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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1914.

VOLUME XCV.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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By Harry C. Lindsay, Reporter of the Supreme Court,
For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

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

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HARRY C. LINDSAY.....Reporter and Clerk
HENRY P. STODDART.....Deputy Reporter
VICTOR SEYMOUR.....Deputy Clerk

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Number of District	Counties in District	Judges in District	Residence of Judge
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Second.....	Cass, Otoe and Sarpy....	James T. Begley....	Papillion.
Third.....	Lancaster.....	Albert J. Cornish....	Lincoln.
		P. James Cosgrave...	Lincoln.
		Willard E. Stewart...	Lincoln.
Fourth.....	Burt, Douglas and Washington.	George A. Day.....	Omaha.
		James P. English....	Omaha.
		Lee S. Estelle.....	Omaha.
		Charles Leslie.....	Omaha.
		Willis G. Sears.....	Tekamah.
		Abraham L. Sutton..	South Omaha.
		Alexander C. Troup..	Omaha.
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		Edward E. Good.....	Wahoo.
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		George H. Thomas...	Schuyler.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth.....	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Wayne.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
		James N. Paul.....	St. Paul.
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Thirteenth...	Arthur, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, Logan and McPherson.	Hanson M. Grimes....	North Platte.
Fourteenth...	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Ernest B. Perry.....	Cambridge.
Fifteenth.....	Boyd, Holt, Keya Paha and Rock.	R. R. Dickson.....	O'Neill.
Sixteenth.....	Brown, Box Butte, Cherry, Dawes, Sheridan and Sioux.	William H. Westover	Rushville.
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IN MEMORIAM.

ELEAZER WAKELEY.

At the session of the supreme court of the state of Nebraska, January 6, 1914, there being present Honorable Manoah B. Reese, Chief Justice, Honorable John B. Barnes, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Jacob Fawcett, Honorable Samuel H. Sedgwick, and Honorable Francis G. Hamer, Associate Justices, the following proceedings were had:

MAY IT PLEASE THE COURT:

On November 21, 1912, in the winter of his patriarchal age, there passed away from this material life to a spiritual existence our dearly loved and venerable friend, Judge Eleazer Wakeley. From his long experience, wisdom and legal learning he had become commonly known to his associates and the general public as the Nestor of the Nebraska State Bar. It was a name which Homer gave to the legendary King of Pylos, whom he described as the wisest of the Greek Princes at the Siege of Troy. It was a laurel on the brow of Judge Wakeley which needed no inscription to inform us that it signalized him as the oldest, the wisest and the most experienced of Nebraska lawyers.

The distinction which he achieved was due to many strong personal qualities and mental endowments. From his earliest boyhood he was a painstaking student of essential details, and searched with ceaseless and indefatigable energy after all manner of knowledge that might be useful to him in his chosen profession. With him no question of law was ever taken for granted, and up to his latest days in the active preparation of cases he aimed to support and amplify every principle of law he presented by a list of authorities collected after the most diligent and recent investigation. He had the ability to fix his whole

mind and thought upon the subject under consideration with an unusual and remarkable power of concentration. He had the faculty of analyzing and reducing to elemental simplicity the legal propositions which he had occasion to present to the court in argument.

In announcing his opinions from the bench as a judicial officer, he spoke with extreme deliberation, but only after the most thorough examination of the questions of fact and principles of law in their various shades and coloring to the end that even-handed justice should be administered without prejudice or favoritism.

He was recognized by persons of all classes, both as man and lawyer, as possessed of an unimpeachable character and of unquestionable integrity. While dignified in deportment, he was always courteous in intercourse and easy to approach. He possessed and exhibited the utmost kindness of heart. He loved and lived the life of the simple virtues. He scorned the methods adopted by the modern scramblers after wealth. He was intensely devoted, and to his oldest days loved with the fervor of youth his family and his church. He possessed all those sterling qualities of manhood which adorn the character and beautify the life of a lovable and successful man.

In philosophizing on a useful life, Judge Wakeley once said:

"When the man who has had a large part in the activities of life passes to his final account, the world asks: Has he been a success? * * * Yet, in the final balance of merit the question is, must the larger credit be given to the man of millions who from his abundance gives for worthy ends, or to the widow who of her penury gives her mite, or of the nameless rustic buried in the country churchyard?

" 'Large was his bounty, and his soul sincere,
He gave to misery all he had—a tear.'

* * * * * *

"And what is the criterion of a successful life? Does it mean only that a man has gained millions that he does not need? That he has won civil honors, and moved in

the high places of the land? That he has achieved fame and renown for genius, or exploits that will live long in history? That may be success, but it is not all. If he has helped the world by invention, or discovery, to better living, or greater comfort, or higher opportunities, if he has helped toward lessening vice, cruelty, injustice, ignorance and misery ever so little, he has been a benefactor. If he has been a citizen whose life and example have inspired others, and tended to the improvement and elevation of the community in right living, and in struggles for better conditions and higher aims, his life has been a success. If in the sphere of life which may have fallen to him, he has been faithful and earnest, if he has searched for his duty, and done it, if he has met the calls and responsibilities of life as they arose, according to his judgment, and his conscience, if he has been a good father, a good husband, a true and reverent man, his life has been successful, and worth the living. He may not have lands or goods to leave to his children, but he is blameworthy if he does not leave them the heritage of a good name, and the record of a just life."

Judge Wakeley lived the ideal life which these beautiful sentences portray. They must have come from the fullness of his own heart, as they are a perfect picture of himself.

Your committee, concurring in the foregoing expression of their sentiments touching the life and the character of Judge Eleazer Wakeley, recommend that they be spread upon the minutes of this court, and that the clerk transmit a copy to the members of the family of our dearly beloved departed friend, whom we will long remember as the Grand Old Man of the Nebraska Bar.

JOHN LEE WEBSTER,
F. S. HOWELL,
B. E. B. KENNEDY,
A. J. SAWYER.

JOHN LEE WEBSTER:

MAY IT PLEASE THE COURT:

The life of Judge Wakeley is a most interesting study. He lived so long; he saw so much; he did so much. It is a life where his knowledge and experience were closely linked with the romance of the history of his time.

It may be well said of Judge Wakeley that he was a lawyer of the old school—a class of men who studied the fundamental principles of law for the reason that without a complete knowledge of them they were skeptical of success.

It was during the early life of Judge Wakeley that Mr. Justice Story gave to the public his volumes on Equity Jurisprudence; Chancellor Kent his valuable Commentaries; and Professor Greenleaf his work on Evidence; and Parsons his volumes on Contracts. All of these volumes are yet recognized as depositories of great legal learning and judicial knowledge. They are still regarded as standard text-books of excellent authority.

Judge Wakeley studied Story, Kent, Greenleaf, and Parsons until he became as familiar with them as are the interpreters of the dramas of Shakespeare, and their volumes of legal lore were as fascinating to him as are the writings of men of genius to the student of literature.

He had a comprehensive understanding of the common law, which grew up out of the necessities of mankind, and was slowly adapting itself to the situations in the American communities. He himself once spoke of it as "Expanding with the multiplied needs and complications of business; keeping pace with the human advancement; ever growing, but growing only as man grows and extends his dominion; permanent in its general body and substance, but flexible in details; plastic to conditions and surroundings; imperfect, as all human productions are imperfect, but pointing the way to its own improvement."

Since Judge Wakeley was admitted to the Bar, nearly every state in the Union has adopted simpler methods of procedure on the philosophical theory that technicalities

shall not stand in the way of Justice, and that forms are immaterial.

It was within his memory when that absurd dogma—and hindrance to justice—which refused to hear the litigant testify in his own behalf, was swept away. We are yet apt to lay too many charges of intrigue and corruption, of oppression and wrongdoing, to the possessors of great wealth, but we recognize them as having the same sacred regard for the solemnity of an oath as do their fellow men, no matter how humble in life, and that all stand equal in the presence of a Court of Justice.

It was within his time that the barbarous system of imprisonment for debt was abolished; a system so incongruous with civilization that it seems as incredulous to believe that it ever existed, as that once men and women were persecuted and burned as witches.

It was within his day that homestead and exemption laws were established for the protection of the family. They had their origin in the progressive West. Their purpose was that the head of a family, although in debt, should be permitted to keep a roof over the heads of his wife and children, and that they would not be driven out of the humble tenement, built, it may be, by their own contributed toil, or saved by their pinching frugality. It was left for the reformatory days of western life to enact into law the principles that the poor man's home was a fortress which the exacting creditor could not take away.

It was within the memory of Judge Wakeley when there was not a single state in the Union in which married women had a separate legal existence. He lived to see the time when women were given all the legal and property rights which are granted to men. He once said of this great change in the law that no recent reform had been more to the honor of the age, more in unison with advancing intelligence, more in accordance with Christian teaching, more in obedience with divine ordinance, than the legal emancipation of women.

The changes in material conditions that have taken place during his lifetime are marvelous. It was during

his boyhood days that the first steamship crossed the ocean; that the first railroad was built. It was during his mature years that electricity came into use, that mysterious thing which links the natural with the supernatural as it carries messages on the telegraph wires, or under the oceans on lines of cables, or delivers its wireless messages as winged spirits, unseen and unheard—a realization of something more wonderful than the mythical legend of the daughters of Wotan carrying on horseback through boundless space the souls of military heroes to the far-off Valhalla.

