL., APPELLEES.

FILED FEBRUARY 11, 1913. No. 17,017.

1. **Dower:** EQUITABLE INTERESTS. Under the statutes in force in 1891, a widow was not entitled to dower in an equitable interest in lands held by executory contract by her deceased husband.
2. **Process:** CONSTRUCTIVE SERVICE: AFFIDAVIT. An affidavit for constructive service upon unknown heirs, under section 83 of the code, must be made by the plaintiff himself, if an individual, and not by his attorney, and must be verified positively.
3. **Taxation:** FORECLOSURE OF LIEN: PARTIES. An action for the foreclosure of a tax lien was brought against specific individuals; the petition being in the ordinary form. The land was not made a party to the suit. The court afterwards, apparently upon its own motion, ordered the land to be made a party defendant, but no amendment was made to the petition or the title of the case, and the land was not described as a party in the published notice, which was in the usual form in a suit against individuals. *Held*, That the land was not brought in, and that the action was not *in rem* against the land itself.

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

Wilcox & Halligan, for appellants.

E. J. Hainer and *C. P. Craft, contra.*

LETTON, J.

This is an action to set aside certain conveyances founded upon tax foreclosure proceedings. A demurrer to the petition was sustained and the action dismissed. Plaintiffs appeal.

The material allegations of the petition are substantially as follows: That Patrick Fitzgerald, who died intestate in July, 1891, was at that time the husband of the plaintiff Mary Moran, and was the father of the plaintiff Patrick Thomas Fitzgerald; that during his lifetime Patrick Fitz-

gerald purchased the land in controversy from the Union Pacific Railroad Company under an executory contract of sale and upon ten annual payments; that after his death the plaintiffs completed the payments, and on January 24, 1894, the railroad company conveyed the land to "the heirs at law of Patrick Fitzgerald, deceased;" that the plaintiff Patrick Thomas Fitzgerald is a minor, born August 17, 1891; that the estate of his father was probated in Cook county, Illinois, and that all the debts and expenses of administration have been paid; that the plaintiffs are the owners of the land, and have at all times since the death of Patrick Fitzgerald resided in the city of Chicago, and their residences and addresses have at all times been published in the directory of said city. It is further alleged that in 1896 John W. Welpton purchased the land at tax sale, and that on September 19, 1890, he filed his petition in the district court for Perkins county seeking to foreclose his tax lien; that a decree of foreclosure was entered, the land sold under the decree to Mr. Welpton, and a sheriff's deed made. A copy of the pleadings and of the record in the foreclosure case is attached to the petition and made a part thereof. The title of the foreclosure case, as shown by the petition, is: "John W. Welpton, Plaintiff, vs. Mrs. Patrick Fitzgerald, full name to plaintiff unknown, the heirs of Patrick Fitzgerald, further and full names to plaintiff unknown, Defendants." The petition is verified in the ordinary form by plaintiff's attorney. On the same day an affidavit was made by the attorney, reciting: "The said premises were conveyed to said heirs by the Union Pacific Railroad Company; that affiant has written said company and been informed by it that said heirs were in Chicago, Illinois; that affiant has been unable to learn the names or addresses of any of the said heirs, and plaintiff has been unable to do so, and their names and addresses are to the plaintiff wholly unknown, and he is unable to ascertain the same. Wherefore affiant and plaintiff prays that service may be made upon said heirs as unknown and without naming them." There was

also filed an affidavit for constructive service in the ordinary form, reciting that "the defendants, Mrs. Fitzgerald, widow of Patrick Fitzgerald, deceased, and the unknown heirs of Patrick Fitzgerald, deceased, are nonresidents of the state of Nebraska, that service of summons cannot be made upon the said defendants or any of them within this state." On November 12 the following paper was filed: "Comes now the plaintiff, and alleges that he is the holder and owner of a tax sale certificate set forth in plaintiff's petition; that the property involved in this case appears by the records to be owned by the heirs of Patrick Fitzgerald, having been deeded to said heirs by the Union Pacific Railroad Company; that plaintiff has made all possible inquiry to discover the addresses of said heirs, and has been unable to find the same; that plaintiff is informed by the Union Pacific Railroad Company that deed was forwarded to said heirs at Chicago, Illinois; but plaintiff has been unable to discover the names of said heirs, or their addresses. Wherefore plaintiff prays that said heirs may be served by publication as the unknown heirs of Patrick Fitzgerald, deceased. John W. Welpton, Plaintiff, By B. F. Hastings, His Attorney." This was verified by the attorney, "as he verily believes." On the same day the following order was made: "It is ordered by the court that the said premises involved in this action, to wit, the southeast quarter of section 13, Twp. 10 north of range 39 west, be made a party defendant herein, also that the unknown heirs of Patrick Fitzgerald be made defendants herein." The notice of publication thereafter made was addressed as follows: "Mrs. Fitzgerald, widow of Patrick Fitzgerald, other and full name to plaintiff unknown, heirs of Patrick Fitzgerald, deceased, will take notice," etc. Proof of publication was made, and on March 19 the court found that due and legal service of summons and notice of the pendency of the action had been given upon all the defendants, and entered the decree of foreclosure by default.

The petition in the case at bar further alleges that no service of summons in the foreclosure case was had upon

the plaintiffs, and that the alleged notice was null and void, and failed to give the court jurisdiction; that the defendants claim title under the void proceedings by conveyance from Welpton. It is further alleged that Mary Moran has a life estate in an undivided one-third interest in the land.

Appellants' brief states: "There is but one question presented for determination in this case; that is, whether the affidavit by which it was sought to make the unknown heirs of Patrick Fitzgerald, deceased, defendants was sufficient to give the court jurisdiction over the plaintiff, Patrick Thomas Fitzgerald, so that the decree in the tax foreclosure suit would bar his rights to this land as the heir of Patrick Fitzgerald? Making unknown heirs a party and obtaining service upon is authorized by section 83 of the code of civil procedure, under the following conditions: 'It shall appear by the affidavit of the plaintiff annexed to his petition, that the names of such heirs or devisees, or any of them, and their residence are unknown to plaintiff.' * * * It will be seen that the affidavit filed in this case is deficient in at least two respects: First, the affidavit does not state that the residence of the unknown heirs is unknown, but affirmatively shows that their residence is Chicago, Illinois, and in lieu of the statement that the residence is unknown says that their address is unknown; second, the affidavit was not made by the plaintiff, as required by law, but by his attorney."

It may be well to clear up the question as to who are the heirs of Patrick Fitzgerald before considering the questions above propounded. At the time of his death he held the land under an executory contract of purchase. Under the statute then in force, and under the settled rule in this court, a widow was not an heir of her deceased husband, and had no dower rights in the lands held under a partially executed executory contract, hence no title is shown in Mrs. Moran. *Crawl v. Harrington*, 33 Neb. 107; *Hall v. Crabb*, 56 Neb. 392; *Grandjean v. Beyl*, 78 Neb. 349, 354; *Nortnass v. Pioneer Townsite Co.*, 82 Neb. 382.

Returning now to the question of the sufficiency of the affidavits for constructive service to confer jurisdiction. It was after the filing of the paper of November 12, verified by the attorney on his belief, that it was ordered that the land and the unknown heirs be made parties defendant, and that service be made by publication. The statute requires that an affidavit for service upon unknown heirs be made by the plaintiff in order to warrant service by publication. It cannot, therefore, be made by his attorney. There is reason for this. The plaintiff might know the facts as to residence and heirship, and yet his attorney be ignorant as to these very matters, and he might thus secure an undue advantage over the defendant. The rule in this state is that, in order to sustain service by publication, the provisions of the statute must be strictly followed. *Stull v. Masilonka,* 74 Neb. 309. The affidavit was, therefore, insufficient to warrant such service upon the "unknown heirs." This is the rule in other states. *Davis v. John Mouat Lumber Co.,* 2 Colo. App. 381; *Sylph Mining & Milling Co. v. Williams,* 4 Colo. App. 345; *Sayre-Newton Lumber Co. v. Park,* 4 Colo. App. 482; *Everett v. Connecticut Mutual Life Ins. Co.,* 4 Colo. App. 509; *Taylor's Heirs v. Watkins,* 43 Ky. 561.

The defendants, however, argue that the land itself was made a party to the suit, and that the action was one *in rem* in which notice to the parties is unnecessary. If the land itself had been made a party by proper pleadings, and had been brought in by proper service of notice of that fact, the doctrine of these cases would be applicable, and the conclusion urged irresistible. In this case, however, the land was not made a party to the suit. It is true that on November 12 the court ordered that the land and the unknown heirs be made parties defendant, but this order was made, so far as the record shows, upon the court's own motion, without any request or suggestion on the part of the plaintiff, and it was never complied with. The petition was not amended in conformity with the order to make the land a party, and the notice for constructive

service was addressed merely to Mrs. Fitzgerald and to the unknown heirs of Patrick Fitzgerald, and not to the land itself. The pleadings remained and the proceedings were had thereafter in all respects as if no such order had been made. We think, therefore, that the proceedings never became actually *in rem* against the land as a party defendant.

Defendants argue that, under the rule announced in *Stratton v. McDermott*, 89 Neb. 622, and *Lear v. Fickweiler*, 92 Neb. 621, the plaintiffs are estopped to insist that the name under which they took title, namely, "the heirs at law of Patrick Fitzgerald, deceased," is not their true name, and that service upon them by such name is sufficient. Upon the father's death the son immediately became vested by inheritance with the interest in the property which the father held. *Cutler v. Meeker*, 71 Neb. 732; *Nortnass v. Pioneer Townsite Co.*, 82 Neb. 382. He acquired such interest by inheritance in his true name, and the doctrine of estoppel as announced in the cases mentioned is not applicable to the facts. We are of opinion that the affidavit for constructive service upon the unknown heirs was insufficient, and that the petition states a cause of action.

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

REVERSED.

WILLIAM REED V. STATE OF NEBRASKA.

FILED FEBRUARY 11, 1913. No. 17,850.

Criminal Law: TRIAL: SEVERANCE. Under section 465 of the criminal code, one jointly indicted with others for a felony is entitled to a separate trial as a matter of right, if the request for a separate trial is made in due season. *Metz v. State*, 46 Neb. 547, distinguished.

ERROR to the district court for Nemaha county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

Lambert & McCarty, for plaintiff in error.

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

LETTON, J.

The plaintiff in error was jointly indicted with three other persons upon the charge of having committed a felonious assault with intent to inflict great bodily injury upon one Goings. Each of the defendants filed a separate motion asking for a separate trial. These motions were overruled and exceptions taken. Trial was had, and the jury returned a verdict finding the plaintiff in error guilty of assault and battery, and finding the other defendants guilty of felonious assault as charged. No bill of exceptions has been preserved. The only assignment of error we can consider, as the record stands, is that the court erred in overruling the motion for a separate trial.

At common law a defendant could not as a matter of right demand to be tried separately, and a severance at the request of either party was a matter of discretion. 1 Bishop, Criminal Procedure (3d ed.) sec. 1018. Section 465 of the criminal code provides: "When two or more persons are indicted for a felony, each person so indicted shall, on application to the court for that purpose, be separately tried." Plaintiff in error insists that the provisions of this statute are mandatory. The state contends that the motion in this case, being made immediately before the trial, was made too late, and, further, that the error, if any, was not prejudicial, since the accused was only convicted of a misdemeanor; that one guilty of a misdemeanor is not entitled to a separate trial as a matter of law, and that he was really tried for a misdemeanor.

The objection that plaintiff in error did not apply for a separate trial in time we think is not justified by the

record. The information was filed in the district court on May 27, 1912. On May 29 the case was set for trial on the morning of the 31st, and on that day the motion was made and overruled before the selection of a jury was begun.

The accused was charged with a felony, and when so charged the statute clearly preserves to him the right to be tried separately. *Johnson v. State,* 14 Ind. 574; *Trisler v. State,* 39 Ind. 473; *Cain v. State,* 44 Ind. 435; *Greer v. State,* 54 Miss. 378. In the case of *Metz v. State,* 46 Neb. 547, the defendant complained of a severance, but did not do so until after a jury had been selected and sworn. It was held that this was too late, which was undoubtedly a correct decision. NORVAL, C. J., however, added the statement (probably true as to the state, but, as we are of opinion, incorrect as to the defendant) that the severance is "in the discretion of the court." This question was not in the case, and must be considered as mere dictum. We hold, therefore, that, when the demand is made by the accused in time, the court has no discretion. This right he may waive by failure to make the request in proper season. In Alabama the code fixes the time at or before which the request must be made. In Washington, where there is no statutory provision as to time, the court say: "The right to a separate trial is a valuable one, and this section of the penal code confers it upon a defendant. It does not specify when the demand shall be deemed waived. We think this right to a separate trial belongs to the defendant, and he may avail himself of the right at the time the cause is assigned for trial. A severance of trial afterwards is in the discretion of the court, until the jury is sworn to try the cause, subsequently to which time a several trial cannot be granted." *State v. Mason,* 19 Wash. 94. There was a dissent on this proposition. No other court taking this view has been called to our attention. There being no statute or rule of court setting a limit of time before the trial for the defendant to elect whether he will be tried separately, we

think the court ought not to hold that the right was waived by failing to exercise it until the day of trial.

Was the error without prejudice? The evidence not being before us, it is impossible to tell whether the defendant's conviction was not influenced by his association with the three defendants who were each found guilty of a felony.

The motion for a separate trial should have been sustained, and the judgment of the district court is therefore

REVERSED.

IN RE ESTATE OF JOHN BROEHL.*

CHARLES BROEHL, ADMINISTRATOR, APPELLEE, V. SOPHIA BROEHL, APPELLANT.

FILED FEBRUARY 11, 1913. No. 17,954.

Appeal: FINAL ORDER. An order granting or refusing a license to sell real estate to pay the debts of a deceased person is a final order reviewable on appeal. *Miller v. Hanna*, 89 Neb. 224, distinguished.

APPEAL from the district court for York county: GEORGE F. CORCORAN, JUDGE. *Motion to dismiss overruled.*

France & France and *Morning & Ledwith*, for appellant.

Power & Meeker, contra.

LETTON, J.

A motion to dismiss the appeal has been made by the administrator, based upon the contention that the order refusing to set apart to the widow a part of the premises as the family homestead and granting a license to him to

* April 7, 1913. Appeal dismissed on motion of appellant.

sell real estate to pay debts of the deceased is not a final order, and that it is not reviewable until after confirmation of a sale based upon such order has been made. In this state orders granting or refusing such licenses have always been considered as final orders, reviewable by proceedings in error until the change in appellate practice, and by appeal since that time. *Waldow v. Beemer*, 45 Neb. 626; *Poessnecker v. Entenmann*, 64 Neb. 409; *Martin v. Bond's Estate*, 64 Neb. 868; *Bixby v. Jewell*, 72 Neb. 755. This is the general rule in other states. 2 Woerner, American Law of Administration (2d ed.) sec. 473, p. *1049.

Section 581 of the code provides, among other things, that "an order affecting a substantial right made in a special proceeding * * * is a final order which may be vacated, modified, or reversed, as provided in this title." Section 582 provides for a review in the supreme court of judgments and final orders. We have frequently held that this is a "special proceeding." The judgment in this case denied the prayer of the widow to set apart a part of the real estate of her deceased husband as the family homestead, and refused to order the sale of the premises in parcels as she prayed. There can be no doubt that the right of the widow and children to have the extent of the homestead determined and to have it set apart before the sale, or to have the land sold in parcels or in such a manner as best to preserve the homestead interest, or to show that the amount of money needed to pay debts is less than alleged are substantial rights. An adverse decision and order based thereon is a final order reviewable upon appeal.

The administrator bases his contention upon the authority of *Miller v. Hanna*, 89 Neb. 224. In that case a husband who was administrator of the estate of his deceased wife procured a license to sell a portion of the real estate, "subject to the life estate of the surviving husband." The heir of the wife, who had no notice of the proceedings until after the order was made, filed objections to the

confirmation, which were overruled, and from the order confirming the sale he appealed. The court held that the estate which the husband took at the death of the wife was liable for her debts, and that "it follows that the judge of the district court *had no power to make the order* complained of, because the effect of that order was to deprive the remainderman of all interest in the estate and declare that the life estate of the husband was not subject to the payment of the debts of his deceased wife." It was also held that, in line with former holdings, an application for a license to sell real estate to pay debts of a deceased person is "a special proceeding." In that case it will be seen that the judge of the district court had no power under the statute to authorize a sale of that which he ordered sold. This lack of power extended throughout the proceedings, and, like any other lack of jurisdiction, the question might be raised at any time. *Miller v. Hanna,* therefore, is not in conflict with previous decisions to the effect that an order granting or refusing a license is reviewable. The motion to dismiss is overruled. *Poessnecker v. Entenmann, supra.*

MOTION TO DISMISS OVERRULED.

JENNIE E. COUNSELMAN ET AL., APPELLEES, V. JOHN B. SAMUELS ET AL., APPELLANTS.

FILED FEBRUARY 11, 1913. No. 16,981.

1. **Taxation:** TAX SALE: TIME FOR REDEMPTION. Where the last day of the two-year statutory period to redeem land sold by a county treasurer for delinquent taxes falls on Sunday, the owner's right of redemption exists during all of the next day.

2. ———: ———: SUIT TO REDEEM: PETITION. In a petition to redeem land sold by a county treasurer at an administrative tax sale, an allegation that plaintiff is the owner of the land is, in that respect, sufficient to resist a demurrer.

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

Hoagland & Hoagland, for appellants.

Wilcox & Halligan, contra.

ROSE, J.

This is a suit to cancel a treasurer's tax deed to a quarter-section of land in Lincoln county and to permit plaintiffs as owners to redeem the land from the tax lien. Defendants claim title by virtue of the tax deed. The trial court granted the prayer of plaintiffs' petition, and defendants have appealed.

Plaintiffs plead, and here assert, among other grounds for relief, that the tax deed is void, because, under the administrative proceedings, they were not given the full time allowed by law to redeem their land. The point is that, the last day of the usual two-year period having been Sunday, plaintiffs were entitled to, but were not given, all of the following Monday to exercise their right of redemption. On this question the facts and law seem to be with plaintiffs. The county treasurer sold the land at private sale August 19, 1904. He so certified, and in his certificate stated that the time for redemption would expire August 20, 1906. The purchaser in his published notice gave the same dates, and stated that he would apply for a deed August 20, 1906, if the premises were not redeemed in the meantime. The treasurer's tax deed was in fact issued August 20, 1906. August 19, 1906, was Sunday.

Were plaintiffs legally entitled to all of the next day, Monday, August 20, to redeem? If they were, the treasurer's deed was void, because, in that event, it was issued pursuant to an insufficient notice before the expiration of the time for redemption. Const., art. IX, sec. 3; Comp. St. 1911, ch. 77, art. I, sec. 212. Where a purchaser's notice to redeem from a treasurer's administrative tax sale fixes a specific date within the statutory period for redemption, the treasurer's deed, if executed on the date

so named, is void. *Hollenback v. Ess,* 31 Kan. 87; *Gage v. Bailey,* 100 Ill. 530; *Benefield v. Albert,* 132 Ill. 665; *Wisner v. Chamberlin,* 117 Ill. 568. A text-writer on taxation says: "When the last day of the statutory period of redemption falls on Sunday, then, either by customary law, or under a statute directing that that day shall be excluded from the computation, the owner will have the whole of the following day in which to redeem. If, therefore, the day named in the notice, as the date when the right of redemption will expire, should prove to be Sunday, though it is correctly calculated to the end of the statutory period in ordinary cases, the notice does not give the owner the full time for redemption to which he is legally entitled, and for that reason it is insufficient." Black, Tax Titles (2d ed.) sec. 334. This seems to be the correct rule. *Brophy v. Harding,* 137 Ill. 621; *Gage v. Davis,* 129 Ill. 236. Section 895 of the code provides: "The time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded." It has recently been held that this statutory provision for computing time is applicable alike to the construction of statutes and to matters of procedure and is controlling, whether the time to be taken into account be days, months or years. *Johnston v. New Omaha T.-H. E. L. Co.,* 86 Neb. 165. According to this interpretation of the code, plaintiffs had all day Monday, August 20, 1906, to redeem their land from the tax lien. The notice having fixed a time before the end of that day, and the deed having been issued before the statutory period expired, plaintiffs' right to redeem was not cut off.

The sufficiency of the petition is challenged because plaintiffs' ownership of the land is pleaded in general terms only. The argument on this point is answered by a former decision. *Hill v. Chamberlain,* 91 Neb. 610.

The manner of proving plaintiffs' title is questioned, but the opinion is unanimous that in this respect sufficient proof was properly admitted. Other questions need not

be considered, since the right of plaintiffs to redeem was conclusively established.

AFFIRMED.

REESE, C. J., not sitting.

NEMAHA COUNTY, APPELLEE, V. RICHARDSON COUNTY; ARTHUR ALLEN, EXECUTOR, APPELLANT.

FILED FEBRUARY 11, 1913. No. 16,996.

1. **Taxation: PLACE OF ASSESSMENT: POWER OF STATE BOARD OF EQUALIZATION.** By section 10941, Ann. St. 1909, the legislature has conferred upon the state board of equalization and assessment, in any case where the statute is silent or uncertain as to the proper place to list personal property for taxation, the same power to fix the proper place as is possessed by the legislature itself.

2. ———: ———: ———. And, it being within the power of the legislature to provide, where the residence and personal property of one under guardianship are both in one county and the residence of the guardian in another, in which of the two counties the property should be listed, where it fails to so provide, the state board of equalization and assessment has full power to act; and when it does so act its determination of the question has all the force and effect of a statute.

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

Quackenbush & Neal and *Amos E. Gantt,* for appellant.

Lambert & McCarty, contra.

FAWCETT, J.

On October 17, 1908, Charles Mason, a resident of the village of Stella, in Richardson county, was adjudged an incompetent person, and his son-in-law, Arthur Allen, a resident of Auburn, in Nemaha county, was appointed his guardian. Allen qualified as such, and filed an inventory

and appraisement of the property of his ward situated in Richardson county, which consisted of a lot and dwelling-house valued at $2,000, and personal property consisting of moneys and promissory notes, all of which were on deposit for safe-keeping in the State Bank of Stella, and were of the appraised value of $9,544.57. An inventory of the real estate was later filed by Mr. Allen showing that his ward was the owner of 872 acres of land in Nemaha county, valued at $84,000. It is shown that there was no personal property in Nemaha county. For the year 1908 the personal property of Mr. Mason was listed by himself with the deputy assessor of Muddy township in Richardson county. The village of Stella, where Mr. Mason had his domicile, was in Muddy township. The guardian has never removed any of the personal property from the State Bank of Stella, but has at all times permitted the same to remain there. The guardian listed the personal property for taxation for 1909 with the deputy assessor of Muddy township, the same as his ward had done when acting for himself. The county assessor of Nemaha county claims the right to assess the personal property in that county, and made a demand upon the guardian to so list the same. Thereupon the guardian filed in the county court of Richardson county a petition praying for instruction and guidance as to his duties in the matter. The county court set a day for hearing, of which due notice was given to the chairman of the board of commissioners and to the county assessor of Nemaha county. Nemaha county entered a special appearance, challenging the jurisdiction of the court over the persons of said parties and the subject matter of the action. The special appearance was overruled, and the guardian instructed that it was his duty to list the personal property of his ward in Muddy township, Richardson county. Thereupon the county assessor of Nemaha county filed an application with the state board of equalization and assessment requesting a decision of that board as to the proper place for the listing and assessment of the personal

property involved, and gave due notice to the guardian and to the county assessor of Richardson county of such application. On August 9, 1909, there appeared before the state board of equalization and assessment "J. H. Lambert, county attorney, C. E Blessing, county assessor, and others representing the county of Nemaha, Nebraska, and A. E. Gantt, county attorney, and N. B. Judd, county assessor, and others representing the county of Richardson, Nebraska, in the matter of the assessment of the property of Charles Mason." There was present the full board. A copy of the findings of the county court of Richardson county, touching the request of Arthur Allen, guardian, for instructions, in relation to the listing of the personal property of his ward for taxation, was filed with the board, and it was agreed by the parties interested that such findings correctly stated the facts in the case. The substance of the findings has already been given above. On the next day, August 10, 1909, the state board met in regular session, all of the members being present, and upon further consideration of the matter the board decided that the property should be assessed in Richardson county. From this action of the state board the county of Nemaha and C. E. Blessing, its county assessor, prosecuted error proceedings to the district court for Lancaster county. Upon hearing in that court, the court found there was error in the order of the state board of equalization and assessment, "in this: that the personal property of the said Charles Mason should have been ordered assessed at the home of his guardian, in Auburn, Nemaha county, and not at the place of the ward's domicile, at Stella, in Richardson county." The order of the state board of equalization and assessment was reversed, and the personal property ordered to be assessed in accordance with the above finding. A motion for a new trial was overruled, and defendant Allen, executor, appealed to this court. (Prior to the filing of the petition in error in the district court, Mr. Mason had departed this life, and Mr. Allen had been appointed executor of his estate.)

We think it must be conceded that the legislature may fix the situs of personal property for purposes of taxation. Section 10941, Ann. St. 1909, provides: "In all questions that may arise under this chapter as to the proper place to list personal property, or when the same cannot be listed as stated in this chapter, if between several places in the same county, the place for listing and assessing shall be determined and fixed by the county board; and when between different counties, by the state board of equalization and assessment; and when fixed in either case, shall be as binding as if fixed in this chapter."

It was evidently with this statute in mind that the county assessor of Nemaha county filed with the state board of equalization and assessment his request for it to determine this question. The state board, upon due notice to all parties interested, and after a full hearing of the matter, with all parties represented by counsel, decided the question. In doing so it acted within the powers conferred upon it by the section of the statute above quoted. The words, "and when fixed in either case, shall be as binding as if fixed in this chapter," have a clear and distinct reference to the first two clauses in the section. The power thus conferred upon the state board is plenary in any case where the statute is silent or uncertain as to the proper place to list personal property for taxation. The board is given the same power to "fix" the proper place as is possessed by the legislature itself. It cannot be doubted that the legislature might have provided, where the residence and personal property of one under guardianship are both in one county and the residence of the guardian in another, in which of the two counties the property should be listed. Where it fails to so provide, the state board has full power to act; and when it does so act its determination of the question has all the force and effect of a statute. *Diemer & Guilfoil v. Grant County,* 76 Neb. 78, so far as it goes, is in harmony herewith.

Without deciding the question of the jurisdiction of the

courts to review, by error or appeal, a decision by the state board of equalization and assessment, when acting under the statute in question, we hold that the district court erred in reversing the action of the board in this case. The judgment is therefore reversed, and the error proceedings from the state board of equalization and assessment dismissed at costs of plaintiff in error therein.

REVERSED AND DISMISSED.

EUGENE DELATOUR, APPELLEE, V. HUGO H. WENDT, APPELLANT.

FILED FEBRUARY 11, 1913. No. 17,014.

1. **Taxation: FORECLOSURE OF LIEN: PROCESS: NAMES.** Defendant brought suit to foreclose a tax sale certificate upon lands standing of record in the true name of the owner, John E. Toumey. Service was attempted by publication. The petition named as defendant John E. "Townry," and the affidavit and published notice designated the defendant as John E. "Towrny." *Held*, That the notice was insufficient, and that the deed issued in such suit was void as against the owner, Toumey, and his grantees.

2. **Adverse Possession: ENTRY: INTENT: EVIDENCE.** Where one, claiming title to real estate by adverse possession, entered originally without color of title or claim of right, and the acts relied upon to show entry and occupation were consistent with a mere intention to trespass from time to time until interfered with by the true owner, his testimony that he intended to take possession and hold and occupy as owner, uncorroborated by acts necessarily indicating such intention, is not sufficient to require a finding in his favor. *Knight v. Denman*, 64 Neb. 814.

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

Morning & Ledwith, for appellant.

Hoagland & Hoagland and *L. O. Pfeiffer*, *contra.*

FAWCETT, J.

From a decree of the district court for Deuel county, quieting title in plaintiff to the south half of the northwest quarter and lots 3 and 4 in section 4-14-42, in that county, defendant appeals.

The pleadings and the evidence show substantially the following facts: One John E. Toumey entered the land as a homestead, and under date of May 21, 1889, was granted a patent therefor. The numerical index in the office of the county clerk shows that on July 1, 1889, Toumey, by the same name set out in his patent, executed a mortgage to the Davidson Investment Company, and on July 10, 1889, he, by the same name, executed another mortgage to one J. W. McMenamy. A copy of the investment company mortgage, introduced in evidence, shows it to have been executed under the name above set out. The copy of the mortgage to McMenamy gives the name of the mortgagor as John E. Tourney. That the true name was Toumey, as set out in the patent and in the numerical index, is not disputed. After obtaining his patent, Toumey, or some one for him, continued to pay the taxes upon the land down to and including the year 1895, after which date the payment of taxes ceased. Some time after executing the mortgages referred to, the exact time not being shown, Toumey removed from the state of Nebraska to the state of Michigan, and in 1909 conveyed the lands by quitclaim deed to plaintiff. Defendant bases his claim for a reversal of the judgment below upon two grounds: (1) that he obtained title to the land under sheriff's deed in a suit instituted by him in 1903 to foreclose a tax lien under a tax sale certificate obtained by him on March 7, 1901; and (2) adverse possession.

In the tax foreclosure suit, relied upon by defendant, the defendants named were J. W. McNenanny, John E. Townry, Mrs. John E. Townry, and the Dandson Investment Company. The service was by publication. In the affidavit for such service the defendants are named as

John E. Towrny, Mrs. John E. Towrny, J. W. McNenanny and the Davidson Investment Company. The published notice gave the names as stated in the affidavit. The decree of foreclosure is entitled Hugo H. Wendt, Plaintiff, vs. J. W. McNenny et al., Defendants. It nowhere refers to any of the other defendants by name. The order of sale issued to the sheriff follows the same course, naming personally but one defendant, and naming him as J. W. McNenanny. The appraisal names only the defendant "McNenanny" and concludes with the recital: "The interest of.....defendant, we value at one hundred sixty dollars." The notice of sheriff's sale names only "McNenamny." The return of the order of sale makes no reference to any of the defendants by name except in the title of the case in the indorsement upon the return, which refers only to defendant "McNenamny." The order of confirmation refers only to defendant "McNenamny." Upon this record the district court properly found: "That in said tax foreclosure proceedings no service of summons of notice of the pendency of said action was had upon the owner of the record title thereof, to wit, John E. Toumey, and by reason of said fact said tax foreclosure proceedings were void, and conveyed no title to Wendt." It requires too great a stretch of the rule of *idem sonans* to hold that either "Townry" or "Towrny" is the same as Toumey.

Upon the second point, viz., the statute of limitations, the evidence shows that in the spring of 1893 defendant wrote to John E. Toumey in Michigan with a view to renting the land in controversy. Counsel for defendant in his brief states: "Receiving no reply, and learning that the land was mortgaged for all or more than it was worth, and that the taxes were unpaid, he concluded that Toumey had abandoned the land. Wendt thereupon, and on or about March 1, 1893, concluded to enter upon this land and take and retain adverse possession until he thereby acquired title, and possession was at that time taken by him for that purpose." It appears that before Toumey

left Nebraska he had broken up about ten acres of the land. In the summer of 1893 defendant raised a crop of wheat upon this ten acres, and in 1894 a crop of millet. No further attempt was made to cultivate the ten acres until about ten years later, nor did defendant offer to pay any of the taxes upon the land, which he says he learned in 1893 were unpaid, until March 7, 1901, when he called at the county treasurer's office and learned that the taxes for the years 1896 to 1899, inclusive, were delinquent, that the land had been offered at public tax sale, but not sold for want of bidders, and that it was then subject to private tax sale. He thereupon paid to the treasurer the delinquent taxes due, and the treasurer sold him the land at private tax sale, and executed to him a certificate of purchase therefor. He paid the subsequent taxes, and on June 16, 1903, commenced the suit to foreclose his tax lien, hereinbefore referred to. Defendant's contention now is that he had ten years of continuous and adverse possession at the time he brought his suit to foreclose his tax lien, and that his purpose in foreclosing the lien was to obtain a marketable title. It is not claimed that at the time he purchased the tax sale certificate he had had ten years' possesssion. If his purpose in foreclosing his tax lien after, as claimed, he had become the owner, by reason of ten years' adverse possession, was simply to secure a marketable title, it is hard to understand why, when he appears to have been compelled to pay $275 at the sheriff's sale, which was $90.48 in excess of the total amount due for taxes and costs of sale, he paid the amount of the surplus into court, and has never made any attempt to recover the same. If he was then the owner of the land, he was himself entitled to any surplus. The fact that he was the bidder at the sale is immaterial. If he were the owner of the property, and John Smith had purchased the land at the sheriff's sale, he, defendant, as the owner of the land, would have been entitled to the surplus, for, if he were the owner of the land, there could be no superior right in any one else. The fact, therefore, that he paid

the surplus into court, and has permitted it to there remain, indicates quite strongly that at that time he was not relying upon his title by adverse possession, but upon his title by purchase at that sale, and when he paid the surplus into court it must have been done in recognition of a superior title in Toumey.

But, be that as it may, the district court was right in finding against defendant generally, for the reason that the evidence does not sustain his claim of adverse possession. The record shows that at the time he claims to have entered upon the land he was an unmarried man living with his father upon an adjoining tract; that he had some cattle which were running with his father's stock; that in 1894 he entered a homestead about five miles distant which he occupied during the full period of five years to entitle him to a patent therefor; that during all of that time his stock continued to run with his father's, he going down occasionally to look after it. No attempt was made to fence the land until after he had obtained title, as he thought, under his tax foreclosure proceeding; so that during all of the ten years, when he claims he was holding the land adversely, it was open, grazing land, upon which there were neither buildings nor fences. He contends that during those ten years he sometimes cut hay upon the land; but the evidence shows that it was the custom of the residents of that section of the country to cut hay upon any of the wild and vacant land in that vicinity. He also claims that during those ten years he kept every one else from grazing cattle upon the land in controversy. Upon this point the evidence shows that there was a good deal of land in that neighborhood, some of which was owned by the railroad company and some by nonresidents, lying open; that by a sort of gentlemen's agreement among the residents these open lands were parceled out and each resident was expected to herd his cattle upon the land within his allotment. We think the evidence fairly shows that in telling others to keep their cattle off of this land defendant was doing so by virtue of this

neighborhood agreement, and not under any claim of ownership. Without pursuing the matter further, we think it clearly appears that defendant never took or held possession of this land during any time within the ten years referred to in any such manner as would start the statute of limitations running adversely to the owner thereof.

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

AFFIRMED.

GUSTAV DRINGMAN ET AL., APPELLEES, V. JOHN KEITH, APPELLANT.

FILED FEBRUARY 11, 1913. No. 17,016.

1. **Former Decision Followed.** Our former opinion in this case, reported in 86 Neb. 476, as to the questions of law involved, adhered to.
2. **Adverse Possession: EVIDENCE.** Evidence examined, and *held* clearly sufficient to sustain the judgment of the district court.
3. ———: **CHARACTER OF POSSESSION.** The possession of defendant set out in the opinion *held* not adverse.

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

Wilcox & Halligan, for appellant.

Hoagland & Hoagland, contra.

FAWCETT, J.

This is a second appeal. A very complete statement of the case will be found in our former opinion, reported in 86 Neb. 476. The case was again tried in the district court, and from a judgment in favor of plaintiffs defendant appeals.

The questions of law involved are settled by our former

opinion. Some of the members of this court, at the former hearing, thought that judgment should then be directed in favor of plaintiffs, but a majority thought, as stated by LETTON, J., in the opinion, that possibly all of the evidence available by the parties had not been introduced; and, while we all thought there was a slight preponderance of evidence in favor of the plaintiffs, the preponderance was so slight as to cause the court to hesitate to set aside the deed upon which defendant relies. The case was therefore remanded for further proceedings upon the ground, as stated: "It may be possible for the defendant to furnish additional evidence with respect to the conversations had by the deputy marshal with Mrs. Dringman when she testifies that she was unduly influenced and coerced. For this reason, the case will be reversed and remanded for further proceedings, instead of rendering a decree upon the facts in evidence." When the case was retried, the deposition of the deputy marshal was taken, and is in the record before us. This deposition removes all doubt from our minds, and leaves us all agreed that upon the evidence now before us the execution of the deed in controversy by Mrs. Dringman was obtained under duress.

It is urged by defendant that on the retrial of the case he introduced the testimony of himself and two witnesses to show that he was in possession of the land from the time the deed was given in 1899, and that, although the plaintiffs were both in court and testified on the trial, the testimony of defendant and his two witnesses was not controverted by them. In other words, the contention is that defendant, under the deed in controversy, took possession of all of the land except a few acres upon which the house and a small corral were located, "not to exceed an acre or two," and that, such being the fact, the four years' statute of limitations had run against the plaintiffs. An examination of the testimony of defendant and his two witnesses shows, very clearly we think, that defendant never took possession of any portion of the land under the deed. The evidence shows that for many years prior to 1899 the

land, of which defendant now claims he took possession under the deed, was inclosed in a large pasture of some 700 or 800 acres, belonging to defendant, and that the possession he has had and the use he has made of the land in controversy since is not different from but precisely the same as for a number of years prior to the execution of the deed. That the former possession was not adverse to, but by permission of, the plaintiffs is not disputed; and, if the possession and use continued the same after as before the execution of the deed, we think it should be held that, so long as the plaintiffs continued to occupy the dwelling-house and corral, the use of the grazing land, which constituted a part of their homestead, was still by their permission, and not adverse.

AFFIRMED.

L. A. WILSON, APPELLEE, V. ANNA J. WILSON, APPELLANT.

FILED FEBRUARY 11, 1913. No. 17,794.

The evidence examined, but not set out in the opinion for the reasons therein stated, *held* sufficient to sustain the findings and decree of the district court.

APPEAL from the district court for Gosper county: ERNEST B. PERRY, JUDGE. *Affirmed.*

R. D. Stearns, for appellant.

Ritchie & Wolff, contra.

FAWCETT, J.

There was submitted with the case a motion by defendant to strike from the files the "rejoinder briefs" filed by plaintiff without leave of court. The motion was well taken, and is sustained.

This is a second appeal. Our former opinion is reported

in 89 Neb. 749. For a full statement of the controversy between these unhappy parties, reference is made to that opinion. A decree in favor of plaintiff was reversed at that time, for the reason that the trial court had evidently acted upon the theory that extreme cruelty is not a defense to a charge of adultery, and therefore excluded evidence offered by defendant to sustain a charge of extreme cruelty, set out in her cross-petition. Upon a retrial, and before another district judge, the decree was again in favor of plaintiff and against the defendant, both upon the charge set out in plaintiff's petition and the countercharge set out in defendant's cross-petition, and defendant is again asking relief at our hands.

It would serve no good purpose to the public, and assuredly would not be of any benefit to the parties, to even briefly recount the facts as disclosed by the present record. We deem it sufficient to say that defendant upon the second hearing was given a full opportunity to introduce all of the evidence offered by her at the former trial and any additional evidence she desired. After carefully weighing the evidence, we do not see how we can interfere. The findings and decree of the district court are fully sustained upon every point.

The controversy between the parties as to the property rights of defendant, and as to the liability of plaintiff as guardian of defendant during the time she was his ward, are now being litigated, and will be fully determined in that litigation. There is, therefore, no necessity of a reference to that controversy here.

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

AFFIRMED.

WILLIAM D. LASHMETT, APPELLEE, V. JOHN PRALL; WILLIAM J. PRALL, INTERVENER, ET AL., APPELLANTS.

FILED FEBRUARY 11, 1913. No. 17,013.

1. **Action, Character of:** PRACTICE. Under our code practice this court must look to the substance of the issue presented and tried in the lower court to determine the character of the action as to whether it is legal or equitable in its nature. Wholesome rules of practice which guard the essential rights of the parties must be enforced, but technicalities which tend to defeat justice will not be regarded.

2. ———: ISSUES. When no issue is taken on the essential facts answered by a garnishee, and a petition in intervention is filed by leave of court and without objection, in which the legal title of the fund in the hands of the garnishee is shown to be in the intervener, and the plaintiff relies upon an equitable right to the fund, the issue so presented and tried is equitable in its nature and upon appeal will be so regarded.

3. **Pleading and Proof.** When one party alleges that a note in controversy has not been paid, and no objection is made to the form of the allegation and description of the note, and no plea of payment, and proof is admitted without objection showing the ownership of the note and that it is unpaid, those facts so far as relevant must be considered as established in determining the issues presented.

4. **Fraudulent Conveyances:** ACTION: SET-OFF. *Held*, That under the law, as stated in *Lashmett v. Prall*, 2 Neb. (Unof.) 284, the judgment in the case at bar cannot be sustained for the reasons there given.

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

Cannon, Ferris, Swan & Lally, W. H. Thompson and *Guy Laverty*, for appellants.

E. P. Clements, C. I. Bragg and *H. A. Robbins, contra.*

SEDGWICK, J.

In October, 1896, this plaintiff, William D. Lashmett,

recovered a judgment in the district court for Valley county against John Prall in an action for damages in the sum of $1,600 and costs. Afterwards a transcript of the judgment was filed and docketed in the office of the clerk of the district court for Loup county, and in January, 1897, the plaintiff began an action in the district court for the last named county to set aside a certain deed of land in that county made by the said John Prall and wife to his son, William J. Prall, this plaintiff, and another son. In that action the defendant John Prall answered, denying that he was the owner of the lands in controversy, and alleging that the deed to his sons was in good faith, and alleging as a second defense that the plaintiff in that action was indebted to him upon a promissory note in a sum larger than the amount of the plaintiff's judgment, and asking that an account be taken and the amount due him upon the note offset against the judgment which the plaintiff was asking to enforce. The trial court found in favor of the plaintiff and entered a judgment setting aside the conveyance of the tract of land to this intervener, William J. Prall, and subjecting the same to the lien of the judgment, and also found that there was nothing due on the said note and that John Prall was not the holder thereof in good faith. Upon appeal to this court the judgment was reversed and the cause dismissed. 2 Neb. (Unof.) 284. Afterwards the land involved in that litigation was sold and the purchase price paid into the Farmers State Bank of Burwell, Nebraska. The said judgment having been revived and execution issued and returned thereon unsatisfied, the plaintiff caused the bank to be summoned as a garnishee. The garnishee by its president appeared and answered, and by leave of court its answer was reduced to writing and filed in the case. The answer disclosed the fact of the sale of the land and that the purchase price was in the bank, and alleged that the garnishee had been informed that the land and the proceeds thereof belonged to this intervener, William J. Prall. The answer also alleged the former proceedings above stated and the

action of this court thereon, and suggested to the court that the garnishee had been advised by counsel that those proceedings constituted a complete bar to the plaintiff's lien. William J. Prall, by leave of court, filed his petition in intervention, in which he alleged the deed from John Prall and wife to him, conveying the land in question, and other matters by reason of which he alleged that he was entitled to the money in the hands of the garnishee. The plaintiff filed a general denial to this pleading in intervention. The district court found the issue in favor of the plaintiff and ordered the garnishee to pay the money into court to be applied on plaintiff's judgment, and the intervener and garnishee have appealed.

The first question to be determined is as to the nature of the action that we are called upon to review. Under the code practice, the court must look to the substance of the issue presented and tried to determine the character of the action as to whether it is legal or equitable in its nature. The court must enforce wholesome rules of practice which guard the essential rights of the parties, but technicalities that tend to defeat justice are not so much regarded as formerly. If the answer of a garnishee is unsatisfactory to the plaintiff he may take issue thereon, and the statute amply provides for making up and filing such issue. In this case the answer of the garnishee so far as it alleged the facts upon which the liability depends is not controverted. The intervener, William J. Prall, alleged that he was the owner of the land and therefore entitled to the fund in controversy. The plaintiff denied his allegation and admitted that the title to the land was in the intervener, but still claimed that the intervener was not in equity the owner of the land and therefore not entitled to the fund. The issue then was entirely between the plaintiff and the intervener and was in its nature an equitable issue. The action now must be regarded as an action in equity.

The intervener in his petition alleged that the note held by John Prall against the plaintiff had not been paid, nor

any part of it. The allegation was incomplete and was subject to motion. No objection, however, was made to the petition in that regard. The plaintiff in his reply did not allege payment of the note, and witness for the intervener was allowed to testify without objection that the note was still owned by John Prall and was wholly unpaid. It would seem that the same issues were presented that were discussed in *Lashmett v. Prall,* 2 Neb. (Unof.) 284. In that case, referring to this same note, it was held: "The indorsee of negotiable paper before due and without notice of defenses, as collateral security for an antecedent debt, is a *bona fide* holder thereof for value within the meaning of the law merchant." The ownership of the note and liability of the plaintiff thereon were discussed quite at large in the opinion, and it was concluded that John Prall was the owner of the note, and that the plaintiff was liable thereon in an amount larger than the amount of the judgment. However, in referring to the contention that there was no liability on the note, it was said in the opinion that the trial court did not "determine especially or otherwise which of these two versions of the interview is the more accurate." From the transcript in this record of the judgment then entered by the trial court this statement in the opinion seems to have been a mistake. The principal question then presented was as to the correctness of the judgment setting aside the conveyances of the land, and the findings of the trial court as to liability on the note were reversed as well as the judgment complained of. If for these and other reasons it might be thought that the judgment of this court then entered should not be regarded as an adjudication of the liability upon the note, it still must be held upon the evidence and pleadings in the case at bar, as above stated, that the note is unpaid and is a valid claim in favor of John Prall and against this plaintiff. There was no plea of the statute of limitations, and, if there were, it would not seem equitable to allow the plaintiff to delay enforcement of his judgment until the five years' limita-

tion had elapsed and then plead the statute against the note, when it had been held that he could not enforce his judgment in an equitable proceeding without paying this note. Equity follows the law, and the statute provides that "when cross-demands have existed * * * the two demands must be deemed compensated, so far as they equal each other." Code, sec. 106. It follows that under the holding in that case this judgment cannot be sustained. The law was there stated thus: "To an action by a judgment creditor to set aside conveyances alleged to have been made in fraud of the judgment, it is a defense that the plaintiff is indebted, upon simple contract, to the judgment debtor in an amount equal to the judgment." It was held that, while the plaintiff was indebted to John Prall in an amount larger than the judgment, he could not maintain an action in equity to enforce that judgment. The reasons are stated in the opinion in the case referred to and it is not necessary to repeat them here.

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

REVERSED AND DISMISSED.

EMMA PULVER, APPELLEE, V. KATE CONNELLY, APPELLANT.

FILED FEBRUARY 11, 1913. No. 17,021.

1. **Mortgages: LIFE ESTATE IN HOMESTEAD.** The life estate of the surviving spouse in the homestead may be mortgaged, and the purchaser upon foreclosure of the mortgage will take the life estate.

2. **———: AFTER-ACQUIRED ESTATE.** If a mortgage deed purports to convey the whole property, an after-acquired interest of the mortgagor will accrue to the title conveyed by the mortgage. This includes an interest in real estate which descends to the mother upon the death of her son. No action of court is necessary to vest such title in the mother. The law vests the title immediately upon the death of the son.

3. **———: CONSIDERATION.** An indebtedness secured by a chattel mortgage is sufficient consideration for a mortgage of land.

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

Hoagland & Hoagland, for appellant.

Wilcox & Halligan, contra.

SEDGWICK, J.

The defendant, Kate Connelly, is the widow of James Connelly, deceased, and the other defendants are their children. Prior to the death of James Connelly the land in question was the homestead of the family upon which they resided. After his death the defendant Kate Connelly executed and delivered to the plaintiff the real estate mortgage upon said land, which mortgage this action was brought to foreclose. The trial court entered a decree of foreclosure, and the defendant has appealed.

The title to the land was held in the name of James Connelly, and at the time of his death there were eight children. After his death and after the execution of the mortgage one of the children died. The trial court held that the one-eighth interest of the deceased child descended to his mother, and that the mother had a life estate in the real estate, and ordered that the life estate and the one-eighth interest be sold to pay the mortgage. The decree was right. The homestead life estate can be mortgaged and the purchaser under the decree will acquire the life estate. *Nebraska Loan & Trust Co. v. Smassall,* 38 Neb. 516.

The mother inherited the right of the deceased child. This interest descended to her by operation of law. There was no necessity of any decree of the court for that purpose. The probate court would have no jurisdiction of such matter, and the constitution forbids that court to try title to real estate. When a deed purports to convey the whole title, an after-acquired interest of the grantor "shall accrue to the benefit of the grantee." Comp. St. 1911, ch. 73, sec. 51.

The real estate mortgage was given in consideration of a prior chattel mortgage between the same parties. This prior indebtedness and the surrender of the deed was sufficient consideration for the mortgage. The suggestion that the chattel mortgage was not released of record is immaterial in this case. The statute provides a method of compelling such release and a penalty for refusing to release a chattel mortgage of record upon demand duly made. There is no allegation of demand nor evidence of refusal to release in this case.

The judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

MARY E. MCNAMARA, APPELLEE, V. WILLIAM C. MCNAMARA, APPELLANT.

FILED FEBRUARY 11, 1913. No. 17,667.

1. **Divorce:** CONDONATION. Condonation of acts of cruelty by the husband against the wife is conditional upon subsequent good conduct, and cannot constitute a defense in an action for divorce if the husband is guilty of cruelty after the alleged condonation.
2. **———:** EXTREME CRUELTY. A false and malicious accusation of adultery by a husband against his wife is cruelty, and if, knowing it to be wholly unfounded, the husband wilfully makes such accusation, and is guilty of other acts of cruelty while her action for divorce is pending, such conduct on his part will be considered as aggravating former acts of cruelty relied upon for a divorce.
3. **Appeal:** EQUITY: TRIAL DE NOVO. In an action in equity this court, upon appeal, must try the case *de novo* upon the evidence in the record. A decree of divorce will be affirmed if a cause of action alleged in the petition is supported by the evidence, although the trial court based the decree upon another alleged cause of action not established by the evidence.
4. **Evidence** found to support the decree of divorce.
5. **Divorce:** MODIFICATION OF DECREE. Decree for alimony and custody and support of children modified for reasons stated in the opinion.

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

Alfred Pizey and *J. A. Douglas,* for appellant.

R. E. Evans, M. F. Harrington and *D. H. Sullivan, contra.*

SEDGWICK, J.