There are thousands of inventions which have been coined by the human brain, which have brought into new uses millions upon millions of wealth. Through these new instrumentalities the recesses of the earth have been opened up, and treasures brought from their depths. These changes have induced the creation of vast corporations through which a thousand men may act as one, and under a single control. The productive power of the nation has been increased, commerce has been extended, and luxury become unrestrained.

The lawyer of the time of Pinckney and Choate is not the lawyer of today. The opinions of the courts of those times are not the opinions which are cited as precedents today. In those olden times the ability of the lawyer was measured by the strength of his reasoning, and the aptitude of his illustrations, and the force of his eloquence in presenting them. To a degree it is true today that the strong lawyer dealing with the modern conditions may not always find precedents in the books which fit the new facts with which he may have occasion to deal. But, if he can do so, likewise can his adversary find the same reported cases, and he who best succeeds will be the one who may add force to his presentation by the brilliancy of illustrations that may be presented from his general storehouse of knowledge, or suggested by the study of human life, or gathered from the pages of history or the fields of literature, and now and then enlivened and brightened from the beautiful in art, or a sympathetic touch of music.

Judge Wakeley was born twenty-three years before Texas was annexed to the Union, and twenty-six years before California and New Mexico were secured by the treaty of 1848. In his childhood all the lands west of Lake Michigan, all the forests and openings of the prairies, beautiful in their wildness, were homes of American Indians. Up to the date when Judge Wakeley was admitted to the bar, all the territory west of the Missouri river was a solitude, save here and there on its eastern fringe an embryo settlement, or a trapper's hut, or a missionary abode. When he received his appointment from President Franklin Pierce as one of the Associate Judges of the Nebraska Territory in 1857, it took him three weeks to travel from his home in Wisconsin to the little city of De Sota, which was then ambitious in time to become a rival of Detroit or St. Louis; but scarcely a vestige remains to tell of its location.

The Judge's jurisdiction extended over the surrounding counties and the adjacent unorganized territory extending to the British dominions on the north, and westward across the prairies and over the mountains to the limits of the Louisiana Purchase. He lived to see "judicial supremacy spread silently, steadily, over the immense territorial realm, protecting the denizens of the cities which have sprung like magic creations from its soil; following the peaceful communities whose aggressive industry has conquered, acre by acre, the virgin valleys from river to ocean; shadowing the pioneer in his prairie dugout; the miner in his far cabin on the mountain side; the freighter on his lonely path to the outposts; the herder in the solitude of the unmeasured plains; the citizen wheresoever his remote home, or rude abode." Out of all these great changes the state of Nebraska came budding forth as a flower blossoms in a cultivated garden. He had a right to say—and a just pride in saying it—a part of this I was.

From 1822 until 1912, what an epoch in the progress of events. Those years have witnessed America's greatest development and progress, and the world's greatest achievements. No wonder that we say of him that he was the Nestor of the Nebraska Bar, as our forefathers of old said of Benjamin Franklin that he was the Nestor of Amer-

ica's statesmen. So, too, we say of Judge Wakeley that he was the Grand Old Man of the Nebraska Bar, just as America once said of Henry Clay that he was the Grand Old Man of the common people.

REESE, C. J.:

My acquaintance with Judge Wakeley dates from the spring of 1872. This, of course, was after his retirement from this court. His connection with the court was in territorial days, and his opinions are reported in the first volume of Nebraska reports. From the beginning of our acquaintance until the day of his decease, our relations, though not specially intimate, were of the most friendly and cordial character. I met him frequently in the various courts of the state, observed his methods in the trial of causes, and never saw a single movement or action on his part which betrayed the least disposition to vary from the exact line of truth, or seek to take any advantage of his adversaries not warranted by the strictest adherence to just and proper legal ethics. The more and better I became acquainted with him, the more he seemed to merit the respect and admiration, not only of myself, but of all who observed his course. Judge Wakeley was one of nature's noblemen. A finished lawyer, a capable and painstaking judge, and withal a truly honest and conscientious man. So long as the judicial and historical records of this state shall endure, the name of Eleazer Wakeley will be honored by the profession, which he loved, and by the citizens of the state, all of whom respected and honored him.

It is ordered by the court, that the resolutions submitted by the committee and these proceedings be spread upon the records of this court, and a copy thereof sent to his family by the clerk.

BY THE COURT:

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

M. B. REESE,
Chief Justice.

IN MEMORIAM.

EDWARD RANDOLPH DUFFIE.

At the session of the supreme court of the state of Nebraska, January 19, 1914, there being present Honorable Manoah B. Reese, Chief Justice, Honorable John B. Barnes, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Jacob Fawcett, Honorable Samuel H. Sedgwick, and Honorable Francis G. Hamer, Associate Justices, the following proceedings were had:

MAY IT PLEASE THE COURT:

Your committee, appointed by the order of this court to draft resolutions in commemoration of the life and service of the late Judge Edward Randolph Duffie, presents the same to this court and moves that they be spread upon its records.

Resolved, That the Bar of the supreme court of Nebraska deeply deplores the death of the late Judge Edward Randolph Duffie; that there be placed upon the enduring records of this court an expression of the respect and esteem in which Judge Duffie was held, and of regret for the loss which is suffered in his demise.

Born October 31, 1846, on a farm in Lewis county, New York, educated at Lowville Academy and at Albany Law School, he came to Sac county, Iowa, in 1866, and entered upon the practice of his profession. Before attaining the age of thirty years, he was elected judge of a district in Iowa, comprising eleven counties, where he served for two terms. After removing to Omaha in 1887, he was twice appointed to the district bench to fill vacancies; he was appointed a commissioner of this court on April 9, 1901, serving until March, 1904; reappointed April 5, 1905, serving till April 10, 1909; and in the fall of that year he removed to Scott's Bluff county, where he engaged in the practice of law until his death early in the present year.

His industry and application will be best appreciated when it is known that, during his term as a commissioner

of this court, he prepared and filed three hundred and fifty-two opinions, or one for every seven days of his incumbency, in addition to the dissenting and special concurring opinions, and other work connected with his position.

His personality was kindly and attractive; his friendships warm and enduring; his love of justice was wholehearted, and his devotion to it supreme.

His published opinions are noted for the logical sequence of their statement, the clear and lucid exposition of the question for decision, the soundness of his reasoning, and the righteousness of his judgment. He served upon the bench during his professional life for upwards of twenty years, and during his varied judicial career he served the cause of Justice without fear, without favor, and without reproach.

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

C. C. FLANSBURG,
J. E. PHILPOTT,
FRANK H. GAINES.

BY THE COURT:

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

M. B. REESE,
Chief Justice.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1914.

ALFRED HALLOWELL, APPELLANT, V. THOMAS L. SLOAN, APPELLEE.

FILED JANUARY 7, 1914. No. 17,360.

1. **Judgment: VACATION: TIME FOR FILING PETITION.** Section 318 of the code, which permits the commencement of a suit to vacate a judgment previously rendered, provides that "no such petition shall be filed more than one year after the final judgment was rendered." Where the final judgment was rendered on the 8th day of April, 1907, and the petition for a new trial was not filed until the 3d day of November, 1909, it is *held* that the petition was filed too late to confer jurisdiction or authority upon the district court to entertain the suit, and that a general demurrer to the petition was rightly sustained.

2. ———: ———: ———. The taking of an appeal from the original judgment to the supreme court will not have the effect of extending the time within which a petition for a new trial may be filed. See *Hellman v. Adler & Sons Clothing Co.*, 60 Neb. 580.

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

Hiram Chase, for appellant.

Herman Freese and *Thomas L. Sloan, contra.*

REESE, C. J.

This is an action brought to vacate a judgment and for a new trial in an action by defendant against plaintiff

then pending in the district court for Thurston county, and in which the judgment was rendered on the 8th day of April, 1907. The petition in this case was filed on the 3d day of November, 1909. The action is based upon the provisions of section 318 of the code, which provides that "no such petition shall be filed more than one year after the final judgment was rendered." From the 8th day of April, 1907, to the 3d day of November, 1909, was more than one year. Therefore there was no jurisdiction or authority for the filing of the petition or for any action to be taken by the district court.

An appeal was taken from the entry of the original judgment by the district court (*Sloan v. Hallowell,* 83 Neb. 762), and a final order of affirmance was rendered March 20, 1909. From that date to the filing of the petition in this case was less than one year, but in *Hellman v. Adler & Sons Clothing Co.,* 60 Neb. 580, it was held that the "final judgment" referred to in section 318 of the code is the judgment rendered by the district court, and that an appeal to the supreme court does not extend the time within which the petition might be filed.

The judgment of the district court sustaining a general demurrer to the petition and dismissing the suit is therefore

AFFIRMED.

LETTON, J., concurring.

I concur for the reason that there are no facts set forth in the petition which make the case one for the intervention of a court of equity.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JONATHAN HIGGINS, APPELLEE, V. J. I. CASE THRESHING MACHINE COMPANY ET AL., APPELLANTS.

FILED JANUARY 7, 1914. No. 17,477.

1. **Interest:** RECOVERY: PLEADING. Under the provisions of section 92 of the code, "where the plaintiff in an action does not pray for interest, none can be recovered." *City of South Omaha v. Ruthjen*, 71 Neb. 545.
2. **Appeal:** ACTION ON BOND: ATTORNEYS' FEES. In an action upon an appeal bond, unless provided for by statute, or the usual course of the law, attorneys' fees will not, ordinarily, be allowed as having been incurred in resisting an unsuccessful appeal from a judgment or final order of the district court to the supreme court.