The plaintiff and defendant were married in the year 1900. The plaintiff began this action in the district court for Dakota county in the year 1907 to obtain a divorce and alimony. The ground alleged in her petition was extreme cruelty. The defendant denied all allegations of cruelty. Upon motion and notice the trial court ordered the defendant to pay certain sums as suit money and temporary alimony, and, the defendant having neglected to make such payments, a further order was made that, unless the defendant comply with the orders of the court in that regard, his answer should be stricken out and he should not be allowed to defend the action. Pursuant to this order the answer was stricken out and a decree entered in favor of the plaintiff, which, upon appeal to this court, was reversed upon the ground that the defendant could not be deprived of his right to defend in an action for divorce from the bonds of matrimony. 86 Neb. 631. The case was remanded to the trial court for further proceedings, and the plaintiff amended her petition, alleging acts of cruelty while the action was pending, and afterwards, upon leave of court, filed a supplemental petition, in which she alleged a cause of action against the defendant upon the ground of adultery. The defendant answered, and upon trial the court entered a decree of divorce in favor of the plaintiff and a judgment for alimony, and gave the care and custody of the children to the plaintiff, and made a further allowance against the defendant for the support of the children. The defendant has appealed.

The defendant insists that the decree of divorce in favor of the plaintiff is not supported by sufficient evidence; that the judgment for alimony is excessive; and that the order of the court in regard to the care and custody of the children is not warranted by the evidence. The trial court found that the defendant was guilty of extreme cruelty as alleged in the original petition and in the amended petition, with special findings of fact constituting the cruelty. The court further found that all of those acts of cruelty had been condoned by the plaintiff before the commencement of the action. The court also found that at a time after this action was begun the defendant was guilty of extreme cruelty in making unjustifiable charges against the plaintiff, and that the defendant was also guilty of extreme cruelty in that he failed, refused and neglected to maintain or support the plaintiff after this action was begun. The court also found that the defendant during the year before the action was begun was guilty of adultery as charged in the supplemental petition.

The record is very large. Some 15 witnesses were examined on the part of the plaintiff, and more than 30 on the part of the defendant. Under the statute we are required to examine this evidence independently of the finding of the trial court and determine anew the issues presented by the parties. In the condition of this record we find this duty to be a very difficult one. It is impossible to feel that confidence in the result of our investigation of the evidence which is desirable in all judicial proceedings. A large part of the defendant's brief is devoted to a discussion of the evidence tending to establish the guilt of the defendant of the crime of adultery charged against him, and it is most earnestly insisted that the evidence fails to support the finding of the trial court upon that issue. There is no direct evidence of the act charged against the defendant, except the testimony of the woman with whom it is alleged the act was committed. She testifies that she was then about 17 years of age, and that

about the same time she also had intercourse with a young man whom she afterwards married, and who she thinks is the father of her child begotton at that time. It would seem that since her marriage she has led a correct life, and her acquaintances vouch for her statement that she has become a respectable woman. There is also the evidence of three other young girls, who testify to improper conduct on the part of the defendant. The evidence of one of these impresses us as being candid and truthful, but she could not positively identify the defendant as the one whom she charges with the improper conduct, and the act which she charges against him was not of such a serious character. The defendant is a man past 50 years of age, and all the evidence in the record that tends in any way to impeach his character relates to a very short period of his life, not exceeding a year and a half or two years. He denies positively, and apparently with frankness, the evidence of these witnesses against him. Very many of his acquaintances, who have known him for many years, testify to his correct conduct and mode of life. It seems improbable that a man who has led a correct and honorable life until past 50 years of age should for a short period abandon all sense of virtue and decency and afterwards again for several years lead an irreproachable life. However this may be, we must still consider the charge of extreme cruelty as a ground for divorce in this case.

The trial court we think was in error in finding that former acts of cruelty had been condoned by the plaintiff so that they should not be considered in determining the weight of the evidence as tending to establish the charge of cruelty. It appears that the finding of the trial court that after the action was begun the defendant was guilty of an act of cruelty against the plaintiff is established by the evidence. All the evidence shows that the plaintiff is a virtuous woman, and that she has during the whole period of their married life endeavored to perform her duty as a wife. The defendant, without any ground therefor, as he and his counsel now substantially admit, wrote

a long letter, ostensibly to his lawyer, reciting in detail accusations against his wife, reciting some of the alleged proof which he could produce showing her to have been guilty of adultery, and threatening, if the action for divorce were persisted in, to bring forward his charge against his wife as a matter of defense. This letter, though ostensibly written to his lawyer, was inclosed in an envelope addressed to his wife, and it was received by her. He says that at the same time he wrote this letter to his lawyer he also wrote one to his wife, and that they must have been exchanged by mistake; but his lawyer received no letter from him, and the court was justifiable in finding that he intentionally forwarded these accusations to his wife. This, under the circumstances, was cruelty. The trial court also found that defendant was guilty of other acts of cruelty about the time and soon after this action was begun. Under these circumstances, the defendant is not permitted to allege the condonation by his wife of a former course of cruel conduct towards her, such as is alleged in her petition. *Heist v. Heist,* 48 Neb. 794. It is urged that conduct after the action was begun cannot furnish a ground for divorce, but it has been held by courts of high authority that to falsely and maliciously charge a virtuous woman with crimes of this character, even if those charges are contained in the pleading and alleged as matter of defense, if wholly unsupported by the evidence, would be regarded by the court as cruelty, and as aggravating other charges of cruelty relied upon as ground for divorce.

In considering, therefore, the evidence in this case as establishing extreme cruelty on the part of the defendant as a ground for divorce, we should take into consideration the whole course of conduct of the defendant during their married life. We cannot attempt in the limits of an opinion of reasonable length to analyze this mass of testimony, much less to recite the testimony of the various witnesses. As we have already stated, the plaintiff at the time of the marriage was about 18 years of age, and the defendant

was 49 years of age. He had been divorced from a former wife, and was the owner and was operating a large ranch in Iowa, which he afterwards sold and purchased a ranch of about 1,000 acres in Brown county in this state. He had met with some financial difficulties on account of his former divorce and the judgment entered therein, and perhaps from other causes, and was very much occupied in his business affairs, and much of the time away from home, and apparently failed to realize the situation and necessities of his young wife, who during the seven years of their married life had borne him four children, and was deprived of the society of her former friends and acquaintances and left to her own resources for diversion, and in the care of her children. It is not necessary to find from the evidence that he used personal violence against her, or purposely or maliciously rendered her life intolerable. Carelessness and neglect, coupled with rude and boisterous behavior, and at times unkind words, with some conduct towards other women that would naturally offend a sensitive wife, if practiced through a period of years, would constitute such extreme cruelty as the law characterizes as ground for divorce. The evidence in some important particulars is conflicting and in many respects unsatisfactory. It may be that we have failed to find the truth of the matter, but upon the whole record we find that the charge of extreme cruelty against the defendant is sufficiently sustained to support the decree.

The defendant seriously complains of the amount of the judgment for alimony. The evidence is particularly conflicting and unsatisfactory as to the amount and value of the defendant's property. He still owns the ranch in Brown county of about 1,000 acres, covered by several mortgages, all of which are said by the plaintiff's counsel to be fictitious and fraudulent, except one mortgage for $10,000, which is admitted to be valid and a first lien. When this litigation was begun the plaintiff also had personal property which is valued by the witnesses as from $10,000 to $20,000. Upon this conflicting evidence the

trial court found that the value of the defendant's property, real and personal, over and above valid liens thereon, is $20,000, and after considering this evidence we would not feel that we can do better than to adopt that as a correct finding. The trial court allowed the plaintiff $5,000 permanent alimony and $1,000 for attorney's fees and expenses. The custody of the children was given to the plaintiff, and the court decreed that the defendant should pay for the support of the children the sum of $600 per year until the further order of the court. $600 per year is 6 per cent. interest on $10,000. This, if the defendant's property was available as cash, would leave the defendant $4,000 unincumbered. We think that the decree of the trial court in allowing these amounts is excessive. While the evidence is conflicting as to the value of the defendant's ranch, it is substantially agreed that it is not at present salable, or at least for the amount that the court has found it to be worth. The defendant has already incurred considerable expense in this litigation, and the evidence will not justify the conclusion with any certainty that the defendant will be able to meet these further payments required of him, even if he should use all of his property for that purpose. The allowance for the support of the children is not final. It can be enlarged or decreased by the trial court at any time, upon proper showing. We think, under the circumstances, that the amount given plaintiff is so large that there is, to say the least, no certainty that the defendant will be able to obtain in cash from his available property any considerable sum in addition to such amount. The sum allowed should, therefore, be considered in full of all demands against him. It is not clearly shown that the defendant could at the present time realize more than $14,000 on his entire property; and we think, therefore, that an allowance of $1,000 for attorney's fees and expenses and $3,000 as permanent alimony for the use of the plaintiff and $400 per annum for the children is all that this evidence will justify.

The trial court entered the following order as to the custody of the children: "That the custody of the children be and it is awarded plaintiff until further order of the court, they not to be removed from its jurisdiction; and defendant is enjoined from interfering with plaintiff in the control of the children, but shall be entitled to visit them at reasonable hours not oftener than once in two months, visits not to last more than two hours each, and to be in the presence of the sheriff in said county, or his deputy." This order can, of course, be modified at any time that necessity demands. If the defendant should improperly interfere with the children or with the plaintiff in the care of the children, the court can make such orders as are necessary for their protection. There is nothing in the evidence that we have found requiring such restrictions placed upon the defendant in regard to visiting his children.

The judgment of the district court is therefore modified. The decree for divorce is affirmed on the ground of extreme cruelty, and the defendant is required to pay to the clerk of the district court of Dakota county, within 60 days from the filing of this opinion, the sum of $1,000 for the plaintiff for her attorney's fees, suit money and expenses, and the further sum of $1,000 as permanent alimony, and the further sum of $2,000 as permanent alimony, payable as follows: $1,000 on the first of August, 1913, $1,000 on the first of February, 1914, and $400 per annum for the support of the children, payable quarterly on the 1st day of April, July, October and January of each year, first payment to be April 1, 1913, with interest on all overdue payments at 7 per cent. per annum; the said sums to be in full satisfaction of all permanent alimony, maintenance and expenses. The plaintiff's receipt may be filed with the clerk in satisfaction of this decree. The order of the district court in regard to the custody of the children is modified so as to allow the defendant to visit the children at all reasonable times, in the presence of their mother. In all other respects the order of the

district court is affirmed. The costs of this litigation are to be taxed against the defendant.

AFFIRMED AS MODIFIED.

DE ETTE RAKOW, ADMINISTRATRIX, APPELLEE, V. ROBERT J. TATE ET AL., APPELLANTS.

FILED FEBRUARY 25, 1913. No. 16,911.

1. **Quieting Title: VENUE: PROCESS.** An action, the purpose of which is to quiet the title to real estate, must be brought in the county in which the real estate is situated. Where the suit is instituted in the district court of such county, the summons may be served on the defendant in any county of the state where he may reside or be found. In such case, the court where the action is pending will have jurisdiction over both the defendant and the subject matter of the action, and summons may be issued and served upon any other necessary or proper defendant, if served anywhere within this state. It is not essential in such case that a summons be served upon any one within the county where the suit is pending.

2. **Appearance.** Where a summons is served upon a person other than the principal defendant, but who is made a party to the suit, and such person appears and by a cross-petition demands affirmative relief, the question of jurisdiction over him will not arise.

3. **Quieting Title: DISCLAIMER.** In such case the filing of a disclaimer of any interest in the real estate by the principal defendant will not defeat the jurisdiction of the court, the disclaimer not having been made in any form prior thereto.

4. ———: **CLOUD ON TITLE.** A written contract by which the plaintiff agrees to sell his real estate to the defendant for a fixed price, and which the defendant purchaser causes to be recorded in the office of the register of deeds of the county where the land is situated, casts a cloud on plaintiff's title to the land where the contract is abandoned and the record of the contract is not canceled by the person named as purchaser, and an action in equity may be maintained by the person named as vendor for the purpose of removing the cloud and quieting the title.

5. ———: ———. In such case the fact that a part of the land described in the written agreement constitutes the exempt home-

stead of the person named as vendor, and which agreement was not signed by his wife, will not defeat the right of the owner of the real estate to have the cloud removed and his title quieted.

6. **Abatement.** Where an action upon the same contract is filed in another county in this state by the defendant in the instant case as plaintiff, but in which the court acquired no jurisdiction over the person of defendant, plaintiff in this case, such action will not abate this one.

7. **Equity: RELIEF.** Where an action in equity is properly brought and the court has jurisdiction over the subject matter and all the parties to the suit, it is the duty of the court to adjudicate all questions and rights presented by the pleadings in order to do full justice to all parties before it.

8. **Quieting Title: EVIDENCE.** The evidence is examined, and it is found that the findings and decree of the district court are sustained thereby.

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

J. J. Sullivan, E. C. Strode and *M. V. Beghtol,* for appellants.

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

REESE, C. J.

This is an action by plaintiff, August G. Rakow, against defendants Robert J. Tate and the First National Bank of Fremont, Nebraska, the object and purpose of which is to quiet the title to the southwest quarter of section 14 and the southeast quarter of section 15, all in township 26, range 5, in Antelope county. It is alleged in the amended petition that on the 14th day of September, 1907, plaintiff, as party of the first part, and Robert J. Tate, as party of the second part, entered into a certain written agreement, in two parts, by which plaintiff agreed to sell defendant the land above described upon condition that defendant should approve the purchase and sale, and, if so approved, the deed was to be made to him October 14 of the same year and left in escrow with the First

National Bank of Fremont; that defendant was to pay to plaintiff the sum of $14,400 by a warranty deed to the east half of section 26 and the east half of section 35, all in township number 15, range 47, in Cheyenne county, the consideration of which was $16,000, plaintiff paying the difference of $1,600, evidenced by his promissory note executed to defendant due March 1, 1908; that, in case the said party of the "second" part (*sic*) should refuse or neglect to pay the purchase money as agreed, said party should thereby forfeit any rights he may have to said land and also should forfeit any money paid in part performance of the contract, but that the first party might, at his election, waive a forfeiture of the contract and proceed to collect the purchase money, and in such event default in payment of interest or principal should cause the whole amount to become due and payable at the election of the first party; that upon a compliance with the terms of the contract by the second party he should be entitled to the possession of the land, but upon a failure by him to comply therewith his right to possession should terminate, and he should surrender the possession of the land and improvements thereon to the party of the first part.

The other part of said agreement was embodied in a somewhat similar writing binding defendant to convey to plaintiff the east half of section 26 and the east half of section 35, all in township 15, range 47, in Cheyenne county, the deed or deeds to be made and deposited in the First National Bank of Fremont on the same date that required the deposit by plaintiff—October 14, 1907—together with an abstract of defendant's title thereto, showing perfect title. If, upon examination of plaintiff's land by defendant, he approved the sale or exchange, the $1,600 note executed by plaintiff to defendant was to be retained by defendant, and the deeds delivered, otherwise the note was to be returned to plaintiff; but, in case plaintiff failed to comply with the agreement, the $1,600 should be forfeited to defendant. These two writings were evidently intended to embody one agreement and should be so

treated. They are both set out at length in the petition, but it is believed that the foregoing fairly sets out the material parts thereof.

It is alleged that it was expressly agreed and understood between the parties that the promissory note signed by plaintiff should not become effective and binding until plaintiff's real estate had been inspected by defendant, and the contract approved by him, after his examination, and the contract and note signed by the wife of plaintiff; that neither the written contract nor note was ever in fact delivered; that they were never assented to and signed by plaintiff's wife, nor was the agreement ratified by defendant, and the transaction was rescinded and revoked by plaintiff; that plaintiff is a married man, the head of a family, and that his exempt homestead is included in the land owned by him and described in said agreement; that in violation of the terms and conditions of the agreement defendant had unlawfully, wrongfully and fraudulently caused the written agreement to be filed and recorded in the records of the register of deeds of Antelope county on the 18th day of October, 1907, and entered on the numerical index of said county, by which a cloud had been cast upon plaintiff's title, and had as wrongfully and fraudulently sold and transferred the $1,600 note to the Farmers State Bank of Plainview, Nebraska, which claimed to be an innocent purchaser thereof, and that the First National Bank of Fremont claimed to have some interest in said note, but it is alleged that such banks had knowledge of the invalidity of the note before they obtained it; that on the 14th day of October the defendant was not the owner of the land which he had contracted to convey to plaintiff, and did not leave in escrow with the First National Bank of Fremont a warranty deed conveying the land to plaintiff, nor did he furnish an abstract of the title thereto, or to any part thereof. The prayer of the petition is for the cancelation of the written agreement and promissory note; that defendant be adjudged to have no interest in plaintiff's real estate; that plaintiff's title thereto be quieted;

that the cloud thereon caused by the record of said agreement be removed; and that the note be ordered surrendered to plaintiff, or, in the event that it be found said banks or either of them holds said note in good faith, that plaintiff may have judgment against defendant Tate for the amount thereof, and for general equitable relief. Summonses were issued and served upon defendants. The Plainview bank showed that it had held the note, but it had been surrendered to defendant before the institution of the suit.

Defendant Tate answered, objecting to the jurisdiction of the court. He also disclaimed any interest, lien or claim upon the land either at the time of answering or the commencement of the suit. He presented as a plea in abatement the pendency of a suit instituted in Cheyenne county by him against plaintiff, which, he alleged, involved the same subject matter, but which, upon a special appearance by plaintiff herein, who was defendant in said action, was dismissed for want of jurisdiction, and from which judgment defendant had appealed to the supreme court, where the action was still pending. Defendant further answered, without waiving the objection to jurisdiction or plea in abatement, admitting the execution of the agreement and note, alleging their unconditional delivery, denying that any of the papers were to be signed by the wife of plaintiff, alleging that the contract was approved by him, and denying that the agreement was revoked by plaintiff. The averments that plaintiff is a married man, and that a portion of his land, described in the contract, was his homestead, are admitted, as also the recording of the agreement for the sale of the land, that the $1,600 note was sold to the Farmers State Bank of Plainview, and that the defendant the First National Bank of Fremont owns said note. It is alleged that on the 14th day of October, 1907, defendant was the actual owner of the land in Cheyenne county described in the contract, and that a deed thereto was executed by defendant and wife and deposited in the First National Bank of Fremont.

The chain of title is set out, but which need not be here recited. It is shown that the title to a part thereof and the possession of all was in Charley Olson, a portion thereof being held by him under a contract with the Union Pacific Railroad Company, the final payment thereon having been made September 30, 1907, and the deed executed by the railroad company November 21, 1907; that, before the execution of the agreement with plaintiff, W. T. Tate, an agent of defendant, had held a contract with Olson and wife for the purchase of the land, and which W. T. Tate had assigned to defendant so that defendant could obtain a deed at any time and comply with his contract with plaintiff, and on October 23, 1907, Olson and wife conveyed the land to defendant, and the deed was recorded April 3, 1908; that the delay in obtaining the deed and presenting the abstract of title was because of plaintiff's refusal to perform his part of the agreement. The prayer of the answer is that the prayer of the petition, "except as to the quieting of the title to said real estate, be denied; that this defendant's objection to the jurisdiction of the court over his person and over the subject matter with reference to said note be sustained, and said matter be dismissed for want of jurisdiction; and that, if said objection to the jurisdiction is overruled, this defendant's plea in abatement be sustained, and said cause be dismissed, and for costs." Other averments of the petition are denied. A transcript of the proceedings of the district court for Cheyenne county in the case of *Tate v. Rakow* is attached to the answer.

The First National Bank of Fremont filed its answer and cross-petition, which, in part, is practically a repetition of the contents of the answer of defendant Tate, which is followed by what we may term an action on the $1,600 note held by the bank, which is alleged to have been purchased in good faith, for value before maturity, and without notice or knowledge that any defense thereto was claimed by plaintiff; and the prayer is for judgment against plaintiff for the amount thereof, including interest.

Plaintiff replied specifically, denying the essential affirmative averments of the answer of defendant Tate, and averring that defendant Tate refused to approve the agreement; that plaintiff thereupon revoked and rescinded the contract, and notified defendant that the offer was withdrawn. The cause was tried to the court, submitted, and taken under advisement September 9, 1909. On the 7th day of October, 1909, plaintiff, August G. Rakow, died, and on the 15th day of December, of the same year, the cause was conditionally revived in the name of De Ette Rakow, the administratrix of his estate. On the 8th day of January, 1910, the order of revivor was made absolute.

On the 3d day of May, 1910, the findings and decree were entered in favor of plaintiff De Ette Rakow, as administratrix, in which the facts as found by the court were set out, including the homestead character of plaintiff's land; that no part of the agreement was signed by the wife, nor was any part thereof acknowledged by either husband or wife; that on September 20, 1909, defendant examined plaintiff's land, when he declared that unless plaintiff reduced the price of his land $2.50 an acre there was no deal, whereupon plaintiff informed defendant that he "would call the deal off," and requested the return of his note; that defendant Tate did not on said day approve of the land, nor agree to take the land upon the terms prescribed in the agreement; that on that day, without the knowledge or consent of Rakow, defendant sold and indorsed the note for value to the Farmers State Bank of Plainview, which purchased the same in the ordinary course of business and without notice of any defense thereto; that on October 14, 1907, Tate and wife executed a deed to Rakow of the Cheyenne county land, and deposited it in the First National Bank of Fremont, but that at that time he was not the owner in fee of said land, and no conveyance thereof was made to him until Ocober 23, 1907, which was delivered to Tate and recorded in the deed records of Cheyenne county April 3, 1908; that on November 21, 1907, the Union Pacific Railroad Company executed

a deed conveying the east half of section 35 to Olson, and which was recorded in the proper county records the 29th day of the same month; that defendant never furnished nor offered to furnish to Rakow an abstract of title to the Cheyenne county land, and Rakow never executed nor offered to execute a deed to the land in Antelope county to Tate, and from and after September 20, 1907, refused so to do; that on January 21, 1908, Tate brought an action against Rakow in the district court for Cheyenne county, alleging the sale and purchase of the Antelope county land, which was approved by him, the failure of Rakow to perform the agreement, that Tate elected to forfeit all interest which Rakow had in the Cheyenne county land and the money paid thereon, and declared a forfeiture of the $1,600 note, and that said cause was afterward dismissed by the court for want of jurisdiction over Rakow; that on November 25, 1907, the Iowa State National Bank of Sioux City, Iowa, purchased the $1,600 note from the Farmers State Bank in due course of business and for value, and the same was subsequently and in a similar way purchased by the Fremont bank, all of which was before the maturity of said note.

The conclusions of law are quite elaborate, and will not be here set out. They are, in substance and effect, that the completion of the agreement of September 14, 1907, was made to depend upon the examination of the Antelope county land and approval of the deal by Tate before October 14, 1907, and if he refused to accept the proposition the note referred to was to be void; that on September 20, 1907, Tate examined the land and rejected the proposition contained in the agreement; that at that time Rakow declared the contract at an end and demanded the return of the note which he had signed; that by the action of the parties the contract was then annulled and terminated, and could not be enforced by either party, and Tate had no power or right to forfeit the $1,600 note; that the written agreement, so far as it affected the homestead of Rakow—the southwest quarter of section 14—was null

and void; that the failure of Tate to have title to the Cheyenne county land at the time he made his deed, and his failure to furnish an abstract of title thereto, as stipulated in the agreement, constituted a default on his part which prevented him from enforcing a forfeiture of the note; that the banks were innocent purchasers of said note, and the Fremont bank, being the owner and holder thereof, was entitled to recover the amount thereof from Rakow's estate, the same being found to be the sum of $1,947.55, and plaintiff was entitled to recover from Tate the same amount. Decree and judgment were rendered accordingly. Defendant Tate appeals.

The defenses pleaded will be noticed in the order in which they are presented. The contention that the court was without jurisdiction contains no merit. The contract on the part of Rakow was recorded by Tate in Antelope county and constituted a cloud upon the title to Rakow's land, and no cautious purchaser would have bought it with that record against it uncanceled. Had Tate caused the cancelation of the record thereof at any time before the beginning of this suit, there would be reason for the contention of no jurisdiction, but he failed to do this. The public records are for the purpose of giving notice of the interests in or ownership of the land to be affected thereby. This recorded contract gave notice to the world of defendant's claimed interest in the land, and to that extent apparently affected Rakow's title, and he was entitled to have it canceled, either by Tate, or by his authority, or by a court of equity.

The contention that the agreement was of no force does not apply, as the proof of the invalidity of the record would have to be made dehors the record, and, until attacked by an equitable proceeding and canceled by a decree, it implied just what it said. *Corey v. Schuster, Hingston & Co.*, 44 Neb. 269; *Smith v. Neufeld*, 57 Neb. 660; *Sanxay v. Hunger*, 42 Ind. 44.

The action to quiet title must be brought in the county where the land to be affected is situated. Code, sec. 51.

Johnson v. Samuelson, 82 Neb. 201. It follows that the action was rightly commenced in Antelope county, and that the service of summons was properly made on Tate without the county. There is no appeal from the judgment in favor of the First National Bank of Fremont, and that part of the case will not be considered.

It is insisted, however, that the court erred in rendering judgment against Tate for the amount of the note, which he had sold, and for which the judgment in favor of the Fremont National Bank was rendered against Rakow's estate. The giving of the note, whether delivered or not, inhered in and was a part of the main transaction. By the action of Tate in terminating the contract on the 20th of September the note became the property of Rakow, and he was entitled to its surrender. Instead of so doing, the defendant sold it, and thereby created a liability against Rakow where none would have existed had not the note been transferred to innocent purchasers. It is a well-settled rule that, where a court of equity obtains jurisdiction of a cause, it will retain it until all questions involved in the case are adjudicated, doing complete justice between the parties. This rule applied fully justified the settlement of all controversies growing out of the main case between the parties, and there was no error in this action of the court. By the sale and transfer of the note to innocent purchasers, thereby creating a liability against Rakow, where none existed before, defendant created a liability against himself in favor of Rakow, and it was entirely proper to adjudicate all questions growing out of the contract.

A plea in abatement was presented and overruled, and of which ruling complaint is made. This subject will be briefly noticed. The final decision of the case mentioned in the plea was rendered by this court on the 21st of May, 1909 (*Tate v. Rakow,* 84 Neb. 459), where it was held that the district court for Cheyenne county never obtained jurisdiction over Rakow, and affirming the judgment of that court. Aside from the question of the

identity of the cause of action pleaded in the two cases, it is very clear that the district court never had jurisdiction to render any judgment or decree against Rakow, and therefore the case was not pending in the sense that would bar the jurisdiction of the district court for Antelope county, where Rakow's land was situated. The district court for Cheyenne county could neither have enforced the contract nor quieted the title of the Antelope county land. The plea was properly overruled.

It is claimed that the findings and decree are not sustained by the evidence and contrary thereto. We do not so view it. The evidence is conflicting on the material parts in the case. The written agreement provides that, if defendant did not approve the purchase of the Rakow land after inspecting it, the note was to be returned to Rakow, and the contract abandoned. He inspected the land September 20, 1907—one week after signing the agreement. The evidence is clear that, upon the examination, he sought to have the agreed price reduced. Rakow testified that defendant insisted upon it, and declined to proceed with the trade unless upon the reduction, and declined to perfect the deal, and that after defendant's declination Rakow notified defendant of his refusal to consider it further, and demanded the posession of the note. He also testified that the note was never delivered to defendant, but that it was agreed he might hold it, as custodian, until it was finally decided as to whether they would carry out the agreement or not, and if that were done defendant should retain the note; if not, it was to be returned to Rakow. True, defendant and another testified to the contrary; but viewing all the circumstances, as shown, we incline to the conclusion adopted by the district court. The note was sold to the Plainview bank on the same day that the defendant inspected the land, and, as alleged and testified to by Rakow, refused to proceed with the contract unless Rakow would reduce the contract price $2.50 an acre. Defendant failed to furnish an abstract of the title to the Cheyenne county

land. He testified that the reason why he did not do so was because Rakow had refused to complete the agreement. The fact, however, remains that at the time he deposited his deed in the bank he could not have done so and shown a perfect title, for the reason that Olson, his grantor, had no deed either of record or otherwise to a part of the real estate, and a perfect title could not have been shown by an abstract of the record.

We have examined the transcript and bill of exceptions with care, and can see no sufficient reason why the decision of the district court should be reversed. It is therefore

AFFIRMED.

RICHARD C. PATTERSON, APPELLANT, V. JOHN STEELE, APPELLEE.

FILED FEBRUARY 25, 1913. No. 16,839.

1. **Pleading**: AMENDMENT. Where a demurrer to a petition in an action founded upon a *quantum meruit* was sustained and the action dismissed, and an amended petition basing a right of recovery upon the same facts, but setting up an express contract, was also held vulnerable to a demurrer, it was not error for the trial court to refuse to permit the latter petition to be amended so as to set up a cause of action upon *quantum meruit*.

2. ———: ———: REVIEW. Permission or the refusal to permit plaintiff to amend an amended petition, after the commencement of the trial, is a matter committed to the sound discretion of the district court, and his order in that behalf will be sustained, unless it appears that there has been an abuse of such discretion.

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

E. C. Wolcott and *Hugh A. Myers,* for appellant.

Weaver & Giller, contra.

BARNES, J.

Action to recover a sum of money alleged to be due from defendant to plaintiff as a part of an agent's commission on a life insurance policy. From an order refusing plaintiff's application to amend his amended petition and dismissing the action plaintiff has appealed.

The record discloses that the plaintiff filed his original petition in the district court for Douglas county on the 17th day of August, 1904, alleging, in substance, that on or about June, 1899, he was a life insurance agent, writing life insurance for the Hartford Life and other companies; that on said date plaintiff had a customer for a $10,000 life insurance policy, but could not satisfy him in any of the companies which he represented; that plaintiff knew defendant at that time; that defendant was on friendly terms with him, and he knew that defendant represented the Northwestern Mutual Life Insurance Company; that plaintiff went to defendant and talked to him about the matter; that thereupon, by mutual consent, plaintiff introduced defendant to said customer that he might have an opportunity to solicit an application from said customer for a policy of insurance in said defendant's company.

Plaintiff further alleged that he made no further effort to write a policy of insurance on the life of his customer; that the customer saw defendant and talked with him several times thereafter in reference to writing a policy of insurance on his life, and that finally, on September 24, 1900, defendant did write a $10,000 policy on the life of plaintiff's customer in the Northwestern Mutual Life Insurance Company, and did thereafter collect from said customer the first annual premium on said policy, which was and is the sum of $830; that by reason of the services so rendered by plaintiff to defendant in procuring said customer and introducing defendant to him on account of which defendant was able to write said policy of insurance, and did so write the same, plaintiff's services

in that behalf were reasonably worth the sum of $332, "and plaintiff is entitled to receive from defendant said sum, which is just and reasonable; that plaintiff has demanded of defendant the said sum of $332, but defendant has neglected and refused to pay the same and still refuses to pay, and no part of said sum has been paid by defendant to plaintiff, and there is now due plaintiff from defendant for and on account of the services rendered by him to defendant as above set forth the sum of $332, and interest from September 24, 1900," for which sum, with interest, plaintiff prayed judgment.

To this petition defendant filed a general demurrer. On the 14th day of January, 1905, the demurrer was sustained. No leave was given plaintiff to amend, but it appears that on the 7th day of February, 1905, plaintiff filed an amended petition, by which he changed his action from *quantum meruit* to one based on an alleged contract between plaintiff and defendant, by which defendant agreed to pay plaintiff for the same services set forth in the original petition 40 per cent. of the first annual premium on such policy of life insurance as the defendant should be able to write on the life of plaintiff's customer, and 5 per cent. on each annual premium paid thereafter at the time when the same should be paid. By the amended petition plaintiff prayed judgment for $539.50, with interest and costs. Thereafter, and on the 6th day of May, 1905, defendant filed a motion to strike the amended petition from the files, for the reason that it stated a new and different cause of action from the one set forth in the original petition, and that the said cause of action was barred by the statute of limitations. On the 20th day of May, 1905, the district court overruled the motion, and thereafter the defendant filed an answer which contained a plea of former adjudication; and further alleged that some time in June, 1899, the plaintiff came to defendant and stated that he had a customer for a $10,000 single premium policy to be paid in one payment; that an oral agreement was entered into at that time between plaintiff

and defendant that when plaintiff's customer should take the said $10,000 single premium policy, the premium to be paid in one payment, defendant would allow plaintiff, as a broker's commission, 40 per cent. of such part of the premium as would equal a twenty-payment life policy, at the same age, and nothing on the excess; that plaintiff's alleged customer refused to take such policy, and stated emphatically that he desired no insurance whatever, and that he had not at any time contemplated taking an insurance policy; that thereupon defendant stated to plaintiff that the deal was off, and that the insurance could not be written, and there was no further conversation between plaintiff and defendant regarding the matter.

It was further alleged that in September, 1900, one Shukert, who plaintiff claimed was his customer, did take from defendant a ten-payment, twenty-year endowment policy for $10,000; that said policy was not written through any representation of the plaintiff, or by reason of any effort on his part. Further answering, defendant denied that said Shukert, at the time said policy was written, or at any other time, was a customer of the plaintiff, and it was alleged that the plaintiff could not have written the said Shukert for any kind of policy in June, 1899, or at any time since that date. The answer also denied all of the allegations of the petition not specifically admitted.

The plaintiff thereupon filed a reply, by which he denied that the agreement mentioned in the petition was for the writing of a single premium policy; denied that he was to get 40 per cent. of such part of such premium as would equal a twenty-payment life policy at the same age; denied that the parties ever talked to Shukert about such single premium policy; denied that defendant told plaintiff that the deal was off; and denied that plaintiff ever agreed to procure a customer for a single premium policy of any amount. The reply contained no other denials, and failed to controvert the allegations of the answer that defendant was unable to write a policy on

Shukert's life until more than a year had elapsed, and until Shukert had ceased to be plaintiff's customer.

Upon the issues thus joined, the cause came on for trial on the 24th day of March, 1910. The jury was impaneled and sworn, and plaintiff proceeded to offer evidence, at which time defendant objected to the reception of any evidence on the ground that the amended petition did not state facts sufficient to constitute a cause of action. Plaintiff asked leave to amend his amended petition, and after argument, and upon due consideration thereof, the court refused leave to amend, discharged the jury, and dismissed the action. A motion for a new trial was filed and overruled, and defendant prosecuted this appeal.

It thus appears that the questions presented for our determination are: First, was defendant's objection to plaintiff's evidence properly sustained? Second, did the court abuse its discretion in refusing plaintiff's request to amend his amended petition, and in dismissing the action?

As we view the record, it is apparent that the defendant was entitled to a judgment on the pleadings as they stood when the trial was commenced, and defendant's objection to the introduction of plaintiff's evidence was properly sustained.

Finally, it further appearing from the record that plaintiff failed to seasonably assert his alleged claim against the defendant, that he delayed the commencement of his action until almost four years had elapsed after the transaction set forth in his petition occurred, that he first sought to recover upon a *quantum meruit,* and long afterwards amended his petition and based his action upon an express contract, that, when met by an objection to the sufficiency of his amended petition, he again sought to amend by asserting his right to recover upon a *quantum meruit,* we are of opinion that the trial court was justified in concluding that the plaintiff's action was without merit, and that he was attempting to continue

its prosecution for the purpose of annoying the defendant and causing him trouble and expense. Therefore, it cannot be said that the court's refusal to allow plaintiff to amend his amended petition was an abuse of discretion.

It follows that the judgment of the district court was right, and is

AFFIRMED.

FAWCETT, J., not sitting.

GEORGE W. FRANCE, APPELLANT, V. ROBERT W. RUBY, APPELLEE.

FILED FEBRUARY 25, 1913. No. 17,052.

1. Limitation of Actions: ACKNOWLEDGMENT OF DEBT. A mere reference to a promissory note, although consistent with its existing validity and implying no disposition to question its binding obligation, and which contains no suggestion of any action in reference to it, is not such an acknowledgment as is contemplated by section 22 of the code.

2. ———: ———. To toll the statute of limitations, there must be an unqualified and direct admission of a present, subsisting debt on which the party is liable. *Nelson v. Becker*, 32 Neb. 99.

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

Lambe & Butler and *France & France*, for appellant.

J. F. Fults, contra.

BARNES, J.

Action on a promissory note for $977.54, given by the defendant to one Harvey on the 21st day of April, 1883, and payable five days after date. Plaintiff's petition was in the usual form, with the additional allegation that on the 23d day of August, 1909, and while plaintiff was still the owner of the note, defendant wrote a letter to plaintiff as follows: "Beaver City, 8-23-'09. Mr. France—Dear

Sir: In regard to that note it is impossible to do anything about it. I have nothing to pay with. This is the third year in succession for crops to burn up here, so you see we are in no position to do anything. Respt., R. W. Ruby." No payment either of the principal or interest is alleged in the petition, and the foregoing letter was pleaded and relied on to toll the statute of limitations. A demurrer to the petition was sustained. Plaintiff refused to further plead, and his action was dismissed. From that judgment plaintiff has appealed.

The sole question presented for our determination is: Does defendant's letter amount to an unqualified acknowledgment of an existing liability for the payment of the note in question? A like question was before this court in *Nelson v. Becker*, 32 Neb. 99. In that case certain letters written by the defendant were relied on to toll the statute, and it was held that they were not an acknowledgment of an existing liability. Section 22 of the code provides: "In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise." In construing that statute it was said: "To remove the bar of the statute, the debtor must unqualifiedly acknowledge an existing liability." In *Hanson v. Towle*, 19 Kan. 273, it was said: "A mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an 'acknowledgment' as is contemplated by the statute. This must be an unqualified and direct admission of a present, subsisting debt on which the party is liable."

As we view the record, this case should be ruled by *Nelson v. Becker, supra*, and the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. PAXTON & GALLAGHER COMPANY.

FILED FEBRUARY 25, 1913. No. 17,536.

Food: STATUTORY REGULATIONS. Where syrup is put up by a wholesaler and sold under a label stating that each half-gallon can contains a brand composed of cane syrup and maple syrup, the pure food law requires also a statement showing the proportion of each. Comp. St. 1911, ch. 33, secs. 8, 22.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Exception sustained.*

Grant G. Martin, Attorney General, George W. Ayres, Frank E. Edgerton and *George E. French,* for plaintiff in error.

Isaac E. Congdon and *Wilcox & Halligan, contra.*

BARNES, J.

In the district court for Lincoln county, the state instituted a prosecution against defendant for violating the pure food law by selling to Ernest T. Tramp, October 5, 1911, six half-gallon cans of improperly labeled or misbranded syrup. The trial court sustained a demurrer to the information and dismissed the prosecution. For the purpose of settling the question of law raised by the demurrer, an exception by the county attorney to the decision below is presented here under section 515 of the criminal code.

The information charged: "That Paxton & Gallagher Company, a corporation, on or about the 5th day of October, 1911, in the county of Lincoln then and there being did then and there wilfully and unlawfully sell to one Ernest T. Tramp, six cans of syrup, each of which said cans did contain a food product, composed of more than one ingredient, to wit, commercially pure cane syrup, and commercially pure maple syrup, and which said product was composed of 75 per cent. of said cane syrup and 25

per cent. of said maple syrup, and as thus prepared was offered for sale in said cans containing said mixture, and was composed solely as aforesaid, each of which said cans was then and there labeled and branded:

"'½ Gallon,
"'YELLOWSTONE
"'Brand
"'Pure
"'SUGAR CANE SYRUP
"'and
"'CANADIAN MAPLE SYRUP
"'Guaranteed equal to any blended syrup
"'on the market. Packed for
"'PAXTON & GALLAGHER CO.
"'Omaha, Neb.'

"And there was not printed on the outside on the main label of said cans, or anywhere else on the outside of any of said cans, a correct statement of the percentage of cane syrup and the percentage of maple syrup of the contents of said cans, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska."

The pure food law makes the sale of a misbranded article of food unlawful. Comp. St. 1911, ch. 33, sec. 22. It further provides that an article shall be deemed misbranded in the case of food: "If sold for use in Nebraska and in package form, other than canned corn; if every such package, as branded and named below, does not have a correct statement clearly printed, on the outside of the main label, of the contents * * * viz., all dairy products, lard, cottolene, or any other article used for a substitute for lard, wheat products, oat products and corn products, and mixtures, prepared or unprepared, sugar, syrup and molasses, tea, coffee, and dried fruit: * * * Provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the follow-

ing cases: First. In the case of mixtures or compounds which may be now, or from time to time hereafter, known as articles of food, under their own distinctive names, and not an imitation of, or offered for sale, under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced, * * * and in case of syrups the per cent. of each ingredient composing said food." Comp. St. 1911, ch. 33, sec. 8.

Did the pure food law require defendant to state on its label or brand the percentage of each kind of syrup in its cans? It is agreed by both parties that this is the question presented. It is clear that the statute required defendant to place on each can a correct statement of the contents. Defendant contends that the label or brand copied in the information was such a statement. The state insists that any lawful statement includes the percentage of each syrup. In determining this question the purposes of the legislation, the evils against which it is directed, and the remedies provided must be considered. In *Gran v. Houston,* 45 Neb. 813, 825, this court said: "In giving a construction to a statute the court will consider its policy and the mischief to be remedied, and give it such an interpretation as appears best calculated to advance its object by effectuating the design of the legislature."

It is well understood, and often stated by the courts, that the promotion of honesty and fair dealing in the sale of foods is one of the purposes of pure food laws. Imposition and fraud arising from the custom of inclosing food in packages for the purposes of sale and delivery, without being opened, are among the evils which called for, and resulted in, the legislation on this subject. The legislative remedies require dealers in some form to make certain packages of food show what they contain, and how much, and to submit to punishment for failure to comply with such requirements. As applied to the cans of syrup sold by defendant, what, in the light of the purposes,

evils and remedies considered in the pure food law, is meant by the term "correct statement of the contents"? Each half-gallon can contained two distinct kinds of syrup. The maple syrup has a distinct character and quality of its own. It is known to be more expensive than cane syrup. If the label used did not indicate that the quantity of cane syrup in a can was the same as the maple, there was nothing on the outside of the package to show the proportion of each. The demurrer admits that 25 per cent. only was maple syrup. The quantity thereof was not stated on the label. As applied to the contents of a can containing two distinct kinds of syrup of different quality and value, the quantity of each kind is as clearly within the purposes, evils and remedies affected by the pure food law as the names of the syrups. A "correct statement of the contents," therefore, included the quantity or proportion of the different syrups, as well as the name of each. In this view of the law, the demurrer should have been overruled. It follows that exception of the county attorney is sustained.

EXCEPTION SUSTAINED.

REESE, C. J., not sitting.

SEDGWICK, J., dissenting.

Section 251 of the criminal code provides, among other things: "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."

This is a question of the meaning of a statute. A somewhat lengthy and complicated section of the statute containing different distinct subdivisions is sometimes at first sight difficult of construction. What was the intention of the legislature? We are not allowed to legislate by adding to or taking from what the legislature intended. The purpose of the whole statute is to prevent two things, adulteration and misbranding. The chapter, after providing for a board and their method of proceeding,

etc., comes to section 7, which enacts what shall be considered adulteration, and then comes section 8, which begins with a general statement of misbranding, which is supposed to cover most cases that will arise. An article is misbranded if the label "shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular." This general statement is followed by lengthy detailed definitions of what shall be considered and what shall not be considered misbranding. After this general definition of misbranding the statute proceeds to state six distinct specific definitions which shall govern in determining when an article of food shall be considered misbranded, and then three distinct specific definitions for determining what articles shall not be considered misbranded. This action is brought under the third specific statement of what shall be regarded as misbranding. The language of the complaint brings it under this third specification plainly, and excludes all others. It is not alleged in the complaint that the article sold was known and sold under its "own distinctive name;" the prosecution therefore is not for a violation of that provision which relates only to articles so known and sold. Moreover, that subdivision, which is the second one quoted in the majority opinion, provides that the articles specified therein, under the conditions therein named, shall not be deemed misbranded. A man cannot be adjudged a criminal because the legislature has not specifically enacted that the thing which he has done shall be deemed innocent. There must first be a law defining his act as a crime and affirmatively forbidding it. So that no prosecution could be sustained under that subdivision if it had been attempted by the prosecution, since the subdivision does not forbid anything, but only specifies certain things that are not forbidden. The question is: What is meant by "a correct statement"? In two other subdivisions of the statute, in dealing with other articles

and different conditions, it is enacted that the proportion or percentage of the ingredients must be stated on the label. The legislature must have had a reason for omitting this requirement from the subdivision under which this action is brought. There could be no other reason than that, as to the articles and conditions covered by this subdivision, it was intended that if the ingredients were correctly stated on the label the percentage or proportion of those ingredients should not be required to be stated.

After all of the provisions of the section defining what is misbranding, there is a proviso, which of course relates to all of the section that has gone before, as follows: "Provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: * * * Second. In case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitation or blends, and the word, 'compound,' 'imitation' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale, and the ingredients composing said articles." The label in question is copied in the majority opinion. The article sold was labeled "so as to plainly indicate" that it is a blend, and it stated "the ingredients composing said article." The word "blend" is not on the label, but the word "blended" is. If the word "blend" had been "plainly stated on the package in which it is offered for sale" it would have been a literal complaince with the statute, which declares that in such case it "shall not be deemed to be * * * misbranded." The decision, then, would have been different; the defendant would be "not guilty." The statute does not declare that, unless the word "blend" appears upon the label, it shall be deemed misbranded. The same subdivision provides that, in case the ingredients are made from different kinds of wheat, the word "blended" may be used. Thus the court convicts the legislature of juggling with trifles. A responsible business

firm of our state is adjudged criminal, although the substance and purpose of the statute has been fully complied with. No one can read the label without knowing that two kinds of sugar syrup have been blended to form the article, and that they constitute the only ingredients thereof.

The provision of the statute which I have quoted, declaring that this article shall not be deemed misbranded, is conclusive of this case for another reason. Even if it could be held that the word "blend" is indispensable to afford the protection which this provision is intended to give, still it declares the policy and intention of the legislature and shows beyond question what the legislature regarded as a "correct statement" of the contents. If public policy required that when two kinds of sugar syrup are blended the proportion and percentage should be stated on the label, as well as a "correct statement" of the ingredients of the blend, surely the legislature would not allow this public policy to be thwarted by so simple an expedient as placing the word "blend" upon the label.

Clearly the legislature did not consider that public policy required the proportion or percentage of the ingredients to be stated in such case. While the courts are not authorized to establish a public policy for the state, and are only required to ascertain and enforce the intention and meaning of the legislature in that regard, yet I may be allowed to suggest that there appears to be good reason for the action of the lawmakers in providing that an article which is a blend of two simple, harmless substances of the same nature and use shall not be deemed misbranded if the label plainly states all of those facts with a correct statement of the ingredients. The evidence in this case shows that cane sugar and maple sugar are essentially the same substance, differing only in flavor; that the flavor of the maple syrup is the sole advantage which it possesses over cane syrup; that maple sugar varies greatly, not in its character or quality, but in the strength of its flavor; that the object is to maintain a

uniform flavor, which requires a varying proportion of maple sugar in the blend, depending upon the strength of flavor in the particular maple sugar used. If, then, the flavor of the article sold is uniform and can be relied upon, there is no benefit to the purchaser in knowing the proportions, except to gratify a curiosity, which cannot be very imperative. There is no necessity or reason for requiring a statement of the percentage or proportion of cane and maple sugar that would not apply with equal or greater force to the various breakfast foods and other similar articles, none of which are required to make such statement on the label. It seems, then, that there is no reason, in the nature of the case, which would lead us to think that the legislature must have intended to declare such a public policy. The language of the subdivision of the section under which this prosecution is brought, taken literally, does not require that the percentage or proportion shall be stated upon the label, in addition to a correct statement of the ingredients of the simple blend. The fact that, when the legislature intended that the proportion or percentage of the ingredients should be stated, it said so in plain words, and in the subdivision under which this prosecution is brought only required that the label should contain a correct statement of the ingredients, is conclusive of the intention; and the legislature has expressly provided that an article of this kind, branded as this was, shall not be deemed misbranded.

In a matter of so great importance to all of the people of the state as is our pure food law, it is indeed unfortunate if we have failed to understand it and correctly interpret and apply it.

LETTON, J., concurs in this dissent.

SARAH L. DISHER, ADMINISTRATRIX, APPELLANT, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLEE.

FILED FEBRUARY 25, 1913. No. 16,924.

1. **Negligence:** POWERS OF COURTS: EMPLOYERS' LIABILITY ACT. The enactment of the employers' liability act (Comp. St. 1911, ch. 21) does not affect the judicial power of a court to determine the legal sufficiency of evidence offered to establish the fact of negligence or of contributory negligence.

2. ———: COMPARATIVE NEGLIGENCE: DIRECTING VERDICT. In a case arising under the employers' liability act, where the existence of negligence or contributory negligence is the matter at issue, a court is entitled to direct a verdict where the lack of evidence of negligence, or the undisputed evidence as to more than slight contributory negligence in comparison with that of defendant, is so clear that reasonable minds cannot differ as to its legal effect; but in all other such cases the issues must be left to the jury.

3. ———: ———: ———. Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison required by the statute rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of the plaintiff. Ordinarily, wherever there is room for difference of opinion upon these questions, they must be submitted to the jury.

4. ———: ———: QUESTION FOR JURY. The facts in the case examined, and it is *held* that in this an action under the employers' liability act the comparison of the degrees of negligence of the plaintiff and defendant should have been left to the jury.

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

Wilmer B. Comstock, for appellant.

M. A. Low, P. E. Walker, E. P. Holmes and *G. L. De Lacy, contra.*

LETTON, J.

Action by the administratrix of the estate of David L.

Disher against the Chicago, Rock Island & Pacific Railway Company for negligently causing the death of plaintiff's intestate. At the close of the plaintiff's evidence the district court directed the jury to return a verdict for the defendant, and the plaintiff has appealed.

Many acts of negligence on defendant's part are alleged in plaintiff's petition, which, on account of its great length, is not set forth in this opinion. Defendant, by its answer, denied all the plaintiff's allegations of negligence, and by suitable averments alleged that plaintiff's intestate assumed the risks incident to his employment by the defendant, and that his death was caused solely by his own gross negligence, and not otherwise. The reply was a general denial.

The bill of exceptions discloses that on the 19th day of December, 1908, plaintiff's intestate was employed by the defendant as foreman in charge of a gang of Greek section men who worked under his directions; that on the day above named deceased was directed to take his men to work in repairing a spur track of defendant's railroad which ran from a point on its main line, north of the city of Lincoln, to University Place, a distance of two or three miles northeast of the city; that deceased was furnished with a hand-car on which to transport his tools and men to and from the place where the repairs were being made; that the spur track on which the deceased was at work joined the defendant's main line a short distance northeast of a cut constructed upon a sharp curve which is within the city limits, and over which the viaduct on Holdrege street is constructed; that about the noon hour, and while deceased and his section men were returning from their work on the hand-car, and while coming through the cut above mentioned at a point within the yard limits of the defendant, they were met by one of the defendant's passenger trains, which was about two hours late, and which was running at a rate of speed of about 25 or 30 miles an hour; that the deceased first discovered the approaching train when it was only five or

six rail lengths away; that he warned his men of its approach, and all of them jumped off from the hand-car, and attempted to remove it from the track; that when they had three wheels of the car from the track deceased called to his men to look out. They sprang out of the way of the approaching train, and none of them were struck or injured thereby but the deceased, who remained on the track, in the endeavor to remove the hand-car, an instant too long, was struck by the pilot beam of the engine as he stepped away, and was instantly killed.