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

O. A. Abbott and *R. J. Harper,* for appellants.

Lambe & Butler and *W. S. Morlan, contra.*

REESE, C. J.

This action was commenced in the district court for Furnas county upon the provisions of an appeal or supersedeas bond executed by the J. I. Case Threshing Machine Company with the National Surety Company as surety. The history of the case dates from the year 1878, when defendant and appellant herein obtained a judgment against the plaintiff herein and others for the sum of $799.19 in the district court for Nemaha county. A transcript of the judgment was filed in the office of the clerk of the district court for Custer county in 1889, and proceedings were there instituted for a revivor of the judgment, and an order of revivor was entered. This plaintiff had become a resident of Furnas county. A transcript was taken from Custer county and filed in Furnas county, where a proceeding in garnishment was commenced against him, and debts to the amount of about $19,050 were seized by the garnishee process. At a

subsequent session of the district court the garnishment was set aside and vacated. The threshing machine company appealed to the supreme court and executed a supersedeas bond in the sum of $5,200 in favor of this plaintiff, and thus held the garnishment good until the final decision of the supreme court was rendered, which affirmed the judgment of the district court. The decision was rendered October 22, 1909, and is reported in *Case Threshing Machine Co. v. Edmisten,* 85 Neb. 272. By the appeal the whole garnishment was held in force from the 27th day of June, 1908, until the 3d day of December, 1909, when finally vacated by the mandate from the supreme court. The allegations of the petition are, in substance, that the garnishment was wrongful and malicious; that the appeal and supersedeas bond by which so much of plaintiff's property was tied up was oppressive and deprived plaintiff of all interest and income therefrom for the time specified, to wit, one year, five months and seven days. The bond bound defendants to "pay all costs and damages that may accrue to the said Jonathan Higgins on account of appealing from the said order of the said court discharging said garnishees, and shall hold the said Jonathan Higgins harmless on account of said appeal." The suit is for interest on the funds which were tied up by the appeal, they being largely in the banks on deposit without interest, and that plaintiff was driven to borrow money from his other resources and credit and pay interest thereon. The damages alleged were $2,666, including $500 for attorneys' fees, for which judgment was demanded.

The defendants answered separately, the issues presented being substantially the same, admitting the legal proceedings set out in the petition, but denying that the garnishment or appeal was wilful or malicious; alleging the validity of the judgment against plaintiff, the validity of the revivor by the district court for Custer county; admitting the issuance of the garnishee summons, that the same was quashed, the appeal, and execution of the bond, that final judgment in the supreme

court was adverse to defendant; denying all allegations as to the amount of money impounded by the garnishment and appeal proceedings; alleging that it was the duty of plaintiff to adopt all reasonable precautions to reduce and avert any loss or damage he or defendants might sustain, by applying to the district court for leave to have the garnishees deposit with the clerk such sum as might be necessary to satisfy the judgment and costs, including the probable costs in the supreme court in case the judgment of the district court should be reversed, and order the residue paid over to plaintiff by the garnishees so that all parties to the proceedings might be protected, but, instead of so doing, plaintiff neglected to disclose to defendants the amount claimed by him to have been in the custody of the garnishees, but carefully concealed the same, whereby plaintiff was estopped to claim or recover interest on the same.

Plaintiff replied by a general denial of the new matter set up in the answer.

A jury trial was had, which resulted in a verdict in favor of plaintiff, finding due him as interest on the funds impounded from the 27th day of June, 1908, to the 3d day of December, 1909, the sum of $401.80, and for expenses and attorneys' fees incurred the sum of $325, and assessing the total at the sum of $726.80, with interest at the rate of seven per cent. from the 3d day of December, 1909, upon the amount so found due, aggregating the sum of $799.71. A motion for a new trial was filed and overruled, and judgment rendered on the verdict. Defendants appeal.

On the trial defendants asked and the court gave the following instruction: "You are instructed that, while the defendants admit that some amount is due for the impounding of the money and property of the plaintiff under the garnishee proceedings, they contend that nothing is due for attorneys' fees claimed, and that the amount claimed is excessive." In the brief of defendants it is said that "defendants do not contend that the damages due the plaintitff on account of interest on the

moneys impounded from June 27, 1908, to December 3, 1909, to wit, $401.80, is excessive," but that "no interest should have been allowed on the amount of the damages found to have been incurred from December 3, 1909, to October 25, 1911" (the date of the trial). By this we are given to understand that it is defendants' contention that no interest should have been allowed on the $401.80, which was found due as interest on the moneys impounded, but that the $401.80 is not objected to. Should that sum have drawn interest to the time of the trial from the time it matured as found by the verdict of the jury?

After stating the facts in the amended petition constituting plaintiff's cause of action, it is alleged: "This plaintiff has been damaged by reason of the foregoing the sum of at least $2,666. Wherefore, by reason of the foregoing, the plaintiff prays judgment against the said defendants, J. I. Case Threshing Machine Company and National Surety Company of New York, for the sum of $2,666 and costs of suit." It will be observed that the subject of interest is not mentioned, nor interest demanded. Section 92 of the code provides: "If the recovery of money be demanded, the amount thereof shall be stated; and if interest thereon be claimed the time from which interest is to be computed shall also be stated." In *City of South Omaha v. Ruthjen*, 71 Neb. 545, it is said in the syllabus: "Where the plaintiff in an action does not pray for interest, none can be recovered." In the body of the opinion we said: "The verdict was for $220.71, when the prayer of the petition was for $200 and costs. The court in its instruction authorized the jury to add interest to whatever amount it might find due to plaintiff as damages. This should not have been done, as the plaintiff does not pray for interest, but simply prays a judgment for $200 and costs. Plaintiff should, therefore, enter a remittitur for $20.71." Over the exceptions of defendants in this case, the court instructed the jury that "the plaintiff is further entitled to interest at the rate of 7 per cent. per annum upon such sums" (interest on the money im-

pounded and attorneys' fees) "from the 3d day of December, 1909, to the present date, to wit, October 25, 1911," the giving of which was assigned for error in the motion for a new trial and in the assignments in this court. This same question was raised in *Rawlings v. Anheuser-Busch Brewing Ass'n,* 1 Neb. (Unof.) 555, and a decision similar to *City of South Omaha v. Ruthjen, supra,* was rendered; the plaintiff being required to remit the interest. The statute and those decisions settle the question in this state, that no interest can be allowed, and we are bound thereby.

The next question presented is as to plaintiff's right to collect attorneys' fees incurred in resisting the appeal taken to this court in the case of this defendant against this plaintiff, *Case Threshing Machine Co. v. Edmisten,* 85 Neb. 272. As we have hereinbefore said, the appeal bond bound the defendants to pay all costs and damages that may accrue to plaintiff on account of the appeal, and shall hold him harmless on account thereof. There is a strong reason, under the circumstances of this case, for holding defendants liable for such reasonable attorneys' fees as plaintiff had to pay. Money many times over the amount of any claim defendant could have had against plaintiff was tied up by the garnishee process and of which he was deprived the use and income, and, were it not for the legislation and the holdings of the courts upon that subject, we would be strongly inclined to hold that reasonable attorneys' fees could be recovered. It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute. Such fees in an action on an appeal bond have not been allowed, so far as we are advised in any case, although, so far as we know, the question has not been squarely presented in this state.

In *Williams v. Fidelity & Deposit Co.*, 15 Am. & Eng. Ann. Cas. 723 (42 Colo. 118), it is stated in a syllabus prepared by the annotator that "an appeal or supersedeas bond in an ordinary civil action or will contest, which provides for the payment of 'all damages' which the obligee may sustain by reason of the appeal, does not entitle the obligee to recover as part of such damages attorneys' fees paid in resisting the appeal or writ of error." The case is quite fully annotated, and it is said: "The reported case is in harmony with the general rule that, in an action on an appeal bond stipulating for the payment of damages, attorneys' fees expended in resisting the appeal cannot be recovered as part of such damages." A large number of cases are cited as supporting the note. In a note to 2 Cyc. 958, it is said that "attorneys' fees expended in resisting an unsuccessful appeal, cannot be recovered as damages in an action on the appeal bond," citing a number of cases, some of which at least are cited in the note herein above referred to. But see *Shows v. Pendry*, 93 Ala. 248, 9 So. 462; *Drake v. Webb*, 63 Ala. 596.

Owing to the peculiar conditions of the bond, and the unreasonable amount of plaintiff's money impounded thereby, we are not entirely free from doubt as to the correctness of this holding, but are persuaded that under the authorities cited the judgment for the amount of attorneys' fees cannot stand.

The judgment of the district court is reversed and the cause is remanded for further proceedings, unless plaintiff enter a remittitur therefrom of all except the $401.80 as of the date of the judgment. In case such remittitur is filed in the office of the clerk of this court within 60 days from this date, the judgment of $401.80 will be affirmed, the same to draw interest at 7 per cent. per annum from the date of its entry in that court.

AFFIRMED ON CONDITION.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

LYMAN B. CORNELL, APPELLANT, V. MAVERICK LOAN & TRUST COMPANY ET AL., APPELLEES.*

FILED JANUARY 7, 1914. No. 17,480.