The negligence charged in the petition is the excessive speed of the train within the city limits through the cut and around the curve, the failure to sound the whistle when approaching the cut, the failure to stop the train after discovering the hand-car, and the failure to keep a proper lookout to discover the hand-car.

The plaintiff contends that, having established a state of facts from which negligence of the railway company in the operation of its train was reasonably inferable, it was the duty of the trial court to submit the case to the jury; that under the employers' liability statute questions of negligence and contributory negligence are for the jury; and that it was an usurpation of the functions of the jury for the trial court to determine these questions. The ordinances of the city of Lincoln provide that no train or engine shall be run or operated upon any railroad within the city limits at a speed in excess of four miles an hour. The plaintiff's evidence shows that the usual and ordinary rate of speed of trains going out through this cut was from 15 to 20 miles an hour. The rules of the railway company require that two long and two short blasts of the whistle shall be sounded at obscure places. The evidence is to the effect that no whistle was sounded or bell rung. It also shows that from the place of the accident, looking down the railroad track in the direction from which the train came, a person standing in the center of the track could be seen a distance of 16 rail lengths away, or about 480 feet. There is also testimony from the men upon the

hand-car that they first saw the engine five or six rail lengths away. The proof also shows that such a train as the one which struck the deceased, under similar conditions and equipped with proper appliances, could be stopped within 100 feet, if running at a speed of 15 miles an hour, and within 150 feet, if running at the rate of 20 miles an hour. The train did not actually stop until it had proceeded about its length beyond the point of the accident, or about five car lengths. Considering the evidence as to the violation of the city ordinance, that the place of the accident was within the yard limits of the defendant and within the city limits, the fact that the usual rate of speed in running through this cut was only 15 to 20 miles an hour, while on this day the train was running at the rate of 25 to 30 miles an hour, and that no signals were given before the cut was entered, we think there was sufficient evidence tending to establish negligence in the operation of the train to take the case to the jury; in other words, a trial court would not be justified, as a matter of law, in declaring that the defendant was not negligent in the operation of its train at that place and time.

Was this negligence the proximate cause of the death of the deceased, or was he so clearly guilty of such contributory negligence that the court could say, as a matter of law, that the accident resulted from his own default?

Disher at the time of the accident was in charge of a gang of Greek section men. By the rules of the company a track foreman "must not run his hand-car without at least one man facing in each direction, nor without full protection by signals when necessary." The evidence shows that he was advised of the fact that trains were liable to be operated at other than the regularly scheduled hours, and that it was his duty to look out for the same at all times and places upon the track. It is also shown that he had been directed by his immediate superior to take precautions in passing through this cut, and that it had been his custom, during the time he had

been at work upon the switch at University Place, to send a man ahead each day before passing through upon his return to Lincoln with the hand-car. Taking all this evidence into consideration, it would seem that the deceased was guilty of negligence in attempting to pass through this cut without taking the precaution of sending a man ahead to look out for trains before entering the cut with the hand-car.

This fact alone, however, does not determine the question presented. After the hand-car was in the cut and the train was seen approaching, the car was stopped by the deceased, apparently in ample time to have removed it from the track if the train had been running either at the rate of speed prescribed by the ordinance, or at the higher rate of 15 to 20 miles an hour, which was the customary rate when passing eastward through the cut. The Greek laborers were unhurt, and the deceased was struck by the projecting pilot beam just as he was moving away. In his endeavor to save the lives of the passengers on the train and prevent the destruction of the property of the company he lingered an instant too long. It seems clear that if the train had been running at the usual and ordinary rate of speed the deceased would have reached a place of safety and that his death could not have occurred. It is a reasonable deduction from the testimony that the hand-car could have been seen by the engineer as far as a person standing upon the track could see another, or about 480 feet, and that the train might have been stopped in time or its speed reduced sufficiently to prevent the accident if a proper lookout had been kept.

Since we must conclude there was negligence on the part of the deceased in entering the cut, the judgment of the district court would be entitled to affirmance, if the law stood as it did before the enactment of the employers' liability act.

Section 4, ch. 21, Comp. St. 1911, commonly termed "Employers' Liability Act," provides: "That in all actions hereafter brought against any railway company to recover

damages for personal injuries to an employee, or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee—all questions of negligence and contributory negligence shall be for the jury."

The appellant contends that the clause, " all questions of negligence and contributory negligence shall be for the jury," makes it the duty of the court, regardless of what the proof may show, to submit the question of the existence of negligence or contributory negligence to the jury, in order to compare the negligence of the workman and the negligence of the employer, and that the trial court has no power to compare the negligence of the parties and determine, as a matter of law, that that of the employee was so gross that he is not entitled to a recovery. While this clause is declaratory of the existing rule, we think that at the time of its enactment in positive form the legislature had in mind the tendency of some courts to remove such questions in close cases from the jury, and that it was intended to extend rather than to limit the duty of the trial court to submit the same. We are not able, however, to adopt the construction for which the appellant contends, and hold that in every case the evidence must go to the jury, regardless of its legal effect.

The doctrine of comparative negligence adopted by this statute has long been in force in some other states, though it has not been approved by legal philosophers or by the courts generally. 1 Thompson, Law of Negligence, sec. 259; 1 White, Personal Injuries on Railroads, sec. 443. In the state of Illinois, where this doctrine has long existed, the question of whether negligence is a question of fact for the jury in all cases has been frequently decided, and it is held that the question is not always for the jury. In *Chicago, B. & Q. R. Co. v. Dewey,* 26 Ill. 255, a verdict

for $5,000 was set aside, for the reason that the court found that the deceased was, as a matter of law, guilty of gross negligence in attempting to pass between cars of a train standing at a station and on the point of moving, although the court also believed that the railroad company was guilty "of such negligence as would have rendered them liable for injury to a child, or a person of less than ordinary mind." The same rule was followed in *Chicago, St. L. & P. R. Co. v. Hutchinson*, 120 Ill. 587; *Werk v. Illinois Steel Co.*, 154 Ill. 427; *Beidler v. Branshaw*, 200 Ill. 425; *Hewes v. Chicago & E. I. R. Co.*, 217 Ill. 500. See, also, Illinois cases in note to section 451, 1 White, Personal Injuries on Railroads.

The rule adopted seems to be that the courts may decide the question if the plaintiff has clearly been guilty of gross and culpable negligence; but, if his negligence is slight as compared with that of the defendant whose negligence is gross, he may recover, and the comparison must be made by the jury. *Parker v. Lake S. & M. S. R. Co.*, 20 Ill. App. 280.

In Wisconsin, also, it has been declared that this provision of the act does not affect the judicial power of the court to determine the legal sufficiency of the evidence tending to prove the fact of negligence or contributory negligence. *Haring v. Great Northern R. Co.*, 137 Wis. 367.

In *Kiley v. Chicago, M. & St. P. R. Co.*, 138 Wis. 215, it was said: "Did the legislature intend by the provisions of subdivision 5 of sec. 1816, as amended, to confer judicial power, vested in the court, on the jury? It declares: 'In all cases under this act the question of negligence and contributory negligence shall be for the jury.' In their general sense the words are but a declaration of the law as it exists, namely, that when the court has found that there is legal evidence tending to show negligence or contributory negligence, it is for the jury to determine from the evidence adduced whether negligence or contributory negligence exists."

Kansas at first adopted the rule of comparative negligence, and afterwards repudiated it. While it was in effect that court held: "It is a question of fact for the jury to determine whether there has been negligence, and its nature and degree; but it is a question of law for the court to determine what degree of care and diligence on the one side and of negligence on the other will entitle the plaintiff to recover." *Caulkins v. Mathews,* 5 Kan. 191.

We are satisfied that in a proper case, where the evidence or lack of evidence is so clear that reasonable minds could not differ, the power is with the court to direct a verdict; but in all other cases under this statute the issues must be left to the jury.

Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison rests with the jury, unless more than slight contributory negligence of the plaintiff, in comparison with that of defendant, is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of the plaintiff. Ordinarily, wherever there is room for a difference of opinion upon these questions, they must be submitted to the jury. In line with this idea, in Georgia it is held that where the plaintiff's negligence is shown to have been the sole cause of the injury he cannot recover, and that where his negligence is shown to be a part of the cause of the injury his recovery will be divided in part. The court say: "For the apportionment of damages according to the relative fault of the parties, there seems to be no standard more definite than the enlightened opinion of the jury. * * * But it should not be overlooked that the defendant is not to be deemed in fault at all, unless there was a failure to exercise ordinary or reasonable diligence." *Georgia R. & B. Co. v. Neely,* 56 Ga. 540; *Atlanta & R. A. L. R. Co. v. Ayers,* 53 Ga. 12.

The question, then, remains whether the evidence in this case so conclusively establishes contributory negli-

gence, as a matter of law, that the plaintiff is not entitled to have the facts as to his negligence and that of the defendant submitted to the jury for comparison. We are unable to say that the negligence of the deceased in attempting to remove the hand-car from the rails, after he had ample time to have saved himself, in view of the fact that he was entitled to presume that the approaching train was coming at the usual and ordinary rate of speed, was so great as to require us to say that, as a matter of law, there can be no recovery. If the jury should consider, after hearing evidence in behalf of the defendant, that the negligence of both parties was equal, or that the negligence of the deceased was more than slight in comparison with that of defendant, then there can be no recovery, under all the authorities we have examined. 1 Thompson, Law of Negligence, ch. 10; 1 White, Personal Injuries on Railroads, ch. 17.

The cases cited by defendant with respect to the duties of section foremen in keeping a lookout for trains, and the particular cases in which the facts were that section foremen in charge of hand-cars were caught by moving trains in cuts on the main line at a distance from a station, and at a point where trains might be expected to be running at their full rate of speed, are not applicable to this case, where the accident occurred within the yard limits, and where both custom and law required a slow movement of the train and proper signals. Furthermore, the cases referred to were decided at a time when, as the law stood, contributory negligence of any degree was a complete bar to a recovery, and they are not applicable to the enlarged liability under the statute.

It is our view that it was the duty of the court, under the facts in evidence, to instruct the jury upon the law of negligence, and for that body to say whether negligence existed on the part of either deceased or defendant; to determine whether that of the deceased, if any, was slight, and that of the defendant, if any, gross in comparison, and either to refuse a recovery, if they find that the negligence

of the deceased was equal to or more than slight as compared with that of defendant, or to diminish the amount of recovery in proportion to the amount of negligence attributable to the deceased, in case they find his negligence was slight in comparison.

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

REVERSED.

BARNES, J., dissenting.

I am unable to concur in the majority opinion. The plaintiff's undisputed evidence in this case shows that Disher was the foreman of the section men upon the hand-car at the time the accident occurred; that for six or seven months he had worked on the section where he was killed; that he had passed around the curve and through the cut in question an innumerable number of times; that it was the well-known rule and custom, and Disher had been instructed, to never run his hand-car around the curve and through the cut without sending a man ahead to flag the cut and see that no train was approaching. He also knew the rule that foremen and trackmen were required to keep out of the way of regular trains, late trains, special or wild trains running at all rates of speed, and that he could expect to meet such trains at any and all times. Notwithstanding this, and his knowledge of the existing physical conditions, and knowing that it was his duty to keep out of the way of all such trains, so as to allow them to proceed at full speed, he went into the cut with a heavily ladened hand-car, without stopping to look or listen, and without sending a man ahead to flag the cut. He knew of the rule, for the testimony shows that before the day of the accident he had always flagged this curve; but on that day, while hurrying to his dinner, he neither stopped his car nor took any precaution whatever to protect himself, and utterly failed to consider the lives of the section men under his charge until he saw the approaching train. Then it was

too late to remove the car from the track before the train struck him. The plaintiff's own evidence, therefore, makes out a case of utter recklessness on the part of the deceased. He was clearly guilty of gross contributory negligence in running his hand-car into the cut where he was struck, without having sent a man ahead to watch for and warn the passenger train, which he might have expected was approaching; and but for his own negligence in that respect he would not have been killed. I am unable to understand how reasonable minds can reach different conclusions upon the undisputed testimony found in this record. *Chicago, B. & Q. R. Co. v. Healy,* 5 Neb. (Unof.) 225; *Cincinnati, N. O. & T. P. R. Co. v. Holland,* 117 Tenn. 257, 96 S. W. 758.

In *Chicago, B. & Q. R. Co. v. Healy, supra,* the deceased was a section foreman on the defendant's road, and on the morning of the accident he, with five others of the section crew under his charge, started over the track upon a hand-car, going to their work. At a certain point on his section the defendant's track makes a sharp curve through a cut. The deceased and his crew went into this curve, just as Disher did in the case at bar, without stopping to send a man ahead to flag the curve. While proceeding through the cut an extra train appeared, running 30 or 40 miles an hour. As soon as the deceased saw the train he exclaimed: "Here she is; get her off, boys!" The hand-car was stopped, and all hands undertook to remove it from the track. Before it could be removed the train struck it, and the deceased was instantly killed. On those facts it was held that there was no negligence shown on the part of the company, and that the cause of the injury was the reckless negligence of the deceased in going into the cut without flagging it.

Therefore I am of opinion that, even if the defendant was guilty of negligence, its negligence was slight in comparison to that of the plaintiff's decedent, which, as we have seen, amounted to gross contributory negligence. To such a case the provisions of section 4, ch. 21, Comp. St. 1911,

have no application. That section provides that in all actions hereafter brought against any railway company to recover damages for personal injuries to an employee, or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, when his contributory negligence was slight, and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

As I view the provisions of this section, they have no application to a case where the negligence of the employee was gross, and where a fair consideration of plaintiff's own evidence establishes, beyond question, gross contributory negligence on the part of the employee. In such a case the provisions of the statute leave no question for the consideration of the jury. It was not intended that in such a case there would or could be a comparison of negligence as between the employee and the employer. Notwithstanding the clear provisions of this statute, the majority insist that, according to the facts established in this case, the right of recovery should have been submitted to the jury. Upon this proposition I am utterly unable to concur with my associates.

As I view the case, the trial court properly instructed the jury to return a verdict for the defendant, and its judgment should be affirmed.

OTOE COUNTY, APPELLANT, V. MRS. J. C. BROWN, APPELLEE.

FILED FEBRUARY 25, 1913. No. 17,037.

Witnesses: FEES: PROCEEDINGS BEFORE COMMISSIONERS OF INSANITY. Under section 50, ch. 40, Comp. St. 1911, witnesses before the board of commissioners of insanity are entitled to the same fees as witnesses in the district court, and are entitled to have the same allowed and paid out of the county treasury in the usual manner.

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

D. W. Livingston, for appellant.

W. H. Pitzer and *Paul Jessen, contra.*

LETTON, J.

This is an appeal by the county of Otoe from a judgment of the district court reversing an order of the board of county commissioners disallowing a claim for the fees of a witness who testified before the board of commissioners of insanity. At the request of the person informed against as being insane, a subpœna was issued for the appellee to appear before the board of insanity commissioners at the hearing. She appeared at the time and place specified, was sworn and testified; and after the hearing the clerk of the board certified the costs of the hearing, including her witness fees, to the board of county commissioners.

The county contends that there is no authority given the board of commissioners of insanity to tax the costs of any proceedings had before them; that witness fees are costs, and that, in the absence of a statute, no costs can be taxed and none recovered. Section 50, ch. 40, Comp. St. 1911, prescribes the compensation of the commissioners of insanity, the clerk, the examining physician, and the sheriff, and provides further: "Witnesses shall be entitled to the same fees as witnesses in the district court. The compensation and expenses provided for above *shall be allowed and paid out of the county treasury in the usual manner.*" Section 20 of the act relating to the powers of the commissioners provides: "For the purpose of discharging the duties required of them, they shall have power to issue subpœna and compel obedience thereto, to administer oaths, and do any act of a court necessary and proper in the premises." Under these provisions it seems clear that the county authorities have the same power and the same

duty with reference to the payment of witnesses before the commissioners of insanity as with reference to the payment of other costs charged against the county in legal proceedings.

The judgment of the district court is therefore

AFFIRMED.

ALLEN H. PRUYN V. STATE OF NEBRASKA.

FILED FEBRUARY 25, 1913. No. 17,547.

1. **Criminal Law**: INSTRUCTIONS: REVIEW. One cannot predicate error upon an instruction when he has requested the court to instruct the jury substantially to the same effect.
2. ———: EVIDENCE: REVIEW. Where the evidence in a criminal case is conflicting, but the testimony on behalf of the state, if believed by the jury, is amply sufficient to sustain a conviction, this court will not interfere.
3. **Homicide**: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to sustain the verdict.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

F. Dolezal and *A. S. Ritchie*, for plaintiff in error.

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

LETTON, J.

The plaintiff in error, who will hereafter be denominated defendant, was charged with the crime of murder in the first degree. He pleaded not guilty, and was found by the jury guilty of the crime of manslaughter. From a judgment on this verdict he prosecutes error.

The errors complained of all relate to the giving or refusal of instructions, except that it is claimed that the evi-

dence fails to show that the defendant used excessive force in repelling an assault.

Patrick Gorey is a saloon-keeper in the town of North Bend. The deceased, Michael Gorey, was his brother. While Michael had no pecuniary interest in it, the evidence shows that he was often in the saloon, and sometimes assisted his brother in the business. The defendant is about 34 years of age, and was employed by his father, who was in the hay business, as foreman of a gang of men engaged in baling hay. On Christmas day, 1911, the day of the tragedy, the defendant went into the Gorey saloon for the purpose apparently of settling with his father for his own work and the work of some of the men. The father deducted some money from his wages and that of the men for some time which he claimed had been lost, and some loud, boisterous and profane language was used between them in this dispute. The father and son then walked toward the back end of the saloon near the stove, still disputing and using profane and vulgar language towards each other. Michael Gorey, the deceased, was standing behind the bar. At this time Patrick Gorey stepped over towards the defendant, and said: "Al., look here, we don't want you in here. We don't sell you at all, and please go out." This he refused to do. Michael Gorey then came from the west end of the bar, holding an automatic pistol in his hand. The testimony in behalf of the state tends to prove that the pistol was unloaded, rusty in the barrel, and that it had not been loaded for two years, and that Michael held the pistol at arms length, pointing to the floor as he walked towards the accused and his father, while there is evidence on the part of the defense tending to show that the pistol was partly raised and pointing towards the accused at that time. In the quarrel with his father, the accused made an uncomplimentary reference to the Goreys, which was heard by Patrick, but it does not appear that it was heard by the deceased. According to the witnesses for the state, Michael said to the accused, as he approached him, "No gun plays here today, you go out," and that the accused

then quickly passed around the stove, pulled out a revolver, and fired twice at the deceased, who was about 12 feet away. A fight then ensued between him and Patrick, in which the accused was knocked down and severely bruised by blows from the pistol which Patrick had taken away from him. The deceased lingered for two days, and then died from the result of his wounds. The evidence on the part of the accused is to the effect that as the deceased approached the accused he carried the pistol partly raised towards the accused, that he said to the accused: "Shoot now, I have got the gun." And it is argued that this language and the conduct of the deceased justified in the accused the belief that he was about to be assaulted with a deadly weapon, and that his action in shooting the deceased under the circumstances as they appeared to him was justified on the ground of self-defense. There is a dispute in the testimony as to the number of shots heard or that were fired. There is positive testimony on the part of the state that only three shots were fired, and that they were all from the accused's revolver, two of which penetrated the body of deceased, and one fired by Patrick Gorey into the wall after he obtained possession of the revolver. Several witnesses for the defendant who were in and about the saloon testify to hearing more than three shots, and the father of the accused testifies that he saw shots being fired from Michael Gorey's revolver.

In the endeavor to establish a higher grade of homicide, the state introduced evidence showing that the defendant while under the influence of liquor had quarreled with his father in the saloon about a year previously, and had been put out by the deceased, and at that time he had threatened "to go and get a gun and get all of them;" that in July or August, 1911, while in a state of intoxication, he made threatening remarks about the Goreys; that in November, 1911, when refused a drink in the saloon, he threatened to get even with the Goreys, and that about the same time he drew a pistol on Michael Gorey, using language of a nature to provoke an assault. It seems to be established that

there had not been the best of feeling between the defendant and the Goreys before the day of the homicide.

It is contended that the evidence is not sufficient to justify a conviction of manslaughter. This is true if the evidence on behalf of the accused is alone considered, but it is equally true that if the jury believed the testimony produced on behalf of the state a verdict of even a higher degree than manslaughter might have been sustained. In such a condition of the evidence, it is for the jury alone to determine the weight of the testimony, and the court is bound by their conclusion.

It is next contended that there is prejudicial error in the instructions given, and in the refusal of the court to give a number requested by defendant. Instructions 17 to 20, inclusive, it is said by counsel for the accused are taken almost verbatim from the case of *Carleton v. State,* 43 Neb. 373, and it is argued that there is such a wide difference between the cases that the instructions given are inapplicable. The principles of the law of self-defense as stated in these instructions are substantially sound. The defendant complains of the use of the expression in instruction 17, that, if defendant was assaulted in such a way as to induce in him "a reasonable and well-grounded belief" that he was in actual danger. In the same instruction the jury were told: "Actual or positive danger is not indispensable to justify self-defense. The law considers that, when men are threatened with danger, they are obliged to judge from appearances and determine therefrom as to the actual state of things surrounding them, and in such cases, if persons act from honest convictions induced by reasonable evidence, they will not be held responsible criminally for a mistake as to the extent of the actual danger." The defendant himself requested the court to instruct the jury that "if at the time he shot Mike Gorey he had reasonable cause to apprehend on the part of said Gorey a design to do him great personal injury, and there was reasonable cause for him to apprehend immediate danger," and that "at the time he did so he had

reasonable cause to believe it necessary for him to shoot the deceased." In another he requested the court to instruct that the important question was: "Were the circumstances such as to afford him (defendant) just and reasonable ground for believing himself to be in such danger." The distinction between the instruction requested conditioning the action of accused upon "just and reasonable ground for believing" and that given by the court making the condition "reasonable and well-grounded belief" is too fine for us to perceive, and the defendant cannot predicate error on a statement of law which in substance he requests the court to charge. The numerous instructions upon the ground of self-defense requested by the defendant, while perhaps not erroneous, were for the most part unnecessary, since the propositions therein contained applicable to the facts were for the most part given by the court to the jury upon its own motion. We are further of the opinion that the refusal to give the cautionary instruction No. 8 with reference to verbal declarations did not prejudice defendant. The testimony as to declarations on the day of the tragedy was given by witnesses both for the state and for the defendant, and it was for the jury to say by a comparison of all the evidence which of the witnesses were to be believed. As to declarations or threats made prior to the day of the tragedy, the verdict shows that the jury were not influenced thereby, or the verdict would have been for a graver crime.

Considering the whole charge of the court, as well as the instructions refused, we are unable to see that any error prejudicial to defendant was committed. On the other hand, the court would certainly have not been justified in giving the instructions requested by the defendant in addition to the 28 which were actually read to the jury. As a general proposition, no good purpose is served by attempting to make hairsplitting distinctions in a multitude of instructions qualifying each other to the confusion of the ordinary mind. The better practice is to make the charge clear and simple, and yet at the same time to cover

the law upon the essential points involved. This we think was done in this case.

We are unable to find from the record that the accused did not have a fair trial. The judgment of the district court is therefore

AFFIRMED.

FRANK LARSON V. STATE OF NEBRASKA.

FILED FEBRUARY 25, 1913. No. 17,875.

Criminal Law: FORMER JEOPARDY. If during a trial of a misdemeanor before a magistrate it appears to him that the defendant should be put upon his trial for a felony, and the magistrate orders a new complaint to be filed, and proceeds, under section 327 of the criminal code, to sit as an examining magistrate, finds probable cause, and binds the accused over to the district court to answer to the felony, the fact that the accused had entered upon his trial before a court having jurisdiction of the misdemeanor will not constitute a good plea in bar to the information for the felony in the district court. *Thompson v. State*, 6 Neb. 102.

ERROR to the district court for Merrick county: GEORGE H. THOMAS, JUDGE. *Affirmed as to conviction, and reversed as to costs.*

Martin & Bockes, for plaintiff in error.

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

LETTON, J.

The defendant was arrested upon a charge of assault and battery. He was taken before the county judge of Merrick county, arraigned upon the complaint, and pleaded not guilty. A jury was waived. Evidence was adduced by the state and by defendant, and both rested. After this was done, and before any decision, the county attorney moved the court to stop all further proceedings, and to

put him upon a hearing for an offense not cognizable before a magistrate, and to proceed as in other criminal cases exclusively cognizable before the district court. The court sustained the motion, to which the defendant excepted. A new complaint was filed, charging an assault with intent to inflict great bodily injury, which is a felony. A warrant was issued and the defendant arrested on this charge. He objected to any hearing upon the latter complaint, for the reason that he had already been placed in jeopardy. This was overruled, and after a hearing the court found there was probable cause and bound him over to the district court.

In the district court an information was filed upon the same charge. The defendant interposed a plea in bar, setting forth specifically all the proceedings before the county judge, and pleading that he had already been placed in jeopardy, and by operation of law had been discharged and acquitted upon the charge of assault. A demurrer to this plea was filed by the state, which was sustained. The plea in bar was overruled, and a trial was had over his objections. The jury found that the defendant was not guilty of assault with intent to inflict great bodily injury, and found that he was guilty of assault. A motion to set aside that portion of the verdict finding the defendant guilty of assault and a motion in arrest of judgment were filed and overruled, and a fine and costs adjudged against the defendant.

After sentence, defendant also filed a motion to retax the costs, for the reason that the costs in the district court were made in the effort to convict him of the alleged crime of assault with intent to inflict great bodily injury, while the jury found that the defendant is not guilty upon that charge. This was also overruled.

The defendant assigns error of the district court in sustaining the demurrer to the plea in bar and in overruling the same, and further complains that the court erred in overruling the motion to retax the costs in the district court.

Section 327 of the criminal code provides: "If in the progress of any trial before a magistrate, under the provisions of this chapter, it shall appear that the defendant ought to be put upon his trial for an offense not cognizable before a magistrate, the magistrate shall immediately stop all further proceedings before him, and proceed as in other criminal cases, exclusively cognizable before the district court." The defendant insists that this provision is unconstitutional as in violation of section 12, art. I of the constitution, providing that no person shall be "twice put in jeopardy for the same offense." The constitutionality of this section we think is really not involved whichever view is taken as to the question of former jeopardy, because the first complaint might be for a misdemeanor not identical with the offense for which the defendant is bound over, and no such question could then arise. The real question presented is not whether this section is constitutional, but whether, when a defendant has been put upon trial for a misdemeanor before a magistrate and the trial has proceeded to such an extent that jeopardy is attached, this will be a bar to a subsequent prosecution for a like offense accompanied by such circumstances of enormity or aggravation as to bring it within a class made felonies by the statute.

A like question to that presented in this case was decided at an early day in the history of this state in the case of *Thompson v. State,* 6 Neb. 102. In that case a person was accused and tried upon the charge of petty larceny. The jury returned a verdict of guilty, and fixed the value of the property stolen at $35. Upon this verdict no judgment was rendered, but the magistrate required the accused to appear before the district court, where he was convicted of grand larceny. A plea of *autrefois convict* was interposed, which upon demurrer was adjudged insufficient. Upon review this court sustained the district court, for the reason that the magistrate had no jurisdiction to determine the question of guilt of a felony, saying: "It should be borne in mind that it is an indispensable requisite to a

plea of *former conviction* that the court whose record is relied upon to sustain it had jurisdiction of the alleged offense." The same rule would, of course, apply to a plea of *autrefois acquit* or former jeopardy. While, as defendant contends, many authorities and a number of text-writers take a different view with respect to cases where the only difference in the two crimes charged is one of degree, a number of other courts take the same view as was taken by this court. *State v. Reiff,* 14 Wash. 664; *State v. Campbell,* 40 Wash. 480, 82 Pac. 752; *State v. Hattabough,* 66 Ind. 223; *Commonwealth v. Harris,* 74 Mass. 470; *Commonwealth v. Bubser,* 80 Mass. 83; *Cunningham v. State,* 80 Ga. 4; *Ex parte Burke,* 58 Miss. 50. See, also, a discussion of the subject in *Warren v. State,* 79 Neb. 526, as applicable to a prosecution for robbery and one for murder based upon the same facts. An interesting discussion of the whole question is found in a monographic note to *People v. McDaniels,* 92 Am. St. Rep. 81 (137 Cal. 192). However, as was said in *State v. Campbell, supra:* "But it will not do to lay down a rule to the effect that in a case where, through inadvertence or misinformation of a prosecuting officer, a defendant has been charged with a misdemeanor—for instance, an assault and battery—and it afterwards eventuates that the actual crime committed was that of an assault with intent to commit murder, or even murder, the law must be content with punishing the defendant for the crime of assault and battery or allow him to escape punishment altogether, by reason of the inability of the state to dismiss the action for assault and battery and indict for the greater offense. Such a determination by a court would surely be the clogging, instead of the lubricating, of the wheels of justice." Moreover, the crime of assault with intent to do great bodily injury is not necessarily involved in the crime of assault and battery, and *vice versa.* The assault in the one case may be made by threatening another with a deadly weapon, and without the element of battery. A great bodily injury is injury to the person of a more grave and serious character

than an ordinary battery. *State v. Gillett,* 56 Ia. 459. The prosecution is based upon a different section of the statute and the crime has other constituent elements. We think no error was made, therefore, by the district court in its ruling upon the demurrer and upon the motions other than to retax costs. As to the latter, it seems clear that the proceedings in the district court were unnecessary. We think the defendant is not justly chargeable with the increased costs, and that the motion to retax should have been sustained. *Biester v. State,* 65 Neb. 276.

The judgment of the district court is affirmed as to the judgment of conviction, but is reversed as to the motion to retax costs, and the cause is remanded for further proceedings.

JUDGMENT ACCORDINGLY.

REESE, C. J. dissents.

THEOPHILUS HOELLWORTH, APPELLEE, V. MARY J. MCCARTHY, APPELLANT.

FILED FEBRUARY 25, 1913. No. 16,927.

Mortgages: CONTRACT OF MARRIED WOMAN: DURESS. A married woman who involuntarily mortgages her separate estate or homestead to secure an individual indebtedness of her husband may have the lien canceled in a suit to foreclose the mortgage, where she was induced to execute it by mortgagee's threats to imprison her husband for feloniously disposing of mortgaged chattels.

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

J. P. Boler, T. J. Doyle and *J. R. Swain,* for appellant.

T. P. Lanigan, W. F. Critchfield and *Lambert, Shotwell & Shotwell, contra.*

ROSE, J.

Plaintiff brought this suit to foreclose a mortgage for $9,230.88 on 720 acres of land in Greeley county. By cross-bill Byers Brothers & Company, defendant, a corporation engaged in the live stock commission business in South Omaha, pleaded a subsequent mortgage on the same property for $12,423.93, and prayed for a foreclosure thereof. In both transactions defendants Patrick H. McCarthy and Mary J. McCarthy, his wife, are mortgagors. From a decree foreclosing both mortgages defendant Mary J. McCarthy has appealed, and will be designated "appellant." Other mortgages aggregating $8,915.80 were pleaded, and foreclosure thereof was properly decreed, but to prevent confusion further reference thereto will be avoided.

A quarter-section of land to which appellant held the fee, and, in addition, an 80-acre tract occupied by her with her husband and ten children as a homestead, were included in the mortgages. Appellant concedes that the other incumbered lands are subject to foreclosure. The question to be determined is whether appellant voluntarily mortgaged her 80-acre homestead and her separate estate of 160 acres. That she signed the mortgages and the notes thereby secured is not disputed. No defect in complying with the forms of the law in regard to acknowledgments appears on the face of the mortgages themselves. Directly stated, the material defenses interposed by appellant are that she was mentally incompetent to incumber her property, and that she was coerced into doing so by threats of mortgagees that her husband would be imprisoned if she failed to execute the mortgages.

The first of the defenses is not established. Appellant understood the transactions, and knew that her acts might deprive her and her offspring of their home. She discussed these matters intelligently with her husband's creditors. She first refused to sign the instruments, and for a time persisted in her refusal without the advice of any one. In

absence of her husband, she left her home after she had been visited there by his creditors and went to the county seat to confer with them. The evidence does not show that she was mentally incompetent when the notes and the mortgages were signed.

It is argued that duress is not properly pleaded in the answer of appellant, and that therefore she is not entitled to relief on that ground. Appellant replies that her answer is sufficient, but, to conform her pleading to her proofs, she tenders here an amendment containing a better plea of duress. It is unnecessary either to discuss the sufficiency of the answer or to determine the right of appellant to amend it in this court, for the following reasons: This is a suit in equity wherein there is no issue to be defined for the guidance of a jury. All parties interested understood that duress was pleaded as a defense, and a large part of more than 600 pages of testimony was directed thereto. To refute testimony tending to show threats, mortgagees cross-examined appellant's witnesses, and in contradicting them produced and interrogated other witnesses. There was no objection that testimony offered by appellant to prove duress was not within the issues or that it was for that reason incompetent. No one was misled or injured by any informality or imperfection in the answer, and it will now be given the same interpretation as that adopted by the pleader, by her adversaries and by the trial court. For the purpose of preventing the review of a defense which was perfectly understood and fully tried, undue importance will not be attached to mere technical objections to an answer in equity. An objection to the authentication of the bill of exceptions is likewise without merit.

Did Byers Brothers & Company procure the signature and acknowledgment of appellant by duress? In considering this question, her physical and mental condition, the surrounding circumstances and the attitude of the parties in conducting the negotiations and in dealing with each other are proper subjects of inquiry. During her married life appellant was frail and excitable. She had 10 chil-

dren, the oldest being 23 and the youngest 3. Occasionally for many years prostration followed nervous attacks. Two physicians testified to the opinion that her nervous disorder was hysteria, that it was permanent, and that it seriously affected her conduct and impaired her will-power. She lived with her family on their 80-acre homestead about five miles from Greeley Center. Her husband, after having been a prosperous ranchman, engaged extensively in the live stock business. He made his sales at South Omaha stock-yards through Byers Brothers & Company, mortgagee. The latter advanced him money to make purchases. Late in the afternoon of May 24, 1907, B. F. Hertzler, a representative of mortgagee, and Mr. Shotwell, its attorney, appeared unannounced at the home of appellant in absence of her husband, and interviewed her in her own house in presence of her son Edward, who was about 21 years old. She was distinctly told that an indebtedness of her husband, which they were seeking to secure by mortgage on her real estate, was about $12,000, and that his commission merchant, Byers Brothers & Company, had a chattel mortgage on about 200 head of cattle. It is undisputed that this information surprised her. She did not owe any part of the indebtedness, nor know of its existence. She told them her husband did not have the live stock mentioned. Hertzler exclaimed: "That's strange." They repeatedly asked her to consent to the giving of a real estate mortgage to secure her husband's debt, but throughout the entire interview she steadfastly refused to do so, and they left her in the evening with the parting admonition to "think it over during the night," and to come to Greeley Center the next morning, stating that their train left for Omaha about 8:30 A. M. These facts and conclusions as to what occurred at their interview are proper deductions from their own testimony and cannot be successfully controverted. Thus far there is nothing to show a direct threat of imprisonment, but enough was said to create in the mind of appellant the fear that her husband might not escape punishment for felonious conduct in con-

nection with his chattel mortgages. This was not the first time the nature of the duties and obligations imposed by her husband's chattel mortgages had engaged her attention. The evidence relating to direct threats of imprisonment is conflicting. Edward, a son of appellant, said repeatedly on the witness stand that he plainly heard Hertzler say to his mother that, "if she didn't sign, he [husband] would have to go to jail, and they would eventually take the property anyhow." Appellant testified directly and positively that Hertzler made threats of like import. Shotwell said he heard no such threats. Hertzler denied having made them, but admitted on cross-examination: "I told her we didn't want to frighten her or scare her. I told her I was sorry I had to come in and bother her, and I thought she ought not to be frightened." Here is an inference from his own testimony that in presence of her son he had already done something to frighten her. If she felt free to resist their demand for a mortgage on the family homestead and on her separate estate to secure a debt she did not owe, why was she frightened?

Edward testified that, after they left, his mother walked the floor crying and saying she would have no home for her children, and that if she had to sign a mortgage her husband wouldn't have to go to jail; that his mother had not retired at 1 o'clock; that he saw her at 4; that she was nervous and agitated; that she left with him for Greeley Center at 7, and that they made the trip in the rain during a thunderstorm. The evidence shows that when she reached town she went to a store kept by a brother of her husband; that she was excited; that her eyes were inflamed from weeping; that she there met her husband and his attorney, J. R. Swain; that her husband pleaded with her to sign the mortgage, but that she refused; that no one advised her to protect the family homestead and her separate estate; that she told Swain she would not execute the security, but that, if she had to, she preferred to give a deed rather than a mortgage. After a short conference, she and her husband and Swain went to the latter's office,

where they met Hertzler and Shotwell. It was understood by all present that her business interests and her intentions were in direct conflict with the wishes of her husband. On the witness stand Swain said he thought appellant had asked him at the store if her husband's conduct had been criminal, and he admitted that he might have advised her, if the facts stated by her were correct, that her husband was in no position to stand a lawsuit. In any event, Swain gave her no encouragement in her oft repeated purpose not to sign a mortgage. He did, however, advise her, when she was suffering from the ordeals described, when she was confronted in his office by three men who were impatiently insisting on her signature, when she was struggling with a mother's impulse to protect the home of herself and her children, and when she was seized with a fear that to do so would result in the imprisonment of her husband, that it would be better to give a mortgage than a deed. This identical advice had been given by Hertzler the evening before. After Hertzler and Shotwell had started to the station, she hastily signed the mortgage. They returned, left it in the hands of Swain for acknowledgment, and rushed to the train. Appellant then went to the residence of a friend in town, said she had been compelled to mortgage her property, and that she would lose her home. She spent the greater part of the day there in hysterics and in bemoaning her fate. She testified, without objection, that she was induced by threats to sign the mortgage, and the evidence and circumstances, when considered as a whole, sustain her in that view. She successfully resisted the importunities of the creditor of her husband. She did not yield to his pleading, nor to the advice of his counsel, but she signed the mortgage when the agent who had threatened her husband with imprisonment started to the station in disappointment. She was not a free agent in the sense that she voluntarily executed the mortgage. She did not act on her own judgment. The advice of her husband and of his attorney, under the circumstances of this case, does not avoid

the consequences of duress. She was moved by fear which overpowered her will. The duress applies with equal force to appellant's offer to execute a deed. In equity, therefore, the family homestead of 80 acres and her separate estate of 160 acres are not incumbered by the mortgage which she was unduly induced to execute, and as to that property the foreclosure is erroneous. *Nebraska Central Building & Loan Ass'n v. McCandless,* 83 Neb. 536. Only a brief reference to the controlling facts and conditions has been made, but all of the evidence has been carefully read and weighed.

Was plaintiff's mortgage on the same land procured by duress? It was executed at an earlier date—November 15, 1906. If the procuring of this mortgage and the one already discussed had been planned by the same person, the methods adopted would scarcely have been more similar. Plaintiff's mortgage is a renewal of older obligations of Patrick H. McCarthy, appellant's husband. His mortgage indebtedness to plaintiff consisted of a number of items aggregating with interest $8,801.03, June 2, 1906. About that time the entire debt was due the First National Bank of Greeley, except $1,000 owing to one of its officers. The first of the original items was a loan of $3,000, April 15, 1905, and a later one was a note for $3,567 given by McCarthy, January 16, 1906, for the purchase price of cattle, and discounted by the bank. The latter note was secured by a chattel mortgage on cattle. Some time during the winter or spring of 1906, McCarthy disposed of the cattle without satisfying the lien of the chattel mortgage. The loans were excessive and could not properly be carried by the bank. Three of its officers undertook to relieve it of the load created by McCarthy's paper and to obtain security in the form of a mortgage on the 720 acres of land owned by McCarthy and wife. The bank officers were Theophilus Hoellworth, plaintiff, of Greeley Center, Cornelius Bradley, of Wolbach, A. P. Cully, of Loup City. There was no attempt to disguise their anxiety to relieve the bank and to procure real estate

security. Who should carry the loan? The business sagacity of these bank officers cannot be doubted. McCarthy was willing to give security in the form demanded. Appellant alone objected. The amount due the bank and its officer was included in a mortgage executed by McCarthy and wife to Bradley, June 2, 1906. For the same debt with accrued interest plaintiff, as Bradley's transferee, procured on November 15, 1906, another mortgage which is the subject of foreclosure herein. Should the separate estate of appellant and the family homestead be sold to satisfy plaintiff's mortgage? Her answer is that her signature and acknowledgment were in both instances procured by threats that her husband would be imprisoned if she failed to execute the mortgages. The question presented requires an examination of the circumstances relating to both transactions. Many of the facts are not in dispute, but the bank officers deny every imputation implying duress. No part of the indebtedness was appellant's, nor did she receive any of the consideration for her husband's notes. Her first business interview with the bank or with any of its officers, according to her own story, occurred late in May, 1906, when plaintiff came to her house one afternoon, in absence of her husband, and told her the latter had borrowed a large amount of money, and asked her to sign a mortgage on her real estate, and was told by her that she was not aware that her husband owed him or his bank anything. A few days earlier she had been in Montana at the death-bed of a brother, and her account of her trip indicates that she had recently been in hysterics from which she had not recovered. She said that she was ill and weak during her interview with plaintiff; that he told her he had given the money to her husband who furnished chattel security; that he did not find the security there; that her husband had left himself in a bad place; that something had to be done; that she was frightened; that she refused to sign the mortgage; that after her husband had been informed of the interview he went to Greeley Center, saw the bankers, and told her

to come to town; that she went to the bank, June 2, 1906, and first refused to sign the mortgage, but finally did so through fear inspired by plaintiff's threat that her husband would be punished criminally if she did not yield. McCarthy testified that plaintiff reminded him of the chattel mortgage, and told him he would be sent to the penitentiary if he did not give them a lien on the land; that he communicated this threat to his wife who went into hysterics. While plaintiff denies that he had made any threat, he admits that he had the interview in absence of appellant's husband; that he went to her house to procure a real estate mortgage; that he visited with her on the subject; that possibly he said to her, "This new loan was to take up the loan secured by the chattel mortgage;" that she told him her husband "would have to mend his ways." To arouse a sense of fear, it was not necessary to advise her that the mortgaged chattels were missing. She would know without being told that they were not in the feed-yards, though she had known nothing of her husband's banking transactions. A covert threat may fairly be inferred from plaintiff's own testimony, and it was as effective for the purpose of inspiring fear as a direct statement. Its very refinement may have made it appear more ominous to a hysterical woman. In any event, it is proper to hold from all the evidence that appellant, when the family homestead and her separate estate were at stake, was able to resist every inducement, but the fear produced by threats to imprison her husband. There was no attempt to foreclose the Bradley mortgage, but it was used five months later to obtain for the very person who had procured it by duress another mortgage on the same property to secure the same debt. Appellant persistently refused to execute the mortgage pleaded in plaintiff's petition, but finally yielded through the same fear that controlled her judgment when she signed and acknowledged the Bradley mortgage.

Plaintiff has a lien on McCarthy's land, but his mortgage should be canceled in so far as it purports to incum-

ber appellant's separate estate of 160 acres and the family homestead of 80 acres. The same relief is granted as to the mortgage of Byers Brothers & Company. In other respects the decree below is affirmed, the costs in this court to be taxed in equal proportion to plaintiff and Byers Brothers & Company.

AFFIRMED AS MODIFIED.

LETTON, J., not sitting.

RICHARD A. UPSTILL, APPELLANT, V. STEPHEN H. KYNER, APPELLEE.

FILED FEBRUARY 25, 1913. No. 17,069.

1. Judgment: RES JUDICATA. The rule is well settled that a judgment of a court of competent jurisdiction upon questions directly involved in one suit is conclusive as to those questions in a subsequent action between the same parties.
2. Waters: INJUNCTION: EVIDENCE. Record examined, and no competent evidence found to sustain any of the allegations in plaintiff's petition not covered by a former adjudication between the parties.

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

J. B. Smith, for appellant.

J. A. Douglas, contra.

FAWCETT, J.

From a judgment of the district court for Brown county, dismissing his suit for an injunction, plaintiff appeals.

The pleadings in the case are unnecessarily voluminous. So much so that no attempt will be made to set them out in detail. Plaintiff and defendant are the owners of ad-

joining mill properties on Long Pine creek in Brown county. The stream runs from south to north, and the mill of plaintiff is north of that of defendant. Plaintiff commenced the construction of his dam in 1883, and completed the same and erected his mill shortly thereafter. Defendant's grantor constructed the dam and erected the mill now owned by defendant in 1885. Defendant became the owner of the property within a year or two thereafter. The parties have had more or less trouble and litigation ever since that time. The purpose of the present suit may be gathered from the prayer of the petition, which is: "That the defendant be permanently enjoined from continuing the use of any obstructions or placing any obstructions on his said dam or race, and from continuing or raising his dam or race any higher than it was in the year 1887 when defendant's grantor owned and operated said dam and race, and that the defendant may be permanently enjoined from obstructing in any manner the free flow of water in Long Pine creek as it flowed when the defendant's grantor owned and operated said dam and race in the year 1887; and that defendant may be permanently enjoined from impeding in any manner the flow of said water and then releasing it and causing it to flow in large and unusual volumes into the plaintiff's race and dam, and from making any repairs to defendant's dam or race by means of manure or other offensive substances, and for such other and further relief as justice and equity may require."

The contention of defendant is that all of the matters for which plaintiff prays relief in the above prayer were adjudicated between the parties by a decree of the district court for Brown county, entered in a suit between the same parties, April 24, 1905. In that case defendant here was plaintiff, and plaintiff here was defendant. Each was seeking an injunction against the other and each obtained relief in the decree. The pleadings filed and the decree entered in that case were introduced in evidence in this. We have carefully examined them and find that the de-

fendant's plea of *res judicata* is fully established and should be sustained. The prayer of plaintiff's petition in this case is identical with the prayer for affirmative relief in his answer in that case, with the single exception of that portion of the prayer in this case which asks the court to enjoin the defendant from making any repairs to his dam or race by means of manure or other offensive substances. Upon that point the evidence is uncontradicted that in 1909 defendant removed his old dam, which was constructed of wood, earth and various other kinds of material, and built in place thereof a solid and substantial dam of concrete, reinforced with steel cables; and that none of the offensive substances complained of are now used in and about any part of his dam or race. The decree of April 24, 1905, adjudicated all of the matters embraced in plaintiff's prayer in this suit. No appeal was taken from that decree by either party, and, if defendant is violating any of its terms, plaintiff can obtain prompt and full relief in the district court.

We might properly end this opinion here, as we have now disposed of everything specifically contained in the prayer of plaintiff's petition; but, under the prayer for general equitable relief, we will consider the allegations in plaintiff's petition that defendant, by raising his dam from time to time, has created such a pressure of water that for a number of years there has been a flow of water underground, through the sandy formation of the valley, which has extended to plaintiff's dwelling-house and rendered the stone basement thereof damp and unhealthy to such an extent that it has seriously impaired the health of Mrs. Upstill. The evidence shows that plaintiff's residence is 280 feet down stream from defendant's dam. Plaintiff testifies that the ground has a natural and even slope. The stream, after leaving defendant's mill and land, runs in a northwesterly direction for some little distance and then turns and flows almost directly east and passes within from 20 to 30 feet of plaintiff's house. At the point where it passes plaintiff's house it is directly north of the

eastern portion of defendant's dam. Bearing in mind the fact that the general course of this stream is north, if we were to draw a straight line from the eastern part of defendant's dam, down grade, due north for 280 feet, we would come to plaintiff's house, and 20 to 30 feet beyond that, and still down grade, we would come to the bed of the stream. The county surveyor was employed by both plaintiff and defendant to make a survey and take certain levels. A plat of this survey with the elevations noted thereon is in evidence and shows that the surface of the stream just below the house is 6½ feet lower than the basement floor in the house. There is no competent evidence in the record that there is any underflow of water between defendant's dam and plaintiff's house. There is nothing but mere conjecture on the part of plaintiff that the dampness in the basement of his house is caused by such underflow. In addition to the lack of evidence of underflow, it seems incredible, if there is any such underflow, that it could affect plaintiff's basement. Water naturally seeks its level. This is true whether it is flowing above or below the surface of the ground. Applying this natural rule or law of gravitation, water leaving defendant's dam and flowing underground down an even slope for 280 feet would not at that point have an elevation of 6½ feet above a clear and unobstructed outlet into a flowing stream 20 to 30 feet below.

Viewed from any standpoint, we think the judgment of the district court is right, and it is

AFFIRMED.

GRACE ARMSTRONG, ADMINISTRATRIX, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED FEBRUARY 25, 1913. No. 17,039.

1. **Negligence: EVIDENCE.** Under the evidence in this case, stated in the opinion, the finding of the jury that the defendant was negligent is not so clearly wrong as to require a reversal upon that ground.

2. ———: CONTRIBUTORY NEGLIGENCE: PRESUMPTIONS: EVIDENCE. There is a presumption that one in his right mind and in possession of his faculties will take ordinary precaution to avoid danger and injury. The evidence of contributory negligence in this case, stated in the opinion, is not so conclusive as to require this court, as a matter of law, to hold that such presumption was overcome and contributory negligence established, contrary to the verdict of the jury.

3. Damages: PRESUMPTIONS: REVIEW. There is no conclusive presumption of law that the present earnings of an able-bodied, active and intelligent young man, under 25 years of age, will not be increased in the future. The court will not reverse as excessive a judgment for damages resulting from his death, solely upon the ground that such present earnings are so small.

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

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

George E. Bertrand, McGilton, Gaines & Smith and *Guy R. C. Read, contra.*

SEDGWICK, J.

Thomas Armstrong was struck and killed by a car that was being switched by the defendant company. His mother, Grace Armstrong, as administratrix of his estate, brought this action in the district court for Douglas county, alleging that the death of the deceased was caused by the negligence of this defendant. Upon the trial there was a verdict and judgment for the plaintiff, and the defendant has appealed.

The defendant denied the allegations of negligence on its part, and alleged contributory negligence on the part of the deceased, and also contended that the verdict is excessive.