1. **Taxation**: SUIT TO REDEEM: REFUSAL OF REQUEST TO FILE SUPPLEMENTAL PETITION. A petition to redeem from a tax sale of real estate was filed on the 2d day of November, 1910, a summons was issued on the same day and subsequently served. The law requires the tax list for the current year to be delivered to the county treasurer on or before the first of that month. The tax for the year 1910 was not paid. After the tax had become delinquent, plaintiff paid it, and, before the final decree dismissing his suit was entered, he asked leave to file a supplemental petition alleging such payment. Leave was denied, to which he excepted. *Held*, That the leave should have been granted.
2. ———: WHEN DELINQUENT. Taxes on real estate are not due so that their collection can be enforced until the 1st day of May following the time when the tax list is placed in the hands of the county treasurer for collection.
3. **Affidavits.** "An affidavit subscribed and sworn to before a person not authorized by law to administer oaths is void and no affidavit." *Lanning v. Haases*, 89 Neb. 19.

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

Burkett, Wilson & Brown and *Ralph P. Wilson*, for appellant.

Albert W. Crites and *C. Patterson, contra.*

REESE, C. J.

This is an action to redeem the northwest quarter of section 19, township 26, range 49, in Box Butte county, from a sale for the taxes of 1902 and subsequent years. The property is alleged to have been sold at administrative sale by the county treasurer on the 14th day of November, 1903. The petition to redeem was filed on the 2d day of November, 1910, and summons issued on that day and subsequently duly served. It is alleged,

*Rehearing denied. See opinion, p. 842, *post.*

among other things, that there was no legal and regular notice of the delinquency of said taxes published by the treasurer prior to the sale; that no legal sale book was kept by the treasurer, as the book in which the sale was entered failed to show the name of the owner of the land sold, or the date of the certificate of sale; that the treasurer made no return of the sale to the county clerk as the law required; that the sale was made to the Maverick Loan & Trust Company; that prior to the application for deed the said trust company pretended to serve and publish a notice of the time for redemption, but that said notice contained no legal description of the property; that it was not served upon the occupant of the land, nor was any search made for the plaintiff in said county, and no proof thereof was made to the treasurer; that none of the proceedings were ever filed with the county treasurer, nor was there any evidence thereof transmitted to the county clerk by the treasurer for record, nor was the same ever recorded, nor did the tax receipts issued to the purchaser show whether the property was sold at public or private sale; that the tax deed did not describe any particular lands as the subject of conveyance, did not state in what county or state the lands were situated, nor otherwise describe them with certainty; that the notice of the time for redemption gave the date of the expiration of the time for redemption as the 2d day of November, 1905, when the time for redemption would not expire before the 14th day of said month, that being the date of the sale in 1903; that the certificate of sale was void, for the reason that it recited that the purchaser would be entitled to a deed on the 2d day of November, 1905; that, by reason of the incorrect statement of dates, the certificate, sale and deed were void; that the Maverick Loan & Trust Company had transferred its interest in the land to the Sheridan Realty Company, but that the transfer was colorable only. The Sheridan Realty Company is made a defendant. A tender to the county treasurer of the amount of taxes, interest and costs, and the refusal of that officer to accept

the money in redemption, is alleged, with prayer that upon payment into court of the amount due the redemption might be made and plaintiff's title quieted, and for general relief. The Sheridan Realty Company answered, denying the unadmitted averments of the petition, and alleging that the land in question was subject to taxation for the year 1902; that the land was duly assessed and listed for taxation for that year and for the subsequent years, and was sold on the 2d day of November, 1903, as advertised, for the sum of $2.93, which was then paid; that the notice of the tax sale was duly published, and proofs thereof furnished the county treasurer. In general, the proceeding leading up to the sale and deed are alleged to be regular and legal, which it is not deemed necessary to here recite in detail, and that all subsequent taxes have been paid, except those of the years 1909 and 1910, which are past due and delinquent. Prayer for quieting of the title in defendant and for general relief. This answer, as an amended answer, was filed May 24, 1911. The reply is a general denial. A trial was had to the court, resulting in a general finding in favor of defendants, with decree dismissing the plaintiff's action. It was specially found that plaintiff had not paid the taxes levied upon the taxed premises for the year 1910, and that without such payment said plaintiff should not be permitted to question the title acquired by defendant under the treasurer's tax deed mentioned in the petition. Plaintiff appeals.

The decree was filed in the office of the clerk of the district court on the 25th day of July, 1911. On the 20th day of the same month plaintiff lodged with the clerk and asked leave to file a supplemental petition, alleging that since the commencement of the action, to wit, on the 11th day of July, 1911, plaintiff paid the taxes levied upon the land in controversy in the year 1910, amounting to the sum of $5.70, leaving no taxes due and unpaid upon the premises. Leave to file this supplemental petition was denied, and upon the ruling thereon error is assigned. It appears from the record that the cause

was tried and submitted to the court on the 22d day of May, 1911, and, while not so shown by the recitals, it is evident that it was taken under advisement by the court, and, while so held, the application to file the supplemental petition was made. We are persuaded that under the circumstances and in the interest of justice the leave should have been granted, and that proof of the payment of the taxes should have been heard. This, however, must depend upon the construction to be given to section 141 *et seq.*, art. I, ch. 77, Comp. St. 1911. We quote the following from defendants' brief. "Section 141 provides that the tax list shall be completed and delivered to the county treasurer for collection on or before November 1 of each year, and a warrant shall be attached commanding such collection. Section 144 provides that no demand for payment of taxes shall be necessary, but it is the duty of every person liable to taxation to attend at the treasurer's office and pay his taxes. Section 150 provides that personal taxes shall become delinquent on December 1 and real property taxes on May 1 following the levy." So far as we have been able to discover, this is a correct summary of the provisions of the statute. This suit was commenced on the day after the date fixed for the delivery of the tax list to the county treasurer. The taxes did not become delinquent until May 1 following. During the interval there is an option to the taxpayer which enables him to anticipate the payment should he so desire. The tax list was presumptively in the hands of the county treasurer on the day the petition was filed, but, if not, the validity of the tax would not be affected thereby. In Black, Law Dictionary (2d ed.) in the definition of "delinquent," it is said: "As applied to a debt or claim, it means simply due and unpaid at the time appointed by law or fixed by contract; as, a delinquent tax." In 2 Words and Phrases, p. 1956, it is said: "Delinquency of taxes necessarily includes present obligation to pay, for such delinquency is the neglect of that obligation to pay." The word "due" is defined by Black as "owing; payable; justly owed;

* * * that which law or justice requires to be paid or done." There is nothing in the statute that requires the taxes on real property to be paid before the 1st of the following May. It draws no interest. The state cannot enforce payment before that time, because it is not due.

Sections 194-196, art. I, ch. 77, Comp. St. 1911, provide for the publication of the delinquent tax list. Section 197 requires proof of the publication to be made by affidavit to be furnished the treasurer. What purports to be an affidavit of publication is attached to the newspaper containing the printed list, but is sworn to before a United States commissioner. In *Lanning v. Haases*, 89 Neb. 19, it was held that such officer had no authority to administer oaths in matters of this kind, and that "an affidavit subscribed and sworn to before a person not authorized by law to administer oaths is void and no affidavit." Such must be the holding in this case, and that there was no legal proof of the publication of the delinquent tax list.

Objection is made that the defects complained of are not alleged and pointed out in the petition. While this is in some instances true, the evidence of the facts upon which this decision is based was offered and received without objection, and we are compelled to decide the cause on the theory of the trial. It follows that plaintiff is entitled to redeem.

The decree of the district court is reversed, the cause is remanded thereto, with directions to permit the filing of the supplemental petition, hear the evidence upon the question of the alleged payment, and, should the same be sustained, enter a decree canceling the treasurer's deed to the Maverick Loan & Trust Company, the deed of the latter to the Sheridan Realty Company, permit plaintiff to redeem and quieting his title upon the payment into court of the amount of the bid, taxes, interest and costs paid by defendants, within a reasonable time to be fixed by the court.

REVERSED.

ROSE, FAWCETT and SEDGWICK, JJ., not sitting.

IDAER A. CORNELL, APPELLANT, V. MAVERICK LOAN & TRUST COMPANY ET AL., APPELLEES.

FILED JANUARY 7, 1914. No. 17,481.

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

Burkett, Wilson & Brown and *Ralph P. Wilson,* for appellant.

Albert W. Crites and *C. Patterson, contra.*

REESE, C. J.

The petition in this case is in all respects similar to the petition in *Cornell v. Maverick Loan & Trust Co., ante,* p. 9, except that there is a different plaintiff, and the land sought to be redeemed is the southwest quarter of section 33, township 27, range 49. In all other respects the issues and evidence are the same. The cases are submitted on the same bill of exceptions and briefs. As the decision will have to be the same as in that case, it is not deemed necessary to formulate a separate opinion, nor to prepare another syllabus.

The decision of the district court is reversed, the cause remanded, and plaintiff allowed to redeem the land upon the same terms and conditions as in No. 17,480 (*Cornell v. Maverick Loan & Trust Co., ante,* p. 9).

REVERSED.

ROSE, FAWCETT and SEDGWICK, JJ., not sitting.

MAREE A. CORNELL, APPELLANT, V. MAVERICK LOAN & TRUST COMPANY ET AL., APPELLEES.

FILED JANUARY 7, 1914. No. 17,482.

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

Burkett, Wilson & Brown and *Ralph P. Wilson,* for appellant.

Albert W. Crites and *C. Patterson, contra.*

REESE, C. J.

The petition in this case is in all respects similar to the petitions in *Cornell v. Maverick Loan & Trust Co., ante,* pp. 9, 14, except that there is a different plaintiff, and the land sought to be redeemed is the southwest quarter of section 4, township 26, range 49. In all other respects the issues and evidence are the same. The cases are submitted on the same bill of exceptions and briefs. As the decision will have to be the same as in those cases, it is not deemed necessary to write a separate opinion, nor to restate the syllabus.

The decision of the district court is reversed, the cause remanded, and plaintiff allowed to redeem the land upon the same terms and conditions as directed in No. 17,480 (*Cornell v. Maverick Loan & Trust Co., ante,* p. 9).

REVERSED.

ROSE, FAWCETT and SEDGWICK, JJ., not sitting.

WILLIAM A. BROOKS, APPELLANT, V. HUGH MACLEAN ET AL., APPELLEES.

FILED JANUARY 7, 1914. No. 17,289.

1. **Counties:** COUNTY BOARDS: SPECIAL MEETING. The failure of a county clerk to make a record of a call for a special meeting of the county board does not invalidate such call, where it was in fact made and due notice given; the record of the county board showing a meeting pursuant thereto.

2. ———: ———: SPECIAL ELECTION: VALIDITY OF CALL. Two members of a county board composed of three members may call a special election to vote on a proposition to issue bonds, though the other member signed a petition for the election.

3. ———: ———: ———: PETITION: RESIDENCE OF PETITIONERS. The statute, requiring that "a petition signed by not less than fifty freeholders" of the precinct shall be presented to the county board for the purpose of calling an election to vote bonds, does not mean that the petitioners shall be residents of such precinct. Comp. St. 1911, ch. 45, sec. 14.

4. **Pleading:** CONSTRUCTION: PUBLIC INTERESTS. In a matter of public concern, the court will be liberal in its construction of pleadings in the interest of the proper conduct of public business and for the protection of the taxpayer, and the same rule will be applied with reference to briefs and arguments.

5. **Counties:** PRECINCT BONDS: VALIDITY: INJUNCTION. A proposition to vote bonds to aid a corporation in the construction of a bridge was submitted to the voters of Riverside precinct in Dawson county. In the petition to call the election no donee of the bonds was named. No proposition was on file with the county board to build the bridge either at the time of the call of the election or, so far as the record shows, at any time since. So far as the record shows, the county board inserted in the call on its own volition the name of a proposed donee. In the petition and in the proposition submitted the proposed site of the bridge was so indefinite and uncertain that it might be located at any point for a mile along the bank of the stream. No road, either public or private, was in existence to the banks upon either side or across the stream within the mile limit at the time of the call, or at the time of the election. The proposition was to vote bonds in the sum of $12,800. The capital stock of the proposed donee, the Riverside Bridge Company, was the sum of $250, "to which shall be added any sums which may be voted by any precinct or

municipal corporation to aid in the construction of said bridge." Other provisions of the articles provided that the corporation might sell the bridge "on such terms and to such persons or corporations as shall seem best for the maintenance of said bridge." There is no provision anywhere that the donee shall maintain the bridge. *Held*, That the proposition was unauthorized; that the location of the proposed bridge was too indefinite and uncertain; that the rights of the taxpayers were not sufficiently guarded; and that the issuance of the bonds should be enjoined.

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

H. M. Sinclair and *W. D. Oldham,* for appellant.

W. A. Stewart, John H. Linderman, John J. Halligan and *T. M. Hewitt, contra.*

LETTON, J.

This action was brought by the plaintiff, for himself and in behalf of all other taxpayers similarly situated, for the purpose of enjoining the issuance and delivery of certain precinct bonds voted by Riverside precinct of Dawson county to aid in building a bridge across the Platte river. The defendants are the board of county commissioners of Dawson county and the Riverside Bridge Company, the proposed donee of the bonds. The principal reasons given in the petition to show that the bonds were illegal are: (1) Illegality in the formation of the precinct; (2) that the petition for the calling of an election was not signed by 50 freeholders; (3) that the proposed donation was in aid of a private enterprise; that the donee is a private corporation with a capital stock of $250; that there is no road either private or public that leads to or from the proposed bridge, nor is there a road or bridge across the river at that point; that the land along the stream, as well as the bed, belongs to private owners; that the donee has no power to take land by eminent domain; that the bridge, when constructed, would be inaccessible to the public, and the property of

the plaintiff will be taken to pay the bonds without due process of law; (4) that a proposition to levy annually "a tax equal to the entire interest charge on the said bonds and equal to 10 per cent. of the principal of the same for a sinking fund, until all of said bonds are paid," is invalid upon its face.

The answer is substantially a general denial. The district court found generally for the defendants, and dismissed the action. Plaintiff appeals.

The first point argued for a reversal is that the order of the county board organizing Riverside precinct is void for the reason that the petition presented to the county board for that purpose did not contain a majority of the legal voters. In his application for injunction plaintiff sets out a petition containing only 37 names, but the answer denies that this is a correct copy of the petition presented to the county board, and there is testimony that a similar petition containing 51 additional names was also filed with the county board.

Plaintiff insists that the order forming Riverside precinct is void for the further reason that it was made at a special meeting, which the record of the county board recites was called by the county clerk, and that this meeting was illegal because the county clerk had no authority to call it, because there is no record of the calling of the meeting, and because the county board had no authority to create a precinct for the purpose of voting bonds.

The county clerk has authority to call a special session when the interest of the public demands. Comp. St. 1911, ch. 18, art. I, sec. 57. The call was made and the meeting held pursuant thereto. The meeting itself is proved by a proper record, and the presumption is that it was properly called. The failure of the clerk to make a record of the call did not invalidate it. *Green & Van Duyn v. Lancaster County,* 61 Neb. 473, 483.

The statute provides that each board of county commissioners shall divide the county into convenient precincts, and, as the occasion may require, erect new ones, subdivide the precincts, or establish better precinct lines.

Comp. St., ch. 18, art. I, sec. 60. This is sufficient to confer the authority upon the county board. The facts with respect to the creation of this precinct are not parallel to those involved in the case of *Morton v. Carlin,* 51 Neb. 202; hence, it furnishes no authority against the validity of the organization of the precinct.

The point argued that the board was not legally constituted, since it was composed of three members, one of whom signed the petition, is not well taken. The joint action of two qualified members of the board was sufficient. *State v. Piper,* 17 Neb. 614. We conclude, therefore, that the attack upon the organization of the precinct made in the petition has not been sustained.

Coming now to the validity of the election: The discussion of this subject assumes several phases. In the first place it is contended that the petition for the election did not contain the names of 50 freeholders, as required by the statute. Sixty names are affixed thereto. It is claimed that four of the signers of the petition were made freeholders for the purpose of signing the petition; but we are satisfied that the finding of the district court to the contrary is sustained by the evidence. It was also contended that a number of nonresident owners of land in the precinct signed the petition, and that if such names are deducted there would not be the names of a sufficient number of resident freeholders signed to the petition to authorize the calling of an election. The right to petition the county board to call an election to vote on a proposition to issue precinct bonds does not depend upon the elective franchise. The statute does not say that the petitioners shall be "resident freeholders" or electors. The requirement is that a "petition signed by not less than fifty freeholders of the precinct" shall be presented to the county commissioners. Comp. St. 1911, ch. 45, sec. 14. To show that the word "freeholders" means "resident freeholders" plaintiff cites *State v. Babcock,* 21 Neb. 187; *Wullenwaber v. Dunigan,* 30 Neb. 877; *Morton v. Carlin,* 51 Neb. 202. In the first of those cases the term "resident freeholders" is neither used in the

statute construed, nor in the opinion of the court. In the second case it was distinctly stated that the question relating to "freeholders" was not necessary to a decision. The words "resident freeholders" do not appear in the opinion, nor in the statute construed, and evidently crept into the syllabus through inadvertence. In the third case cited, this syllabus inadvertently containing the word "resident," is copied in the opinion. Petitioners for a license to sell intoxicating liquors must be "resident freeholders." Comp. St. 1911, ch. 50, sec. 1. There is no provision of statute, however, requiring petitioners for an election to vote bonds to be "resident freeholders." The terms "freeholders" and "resident freeholders" in the different statutes are not synonymous, and cannot be so construed. Nonresident and alien freeholders of the precinct may petition the county board to call an election to vote bonds. *Rix v. Johnson,* 5 N. H. 520; *Matthews v. People,* 159 Ill. 399. In this view of the law the petition assailed is sufficient.

The objections that the bonds were not voted and will not be delivered for a public purpose are more serious. The pleading of the specific defects in the proceedings and as to the character of the donee is by no means a model in form, but the court in a matter of public concern will be liberal in its construction of pleadings in the interest of the proper conduct of public business and the protection of the taxpayer.

The same rule will be applied with reference to the briefs and arguments; and, as section 675*c* of the code provides, the court may consider a plain error not assigned.