1. The first contention of the defendant is that the deceased, under the circumstances in this case, must be considered to have been a trespasser, or at least a mere licensee, upon the tracks of the defendant, and that there-

fore the defendant was not under the "obligation that might arise toward one injured at a recognized crossing or pathway, and there was no reason why appellant's switching crew should have anticipated that one of Cudahy's men would place himself in such a dangerous position on the track that he could not extricate himself, nor that Cudahy's men would not protect themselves against the movement of the cars on these tracks, for they used this track as a convenience to themselves in passing to and from the repair shop, and were required to exercise a high degree of care." This contention is clearly not justified by the evidence. The deceased was in the employ of the Cudahy Packing Company. That company had a covered inclosure in or near the switching yards of the defendant. Within this inclosure there was a shed with a narrow platform on each side thereof, used for the purpose of cleaning and icing the refrigerator cars of the packing company. Forty or fifty men were employed by the packing company in this service. This shed was a long narrow structure, used by the men in handling the ice and for similar purposes, and the platforms extending along each side were very narrow, and were high, to correspond with the height of the platform of the cars to be cleaned and iced. On each side of this shed there was a switching track, upon which the refrigerator cars were placed for cleaning and icing, and were located so near the platforms that the men could pass readily from the platforms to the cars. At the east end of the platform there was a step and "handhold" which the men used in passing to and from the shed and platform. The employees of the defendant company were engaged in switching coal cars; and, to use the expression of the witnesses, they "kicked" two cars along one of these tracks into the inclosure of the packing company; that is, the switching engine was pushing a train of several cars towards this switching track, and detached two of the forward cars and allowed them to run by their own momentum along this track into the said inclosure. The cars were running at a speed of three or four

miles an hour when they entered the inclosure. Several witnesses testified that neither coal cars nor any others, except refrigerator cars of the packing company, were expected or allowed upon the switch track within the packing company's inclosure, except upon rare occasions when a car was pushed there at the request of the packing company for the purpose of removing the accumulations from the cleaning of the refrigerator cars. Other witnesses testified that the defendant company was at liberty to use these tracks at its own convenience, and that it frequently did so. This evidence being somewhat conflicting upon this point, there is no doubt that the jury might find that the former proposition was established by the evidence.

It is very manifest from these conditions that the employees of the packing company were not trespassers in going to and from their cars over these tracks in this inclosure, nor were they licensees. They were acting in the regular course of their employment, and were entitled to that protection which should be accorded to men who were where it was not only their right, but their duty, to be. This is virtually conceded by the defendant in its answer in the admission that the deceased "received certain injuries on the premises of the Cudahy Packing Company at South Omaha, Nebraska, from which he died." Several witnesses testified, and the plaintiff contends, that the universal practice had been to push these refrigerator cars along the switch track with an engine that could be heard by the workmen, which enabled them to avoid danger; that these cars on this occasion moved without noise, and there was no lookout stationed to warn the workmen of danger; and that the defendant was negligent in this respect, and also in driving these unusual cars onto these tracks without notice or warning to the employees of the packing company. The jury must have found that the defendant was negligent in these respects; and, while the evidence at some points is somewhat conflicting, we cannot say that this finding is so clearly wrong as to require a reversal.

2. The defendant insists that the deceased was guilty of contributory negligence which was the proximate cause of his death. The deceased and another employee of the packing company, who was a witness at the trial, were on the platform referred to and near the end where the step and "handhold" were. This witness testified that the deceased had some of his tools with him, and was about to go from the shed, where he had been at work, to the tool house, a few rods distant. Some trivial conversation passed between the deceased and the witness, and immediately the witness heard a scream, and, turning, saw the deceased between the platform and the moving car, which was so close to the platform that the deceased was immediately killed. The theory of the defense is that the deceased, while engaged in this conversation with the witness, was careless of his own safety, and must have stepped from the platform without turning his face toward the direction from which the cars were coming, and without any precaution to avoid the accident which followed. In such case there is always the presumption that a man in his right mind and with the use of his faculties will take the ordinary precautions for his own safety. If the jury believed from the evidence that the manner of throwing this car into the inclosure was an unusual one, and not to be expected by the employees, that it moved with little, if any, noise, and that the car was so different in its construction from the refrigerator cars ordinarily placed upon those tracks, and so much lower, not being much above the high platform on which the deceased stood, that the deceased, if he had looked for the refrigerator car, might not have seen the car in question, they might reasonably have found that the presumption of ordinary care was not overcome by this evidence. It follows that the verdict was not so wholly unsupported by the evidence that we can say, as a matter of law, that it is clearly wrong.

3. The jury assessed the plaintiff's damages at $7,000. The defendant contends that this is grossly excessive and is not supported by the evidence. The deceased was a

young man not over 25 years of age. The interest on $7,000 at 6 per cent. would nearly, if not quite, equal the salary that he was receiving, so that, if those dependent on him for support were receiving his whole salary, $7,000 would be much more than the present worth of such benefits during the expectation of life of the beneficiaries, as shown by this evidence. We think, however, that this is not the true measure of the value of the life of the deceased to those beneficiaries. There is no certainty, and perhaps not even a probability, that the present earnings of an active young man of that age are the limit of his full capacity. What were the reasonable probabilities of his future earnings, and the future necessities of the beneficiaries? It is always difficult in such cases to determine the exact measure of the pecuniary loss, and this duty devolves upon the jury. They must take into consideration the condition of the parties and all of the circumstances disclosed by the evidence, and determine what sum will make full compensation for the loss sustained. We cannot say from this evidence that the finding of the jury in this respect is so clearly wrong as to require the court, as a matter of law, to overrule it.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. CITY OF LINCOLN, APPELLEE, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 25, 1913. No. 17,678.

1. **Municipal Corporations**: STREETS: VACATION. Under the statute in force in 1892 and 1893, the mayor and council of the city of Lincoln had authority to vacate streets and alleys in said city, and the vacated portions reverted to the owners of the adjacent lots. Comp. St. 1893, ch. 13*a*, art. I, sec. 67, subd. IV.

2. ——: ——: ——. The ordinance of 1892 *held* to vacate that

portion of P street taken and occupied by the defendant company as its station and switching grounds, and, the company then being the owner of the adjacent lots, the vacated portion became the property of the company.

3. ———: RAILROADS: VIADUCTS. The city of Lincoln cannot compel a railroad company to construct a viaduct over its property occupied by its station and switching tracks where there is no public way or street.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed and dismissed.*

M. A. Low, P. E. Walker, E. P. Holmes and *G. L. De Lacy,* for appellant.

Foster & McClenahan and *Burr, Greene & Greene, contra.*

SEDGWICK, J.

In March, 1907, the mayor and council of the city of Lincoln duly enacted and approved an ordinance decreeing the necessity of a viaduct and approaches thereto "over and across the tracks of certain railway companies in and over P street of the city of Lincoln," and requiring the defendant company to construct a viaduct over and across its railway tracks at P street. At the general city election of that year the plan was approved and the mayor and council empowered to require its construction. In August of the following year the mayor and council duly passed and approved an ordinance for that purpose. The company having neglected to construct the viaduct, this action was brought in the district court for Lancaster county to obtain a peremptory writ of mandamus to compel it to do so. Upon trial in that court the issues were found in favor of the city, a peremptory writ ordered as prayed, and the defendant company has appealed.

There is no question raised as to the regularity of the preliminary proceedings, but it is contended by the defendant that there is no public street over its right of way at the place in question, and that therefore the city of

Lincoln is without authority to compel the construction of the viaduct. This question depends upon the construction and meaning of the ordinance known as ordinance No. 218, also known as No. 1641, enacted in July, 1892, entitled: "An ordinance providing for the passage of the railway of the Chicago, Rock Island & Pacific Railway Company across and through the streets and alleys of the city of Lincoln, in the county of Lancaster, and state of Nebraska, and vacating portions of certain streets and alleys in said city for the purpose of giving right of way and other privileges in said city to said railway company." The seventh section of this ordinance is as follows: "That all of that part of P street in said city lying south of lots 9, 10, 11 and 12, in block 13, Kinney's O Street addition to said city, be, and the same is hereby, vacated." That part of P street described in this section was about 200 feet in length, and at that time the defendant company owned the lots abutting thereon on each side of the street. Under the statute then in force, if a street of the city was vacated, the territory so vacated reverted to the owners of the adjacent lots.

It is contended by the city that the mayor and council were without authority to vacate the streets of the city, and that the proper construction of the ordinance is that it grants a right of way to the company over the streets of the city, and does not vacate the streets for any other purpose. Upon the first contention it is sufficient to say that the statute then in force expressly authorized the mayor and council "to open, widen, or otherwise improve, vacate, care for, control, name, and rename any street, avenue, alley, or lane, parks, and squares, within the limits of the city." Comp. St. 1893, ch. 13*a*, art. I, sec. 67, subd. IV. Some authorities are cited by the relator holding that the city, under such a statute, cannot vacate a public street solely for the purpose of donating it to some individual or corporation, but those authorities are not applicable for two reasons: First, because in those cases the streets when vacated remained the property of the

city, and, of course, could not be disposed of as a pure gift or donation; second, because in this case the ordinance was somewhat in the nature of a contract, and was enacted for the public benefit to procure the defendant company to construct its line through the city for the convenience of the citizens and traveling public generally, as well as for the accommodation of the company.

The twelfth section of the ordinance provided that the company and its successors and assigns are "given and granted the right and privilege of occupying so much of said streets and alleys, vacated by this ordinance, as said railway company, its successors and assigns, may at any time desire for its railroad, switches, side-tracks, depots and other railroad purposes." It is contended that this shows that the intention was merely to create a right of way over the streets vacated, and not to vacate the streets named for other purposes. It will be noticed that the title of the act specifies that it is the purpose to grant a right of way through the streets and alleys of the city and to vacate portions of said streets and alleys, not only for the purpose of giving a right of way, but also to give "other privileges" in said city. The first section of the ordinance granted a right of way "over, through, along and across (naming 12 streets), together with the right of way upon, along and across all alleys crossed or intersected by said located line." This section does not mention the vacating of any streets, and was sufficient for the purpose of granting a right of way, if that was all that was intended. O street was then, as it is now, the main thoroughfare of the city, and section 1 also provided that no more than two tracks, including the main line, should be constructed over O street. The ordinance also provided that the company shall not construct more than three tracks, including the main line, across L, M, N and Monroe avenue, which lie immediately south of P street, and not to exceed four tracks, including its main line, across Q and R streets, which lie immediately north, and there is no limitation of the number of tracks to be placed

across P street. It was provided that the company shall maintain an arc light of 2,000 candle power on M, N and O, three streets immediately south of P street, and on Q, R and Vine, three streets immediately north, but made no provision for maintaining a light at P street. The ordinance also required the company to pave and keep in repair as a street a strip of ground immediately west of its depot, 25 feet wide, "so as to connect with O street and with P street in said city," thus enabling the traffic on P street to pass over on O street, as it was prevented from crossing on P street. This provision the company has fully complied with. In due time after the enactment of this ordinance the company took possession of that part of P street that was vacated by the seventh section of the ordinance, and constructed its switch tracks and other improvements thereon, erected its station building immediately adjoining it, and, in fact, extending slightly upon the vacated portion of the street. The evidence shows that some foot-passengers have crossed over this vacated strip, and that teams and conveyances have been known to cross it, but the tracks "have a 4½-inch drop on its rail," and they are not planked or otherwise prepared for crossing. There has been no crossing there by people or conveyances in any different manner than they might cross or drive over the railroad right of way at any and all places. The property has been in the exclusive possession and control of the railway company as much as any property devoted to a public use could be, and this has been continued now for much more than 10 years.

Other sections of the ordinance vacate that part of Twentieth street lying between P and O streets which the company was required to pave, as above stated, and also a small portion of two alleys through which the right of way extended; and it is contended that the provision, that the company should have the right and privilege of occupying these vacated parts, indicates that the intention was to make a qualified vacation for right of way only. The railway company did not own the property abutting

on the vacated portions of these two alleys, and it may have been thought necessary, in order to secure the right of way then as against the owners of the abutting property, to make special provision therefor in the ordinance. Whether the mayor and council had power to prevent the vacated portions of these alleys reverting to the owners of the abutting property is not now material in this inquiry. The company has occupied them under this claim of right for much more than 10 years, and it is too late now to question the right of the company in its depot and switching grounds because of any doubt as to the original right to occupy the vacated alleys as against the owners of the abutting property. Under these conditions, it is impossible to conclude that the vacation of the part of P street in question by the seventh section of the ordinance was intended merely as a grant of right of way. This vacated portion of P street became the property of the defendant company as the owner of the abutting lots. This ownership and full control of the property has been continually recognized by the city authorities and the company has held and exclusively occupied this territory for much more than 10 years. The power given to the city by the statute to compel the construction of a viaduct requires that it must be over a railway track on or across a "public way," and must be a "viaduct on or along such street, under or over such track." Ann. St. 1911, sec. 8031. As there was no public way or street crossed by the railway tracks at the proposed place, the city was without authority to compel the construction of a viaduct.

We do not at this time determine the right and power of the city to now open the street over these station grounds by condemnation proceedings, as that question is not presented by the record.

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

REVERSED AND DISMISSED.

HAMER, J., not sitting

FAWCETT, J., dissenting.

I am unable to concur in the construction by my associates of ordinance No. 218, published in the Revised Ordinances of the City of Lincoln in 1895 as No. 1641. At the time that ordinance was passed and the streets entered upon by the respondent, I do not think either the city or the railway company regarded the ordinance as an absolute and unlimited vacation, for its full width, of any part of P street. To my mind, the intent and purpose of the ordinance was simply to give the company a right of way across the streets and alleys of the city, named in the ordinance, together with the right to construct certain side-tracks across but not along P street. That it was not the intention of the city to give the company the right to erect its depot building upon P street, or any other street, is shown by section 4 of the ordinance, which provides: "That said railway company shall, within one year, construct a substantial passenger depot building of brick or stone, or brick and stone, at or near the northwest corner of the intersection of O and Twentieth streets and north of O street." In order to comply with this provision of the ordinance, the company would be compelled to build its depot upon its own ground lying north of O, west of Twentieth and south of P streets. This construction is corroborated by the fact that the company did, within one year thereafter, construct its depot building as I have indicated. No part of the foundation or walls of the depot extends north of block 28, or upon P street. The only encroachment upon P street by the depot is by a projection of the cornice, upon the north end of the baggage room, a few inches over the south line of P street. That the ordinance was intended merely as a grant of a right of way and not as an absolute vacation of P street is shown by the ordinance itself. The title of the ordinance reads: "An ordinance providing for the passage of the railway of the Chicago, Rock Island & Pacific Railway Company across and through the streets and alleys of the

city of Lincoln, in the county of Lancaster, and state of Nebraska, and vacating portions of certain streets and alleys in said city for the purpose of giving right of way and other privileges in said city to said railway company." The whole reference in this title to the question of vacation is in the last clause, "and vacating portions of certain streets and alleys in said city for the purpose of giving right of way and other privileges in said city to said railway company." It will be observed that in this clause of the title there is not even a comma separating the words, "and vacating portions of certain streets and alleys in said city," from the words, "for the purpose of giving right of way and other privileges in said city to said railway company." It seems to me that words could not be used to indicate more plainly that the vacating of certain streets and alleys was to be "for the purpose," and for the purpose only, "of giving right of way," etc. The language of the ordinance itself is in harmony with the title, and its interpretation is as unmistakable.

Section 7 provides: "That all that part of P street in said city lying south of lots 9, 10, 11 and 12, in block 13, in Kinney's O street addition to said city, be and the same is hereby vacated." If the construction placed upon the ordinance by the majority opinion is correct, then that portion of P street, lying south of those four lots in block 13, and north of lots 1, 2, 3 and 4 in block 28, became the absolute property of the company, by reason of the fact that it was then the owner of the four lots in block 13 and the four in block 28, above enumerated, and P street, from the west line of lot 9 in block 13, and lot 4 in block 28, east to Twentieth street, no longer existed. If the city council considered that it was so vacating that portion of P street, wiping it off the map of the city, so to speak, and giving it to the railway company, what did either the city or company expect that the city and the public generally would gain by the provision in section 8 of the ordinance, which provided that the company "shall dedicate, pave and keep in repair, as a street, a strip of

ground west of its said depot 25 feet wide, and through said block 28, in Kinney's O street addition to Lincoln, Nebraska, so as to connect with O street and with P street in said city?" The strip of ground specified, lying west of the company's depot, would run from O street northerly, and would strike the point where P street had formerly been some distance east of the west line of lot 9, in block 13, and lot 4, in block 28, so that, while it would connect with O street on the south, it would not connect with P street on the north, because, if the majority opinion be right, there was then no P street at the point where this 25-foot strip would intersect what formerly had been P street. In other words, the northern termini of this 25-foot strip would be upon the railway company's private land, which it received under the ordinance. When the right of a city to the control of its streets is sought to be taken from it by construction, such construction should rest upon more reasonable ground than this.

Again, it was admitted by the respondent at the trial "that, before the construction of the railroad, the city built a water main on P street at the place in controversy in this lawsuit, and has since said time maintained it;" yet the ordinance nowhere reserves to the city the right to go upon this part of P street for the purpose of making repairs that may at any time be needed upon its water main. If the city desired to go upon that ground for the purpose of renewing or repairing this water main, it would have to first obtain the consent of the railway company, or proceed as a trespasser. I do not think either the city or company then considered, or that the company should now be permitted to contend for any such construction of this ordinance.

Again, section 12 of the ordinance provides: "That said Chicago, Rock Island & Pacific Railway Company, its successors and assigns, be and the said railway company, its successors and assigns, are hereby given and granted the right and privilege of occupying so much of said streets and alleys, vacated by this ordinance, as said railway

company, its successors and assigns, may at any time desire for its railroad, switches, side-tracks, depots, and other railroad purposes." What was intended by this section? Is it to be construed as a mere jumble of words, without purpose or meaning of any kind? Certainly not. The company is "given and granted the right and privilege of occupying"—what? The other streets and alleys over which it might cross? No. It was given and granted the right and privilege of occupying "so much of said streets and alleys, vacated by this ordinance." If the ordinance absolutely vacated those streets and alleys, the land became the property of the company, and it did not need any grant from the city of the right and privilege of using it for any purpose it saw fit. This provision was inserted in the ordinance for the reason that the city and the company both knew that it was not the intention to absolutely vacate these streets and alleys, but to simply give a right of way over and across them; and the grant given by this section was to permit the company to not only cross the streets and alleys, designated as vacated, but at any time, when desired for its railroad switches, side-tracks, depots and other railroad purposes, to occupy so much of said streets and alleys as would be necessary for those purposes. This is undoubtedly what is meant by the words "and other privileges" found in the title of the ordinance, following the words, "for the purpose of giving right of way." A point is attempted, in the majority opinion, to be based upon these words; but I do not think it requires argument to support the statement that they cannot, by construction, be made to grant any greater rights than those given by the specific words of grant with which they are connected. The words "other privileges" cannot be construed to mean more than "similar" privileges. Privileges of like character. The meaning of the language is as if the clause had been written, "and vacating portions of certain streets and alleys in said city for the purpose of giving right of way and similar privileges in said city to said railway company."

To my mind, section 13 of the ordinance is also significant. It reads: "By the acceptance of the rights and privileges hereby granted, the said railway company shall be taken to agree, and does hereby agree, to save and keep said city of Lincoln harmless from the payment of any damages, growing out of the rights hereby conferred, in favor of any person whomsoever." The only references in this section are to rights and privileges granted, and not to lands donated, by vacation or otherwise. It is another circumstance in the chain of circumstances, tending to show that both the city and the company considered and fully understood that all the company was obtaining was certain rights and privileges over and across the streets and alleys of the city.

It is contended by the city that, to hold that the ordinance absolutely vacated that portion of P street in controversy, and thereby, by reason of the fact that the company owned the lots on either side abutting thereon, transferred to the company the title and absolute ownership of that portion of the street so vacated, is contrary to, prohibited by, and in conflict with the fourteenth amendment to the constitution of the United States, in that it constituted the taking of property without compensation; that the ordinance was passed without a vote of the people, or an opportunity on the part of any one to be heard in any tribunal as to compensation. It is stipulated that O and P streets and the various lettered streets running east and west from corporation line to corporation line "were duly laid out and dedicated for public use as streets, and the fee title thereto conveyed to the city of Lincoln." Relator contends that, such being the case, if the street was vacated as claimed, the title to the ground did not pass to the abutting lot-owners, but remained the property of the city, and became a part of its real estate, which it could not donate to the company, nor even sell without a vote of the electors of the city, in accordance with section 9, article II, chapter 13*a*, Compiled Statutes 1891, which provides that the mayor and

council "shall not have power to sell any real estate of the city unless authorized so to do by a vote of the majority of the electors of such city at a special election therefor." This question is squarely decided adversely to the city in the second paragraph of the syllabus and in that part of the majority opinion upon which the syllabus is predicated.

P street is one of the main public streets of the city of Lincoln, extending from the city limits on the west to the city limits on the east. It is well built up on both sides of the street for over a mile west of the point in controversy. The post office, the Lincoln Hotel, the Savoy Hotel, the Commercial Club, the Elks Club, the Young Men's Christian Association, and many large business buildings front upon it. It is also built up on both sides with valuable residences, solidly for many blocks, and partially so for many more blocks east of the point in controversy. By a vote of the electors it has been decided that a viaduct should be built across the tracks of the railway company where they cross that street. The necessity for such a viaduct is not questioned. O street (the next street south) is frequently quite congested. Numerous street car lines run on O street. It is the main street leading to the city cemetery. The travel over it by automobiles, carriages and wagons is more or less continuous, and the crossing at its intersection with respondent's track is necessarily more or less attended with danger, notwithstanding the precautionary steps taken by the company to prevent accidents. With a viaduct across the tracks on P street the congestion on O street would be relieved. Automobiles and other vehicles could pass over the tracks without danger or delay. The people living on P street, east of the tracks, would have the use of the street to and from the post office and business center of the city, and the thousands of citizens living west of Twentieth street would have a safe and never-obstructed route to the city cemetery. The proposed viaduct would not prevent or in the least obstruct the company in the free use of the

street for any of the purposes specified in the ordinance. On the contrary, it would give the company such use freed from the dangers incident to the use now being made of it by the public on foot and at times in vehicles of various kinds. In the closing lines of the opinion there is the suggestion of a possible right on the part of the city to regain control of P street by condemnation proceedings. I am unable to see the justice in requiring the city to resort to condemnation proceedings, and to pay to the company, in such proceedings, a large sum of money, to regain that for which the company paid nothing, and which it is exceedingly doubtful if it ever obtained. There being, to say the least, grave doubt upon that point, such doubt should, under the circumstances shown in this case, be resolved in favor of the city. It is idle to say that the city received any consideration for the conveyance of its fee title to or the surrender of its control over a solid section of one of its principal streets. The right given the company to run its main-line track through the center of the capital city of the state, and to use streets and alleys in the heart of the city for side-tracks and switches, was and is worth to the company many times as much as any benefit it thereby conferred upon the city. The only way it will suffer from building the viaduct will be in the cost thereof. Equity, and its contract with the city, both require it to bear that cost. The district court so found, and I think it should require a much clearer case than the one before us to warrant us in reversing that judgment.

Tonkawa Milling Co. v. Town of Tonkawa, 15 Okla. 672, is as like the case at bar as "two peas in a pod." The title to the ordinance in that case is: "An ordinance granting a right of way to the Blackwell and Southern Railway Company through the town of Tonkawa, Kay county, Oklahoma territory, and, for the purpose of such right of way, vacating certain streets, avenues and alleys in said town of Tonkawa." The only difference in that title and the one under consideration here is the words of vacation and of the purpose therefor are transposed. In

the consideration of that case, on page 678, the court say: "By the express terms and provisions of the ordinance it is clear that nothing more was intended or attempted by the town than to grant to the railway company a right of way over and across the streets and alleys named, and the right to the railway company to use and occupy the same for the purposes mentioned." I fully concur in that construction of the ordinance. I do not see how any other construction can reasonably be placed upon the language used. No case has been cited, either in the majority opinion or in the brief of counsel, which would sustain any other construction.

REESE, C. J., concurs in this dissent.

AMERICAN CASE & REGISTER COMPANY, APPELLANT, V. D. J. CATCHPOLE, APPELLEE.

FILED FEBRUARY 25, 1913. No. 17,051.

1. **Pleading: ANSWER: SUFFICIENCY.** If there is no motion in the trial court to require a more complete and certain statement of facts in an answer alleging fraud in procuring a signature to a promissory note, the answer will be liberally construed in that regard to support the judgment.
2. **Appeal: CONFLICTING EVIDENCE.** A law case tried by the district court without a jury upon conflicting evidence will not be reversed upon appeal, unless from the whole record it appears that the judgment is clearly wrong.

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

L. C. Chapman, for appellant.

Burr, Greene & Greene and *E. Ross Hitchcock, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court

for Johnson county upon a note which it was alleged in his petition was given for an "account register." The allegations of the answer substantially admit the signing of the note by the defendant, but allege that it was obtained by the fraud of the plaintiff's agent. The defendant alleged that he signed the order for the machine, and "that his name was obtained without the knowledge or intention of the defendant to the note as well as to the said order, which was done by the use of carbon paper, and the defendant was thus deceived, and his signature was obtained to the note sued on, without the knowledge or intention of the defendant, by the use of carbon paper in this fraudulent manner."

This, perhaps, is not a very artistic manner of pleading the facts constituting the fraud, but no motion was made for a more definite statement, and the defendant's evidence of fraud was received without objection on the ground of any supposed insufficiency of the answer. The defendant testified positively to the signing of the order, and that he only signed his name once, and did not know at the time that he had signed any such note, or that it was intended that he should.

The case was tried to the court without a jury, and the court found for the defendant and dismissed the plaintiff's action. The evidence is perhaps conflicting, but we cannot reverse the judgment of the trial court under such circumstances, if there is a substantial conflict, and it does not affirmatively appear that the finding is clearly wrong.

The judgment of the district court is

AFFIRMED.

MARY HENZE, APPELLANT, V. JOHN MITCHELL ET AL., APPELLEES.

FILED FEBRUARY 25, 1913. No. 16,649.

1. **Taxation**: REDEMPTION: RIGHT OF WIFE. Before the repeal of the act authorizing the existence of the dower interest of the wife in the husband's lands, she had a property right therein, which she should be allowed to protect by the proper action as against the imprudence or neglect of her husband, and she is *held* entitled to protect such right as well before her husband's death as afterwards, and, where the husband neglected to redeem such land from a sale for taxes, the wife had a right to maintain her action to redeem from such tax sale.

2. ———: ———: ———. Where, in an action to set aside a tax sale, or to be allowed to redeem from the lien of the same, it is admitted by the owner of the tax lien sought to be set aside or redeemed from that the land on which the same is a lien belonged to the plaintiff's husband at the time of the original decree of foreclosure and sale, and that the wife had a dower right in such land, it follows that she is at liberty to protect her interest in the premises by the maintenance of the proper action to redeem.

3. **Process**: VALIDITY. The alleged service upon the wife in the original case examined, and *held* to be void.

4. **Taxation**: REDEMPTION: RIGHT OF WIFE. Where, in a proceeding to foreclose a tax lien, no sufficient service was had upon the wife, who was admitted by the answering defendant to hold a dower interest in the lands of her husband, she will be allowed to redeem from a tax sale as though no such decree had been entered.

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

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

Cornelius Patterson and *Albert W. Crites, contra.*

HAMER, J.

This action was brought by the plaintiff, Mary Henze, against John Mitchell and George H. Henze to redeem her

alleged homestead from alleged tax liens. The petition was filed in the instant case December 15, 1908. It alleged a sheriff's sale of the premises in controversy to the defendant John Mitchell under a decree of foreclosure describing certain tax liens, and that the decree was void as to the plaintiff for the lack of service upon her. The prayer was, to be allowed to redeem from the tax liens and to quiet title in the plaintiff. January 16, 1909, there was service upon the defendant Mitchell. March 29, 1909, there was a decree in favor of the plaintiff upon the evidence taken and according to the prayer of the petition. It was rendered on a default. April 8, 1909, the defendant Mitchell filed an answer to the plaintiff's petition; but there is no showing that this was done by leave of the court. March 4, 1910, the plaintiff filed a reply to this answer, in which she insists upon her decree of March 29, 1909, and denies the allegations of new matter contained in the answer. February 21, 1910, there was a hearing, according to the bill of exceptions, upon the application to vacate the decree of March 29, 1909. This proceeding is not shown by the transcript to have been journalized. The first bill of exceptions appears to have been signed by the judge April 29, 1910, and refers to the affidavits given in evidence upon the application to vacate the decree, and on which the hearing seems, by the said bill of exceptions, to have been had. March 4, 1910, there was a hearing and an order dismissing the plaintiff's petition. Also, the plaintiff's motion to set aside said order was denied. The second bill of exceptions is signed by the trial judge April 19, 1910, and recites the giving of certain evidence on behalf of the plaintiff, which is therein specified, and also on behalf of the defendant recites "his motion for a judgment of dismissal, which motion was sustained." The petition in the instant case alleged, among other things, that on and prior to February 23, 1900, the plaintiff was the owner and entitled to the immediate possession of the N. W. $\frac{1}{4}$ of section 18, township 31 north of range 46 west, in Sheridan county; that

the title of record to said real estate was in the defendant George H. Henze, the husband of the plaintiff, "and as a family plaintiff and said defendant George H. Henze * * * were residing upon the said real estate as their homestead at the dates mentioned;" that the decree in favor of the plaintiff found that on January 16, 1909, in said county of Sheridan, the defendant John Mitchell was duly served with a summons requiring him to answer the petition on or before February 8, 1909, and that the defendant George H. Henze had entered his general appearance in the case, and had waived the service of the summons; that each defendant was in default of a pleading; that the facts stated in the petition were true; that the plaintiff was entitled to the relief prayed in said petition; that the plaintiff was entitled to redeem from the purported sale and decree and sheriff's deed upon tax sale foreclosure, upon payment into court, for the benefit of the defendant John Mitchell, of the sum of $281.10, being the amount paid at the sale, with 12 per cent. per annum from date of the said sale until date of the decree, and the taxes since that date paid by Mitchell upon said tract, allowing therefrom as mesne profits a sum equal to the annual taxes paid. It was decreed that the title should be quieted in the plaintiff, "and as her homestead, free and clear from any lien, claim or demand of any person or corporation," and free from any tax lien, claim or mortgage of any person, upon the payment into court of said sum of $281.10 for the benefit of the defendant Mitchell. The decree in favor of Mary Henze was fully supported by the allegations of the petition; the trial court took the evidence; and it is not shown that the evidence failed to support the decree rendered.

The facts upon which the foreclosure is alleged to have been void as to the plaintiff are recited in the petition in the instant case: That on February 23, 1900, a petition was filed in the district court for Sheridan county, entitled "The County of Sheridan, Plaintiff, v. George H. Henze, and *Mrs. Henze, his wife, Christian name unknown*,

E. S. Ormsby, Trustee, and the American Investment Company, and John Mitchell, Defendants;" that the purpose of that case was to foreclose an alleged tax lien against the land in controversy; that there was never any sale of said real estate for taxes by the county treasurer; that the land had not been assessed, and that the taxes had not been extended against it; that the petition falsely stated in the verification that the Christian name of Mary Henze was unknown to the county attorney in that case, and to the said John Mitchell, when the same was known; that this was done to prevent Mary Henze from having a knowledge of the pendency of the action; that a purported cross-petition was filed in the said case of the County of Sheridan v. George H. Henze et al. by the defendant John Mitchell, in which he claimed to own a tax lien upon the premises sought to be foreclosed; that the said cross-petition failed to state a cause of action; and that no proof of publication of the delinquent tax list was ever filed in said county.

The plaintiff in the instant case stated in her petition that no summons was served upon her or delivered to her, and that she had not waived the same; that she did not have any knowledge of the facts until about August, 1907; that a purported sheriff's deed was made to the said John Mitchell, who became the purchaser at said sale; that the said defendant John Mitchell had promised the defendant George H. Henze that, if he, the said George H. Henze, would not bid at the sheriff's sale, then that he, the said John Mitchell, would convey the said tract by deed to the said defendant George H. Henze, but that said Mitchell failed to so convey said premises, and refused to permit a redemption thereof from said sale; that said defendant John Mitchell filed an answer in the instant case, which admits that the plaintiff, Mary Henze, had an inchoate dower interest in the land in controversy as the wife of the defendant George H. Henze, and denied that he had ever entered into any agreement with the said George H. Henze to purchase said land at sheriff's sale and convey

the same by deed, or otherwise, to the said George H. Henze, and denied that he had ever permitted the redemption of the said premises; that said Sheridan county got its decree against said George H. Henze and the plaintiff for $7.41 taxes and interest, which was represented by the said tax sale certificate claimed to be held by said John Mitchell; that on the 22d of November, 1899, said Sheridan county and the said John Mitchell sued out their order of sale, and caused the sheriff to appraise and sell said land on the 26th of December, 1899, and that the sheriff sold the same to the said John Mitchell for $130.75, which said John Mitchell then paid to the sheriff; that the said county of Sheridan procured in said court an order confirming said sale, and directing the sheriff to execute and deliver a deed for said land to the said John Mitchell.

The summons in the foreclosure case was apparently served upon Mrs. Henze by leaving an alleged certified copy at her usual place of residence. Her Christian name is not in the summons. She is not sued as Mary Henze, nor does the record disclose the fact that she is Mary Henze. This sort of service cannot be defended under the decisions of this court in the foreclosure of tax liens, and some other cases. *Enewold v. Olsen,* 39 Neb. 59; *Butler v. Smith,* 84 Neb. 78; *Herbage v. McKee,* 82 Neb. 354. And where there is no service, or no sufficient service, the judgment against the person who should have been served is void, and such person may redeem from the sale made. *Clarence v. Cunningham,* 86 Neb. 434; *Humphrey v. Hays,* 85 Neb. 239; *Smith v. Potter,* 92 Neb. 39; Code, sec. 148.

In *Enewold v. Olsen, supra,* this court held that the name of a person consists of one given name and one surname, and, using the given name first and the surname last, constitute such person's legal name, and that to be ignorant of either is to be ignorant of such person's name, within the meaning of section 148 of the code; that the law requires that a defendant shall be sued by his true name, if the same is known or can be ascertained by the party

suing him; and that, under section 69 of the code, a court obtains no jurisdiction over the person of a defendant served with a summons by leaving a copy at *his usual place of residence,* unless such defendant is described by his true name, except in cases brought under section 23 of the code; and it was also held, under section 148 of the code, that if a defendant is sued by any name and description other than his true name, except in actions brought under section 23 of the code, a court acquires no jurisdiction over him by the sheriff leaving a copy of the summons at such defendant's usual place of residence. It was held in such case that the court acquired no jurisdiction by a copy of the summons left at the defendant's usual place of residence, and that a judgment rendered against him in the name of "F. Olsen, full name unknown," was a nullity. Section 148 of the code provides: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown,' and a copy thereof must be served *personally upon the defendant.*" The record shows that this was not done in the instant case. If she had any interest in the premises, her right could not be extinguished except the summons was *personally* served upon her. *Butler v. Smith,* 84 Neb. 78; *Herbage v. McKee,* 82 Neb. 354.

The plaintiff contends for the right to protect that which she alleges was her homestead. It is claimed by the defendant Mitchell that, at the time the decree in favor of the plaintiff was set aside, the evidence fails to sustain the homestead claim. It is admitted by his answer that the plaintiff, Mary Henze, was the wife of the defendant George H. Henze, and that she had an inchoate right of dower in the premises at the time they were sold, because of the ownership of her husband. *Blevins v. Smith,* 104

Mo. 583, 13 L. R. A. 445, is cited as authority for the defendants' contention. We do not so understand it. It is said in that case that Missouri has "by statute adopted the common law in regard to dower." The court then quotes from Lord Coke: "There be three things highly favored in law, *life, liberty,* and *dower.*" The opinion also copies from Chief Justice McKean in *Kennedy v. Nedrow,* 1 Dal. (U. S.) *415: "Dower is a legal, an equitable and a moral right, * * * favored in a high degree by law, and, next to life and liberty, held sacred." This is followed by the language of the Missouri statute securing to the wife her common law and statutory dower. The court then say: "The right of dower attaches whenever there is a seizin by the husband, during the marriage, of an estate of inheritance, and, unless it is relinquished by the wife in the manner prescribed by law, it becomes absolute at the husband's death." Section 4901, Ann. St. 1903, was in force at the time of the sale of the land under the tax foreclosure. It reads: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seized, of all estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." Among other things the Missouri supreme court say: "Indeed, the whole system is based on the idea that it is the duty of the husband to pay the taxes on his land. And a failure to pay the taxes is a default on his part. The wife is under no obligation to pay the tax. She does not own the fee; she does not reap the usufruct; certainly no system based upon justice would exact of her a tribute on property she might never enjoy, and rob her of her dower for failure to pay a tax she did not owe." It is further said: "An ordinary execution sale conveys to the purchaser all the right, title, and interest of the defendant in execution, but it has no effect upon the inchoate dower of the wife." The court quotes from *Graves v. Ewart,* 99 Mo. 13, *Powell v. Greenstreet,* 95 Mo. 13, and *Gitchell v. Kreidler,* 84 Mo. 472. In *Powell v. Greenstreet,* the judge

who delivered the opinion is quoted as saying: "It must be taken as settled law that purchasers at these sheriff's sales, made on executions in tax suits, acquire only the right, title, and interest of the defendants in the tax suits." In *Blevins v. Smith, supra*, it is said: "We regard the dower right as of inestimable value to the homes of this state. The trend of public opinion is rather to enlarge, as our homestead laws clearly indicate, than to cut off this sustenance of the widow." The statute is cited "as a monument to the wisdom and humanity of our commonwealth."

When dower once attaches, the husband cannot, by any act or admission of his, defeat it, and no judgment rendered against him will prejudice the right and interest of the wife. *Grady v. McCorkle,* 57 Mo. 172; *Williams v. Courtney,* 77 Mo. 587.

The right of dower, when marriage and seizin unite, is vested and absolute, and is as completely beyond legislative control as is the principle established. *Russell v. Rumsey,* 35 Ill. 362; *Steele v. Gellatly,* 41 Ill. 39.

The power of the legislature to cut off the inchoate right of dower may well be doubted. *Dunn v. Sargent,* 101 Mass. 336.

In *Davis v. Green,* 102 Mo. 170, 11 L. R. A. 90, it was held that the sheriff's deed to the husband gave the plaintiff dower in the land, and that no act or declaration of the husband could divorce the same or impair it.

In *Seibert v. Todd,* 31 S. Car. 206, 4 L. R. A. 606, it was held that, where the seizin of the husband is accompanied at its inception with a lien, the inchoate right of dower of the wife attaches in subordination and subject to the lien.

In *Bullard v. Bowers*, 10 N. H. 500, the mortgage contained a condition that the mortgagor should provide a good and comfortable home in the dwelling-house on the mortgaged premises, and a good bed for the use and benefit of Asahel Bullard during his natural lifetime, and also pay to him $300 when he might be in need of the same for his support by reason of old age; and it was held that, so long as the mortgagee had not demanded a performance of

the condition, it remained unbroken, and that the widow of the mortgagor could not be debarred of dower.

In 1 Scribner, Dower (2d ed.), it is said in section 3, p. 481: "It was settled in the English courts of equity at an early day that as to all charges and incumbrances upon the husband's land valid and effectual against the wife, which were in their nature redeemable, there was conferred upon her, *by reason of her interest in the premises*, a right of redemption." Many English cases are cited in the note to this section, among which are *Hitchens v. Hitchens*, 2 Vern. (Eng.) 403; *Hamilton v. Mohun*, 1 Will. P. (Eng.) 118; *Squire v. Compton*, 9 Vin. Abr. (Eng.) 227. It is said in the same section that, when in the United States the right of the widow to be endowed was extended to equities of redemption of mortgages in fee, it followed as an incident thereof that she was entitled to redeem. "And accordingly it is the general, if not the universal, American doctrine that the widow may redeem the husband's lands from an existing incumbrance, and thus entitle herself to dower even as against the mortgagee."

In *Hugunin v. Cochrane*, 51 Ill. 302, 2 Am. Rep. 303, it was held that where a husband purchased lands, giving his notes as security for the purchase price, and afterward, by his sole deed, reconveyed the lands to the vendor as a satisfaction of the notes, the wife's right of dower did not attach.

In *Williams v. Kinney*, 43 Hun (N. Y.) 1, it was held that "the equitable dower of the widow was subject to the equitable lien existing in favor of Huntington (the vendor), but that she had an equitable claim to have the personal estate exhausted in discharge of the personal obligation of the husband under the contract of purchase." The right to have the personal estate exhausted emphasizes the high regard of the court for the dower interest of the widow.

In *McClure v. Harris*, 12 B. Mon. (Ky.) 261, it is said that the widow was entitled to dower in all the land em-

braced in the mortgage which had been given by her husband.

In *Blair v. Thompson,* 11 Grat. (Va.) 441, it was held that, where W. gave a bond and security for the purchase price, the vendor's lien was not retained, and that his widow was entitled to dower in the land.

In *Steuart v. Beard,* 4 Md. Ch. 319, it was held that, where the husband had an equitable interest in the land conveyed by G. to S. subject to the payment of the sums secured by a deed, but not liable to the judgment so as to defeat the widow's title to dower, judgment having been recovered after the marriage, it was subordinate to the claim of dower, which commenced with the marriage and the purchase of the land by the husband.

In *Clements v. Bostwick,* 38 Ga. 1, it was held that, when the husband of a married woman died seized and possessed of a tract of land to which he held the legal title, the widow was entitled to her dower therein, and that the vendor's equitable lien for part of the unpaid purchase money, which was not enforced during the lifetime of the husband, would not override or defeat the widow's legal right to her dower in the land.

In *Meigs v. Dimock,* 6 Conn. 458, it was held that the widow's right of dower would be protected as against a sale by an administrator for the payment of the grantee's debts, and against D. who had gone into possession of the premises and made repairs and improvements under a conveyance from C., who was the grantee of A.

Cameron, Law of Dower (p. 4), cites Blackstone, and says: "The right of a widow to dower did not originate from any legislative or other law, but, as Blackstone says, from that ancient collection of unwritten maxims and customs called the Common Law, however compounded, or from whatever fountains derived which had subsisted immemorially." He further says (p. 5): "Dower was intended for the sustenance of the widow and the nurture and education of the children, and is paramount to the debts of the husband even owing to the Crown."

In *Adler & Sons Clothing Co. v. Hellman*, 55 Neb. 266, it is said in the syllabus: "The dower right of a wife in the real estate of her husband while inchoate is not a possessory right, but is a present, subsisting right or interest of a legal character, and can only be extinguished by the voluntary release or act of the wife, or operation of law." *Butler v. Fitzgerald*, 43 Neb. 192; *Wylie v. Charlton*, 43 Neb. 840.

"Marriage and seizin are essential to the existence of an inchoate right of dower, as has already been noticed in respect to a widow's dower right." 14 Cyc. 926, citing *Price v. Hobbs*, 47 Md. 359; *Scott v. Howard*, 3 Barb. (N. Y.) 319.

"When it becomes necessary to determine the value of the wife's inchoate dower interest in her husband's lands, it is competent to show the age, health, and habits of both the husband and the wife, and also to consult mortality tables of recognized authority." 14 Cyc. 926, citing *Sedgwick v. Tucker*, 90 Ind 271; *Unger v. Leiter*, 32 Ohio St. 210; *Mandel v. McClave*, 46 Ohio St. 407, 15 Am. St. Rep. 627, 5 L. R. A. 519; *Strayer v. Long*, 86 Va. 557, 10 S. E. 574.

"An inchoate right of dower is a subject of judicial protection" 14 Cyc. 926, citing *Buzick v. Buzick*, 44 Ia. 259, 24 Am. Rep. 740; *Atwood v. Arnold*, 23 R. I. 609, 51 Atl. 216.

"It has been held, therefore, that the wife may sue in her own name to set aside a deed or other instrument made by her husband in fraud of her dower." 14 Cyc. 926, citing *Buzick v. Buzick*, 44 Ia. 259, 24 Am. Rep. 740; *Clifford v. Kampfe*, 147 N. Y. 383; *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *McClurg v. Schwartz*, 87 Pa. St. 521.

"It has also been held that, where lands are sold on foreclosure and a surplus remains after satisfying the mortgage debt, the wife's portion thereof may be invested for her benefit free from the claims of creditors, judgment or otherwise, the income thereof to be paid to the husband during their joint lives, and to her during her own life if

she survive her husband." 14 Cyc. 927, citing *Matter of Brooklyn Bridge,* 75 Hun (N. Y.) 558; *Wheeler v. Kirtland,* 27 N. J. Eq. 534.

"The proceeds of a married woman's sale of her inchoate dower interest in her husband's land, although invested in other land, are a part of her separate estate, and not subject to execution for her husband's debts." 14 Cyc. 927, note, citing *Beals' Ex'r v. Storm,* 26 N. J. Eq. 372.

"In the absence of statutory provision to the contrary, when the wife's inchoate dower right has once attached, it cannot be divested, except by some act of her own, done according to the forms and in the manner prescribed by statute." 14 Cyc. 929, and cases cited.

As a rule, the wife will not be precluded by judgments in actions to which she is not a party. *Herrington v. Coburn,* 108 Ill. 613; *Wilkinson v. Parish,* 3 Paige Ch. (N. Y.) *653; *Foster v. Hickox,* 38 Wis. 408; *Greiner v. Klein,* 28 Mich. 12.

There must be a strict compliance by the tax sale purchaser or his assignee with each condition imposed by the statute, or the sale is void, the deed void, and redemption should be permitted. *Peck v. Garfield County,* 88 Neb. 635. In that case Judge FAWCETT, delivering the opinion of this court, said that the unsworn return of the man who was sheriff was not the kind of proof required by the statute (which was an affidavit), and that it was, therefore, not competent evidence; that a tax deed issued upon such a certificate was void, and the court erred in refusing to permit the plaintiff to redeem. Also, in *Thomsen v. Dickey,* 42 Neb. 314, this court construed section 3, art. IX of the constitution, and section 123, art. I, ch. 77, Comp. St. 1893, and, reaffirming *Larson v. Dickey,* 39 Neb. 463, said the notice to redeem must be served upon the very party designated by the statute, and must contain the precise information required, and that the statements required were as jurisdictional as the service of the notice. When by its terms it is obvious that a tax deed does not convey a title, "it fails utterly to affect the rights of the original

owner." *Conners v. City of Lowell,* 209 Mass. 111. Tax deeds, good on their face, may be held invalid by reason of some error in the original assessment, or otherwise, not apparent upon examination of the deed itself. *Roberts v. Welsh,* 192 Mass. 278; *Welsh v. Briggs,* 204 Mass. 540. And where the tax sale certificate failed to specify when the purchaser would be entitled to a deed, and the deed itself failed to recite the facts which it was provided the certificate should recite, the deed itself was held to be void. To the same effect is *Anderson v. Hancock,* 64 Cal. 455. In *Vestal v. Morris,* 11 Wash. 451, it was held that the tax deed is not sufficient to pass title, when the property was not assessed in the name of the known owner, and no notice had been given by the treasurer that the duplicate assessment roll was in his hands, together with the date when taxes must be paid, and no notice had been advertised by the sheriff that the sale for delinquent taxes would be at public auction. "Compliance with all provisions of law designed for the benefit of the taxpayer is a condition precedent to the validity of the tax." 1 Blackwell, Tax Titles (5th ed.) secs. 163, 164. And great strictness is required, as shown by many cases cited. Also, Black, Tax Titles (2d ed.) sec. 162, and cases cited.

The foregoing authorities show a most jealous regard by the courts for the wife's inchoate right of dower and a continuous effort to preserve it. It would seem that an action to foreclose a tax lien against the owner of the fee is a personal action.

In *Clarence v. Cunningham*, 86 Neb. 434, this court said in the syllabus: "In a personal action to foreclose a tax lien against the owner of the fee, who is a resident of the state upon whom personal service can be made within the state, service by publication only is void." This point in the syllabus treats an action brought against the owner of the fee to foreclose a tax lien as a *personal action.* It then follows up this statement by a conclusion emphasizing the former statement, and which is that service by publication in such case, where personal service can be made within the state, is void.

In *Humphrey v. Hays,* 85 Neb. 239, this court held: "A decree foreclosing a tax lien based upon service by publication, where the owner of the land is a resident of this state upon whom personal service of summons could have been made, and the affidavit for service contains no statements which would authorize constructive service upon the land against which the taxes were assessed, is void." This would seem to be an additional authority upon the question that the foreclosure of a tax lien is a *personal action,* and that there can be no service by publication where the owner of the land is a resident of the state. If a mere proceeding against the land would be sufficient in such case, then no personal service would be necessary. In the same syllabus it is said: "Such a decree may be attacked in an action to redeem the premises from the lien for taxes and remove the cloud created thereon by such void decree." In the same syllabus it is further said: "In an action to quiet title as against a sale for taxes made under a void decree of court, an offer to pay such sum as the court may find due the defendants on account of any lien for taxes paid is a sufficient offer to do equity and a sufficient tender of any taxes due the defendants. *Payne v. Anderson,* 80 Neb. 216."

In *Humphrey v. Hays, supra,* Mr. Justice BARNES, delivering the opinion of this court, cited, with approval, *Payne v. Anderson,* 80 Neb. 216, and said that it was held in that case "that a judgment or decree affecting the title to land owned by a resident of this state, where the only notice is by publication, is void, where no appearance was made by or for such resident; that, in an action to quiet title as against a sale for taxes made under a void decree of the court, an offer to pay such sum as the court may find due defendants on account of any lien for taxes paid is a sufficient offer to do equity and a sufficient tender of any taxes due the defendant. The petition in this case contained such an offer, and it follows that our former rulings upon the question involved in this suit require us to affirm the judgment of the district court." In that case

this court seems to have agreed unanimously (1) that the limitation of two years within which a party might redeem from the sale for taxes has no application to a sale made under a void decree foreclosing a tax lien; (2) also, that in such case an offer to pay such sum as the court might find due on account of any lien for taxes paid was a sufficient offer to do equity and a sufficient tender of any taxes due to the defendants; (3) that in such case an action to quiet title could be brought at any time within 10 years from the recording of the deed made on the sale under the decree. The affirmation of the several things stated would seem to show that this court has heretofore considered that the foreclosure of a tax lien and the sale of the premises under the decree rendered were all steps in a personal action, similar to the foreclosing of a mortgage, and not alone against the land. In *Clarence v. Cunningham,* 86 Neb. 434, it was held: "When a decree foreclosing a tax lien is set aside as void for want of service, the owner of the fee should be allowed to redeem from the tax lien as though no such decree had been entered." In *Smith v. Potter,* 92 Neb. 39, it was held, in a tax foreclosure proceeding by a county to recover delinquent taxes, where service was made by publication and the premises were sold under the decree of foreclosure, that the purchaser at the foreclosure sale bought subject to the right of one having a valid lien upon the premises to redeem from such sale, and that the party claiming the lien could not be debarred without a hearing, if he answered setting up his defense and demanding such hearing.

In the instant case the plaintiff is a resident of the state, and was such resident at the time of the attempted service. It therefore follows, for all the reasons given, that the original judgment against her is void. Whatever the interest is that she may have in the premises, she is entitled to protect it. Her interest is admitted to have been the dower interest of a wife in lands owned by her husband. The uniform procedure of the courts for a long period of years is to protect the inchoate right of dower held by the

wife in her husband's realty. The subsequent repeal of the statute creating the dower interest does not divest the owner of the same of such interest as she had at the time of the sale. The rights of the parties are determined by the conditions existing when the sale was made, except as modified by the new act of 1907, touching the descent of real property. While that act repeals the inchoate right of dower held by the wife, it increases her interest in the premises owned by her husband from a mere life estate to the ownership of a fee immediately upon the husband's death. The wife then becomes one of the heirs.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree allowing plaintiff to redeem, and finding and fixing her interest in the property.

REVERSED.

SEDGWICK, J., concurs in conclusion only.

LETTON, J., dissenting.

If Mrs. Henze had endeavored to redeem her husband's land from the tax lien within the statutory two years after the sale, she would have been entitled to do so, having a sufficient interest in the property to extend to her his right of redemption. There is no requirement in the statute that the wife of a landowner be made a party to tax foreclosure proceedings. In a few states, such as Missouri and Illinois, in which either the statutes as to the nature of the tax upon real estate and the lien created thereby, or the statute of dower, are very different from those of this state, it is held that the foreclosure of a tax lien does not bar an inchoate dower interest. In states such as Nebraska, in which there is no personal liability on the part of the landowner to pay the tax, in which the lien attaches to the land itself, whether assessed in the name of the owner or in that of some other person, or as unknown, in which the land is not listed by the owner but by the assessor, and in which the land itself is sold to pay delin-

quent taxes, the contrary is the rule, and an inchoate right of dower is barred by a foreclosure proceeding in which the owner is served and jurisdiction properly obtained over him. *Robbins v. Barron,* 32 Mich. 36; *Jones v. Devore,* 8 Ohio St. 430; dissenting opinion in *Blevins v. Smith,* 104 Mo. 583, 13 L. R. A. 445; Blackwell, Tax Titles (5th ed.) sec. 954. Henze was effectually foreclosed from any interest, so that even under the majority opinion all she ought to be allowed to redeem at this time is her own inchoate dower right, which will not give her any right of possession or of admeasurement until her husband's death. In other words, she redeems now, if at all, her own dower right; and cannot avail herself of her husband's redemption right, of which he has been deprived by the judgment against him. Since there was no right in the plaintiff to set aside the foreclosure proceedings and be allowed to redeem, the district court committed no error in setting aside the default decree and rendering judgment for the defendants.

ROSE and FAWCETT, JJ., concur in dissent.

JANETTE E. MCKEE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 25, 1913. No. 16,853.

1. **Railroads:** ACTION FOR DAMAGES: EVIDENCE. The evidence examined, and *held* to sustain the verdict.

2. **Damages:** INJURY TO CROPS. In case of the destruction of a permanent or perennial crop, such as alfalfa, the measure of damages is the difference between the value of the land before and after the destruction of the crop. *Thompson v. Chicago, B. & Q. R. Co.,* 84 Neb. 482; *Morse v. Chicago, B. & Q. R. Co.,* 81 Neb. 745.

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

Byron Clark, W. S. Morlan and *Arthur R. Wells,* for appellant.

John Everson, contra.

HAMER, J.

The plaintiff recovered a judgment against the defendant in the district court for Harlan county for $555.42 damages because of the alleged destruction of 30 acres of alfalfa by fire alleged by the plaintiff to have been set by one of the defendant's locomotives. It is claimed in the petition that the defendant negligently and carelessly caused and permitted sparks to be cast off from the engine, and thereby ignited grass and weeds and other combustible material at and along defendant's right of way, and that the fire spread over the land of the plaintiff.

The evidence shows that one of the defendant's freight trains went by at about 2 or 3 o'clock in the afternoon, and that directly afterwards a fire was discovered, which spread over the alfalfa field and did the damage complained of. The fire seems to have started about 100 feet from the track, and before the train was out of sight. An examination of the evidence would seem to justify the conclusion that the verdict is sustained by the evidence, tending to show that sparks from the engine of the defendant set the fire. It is contended by the defendant that the rule touching the sufficiency of circumstantial evidence laid down in the case of *Union P. R. Co. v. Keller,* 36 Neb. 189, should be held to apply to this case. The rule as quoted is: "It devolves on the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. It need not be shown that any particular engine was at fault, but it will be sufficient if the fire is proved to have been set by any engine passing over the defendant's railway, and the evidence may be wholly circumstantial, as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines, and, second, facts tending to show

that it probably originated from that cause and no other." It is said in defendant's brief: "Beyond the bare statement that it was a *'dry day,'* no evidence was offered as to the condition of the field, from which the court can conclude whether a fire would likely be started from a locomotive; nor is there any evidence whatever from which the jury might infer that there was no other possible source from which the fire might have originated." The plaintiff's husband testified: "In the afternoon—I think between 2 and 3 o'clock—a freight train came through, going west, and it set fire over there in the alfalfa field, where I had a field of about 35 acres of alfalfa that I sowed that spring." He testified that the fire did burn off the alfalfa and the grass and weeds; that the alfalfa was a good stand; that he and his wife wet some gunny sacks and went out and tried to put out the fire; that the value of the land with the alfalfa on it was $100 an acre, and that immediately after the fire the land was worth $75 to $80 an acre. George Davidson testified that he saw the train go by in the afternoon; and that it was warm that day; and that before the train was out of sight there was quite a smoke; and that it (the fire) went so fast after it got started that he did not think it was worth while to do anything with it; that it burned pretty nearly all over the 35 acres of alfalfa; that the alfalfa was a good stand; that the wind was blowing a pretty good gale, and that the fire burned dead matter in the alfalfa, weeds or foxtail mixed with it; that the fire started about 100 feet from the track; that the field of alfalfa was adjoining the right of way; and that the fire started in the field.

In *Thompson v. Chicago, B. & Q. R. Co.*, 84 Neb. 482, 23 L. R. A. n. s. 310, the evidence showed that two persons saw a fire burning on a railroad right of way shortly after an engine passed, and it was held that this evidence was sufficient to sustain the finding that the fire spread from the defendant's engine. We think the evidence in the instant case fully justifies the conclusion that defendant's engine started the fire.

It is next contended that the verdict was excessive and evidently due to the influence of passion and prejudice. It appears from the evidence that about 35 acres of alfalfa was burned over. While it is true that the evidence might have been more specific touching the condition of the alfalfa after the fire ran over it, the foregoing evidence was enough to enable the jury to form an intelligent conclusion concerning the amount of damages sustained. In *Thompson v. Chicago, B. & Q. R. Co., supra,* the jury were instructed, concerning the loss of an alfalfa crop, that the damages might be shown by showing the value of the land before the crop was burned and its value after the crop was destroyed. The jury were instructed that the measure of damages for the loss of the alfalfa would be "the difference in the value of the land with the stand of alfalfa as proved immediately prior to its destruction and the value of the land at and immediately after the destruction of the alfalfa." This court then said, Judge LETTON delivering the opinion: "There is a difference in conditions between an ordinary annual crop and a permanent crop, such as alfalfa, which justifies and requires a different rule in the measurement of damages, and we are of the opinion that a fair criterion of the damage suffered by the destruction of a good stand of alfalfa would be the difference between the value of the land with such crop standing and growing upon it and the same land without such crop." This view seems to fully sustain the verdict, supported as it is by the evidence.

In *Morse v. Chicago, B. & Q. R. Co.,* 81 Neb. 745, this court said in the syllabus: "Where the planting of land to a perennial crop, like alfalfa, increases the market value of such land, it is proper to show the damage done by the destruction of a stand thereof by proving the value of the land with and without such stand." In the case cited the plaintiff offered evidence which tended to prove that the overflow of water complained of in that case killed a stand of alfalfa growing on about 30 acres of land, and he offered testimony and was permitted to show

what the land was worth with the alfalfa growing upon it, and what it was worth without the alfalfa. The learned commissioner who delivered the opinion of this court said: "In this we discover no error. It is well known that seeding to alfalfa is a hazardous process, the result of which cannot be accurately predicted, and failures often result from conditions altogether beyond the control of the husbandman. Under these circumstances, the difference in value between land having a successful stand of alfalfa and land without the same would be a safer measure of the value of such stand than would the cost of again seeding to alfalfa."

A careful examination of the evidence leads us to conclude that it fully sustains the verdict. We find no error, and the judgment of the district court is

AFFIRMED.

IN RE CHARLES W. WILLARD.

CHARLES W. WILLARD, APPELLANT, V. CHARLES E. HENIG ET AL., APPELLEES.

FILED MARCH 6, 1913. No. 17,933.

1. **Habeas Corpus**: IRREGULARITIES. When the requisition papers for the extradition of a person charged with crime in another state clearly show the county in which it is alleged that the crime was committed and where the proceedings were begun, and the governor of this state has ordered the return of the defendant, the fact that the request for extradition by the governor of the requesting state names a different county as the one where the proceedings were begun will not be regarded so material as to require the court upon habeas corpus to discharge the prisoner.

2. ———: RETURN. Upon proceedings in habeas corpus to obtain the discharge of one who is held under the governor's warrant in extradition, if the return sets forth the governor's warrant under which the accused is held, and the recitals of the warrant, together with the allegations of the application for habeas corpus, show facts sufficient to justify the detention of the accused, the return is sufficient.

3. **Extradition**: SHOWING: HABEAS CORPUS: QUESTIONS OF LAW. When such requisition is made on the governor of this state, he must determine, first, whether the person demanded is substantially charged with a crime against the laws of the state from whose justice it is alleged he has fled by an indictment or affidavit properly certified; and, second, is he a fugitive from justice from the state demanding him? When it is made substantially to appear to the court in habeas corpus proceedings upon what showing the governor acted, it becomes a question of law for the court to determine whether or not the accused has been substantially charged with a crime against the demanding state. *Dennison v. Christian*, 72 Neb. 703.

4. **Courts**: EXTRADITION: REVIEW. The courts are bound by the construction of the extradition laws adopted by the supreme court of the United States, and the courts of this state will not review the decision of the governor in extradition proceedings upon a question of fact made before him which the law makes it his duty to decide, and upon which there was evidence pro and con before the governor.

5. **Appeal**: SUFFICIENCY OF EVIDENCE. In determining whether the evidence before the court below was sufficient to support the judgment, this court will not regard errors of the trial court in admitting incompetent evidence, if it appear from the whole record that upon the evidence conceded to be competent no other conclusion could be reached than the one reached by the trial court.

6. **Evidence** examined, and found sufficient to sustain the judgment of the district court.

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

B. F. Good, E. G. Maggi, A. M. Bunting and *T. J. Doyle*, for appellant.

J. B. Strode and *G. E. Hager, contra.*

BARNES, J.

Appeal from a judgment of the district court for Lancaster county denying the relator a writ of habeas corpus.

It appears that on or about the 12th day of June, 1912, one J. P. Bland filed a complaint in due form before Charles Humphrey, a justice of the peace in and for

Lenawee county, in the state of Michigan, charging the relator with the crime of embezzlement, which was alleged to have been committed in that county and state on or about the 22d day of May, 1912. Thereupon, the justice of the peace issued his warrant, in due form, for the arrest of the relator, who was charged with the commission of the crime, under the name of William A. Maynard, and who, it is admitted, is the relator. Thereafter, and on the 17th day of October, 1912, the governor of the state of Michigan, upon an exhibition of the said complaint and warrant, and upon the affidavits and certificates thereto attached, made his request upon the governor of the state of Nebraska for a warrant of rendition for the delivery of the relator to one Charles E. Henig, who was designated by the governor of the state of Michigan as his agent to receive and take relator into custody and return him to that state to be dealt with according to law. It further appears that on the 9th day of November, 1912, the governor of this state duly honored the above request, and issued his warrant of rendition to the respondent, who thereupon took the relator, who was found in the city of Lincoln, and who had assumed the name of Charles W. Willard, into custody. To obtain his release, relator brought this proceeding. On the trial in the district court the writ of habeas corpus was denied, and the relator was remanded to the custody of the respondent, and from that judgment the relator has appealed.

It is conceded that but two questions are presented by the record for our determination: First, is the relator substantially charged with an offense against the laws of the state of Michigan? Second, is he a fugitive from the justice of that state?

Concerning the first of these questions, it is not contended that the complaint filed before the justice of the peace in Lenawee county, Michigan, is insufficient in form to charge the relator with the crime of embezzlement. No attack is made upon the form or sufficiency of the warrant issued by the justice of the peace upon that com-

plaint, or the warrant of rendition issued by the governor of this state. It is therefore conceded that the proceedings in those matters were regular and sufficient. The record discloses that they are amply supported by the affidavits, the certificates of the proper officers, and the showing which is contained in the bill of exceptions. It is argued that the writ of habeas corpus should have been granted, and the relator discharged from custody, because the request of the governor of Michigan contains a statement that the relator was wanted for a crime committed in the county of Van Buren, instead of Lenawee county, in that state. It appears, however, that this statement was merely a clerical error, which in no way affects the validity of the rendition warrant issued by the governor of this state, and under which relator was taken into custody. In *State v. Clough,* 71 N. H. 594, 605, 67 L. R. A. 946, it was said: "The evidently clerical error in the affidavit of the clerk of court, that the indictment was returned 'on the second Monday of February, A. D. 1892,' did not preclude a finding by the governor that the true date was the second Monday of February, 1902. The caption of the indictment, as well as the affidavit of the district attorney, fully authorized that conclusion, which is placed beyond peradventure by an amendment of the clerk's affidavit in this court. The objection urged on this ground is a refinement of technical reasoning which has nothing to commend it in the modern administration of justice in criminal cases." It should be observed that in the request for the rendition warrant the governor of the state of Michigan asks that the relator be apprehended and delivered to the respondent, who is authorized to receive and convey him to that state, there to be dealt with according to law; and the rendition warrant issued by the governor of this state authorizes and requires the respondent to take the relator into custody, and return him to the state of Michigan, there to be dealt with according to law. We are therefore of opinion that the relator's contention upon this point is without merit.

It is conceded that the question as to whether the relator is substantially charged with the commission of a crime is one of law. That question was first presented to the governor of the state of Michigan, who was required to satisfy himself that a crime had been committed in his state. There was also attached to his requisition evidence of that fact in the copies of the judicial acts on which the warrant for the relator's arrest was founded. These copies, together with all of the certificates, affidavits and other matters appended to, and made a part of, the request for the rendition warrant are found in the record, duly authenticated, and are sufficient to authorize the issuance of the warrant and to comply with the requisites necessary to authorize the demand as plainly specified in the act of congress, and sections 333 and 364 of the criminal code of this state. The certificates of the executive authority are made conclusive as to their verity when presented to the executive of the state where the fugitive is found. *Kentucky v. Dennison*, 24 How. (U. S.) 66.

Again, this question was first passed upon by the governor of the state of Michigan, who had before him the record of the judicial acts on which the warrant for relator's arrest was issued, and the statute of his state pertaining to and defining the crime of embezzlement. That statute, duly exemplified, appears in evidence in the bill of exceptions. It differs materially from the ordinary statutes of embezzlement found in most of the states. It makes it a crime to convert to one's own use, not only property and money belonging to another, but also money or property "which is partly the property of another and partly the property of an officer, agent, clerk, servant, attorney at law, collector," etc. The complaint charges, in substance, that William A. Maynard, in the county of Lenawee, in state of Michigan, being the agent, clerk, servant and employee of John P. Bland, did then and there take into his possession and receive the sum of $98 by virtue of his employment as such agent, clerk, servant and employee, said money being the property of said

John P. Bland, and did then and there convert and embezzle said money to his own use without the consent of the said Bland. The second count of the complaint charges the same, except that Maynard received the money as collector of the said John P. Bland. And the third count contains a like charge, with the exception of the allegation that the money was concealed by the said Maynard with intent to convert the same to his own use. All three counts of the complaint are fully covered by the statute of the state of Michigan above referred to, and each constitutes a crime under the laws of that state. It follows that upon the face of the proceeding the relator is substantially charged with a crime against the laws of the state of Michigan. In order to avoid the effect of this record, and in his attempt to secure his release, the relator set forth in his petition what he alleges to be his contract with the complaining witness, Bland, and testified upon the trial in the district court that Bland was owing him a considerable amount of money as commissions on accounts collected by Bland himself. It is also contended that by the terms of his contract the relator was not required to account for and pay over the money belonging to his principal until after the expiration of one year from the date of his employment. It appears, however, by the terms of the contract that the relator was required to settle with Bland every 90 days; that his first settlement and accounting was due on the 19th day of May, 1912. The record discloses that demand was made upon relator for settlement and payment of the money in his hands; that, instead of making such settlement, he immediately left the county and state of his residence, to which he has never since returned.

Upon this showing it is argued that the relator was not guilty of the crime of embezzlement with which he was charged. It may be conceded that the relator's act would not constitute the crime of embezzlement in this state; but the provisions of the criminal law of the state of Michigan found in this record are entirely different

from the provisions of the criminal laws of this state; and the matters urged by the relator to secure his release do not show or tend to show that he was not substantially charged with a criminal offense. At most, his testimony relates to matters which might be urged as a defense on his trial upon the complaint in question. As we view the record, the governor of this state correctly determined that the matters before him were amply sufficient to show that the relator was substantially charged with the commission of a crime against the laws of the state of Michigan.

Finally, it is contended that the relator is not a fugitive from justice. The testimony discloses that the public prosecutor of Lenawee county, in the state of Michigan, was acquainted with the relator personally; that he talked with him a number of times in the city of Adrian, Michigan, during the months of April and May, 1912; that he knew relator was conducting a collection business there, and was informed and believed that relator upon leaving Adrian came to Lincoln, Nebraska, and engaged in the collection business similar to that conducted at Adrian, under the name of Charles W. Willard. The respondent Henig testified that he made diligent search for the relator, beginning about the 27th day of May, 1912, and continuing to the 17th of October of that year, when he located relator under the name of Charles W. Willard at Lincoln, Nebraska. It appears beyond question that the relator was a resident of the city of Adrian, in the state of Michigan, at the time of the commission of the offense with which he is charged. The testimony discloses that he left that city on or about the 26th day of May, 1912, stating that he was going to Buffalo for the purpose of bringing his household goods to Adrian; that, instead of going to Buffalo, he went to the city of Detroit. He admits that he there assumed the name of Wilson, and gave as a reason therefor that his wife's people were seeking him in order to procure his arrest for not supporting her. He admitted that he had communicated with his

former office but twice, and that within a week after he left Adrian; that he came to Lincoln and established a collection agency under the name of Charles W. Willard. He also testified that he intended to return to Michigan and continue his business there. It appears from the record that prior to his coming to Lincoln the relator was in the city of Grand Island, in this state, where he engaged in a like business; that an officer from that city intervened in this proceeding, and asked that the relator be remanded to his custody to answer to a crime charged to have been committed by him in that city similar to the one with which he is charged in the proceedings contained in this record.

From the testimony contained in the record, the conclusion is irresistible that when the relator left the city of Adrian he never intended to return; that he changed his name when in the city of Detroit, and there assumed the name of Wilson; that he fled from there to the state of Nebraska, and again changed his name to that of Charles W. Willard. After reading the entire record, we are of opinion that the district court of Lancaster county was justified in finding that the relator is a fugitive from the justice of the state of Michigan. *Dennison v. Christian*, 72 Neb. 703.

The trial judge having correctly resolved both of the questions presented by this record against the relator, and having properly refused to release him by the writ of habeas corpus, the judgment of the district court is

AFFIRMED.

HAMER, J., dissenting.

My sense of duty compels me to record a dissent from the majority opinion. The government is to protect the people in the enjoyment of their homes, their liberty, and their lives, and they should not be disturbed in such enjoyment because of criminal proceedings commenced against them in a foreign state, unless such enjoyment has been forfeited by a clear violation of written law, and

such violation is made manifest by the application of the demanding state supported by evidence which is satisfactory to our courts. The decision of the governor of the asylum state is not final. The alleged fugitive is entitled to sue out a writ of habeas corpus and refer the question to the courts. Hawley, Interstate Extradition, p. 29; *In re Briscoe,* 51 How. Pr. (N. Y.) 422. He further says: "It must appear in some way that the act charged amounts to a crime in the demanding state. This is a jurisdictional fact." On application to the courts, a prisoner may be discharged. That some one has alleged a conclusion before the justice of the peace in Michigan who issued the warrant against the alleged fugitive, and which the governor of that state seeks to comply with, should not be enough to subject the prisoner to the inconvenience, expense and ignominy of arrest and prosecution. The danger is that a loose application of the extradition law between states may be used for the mere purpose of enforcing a collection. This should not be tolerated. As this case comes here on appeal from the judgment and order of the district court for Lancaster county, it follows that the evidence must be considered as all included in the testimony taken before the district court and in the original application for the order of arrest. This application is based upon affidavits hereinafter referred to, and which were filed before the justice of the peace in Michigan.

In the view that I take of this case, the petitioner entered into a contract with one Dr. Bland for the attempted collection of a lot of doctor bills, and the contract provides for *mutual accounts* between the petitioner and Bland; that is, if the debtor paid an account to Bland, then Bland was to be indebted to the petitioner in the sum of 25 per cent. of the amount paid, and, if the petitioner collected a claim, he was to give 75 per cent. of it to Bland, and *quarterly settlements* were to be made between them, the contract looking to a *final settlement at the end of one year.* There was no guilt on the part of

the petitioner, because Bland was indebted to the petitioner for commissions where the debtors had paid directly to Bland, and the petitioner was indebted to Bland on accounts which he had collected, and the contract was made between them on the 19th of February, 1912, and *the year* which the contract was to run had not expired and would not expire until February 19, 1913. Before the year was one-half over, and in May, these proceedings were commenced.

Two affidavits by Bland were filed before the justice of the peace who issued the warrant. The first affidavit contains a formal charge of embezzlement without the details, and the other affidavit proceeds in detail to set up the facts which constitute the alleged offense. One of these affidavits charges the indebtedness of the relator *on information and belief.* Of course, the charge against the accused is no stronger than its weakest statement, and, if the weakest statement is on information and belief, then the *whole charge* stands on *information and belief*, and the result is that a man is arrested and taken away from his family and prosecuted when the charge against him is on *information and belief.* The affidavit setting forth the details recites that the accused entered into a contract with the complainant under the name of the "Mercantile Law Company," and said he had a peculiar system of collecting; that he made personal calls on all debtors; that he would take statements of accounts and collect the same on a commission basis; that "he represented that he would take the accounts and collect the money due from the debtors and *settle* with me for all amounts collected on a certain date." The affidavit then sets up the fact that the petitioner "was to collect as many of said accounts as possible for me, and that he was to retain 25 per cent. of the amount collected for his work; that 75 per cent. of the amount collected was to be held by him, as my agent, for a period of 90 days from the date the contract was entered into; * * * that this contract last mentioned was entered into on or about February 19,

1912;" that in compliance therewith he, the said Dr. Bland, gave the said petitioner a large number of accounts, beginning with Morris Duffield, $6 and reciting the accounts, "on which accounts the said William A. Maynard has collected the sum of $98, as *deponent is informed and believes,*" said information being based upon the adffiavits of the said parties last mentioned that they have paid various amounts, as mentioned in said affidavits, to said William A. Maynard on said accounts. The agreement made between Dr. Bland and the petitioner, omitting the heading and the signatures, and the closing, is as follows:

"This agreement witnesseth: That J. P. Bland of Adrian, Mich., has become a subscriber to Mercantile Law Co., of Cleveland, Ohio, and that said subscriber is entitled to the benefits herein set forth for the term of one year from above date. Mercantile Law Co. obligates itself to give prompt attention to all claims placed in its hands for collection and adjustment by said subscriber, and also agrees to apply such legal redress which will enforce collections. The subscriber hereby authorizes Mercantile Law Co. to commence actions at its discretion in the several courts of this state or of any other state on any of the claims placed in its hands, and agrees that, if such action be brought, he will in no manner interfere with the same, or cause the action to be discontinued until the case has been prosecuted to judgment, unless the consent of Mercantile Law Co. can be obtained. In consideration of the aforesaid services, J. P. Bland of Adrian, Mich., agrees to report to Mercantile Law Co. as soon as collected all payments received on claims filed for collection and to pay to said Mercantile Law Co. at once a commission of 25 per cent. on all collections and settlements made on the accounts placed in its hands, whether the money is paid by the debtor to Mercantile Law Co. or to the subscriber. It is mutually agreed that this contract shall remain in force for a period of one year from the above date, and that Mercantile Law Co. shall be entitled to its

commission on all claims settled by either party hereto, within the life of this contract. It is further agreed by Mercantile Law Co. that it shall make settlement for all moneys belonging to the subscriber once every 90 days from the date hereof. It is mutually agreed and understood by both parties herein mentioned, that payment of the aforesaid commissions upon all collections and settlements shall constitute the full amount of liability of the subscriber."

It will be observed that the liability in this case is based upon a contract of (1) doubtful meaning, (2) uncertain "information and belief." If the mere charge against the relator in a case of this kind is sufficient to enable him to be taken from his home to a foreign state there to be prosecuted, then liberty is not very secure in Nebraska. It is not the name by which an alleged criminal act is called that determines whether the thing done is done in violation of the law; it is the act done. It is unreasonable to suppose that the laws of Michigan provide for the punishment of a collector who is not in default under a contract which he has made with his client or customer. To the writer it is time enough for Dr. Bland to insist upon his warrant for extradition when he has demonstrated the fact under his doubtful contract that the relator owes him. The contract might receive one construction in Nebraska and another in Michigan. Dr. Bland became a subscriber to the "Mercantile Law Company," and was "entitled to the benefits" set forth in the agreement "for the term of *one year*" from February 19, 1912, the date of the agreement. The second paragraph obligates the "Mercantile Law Company" to give prompt attention and adjustment by said subscriber, "and also agrees to apply such legal redress which (as) will enforce collections." The next paragraph authorizes the law company to commence actions in the courts of the state or of any other state, and obligates the doctor not to interfere with the same. The next paragragh provides the terms of compensation, and that the contract *shall remain in force for the period of*

one year; that the parties shall make *settlement* every 90 days. It is contended by the prosecution that to make "settlement" means to make payment. The word "settlement" is defined in Webster's New International Dictionary at length. That part of it applicable to this case reads: "Act or process of adjusting or determining; composure of doubts or differences; arrangement; adjustment; as, settlement of a controversy, of accounts, etc.; also, condition of affairs thus adjusted." It was not payment that was talked about, but a mere settlement, an adjustment from time to time between the parties, and there could be *no default* by either party until the *expiration of the year.* Townsend, Moran, Grouth, Kelley, Lewis, Edmund, each made payments to Dr. Bland on which the doctor owed the relator his commissions. Howes, Townsend, Kelley, Lewis, Edmund, Seethaller, Sherman, and Preston also paid money to Dr. Bland, and he retained the commission due to the relator. Dr. Bland's affidavit says they were doctor bills, "statements of accounts which were owing to me from *patients* for services rendered." It is the doctor's contention that the relator owes him *under the contract a balance* for collecting these doctor bills, many of which were old, and some of which were outlawed.

Something of an examination of the embezzlement cases in Michigan shows that the relator should not be convicted. *People v. Wadsworth*, 63 Mich. 500. In the foregoing case funds were deposited in a bank that belonged to the city treasurer. They were put in there as ordinary deposits, and it was held that the banker was not guilty of embezzlement. See, also, 3 Howell, Ann. St. (Mich.) sec. 9263*a*, making it a felony for a public official to appropriate to his own use moneys received in his official capacity, and section 9263*c*, making the failure to pay over to his successor all moneys and property collected *prima facie* evidence of the offense. In this case it was held that the accused might rebut a *prima facie* case made under the statute by proving that moneys were in fact

received, and that the shortage represented saw-logs which he had taken in payment of taxes, in lieu of money, and which had been lost. *People v. Seeley,* 117 Mich. 263. The court held that there should be an order of court which he refused to obey. That applies to this case. There is no order of the court in this case, touching the indebtedness, which the relator refuses to obey. Along the same line is *People v. Fairchild,* 105 Mich. 437.

The law under which the relator is prosecuted reads: "Section 55. If any officer, agent, clerk, or servant of any incorporated company, foreign or domestic, or if any clerk, agent, or servant of any private person, or of any copartnership, except apprentices and other persons under age of sixteen years, or if any attorney at law, collector, or other person, who, in any manner, receives or collects money or any other property for the use of and belonging to another, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use without the consent of his employer, master, or the owner of the money or goods collected or received, any money or property of another, or which is partly the property of another and partly the property of such officer, agent, clerk, servant, attorney at law, collector, or other person, which has come to his possession or under his care in any manner whatsoever, he shall be deemed to have committed larceny, and, in a prosecution for such crime, it shall be no defense that such officer, agent, clerk, servant, attorney at law, or other person, was entitled to a commission out of such money or property, as commission for collecting or receiving the same for and on behalf of the owner thereof; provided, that it shall be no embezzlement on the part of such agent, clerk, servant, attorney at law, collector, or other person, to retain his reasonable collection fee on the collection, or any other valid interest he may have in such money or property." 3 Howell, Ann. St. (Mich.) sec. 9176*a*. The foregoing contemplates that the person making the collection shall retain his commission "or any other valid in-

terest he may have in such money or property." The petitioner testifies, and it is not denied, that he was put to expense in the collection of these accounts. He is entitled therefore to payment. It follows, therefore, from the act itself and from the decision of this court in *Van Etten v. State,* 24 Neb. 734, as, also, *Miller v. State,* 16 Neb. 179, and *State v. Kent,* 22 Minn. 41, that the petitioner is not guilty of embezzlement under the statute.

There can be no criminal intent so long as the agent or collector is making an honest contention for what he deems to be his own. *Hamilton v. State,* 46 Neb. 284. Nor can there be a conviction where there is an unsettled and unliquidated account between the parties. *State v. Culver,* 5 Neb. (Unof.) 238. And, where the defendant in a criminal prosecution has an interest in the property or money alleged to have been fraudulently converted to his or her own use, there can be no conviction of the crime of embezzlement. *McElroy v. People,* 202 Ill. 473.

I am unable from the record to see that the relator is guilty of anything; but, if he is guilty of anything, then he is guilty of *false pretenses.* If he drew a contract and did not intend to go ahead and collect the money, but intended to get hold of some small part of it and then to keep it, and he used the contract as a fraudulent inducement for the purpose, then the thing done was not embezzlement, but it was false pretenses, and he should be arrested and tried upon that charge. *Hess v. Culver,* 77 Mich. 598, 18 Am. St. Rep. 421, 6 L. R. A. 498; *Pearl v. Walter,* 80 Mich. 317; *Knight v. Linzey,* 80 Mich. 396, 8 L. R. A. 476; *Stoney Creek Woolen Co. v. Smalley,* 111 Mich. 321; *Getchell v. Dusenbury,* 145 Mich. 197. Henig cannot lawfully return the relator to Van Buren county, because there is no charge pending against him there. There is no proof attached to the extradition warrant that the relator committed an offense in Van Buren county. If the relator is to be deprived of his liberty, first let a new application be made to the governor of Nebraska by the governor of Michigan and an orderly procedure be had.

The relator excuses changing his name upon the ground of difficulty with his mother-in-law, who threatened to prosecute him. He is now supporting his wife and two children.

EMERY L. MEYERS, APPELLANT, V. FURNAS COUNTY, APPELLEE.

FILED MARCH 14, 1913. No. 17,102.

1. **Paupers: LIABILITY OF COUNTY.** Under the provisions of section 14, ch. 67, Comp. St. 1911, if any person, not coming within the definition of a pauper, shall fall sick within any county of the state, not having money or property to pay his or her board, nursing, and medical aid, it is the duty of the overseers of the poor of the precinct where such person shall be to furnish such assistance as they shall deem necessary. This gives the overseer full authority to provide the necessary medical aid to such sick person.

2. ———: ———. Where a physician is employed by an overseer of the poor to give medical aid to a destitute person, who has fallen sick, and the service required is performed, the fact that the overseer has not made a written report of his doings thereon to the county board cannot defeat the liability of the county for the service rendered under such employment.

3. ———: ———: **SUFFICIENCY OF PETITION.** The averment in a petition that a person had fallen sick under such circumstances as to show her destitution and inability to provide for herself, or be provided for by others, is a sufficient allegation of the dependence upon the county, when assailed by a demurrer.

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

Lambe & Butler, for appellant.

R. J. Harper, W. S. Morlan and *John Stevens, contra.*

REESE, C. J.

This is an appeal from a decree of the district court for

Furnas county in sustaining a general demurrer to plaintiff's petition. From a judgment dismissing the suit, plaintiff appeals.

It is alleged in the petition, in substance, that on the 23d day of May, 1908, one Bertice Overholtzer, a resident of Cambridge precinct, in said county, became sick and diseased; that it became necessary, in order to preserve her life, that she should have medical aid and attention; and that, having no money or property with which to pay for medical treatment, she was dependent upon defendant for such necessaries. The character of the malady from which it is alleged she was suffering would indicate that medical relief could not be long delayed without danger to her life. While not directly so alleged, it is inferable from the petition and briefs of counsel that Dr. Green of Beaver City, which was 30 miles distant from where the patient was sick, was the county physician. The petition alleges that the application for relief for said sick person was made to one of the members of the county board, the board not then being in session, who advised that the matter be submitted to Dr. Green for instructions; that Dr. Green refused to render medical aid, but directed, in case it was an emergency, that plaintiff, who was a physician, should render the necessary service; that the local justice of the peace, the overseer of the poor in said precinct, was seen, who made a written request to plaintiff to render and attend to the needs of Miss Overholtzer, and charge the same to the county of Furnas, and thereupon plaintiff took charge of the case, and carried it to a successful termination; that the patient was destitute, and resided in said precinct; that up to the date named her relatives and friends had been able to provide the necessary medical aid, but her means at said time became wholly exhausted, and she was entirely without funds or assistance and became dependent upon the county; that, under the directions of Dr. Green and the overseer of the poor, he performed the service. Plaintiff's claim was presented to the county commissioners and rejected, from which he ap-

pealed to the district court. By filing the demurrer, all allegations of the petition which were well pleaded were admitted, among which were that the patient was a resident of Cambridge precinct, of which the justice of the peace was the overseer of the poor; that she was sick, destitute, and needed medical attention in order that her life might be preserved; that the justice, having authority so to do under the law, employed plaintiff, on behalf of the county, to perform the service; that plaintiff performed the service, and the compensation therefor had not been paid.

We are unable to see why, under the provisions of chapter 67, Comp. St. 1911, a cause of action was not stated. Assuming, as we must, under the averments of the petition, that the justice of the peace was in the discharge of the plain duty imposed upon him by section 14 of the act, we must hold that, upon the performance of the service, a claim arose against the county for the reasonable value of the medical service rendered.

There is no averment that the justice of the peace made a written report of his action to the county board; it being alleged that his report was oral. It is claimed that the failure of the justice of the peace to make his report in writing defeated plaintiff's cause of action, if one ever existed; that the written report is made a condition precedent to the creation of a valid claim against the county. We cannot so hold. There was no obligation imposed upon plaintiff to see that the justice performed the duty required by the statute. To hold that the claim would be thereby defeated would be equivalent to saying that one person could defeat the just claim of another by simply refusing to discharge an official but later duty, having no connection with the rendition of the service. By such a course the benign purpose of the statute could be nullified, and the destitute and suffering would be left to shift for themselves or depend upon the voluntary charity of others. This the law does not contemplate.

It is argued by counsel for the county that it is not

sufficiently alleged that the patient had no relatives of sufficient ability to provide for her, or who had failed or refused so to do. It is true that the petition is not as specific on this matter as it might and probably should be, but as against a demurrer enough is stated to show the destitution of the patient and her need of immediate medical aid and assistance. A motion for a more specific statement in that behalf might have been interposed, but as against a demurrer the averment must be held sufficient.

It is also contended that the case at bar was not an emergency case under the provisions of section 14, ch. 67, Comp. St. 1911. The provision is: "Whenever any nonresident, or any other person not coming within the definition of a pauper, shall fall sick in any county in this state, not having money or property to pay his or her board, nursing, and medical aid, it shall be the duty of the overseers of the poor of the precinct where such person shall be to furnish such assistance to such person as they shall deem necessary." The averments of the petition seem to have brought the case squarely within the provisions of the section.

Other matters insisted upon are proper subjects of answer, if a defense, but cannot be disposed of upon demurrer.

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

REVERSED.

ALBERT H. ARONSON, APPELLEE, V. JOHN P. E. CARLSON, APPELLANT.

FILED MARCH 14, 1913. No. 17,098.

Appeal: AFFIRMANCE. Where the record brought to the supreme court on appeal contains no bill of exceptions, the judgment of the district court, if sustained by the pleadings, will be affirmed.

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

John Tongue, for appellant.

Mills & Beebe, contra.

BARNES, J.

Action in the district court for Polk county to recover a balance alleged to be due plaintiff on a judgment rendered against defendant and in plaintiff's favor in the district court for the county and city of Denver, in the state of Colorado. Plaintiff had the judgment, and the defendant has appealed.

The record brought to this court contains no bill of exceptions, and therefore the only question presented for our determination is, are the pleadings sufficient to support the judgment? The transcript discloses that plaintiff's petition was in the usual form of a declaration on a foreign judgment. Defendant's answer does not challenge the jurisdiction of the district court of the state of Colorado in which the judgment sued on was rendered. It contains no allegation of fraud on the part of plaintiff in obtaining the judgment, and contains no plea of payment or satisfaction.

As we view the record, the pleadings are sufficient to sustain the judgment of the district court, and it is therefore

AFFIRMED.

CHARLES A. PATTERSON, APPELLEE, V. GEORGE W. COX ET AL., APPELLANTS.

FILED MARCH 14, 1913. No. 17,103.

Appeal: DECREE: MODIFICATION: AFFIRMANCE. On appeal from a judgment foreclosing a real estate mortgage, where the only substantial error found in the record is in the rate of interest which it is provided the decree shall bear from and after its rendition, it will be modified by correcting such error, and the decree, as thus modified, will be affirmed.

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

Lambe & Butler, for appellants.

W. S. Morlan and *F. W. Byrd, contra.*

BARNES, J.

Action in the district court for Furnas county to foreclose a real estate mortgage given to secure the payment of certain promissory notes executed and delivered to the plaintiff by the defendants George W. Cox and his wife, Sarah E. Cox. The petition was in the usual form and set forth copies of the notes in question. Defendants filed a motion to require plaintiff to make his petition more definite and certain by attaching copies of the notes. The motion was overruled, and defendants filed an answer, which contained: First, a qualified denial; second, an allegation that the defendant Sarah E. Cox was a married woman; that she had had no transaction with the plaintiff in which she intended to bind her separate estate; third, that at the time the notes and mortgage were executed and delivered defendant George W. Cox was not indebted to plaintiff in any sum whatsoever, and that the mortgage was not acknowledged by defendants.

It was further alleged, in substance, that on and prior to the time when the mortgage in question was executed

defendant George W. Cox was indebted to the Arapahoe State Bank; that the indebtedness to the bank had not been released; that defendants were then, and are now, residing upon and claiming the section of the land described in the mortgage as their homestead. It was also alleged that the mortgage did not set forth the true terms of the agreement between plaintiff and the defendants, and there was a prayer for a reformation of the same. It was finally alleged that the true intention of the defendants was not to alienate or incumber their homestead rights, and the answer concluded with a prayer that the petition be dismissed. Plaintiff's reply admitted that the defendants were husband and wife, and resided upon the land in question, but denied each and every allegation contained in the answer, except those specifically admitted. A trial was had upon the issues thus joined, which resulted in findings and a decree of foreclosure. The defendants have appealed.

Appellants' first contention is that the court erred in overruling their motion to make plaintiff's petition more definite and certain, and it is argued that if the motion had been sustained it would have appeared affirmatively that there was a defect of parties; that the plaintiff had no capacity to sue; and that the action was not prosecuted in the name of the real party in interest. As above stated, the petition contained literal copies of the notes. It appears also that the notes themselves were introduced in evidence. Under this state of facts, we are unable to see how any prejudice could have resulted in overruling the defendants' motion.

It is also contended that the action was not prosecuted in the name of the real party in interest, and therefore the court erred in rendering a judgment for the plaintiff. The testimony, as contained in the record, shows, beyond question, that the plaintiff was the real party in interest; that he furnished the money to and for the use of the defendants, which was the consideration for the notes and mortgage in question. Two witnesses testified positively

to those facts, and the defendants introduced no evidence to controvert this testimony.

It is also argued that the record shows that the mortgage was not acknowledged by the defendants. The only testimony offered to support that contention was the statement of the defendants that, when the notary took the acknowledgment, they were not asked if they signed the mortgage as their voluntary act and deed, and they were not required to hold up their hands at the time the acknowledgment was taken. On the other hand, the acknowledgment appears to be in due form, certified by the notary under her hand and seal, and there was other testimony by which it was shown that the acknowledgment was taken in the usual form, after the defendant George W. Cox had read the mortgage, and it had been read by one Samuel Patterson to the defendant Sarah E. Cox. No testimony was offered tending to show that the mortgage did not contain the real contract between the parties. As we view the testimony, it was entirely insufficient to overthrow the presumption of regularity in the execution and acknowledgment of the mortgage.

After a careful examination of the record, we are satisfied that the defendants failed to establish any of the so-called defenses exhibited by their answer. We are therefore of opinion that the decree in question was the only one which the court could lawfully have rendered, and the judgment of foreclosure should be affirmed. It appears, however, that through some mistake or clerical error the decree provides that it shall bear interest at the rate of 8 per cent. per annum from and after its rendition. We find that the rate of interest provided by the notes and mortgage in question was 7 per cent. per annum, and the decree should be, and it is hereby, modified accordingly, and the judgment of the district court, as thus modified, is

AFFIRMED.

THEODORE J. MILLER, APPELLEE, V. HOMER C. BOARDMAN, APPELLANT.

FILED MARCH 14, 1913. No. 17,084.

1. **Tax Foreclosure: PROCEEDINGS IN REM: PLEADING.** Section 4, art. V, ch. 77, Comp. St. 1899, allows an action *in rem* to be brought against the land itself as defendant in tax foreclosure proceedings: (1) Where the owner of the land is not known; (2) where the action is commenced against a person who disclaims ownership. In order to confer jurisdiction upon the court to proceed *in rem* upon the first ground, it is essential that it be made to appear by a direct allegation in the petition that the owner of the land is not known, and the mere naming "the unknown owner of said land" in the title as a party defendant does not amount to an allegation of want of knowledge.

2. ———: ———. In tax foreclosure proceedings which are brought *in rem* against the land itself, the requirements of the statute and all conditions precedent must be strictly complied with in order to confer jurisdiction upon the court.

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

B. F. Hastings and *Wilcox & Halligan*, for appellant.

McGilton, Gaines & Smith, contra.

LETTON, J.

This is an action to cancel and set aside a deed based upon the foreclosure of a tax lien and for permission to redeem. The petition is very lengthy and sets forth the facts with much detail. A demurrer was filed and overruled; and, the defendant refusing to plead further, a decree was rendered in plaintiff's favor, from which defendant appeals.

The facts pleaded are substantially as follows: In 1894 the plaintiff, who was a resident of Peoria, Illinois, was the owner in fee of 160 acres of land in Perkins county, described as the northwest quarter of section 3, township

11, range 40. In 1883 the land was sold by the Union Pacific Railway Company to one Lance under a ten-year contract, and in 1884 Lance assigned the contract to plaintiff, who completed the payments in January, 1894; but, owing to the fact that his contract had been mislaid so that it could not be surrendered, a deed was not issued to him by the Union Pacific Railway Company until December, 1905. When plaintiff received his deed he at once sent it to the clerk of Perkins county for record, and at that time he learned for the first time that tax foreclosure proceedings had been instituted and a sheriff's deed issued under the same. In the tax foreclosure proceedings, in August, 1901, a petition was filed entitled "Homer C. Boardman, Plaintiff, v. The Northwest Quarter of Section 3, in Township 11, Range 40, in Perkins County, Nebraska, and the Unknown Owner of said Land, the Union Pacific Railway Company, Defendants." The petition alleged the purchase of the land by the plaintiff from the county treasurer at tax sale, the issuance of a tax sale certificate, and the payment of subsequent taxes, and prayed for a foreclosure. It was verified, as follows: "H. E. Goodall, first being duly sworn, deposes and says that he is the duly authorized attorney of the plaintiff in the above entitled action; that said plaintiff is absent and is a nonresident of the county of Perkins, and state of Nebraska; that the tax sale certificate and tax receipts herein sued on are in my hands as such attorney; that I have read the foregoing petition, and that the facts and allegations therein contained are true, as I verily believe. H. E. Goodall." An affidavit for service by publication was filed on August 14, 1901, with the same title as the petition, which set forth at length the object and prayer of the petition, and contained the following additional statement: "Affiant further says that the defendants, the unknown owners of said land are non-residents of the state of Nebraska, and that service of summons cannot be had upon said defendants, or either of them, within this state. Wherefore plaintiff prays that service may be

had on said defendants by publication." A notice directed to the defendants named in the title of the petition was duly published. A default was taken and a decree of foreclosure rendered in October, 1901. The premises were afterwards advertised for sale, sold by the sheriff, and the sale confirmed by the court. Before the affidavit for publication was filed, Mr. Goodall wrote to the Union Pacific Railway Company to the effect that he held a tax foreclosure certificate upon this tract of land for a client; that title is apparently still in the company; and that if the company had any interest in it he would advise his client to accept a redemption. In reply to his letter, the land commissioner of the railway company wrote Mr. Goodall that the land was sold in 1883 to A. S. Lance of Arlington, Bureau county, Illinois, and that final payment was received in January, 1894, from one Theo. J. Miller, who claimed to own the land, whose address at that time was 211 Main street, Peoria, Illinois. The letter also informed him that the railway company had no pecuniary interest in the land, but only held the naked legal title. The petition alleges that Goodall was attorney for Boardman; that he received the letter from the land commissioner, and knew when he filed the petition to foreclose who the real owner of the premises was.

Section 4, art. V, ch. 77, Comp. St. 1899, which was in effect when the foreclosure suit was begun, provides: "Service of process in cases instituted under this chapter shall be the same as provided by law in similar causes in the district courts, and where the owner of land is not known, the action may be brought against the land itself, but in such case the service must be as in the case of a nonresident; if the action is commenced against a person who disclaims the land, the land itself may be substituted by order of court for the defendant, and the action continued for publication." The statute allows an action to be brought against the land itself in only two instances, one where the owner of the land is not known, and the other where the action is commenced against one who

disclaims. In order to confer jurisdiction upon the court to proceed *in rem* against the land, it must be made to appear that the owner is not known. It has been held that it is sufficient that this be made to appear by a direct allegation in the petition, and that, if this has been done, it is unnecessary to again show it in the affidavit for service by publication; but we think it has never been decided that the mere naming of a defendant as "the unknown owner of said land" in the title amounts to an allegation of want of knowledge on the part of the plaintiff or the affiant as to who the owner may be. Neither in the petition nor in the verification is there a statement or allegation that the name of the owner is unknown to plaintiff or affiant. When we consider admissions made by the demurrer as to the facts pleaded of knowledge by Goodall of the purchase of the land by Lance, and the making of the final payment by Theo. J. Miller, who then claimed to be the owner, the reason why no such allegation is to be found is apparent. In all probability Mr. Goodall would be much averse to making either a statement or an affidavit that the owner was unknown, and he very properly refrained from so doing.

Actions *in rem* against the land itself are special statutory proceedings, and the requirements of the statute must be strictly complied with. Since the jurisdiction of the court to proceed purely *in rem* depended upon the fact of ignorance as to the ownership of the land, and this fact was neither alleged nor established, the condition precedent demanded by the statute was not fulfilled, and the court never acquired jurisdiction. The case is not one where a material fact is insufficiently set forth, in which case such a defect is held to be a mere irregularity (*Atkins v. Atkins*, 9 Neb. 191, 200); but it is, as said in that case, "a total want of evidence upon a vital point." *Leigh v. Green*, 64 Neb. 533; *Gwin v. Freese*, 90 Neb. 15.

The judgment of the court was right and is

AFFIRMED.

IDA C. SCOTT, APPELLEE, V. JOHN R. HOUSE ET AL., APPELLANTS.

FILED MARCH 14, 1913. No. 17,111.

Husband and Wife: NECESSARIES: LIABILITY OF WIFE. The property of a married woman is not liable for the payment of debts contracted for necessaries furnished the family until after an execution against the husband for such indebtedness has been issued and returned unsatisfied. Comp. St. 1911, ch. 53, sec. 1. And the fact that no judgment has been rendered against the husband for such debt may be shown by the wife, in an action by her to enjoin the levy of an execution upon her lands to pay such a debt.

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

Hiram Chase and *R. E. Evans,* for appellants.

T. L. Sloan and *Herman Freese, contra.*

LETTON, J.

This is an action to restrain the defendants from enforcing by execution a judgment against the real estate of plaintiff. The case was heard upon an agreed stipulation of facts, and at the conclusion of the trial the court entered his findings of fact and conclusions of law and enjoined the enforcement of the judgment as prayed. Defendants appeal.

The material facts which appear by the stipulation are, as follows: The plaintiff is a married woman living with her husband. A bill of particulars was filed by John R. House (defendant herein), as plaintiff, against Ida C. Scott (plaintiff herein) in justice court for the recovery of $61.50, and interest, for goods, wares and merchandise sold and delivered to her at her request. She appeared, obtained a continuance, but made no appearance at the trial, at the close of which a judgment was rendered for the amount found due. A transcript of this judgment was filed in the district court, and an execution was issued and levied upon 80 acres of land belonging to her.

Defendants state the case as follows in their brief: "Appellants' claim, or case, may be stated thus: By operation of the latter portion of section 5317 (Ann. St.), the wife is made surety for necessaries used by her family; that this suretyship attached to any property that the wife may ever become seized of that is not exempt from sale or execution; that, as a condition precedent to a judgment on this suretyship, there must be a judgment against the husband and an execution issued and returned unsatisfied; that the appellee in this case is concluded as to the fact of the judgment and execution against the husband, because the fact as to whether there was such a judgment and execution was a matter of defense in the action by the appellant House against the appellee, and which resulted in the judgment, the collection of which is enjoined." Defendants also state that they make no claim that the plaintiff is bound by reason of a contract made by her with House. Defendants insist that the plaintiff is concluded as to the fact of marriage by the judgment, since she did not plead coverture, and is also concluded as to whether a judgment had been obtained and an execution returned unsatisfied against her husband before the suit was brought, because these matters might have been raised as defenses before the justice, and insist that the judgment is an adjudication against her as to all such issues, and no advantage can be taken of such matters now.