The petition to the county commissioners to call the election specified "that the work for which bonds are desired to aid is the construction and operation of a wagon bridge across the Platte river in said county, extending from section 5 on the north bank to section 8 on the south bank, both in town. 10 north, of range 24 west of the 6th P. M." It failed to set forth whether the bridge was to be built by the county, by the precinct, or

by a private corporation, whether it should be a free bridge upon a public highway, or whether it should be a toll bridge owned by a private corporation. At the special election the board submitted the questions whether bonds should be issued and a tax levied "to aid in the construction and completing of a wagon bridge across the Platte river, extending from section 5 on the north bank of said river to section 8 on the south bank of said river," etc., and, also, "shall said bonds be delivered to the Riverside Bridge Company, a corporation, upon giving sufficient security, to aid in the construction of said bridge, upon the execution thereof by the board of county commissioners of Dawson county, Nebraska, * * * and shall said bonds be delivered to the said bridge company on its giving bond, to be approved by the board of county commissioners, to apply the proceeds thereof to the construction of said bridge." There is no condition in the bonds, or in the proposition to vote bonds, requiring the bridge to be maintained by the corporation. There is no provision that the bridge shall be a public one, whether toll or free. A proposition to vote bonds is in the nature of a contract which, when accepted, is binding with respect to the parties. *Wullenwaber v. Dunigan, supra; Nash v. Baker,* 37 Neb. 713. No proposition had been filed with the county board by the Riverside Bridge Company at the time the election was called, and no such proposition is shown to have been on file when the election was held, or has since been put on file.

Section 3 of the articles of incorporation of the Riverside Bridge Company is as follows: "That the capital stock of said company shall be the sum of $250 to which shall be added any sums which may be voted by any precinct or municipal corporation to aid in the construction of said bridge; that the capital necessary to construct said bridge is $12,800." Another section provides: "The business to be transacted by said corporation shall be the construction and operating of a wagon bridge across the Platte river at a point between sections 5 and 8; * * * that the company * * * may

purchase or otherwise acquire real estate for roads and approaches to the said bridge, may borrow money and issue bonds, may, if necessary, collect tolls for the use thereof, may purchase and sell materials necessary for the construction thereof, and may after the construction of the same, when deemed best, sell, convey, and transfer the said bridge with all appurtenances on such terms and to such persons or corporations as shall seem best for the maintenance of the said bridge."

No county road had been established to any definite point on the river bank between sections 5 and 8, nor any road running across the river. The bridge corporation may, so far as anything in the proposition goes, build at any point within the limit of one mile along the river bank. When a taxpayer is called upon to vote upon the granting of public money in aid of the building of a bridge, the locality of the bridge should be definitely fixed, or should be fixed at least within a much narrower latitude than one mile.

We are also of the opinion that the county commissioners have no authority upon their own initiative and without any proposition ever having been made and filed by any one, to insert in a proposition to be voted upon the name of any particular person or corporation.

To sum up: The condition of the record in these respects is that, without any tender or offer to build a bridge having been made to the county board, that body, acting by two of its members, the third member being disqualified by reason of being an active petitioner, submitted a proposition to the voters to issue bonds in the sum of $12,800 to a corporation with a capital stock of $250, which was organized to build a bridge. The location of the bridge was not fixed within a mile. One person might vote for the bonds with the idea that the bridge would be located at one point on the river bank, another might vote for it under the impression that it was to be located nearly a mile away. If there had been a road located and established to and across the river at a definite point before the election, it is possible that this objection

might have been overlooked; but, when it is sought to levy a tax for the purpose of making a donation, each voter is entitled to know definitely just how and where the money is to be expended, and to have definite and specific information before he is called upon to vote. If this is not furnished, and the proposition is indefinite and uncertain, if a majority vote for the proposed issue, a taxpayer may stand upon his legal rights and call upon the courts to aid him in restraining the illegal issue.

While it is not the province of the courts to act as the voluntary guardians of taxpayers, where they are called upon for relief it is their duty to furnish it. It is probably true that a majority of the people of Riverside precinct earnestly desire a bridge to be built over the Platte river, and that the purpose is entirely proper and commendable; but, before being compelled to pay taxes to help a private corporation build, each taxpayer should have a clear idea as to where the bridge is to be built, and whether upon the public highway or otherwise. It would be better to have the proposition designate whether the bridge is intended to be a toll bridge or a free one, although the supreme court of the United States has held that this is not absolutely essential to the validity of the bonds. This court in the past has, for the protection of the taxpayer, consistently and repeatedly stood upon and required the letter of the law in such proceedings to be strictly complied with. While everything in the matter has in all probability been done in the utmost good faith, we cannot uphold the laxity of the methods pursued. *George v. Cleveland,* 53 Neb. 716; *Nash v. Baker, supra.*

Holding these views, we find it unnecessary to consider the other points presented. The judgment of the district court is therefore reversed and the cause remanded, with directions to render a decree as prayed in the plaintiff's petition.

REVERSED.

HAMER, J., concurring in part, and in the conclusion.

I do not like to burden the taxpayer with a liability which starts in an irregular way. The formation of the precinct was in pursuance apparently of an agreed plan to vote the bonds on the territory. There is nothing in the construction of a bridge which requires undue haste and irregular methods; and, while there was probably no intent to defraud, the method of forming the precinct was not for the general purposes of government, but to cause the bonds to be issued, which is only *one* purpose and therefore not in accordance with the general purposes of the law. The law calls for the creation of a precinct so that it may exercise all the legitimate functions of government for which a precinct is created. The petition to form the precinct was sworn to by William Ralston before the county clerk on the 1st day of December, 1910. It contemplated the formation of a precinct "to be called Riverside precinct." Up to that time there had been no such precinct. On that same day, December 1, 1910, the board of county commissioners of Dawson county met to create this particular proposed precinct. On that day the board granted the petition as petitioned, and the new precinct was constituted to include the sections described in the petition; said precinct to be known as "Riverside precinct, Dawson County, Nebraska." The board then adjourned to meet December 15, 1910. At this meeting on December 15, 1910, the board considered the matter of voting the bonds in question. It found that the petition was signed "by more than 50 resident freeholders of said Riverside precinct." It provided for the submission of a proposition to vote the bonds at an election to be held in February, 1911. The proposition proposed to be submitted was for the delivery of $12,800 in bonds to a bridge company with a capital of $250.

The first question to be considered is the organization of the precinct.

(a) Was it legal to organize it for the express purpose of voting bonds to build a bridge? A precinct is

not a municipality, and the creation of a precinct ought only to be contemplated for the legitimate purposes for which it may exist. It can only act through and by means of the board of county commissioners or supervisors who are trustees on behalf of the *people* who live in the precinct. A precinct is not a legal entity having the power to act. It does not act on its own account. The thing done was done by the board of county commissioners, and the men who prepared and presented the petition to them must have known at the commencement that there was no municipality asking for the creation of these bonds. A precinct is a mere territorial division. *State v. Dodge County*, 10 Neb. 20.

(b) The meeting was called November 18, 1910, by the deputy county clerk. He had not been ordered to call it by the board or by his principal, the county clerk. I do not understand that he had the power to substitute himself for his principal, or of substituting himself for the board of county commissioners. He was only their clerk. According to the testimony of the county clerk there was no order from the board to call the meeting. I am not satisfied that the board had any jurisdiction to act under the circumstances.

(c) There is another reason why it would seem that there was no jurisdiction to proceed. There was nothing before the board; that is, there was nothing in the office in the shape of a petition to the board *at the time it is claimed that this deputy county clerk acted.* And how could he act unless there was a petition, even though it be admitted that he might otherwise have the right to act. Under the statement made, with nothing in the office, with nothing pending, he makes the order. It is analogous, seemingly, to the issuance of a summons by the clerk of the district court when no petition has been filed.

(d) The county board changed the lines of the precinct for the special purpose of enabling the voters who would thereafter be in the precinct to carry the bridge bonds. They gerrymandered the territory. Section 7, ch. 35, Gen. St. 1873, provides: "Any precinct in any or-

ganized county of this state, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act." This only means what it says. It does not mean that any power is conferred upon the precinct as a political body. The act in question contemplates that the board of county commissioners of the county will issue the bonds if the vote justifies such issue. It does not mean that the board may change the boundaries so that a majority may be obtained in favor of their issue. In *Morton v. Carlin*, 51 Neb. 202, the board of county commissioners of Otoe county changed the precinct boundary of Nebraska City and put into the precinct a large number of sections with a view to accomplishing certain results. It was held that counties and county boards can exercise only such powers as are expressly conferred upon them by statute, and that such grant of powers must be strictly construed. *State v. Lincoln County*, 18 Neb. 283. It was further held that the change of the precinct boundaries of Nebraska City was without jurisdiction and void, and that the bonds issued were without authority of law, and there was an injunction restraining the levy of taxes. This court is as much bound now as it was then to see that such a thing as this is not done. County commissioners can legally transact county business at a regular session of the county board, or when specially called by the county clerk, of which special meeting notice is given in the mode provided by law. *Morris v. Merrell*, 44 Neb. 423. The object of calling the commissioners together should be stated in the notice. *Commissioners v. Kent*, 5 Neb. 227.

(e) It does not appear what the corporation, which is organized with a capital of $250, is going to do, except that it seems willing to receive $12,800 in bonds from Riverside precinct. It does not appear from the election proclamation that this corporation is going to have a toll bridge, or that it is going to donate the bridge to the public. The only question submitted is: "For

bridge bonds and tax." "Against bridge bonds and tax." It is true that the bridge company agreed to give a bond "to apply the proceeds thereof to the construction of the said bridge," but that determines nothing as to whether the bridge is to be a toll bridge or a free bridge. The petition for the election is equally silent. By the articles of incorporation the business to be transacted shall be the construction and operation of a wagon bridge across the Platte river at a point between sections 5 and 8, in township 10 north, of range 24 west of the sixth P. M. The bridge company is authorized to collect tolls, "if necessary," and may sell and convey the bridge after it is constructed. The sum of money proposed to become a lien against the taxable property of the precinct should be carefully guarded. For anything that appears in the proceedings there is nothing to prevent the bridge company from selling out to an irresponsible party who might allow the bridge to run down and become a wreck.

(f) The condition put in the bonds is, "shall said bonds be delivered to the said bridge company on its giving bond, to be approved by the board of county commissioners, to apply the proceeds thereof to the construction of said bridge." It will be seen that there is no condition in the bonds further than "to apply the proceeds thereof to the construction of said bridge." There is nothing about turning the bridge over to the public, or about maintaining it for the use of the public. Neither is there anything about maintaining the bridge as a toll bridge or as a free bridge.

(g) I am not able to say that there is no public road leading to or from said proposed bridge. There is no road across the stream. The bed of the stream belongs to private parties.

An examination of the cases of *George v. Cleveland*, 53 Neb. 716, and *Nash v. Baker*, 37 Neb. 713, will show that this court, in the protection of the taxpayer, has stood upon the letter of the law. The corporation was organized as a private corporation. Apparently it was organized for the benefit of the stockholders. In the cases

last above cited it will be seen that this court has insisted that the purpose should be one authorized by law, and, otherwise, that the bonds will be enjoined.

(h) Whether the precinct was ever organized may well be doubted. One of the petitioners, Mr. Costin, was a member of the board of county commissioners. Did he have a right to sit in judgment on his own case? The testimony shows "he was active in getting up this Riverside precinct." He seems to have made a speech, in which he said "he had looked into the matter further than anybody else; he told us his proposition for getting the bridge; he said the bond proposition was the only one that would succeed; * * * the first thing he said we would have to have a majority of the voters in the proposed territory to sign a petition to have the district set off; then to have a petition with 50 freeholders calling for a bond election, and if the election carried for the bonds we would go ahead and build the bridge and then turn the bridge over to the county, and, after the county had accepted the bridge, the territory would be returned to the original precinct." When he was asked why the six sections on the east had not been taken as well as on the west, as they were as close to the proposed bridge as the rest, he said: "We were laying off a precinct to carry for bonds." This is not denied; the other witnesses corroborate it. Jerry Costin testified: "I presume the object was to form a precinct there to build a bridge, that was as far as I know."

In *Nash v. Baker*, *supra*, the trial court made a finding that the representations of the promoters could have deceived no one in view of the actual facts, but this court held that there was deception nevertheless, and enjoined the bonds. In that case bonds were to be issued for the construction of a railroad from Kearney to Callaway. The promoters represented that the road to be constructed would be an independent line of railway, and that there was a president and other officers who lived at Kearney. The trial court took the view that the proposed railroad could not be an independent road, and that everybody

must take notice of that fact because it was in the center of the continent, 700 miles from a waterway, and with no power of exit except over the Burlington or Union Pacific, and that it could do nothing except by a traffic arrangement, and that these facts must be apparent to everybody, and therefore that there was no deception. In *George v. Cleveland, supra,* this court was equally zealous in protecting the taxpayer, and enjoined the bonds.

While everything that was done may have been done in the utmost good faith, the protection which the statute seems to require has been denied to the taxpayers of the precinct. I concur with the majority opinion to the extent that the bonds ought not to be issued.

JOHN S. COLLISON ET AL., APPELLEES, V. JOHN L. REAM, APPELLANT.

FILED JANUARY 7, 1914. No. 17,412.

1. **Contracts:** RESCISSION. One who seeks to rescind a contract must rescind the whole contract. He cannot accept and retain the benefits of that portion of it which is beneficial to him and at the same time rescind and set aside that portion which is not to his advantage.

2. ———: ———. Where C. & C., the owners of a mill, who were desirous of procuring the services of W. as miller, agreed with W. & R., who were the owners of stock in a corporation which owned a patent for a washing machine, and a small amount of other property, that they would incorporate the milling business, and issue to W. & R. 66 shares of stock, being one share more than one-half of the stock issued, in consideration for the transfer to them of 75 shares of stock in the other corporation; and after the exchange was effected W. took charge of the mill and the business, improved the property, and increased the sales, and W. & R., either directly or indirectly, furnished $1,500 for the use of the milling company in the business, a petition by C. & C. tendering 38 shares of stock in the other corporation to R., and seeking to rescind the transaction as to him on account of false statements as to its value and extent made by him in procuring the contract, while affirming it as to W., *held* to show no equity

in the bill; *held*, further, that, if C. & C. are entitled to rescind the contract, it must be as a whole, since they are not entitled to accept and retain that portion of the contract which is advantageous to them and rescind that portion which is to their disadvantage.

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

T. J. Doyle, *G. L. DeLacy* and *J. R. Swain*, for appellant.

E. P. Clements and *J. R. Berry, contra.*

LETTON, J.

This is an action to rescind an executed contract for the exchange of stock in two corporations. Plaintiffs succeeded in the action, and defendant appeals.

Many of the facts are not disputed and these will be summarily stated. About September 1, 1908, the plaintiffs John S. and August K. Collison were the owners of a flouring-mill operated by water-power situated at Ord, Nebraska. One William A. Wright, a practical miller and mechanic, was the inventor and patentee of a washing machine, which at the time was being manufactured by the Nebraska Incubator Company, of Fairfield, Nebraska. John L. Ream, the defendant, and Wright had been associated together for some time as partners, under the name of the Wright Washing Machine Company, in procuring the manufacture and sale of the washing machine, and had a written contract with the incubator company for the manufacture of its machines in quantities. The Wright Manufacturing Company, a corporation, was afterwards organized for the purpose of taking over this business; Ream and Wright owning all the stock at the time of the exchange. In August, 1908, Ream met John S. Collison at Ord, and some conversation was had between them, in the course of which Ream stated that he and Wright were in the washing machine business; that Wright was an experienced miller; that they wanted to get an interest in

the Ord mill so that the establishment of the Wright Manufacturing Company could be placed at Ord and be operated with the same water-power. The Collisons were not practical millers, and wanted to avail themselves of Wright's experience and ability as a miller and machinist. Shortly afterwards Wright and Ream went to Ord, and the parties made a tentative agreement. Under the arrangement then made, Collison Brothers were to form a corporation which should take over the mill property and business, under the name of the Ord Milling Company, with a capital stock of $25,000, $13,000 of which was to be issued. Wright and Ream were to receive one share over one-half of the stock issued in exchange for 75 shares of stock of the Wright Manufacturing Company. After making some inquiries as to the assets of the Wright Manufacturing Company, they then went to Mr. Clements, an attorney, to have the contract drawn up, who advised Collison to go to the plant at Fairfield, where the washing machines were under construction, and look over the property of the company. Collison and Ream then went to the incubator factory at Fairfield, and from there to Axtel, Kansas, where the home office of the Wright Manufacturing Company was situated. Collison then returned to Ord, without Ream, and Wright and the plaintiffs closed the transaction in the office of Mr. Clements. Thirty-three shares of the mill company stock were transferred to Ream and 33 to Wright in exchange for the Wright Manufacturing Company stock. Immediately thereafter Wright removed to Ord, took charge of the mill, rearranged the machinery, and made other lasting improvements. The result has been that the grade of flour manufactured has been improved and the business of the mill has materially increased since Wright became miller. Ream, who is a traveling salesman, also helped to bring in new customers and increase the sales of flour. So far the facts seem to be undisputed.

Plaintiffs' petition bases their right to rescission upon the allegations that, at the time of the conversation in Ord, Ream represented that the Wright Manufacturing

Company was actively engaged in the manufacture and sale of washing machines, and was earning 30 per cent. upon the capital stock; that that company was the owner of washing machines complete and in process of construction, material, bills receivable, furniture, and other property, all of the value of $15,000, and was not in debt, and on the further allegations that afterwards, when Collison visited the plant of the Nebraska Incubator Company at Fairfield, he pointed out a large number of washing machines complete and partially complete, and a large amount of material for their construction, and there represented that all of this property belonged to the Wright Manufacturing Company; that afterwards plaintiffs discovered that the patent was of no value, that the corporation was not actively engaged in the manufacture and sale of washing machines, had never earned any dividends, was heavily in debt, that the washing machines and the property pointed out to him at Fairfield were not the property of the Wright Manufacturing Company but belonged to the incubator company and that the stock of the Wright Manufacturing Company was of no value whatever.

The answer pleads that the mill property, at the time of the transaction, was of little or no value, and was not being operated as a mill; that the Ord Milling Company was incorporated for the purpose of rehabilitating the mill and building up and developing its business; that no misrepresentations were made; that the Collisons had investigated the assets of the Wright Manufacturing Company, and there had been exhibited to them the contract with the Nebraska Incubator Company, and they knew the exact condition of affairs; that they also received from Wright a truthful and correct statement of the assets of the Wright Manufacturing Company. It is also alleged that, after the exchange, both Wright and defendant devoted their time, energy and skill to building up the mill; that plaintiffs refused to furnish any capital for that purpose, but defendant has supplied $2,000 in cash to buy grain and pay operating expenses; that, as a result of the efforts of himself and Wright, a

lucrative business has been established; that he has received no remuneration for his time and services; that, after the plaintiffs had full knowledge of the exact condition of affairs of the Wright Manufacturing Company and the value of its stock, it induced defendant to spend his money, time and efforts in the interest of the Ord Milling Company, and are estopped by their laches and delay from maintaining this action; and that there is no equity in plaintiffs' bill, for the reason that it does not offer to do equity by reimbursing the defendant for his money and services.