While fully conceding the general principles of law with respect to former adjudication and judgments against married women urged by defendants, the writer is of the opinion that the argument made as to the conclusiveness of the judgment cuts both ways, and that a judgment cannot be shown, solely for the purposes of an execution, to be a judgment for necessaries by facts dehors the record. The record does not show that the judgment was rendered for necessaries furnished the family. If we concede that the defenses of coverture and of the failure to issue an execution against the husband

should have been pleaded before the justice, it must also be conceded that the fact that the judgment was sought for necessaries, which gives it a peculiar force and power which it would not otherwise have, should also have been made to appear in that court. If one set of facts cannot, as defendants claim, be shown aliunde, what reason can be given for allowing the other fact as to necessaries to be shown upon the other side? A majority of the court, however, prefer not to announce this view.

It is stipulated "that the basis of the claim for which the judgment complained of was rendered was for necessaries furnished by the defendant John R. House to the plaintiff and her husband," and that the "judgment obtained * * * against the said Ida C. Scott was obtained without having first obtained a judgment against her husband, Frank Scott, for necessaries."

Section 1, ch. 53, Comp. St. 1911, provides that all the property of a married woman of every kind and nature "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; provided, that all property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands, and tenements whereon to levy and make the same." This statute has been considered by this court a number of times and uniformly upheld. *George v. Edney,* 36 Neb. 604; *Small v. Sandall,* 48 Neb. 318. It was held in *Noreen v. Hansen,* 64 Neb. 858, that in such a case as this "the cause of action does not arise against her until an execution based upon a judgment against her husband has been returned unsatisfied." In *Fulton v. Ryan,* 60 Neb. 9, 13, where it was sought to avoid the effect of a plea of coverture in the answer by the allegation in the reply that the note was given for necessaries, the court held

that portion of the reply defective, "for the reason that it does not set up the fact that execution against the husband on the indebtedness had been issued and returned unsatisfied for want of property on which to levy." By this section of the statute it is a condition precedent to a sale of the property of a wife for her husband's debt that the execution against the husband has been issued and returned unsatisfied. The statute is explicit that the property of the wife is not subject to sale until this essential fact has been established. We are all of the opinion that, under a judgment which fails to show that it was rendered for necessaries, the shield of the statute may be raised at any time before a sale of the wife's property, and a majority believe this fact may be shown even under judgments which recite they are rendered for necessaries. Since this condition precedent to any liability upon the part of the plaintiff's property is shown not to exist, the plaintiff is entitled to an injunction restraining the levy and sale.

Having reached this conclusion, we find it unnecessary to determine the claim made that her real estate is exempt under the laws of the United States relating to the property of members of the Omaha Tribe of Indians.

The judgment of the district court is

AFFIRMED.

DR. S. S. STILL COLLEGE AND INFIRMARY OF OSTEOPATHY, APPELLEE, V. HOMER D. MORRIS ET AL., APPELLANTS.

FILED MARCH 14, 1913. No. 17,109.

1. **Married Women: CONTRACTS: VALIDITY.** A married woman may make a valid contract to pay tuition essential to an educational course for herself in osteopathy, though she has no separate estate.

2. **Appeal.** A judgment will not be reversed as excessive, where it is not challenged on that ground.

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

M. H. Weiss, George W. Berge, C. J. Campbell and *C. L. Richards,* for appellants.

W. E. Goodhue, Merrill C. Gilmore and *Edwin G. Moon, contra.*

ROSE, J.

This is a suit by payee against the makers of a promissory note for $600, dated February 1, 1903, and payable 30 months after date. Defendants are husband and wife. The execution and delivery of the note are admitted. The wife pleads coverture, want of consideration, void suretyship in absence of a separate estate, and want of capacity to make a binding contract. The case was tried to the court without a jury, and from a judgment against both defendants for the full amount of plaintiff's claim, they have appealed. The husband did not establish any defense, and on appeal suggests no reason for a reversal of the judgment as to him. The sufficiency of the defenses interposed by the wife, however, is properly and ably presented.

When the note was executed, defendants were husband and wife, and the latter had no separate estate. Her view of the case is that she signed the note as surety for her husband, and that, having no property of her own, her contract was void and did not bind subsequently acquired property. In support of her position the following cases are cited: *Northwall Co. v. Osgood,* 80 Neb. 764; *Farmers Bank v. Boyd,* 67 Neb. 497; *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Kocher v. Cornell,* 59 Neb. 315. Is the present case controlled by the principles invoked by the wife? Her own testimony establishes these facts: Subsequent to her marriage, she and her husband took together a two-year course in osteopathy. Having finished their course, the husband signed the note in con-

troversy in an attempt to settle the tuition of both, but plaintiff refused to issue their diplomas—the evidence of their right to practice osteopathy—until the wife also signed the note. After she did so, both received diplomas, which were used by them in registering as practitioners in this state. To some extent, at least, the wife has practiced osteopathy and still has that right. Half the consideration for the note was her own tuition. Under the circumstances disclosed by these facts, could she make a valid contract to pay her tuition, though she was a married woman having no separate estate? If she could, she was a principal, rather than a surety, to the extent of her own tuition. Her education prepared her for a learned profession. It was a personal achievement. She may use it as a means of livelihood. As a practitioner she may devote her earnings to herself without interference from her husband. In that way she may accumulate a separate estate. Coverture did not prevent her preparation to practice osteopathy, nor will it take away the fruits of her profession.

The statute declares: "Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her, in her own name." Comp. St. 1911, ch. 53, sec. 4. The word "business" is evidently used in this statute in a popular and legal sense, making it applicable to any particular employment, occupation, or profession, followed as a means of livelihood. Black, Law Dictionary; Webster's New International Dictionary; *Goddard v. Chaffee,* 2 Allen (Mass.) 395; *People v. Commissioners of Taxes,* 23 N. Y. 242; *Territory v. Harris,* 8 Mont. 140; *Trustees of Columbia College v. Lynch,* 47 How. Pr. (N. Y.) 273; *Beickler v. Guenther,* 121 Ia. 419. The legislation, in declaring that the earnings of a married woman for "services" shall be her separate property, clearly extends to the practice of osteopathy. If a mar-

ried woman having no separate estate cannot enter into a valid contract to pay tuition essential to preparing herself for such a profession, the door of opportunity will be closed to many. In absence of restrictive language, the statutory right to the benefits of such a business implies the power to make contracts necessary to preparation therefor. *Stewart v. Jenkins,* 6 Allen (Mass.) 300; *Chapman v. Foster,* 6 Allen (Mass.) 136; *Bodine v. Killeen,* 53 N. Y. 93; *Frecking v. Rolland,* 53 N. Y. 422. This view is in harmony with analogous reasoning in *Tyler v. Winder,* 89 Neb. 409, wherein 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." The conclusion is that, when the wife signed the note in controversy, she entered into a valid contract to pay her own tuition at least.

As the judgment below is not assailed as excessive, it is

AFFIRMED.

JOHN M. HENRY, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED MARCH 14, 1913. No. 17,067.

1. **Municipal Corporations:** PRIVATE ENTERPRISES: LIABILITY. It is no part of the duty of a municipal corporation to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is entirely voluntary on its part, and, while engaging in such business, it is acting in a purely private business capacity, outside of its functions and duties as a municipal corporation, and is bound by all of the rules of law and procedure applicable to any other corporation or person engaged in a like enterprise.

2. ———: ACTION FOR INJURIES: NOTICE. Section 126, art. I, ch. 13, Comp. St. 1911, requiring the filing of a notice with the city clerk

of a municipal corporation within 30 days from the time a right of action for an unliquidated claim accrues, as a condition precedent to an action thereon, applies to claims against such a corporation arising out of the performance of its corporate duties, but has no application to a case arising out of the conduct by it of a purely private business enterprise, voluntarily entered into, which is entirely outside of its ordinary governmental functions or corporate duties.

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

Wilmer B. Comstock and *J. U. Tingley,* for appellant.

Fred C. Foster and *D. H. McClenahan, contra.*

FAWCETT, J.

From a judgment of the district court for Lancaster county, sustaining a general demurrer to his petition and dismissing his action, plaintiff appeals.

The petition alleges that the defendant is a city of the first class, and at the times set out owned and operated a system of waterworks by and through which it furnished water to its inhabitants for a compensation; that as a part of its water system it maintained station houses, wells, pumps, and other machinery, and employed a large number of servants and employees; that a part of the machinery and pumps used were operated and propelled by electricity; that plaintiff was a servant of defendant regularly employed at and about its pumping station known as Rice station; that through the negligence of defendant in several particulars, which for the purpose of this decision it is not necessary to enumerate, and without fault on the part of plaintiff, plaintiff received a serious injury. To this petition the defendant filed and the court sustained a general demurrer based upon the fact that the petition does not allege that plaintiff, within 30 days after his injury, filed a claim with the city clerk, as required by section 126, art. I, ch. 13, Comp. St. 1911. The section referred to provides: "In order to maintain

an action for an unliquidated claim it shall be necessary, as a condition precedent, that the party file in the office of the city clerk, within 30 days from the time such right of action accrued, a statement of the amount of the claim, giving full name of the claimant, the time, place, nature, circumstance and cause of the injury or damage complained of."

The contention of defendant is that the construction placed by the trial court upon this section of the statute is settled by numerous decisions of this court. Before entering upon a consideration of those cases, let us consider the status of a municipal corporation. As generally understood, a municipal corporation occupies a dual relation to its citizens and the public. It is bound to discharge its governmental functions. In the discharge of those functions it stands as the representative of the state and has all of the governmental powers conferred upon it by statute. It is also bound to perform its corporate duties; not alone such as are expressly imposed upon it by statute, but such also as devolve upon it by reason of the governmental powers and privileges which have been conferred upon it; such as the use of reasonable diligence to keep its streets, alleys and sidewalks in reasonably safe condition for the use of the public. In the discharge of these governmental functions and performance of these corporate duties, it is subject to the control of the legislature, must assume all the burdens imposed upon it by statute, and is entitled to all the privileges, immunities and exemptions given to it by statute. The legislature, therefore, has a right to provide that, before it can be held liable for any dereliction of duty or for negligence on the part of its officers and employees, while it is acting in either of these dual capacities, a claim, in accordance with the provisions of the section of statute above quoted, shall be filed with its clerk within such reasonable time as it may fix. It is entitled to these privileges and immunities because of the fact that the functions and duties above referred to are imposed upon it by law and it must dis-

charge and perform them; but here the duties imposed upon it by law cease. It is no part of its duty, as a municipal corporation, to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is purely voluntary on its part, and it thereby assumes a third relation, separate and distinct from the dual relations above considered. While occupying this third relation no governmental functions or corporate duties, as a municipality, devolve upon it. It is then engaged in an ordinary business enterprise, and is bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise. It has no greater or higher privileges or immunities than are possessed by any other private corporation. It is subject to the same liabilities and entitled to the same defenses; no more and no less. We are not willing to indulge the presumption that the legislature intended, by the statute quoted, to grant any special privileges to a municipal corporation, while acting in such private business capacity, or relation, but rather that it intended the limitation to apply to claims against a municipality, arising out of the performance of its governmental functions or corporate duties.

In *Kelly v. City of Faribault*, 95 Minn. 293, reaffirmed in *Gaughan v. City of St. Paul*, 119 Minn. —, 137 N. W. 199, and in *Quackenbush v. Village of Slayton*, 139 N. W. (Minn.) 716, in considering a statute of that state requiring 30 days' notice to be given to a municipality of claims for injuries received from defects in its streets, sidewalks, or its public works before action therefor, it is said: "We think it very clear, from the history of the law requiring notice to municipalities of injuries thereon, and its subsequent development, that it never was intended to apply to the relations between master and servants when the latter are injured by reason of failure of the former to provide a reasonably safe place for the servant to work, or as to any absolute duties which are enjoined

by law upon the employer. The object of the notice, when required, is well understood to be to give the municipality an opportunity to investigate, and to protect against fictitious claims. The reason for the rule hardly applies in a case where its own servants are injured in such work by the negligence of the master, but specifically to cases where the public are interested in using within their rights the property of the city. With reference to such injuries, when they occur, the municipality would seldom have notice or opportunity to obtain the requisite information of the cause thereof, or the evidence of the city's negligence, to enable it to defend, after long delay. This would not apply to an injury of the kind happening in this case, for it must be presumed that, with reference to its own servants, and the violation of its duties to them, it has and ought to have the same notice as other persons occupying the relation of employer over the persons who are in direct relation with it. While a very strict and technical construction of the statute might bring the case within its letter, we are very clear it was not within its spirit, and, if it is desired that it should be, the relief must be obtained from the legislature." The above language from the supreme court of Minnesota applies with great aptness to the case at bar, and in harmony with the holding of that eminent court in the case before it we hold, in the case at bar, that the statute as to notice was not intended to apply to a case arising out of the conduct by a municipality of a purely private business enterprise, voluntarily entered into, which is entirely outside of its ordinary governmental functions or corporate duties.

In *Burke v. City of South Omaha,* 79 Neb. 793, we said: "When the state imposes upon an incorporated city the absolute duty of performing some act which the state may lawfully perform, and pertaining to the administration of government, the city, in the performance of that duty, may be clothed with the immunities belonging to the mere agent of the state; but, when the city is merely authorized by way of special privilege to perform such an act in part

for its corporate benefit and the benefit of its inhabitants, the city is not clothed with these immunities, and is liable to be sued for injuries inflicted through its negligence in the performance of such an act." In *Reed v. Village of Syracuse*, 83 Neb. 713, we said: "Villages that lawfully engage in commercial enterprises are liable to the public the same as individuals."

In *Esberg Cigar Co. v. City of Portland*, 75 Am. St. Rep. 651 (34 Or. 282), it is held: "When a city voluntarily undertakes to construct and maintain waterworks, in pursuance of statutory authority, for its own private emolument and advantage, the works belong to it in its private, rather than in its public or governmental, capacity, though the public may derive a common benefit therefrom, and the city is, therefore, answerable to persons injured by negligence in the construction or maintenance of such works." In the opinion it is said: "But when a special power or privilege is conferred upon or granted to a municipal corporation, to be exercised for its own advantage or emolument, and not as a mere governmental agency, it is liable to the same extent as an individual or a private corporation for negligence in managing or dealing with the property rights or franchises held by it under such grant." In *City of New Orleans v. Kerr*, 69 Am. St. Rep. 442 (50 La. Ann. 413) it is held: "A municipal corporation, with respect to the private character of its powers and obligations, represents the pecuniary and proprietary interests of individuals, and the rules which govern the responsibility of individuals are properly applicable."

In *State Journal Printing Co. v. City of Madison*, 148 Wis. 396, it is said: "In furnishing water to private consumers the city is acting in a private business capacity, and not in its governmental capacity, and it is bound to exercise ordinary care, namely, that reasonable degree of care in view of the dangers involved which the great mass of ordinarily prudent persons engaged in the same or similar business would and do exercise under like circum-

stances. For any failure to exercise this degree of care, proximately causing injury to another, the city is liable to the same extent that a private person or a corporation operating a waterworks system is liable; no more and no less." In *Relyea v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301, it is said: "The difference between a statute requiring notice to be served, as for example section 1339, R. S. 1878, as a condition of a right to damages for an injury through failure of duty on the part of a municipality to keep its highways in a proper state of repair, and a statute requiring such a notice to be served as a condition of recovery for injuries to an employee through actionable negligence of his employer, is that the former is a condition of the right to damages and the remedy to recover the same as well, while the latter is a condition acting on the remedy alone, the right not being dependent on the statute at all. Such difference is well defined in the books and universally recognized. In *Smith v. Cleveland*, 17 Wis. *556, it is said, in effect, that the difference between laws that the legislature may change at will and those which the constitution protects from interference to the prejudice of vested rights is that under the former the right is dependent on the law, and under the latter the right itself is independent of the law. The subject was recently discussed in *Schaefer v. City of Fond du Lac*, 99 Wis. 333, and *Daniels v. City of Racine*, 98 Wis. 649, where it is said that a right given by statute may be changed by adding new conditions, or wholly taken away by statute. There, as in most cases of the kind, the right of action was spoken of as synonymous with the right itself, and properly so. If the distinction be not kept in mind between statutory and common law rights, where the court speaks regarding a condition of the former as precedent to a right of action therefor, it will be taken as meaning that the condition is in the nature of a limitation acting on the remedy alone." The right of a servant to recover damages for an injury resulting from the negligence of his master is not dependent upon the statute.

It is a common law right. A right by statute to compensation for injuries can be granted upon condition. That right may be changed or taken away entirely in the discretion of the legislature. Such rights are not the subject of constitutional protection, but depend solely upon the legislative will; but a common law right is independent of statute and *is* the subject of constitutional protection. *Relyea v. Tomahawk Paper & Pulp Co., supra.*

In the light of the above authorities, we conclude that in the installation and management of its waterworks system defendant must be treated as a private corporation engaged in a purely business enterprise, as separate and distinct from the performance of its governmental functions and corporate duties as if it were not a municipal corporation at all, and that its liability to plaintiff must be determined solely under the law and procedure applicable to a private corporation and its employee. So construing the duties and relations of the parties, we hold that defendant is answerable to plaintiff for any negligence on the part of the former which resulted, without fault of the latter, in an injury to his damage, and that plaintiff has a right to prosecute his action for such damage, if any there be, within the same time and in the same manner as any other employee similarly injured would have a right to prosecute an action for damages under like conditions.

In none of the cases cited by defendant was the municipal corporation acting in a private capacity in a purely business enterprise. In *City of Lincoln v. Grant,* 38 Neb. 369, the action was for damages caused by a change of grade. In *Nothdurft v. City of Lincoln,* 75 Neb. 76, the action was for damages by reason of a defective sidewalk. In *Dayton v. City of Lincoln,* 39 Neb. 74, it was a change of grade. In *Dovey v. City of Plattsmouth,* 52 Neb. 642, it was the location and construction of a storm sewer. *Foxworthy v. City of Hastings,* 25 Neb. 133 (erroneously cited in the brief as 46 Neb. 700) was a sidewalk case. In *Reeder v. City of Omaha,* 73 Neb. 845, the question was

the grading of a street in such a manner as to form a pond in which the infant son of Reeder was drowned. In *Reining v. City of Buffalo,* 102 N. Y. 308, it was the erection of an embankment by the city—a case of street improvement. In *Collins v. City of Spokane,* 64 Wash. 153, 116 Pac. 663, it was negligence in maintaining a foot-bridge on the public street. In *Walters v. City of Ottawa,* 240 Ill. 259, it was a defective sidewalk. In *Nichols v. City of Minneapolis,* 30 Minn. 545, it was an injury to plaintiff's horse by a defect in the street. In *Postel v. City of Seattle,* 41 Wash. 432, it was a change of grade. In *Condon v. City of Chicago,* 249 Ill. 596, it was the falling of the bank of a ditch—a street improvement case. The discussion in that case sustains defendant's contention, but, in so far as it does so, the discussion is dictum, and a reading of the case shows a want of due consideration of the precise question here involved. It will be seen that the cases from other states above cited by defendant, like the decisions from this court above cited, all relate to the performance by a municipal corporation of its corporate duties. In the decision of this case we do not depart from the rule announced in our former decisions above cited. On the contrary, we adhere to them, and in any case that might now come before us, involving the corporate duties of a municipal corporation, we would adhere to the rule announced in those cases; but they are clearly distinguishable from the case at bar.

After a very careful consideration of the cases cited by the parties to this action, and after an exhaustive independent examination of the authorities, we have reached the conclusion above announced.

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

REVERSED.

HAMER, J., concurring.

The plaintiff and appellant sued the city of Lincoln to

recover damages alleged to result from the loss of part of his hand. He was employed as a servant of the defendant, and was assisting in the operation of one of its pumping stations. The pumps used were operated by electricity, and the hand was injured, as claimed in the petition, by coming in contact with an electric switch. The trial court sustained a general demurrer to the petition and dismissed the action.

A decision of the case necessitates a construction of section 126, art. I, ch. 13, Comp. St. 1911. The section provides, among other things, that all claims against the city must be presented in writing, verified by the claimant or his agent, stating that the same is correct, reasonable, just, and unpaid; that no claims shall be allowed unless presented, verified, and read in open council; that "in order to maintain an action for an unliquidated claim it shall be necessary, as a condition precedent, that the party file in the office of the city clerk, within 30 days from the time such right of action accrued, a statement of the amount of the claim, giving full name of the claimant, the time, place, nature, circumstance and cause of the injury or damage complained of." The demurrer seems to have been sustained because of the absence of an allegation in the petition that plaintiff had filed the claim with the city clerk within 30 days of the date of his injury. The petition alleges that the defendant is a city of the first class existing under article I, ch. 13, Comp. St. 1907; that the defendant owned and operated a system of waterworks in the city of Lincoln, through which it furnished water to the inhabitants of said city *for compensation;* that as a part of said water system it maintained station houses, wells, pumps, engines, and other machinery, and employed many servants; that part of the machinery and pumps was operated by electricity conveyed through and controlled by wires, switches, and other electrical appliances; that on and prior to the 3d day of September, 1908, the plaintiff was a servant of the defendant, employed by it at its pumping station in which plaintiff was required to use

and operate a switch to control the passage of the current of electricity that operated the pumps at said station, and that there passed through the wires controlled by said switch, and through said switch, a voltage of electricity of 4,400 volts; that because of so great a voltage it was necessary for the safety of the person operating the switch that the handle of the switch should be constructed of rubber or some material not a conductor of electricity; that the plaintiff was told by the defendant that the handle was of rubber; that said handle had the outward appearance of being constructed of that material; that the defendant negligently furnished the said switch and required the plaintiff to use and operate the same with a wooden handle, which was extremely dangerous, and that these facts were known to defendant, but not to the plaintiff; that the defendant neglected to provide a covering or shield for said switch and for said wires and appliances; that solely because of the negligence of the defendant city while the plaintiff was in its employ as aforesaid and on or about the 3d day of September, 1908, and while the said plaintiff was acting under the direct and immediate supervision and command of said city exercised through its servants, the exact details of which acts of negligence are fully set out in the plaintiff's petition, and without any fault whatever upon the part of the said plaintiff, a high voltage of electricity passed through the said switch and came in contact with plaintiff's hand through said wooden handle of said switch, and so burned the plaintiff's hand as to necessitate the amputation of the thumb and fore finger, and caused plaintiff to receive a terrific shock, whereby he became sick and was confined to the hospital for the period of 40 days, and expended $100 for medical and surgical attendance, and thereby injured his nervous system, and caused him to be permanently afflicted with palpitation of the heart, and maimed and crippled him for life, to plaintiff's damage in the sum of $10,000; that plaintiff at the time of the injury, and for more than 30 days thereafter, was an infant; that on the 19th day of

September, 1908, the plaintiff went to the office of the city attorney of the city of Lincoln, and asked him when it would be necessary to file a claim in order to recover damages, and was then informed that it was unnecessary to file such claim within any certain time; that the plaintiff relied upon the advice of the city attorney and filed his claim December 29, 1908; that said claim was received and considered without objection as to the time when the same was filed, and was referred to the city attorney and the unliquidated claims committee; that they acted on the merits of said claim without objecting to the time when the same was filed, and that said committee reported that said claim should be allowed; that September 5, 1908, two days after the injury, the water commissioner of the city had notice of the time, place, and cause of the injury. It is apparent that the city officials did not consider that the failure to file the claim within 30 days from the time of the injury would release the city. That is evidenced by the fact that the city attorney informed the plaintiff that it was unnecessary to file the claim within any certain time; and it could have been no part of the plan of the city to deceive the plaintiff until after the 30 days had expired; and it is seemingly apparent that the council for the city did not regard the statute as applicable to cases of this kind, for the reason that the claim was received and was considered without objection as to the time when it was filed, and the city attorney and the claims committee acted on the merits of the claim without objecting to the time when it was filed, and the committee reported that the claim be allowed.

The plaintiff, after the demurrer was sustained, elected to stand upon the petition, and a judgment was rendered dismissing plaintiff's action at plaintiff's costs. The legislature did not intend to have this provision apply to such cases as that which we are now considering. When a city goes into the same business as a private citizen or a private corporation, it ought to be liable for its acts of negligence just as they are liable. When the city engages

in furnishing water or gas or electricity for the use of the people, it is well to remember that it does not do so under the exercise of any political power. If a municipality by reason of its negligence causes injury to one of its employees for which it should be held liable because of such negligence, then it ought not to be necessary for the plaintiff, in order to maintain his action, to file in the office of the city clerk, within 30 days from the time of the injury, a statement of the amount of his claim for damages, and the time, place, nature, circumstances, and cause of the injury complained of. To impose such a burden upon the injured person is to discriminate against labor and refuse it an equal opportunity in the courts with other legitimate articles of barter, bargain and sale, whether of merchandise or professional or mechanical services, and therefore it could not have been within the legislative intent to deny labor the opportunity, where its owner is injured, to recover for the injury done. Where there is a failure to file such notice in the office of the city clerk within the time alleged, it should constitute no bar to the plaintiff's right to maintain an action against the city for the full amount of his damages. The people who labor may not always be advised of their rights, and they ought not to be caught with traps, pitfalls, or deceit of any kind. Oftentimes a serious injury would prevent the injured person from making an investigation. Laborers are seldom familiar with the ways of business. There ought to be no barriers or obstacles interposed which would prevent the laborer from getting the damage to which he is legitimately entitled because of injuries sustained by reason of the negligence of the city while the injured servant is in its employ. The city is and ought to be liable for its negligence, to the same extent as a private person or a corporation, whenever it engages in private business for compensation.

In 28 Cyc. 1256, it is said: "A municipality, being not only a public agency, but also a *quasi*-private individual, is therefore subject to the law; for its wrong to the public

it may be prosecuted, and for its torts against individuals it may be sued in a civil action for damages like a private corporation." It is further said on p. 1257: "The one class of its powers is of a public and general character, to be exercised in virtue of certain attributes of sovereignty delegated to it for the welfare and protection of its inhabitants or the general public; the other relates only to special or private corporate purposes, for the accomplishment of which it acts, not through its public officers as such, but *through agents or servants employed by it.*" In the former case its functions are political and governmental, and no liability attaches to it at common law, either for nonuser or misuser of the power, or for the acts or omissions on the part of its officers or the agents through whom such governmental functions are performed, or the servants employed by such agencies. In its second character above mentioned, that is, in the exercise of its purely municipal functions, or the doing of those things which relate to special or private corporation purposes, the corporation stands upon the same footing with a private corporation, and will be held to the same responsibility with a private corporation for injuries resulting from its negligence, and will be liable for the doings of its officers, agents, or employees acting within the scope of such municipal power, or of the servants employed by such officers.

In *City of New Orleans v. Kerr,* 69 Am. St. Rep. 442 (50 La. Ann. 413) it is said: "A municipal corporation, with respect to the private character of its powers and obligations, represents the pecuniary and proprietary interests of individuals, and the rules which govern the responsibility of individuals are properly applicable." In *Esberg Cigar Co. v. City of Portland,* 75 Am. St. Rep. 651 (34 Or. 282) it is said: "When a city voluntarily undertakes to construct and maintain waterworks, in pursuance of statutory authority, for its own private emolument and advantage, the works belong to it in its private, rather than its public or governmental, capacity, though the public may

derive a common benefit therefrom, and the city is, therefore, answerable to persons injured by negligence in the construction or maintenance of such works." In *Bowden v. Kansas City*, 105 Am. St. Rep. 187 (69 Kan. 587) it is said: "A municipal corporation is liable for negligence in the care and control of public property in the discharge of a ministerial duty, irrespective of whether or not an income is derived from it." In the same case it is said: "A municipal corporation is liable to a fireman for injuries sustained through its negligence in not furnishing him a reasonably safe place to work in one of its fire stations."

In *Burke v. City of South Omaha*, 79 Neb. 793, it is said in the syllabus: "The making, improving and repairing of streets by a municipal corporation relate to its corporate interest only, and it is liable for the wrongful or negligent acts of its agents in performing such duties." The judgment of the district court in favor of the plaintiff was affirmed by this court. In *Reed v. Village of Syracuse*, 83 Neb. 713, it was held: "Where a village, engaged in supplying water and manufacturing gas for its own use and for sale to private consumers, so installs a tank for the storage of gasoline that it leaks into the pumping pit of the waterworks and causes an explosion in which an employee of the village is injured, the question whether such explosion is attributable to negligence on the part of such village is for the jury."

In *Hollman v. City of Platteville*, 101 Wis. 94, it is said in the body of the opinion: "When the act done is within its chartered powers and relates to the administration of local or internal affairs, as distinguished from its legislative, discretionary, or *quasi*-judicial duties, the rule of *respondeat superior* applies, and the city will become liable for the act of its servants and agents, which it has authorized or adopted." In *City of Toledo v. Cone*, 41 Ohio St. 149, the city was held liable to an employee for injuries resulting from the negligence of the superintendent of the cemetery. In *Donahoe v. Kansas City*, 136 Mo. 657, it was held: "The construction of sewers in a city

is a corporate and ministerial function as distinguished from a governmental one and a city is responsible for injuries arising from its negligence in the performance of the work." In 20 Am. & Eng. Ency. Law (2d ed.) 1197, it is said: "It is held, as a rule, that a city in supplying water or light to its inhabitants acts as a private corporation, and is subject to the same duties and liabilities." In *State Journal Printing Co. v. City of Madison*, 134 N. W. 909 (148 Wis. 396) it is said in the syllabus: "A city furnishing water to private consumers acts in a *business* capacity, and it must exercise the care that ordinarily prudent persons engaged in similar business would exercise under like circumstances." In 28 Cyc. 1258, it is said: "In the exercise of its purely municipal functions, or the doing of those things which relate to special or private corporate purposes, the corporation stands upon the same footing with a private corporation, and will be held to the same responsiblity with a private corporation for injuries resulting from its negligence." In *Relyea v. Tomahawk Paper & Pulp Co.*, 72 Am. St. Rep. 878 (102 Wis. 301) the court held, as stated in the syllabus: "Laws changing the time for, or conditions of, the enforcement of common law rights are in the nature of statutes of limitations, which, if of such a character as to materially affect the right itself, are within the inhibition of the constitution in regard to the passage of laws impairing the obligations of contracts or taking property without due process of law." In *Smith v. Cleveland*, 17 Wis. *556, it is said, in effect, that the difference between laws that the legislature may change at will and those which the constitution protects from interference and the prejudice of vested rights is that, under the former, the right is dependent on the law, and, under the latter, the right itself is independent of the law. In *Kelly v. City of Faribault*, 95 Minn. 293, it is said in the syllabus: "Chapter 248, p. 459, laws 1897, requiring 30 days' notice to be given to a municipality of claims for injuries received from defects in its streets, sidewalks, or its public works, before action therefor, does *not apply* to a

case where an employee or servant asks for redress for injuries from the negligence of a city in failing to provide a reasonably safe place for its servants to work, or other absolute duties of the master." In *Bradley v. City of Eau Claire,* 56 Wis. 168, it is held: "The words 'claim or demand' in a city charter which provides that 'no action shall be maintained by any person against the city * * * upon any *claim or demand,* until such person shall first have presented his claim or demand to the common council for allowance,' etc., apply to claims or demands arising *upon contract* only, and not to a claim or demand arising out of a tort"—citing *Kelley v. City of Madison,* 43 Wis. 638. See, also, *Sutton v. Snohomish,* 11 Wash. 24, 48 Am. St. Rep. 847; *Jung v. City of Stevens Point,* 74 Wis. 547; *Lay v. City of Adrian,* 75 Mich. 438. In *Nance v. Falls City,* 16 Neb. 85, it is said: "The word 'claims' in section 80 of the chapter relating to cities of the second class applies alone to those arising upon contract, and not upon tort, as for the death of a person through the negligence of the city." It is the opinion of the court that the city was acting in its *private business capacity,* and that while it acted in that capacity it was bound to exercise a reasonable degree of care, in view of the charges involved, and that for any failure to exercise this degree of care it is liable for an injury to another, as a private person or corporation might be. In *Shields v. Town of Durham,* 118 N. Car. 450, it was held: "Section 757 of the code, requiring that claims against municipal corporations shall be presented to the proper authorities and demand for payment as prerequisites to an action to enforce such claims, applies only to demands arising *ex contractu,* and not to those arising *ex delicto.*" *Giuricevic v. City of Tacoma,* 57 Wash. 329, sustains the plaintiff's case. In that case an electric light pole standing in the street fell and injured the plaintiff because the city caused the earth about the pole to be excavated.

The following are sidewalk cases, and do not apply to this case, because of the fact that in sidewalk cases there

is no liability for damages, *unless expressly given by statute: Davidson v. City of Muskegon*, 111 Mich. 454; *Springer v. City of Detroit*, 102 Mich. 300; *Kenyon v. City of Cedar Rapids*, 124 Ia. 195; *Hay v. City of Baraboo*, 127 Wis. 1; *Van Frachen v. City of Fort Howard*, 88 Wis. 570; *Jones v. City of Albany*, 151 N. Y. 223; *Borough of Youngsville v. Siggins*, 110 Pa. St. 291. We do not intend to overrule our prior decisions, and adhere to them as they have been heretofore announced.

LETTON, J., dissenting.

I have no quarrel with the opinions with regard to the liability of a municipal corporation to its employees for its negligence while engaged in *quasi*-private enterprises where no limitation is imposed by statute, but this is not the question before us. The real question involved is whether the legislature has power, in creating a municipal corporation, to impose conditions upon the right to maintain actions against the same.

The provisions of the statute under consideration in this case apply to *all claims*, liquidated and unliquidated, whether based upon contract or *based upon the torts* of the municipality. There are two lines of authorities upon this question, but the matter has already been considered by this court and a definite principle established. The cases which have arisen have not been based upon negligence of the corporate authorities in the operation of waterworks, electric light plants, or other public service activities, but the fundamental question of the power of the legislature to impose conditions upon the granting of the right to sue municipal corporations for any cause has been involved and determined. This court has held that a failure to comply with the conditions prescribed by the statute is a valid and sufficient defense against a cause of action *the right to which is guaranteed by the constitution of the state*. It was said in *City of Lincoln v. Grant*, 38 Neb. 369: "Our conclusion is that the filing of the statement contemplated by the charter of the city is in the

nature of a condition precedent to the right to prosecute an action for damages, and is a material allegation in order to state a cause of action." It was further said: "In our opinion the provision under consideration is a reasonable exercise of the legislative power, and consistent with the soundest public policy." See, also, *Dayton v. City of Lincoln*, 39 Neb. 74; *City of Lincoln v. Finkle*, 41 Neb. 575. These are all cases in which the right to recover damages from the city was preserved by the constitution to the plaintiffs, since their property was taken or damaged for public use. A constitutional right of action is certainly as sacred as a common law right of action. If the legislature can impose terms upon the exercise of one, it seems to me an inevitable logical conclusion that it can impose terms upon the exercise of the other. Mr. Dillon considers this subject at length in 4 Municipal Corporations (5th ed.) sec. 1613, and cites many cases upholding the power. The doctrine is also clearly and forcibly stated in the recent case of *Condon v. City of Chicago*, 249 Ill. 596, in line with the holdings of this court. The force of that opinion is not disclosed in the majority opinions. The fact is that the action was by an employee of the city who was alleged to have been injured by its negligence as a master in not providing a safe place to work. There is nothing in the opinion to indicate that the injury was received in a street. In that case, as in this, it was argued that there is a distinction between the liability of a municipal corporation with regard to its streets, and its liability with respect to injuries to its employees, and that as to the latter it stands upon the same footing as a private corporation. The court said, speaking of municipal corporations: "The liability of such corporations upon their contracts and for their torts is the same as that of private corporations or individuals, and notice is no more necessary as a condition precedent to an action against a municipality than against an individual, unless required by a statute. The power of the legislature, however, *to require notice has been generally*

recognized, and in many of the states a previous notice or presentation of the claim is essential to the maintenance of an action against a municipal corporation, either in all cases or in certain kinds of cases. In some jurisdictions the statute requires notice in actions *ex contractu* only; in some it applies to all claims, whether in tort or contract; in others it is limited to injuries arising from defective streets; in others it includes personal injuries of all kinds; and in still others all actions of tort." It is pointed out that the cases of *Kelly v. City of Faribault,* 95 Minn. 293, and *Giuricevic v. City of Tacoma,* 57 Wash. 329, cited in the majority opinions, were brought under statutes referring specifically to injury from defects in streets, while the Illinois statute like the Nebraska one applies to "all claims." There is no distinction made in the statute as to the nature of the claim. It says "all claims," and includes "torts" by name. The court has heretofore refused to ingraft any distinctions or modifications on the statute, and it should adhere to this position. While the humanitarian doctrine of the majority opinion may commend itself to our sympathies, the legislature, in my opinion, had the power to impose the conditions, and this court should neither minimize them by attempted construction of a plain statute, nor depart from its former holdings. If the law is to be changed, let it be done by the legislature.

MARION O. AYRES, APPELLEE, V. GEORGE BARNETT ET AL., APPELLANTS.

FILED MARCH 14, 1913. No. 17,089.

1. Injunction: TRESPASS: INSOLVENCY. One who has repeatedly trespassed upon the land of another, and threatens to continue such trespass, may be enjoined from so doing; and the question as to whether or not the trespasser is insolvent is immaterial.

2. ———: ———: REMEDY AT LAW. An owner of real estate is not required to permit the devastation of his timber land by a trespasser and seek relief in an action at law for damages. He may prevent such trespass by injunction.

3. Stipulations: EVIDENCE. The pleadings, and the stipulation of the parties in evidence, examined and set out in the opinion, *held*, that plaintiff was not required to show ten years' adverse possession in order to entitle him to recover.

4. Evidence examined, and *held* ample to sustain the findings and decree of the trial court.

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

Paul Pizey and *Alfred Pizey,* for appellants.

R. E. Evans, contra.

FAWCETT, J.

The controversy in this case is over a strip of land some eight or nine rods in width, on the south line of lot 5, section 32, township 29, range 9, in Dakota county. The question is as to whether this strip is a part of lot 5 or a part of the southeast quarter of the southwest quarter of section 32, lying immediately south of lot 5. From a decree of the district court, finding that the strip is a part of lot 5, and perpetually enjoining defendant from trespassing thereon, defendant appeals.

The case was originally commenced against defendant Barnett alone, but prior to the trial defendant Eimers was brought in and an amended petition filed. In this petition plaintiff alleges that he is the owner of lot 5 and has been in possession of the same for more than 12 years last past; that defendant Barnett "has entered upon said premises and has cut and hauled away, and is cutting and hauling away, and threatens to continue to cut and haul away, and has appropriated and continues to appropriate and threatens to appropriate, the timber which stood and is standing upon said real estate;" that the chief value of the real estate is in the timber; that if defendant is per-

mitted to continue he will cut down and destroy all of the growing and standing timber; that Barnett is insolvent; that plaintiff is wholly without adequate remedy at law; that the claim of Barnett is a cloud upon plaintiff's title; that defendant Eimers claims some interest, the exact nature of which is unknown to plaintiff, but that whatever its character "the same is without basis either in law or fact and is a cloud upon plaintiff's title." Plaintiff prays that defendants be restrained from claiming said real estate, from entering thereon, from cutting or hauling away any timber, trees or logs, or trespassing upon said premises; that plaintiff's title be quieted, and for general equitable relief. Defendant Barnett answered, admitting that there is a strip along the south side of lot 5 about nine rods in width "which defendant has laid claim to since the 1st day of March, A. D. 1909 (and before), claiming that said strip is a part of the south half of the southwest quarter of said section 32; and defendant further admits that he is in possession of said property and has been since the 23d day of January, A. D. 1909;" alleges that his claim to the property and his right of possession is based upon two contracts, which he sets out, and which are shown to have been executed to him by defendant Eimers; and denies all other allegations in plaintiff's petition; prays that the injunction asked for by plaintiff be denied and plaintiff's action dismissed; that plaintiff be forever enjoined from interfering with his right of possession of the strip of land in controversy, and for general relief. Defendant Eimers answered, alleging that he is the owner and in possession of that portion of the southeast quarter of the southwest quarter of section 32 embraced in his contract with defendant Barnett; that Barnett has entered into a contract of purchase and is in possession of the tract under such contract; and for further answer adopts the answer of defendant Barnett. For reply plaintiff said: "Comes now the plaintiff, and, for reply to the answer of the defendants, denies that he has ever been in possession of said property."

It is now contended by appellant that by the above pleadings plaintiff has admitted that defendant Barnett is in possession of the strip of land in controversy and that plaintiff himself has never been in possession of the same. While plaintiff's reply is rather carelessly worded, it is clear from an examination of the pleadings, as well as from the manner in which the case was tried, that the pleadings were not so construed at the time of trial in the court below. Plaintiff's petition does not admit that defendant Barnett at the time the suit was commenced was in possession of the land. The allegation is that the defendant has unlawfully and wrongfully entered upon said premises and trespassed thereon, and has cut and hauled away and is cutting and hauling away timber, etc. This is far from being an allegation that defendant Barnett was in possession of the land, and the fact that in his answer defendant alleges that he "admits that he is in possession of said property" will not impute any such character to plaintiff's petition. The statement in plaintiff's reply that he "denies that he has ever been in possession of said property," in the light of the pleadings and in the manner in which the case was tried, will bear no other construction than that the word "he" referred to defendant Barnett, and not to plaintiff.

At the beginning of the trial it was stipulated between the parties that plaintiff is the owner of the record title of lot 5, and that defendants are the owners of the record title of the land in the southeast quarter of the southwest quarter of section 32. The question therefore to be determined by the court was whether this controverted strip of land was in lot 5 or in the southeast quarter of the southwest quarter of section 32. The decree found and adjudged that plaintiff is the owner of lot 5; that he had been in exclusive possession of the same for more than 12 years next before the commencement of the action; that the strip of land in dispute, lying along the south side of said lot 5, is a part thereof as originally surveyed and platted by the United States government, and is the prop-

erty of plaintiff, and that he has been in the open, exclusive and adverse possession thereof for more than 12 years next before the filing of the action; that defendant Barnett since the 1st day of March, 1909, had claimed to be the owner, "has trespassed thereon, and has cut and threatens to cut the growing timber thereon, and that said Barnett is insolvent;" that neither of the defendants has any right, title, interest or claim to the strip of land in controversy or to the possession of the same; and that defendants be perpetually enjoined from trespassing upon the land or from claiming any right, title or interest in and to the same.

Defendant contends that the decree must stand or fall absolutely upon the question of the insolvency of defendant Barnett, and argues that the evidence is clearly insufficient to sustain the charge of such insolvency. We do not think this question enters into the case. If the land belonged to plaintiff, and Barnett had trespassed upon the same, and was threatening to trespass further by cutting down the timber, plaintiff was entitled to restrain him from so doing, regardless of the question as to whether or not he was insolvent. If he were worth a million, plaintiff would not have to submit to such trespass and content himself with an action for damages.

The second point urged is that plaintiff's remedy should have been by ejectment or an action for damages, and that he must show that these or similar remedies at law would be inadequate before the remedy by injunction could be resorted to. This contention is based upon defendant's construction of the pleadings already discussed and shown to be without merit.

The third point urged is that the evidence is insufficient to show ten years' adverse possession by plaintiff. We do not think any such burden rested upon plaintiff. Defendant having stipulated that plaintiff was the owner of the record title, it would rest upon him to show that plaintiff had been divested of his title by ten years' adverse possession on the part of defendant. This was not done or attempted to be done.

Defendant's fourth and last contention is that plaintiff has failed to establish the line between lot 5 and Barnett's land. Upon this point the evidence is conflicting. There is some controversy as to where the government corners were established. Several surveys have been made which do not agree. We deem it unnecessary to go into this evidence in detail, for the reason that we think it not only is sufficient to show that the controverted strip is in lot 5, as found by the court, but that it preponderates in favor of that finding. There can be no controversy as to the soundness of the authorities cited on both sides. The trouble with defendant's case is that the authorities cited by him do not fit the facts in this case.

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

AFFIRMED.

CHARLES E. BRIDE ET AL., APPELLANTS, V. JOSEPH H. RIFFE, APPELLEE.

FILED MARCH 14, 1913. No. 17,114.

Sales: RESCISSION. One who is induced to become the vendee of a special line of merchandise for sale at retail, under an agreement with a wholesale vendor that he shall have the exclusive sale of such special line of merchandise in the city where he is engaged in business, may, upon learning that the vendor has, without his knowledge or consent, sold merchandise of the same special line to a competitor for resale in such city, rescind the contract and return the merchandise so purchased; and in such a case the vendor will not be heard to say that deception was immaterial because no real injury resulted therefrom.

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

Tibbets, Morey & Fuller, for appellants.

H. F. Favinger and *J. W. James, contra.*

FAWCETT, J.

This action originated in justice court, and was appealed to the district court for Adams county, in which court there was a verdict and judgment for defendant. Plaintiffs appeal.

Plaintiffs sued to recover for goods sold and delivered. The answer, among other things, alleges that the goods purchased were a special line and design of jewelry; that, for the purpose of inducing defendant to purchase the goods, plaintiffs represented that defendant should have the exclusive sale of that line of goods in the Hastings market; that, in reliance upon those representations, the purchase was made; that such representations were the sole and only inducement that caused him to enter into the contract; that the representations were fraudulent and false, and known so to be by plaintiffs when made; that at the time of the purchase plaintiffs had already, on that same day, sold the same line of goods to a rival jeweler in the city of Hastings, which fact was unknown to defendant; that defendant learned of the sale to his rival about 30 days later, whereupon he immediately notified plaintiffs of his rescission of the contract and the reasons therefor, and returned all of said goods to plaintiffs. It appears from a motion subsequently filed that defendant's answer originally contained the allegation: "And at said time, the said O. C. Zinn had been given the exclusive sale of said goods in this market." Upon motion of plaintiffs this allegation was stricken from the answer, to which defendant duly excepted. The reply is a general denial, coupled with the allegation that plaintiffs refused to accept the goods when returned to them, and immediately returned them to defendant; admits that prior to the sale to defendant plaintiffs had sold to Zinn goods of the same special line to the amount of about $30.

There is a conflict in the evidence as to the issues thus tendered. The jury, as we think upon sufficient evidence, found the issues in favor of defendant. This verdict set-

tles the question in favor of defendant that the goods were purchased by him under an express agreement that, in purchasing this special line of goods, he was to have the exclusive sale of that line in the city of Hastings. This being true, defendant had a perfect right, upon discovery of the fact that he had not been given such exclusive sale, to rescind the contract. He exercised that right immediately by notifying plaintiffs of his election to rescind and by returning all of the goods purchased. He had this right regardless of the question as to whether he had suffered any real injury by reason of the deception practiced upon him. *MacLaren v. Cochran*, 44 Minn. 255.

Plaintiffs rest their claim for reversal upon three points: (1) That, under the undisputed evidence, the verdict should have been for plaintiffs. This assignment is disposed of by what we have already said. (2) Error of the court in giving instruction No. 12, to the effect that if the jury believed from the evidence that plaintiffs "had made a false representation to the defendant in regard thereto, and the defendant relied thereon, this would be fraud." In commenting upon this instruction, counsel say that there was no evidence that the agent represented to defendant that he had not sold goods elsewhere in Hastings. The representation that he would give defendant exclusive sale of this special line of goods was a false representation, known to be false and impossible of execution when made, and we think was sufficient to justify the language used in the instruction. (3) That the court erred in overruling the objections of plaintiffs to a certain portion of the opening statement made by defendant's counsel. The language used in the opening statement was that defendant expected to prove that, at the time plaintiffs made the sale of the goods to him, they had already entered into a similar contract with a competitor. This statement was objected to at the time by counsel for plaintiffs, and the objection overruled.

In the course of the trial, defendant offered to prove by his competitor, Mr. Zinn, the fact which in his opening

statement he said he expected to be able to prove. The offer was objected to as incompetent, irrelevant and immaterial, and the objection sustained. We think the error of the trial court was in sustaining the objection to the offer, and that it did not err in overruling the objection made to the statement of defendant's counsel in his opening statement of the case. Defendant had a right to prove the deception, alleged in his answer, by showing any transaction between plaintiffs' agent and a competitor of defendant which would tend to establish the same. Evidence that plaintiffs' agent had on the same day made a similar contract with a competitor would be competent and material upon that point; and the fact that the court had erroneously stricken from defendant's answer the express allegation referred to did not deprive defendant of the right to prove that fact under his general allegation of fraud.

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

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, V. WOODRUFF BALL ET AL., DEFENDANTS.

FILED MARCH 14, 1913. No. 16,050.

1. **Boundaries:** EVIDENCE: SUFFICIENCY. The additional evidence produced upon this second trial, together with the evidence taken upon the first trial, requires a finding and judgment in favor of the defendant. The finding stated in the seventh paragraph of the syllabus of the former opinion (90 Neb. 307) is contrary to the preponderance of the whole evidence.

2. **Former Opinion Modified.** Former syllabus and opinion modified so as to leave questions of laches and estoppel undetermined. Under the present condition of the evidence those questions are not necessarily involved.

ORIGINAL action by the state to quiet title to a certain tract of land. *Decree for defendant.*

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

Brown, Baxter & Van Dusen, F. M. Walcott and *Frank M. Tyrrell, contra.*

SEDGWICK, J.

This action was originally begun in this court, and upon the first trial judgment was entered in favor of the plaintiff. Afterwards, upon a showing of newly discovered evidence, a new trial was granted, and the Honorable John J. Sullivan was appointed referee to take evidence and report findings of fact and conclusions of law. The referee took a large amount of additional testimony, and filed his report, finding generally in favor of the defendant. The attorneys for the state have filed exceptions to this report, and the case has been submitted upon additional briefs and oral argument.

In the former opinion (90 Neb. 307) the issues and the principal points of the controversy are stated. It was also stated in that opinion that "the parties substantially agree that if the 'Ball corner,' located 45 chains and 48½ links west of the northeast corner of section 36, is the site of the corner established in 1882 by McElroy, the government surveyor, as the northwest corner of the section, we should find for the defendant." It was found from the evidence, as it then stood, that the "Ball corner," mentioned in the above quotation, was not shown to be the location of the corner established by the surveyor, McElroy. The additional evidence taken by the referee relates mostly to this question, and he finds that the evidence establishes the identity of the so-called "Ball corner" with the corner established by the surveyor, McElroy. The referee appears to have given unusual attention and care in the investigation of the case, and in his report he says:

"Two theories are admissible: (1) That McElroy established the Ball corner as the northwest corner of the

section; (2) that McElroy established the northwest corner a mile west of the Ball corner.

"The second theory is supported by evidence and circumstances worthy of consideration, but it is, in my judgment, completely overborne by the proofs adduced in support of the first theory. The evidence given at the first trial, plus that produced at the second trial, preponderates greatly in favor of defendant's contention, and fully satisfies me that the truth is the Ball corner was the first interior section corner established by McElroy in the 1882 survey of township 30. All the original section corners and some of the quarter-section corners on the north line of the southern tier of sections in township 30, west of the Ball corner, are now satisfactorily located by the evidence, and are shown to bear a proper relation to the Ball corner, assuming it to be the northwest corner of section 36. The corner at the bend of Snake creek, about four miles north of a point one mile west of the Ball corner, is now proved with practical certainty to be the government corner for sections 2, 3, 10 and 11. No corners have been found on the line described in the McElroy field notes running north from the southwest corner of section 36. It further appears from the testimony of old settlers that in early days the government corner five miles west of the Ball corner was understood to mark the west boundary of the township.

"These salient facts, well established, as I think, by the evidence now in the record, make a revision of the former finding with respect to the location of the northwest corner of section 36 imperative. It would not be possible to present within reasonable bounds any condensation of the great mass of evidence given at the trial that would materially aid the court in dealing with exceptions to this report. To give a just impression of its value, it would be necessary to set out an abstract of it. Perhaps I have given too much weight to some and too little to other testimony, but, as a result of it all, I feel fully convinced, in the light of the new evidence, that the court was wrong in

holding that the Ball corner was not established by McElroy as the northwest corner of section 36.

"I further find that McElroy, in making the interior survey of township 30, ran a line due north from the southwest corner of section 36, 40 chains, to the edge of the Boardman marsh where a mound was erected. He did not, however, cross the marsh, but went around it, and established the Ball corner on the assumption, doubtless, that it was half a mile north of the mound erected on the south side of the marsh. From this corner he ran straight lines north and south, and thus fixed the boundaries of section 36 as a tract containing approximately 480 acres. In other words, he eliminated by error what would have been the northwest quarter of the section had it been of statutory dimensions.

"But if the state's claim with respect to the location of the northwest corner of section 36 were conceded, the judgment should, nevertheless, in my opinion, go in favor of the defendant. To deprive him of the property in dispute under the admitted facts would, it seems to me, be altogether unconscionable. I do not see how it can be done without disregarding entirely maxims of equity which are and ought to be of universal application. The state, as a suitor in its own court, is bound by self-imposed bonds to accord to an adversary the full measure of justice which it claims for itself. It cannot, under equitable principles, demand equity without offering to do equity. Year by year, from 1904 to 1912, acting through its duly constituted agents, it collected taxes from defendant as the owner of the land in dispute and expended them for public purposes. It has never made restitution; it has never offered to make restitution. It is here asking this court, in the exercise of its equitable jurisdiction, to award to it the land patented to defendant by the general government, while all the time holding fast to the money which defendant paid it on the assumption that the property was his. It has not offered to do equity, and has, therefore, no just claim to equitable relief.

"The equitable doctrine of laches stands also in the state's way. Not only by its affirmative action in taking and using money collected from defendant as taxes, but by its long inertia as well, it has forfeited the right to invoke equitable intervention in its behalf. Not only has defendant expended money and labor upon the property in the justifiable belief that it was his, but with the lapse of time and the death, dispersion and loss of memory of witnesses, the difficulties of establishing his claim of ownership have been very materially enhanced. His plight is far worse now than it was at the time when the state ought, in the exercise of reasonable diligence, to have commenced this suit. I do not think the fact that school lands are, by the constitution, set apart for educational uses absolves the state, wherever they are involved, from the obligation of equitable doctrines. The state has a proprietary interest in school lands and is bound to devote them to a specific purpose—one of the many purposes which it is organized to carry into execution. It is true that the state has declared itself to be a trustee for school lands, fines, penalties and forfeitures. This means merely that it has resolved to dedicate certain of its own property and funds to educational uses; but, conceding that the court is here dealing with a technical trust, that fact cannot influence the decision. I have never understood that the existence of a trust of any character was sufficient to free either the trustee, the *cestui que trust*, or the chancellor from the obligations imposed by sound morality.

"My conclusion upon the whole case is that the petition should be dismissed and all costs taxed to the state."

The case has been thoroughly briefed and ably presented, both on the part of the state and on the part of the defendant, and the evidence as to this location of this section corner by the surveyor, McElroy, in the original survey has been thoroughly analyzed and carefully presented. The question is not without difficulty, and we realize the force of the suggestion of the referee that both

theories are worthy of discussion and careful consideration. We think, however, the conclusion of the referee upon this point is supported by the preponderance of the evidence. Having reached this conclusion, we do not find it necessary to consider and discuss the questions suggested as to estoppel and laches, and desire to modify our former opinion in that respect so far as to leave those questions undetermined.

Upon the main question above stated, the report of the referee is approved and confirmed, and judgment entered for the defendant accordingly.

DECREE FOR DEFENDANT.

ROSE, J., dissenting.

After a full hearing and a careful consideration of the evidence, without the aid of a referee, a decree in favor of plaintiff was entered at a former term. *State v. Ball,* 90 Neb. 307. In my judgment the findings on the first trial were correct. I do not agree with the referee and the majority that the newly discovered evidence requires a different judgment. The exceptions should be sustained. I also dissent from that part of the majority opinion opening the questions of estoppel and laches for future consideration. The doctrine that petty administrative officers by means of unauthorized acts can dispose of state school land in violation of provisions of the constitution should never be sanctioned. If the constitutional and statutory system of holding and controlling school land may be substituted for unauthorized acts of taxing officers, who can tell whether any land belongs to the permanent school funds? Is morality in this respect to be the test of the rights of the state as intimated by the referee? Are ideas of unwritten, indefinable moral obligations, floating in the inner consciousness of judges, and arising from conflicting testimony of litigants, to be the means of depriving the sovereign of school land? Is trespass to be substituted for law? Unless there is some idea

that constitutional government administered by written statutes is to be abandoned in a material respect, the questions of estoppel and laches, as announced in the former opinion, should not be open to further controversy.

Estoppel and laches are properly applied to rational persons who have the power to contract and to act in all their dealings as free agents, but those doctrines have no application to a sovereign having only power to act through departments and officers whose duties and powers are limited and defined by written statutes. Individuals are not wronged by applying to the state a rule which does not apply to them, because the powers, duties and acts of officers are shown by public records available to all. Courts ought not to assume in advance that the state will be immoral in its administrative dealings in regard to its school land. The legislature, if asked, will enact proper laws to correct any wrong or to appropriate money to pay any proper claim. In the meantime the attorney general should assert the rights of the state as they exist under present institutions. Any other view disregards the philosophy on which constitutional government administered by means of written statutes is founded. I am therefore compelled to dissent from that part of the majority opinion opening the questions of estoppel and laches.

BARNES, J., concurs in dissent.

WILLIAM M. MORNING, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED MARCH 14, 1913. No. 16,968.

1. **Municipal Corporations: STREETS: DEDICATION.** Land cannot be dedicated to the public for a street by deed, unless such deed is executed by the owner of the land. If there are outstanding liens which afterward ripen into full title, such attempted dedication by the owner of the equity of redemption alone, without the knowledge or consent of the lien-holder, will be of no effect.

2. ———: ———: ———: ESTOPPEL. If the deed of dedication is not recorded, and the holder of such lien has no notice of the existence of the deed, or that there is any claim of right on the part of the public or of any individual to use the land as a street, the fact of such user will not estop the lien-holder to deny that he consented to such dedication.

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

Morning & Ledwith, for appellant.

Fred C. Foster and *D. H. McClenahan, contra.*

SEDGWICK, J.

The plaintiff began this action in the district court for Lancaster county against this defendant to quiet his title in a certain city lot described in the petition, and to cancel a deed of dedication executed by a former owner of the lot. The district court entered a decree in favor of the defendant, and the plaintiff has appealed.

The petition alleges that one Lizzie E. Reeves was formerly the owner of the lot in question, and neglected to pay the county and city taxes assessed thereon for the year 1889, and subsequent taxes, and that on the 29th day of November, 1890, the lot was duly sold at a regular tax sale, according to law, and that the Farmers Loan & Trust Company purchased the lot at that sale, and afterwards the purchaser paid the subsequent taxes and foreclosed its lien for taxes and a decree of foreclosure was duly entered, and pursuant thereto the lot was duly and regularly sold by the sheriff of the county under the order of the court, the sale confirmed, and a deed duly ordered, executed and delivered to the Farmers Loan & Trust Company. The deed was regularly recorded in the proper office on the 23d day of August, 1898. The plaintiff purchased the lot from the Farmers Loan & Trust Company, and in July, 1902, the said company executed a deed of conveyance to the plaintiff conveying the said lot, which deed was duly recorded in August, 1902. In December,

1890, the said Reeves executed a deed of dedication dedicating the lot to the public as a street. This deed by some oversight was not recorded until in June, 1906. These allegations are admitted in the answer, and are not controverted in the evidence. There is evidence tending to show that the lot has been for many years more or less used by the public, but there is no evidence that the plaintiff ever consented to such use, or that the plaintiff, prior to the year 1906, knew or had any reason to suppose that the lot had been dedicated to the public, or that it was being used as a street under any claim of dedication or other right. Under these circumstances, it seems clear that the plaintiff's interest and title in the lot has not been acquired by the public or affected by the attempted dedication and user. In *Warren v. Brown*, 31 Neb. 8, 19, it is said: "To establish the existence of a public road by dedication by deed, it must appear that the grantor was the owner of the lands when the dedication was made." In *Gate City v. Richmond*, 97 Va. 337, 33 S. E. 615, it is held that one who holds only the equity of redemption has no power to make a valid dedication of the land to public use. In that case the owner of the land executed a trust deed in the nature of a mortgage and afterwards sold his equity of redemption, and it was held that the purchaser had no power to dedicate the land to public use. In *Hays v. Perkins*, 109 Mo. 102, 18 S. W. 1127, the owner of the land attempted to make a dedication to public use while there was a judgment against him which was a lien upon the land. The court said: "Hays could not, by laying the land off into lots and streets, affect the lien of the judgment. As against this judgment the plat could not operate as a dedication of the streets to public use. The sale when made related back to the date of the judgment and thus defeated the dedication."

In the case at bar there was not only a valid lien for taxes of at least as high a grade as the lien of a judgment, but the land had actually been sold by virtue of the lien, and the interest so acquired in the land afterwards ripened

into a complete title. Surely the owner of the equity of redemption cannot by secret deed, without the knowledge of those holding interest in the land superior to his own, convey or destroy these interests. There is no evidence in this case as to the value of the lot at the time of the attempted dedication, and therefore it does not appear that Mrs. Reeves had any substantial interest in the lot at that time. We think this suggestion makes the reason of the rule apparent; for if the owner of the equity of redemption could defeat prior rights, relatively of small importance as compared with her own, she could by the same reasoning defeat prior liens, although they were equal to the full value of the land.

The decree of the district court is reversed and the cause remanded, with directions to enter a decree for the plaintiff as prayed.

REVERSED.

GARRY IRON & STEEL COMPANY, APPELLEE, V. OMAHA COAL & BUILDING SUPPLY COMPANY, APPELLANT.

FILED MARCH 14, 1913. No. 17,055.

1. **Trial**: DIRECTING VERDICT. The trial court should not submit a cause to the jury unless there is such a substantial conflict in the evidence upon the issue presented that a finding of the jury for either party would be sustained. If the court would be required to set aside a verdict for defendant, upon the pleadings and evidence, a verdict for the plaintiff should be directed.

2. ———: ———. Upon the pleadings and evidence stated in the opinion, the trial court rightly directed a verdict in favor of the plaintiff.

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

Mahoney & Kennedy, for appellant.

Crane & Boucher and *J. W. Woodrough, contra.*

SEDGWICK, J.

The defendant is a corporation, and since the commencement of the transaction involved in this litigation has changed its corporate name, perhaps more than once. The plaintiff was engaged in the manufacture of Cleveland expanded metal lath, at Cleveland, Ohio, and in December, 1907, the defendant, in the name of the "Omaha Coal & Building Supply Company," entered into contract with the plaintiff whereby the plaintiff made the defendant its exclusive agent for the city of Omaha for the sale of its lath. In this contract the plaintiff agreed to furnish the lath at the price and on the terms named in the contract, and it was also agreed that the contract was subject to cancelation by either party upon 60 days' notice. Afterwards, the defendant ordered a car-load of the lath, which was duly shipped by the plaintiff and received on or about the 28th day of January, 1908. The plaintiff brought this action to recover the contract price for the lath, and, upon trial in the district court for Douglas county, the court directed the jury to find a verdict in favor of the plaintiff for the amount claimed, and, judgment having been entered, the defendant has appealed.

The defendant, in its answer, admitted the contract and the receipt of the lath as above stated, and alleged that before making the contract, and "as consideration for which defendant was to accept said offer, and as a representation of fact relied upon by the defendant, upon which defendant's acceptance of said offer was based, the plaintiff, through its agents and servants, deceitfully, knowingly and fraudulently stated and represented to the defendant that said Cleveland expanded metal lath was suitable for and reasonably fit for general building use in the city of Omaha, and in such territory immediately adjacent thereto as the defendant sought to cover in its sales; and that said Cleveland expanded lath was as serviceable and as marketable, and as reasonbly fit for use as the Herringbone lath, which latter lath has been satisfactorily

used in said city, and all places where defendant company has sought to make sales, for a number of years; and that said Cleveland expanded metal lath, which in its manufacture defendant represented is made to be placed on '16-inch centers,' was satisfactorily serviceable and reasonably fit for said particular use." The supposed failure of the lath as warranted and represented is alleged in the answer in these words: "Said lath was not and is not suitable or reasonably fit for general building use in the city of Omaha and the commercial territory contiguous thereto, or elsewhere. Said lath was not and is not as serviceable and marketable or as reasonably fit for use as the Herringbone lath, and said lath was not and is not reasonably fit or serviceable for use on '16-inch centers.'"

The plaintiff insists that this answer does not state any defense; that the allegations are indefinite and merely state conclusions and matters of opinion. It will be noticed that there is no allegation in the answer as to the material or workmanship, or of facts from which it could be determined whether the lath was suitable or reasonably fit for the purposes for which it was intended, or was as fit for use as the Herringbone lath, or fit for use on "16-inch centers." The evidence which is supposed to support the defense is still more indefinite and uncertain. The trial court regarded the allegations of the answer as sufficient to admit of proof, but found that the evidence was wholly insufficient to constitute any defense to the plaintiff's claim.

It is a rule now well established in this court that the trial court should not submit a cause to the jury unless there is such a substantial conflict in the evidence upon the issue presented that the finding of the jury for either party would be sustained. If the court would be required to set aside a verdict for the defendant upon the pleadings and evidence, and so make another trial of the issue necessary, the cause should not be submitted to the jury, but should be determined by the court.

The trial court in his opinion stated, in effect, that the

evidence showed without any substantial conflict that the lath in question "is one of general use * * * all over the country * * * and has a value known and accepted among builders and the trade." There is evidence tending to show that this lath had not been used at all in Omaha, and that the defendant had no knowledge whatever of the Cleveland expanded metal lath at the time it entered into the contract, but this is not in conflict with the evidence of the dozen or more witnesses who testify that this lath was in general use in St. Louis, Kansas City, San Francisco, Cleveland, and other cities throughout the country.

The trial court also concluded "that the defendant at the time the contract was made had a general knowledge of metallic lathing." The defendant says that this is erroneous, because the evidence shows "that not only was the defendant unfamiliar with Cleveland expanded metal lath, but that it had not handled any metal lath." We think the evidence shows beyond question that the defendant at the time of entering into this contract had a general knowledge of metallic lathing. Mr. Monaghan, the defendant's manager, who ordered the goods in question, testified that he had never seen or known of that lath at that time, and that no member of the defendant company had, but he also testified: "We had sold it (metal lath) and bought it from others, and were familiar with the stock lath, but did not carry it ourselves. If we got a call for metal lath, we got it from those who had it and delivered it, and in that way dealt with it, but not extensively. In that way I had informed myself of the different kinds of lath on the market, and what its purposes were, and what it was adapted to, and what it ought to look like, and how it ought to feel, whether it was stiff or not, and how it was used." The evidence shows that metal lath was very much used in Omaha, and that the defendant was then, and had been for a long time, engaged in dealing in building materials, including metal lath, and the witness was no doubt correct in saying that

the defendant was informed of the different kinds of lath, and what its purposes were, and what it was adapted to, and what it ought to look like, and how it ought to feel, whether it was stiff or not, and how it was used.

We think, also, the trial court was right in concluding "that the difference in the value for building purposes and uses of the Herringbone lath and that in question is shown to be one wherein one might be better for certain uses than another, depending largely upon the conclusion of the ones using it." The defendant admitted the contract and the receipt of the property, and had the burden of establishing its alleged defense. Two grades of lath were included in the purchase, called 24 gauge and 27 gauge. One witness testified that "the 24 gauge is thicker than the 27 gauge lath." The defendant offered no evidence explaining the difference in the use of these grades or whether there is any substantial difference. We cannot tell from this evidence whether it is contended that both grades are defective or whether there is any difference in that regard, or whether the respective grades were intended for different conditions and were used as intended.

The defendant called two witnesses who testified as to the character of this lath. Mr. Anderson, who had been engaged in the "plastering contract business" for 20 years, testified that he was familiar with the character of building construction in Omaha; that in general the distance between the studding and joists is 16 inches, but in some cases there are what are called 12-inch centers; that he tried to use the Cleveland lath on the Omaha Gas Company's building, and found "it would take too much labor and material to cover it, so we did not use it any more." They used about 50 yards on 16-inch centers. "The lath was too flexible. When we applied the mortar to it, it bagged down from the ceiling, and it would take a great quantity of mortar to fill up the depressions left so as to level off the ceiling. The lath bagged down after the first coat, and then we had to fill the whole surface in

order to get it even with the bagged places to make the surface level. This required the use of more plaster. Double tying means when you tie for 16-inch centers between the joists. We double tied this lath. We do not have to tie the Herringbone lath at all. It will stand without tying, but the Cleveland lath will not. After we found how the Cleveland lath operated, we refused to use any more of it." He also stated: "I don't consider it worth anything for 16-inch centers; I lost more material and labor than what the difference is between the Herringbone and this lath, or about such an amount." He said: "There was no value to it." When asked what was the market value, he answered: "The only thing I know about the market value is what they ask for it when they sell it. I think that was 16 to 17 cents per square yard. * * * It was valueless to me. Q. Well, how about the trade generally beside yourself? A. I considered it for every man that used it, it was valueless. Q. You mean by that without market value? A. Yes." On cross-examination he testified that he used the Cleveland lath afterwards, and paid the regular price for it. The other witness called by the defendant was Mr. Rice, who testified that he had been in the plastering business for 40 years, and "saw the Cleveland lath on the Hanson restaurant on Sixteenth street." The lath was on before he saw it, and they could not plaster on it at all. "We had to give the lathers extra time for the work. The lath required more labor than ordinarily. The extra cost of mortar and labor required in using the Cleveland lath amounted to one-third more than in the case of the use of any other lath I ever used." They made no attempt to state which grade of the Cleveland lath they used, nor the conditions under which they used it, nor any defect in its material, manufacture or design. They stated conclusions, and their evidence shows that they are stating matters of opinion, and not facts from which the jury might draw a conclusion.

The plaintiff called Mr. Dietz as witness, who testified that he had been a lather for 27 years, and had used large

quantities of material, lathing 18,000 yards on one building. He had used the Pittsburg and Herringbone and Cleveland lath. He named several important buildings on which he had used the Cleveland lath. He described the Herringbone lath as follows: "The Herringbone lath is awfully weak. In fact, you can't use it on 16-inch centers. It is like a lot of ribs, and will break if you bend it. You can bend the Cleveland lath in any way you want. It's heavier and stiffer. To my estimation it is 100 per cent. better than Herringbone lath. The Herringbone lath is too weak and will sag if you put it on 16-inch centers, or ceilings, or partitions, and, if you get mortar on it, it will sag down. It is almost impossible to use it on 16-inch centers. The Cleveland lath is better in every way, and I have never had any trouble with it. I have no interest in this case." Mr. Sparks had been a plasterer about 16 years, and he testifies that "Cleveland lath is very superior to the Herringbone lath in regard to stiffness, and in requiring less mortar, less time for workmen, and that the Cleveland lath, when used on 16-inch centers, will give good results, being heavier and stiffer than the Herringbone lath, and that, when putting mortar on the Herringbone lath, it will drop back and go through, which is not the case with the Cleveland lath, and that the Cleveland lath is the best for general use and for all purposes the witness ever used lath." Several other witnesses for the plaintiff testified to the same effect.

It will be noticed that none of the defendant's witnesses testified to any defect in the lath in its material, manufacture, workmanship, or design. The evidence is without conflict that this lath is in general use in many places; that it is regarded by contractors and builders as a standard article; and that there is a variety of opinion as to which of several kinds of metal lath is the most desirable, depending, so far as this evidence shows, upon the kind of work that is being done and the conditions and circumstances under which it is used. After the defendant had received the lath in question, which was in January, 1908,

there was considerable correspondence between the parties as to the merits of the lath and the condition of the market and the payment of the plaintiff's claim. The letter to the plaintiff on the 11th of May stated that the defendant had paid the plaintiff about $40 on the account, and under date of May 26 the defendant stated that the market in Omaha on metal lath had declined 2 cents per yard, and that the defendant had made concessions in price until the profit amounted to nothing, but had failed to get the business; that the Herringbone lath was being sold on the market at 14 cents, which was less than, or practically equal to, the cost of lath to the defendant, and that the defendant would be willing to handle the lath on a margin of ½ a cent a yard, but could not afford to sell it below cost. The letter continued: "We will endeavor to introduce this lath in this market, and it seems only justly fair that you should make some concession in prices to us. The lath is thought very well of by contractors who have used it. It answers the purpose very satisfactory on 12-in. centers, but does not give satisfaction on 16-in. centers. The Herringbone seems to be the ideal lath on 16-in. centers, and especially on ceiling work. On exterior work, the Garry lath is giving good satisfaction. Now, consider this matter carefully and from a business standpoint, and advise us as soon as possible if you can make our price at Omaha the same as you quoted us f. o. b. Cleveland. I am almost certain that this will enable us to get the business, and at least meet the prices quoted by Sunderland Bros. on Herringbone. The only way to introduce this metal lath in Omaha is to have a price a little more favorable than that price which Herringbone is sold." The letter of May 26 shows that the defendant had investigated and tested the lath. It states what was claimed to be a point in favor of the Herringbone lath, and also points in favor of the lath in question, and amounts to an admission that the lath received by them was a compliance with their contract.

Under these conditions, the general statement of two

witnesses that they were dissatisfied with the lath and preferred to use some other manufacture would not support a finding that the lath was defective, or that the defendant had in any way violated the terms of its contract.

The district court was therefore right in instructing the jury to find a verdict for the plaintiff, and the judgment is

AFFIRMED.

PETER D. THOMSEN, APPELLEE, V. BERNHARD J. JOBST, APPELLANT.

FILED MARCH 14, 1913. No. 17,062.

1. **Master and Servant**: DANGEROUS APPLIANCES: ASSUMPTION OF RISK. The general rule is that an employee who, without objection on his part, works under dangerous conditions, with full knowledge of the danger incurred by him in so doing, will be held to have assumed the risk. But when the employer, who also knows the dangerous conditions, orders the employee to so perform the work notwithstanding his protest, and enforces the order with threats of discharge from employment, and himself stands by and directs the employee in doing the dangerous work, he will not afterwards be heard to say that the employee assumed the risk or was guilty of contributory negligence in obeying his orders.

2. ———: ———: NEGLIGENCE OF MASTER. The master is not necessarily negligent because he uses such machinery or appliances as are not in general use. But when he requires an implement to be used in a dangerous manner, under dangerous conditions and surroundings, and in a manner and under conditions more dangerous than the usual method, he may be guilty of negligence in so doing.

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

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Weaver & Giller, contra.

SEDGWICK, J.

The plaintiff recovered a judgment in the district court for Douglas county for damages on account of injuries sustained while in the service of the defendant. The defendant has appealed.

There is little, if any, conflict in the testimony. The record discloses the following facts: The defendant, at the time the accident in question occurred, was a contractor and builder, carrying on his business in the city of Omaha. The plaintiff was a carpenter some 35 years of age, having had many years' experience in that line of work, and having been employed by the defendant from time to time. On the 17th day of May, 1909, plaintiff was working for the defendant, who was just completing a contract for the erection of a six-story warehouse for the Moline Plow Company. The job was completed, with the exception of a small amount of finishing in a showroom, situated in the sixth story of the building. The unfinished work required the nailing of some short pieces of molding around the top of a wooden post which was from 14 to 16 feet high. One Rasmus Nelson, who was defendant's foreman in charge of the construction work, told plaintiff to finish the top of the post. Plaintiff testified that he said to Nelson: "Ain't I going to have a scaffold for that?" Nelson said: "A man that can't work on that stepladder can't work on this building." Plaintiff thereupon placed a stepladder, which had been constructed on the premises by himself and a fellow workman, and with some tools and the pieces of molding, which had been sawed for the purpose of finishing the post, ascended to the top of the ladder, and, while standing in that position, commenced to nail the pieces of molding in place. Nelson stood by directing the work, and called his attention to the fact that one piece of the molding was not straight. Plaintiff attempted to fit the molding, and in so doing pushed the stepladder away with his feet. He caught hold of the molding, but

it was not strong enough to hold his weight, and he fell to the floor, and thus sustained the injuries of which he complains.

Plaintiff further testified that the use of a stepladder was dangerous, and one of his witnesses stated that it was so dangerous that a man ought not to use it at all. This witness admitted, however, that it was possible to do the work by the use of a stepladder, but that a man ought not to do it, if he wanted to be as careful of himself as he ought to be. The plaintiff admitted that he knew the use of the stepladder was dangerous, but stated that he used it because he did not want to lose his job. Defendant and his witnesses testified that it was customary to use a stepladder to nail short pieces of molding, like those in question, in place; that a scaffold was not required, and was never used for such a purpose, unless large amounts or long strips of molding were to be fastened in place. It was contended by the defendant upon the hearing that the foregoing facts were not sufficient to render defendant liable for the injuries sustained by the plaintiff, and that the district court erred in refusing to direct the jury to return a verdict in his favor.

A stepladder is generally considered to be one of that class of simple tools that any workman is supposed to understand. There are many cases holding that one who uses such simple tools cannot be heard to say that they were defective and dangerous, and that he was not aware of the defect. This is not the condition here. Plaintiff admits that he knew that the use of the stepladder under the conditions existing was dangerous, and, under ordinary circumstances, he would be held to have assumed the risk of injury in so using it. The defendant also admits that there is sufficient evidence in the case from which the jury might find that, under the circumstances, to use the stepladder as it was used was dangerous. The question that we must determine is: Can the defendant now rely upon the fact that plaintiff knew the danger that he incurred, and allege that he assumed the risk and was guilty of contributory negligence?

In *Lee v. Smart*, 45 Neb. 318, it is said: "Where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such a character as to threaten immediate injury, or where it is reasonably probable that they may be safely used by extraordinary caution and skill, the master will be liable for a resulting accident." This conclusion appears to be derived from the language used in *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578. Several other opinions of this court are cited as upholding this doctrine. The reason of this exception from the general rule is not stated in the opinion in *Lee v. Smart, supra*. The court appears to rely upon the authorities cited as a sufficient support for the holding. In that case it was conceded that the plaintiff had full knowledge of the dangerous character of the implement used, and yet the defendant was not allowed to defeat his action on the ground that he had either assumed the risk or had been guilty of contributory negligence. It is difficult to perceive how these former cases can be distinguished from the case at bar. If the defendant is not allowed to assert assumption of risk or contributory negligence because he has promised to remedy the defect in the dangerous implement, and so induces the plaintiff to continue its use, why should he be allowed to rely upon such defenses when he has insisted that the defendant shall continue to use the dangerous implement, and has induced him to do so by a threat of this nature, and not only that, but has stood by and directed him in the dangerous use of the implement. See *Sapp v. Christie Bros.*, 79 Neb. 701, and note to *Lowe Mfg. Co. v. Payne*, 30 L. R. A. n. s. 442.

The defendant complains that evidence was received over his objection "that some other way of conducting the business than that which was used was usual and customary." In *Central Granaries Co. v. Ault*, 75 Neb. 249, 255, it was upon rehearing held that the master is not necessarily negligent because he uses such machinery and appliances as are not in common use. It is thought that

such a rule would tend to prevent the adoption of better and safer tools and appliances. The holding of the trial court is not inconsistent with *Central Granaries Co. v. Ault, supra.* The evidence admitted in the case at bar was not that the implement used was not in common use. It was to the effect that it was not customary to use a stepladder in work of this nature, under conditions there existing, and that the method used was more dangerous than the ordinary one, and this is clearly competent under the rule as stated in *Central Granaries Co. v. Ault, supra.*

The case is very close upon the facts presented, but we cannot say that the findings of the jury are so clearly wrong as to require a reversal. The judgment of the district court is

AFFIRMED.

BARNES, J., dissenting.

I am unable to concur in the opinion of the majority. The record in this case clearly shows that the plaintiff's injuries were caused by his own negligence in using a stepladder, which the opinion concedes is an ordinary appliance, simple in its nature and construction; one which the testimony shows is customarily used in performing the particular work required of plaintiff, and on which he was engaged at the time his injuries occurred. The ladder was not defective or in any manner out of repair, and its use was entirely familiar to plaintiff, who was a skilled and experienced mechanic. If he had used the ladder with ordinary care, the work required of him could have been safely performed. In such a case the great weight of authority is that the master is not liable for the servant's injuries. *Vanderpool v. Partridge,* 79 Neb. 165; *Marsh v. Chickering,* 101 N. Y. 396; *Sweeney v. Berlin & Jones Envelope Co.,* 101 N. Y. 520; *Standard Oil Co. v. Helmick,* 148 Ind. 457; *Cahill v. Hilton,* 106 N. Y. 512; *Borden v. Daisy Roller Mill Co.,* 98 Wis. 407; *Sellers v. Chicago, B. & Q. R. Co.,* 87 Neb. 322. The majority opinion seems to be founded upon the rule announced in *Lee v. Smart,* 45

Neb. 318; *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578, and *Sapp v. Christie Bros.,* 79 Neb. 701.

It should be observed that in *Lee v. Smart, supra,* it appears that the plaintiff was injured by reason of a defective wagon brake. He had called the master's attention to the defect, and had been told that he could safely use the wagon because the streets were level. Afterwards the defendant sent the plaintiff across the bridge spanning the Missouri river at Omaha, with this wagon heavily loaded with green lumber. The plaintiff had never driven over the bridge, and therefore was not aware of its condition. When he reached a point near the Iowa end of the bridge, and while attempting to hold the wagon from descending a sharp incline, his team got beyond his control, and, as a result, his injuries occurred. It was held that the question of plaintiff's contributory negligence was properly submitted to the jury, and a judgment in his favor was affirmed.

In *Sapp v. Christie Bros., supra,* defendants furnished the plaintiff with a light wagon for use in delivering goods and wares about the city of South Omaha. The wagon was not then, and never had been, provided with a brake. The neck-yoke which the plaintiff was required to use appeared to be somewhat old and season-cracked, and the "pole-eye" or leather attachment in which the end of the wagon pole is inserted was considerably worn and weakened. It appears, however, that the neck-yoke was repaired to some extent with baling wire, and the plaintiff was told that the defendants were rushed with business just then, but that, when they got up with their orders, they would have things fixed a little better. Plaintiff began work on Monday morning, when the foregoing conversation took place. He remained in his employment continuously until about noon of the following Thursday, when he attempted to deliver a load of feed to one McMasters. The shed or stable to which the delivery was to be made stood adjoining an alley extending through a block of ground, and connecting two streets. It was a

public way, much used and traveled, but the surface of the ground was some 10 or 12 feet lower where the building stood than was that of the street whence the plaintiff approached it. Plaintiff sitting on the wagon, reined his team into the alley, and started down the incline. In some manner the end of the neck-yoke, to which the hame straps were attached, broke off while the wagon was descending, and that end fell down; immediately the leather "pole-eye" gave way, the pole dropped to the ground, struck an obstruction, bent and broke, and a piece of it flew upward and hit the plaintiff and knocked him from the seat, inflicting the injuries complained of. In that case a judgment for the plaintiff was affirmed. But it must be observed that the defects of which plaintiff complained were called to the attention of the defendants, and there was a promise to repair.

In *Sioux City & P. R. Co. v. Finlayson, supra*, the plaintiff was an engineer in the employ of the defendant company. He was furnished with a defective engine, and, by reason of the defects, an explosion occurred by which the plaintiff was severely injured. The defendant's attention had been directed to the condition of the engine, and there had been a promise to repair. The plaintiff had judgment, which was affirmed by the supreme court, and it was said: "If an employer knowingly furnishes an employee defective machinery with which to work, and which machinery, though dangerous, is not of such character that it may not be reasonably used by the use of care, skill, and diligence, and the employee, in obedience to the requirements of the employer, uses and operates such dangerous machinery carefully and skilfully, believing there is no immediate danger, and when it is reasonably probable it can be safely operated with such care, the employee does not assume the risk, and if he is injured by such machinery without fault or negligence on his part, the employer will be held liable for the damages resulting from such injury."

It should be observed that the foregoing cases are ex-

ceptions to the general rule; and it is apparent that the facts of this case are not the same as those upon which the rule in those cases is founded. As I view the case, in order to affirm the judgment of the district court, the majority have taken an additional step in the direction of declaring the existence, in this state, of an employer's liability law. Our legislature, so far, has not seen fit to abrogate the common-law rules by which the liability of the master to the servant have heretofore been determined. Until the adoption of what is known as an employer's liability law, I feel that we should adhere to the common-law rule, as declared by the great weight of authority in this country. I am therefore of opinion that the defendant's motion to direct a verdict in his favor should have been sustained.

For the foregoing reasons, I am of opinion that the judgment of the district court should be reversed.

FAWCETT, J., concurs in this dissent.

ROBERT J. TATE, APPELLANT, V. ROBERT F. KLOKE, APPELLEE.

FILED MARCH 14, 1913. No. 17,092.

1. **Contracts:** CONSTRUCTION. Effect must be given to a written memorandum and deed executed pursuant thereto as one transaction, in the light of the facts as they existed at the time of the execution and delivery of the deed.

2. **Appeal:** TRIAL DE NOVO: DECREE. The issues presented by appeal to this court in a suit in equity must be tried *de novo*, and a proper decree entered or directed. Upon the issues and evidence stated in the opinion, the decree of the district court is reversed, and decree directed in favor of the plaintiff.

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

John J. Sullivan, Edmund C. Strode, Jesse L. Root, and *M. V. Beghtol,* for appellant.

Frank T. Ransom and *A. S. Churchill, contra.*

SEDGWICK, J.

In 1903 the plaintiff was in the real estate business, residing in Plainview, Pierce county, and the defendant was the president of a bank at West Point, and was residing in that town. Under an agreement between them they purchased several tracts of land in Pierce county. The defendant furnished the money for these purchases, and took the titles of land purchased in his name. The plaintiff was active in the sale and purchase of the land, and it was agreed that after allowing the defendant, out of the sales of the land, the money which he had advanced in the purchase thereof, together with interest thereon, the net proceeds should be equally divided between the parties. In October, 1903, they purchased a tract of 240 acres, being the N. E. ¼ and the E. ½ of N. W. ¼ of a certain section in Pierce county, at a cost to them, after deducting the plaintiff's commission as real estate agent, of $6,600. Three days later they purchased the remaining 80 acres of the N. ½ of the section at the price of $1,400. After these lands were disposed of, the plaintiff brought this action, and alleged that the defendant had not accounted for and paid to him his one-half of the net profits. Upon trial in the district court for Douglas county, the court found in favor of the defendant, and the plaintiff has appealed.

The land was not sold in tracts as it was purchased, but the N. W. ¼ of the section was first sold, and afterwards the N. E. ¼. There is some controversy between the parties as to the sale of each of these quarters, but the principal controversy related to the last sale of the N. E. ¼ of the section. While the parties held this land, the plaintiff entered into a partnership in the real estate

business with one Engler who had formerly been the cashier of the defendant's bank, and they conducted real estate business in the name of Tate & Engler at Plainview for some time, and undertook to sell this half section of land. The contention in regard to the sale of the N. W. ¼ will be considered later. The plaintiff contends that, after the relation between himself and the defendant had been somewhat changed by the forming of the new partnership with Mr. Engler, it was agreed between the plaintiff and defendant that Tate & Engler might sell the N. E. ¼, and have for their services in so doing all that they could obtain therefor over and above $5,450. The defendant denies this agreement, and this constitutes the main controversy between the parties.

The plaintiff and Mr. Engler both testify positively to this agreement and understanding between the parties, and the defendant as positively denies that any such agreement or understanding was ever had. These three men appear to have had confidence in each other. This evidence shows that they were not very careful in making their contracts. The business was mostly done in general conversation. No writings were at any time executed between them, and it is not unusual, under such circumstances, that there should be honest misunderstanding. The conflict in their testimony does not appear to be in regard to the facts, nor in regard to the language used by them in their various talks about the matter. Each appears to have misunderstood the other's meaning, and this led to their subsequent difficulty. It does not appear to us to be a case of fraud or false swearing. Tate & Engler found a purchaser for this N. E. ¼ in one Heyn, who, it appears, agreed to purchase it for $6,400. They told the defendant that they had a purchaser for the land, and asked him to convey the land to them, according to their understanding, for $5,450. After some conversation in regard to the matter, the defendant agreed to do so, and they paid to him $500 thereon, and the defendant executed and delivered to them the following

memorandum: "West Point, Nebr., Oct. 23d, 1905. Received of Tate & Engler $500 as part payment for the purchase of the northeast quarter of section 17, township 27, range 3 west, at $5,450, and to assume a mortgage of $3,000 on said land drawing interest at the rate of 5%. Balance of $1,950 to be paid in cash on March 1st, 1906, $550 and a mortgage of $1,400 drawing 6% interest. To be closed on or before March 1st, 1906. (Signed) R. F. Kloke." Mr. Heyn resided near West Point, and was acquainted with the defendant, and apparently had before that time transacted some business with him. The defendant discovered that they were obtaining $6,400 for the land from Mr. Heyn, and then it appeared that there had been a misunderstanding between the defendant and Tate & Engler in regard to this quarter section of land. The defendant insisted that he had consented that the land might be sold for $5,450, if that was the best price that could be obtained. The plaintiff contended that it had been agreed that Tate & Engler should have the land for that price, and for their services in finding a purchaser and making the sale should have all they could obtain for the land above the agreed price of $5,450. On account of this misunderstanding the sale to Mr. Heyn failed. The defendant insists that the above memorandum was procured by fraud and misrepresentation, in concealing from him the price for which the land had been contracted.

As we have seen, the original agreement between the plaintiff and defendant contemplated that the lands purchased should be taken in the name of the defendant, and, when sold, should be by him deeded to the purchaser. The defendant says that, in making this agreement to deed the land directly to Tate & Engler, he supposed that it was immaterial whether it was so deeded or deeded by him directly to the purchaser, and that he did not particularly inquire why they desired to have the deed to themselves instead of to the purchaser. However that may be, it appears that the defendant retained the $500, and that some time afterwards, and after he had full in-

formation of the claim of the plaintiff and of the plaintiff's understanding of their agreement, he executed the deed, pursuant to the memorandum which he had given them, as a final disposition of the whole controversy. We cannot now say that the deed and the memorandum, in pursuance of which the deed was given to Tate & Engler, were procured by fraud. This memorandum and deed are consistent with the plaintiff's understanding of their agreement, and are wholly inconsistent with the defendant's claim.

There is not much conflict in the evidence in regard to the disposal of the N. W. ¼ of the section. Tate & Engler exchanged this quarter, taking an 80-acre tract in Cass county in part payment. The defendant made a deed to the purchaser, and recited in the deed a consideration of $6,000. The defendant testifies that Mr. Engler told him of the opportunity to make the exchange, and that they were taking the 80 acres of land in Cass county, and that they would make the quarter section of land net to him $5,000. The defendant now insists that they meant that he was to have all of the difference between the purchase price of this quarter section of land and the $5,000 net to him agreed upon. The agreement between them as to the sale of this quarter was, as usual between them, somewhat indefinitely expressed, but we think that a fair construction of the language used is that, in the exchange of the quarter for the 80 acres of land, the cash value of the quarter for the purpose of settlement between the parties should be considered as $5,000. The N. E. ¼ and ½ of the N. W. ¼ having been purchased together for a sum in gross, and the remaining eighty purchased afterwards, the price paid for the respective quarter sections was indefinite and a matter of estimate. For that reason, it was impracticable to say definitely the profits realized on each quarter section separately. None of the witnesses could state definitely the amount paid by the defendant for taxes and other expenses, and it is difficult to determine accurately what the net profit on the whole trans-

action was. However, giving the defendant the benefit of his own testimony in regard to these expenses, we find from the evidence that the defendant paid for the three eighties $6,600, and for the other 80 acres $1,400, making $8,000 paid for the half section. The defendant, according to his testimony, should be allowed about $1,210 for interest on the money he invested and for taxes paid by him. He received for the N. W. ¼ $5,000, and for the N. E. ¼ $5,450, and collected rents on the land amounting to $324.35, leaving a net profit of $1,564.35. The plaintiff is therefore entitled to one-half of this net profit, with interest thereon at 7 per cent. per annum from their settlement, March 1, 1906.

The judgment of the district court is reversed and the cause remanded, with instruction to enter judgment in favor of the plaintiff as above indicated.

REVERSED.

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

The majority opinion finds 320 acres of land bought by the plaintiff and defendant for $8,000, and the title taken in the name of the defendant, Kloke, who was a bank president, and who furnished the money under an agreement that he was to have one-half of the net profits when the property should be sold. The plaintiff formed a partnership in the real estate business with one Engler under the name of Tate & Engler, and after he had made the arrangement with Kloke. Tate & Engler undertook to sell part of the land, the N. E. ¼, and plaintiff contends it was agreed between him and the plaintiff that Tate & Engler might sell this particular quarter, and for their services for selling it were to have whatever they could obtain over and above $5,450. The defendant testified that he consented the land might be sold for $5,450, if that was the best price that could be obtained for it. The plaintiff, Tate, and Engler, his partner, testified that no such an agreement was made. Tate & Engler found a

purchaser for this N. E. ¼ at $6,400, a Mr. Heyn, and a writing was signed by the defendant, in which he acknowledged the receipt from Tate & Engler of $500 as part payment on the purchase price at $5,450, and containing details of the items of the proposed payment of the remainder. The defendant made the deed to Tate & Engler after he had full information touching the matter in dispute. The majority opinion does not find any fraud in the representations of the plaintiff made to the defendant, Kloke, concerning the price for which this quarter was agreed to be sold, but finds that the sale to Heyn failed because of the misunderstanding, and says: "The conflict in their testimony does not appear to be in regard to the facts, nor in regard to the language used by them in their various talks about the matter. Each appears to have misunderstood the other's meaning, and this led to their subsequent difficulty. It does not appear to us to be a case of fraud or false swearing." And at the same time the majority opinion says this: "We cannot now say that the deed and the memorandum, in pursuance of which the deed was given to Tate & Engler, were procured by fraud. This memorandum and deed are consistent with the plaintiff's understanding of their agreement, and are wholly inconsistent with the defendant's claim."

The majority opinion seems to me to be in disregard of the evidence, so far as that evidence relates to the N. E. ¼, and the contention of the plaintiff and defendant concerning the same; but as the sale of that quarter failed, and therefore no actual profit was made upon it, and as it cannot with certainty be said that an improper division of the profits on the other quarter was made by the opinion, it follows that no one may say that the conclusion reached is wrong. I dissent from so much of the opinion as discusses the contention between the plaintiff and defendant and refuses to consider that the plaintiff is charged with fraud, or that there is any evidence touching that fact; but if there was fraud there was no result from it, because there was no sale of the N. E. ¼ and there

could have been no profit realized from it. I therefore concur in the conclusion.

HEMAN STANNARD, APPELLEE, V. ORLEANS FLOUR & OATMEAL MILLING COMPANY ET AL., APPELLANTS; E. S. KIRTLAND, APPELLEE.

FILED MARCH 14, 1913. No. 17,097.

1. **Landlord and Tenant:** LEASE: CONSTRUCTION. A lease, like a deed, may be made for the purpose of securing liabilities existing and to be incurred; and when the conditions under which it is made and the subsequent conduct of the parties show that such was its purpose, there being no express provision in the lease to the contrary, it will be so construed.

2. **Bills and Notes:** BONA FIDE HOLDER. The sale, indorsement and delivery of a promissory note does not necessarily constitute the purchaser a *bona fide* holder thereof for value without notice of existing equities. In an action thereon by the purchaser, he must allege and prove that he is such *bona fide* holder, or the note will be subject to equities existing between the original parties.

3. **Judgment:** LIEN. Ordinarily the lien of a judgment extends only to the interest and rights of the judgment debtor in the property as existing at the date of the lien, or acquired during its existence.

4. ———: LIENS: PRIORITY. If a judgment creditor is a stockholder and largely interested in his judgment debtor, a corporation, and the corporation, with his knowledge and consent, enters into a contract with one K., pursuant to which K. advances money for improvements and repairs of the corporate property with the understanding that he is to be reimbursed out of the property so improved, the claim of K. for money so advanced will in equity be preferred to the lien of the judgment.

5. **Liens:** PRIORITY: ACCOUNTING: APPEAL. In an action to establish the priority of liens and foreclose the same, if a lien-holder has had possession of the property and paid expenses and received profits in controlling the same, the court should take an account of the profits and expenses and apply the net profits, if any, upon such lien. If an appellant from the decree of the trial court did not insist upon such accounting at the trial and objected to the appointment of a referee to take such account, he will not be

entitled to a reversal in this court because such accounting was not taken. Upon affirmance of the decree, the trial court can take such accounting before the sale of the property.

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

E. J. Clements, R. R. Schick, John Everson and *Thomas & Shelburn*, for appellants.

R. L. Keester and *F. H. Strout, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court for Harlan county to foreclose two real estate mortgages upon mill property situated in that county. The defendant Kirtland answered, admitting the allegations of the plaintiff's petition, and alleged that he had a lien upon the property for improvements and machinery and for certain other liens paid by him, and asked that the same be adjudged a lien, subject only to the lien of the plaintiff. The defendants Mary A. Spear and Henry Wenholz answered, alleging judgment liens on the property and asking that they be made first liens thereon. The court found that the liens of the plaintiff and of the defendant Kirtland were prior to those of the defendants Spear and Wenholz, and the defendants Spear and Wenholz have appealed.

On the first day of May, 1908, the defendant Orleans Flour & Oatmeal Milling Company, a corporation, was the owner and was operating the mill in question, and was largely indebted to various persons, including the bank of which the defendant Kirtland was president. The mill property needed large repairs and improvements, and on that day the company entered into a contract with defendant Kirtland, whereby it leased the property to the defendant Kirtland for the term of 10 years. The lease contained the following provisions: "And the said party of the second part, in consideration of leasing of the prem-

ises as above set forth, covenants and agrees with the party of the first part to pay to said party of the first part as rent for same, the sum of the one-half profits, payable as follows, to wit: After deducting all expense from total profits, balance of profits to be divided equally every year on the 1st day of May, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917 and 1918. Said first party to pay for all repairs and keep mill in first class order. Also the said second party to have privilege of putting in new machinery and material as is necessary to keep mill in first class repair and order, and such machinery and material used in repairing shall be the property of the said second party till paid for by said first party. Said milling and grain business to be run under the name of the Orleans Milling & Elevator Company, and all stock and grain bought after date of this lease shall be the property and under the supervision of E. S. Kirtland, party of the second part, during the life of this lease. And it is further covenanted and agreed, between the parties aforesaid, that profits due to party of the first part as rent on said premises shall be paid to party of the second part on the 1st day of May each year, during the life of this lease, to be applied on the indebtedness to the party of the second part until said second party is fully paid."

The appellants insist that under this lease the defendant Kirtland was required to operate the mill property for the full term of 10 years, and that he might purchase outstanding liens for the purpose of protecting his tenancy, but for no other purpose, and that he was in fact the real owner of the notes and mortgages upon which the plaintiff based his action, and that, as the defendant Kirtland could not maintain an action to foreclose his mortgage or other liens during the term of his tenancy, therefore the plaintiff could not maintain this action, and that the liens of the judgments of the appellants should be declared to be the first liens on the property. It was insisted that the trial court should have taken an accounting of the profits of the business while under the control

of the defendant Kirtland, and should have applied the same upon the claims of the defendant Kirtland. After the execution of this lease, the defendant Kirtland became the owner of the notes and mortgages constituting the plaintiff's claim, and afterwards sold and transferred them to the plaintiff. The defendant Kirtland also paid for improvements and repairs to the mill and mill property, amounting to $11,354.59.

There is some discussion in the brief as to whether the plaintiff is an innocent purchaser for value of the notes sued upon, without notice of the defenses interposed thereto, but that question is not presented by the record. There is no allegation in the pleadings that he is an innocent purchaser and purchased the notes without notice; nor is there any evidence tending to support such a contention. The plaintiff's claim must therefore be considered as it would be considered if now owned and held by the defendant Kirtland. The judgment of the defendant Mary A. Spear was entered in the district court for Harlan county on the 15th day of November, 1909; and, as it does not appear when the term began at which it was held, it must be considered as a lien from that date. The judgment was against the defendant Orleans Flour & Oatmeal Milling Company, and became a lien upon such interest as that company had in the property at that time. The judgment of the defendant Henry Wenholz was entered in the county court of Harlan county, and a transcript thereof was filed in the office of the clerk of the district court for that county on the 17th day of November, 1908, and became a lien upon the property in question from that date. It appears from the evidence that the defendant milling company had, at the time of executing the lien to Mr. Kirtland, been conducting the milling business there, and was very much involved in debt, and that the property was in bad condition, needing repairs and improvements. To construe the terms of the lease and the rights of the respective parties thereunder, we should consider the existing conditions and the practical construction that the

parties themselves have given to the transaction. Mr. Olmstead, who was the president of the milling company, and had been in the active management of the business, continued in that capacity; and it appears that the company had neglected its corporate organization. The business was not being managed by the directors of the company, if indeed there was a board of directors, and the affairs of the company seem to have been left largely, if not entirely, in the hands of Mr. Olmstead. He continued in active participation in the management of the business after the execution of the lease. He ordered most, if not all, of the machinery and materials for improvements to the property, and himself, in the main, drew the checks in payment therefor, Mr. Kirtland furnishing the money.

Under these and other circumstances appearing in the record, it must be considered that the purpose of the lease was to furnish means to continue the business, and to secure Mr. Kirtland, and the bank he represented, in the claims held against the company. The improvements were mostly made before the judgment of Mary A. Spear became a lien upon the property, and her lien could not give her any greater rights as against Mr. Kirtland and his claim than were possessed by the company at the time her judgment became a lien. We think the trial court was right in preferring Mr. Kirtland's liens to her lien.

In his cross-petition Mr. Kirtland alleged that the defendant Wenholz participated in the organization of the defendant company, and was at the time of entering into the lease one of the principal stockholders therein; that Mr. Wenholz knew the conditions of the lease and the subsequent management, and made no objection thereto. These allegations are denied by Mr. Wenholz in his answer; but there is evidence tending to establish them, and no evidence to the contrary. Under these circumstances, the court was right in subjecting his lien to that of Mr. Kirtland.

The ordinary procedure would be to take an account of the rents and profits of the business and apply them upon

the claim of Mr. Kirtland in entering the decree. The evidence was taken at the April, 1910, term of court, and after finding the priority of liens the court appointed a referee to take such account, and the defendants Spear and Wenholz took an exception to the appointment of the referee. At the next term the court found that the referee had not reported, and proceeded to enter judgment upon his former finding. No objection appears to have been made to this by the parties now complaining. We cannot, therefore, reverse this judgment for this irregularity. If it should be desired by the parties, the trial court can proceed to take this accounting before ordering the sale.

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

AFFIRMED.

LETTON, J., not sitting.

WILSON T. GRAHAM, APPELLANT, V. ROBERT HANSON ET AL., APPELLEES.*

FILED MARCH 28, 1913. No. 17,110.

1. **Vendor and Purchaser:** ACTION FOR DEPOSIT: BURDEN OF PROOF. Where a sum of money is deposited in the hands of a third person, as the balance of a purchase price of certain real estate, to be paid to the vendor when the land in question is surveyed, and a plat thereof together with a certificate to the effect that the title of the purchaser is valid, and that no mountain is situated upon the land, the burden of proof is on the vendor to show a substantial compliance with the agreement, in order to entitle him or his assignee to the payment of the fund deposited.

2. ———: ———: DEFENSES: BURDEN OF PROOF. In such a case, if the defendant seeks to prevent the payment of the money so deposited, on the ground that the land attempted to be sold and conveyed to him has no potential existence, the burden is upon him to establish such defense by a preponderance of the evidence.

3. **Evidence** examined, and found to be insufficient to establish that defense.

* Rehearing denied. See opinion, p. 605, *post*.

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

Brome, Ellick & Brome, for appellant.

Park B. Pulsifer, Parish & Martin and *W. C. Lambert, contra.*

BARNES, J.

Plaintiff commenced this action in the district court for Douglas county, to recover the sum of $2,000, which had been deposited with the First National Bank in the city of Omaha, and $1,000 deposited with a bank in Concordia, in the state of Kansas, as a balance of the purchase price of a tract of land situated in the Republic of Mexico, under a written agreement, which reads as follows:

"Omaha, Nebraska, Nov. 15, 1906.

"It is stipulated and agreed by the undersigned parties hereto in settlement of Mexican land proposition as follows: It is stipulated and agreed that $2,000 is to be left with the First National Bank of Omaha. $1,000 of this is left by G. M. Culver, and $1,000 by J. G. Armstrong, W. J. Winston and W. V. Bennett, until parties of the second part have 10,630 acres surveyed and a plat of the survey furnished to Mr. Culver and Mr. Hanson. The land in question is in a tract of land known as La Joya in the state of Oaxaca, Mexico.

"If any of this land is covered by a mountain at or near Piedra De Sol, and it is understood that the mountain mentioned in this contract is not to mean hills, then there is to be a reduction allowed of $1 per acre for the land covered by said mountain, and to be taken out of the $2,000 equally. As soon as the land is surveyed, the $2,000 is to be turned back to G. M. Culver, Armstrong, Winston and Bennett at once, or if any of said land is covered by the said mountain, $1 per acre shall be paid to Robert Hanson, and the balance ½ to G. M. Culver and the other ½ to Armstrong, Winston and Bennett.

"It is further agreed that a certificate of examination shall be furnished by J. L. Starr Hunt, as soon as it is possible to procure same, or from some other reputable attorney as to the title of the land in question. The surveying in question is to be done at once or as soon as it is possible to procure surveyors and men to do same. The $1,000 now in the Farmers' and Merchants' Bank at Concordia, Kansas, mentioned in former contract, is also to be turned over to Armstrong, Winston and Bennett as soon as the plat is furnished Culver and Hanson, or to the president of the Toltec Tropical Company of Concordia, Kansas. (Signed) Robert Hanson, G. M. Culver, J. G. Armstrong, W. J. Winston, W. V. Bennett."

It was alleged that Armstrong, Winston and Bennett had complied with all of the conditions of the agreement on their part, and had assigned to plaintiff the money deposited under the contract; that plaintiff had made demand upon the bank for the money mentioned in the contract, which demand for payment had been refused. It was further alleged that the bank was threatening and was about to pay the fund in question to the defendants, or some other person designated by them. Plaintiff prayed for an order of injunction restraining the bank from making such threatened payment, and for a judgment for the sum of $3,000, with interest thereon, and for other further and general equitable relief.

To this petition defendant Robert Hanson filed a separate answer, admitting the nonresidence of himself and Culver, the sale of 10,630 acres of land to the Toltec Tropical Land Company, the making of the deposits in the Kansas bank and the First National Bank of Omaha; averred that in executing the written agreement for the deposits he was acting as an officer and agent of the Toltec Tropical Land Company; disclaimed having any right, title or interest in the funds on deposit; averred that they were the property of the Toltec Tropical Land Company, and denied all other allegations of plaintiff's amended petition. Thereafter, the defendant the Toltec

Tropical Land Company filed a petition of intervention, and averred its corporate existence; alleged that the defendant Robert Hanson was at all times its president and general manager; that all of his acts in respect to the matter in controversy were on behalf of and for the intervener; alleged a transfer to the intervener prior to the commencement of this action of all of the interest of the defendant G. M. Culver in the fund in controversy; alleged that plaintiff is not the real party in interest, but that the real parties in interest are intervener and the defendants Armstrong, Winston and Bennett; alleged an assignment by Culver, prior to the commencement of the action, to intervener of all of the interest in the fund in the First National Bank of Omaha; and averred that prior to November 15, 1906, the intervener had agreed to purchase from the defendants Armstrong, Winston and Bennett 10,630 acres of forest land in Mexico, and had agreed to pay therefor the sum of $20,000; that it had paid in cash the sum of $500, and had on deposit, for the purpose of paying the balance of said purchase price, the further sum of $18,500, and had by agreement retained in the bank at Concordia, Kansas, the sum of $1,000 to cover the expenses incident to a survey of said land; that the defendants Armstrong, Winston and Bennett had caused to be executed to the intervener a deed, purporting to convey lands in Mexico, describing by metes and bounds the land alleged to have been conveyed; that Armstrong, Winston and Bennett had agreed to have the land surveyed and identified by cutting through the forest a path or line around said land; that this had not been done on November 15, 1906, at the time the contract of that date was made; that defendant Hanson, in making the contract, acted solely for intervener; that defendants Armstrong, Winston and Bennett failed to comply with the terms of said agreement, having failed to cause the land to be surveyed, or to cause the plat of the survey to be furnished to the intervener, or to the defendants Culver or Hanson, and failed to procure and deliver to intervener,

or any one in its behalf, a certificate of examination by J. L. Starr Hunt, or any other attorney, or person, as to the title of the land in question; that, upon execution of the agreement of November 15, 1906, there was paid to defendants Armstrong, Winston and Bennett all moneys remaining due and unpaid upon the purchase price of the land, excepting the $2,000 remaining in the hands of the Omaha bank, and the $1,000 remaining in the hands of the bank at Concordia, Kansas. It was further alleged, that the two funds in the banks aforesaid became the property of the intervener, and that ever since November 15, 1906, intervener has been entitled to receive this money, but intervener has been kept out of the use of the money; and it was prayed that the funds be adjudged the property of the intervener, and ordered turned over to it, and for a judgment against the plaintiff and the defendants Armstrong, Winston and Bennett for interest on the fund from November 15, 1906, and for general equitable relief.

Intervener also set up as a further defense that defendants Armstrong, Winston and Bennett did not own the 10,630 acres of land conveyed to the intervener; that the title thereto had failed, and it was sought to recover a judgment in favor of the intervener and against the defendants Armstrong, Winston and Bennett for the portion of the purchase price paid, with interest and damages. This last mentioned cause of action was by a demurrer eliminated from the pleadings, and the plaintiff answered the petition of intervention by denying all of the averments thereof not specifically admitted; admitted the intervener to be a nonresident corporation; and alleged that it was prohibited from transacting business in the state of Nebraska by reason of its failure to comply with the law of this state as to filing statements with the attorney general, and obtaining an occupation permit, pursuant to the laws of this state.

Defendant Winston answered plaintiff's amended petition by admitting the purchase of the land by Hanson, and the conveyance of title to the Toltec Tropical Land Com-

pany, the making of the agreement, and the deposit of November 15, 1906, and the compliance by Armstrong, Winston and Bennett with that agreement; denied the assignment of the claim against Hanson to the plaintiff, Graham; and averred affirmatively that he had never authorized such assignment. The answer of the First National Bank admitted its possession of the $2,000 deposit, averred that it was a mere stakeholder, and was ready and willing at any time to turn the money over to whomsoever the court should designate is entitled to receive it. A trial was had to the court upon the foregoing issues, and resulted in a finding and judgment for the defendants. Plaintiff filed a motion for a new trial, supported by affidavits which are found in the bill of exceptions. The motion was overruled, and the plaintiff has brought the case to this court by appeal.

The appellant contends that the district court erred in its findings for the intervener, the Toltec Tropical Land Company; that its findings and judgment thereon awarding to the intervener the fund deposited in the First National Bank of Omaha are not sustained by the evidence. Upon the issues made by the pleadings, in order for the plaintiff to recover the fund in question, he was required to prove, by a preponderance of the evidence, that the land sold and conveyed to the intervener by Armstrong, Winston and Bennett, known as the Nebraska Tropical Development Company, had been surveyed; that a proper plat of such survey, together with a certificate of the validity of the Toltec company's title to the land in question, had been furnished to the defendant Hanson or the Toltec company by J. L. Starr Hunt, or some other reputable attorney of the city of Mexico, and that there was no mountain situated upon the said tract of land.

Plaintiff, to maintain this issue, produced the deposition of one Herman Erle, taken in the city of Mexico in May, 1910, who testified, in substance, that in the early part of 1907, commencing January 10, he began a survey of the land in question, and completed his work in the

month of March following; that he surveyed the land and established the corners; that the land surveyed by him was the tract conveyed to the Toltec company, as shown in a plat or map called "Graham's exhibit A 1," which is a certified copy of the official map of what is known as the La Joya tract. At the examination of witness Erle, the defendants produced a small plat or copy of the plat furnished defendant Hanson by Armstrong, Winston and Bennett, showing the portion of the La Joya tract surveyed by the witness. It appears that the plat or map of the survey made by this witness was not certified at the time it was delivered to defendant Hanson, but either the plat so furnished or a copy of it was afterwards sent to the surveyor, his certificate was appended to it, and it was delivered to the defendant Hanson. The evidence of surveyor Erle is not disputed, nor is his reliability, competency or integrity directly called into question. There is also found in the bill of exceptions a certificate made by one Lawrence Bedford, who, it appears, is a reliable, practicing attorney of the city of Mexico, in which he stated that, upon an examination of the title of the land in question, it is his opinion that it was properly conveyed to the Toltec company, and its title thereto is good and perfect in all respects. This evidence is not directly disputed by the defendants, but it is contended that the vendor, the Nebraska company, was required to have the surveyor cut a path through the forest of tropical growth on the lines of survey sufficient to enable defendants to ride around the land, and thus view and examine it. It must be observed that the written contract contains no such agreement. We are therefore of opinion that the evidence is not sufficient to authorize and require a finding for the defendants upon this question. It is strenuously contended, however, that the Toltec company obtained nothing by its deed from the Nebraska company, because the land described therein had no potential existence, or, in other words, the whole tract, or at least a part of it, was the property of other

persons or corporations. It must be conceded that to maintain that issue the burden of proof was on the defendants.

The record discloses that the La Joya lands, of which the tract in question is a part, amounting to some 60,000 acres, were sold and conveyed by the municipality of Jacatepec to one Karl E. Sheldon, by a deed dated the 13th day of October, 1904, executed in his favor by Mr. Francisco Santiago, municipal agent for the municipality of Jacatepec, according to the orders of the political chief of the district of Tuxtepec, and approved by the government of the state of Oaxaca, under a decree of the court of first instance, in a proceeding in which all of the persons, corporations, companies and municipalities bordering upon the land in question, or in any other way interested therein, were made parties, who had all renounced or granted the land, so far as their interests were concerned, to the municipality of Tuxtepec, to be sold by it to the grantee above named; that Karl E. Sheldon conveyed to the Nebraska company, limited, on the 17th day of November, 1904, something over 17,400 acres of this land, which conveyance appears to be regular and in accordance with the laws of Mexico; that thereafter the Nebraska company sold and conveyed the land in question, which is a part of the La Joya tract, amounting to 10,630 acres, to the defendant the Toltec company, and, as above stated, the land so conveyed to the Toltec company was surveyed, and the corners established by the witness, Herman Erle.

To overthrow this evidence the defendants produced the deposition of one Delaney W. Cobb, taken in the city of Mexico, who testified, in substance, that he had had some experience in engineering and surveying; that he was acquainted with the lands in the vicinity of what he designates as the Piedra De Sol, a well-known and established landmark, something over three miles distant from the nearest corner of the land in question, in a southeasterly direction; that he was also well acquainted with

the location of another well-known and established landmark, a considerable distance from the southwest corner of this land, known as Mano Marquez; that these landmarks were situated upon the north bank of the Rio De Cajones river; that he had traced the course and followed the meanderings of this river from Piedra De Sol to Mano Marquez, and that this river runs through the tract of land in question; that on the south bank of the river is the municipality of Ozumacin, that on the east of La Joya are the lands of the Rendon company, that on the north bank of the river he found coffee plantations, and other improved tracts of land that belonged to corporations or companies other than the Toltec company. This witness, however, does not claim to have surveyed the lines of the tract of land in question, or that he was ever upon the land, unless he was there at the time he was following the course of the Rio De Cajones river. His testimony is corroborated by the evidence of one Williamson, who also claims to have some knowledge of the river and of the lands south of the La Joya tract.

It is argued that surveyor Erle should have started his survey at Piedra De Sol, and, failing to do so, his work was not entitled to credit. It appears, however, that Erle commenced his survey at what is known and conceded to be the northwest corner of the municipality of Jacatepec; that, starting from that point, he ran his survey to a point which he established as the northwest corner of the land in question; that from that point he surveyed the line between the municipality of Chiltapec and Jacatepec, that line being the north boundary of the Toltec company's land; that he continued his survey along the line, and established the northeast corner of this land; that he then went back and surveyed from the northwest corner directly south, and established the southwest corner of the land; that from that point he ran a line in a northeasterly direction to the place where he established the southeast corner of this tract; that he did not run the line between the southeast corner and the northeast cor-

ner of this land, because it was not required, the remainder of the survey being merely a matter of mathematical calculation; that the tract thus surveyed contained a little more than 10,630 acres; that in running his lines he did not cross the Rio De Cajones river, which was so far south of the south line of his survey that he was not able to see it or ascertain its locality; that there was no improved land in the vicinity of his lines of survey, and that the tract of land which he surveyed is what is known as virgin forest.

Without unnecessarily extending this opinion, it may be said that his testimony was strongly corroborated by other evidence, including the testimony of one Vickers, who also made an examination of the land and the country surrounding it. We are therefore of opinion that defendants failed to establish their defense that the land purchased by the Toltec company had no potential existence by a preponderance of the evidence.

It was stated upon the hearing of this case that another suit was pending in the district court for Douglas county between some of the parties to this action, in which the defendant the Toltec company was seeking to recover the purchase price of this land from defendants Armstrong, Winston and Bennett, or the Nebraska company, and, for that reason, we decline to decide the merits of that controversy in this case, and what is said in this opinion is not to have any bearing upon the trial of that case. We simply determine that the defendants failed to establish the defense of nonexistence of the land in question, and that the evidence in this case is insufficient to sustain a judgment in their favor.

This case seems to depend largely upon the case pending between the vendor and vendee of the tract of land in question. The claim of this plaintiff depends upon the rights of the Nebraska company as against the intervener herein. The determination of that case will dispose of some, if not all, of the issues in this case. The bank will, of course, retain the fund involved until the main case is disposed of.

The judgment of the district court is reversed and the cause remanded, with directions to continue the same until the case between these defendants and the intervener is disposed of.

REVERSED.

FANNIE SVANDA, APPELLEE, V. FRANK SVANDA, JR., APPELLANT.

FILED MARCH 28, 1913. No. 17,126.

1. **Divorce:** NONSUPPORT. Where a husband, having sufficient ability, without just cause, fails and absolutely refuses to contribute anything to the support of his wife, the court may grant her a decree of divorce.

2. **Marriage:** ANNULMENT: INSANITY. Mere weakness of mind is not a sufficient ground for the annulment of a marriage, unless it amounts to idiocy or insanity. Nor will circumstances tending to show fraud, combination or circumvention on the part of the father and friends of the wife to induce one to marry his daughter give the court authority to decree the annulment of the marriage, unless the petitioner was an idiot or insane, within the meaning of those terms, at the time the marriage ceremony was performed.

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

Edwin Falloon, S. P. Davidson and *Roscoe Anderson,* for appellant.

Reavis & Reavis, contra.

BARNES, J.

Plaintiff brought this action in the district court for Richardson county to obtain a divorce from her husband, Frank Svanda, Jr., on the ground of nonsupport. The petition was in the usual form. Service of summons was had upon the defendant, and thereupon Frank Svanda, Sr., the father of defendant, procured his own appointment

as his son's guardian, and in that capacity filed an answer to plaintiff's petition, admitting the marriage, denying nonsupport, and alleging, in substance, that at the time the marriage ceremony was performed the defendant was mentally incompetent to enter into the marriage contract, that the marriage was void, and prayed that plaintiff be denied a divorce, and that defendant have a decree annulling the marriage, and for costs. The reply was, in substance, a general denial. Upon a trial of the issues thus joined, plaintiff had the findings and judgment, and the defendant has appealed.

As we view the record, plaintiff clearly established her allegation of nonsupport. In fact, it is not claimed by the defendant that at any time since about one month after the marriage he has contributed anything to the support of his wife, although he is possessed of some property, and was able, by his labor on the farm, to furnish her with proper food and clothing.

Defendant, to maintain the issue of mental incapacity, produced the evidence of three physicians, who claim to have examined him upon the eve of the trial. They testified, in substance, that at the time they examined him he was mentally incompetent to contract marriage. It must be observed, however, that the physicians had never examined the defendant at any other time, and knew nothing about his mental condition either before or at the time when the marriage ceremony was performed.

A witness was also produced who stated that, when defendant was about 17 years of age, he attended his school. He testified that defendant was dull, and made little or no progress in his school work. Other witnesses testified that defendant, when a boy, was backward and retiring in his disposition, and preferred the company of neighbor boys rather than the society of girls; that at times, when company or strangers came to the home, he kept out of sight, to some extent, at least. Two other witnesses testified that they were of opinion that defendant was not competent to make contracts. But it should

be observed that each of those witnesses had contracted with him in the way of purchase and sale of property. In fact, it may be said that defendant was not possessed of any great degree of mental power; but the testimony of his own witnesses shows that he was able to carry on the ordinary business of farming; that he rented 80 acres of land from his father for several years, which he successfully farmed on his own account; that he had a team of his own, as well as other personal property.

It is claimed, however, that defendant did not ask the plaintiff to marry him, and this fact is urged as evidence of his mental incapacity. It appears, however, that the plaintiff was employed as a domestic at the home of defendant's father and mother; that after she had been there something over a month the father and mother told her that, if she and Frank (meaning the defendant) would get married, they would give them 160 acres of land; that after talking the matter over plaintiff and defendant agreed to the proposition; that defendant's father purchased him a suit of clothes and furnished him with money with which to pay the expenses of the marriage, and thereupon defendant and plaintiff went over to the home of plaintiff's parents; that the following day, March 12, 1907, they went with her father to Pawnee City, where they were married by a justice of the peace; that they returned to the home of plaintiff's father, where they remained that night, and the next day they went to the Svanda home, where they lived as husband and wife for about a month, when, by reason of the conduct of defendant's father towards the plaintiff, the defendant took her to her father's home, promising to visit her every other day, and told her that as soon as he had his corn planted he would come for her and they would make a home for themselves; that some days after defendant left her father's house he returned and informed her that he would have nothing more to do with her, and from that time to the day of the trial defendant failed and refused to live with plaintiff or furnish her any means of support whatsoever.

The burden of proof in this case was on the defendant to show such mental incapacity on his part as would render his marriage with the plaintiff void. On that question it was said in *Elzey v. Elzey,* 1 Houst. (Del.) 308: "Imbecility of mind is not a sufficient ground of divorce, unless it amounts to idiocy or insanity. Nor will intoxication at the time of the marriage, accompanied with circumstances of fraud, combination, or circumvention on the part of the father and friends of the wife, to induce the petitioner to marry his daughter, give the court jurisdiction to decree a divorce, unless the petitioner was *insane,* within the meaning of the act." In that case it was further said: "It would be dangerous, perhaps, as well as difficult, to prescribe the precise degree of mental vigor, soundness and capacity essential to the validity of such an engagement; which, after all, in many cases depends more on sentiments of mutual esteem, attachment, and affection, which the weakest may feel as well as the strongest intellects, than on the exercise of a clear, unclouded reason, or sound judgment, or intelligent discernment and discrimination, and in which it differs in a very important respect from all other civil contracts."

It must be observed that it was neither alleged nor proved that defendant was insane or an idiot when the marriage ceremony was performed, and there is much competent evidence in the record which tends to show that defendant had sufficient mental capacity to enter into the marriage contract at the time the ceremony was performed; and, although the testimony is conflicting, in view of the rule above stated, we are of opinion that the findings of the district court are amply sustained by the evidence.

It appears that the decree of the district court gave the plaintiff $400 as permanent alimony, and $100 as attorney's fees. We assume that the trial court took into consideration the fact that in another action, tried in that court, plaintiff had on appeal recovered jointly with defendant an interest in 120 acres of valuable land, and

therefore the court allowed her only $500 as the amount of her permanent alimony and attorney's fees.

As we view the record, the judgment of the district court was right, and it is therefore

AFFIRMED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

JOSEPH H. BRUGMAN ET AL., APPELLEES, V. HENRY J. BRUGMAN, APPELLANT.

FILED MARCH 28, 1913. No. 17,128.

1. **Deeds:** CANCELATION: MENTAL CAPACITY: BURDEN OF PROOF. Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity.

2. ———: EXECUTION: MENTAL CAPACITY. In determining the mental capacity of the grantor to execute a deed, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property, and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said that he was incompetent or incapable of executing the instrument.

3. ———: ———: UNDUE INFLUENCE: HUSBAND AND WIFE. A conveyance of real estate by a wife to her husband for an express, nominal consideration may raise a presumption of undue influence; but this is a rebuttable presumption, and, if the facts and circumstances surrounding the transaction are such as to show that her act was just and for her own good, the burden of proof rests on the one who attacks the conveyance to establish the fact of undue influence.

4. ———: ———. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child, a husband to a wife, or a wife to her husband, which inspires the gift, is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor. *Hacker v. Hoover*, 89 Neb. 317.

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

Frank D. Williams, for appellant.

H. C. Vail, contra.

BARNES, J.

This action was commenced in the district court for Boone county to cancel and set aside a quitclaim deed executed and delivered by one Julia A. Brugman, now deceased, to her husband, Henry J. Brugman, conveying to him an undivided one-half interest in the west half of section 29, township 21, range 6 west, situated in that county. A trial in the district court resulted in a decree for the plaintiffs, and the defendant Henry J. Brugman has appealed.

Upon the issues made by the pleadings, the burden of proof was on the plaintiffs to show that their mother, Julia A. Brugman, paid a part of the consideration for the purchase of the land in question out of her separate estate. The plaintiffs to maintain that issue produced the testimony of Joseph Brugman to the effect that, when he was about nine years of age, he heard it stated in certain conversations in the family that his mother had at one time received about $1,400 from her father's estate, and a part of that money was contributed to the purchase of certain property, used as a home for the family, in David City; that the proceeds of that property were used as a part of the purchase price of the land in question. On the other hand, defendant Henry J. Brugman testified that at the time he married his wife they each possessed a small amount of money, which was used up in living expenses; that his wife, later on, received about $700 from her father's estate, which was used in defraying her expenses during a long period of illness from which she was suffering, in household expenditures, and business ventures; that when the family moved to David

City his wife had only about $100; that no part of her estate was used in the purchase of the David City property; that he purchased that property with the results of his own labors as a carpenter, and with money borrowed from his sister; that he built a house thereon, and otherwise improved the property; that the proceeds of the David City home furnished the money consideration for the land in question, which was and is heavily incumbered, and at his request was conveyed to himself and wife jointly; that from the proceeds of his labor on the farm he has paid the taxes assessed against it, and the interest on the mortgages, and reduced the amount of the incumbrance; that he has made lasting and valuable improvements on the farm; that, owing to his wife's ill health, she was unable to assist him in bearing his burdens; that he has paid a large sum of money as hospital fees and for medical attendance in his endeavors to cure her maladies; that he has been compelled by his own labor to carry on the farm, and at the same time care for his sick wife, and perform his own household work, such as cooking his own meals, etc.; that the plaintiffs left home, and for many years have been engaged in business for themselves; that they have furnished nothing for the support of either their father or mother, and have contributed nothing to pay for or improve the land in question. As we view this evidence, plaintiffs have failed to establish the allegations of their petition, so far as this branch of the controversy is concerned.

Plaintiffs, by their petition, alleged that, at the time the deed in question was executed, their mother, Julia A. Brugman, was of unsound mind, and incapable of understanding the nature of the transaction, and that she was mentally incompetent to make such an instrument. Defendant Henry J. Brugman denied those allegations, and therefore the burden of proof was upon the plaintiffs to maintain that issue.

The evidence discloses that Mrs. Brugman was a large woman, weighing about 250 pounds; that it was always

difficult for her to move about; that in May, 1906, while living with her husband upon the farm, she suffered a paralytic stroke, which affected her right side, and rendered her speech somewhat labored; that her husband was kind, careful and considerate in attending to her wants; that, later on, he took her to a hospital in Columbus, Nebraska, where she was treated by a firm of physicians styled Martyn, Evans & Evans; that she received considerable benefit from the treatment, and in the early fall of that year returned to the farm, where she was again cared for by her husband; that during that fall, and the following winter, she attended church on Sundays, and was able, to some extent, to move about; that in the early spring of 1907 her husband again took her to the hospital in Columbus, where she was placed under treatment by the doctors above named; that the defendant Henry J. Brugman asked Doctor C. D. Evans, a member of the firm, to advise him whether his wife was capable to make the deed in controversy; that Doctor Evans told him that he would let him know later on; that, in pursuance of defendant's request, a consultation was held between Doctor D. T. Martyn, Doctor W. S. Evans, and Doctor C. D. Evans; that they all participated therein, and were all of one accord that Mrs. Brugman was mentally competent to make the deed, and a letter was written by Doctor C. D. Evans to her husband so advising him. It is true that Doctor Evans, when giving his testimony in the instant case, stated that, if he wrote such a letter, he was mistaken as to her condition at that time. It appears, however, that appellant, Henry J. Brugman, received the letter, and his testimony as to its contents was as follows: "If you have any papers you wish your wife to sign, she is in a capable condition to sign them. Come right down." In response to that letter Brugman went to Columbus on June 18, 1907, and while there saw Doctor C. D. Evans, who said his wife was capable and all right, to go ahead. He was asked by the doctor to go across the square to the office of Mr. Beecher, a notary

public; that Beecher drew the deed at his request, and thereupon they drove around to the Doctor's office, where Doctor W. S. Evans identified Mr. Brugman, and told Mr. Beecher that it was all right, to go up and execute the papers; that on reaching the hospital, and going to Mrs. Brugman's room, they found her sitting in a chair, with a book in her lap. When asked how she was, she said: "About like always." Her husband then told her that Mr. Beecher was a notary, and had come down to get her to sign the deed. There were present the notary, a Mr. Fisher, who witnessed the deed, and one of the sisters in charge of the hospital; that the notary thereupon explained to Mrs. Brugman that he had come there to make a deed transferring her interest in some land to her husband. The notary read part of the deed to her, stated its contents, and what it conveyed, and she went over to the table, he assisting her in walking, and signed the deed with the pen in her right hand, and acknowledged it as her volntary act; that the deed was then delivered to Brugman, who filed it for record in January following his wife's death. Brugman testified that he did not think he had been down to see his wife but once before the deed was signed; that he visited her that afternoon; that she asked him in particular about the boys; that thereafter he went down to Columbus to see her about every two weeks until the latter part of the fall; that she always recognized him, and always asked about the boys; that he first noticed, about the middle of August, that she was getting weaker, and her speech was more labored; that he was there again about September 22; that his wife was getting weaker, but still she recognized him; that he was in poor health, and saw her but once more while she was alive; that he took the title from her to the land so that if anything happened to him the boys would get it as his heirs.

It further appears that on October 28 he had a sale of all of his personal property, and put the proceeds, amounting to $1,662.24, into the farm. The notary testi-

fied that he drew the deed in controversy on June 18, 1907; that he went with Brugman on the same day to his wife's room at the hospital; that he did not notice anything unusual in her mental condition; that he took her acknowledgment believing her competent to execute the deed; that he partly read and explained the deed to her, and that he would not have certified to the deed had she not assented to it as her voluntary act. It should be observed that Doctor Martyn and Doctor W. S. Evans both testified that they saw Mrs. Brugman, and treated her nearly every day, at and about the time she made the deed in question; that she was capable of executing it, and they testified positively that in their opinion she was mentally capable of executing that instrument. There is considerable testimony in the record tending to show that Mrs. Brugman's mind was somewhat affected by her illness, and that she was physically weak and very ill.

It is not every weakness of mind arising from old age or sickness, or other causes, that will avoid a deed. There must be a total want of reason or understanding. *Johnson v. Phifer*, 6 Neb. 401. Mere mental weakness will not authorize a court of equity to set aside an executed contract. *Mulloy v. Ingalls*, 4 Neb. 115; *Schley v. Horan*, 82 Neb. 704; *Mann v. Keene Guaranty Savings Bank*, 86 Fed. 51. In order to vacate a deed on the ground of mental incapacity of the grantor, it is necessary to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interest. The mere circumstance that the mental powers have been somewhat impaired by age or disease is not sufficient, if the maker of the deed still retains a full comprehension of the meaning, design and effect of his act, unless by reason of undue influence of the grantee he was unable to exercise his will in that respect. Therefore, to our minds, the evidence is not sufficient to overcome the presumption of Mrs. Brugman's mental capacity, and the testimony of defendant's witnesses tending to establish her competency to make the deed in question.

We come now to consider the question of undue influence: It may be conceded that, where a wife makes a deed of property to her husband for a stated nominal consideration, undue influence on his part may be presumed; but that is a rebuttable presumption, which may be overthrown by the facts and circumstances surrounding the transaction. On this question the evidence discloses that Brugman had visited his wife but once or twice from the time she went to the hospital at Columbus in the early spring of 1907 to the date of the conveyance, and therefore the opportunity to even suggest to her that she should make the conveyance, much less to urge her to perform that act, was practically wanting. It also appears, without dispute, that there was no meeting between Brugman and his wife on the day the deed was executed prior to the time of its execution; that when Brugman, the notary and the witnesses called upon Mrs. Brugman at the hospital, her husband took no part in the conversation; that the purpose of their visit was communicated to Mrs. Brugman by the notary, who also explained to her the nature of the transaction, and gave her whatever assistance she required to enable her to sign the instrument. This of itself seems sufficient to overthrow the presumption of undue influence. In addition to this testimony, it must be presumed that Mrs. Brugman was aware of her husband's financial condition. She knew that the farm was heavily incumbered; that in order to facilitate the renewal of the mortgages, and thus prevent foreclosure proceedings, and save the farm for his use and the future use of their children, the only feasible way to accomplish that end was to invest him with the whole title to the estate. This was a wise, just and equitable method of procedure. In such case there is no presumption of undue influence. Indeed, in cases of this kind much depends upon the circumstances, and when it appears that the deed of gift or voluntary conveyance is a just and natural act, and one which a person in full possession of his faculties might and ought to make, then the burden remains with the

party who assails the gift or conveyance. *Cudney v. Cudney,* 68 N. Y. 148; *Schofield v. Walker,* 58 Mich. 96; *Dailey v. Kastell,* 56 Wis. 444.

Undue influence which will avoid a deed is an unlawful or fraudulent influence, which controls the will of the grantor. The affection, confidence and gratitude which inspires the gift from a wife to a husband is a natural and lawful influence, and will not render it voidable, unless the influence has been so used as to confuse the judgment and control the will of the donor. *Hacker v. Hoover,* 89 Neb. 317.

It appears in this case that Mrs. Brugman did a just, perfectly reasonable, and natural act. She did what any person in the full possession of his faculties and uninfluenced by the wrongful pressure of another might well have done. Her sons were each and severally working for themselves. They had not contributed to the care and expense of their mother. The land was not productive. It was heavily incumbered at a high rate of interest, which was required to be paid yearly. It was necessary to keep up the taxes and the insurance, and some repairs upon the premises would be required each and every year. She was an invalid, with attendant heavy expenses. She knew that her husband had performed most of the housework, and had conducted the farm, and looked after her wants as well; that his health was failing, and his burdens were heavy. He was the only person on whom she could rely for sustenance and sympathy, and she evidently considered that he could better care for her, and for himself, if the property in question could be saved from the incumbrances and made available for their use.

We are therefore of opinion that, in view of all of the circumstances, the findings and judgment of the district court should have been for the defendant.

For the foregoing reasons, the judgment of the district court is reversed and the action is dismissed.

REVERSED AND DISMISSED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

JOHN M. ADAMS, APPELLANT, V. ANDREW O. ANDERSON ET AL., APPELLEES.

FILED MARCH 28, 1913. No. 17,129.

Justice of the Peace: CHANGE OF VENUE: STATUTORY PROVISIONS. Sections 958 and 958*a* of the code, as amended by the legislative session of 1905, have not changed the rule announced in *Martin v. Mershon*, 3 Neb. (Unof.) 174, that "an order of a justice of the peace, granting a change of venue, made on an *ex parte* hearing and before the return day of the summons, is void."

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

Claude S. Wilson, for appellant.

O. B. Polk, contra.

BARNES, J.

Action to cancel a judgment rendered against the plaintiff in justice court of one Joseph Devine, a justice of the peace of Lancaster county, and to enjoin its collection. A demurrer to the petition was sustained; plaintiff stood upon his petition, refused to further plead, and his action was dismissed. From that judgment plaintiff has appealed.

It is conceded that the only question presented by the record is: Has a justice of the peace the right or authority to order a change of venue, in a case commenced in his court, before the return day of the summons, on the application of the defendant, in the absence of and without notice to the plaintiff. Plaintiff's petition alleged, in substance, that on the 1st day of August, 1910, the defendant Anderson commenced the suit in the justice court of Joseph Devine, a justice of the peace of Lancaster county, against plaintiff, to recover the sum of $14; that a summons was issued, returnable August 12, 1910, at 2 o'clock P. M., which was duly served upon the plaintiff herein; that on August 9, 1910, some three days before

return day of the summons, the plaintiff in this case, who was the defendant in that action, filed an affidavit with the justice asking for a change of venue; that on the 11th day of August the justice, at plaintiff's request, in the absence of and without notice to the plaintiff in that action, ordered a change of venue; that before the return day the justice of the peace delivered to the plaintiff a transcript transferring the action to the justice court of one Stevens, and delivered the transcript, together with the files in his office, to the plaintiff; that plaintiff thereupon filed the transcript in Justice Stevens' court, and the cause was set for hearing at 2 o'clock P. M. of August 12, 1910; that on the return day of the summons, at 2 o'clock P. M., Anderson, the plaintiff in the action, with his attorney, appeared in Justice Devine's court, and on his application the order for a change of venue was set aside, and thereupon Anderson filed a substituted bill of particulars, and demanded judgment against this plaintiff. A jury was impaneled, and a trial was had, which resulted in a verdict and judgment in favor of Anderson and against the plaintiff herein; that more than 10 days thereafter Justice Devine issued an execution to the defendant Peck, as constable, commanding him to collect said judgment, and on the 12th day of September, 1910, plaintiff filed his petition in this case, to which the demurrer above mentioned was sustained, and, as above stated, the action dismissed.

It is conceded by counsel for the plaintiff that a question like the one here presented was determined by this court in the case of *Martin v. Mershon*, 3 Neb. (Unof.) 174, and, but for the amendment of 1905 to sections 958 and 958*a* of the code, that judgment would be decisive of this case. It is contended, however, that by the amendment in question a justice of the peace is given authority, in plaintiff's absence, and without notice to him, to order a change of venue, on the application of the defendant, before the return day of the summons, and therefore *Martin v. Mershon, supra,* is not in point.

We think plaintiff is mistaken in this contention. The amendment of 1905 (sec. 958) provides: "If the *application* for such change be made by the defendant on or before the return day of the said cause, the defendant shall be required only to pay the costs of the justice for making the transcript and certificate and also the docketing and filing fees of the other justice; and all other costs in the case shall abide the result of the suit and shall not be demanded on granting a change of venue." As the law stood before those sections were amended, it had sometimes occurred that the plaintiff in an action, in order to prevent a change of venue, had subpœnaed a large number of witnesses to appear before the justice on return day, and in such case the defendant, in order to obtain a change of venue, was required to pay the fees of the plaintiff's witnesses. It seems quite clear to us that the only purpose of the amendment was to prevent the plaintiff from imposing such a hardship upon the defendant in order to prevent him from obtaining a change of venue. There is nothing in the sections, as amended, which in terms authorizes the justice to make an order granting a change of venue, in the absence of plaintiff, and without notice to him before the return day of the summons. It is argued, however, that, if the order for the change of venue was void because it was prematurely made, the justice should have considered the application, and granted the change on the return day of the summons. It was alleged in plaintiff's petition, however, that before the return day he had taken the files in the case, with his application for a change of venue, and transferred them to Justice Stevens' court. Therefore the application was not before Justice Devine on the return day of the summons, and he was not required to consider it.

We are of opinion that, notwithstanding the amendment above mentioned, this case is ruled by *Martin v. Mershon, supra;* and the judgment of the district court is

AFFIRMED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.
LETTON, SEDGWICK and HAMER, JJ., not sitting.

CALVIN B. PAINTER, ADMINISTRATOR, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES.

FILED MARCH 28, 1913. No. 17,142.

1. **Carriers:** ACTION FOR INJURIES: DIRECTING VERDICT. In an action against a railroad company to recover for personal injury alleged to have been caused by the defendant's negligence, it is necessary for the plaintiff to prove by competent evidence that the negligence of the defendant was the proximate cause of the injury complained of; and, where plaintiff fails to furnish such proof, it is the duty of the trial court to direct the jury to return a verdict for the defendant.

2. **Negligence** cannot be established by inference and conjecture in contradiction to the testimony of competent and unimpeached eyewitnesses. *Kennedy v. Chicago, B. & Q. R. Co.*, 80 Neb. 267.

3. **Carriers:** PASSENGERS: STATUTORY PROVISIONS. Where a passenger places himself under the charge of the carrier as he begins his journey, he is a passenger being transported, and is within the protection of section 3, art. I, ch. 72, Comp. St. 1911, until he is afforded an opportunity to leave the premises of the carrier at his destination; but if it appears that the passenger, having reached the end of his journey, has departed from the car, and has had a reasonable time and opportunity to avoid injury from the operation of the train, or further necessity of relation with the servants of the carrier, he ceases to be a passenger, and thereafter is not within the protection afforded by the statute.

4. ———: ACTION FOR INJURIES: DIRECTING VERDICT. Where it is established by the uncontradicted evidence of competent witnesses that the plaintiff's injuries were not caused by the negligence of the carrier, and that the plaintiff was injured at a time when he was not a passenger "being transported over the defendant's road," within the meaning of section 3, art. I, ch. 72, Comp. St. 1911, it is the duty of the trial court to direct a verdict for the defendant.

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

Fred W. Ashton and *J. L. Cleary*, for appellant.

Byron Clark, Arthur R. Wells and *O. A. Abbott, contra.*

BARNES, J.

This action was brought by the administrator of the estate of one Lloyd Painter for negligently causing the death of plaintiff's decedent. On the trial in the district court for Hall county, and after the introduction of all of the evidence, the court, on motion, directed a verdict in favor of the defendant. Judgment was rendered on the verdict, and the plaintiff has appealed.

It is appellant's main contention that the district court erred in directing a verdict for the defendant. By his petition it was alleged, in substance, that on the 29th day of December, 1908, his decedent bought a first class ticket from the defendant company at Ravenna, Nebraska, and on the morning of that day took defendant's train No. 44, a full-vestibuled passenger train, for Grand Island; that he delivered his ticket to the conductor, Charles Holts, and that, as the train approached Grand Island, brakeman Prey, who was made a defendant, called the station; that decedent left his seat and started toward the door; that he stepped on the platform as the train was pulling into Grand Island; that he had every reason to believe that the platform was protected; that the vestibule was dark and not protected; that the platform was up and unguarded, and that the plaintiff's decedent, without any negligence on his part, fell through and was thrown from the train. It was further alleged that it was the duty of the railroad company to keep vestibule platforms closed; or, if left open, to have an employee, either brakeman or conductor, present to warn passengers and protect them from falling through the opening; that the platform door in said vestibule was not protected, and that Holts, the conductor, and Prey, the brakeman, individually and as employees of defendant, carelessly, negligently and unlawfully permitted the vestibule to remain open and unprotected, and negligently left the said open place unguarded; that, as a result of said negligence, Painter fell through the said opening and under said train, and that the defendants thereby caused his death.

The defendant company, by its answer, admitted that Painter was a passenger on its train from Ravenna to Grand Island on December 29, 1908; but denied that he fell from its train as it was approaching Grand Island, and alleged that he alighted at said station without injury after the train had stopped at the usual place of delivering and receiving passengers. The answer further denied each and every other allegation not specifically admitted or denied; and alleged that any injuries to the person of Lloyd Painter which were received at or about the time mentioned in the petition, and therein alleged to have resulted in his death, were caused by his own gross negligence, his voluntary and excessive use of intoxicants, and by a violation of defendant's rules and regulations brought to his notice, and his injuries were not caused by any negligence or fault of defendant. Defendants Holts and Prey filed a general denial to the plaintiff's petition. To the answer of defendant company, plaintiff replied specifically, denying each of the several allegations of the answer.

There is no conflict in the evidence as to the fact that Lloyd Painter was a passenger on the defendant's train from Ravenna to Grand Island at the time alleged in the pleadings. The plaintiff, to further maintain the issues upon his part, produced the testimony of certain witnesses, from which it appeared that after the defendant's train left the station at Grand Island Painter was found lying beside the track between 400 and 500 feet north of the depot, in an unconscious condition, with both of his feet cut off; that it was apparent that he had received his injuries by being run over by the defendant's train. Plaintiff produced no evidence, however, showing or tending to show that Painter fell from the defendant's train in the manner alleged in his petition. In fact, plaintiff produced no testimony showing or tending to show the manner in which Painter received his injuries. On the other hand, conductor Holts testified that he saw Painter in the depot at Ravenna before the train arrived at that

point; that the train was late, and Painter was finding fault because he had been called to take the train too soon; that he showed signs of intoxication; that he talked loud, and conducted himself in such a manner as to attract Holts' attention and the attention of other persons waiting in the depot; that he learned before the train arrived that decedent's name was Painter. His testimony was corroborated by defendant Prey, who was his brakeman, and was waiting for the arrival of his train, and a number of other witnesses who were present in the depot at Ravenna at that time. Holts further testified that after the train started from Ravenna he took up Painter's ticket, and was requested to call him when the train reached Grand Island; that he notified brakeman Prey of Painter's desire to be awakened at Grand Island, as that was the place of his destination; that Painter occupied a seat in a chair car next behind the smoker; that he kept in mind the fact that Painter had requested that he be awakened at Grand Island, and when they were nearing that station he called the brakemen's attention to that fact. Holts also testified that he had a passenger on his train named Flynn, who had a ticket from Mason City; that he had seen Flynn at different times before, and knew that he was on the train that night because he had also asked to be awakened at Grand Island; that Flynn was riding in the forward chair car on the north side, three or four seats from the front end, and sat about opposite Painter; that when they arrived at Grand Island and after the train stopped at the depot, both Painter and Flynn went out of the front door of the chair car and got off at the same opening between the smoker and the chair car; that brakeman Prey was guarding the opening. The witness further said: "I was at the opening at the head end of the rear chair car when I saw Painter walking north. I had told Prey to be sure and awaken him, and had asked Prey if he had gotten off. The trap doors were opened by brakeman Prey about 1,000 feet before we reached the station, * * * two were opened; he first

opened one, and then went ahead. I guarded the first one while he opened the second. The vestibules were lighted with Pintsch gas lights. The vestibules are always lighted." Holts was corroborated by the evidence of brakeman Prey, who stated that he guarded the vestibule at the front end of the chair car where Painter alighted; that he saw Painter get off the train onto the platform after the train had stopped at the depot, and saw him start north, or rather northeast along the platform towards the rear of the train.

Irwin Flynn, who was the passenger mentioned by conductor Holts, testified that he came to Grand Island on train No. 44, December 29, 1908. He said: "Upon arrival I got off the train and went in a bus from the Burlington station over to the Union Pacific depot. Then I went back to the Burlington station, arriving there about a half hour after the train had first arrived and found Painter lying in the men's waiting room with his feet cut off. I recognized Painter. I had seen him on the train. I rode in the second seat from the front end of the north side of the car and Painter rode on the south side, a seat or two back from me. I got on at Mason City, and Painter got on at Ravenna. When I got up to get off the car at Grand Island, Painter was in the car there sitting down. I got off the steps and the trainman was standing there, but I can't say who he was. The train had stopped when I got off. The opening at which I alighted was about six feet north of the bay window in the depot."

One Stephen Velda, a witness for the defendant, testified, in substance, that he was in the depot at Grand Island when No. 44 came in on the morning of December 29, 1908; that the train was standing still when he came out of the depot. He further said: "When I got out of the depot, I kept toward the north end of the depot, to get across the street, the train was in my way. While I was walking along the train I saw the man standing right next to the cars between the second and third coach, but it was on the rear end. I looked at him and saw there

was nothing wrong, and I kept on going across the street, and went about a couple of car lengths, and when I got across the tracks * * * I heard the train start off, and at the same time I heard somebody call for help, and I turned around and started back, and saw the man lying there, and saw what the trouble was with him. * * * When I heard the outcry, the train had moved about 250 feet."

The brakeman, Harry Prey, testified, in substance, as follows: In the station at Ravenna before the train left that morning, I had seen a man who was said to be Mr. Painter. He wore a light hat and a black overcoat. He was on the train after we left Ravenna, sitting four or five seats back, on the south side of the chair car. I was going through to close the vestibule doors when he motioned to me, and said: "Will you see that I get off at Grand Island?" When near Grand Island I awakened him, and also awakened the rest of the Grand Island people; and after they whistled for the station I started from the rear end, and took my time going through to see that everybody was awakened who was to get off at Grand Island. I came into the vestibule at the head end of the rear chair car, and opened that vestibule. Conductor Holts was there. I then went on through the next car, where Mr. Painter was; that was the chair car right back of the smoker. I took my time going through there to see that everybody was awake. I came to Painter and touched him on the shoulder, and said, "Grand Island!" I called that car as I went through, and then went on into the smoking car, and did the same thing there, taking time to see that everybody was awake, and I came back to the end of the first chair car, behind the smoker, and opened that vestibule. I remained there until the train stopped at the depot. From the time that vestibule was opened until the train came to a dead stop at the station nobody got out of that opening. I opened the two vestibules. The rest of the vestibules were closed. After we stopped at Grand Island Painter got off at the

opening where I was. He was the last passenger to get off at that opening that I was guarding. The last I saw of him he was about six or seven feet north of the opening going towards the depot. After he alighted the conductor came and wanted to know if that man got off—the old gentleman that he had told me about. I pointed him out, and said, "There he goes." He got off the train safely, and did not receive any injuries while getting off. He was walking unaided, looking out for himself. The step at which Painter got off was about opposite the baggage room door. The waiting room and station office were lighted up. I knew nothing about the accident when I left Grand Island. The first I heard of it was at Aurora, where we got word by wire. No witness disputes this evidence in any way. It thus appears that the plaintiff failed to prove the allegations of his petition as to the manner in which his decedent was injured.

Plaintiff contends, however, that, if the evidence was insufficient to establish his charge of negligence, still his cause should have been submitted to the jury on the theory that when his decedent was injured he was within the protection of section 3, art. I, ch. 72, Comp. St. 1911, which provides: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." It must be observed that the cause was not tried upon that theory; and, as we view the evidence, it fails to show that plaintiff's decedent was a passenger "being transported" over defendant's railroad at the time the accident occurred. The section of the statute quoted above has been construed by this and other courts in many cases, and the rule is well settled that after a passenger, as defined in the statute, places himself under the charge of the carrier as he begins his journey until he is afforded

an opportunity to leave the premises of the carrier at his destination, he is a passenger being transported; but if it appears that the passenger, having reached the end of his journey, has departed from the car, and has had a reasonable time and opportunity to avoid further injury from the operation of the train, or further necessity of relation with the servants of the carrier, he ceases to be a passenger, and stands toward the carrier as one of the ordinary public. *Chicago, R. I. & P. R. Co. v. Sattler,* 64 Neb. 636; *Fremont, E. & M. V. R. Co. v. Hagblad,* 72 Neb. 773, 790; *Chicago, B. & Q. R. Co. v. Mann,* 78 Neb. 541; *St. Louis, I. M. & S. R. Co. v. Beecher,* 65 Ark. 64, 44 S. W. 715; *King v. Central of G. R. Co.,* 107 Ga. 754, 33 S. E. 839; *Hendrick v. Chicago & A. R. Co.,* 136 Mo. 548, 38 S. W. 298; *Pittsburgh, C. & St L. R. Co. v. Krouse,* 30 Ohio St. 222; 6 Cyc. 541, 542.

As we view the evidence, plaintiff's decedent had ceased to be a passenger when he received his injuries. The defendant company had safely delivered him from its train to its depot platform, and afforded him an opportunity to safely depart from the place where he was delivered. He had, in fact, left the depot and the depot platform, and must have wandered along the track by the standing train to a point at least 150 feet from the end of the depot platform. He had broken away from the care of the defendant's servants, and therefore was not a passenger "being transported" when he was injured. Plaintiff's petition does not charge, nor does the evidence show, that the defendant company was guilty of any breach of duty to the decedent after his safe delivery upon the depot platform. Therefore we are of opinion that the district court properly sustained the defendant's motion, and directed the jury to return a verdict in its favor.

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

AFFIRMED.

REESE, C. J., ROSE and FAWCETT, JJ., concur.

LETTON, SEDGWICK and HAMER, JJ., not sitting.