The action is brought against Ream alone to procure the surrender of 33 shares of stock assigned to him. John S. Collison seems to have conducted the exchange on behalf of himself and his brother. He testifies that in the conversation he had with Ream in Ord he was told by him that the Wright Manufacturing Company had assets of the value of $15,000; that it was making 30 per cent. on the investment; that the assets were washing machines, material for their manufacture, bills receivable, and money in bank; that, when they went to Fairfield, Ream showed him at the plant of the Nebraska Incubator Company a number of washing machines and a large quantity of material, and stated that it all belonged to the Wright Manufacturing Company and was paid for; that, at the office of the company in Axtel, Ream stated that the whole of their property was worth about $12,500 and he would have to give more stock to make up the deficiency. He also testifies that in June, 1909, he became mistrustful when no meeting of the Wright Manufacturing Company was held, but Ream told him they were doing nothing with the washing machine business until the mill business was in proper condition; that, when no meeting was held in 1910, he again looked into the matter, and that in July of that year he found out that the Wright Manufacturing Company did not own the property shown him at Fairfield, and owed $2,000. On cross-examination he testified that 75 shares of Wright Manufacturing Company stock was transferred to Collison Brothers, and that

he did not offer to rescind or turn back the stock before beginning suit; that Ream, or the Wright Manufacturing Company, had furnished $1,500 to be used in the mill business, which stood on the books to the credit of the Wright Manufacturing Company and that no offer had been made to return this money; that Wright told him that they did not own the factory, but that they had paid in advance for about 1,000 machines; that the mill is worth now from $9,000 to $10,000; that he would not have traded but for Mr. Wright coming into the mill.

August K. Collison testifies that, while his brother was getting ready to go to Fairfield, the witness had a conversation with Ream, in which Ream told him they had about 400 machines under construction, and material for about 1,000 more, and about $2,000 working capital, and that the business was paying about 10 per cent. on an investment of $15,000. He also testified that the value of the mill company stock transferred to Ream was about $3,300.

Mr. Clements testified that in the conversation in his office he asked Ream what were the assets of the Wright Manufacturing Company, and that Ream told him that they had a patent that was worth $50,000; that he then asked what were the tangible assets, and Ream said they had a great many washing machines and material, money in the bank, accounts, office furniture, and fixtures, in all worth $15,000; and that they had no debts.

It seems that, before making the exchange, John S. Collison went to Greeley Center to visit Mr. Wright. Mr. Wright testifies that in a conversation there he told Collison that Wright and Ream had paid $1,000 to the incubator company for manufacturing machines, which was true, and he denies specifically telling him that they had 1,000 machines which had been paid for in advance. He also says he then told Collison: "We possessed contracts with the Fairfield company, and possessed a patent on a washing machine, but we possessed no incubators or no factory;" that he was present at the conversation in Clements' office; does not remember hearing Ream tell Clements

that the property of the company was worth $15,000, that, if the statement had been made, he would have known it was false and would have told Collison so. Wright also testified to the improvements made at the mill, such as putting a new dynamo and smokestack; that the value of the mill at the time he took charge was $7,500, encumbered by a mortgage of $3,500, which is still unpaid, and there were $4,000 of debts, of which $1,000 has been paid from the business; that Collison had put no money into the business since he took charge; and that the property is now worth between $9,000 and $10,000.

Ream testifies that the Wright Manufacturing Company was organized in January, 1908; that previous to this Wright and Ream had sold 700 machines direct to customers; that afterwards they found it more profitable to have the sales made by the incubator company. He denies making any untrue statements while at Fairfield, or that they saw any material there, except some castings; testifies that at Axtel he showed Collison the contracts with the incubator company, the books, and everything pertaining to the business; and that Collison then said he understood that the contract, and the machines on hand were all the Wright Manufacturing Company then owned. He denies saying that the company had $15,000 worth of property, but says he stated at Clements' office that Wright and he had done about $15,000 worth of business. He testifies that the $1,500 was furnished by Wright and Ream to the milling company, and not by the Wright Manufacturing Company. He testifies further as to his efforts in procuring credit for the mill company, and to trying to procure customers for the flour.

Mr. VanSkyke, who introduced the parties and who was present at the conversation in Clements' office, says he understood the statement made by Ream to be, not that the assets of the Wright Manufacturing Company were $15,000, but that the company had done $15,000 business; that after the deal was closed August K. Collison said to him that, even if the washing machine business amounted to

nothing, he considered that if they got Mr. Wright into the mill it would be a good deal for them.

It is impossible to set forth the evidence in full, but the most material points are as stated. No effort has been made to rescind the contract so far as Mr. Wright is concerned; Collison giving as a reason that Wright had not misrepresented anything to them.

The impression we derive from the whole evidence is that Collison was so anxious to make the exchange that he almost deceived himself, but that at the same time that Ream's flamboyant statements as to the value of the assets were not justified, and the manner in which Collison testifies he was deceived at Fairfield was perhaps sufficient to justify a rescission of the whole contract if promptly made after the discovery. It seems a fair conclusion to draw from the evidence that, at the time of the exchange, the stock of the Wright Manufacturing Company was of very little value. The tangible assets consisted of 27 washing machines in a warehouse at Fairfield, a contract with the incubator company providing how much should be paid for the manufacture of each machine, allowing sales to be made by that company, and providing that for all machines sold by it a royalty should be paid to the Wright Manufacturing Company. This contract was of little or no value as an asset. There is nothing to show that this patent is of any merchantable value. From the fact that apparently neither salaries nor dividend had ever been paid, while it had borrowed $2,000, which was still unpaid at the time of the exchange, it would seem to be a fair conclusion that the net assets of the company were negligible. On the other hand, the evidence as to the value of the mill property and business at the time of the exchange is not very clear. Collison says it was worth $7,500 and was encumbered by a mortgage for $3,500. Wright agrees with this valuation, but says that the business owed also $4,034, of which $1,000 has since been paid out of the profits. If the latter statement is correct, the debts covered the assets, and the stock was worth no more than that of the Wright Manufacturing Company. The

witnesses agree the property is now worth between $9,000 and $10,000, but from this must be deducted the mortgage debt and the unpaid accounts. It would seem that Mr. Collison was exceedingly anxious to get Mr. Wright into the mill, and was of a very confiding nature, since he was willing to make the trade without making any examination of the assets until advised by his attorney to do so.

The appellant argues three points: First, that there is no evidence of any misrepresentations; second, the contract of exchange was between Collison Brothers and Wright and Ream, and could not be accepted in part and rescinded in part; that no sufficient tender had been made before suit, and that the plaintiffs are guilty of laches, and are estopped from rescinding the contract.

It is obvious that Wright and Ream each owned an equal number of shares of stock in the Wright Manufacturing Company and were jointly concerned in the exchange of the property. The agreement was by Wright and Ream to trade 75 shares of washing machine stock for 66 shares of mill stock. It is also shown that the moving cause for the exchange on the part of the Collisons was largely the desire to obtain Wright's services in the mill. In all the conversations Ream was talking for Wright and Ream jointly, and in the conversation that Collison had with Wright at Greeley Center, it was not a separate transaction that was discussed, but it was the exchange of stock of Wright and Ream in the one company for that of Collison Brothers in the other. The testimony also seems to show that the $1,500 which was furnished to the milling company after the exchange was procured by Ream and Wright on their individual credit. It was either furnished by them to the Wright Manufacturing Company and by that company transferred to and used by the milling company or it was furnished directly. The books are not in evidence, and the testimony is not quite clear. In this matter, as in all others connected with the mill transaction, Wright and Ream were acting together. As affairs now stand, the Collison Brothers have procured the services of Mr. Wright in the mill, and his technical knowl-

edge and skill have resulted in the improvement of the mill property and the building up of the business. Through Wright and Ream the mill has secured the use of $1,500 of money for which these men are individually liable to the lender. It is an elementary maxim that one who seeks equity must do equity. He cannot accept that portion of a contract which is beneficial to him and at the same time reject and seek to be relieved from that portion which he believes to be injurious to his interests. When a contract is rescinded, parties should be placed in *statu quo* as nearly as possible. The plaintiffs by the exchange of stock procured the opportunity to avail themselves of the services of Mr. Wright as a shareholder and employee in the mill, the use of $1,500 working capital, the increased value of the business caused by the technical knowledge and skill of Mr. Wright, and the conversion of a profitless undertaking into a successful business. They remain as stockholders in the Wright Manufacturing Company to the extent of one-half the shares of stock transferred to them. They still retain their share of the benefit to that company, or to the milling company, derived from the use of the $1,500 made available by Wright and Ream. They have enjoyed the benefits of the contract for about two years, and now only offer to return to one of the parties one-half of the stock transferred. We think it would be decidedly inequitable to allow the Collisons the use of the $1,500 while setting aside the transaction which was the moving cause of the loan.

Upon the whole case, we are of opinion that a sufficient tender to return has not been made; that the transaction was a joint one between Collison Brothers and Wright and Ream; that, if rescinded at all, it must be rescinded as a whole; and that as the case now stands there is no equity in the plaintiffs' petition.

The judgment of the district court is therefore

REVERSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

STATE, EX REL. KATZ-CRAIG CONTRACTING COMPANY, APPELLEE, V. JOHN H. DARNER, MAYOR, APPELLANT.

FILED JANUARY 7, 1914. No. 17,455.

Municipal Corporations: CLAIMS: ALLOWANCE. The charter of a city provides, "All ordinances and resolutions, or orders for the appropriation or payment of money, shall require for their passage or adoption the concurrence of a majority of all members elected to the council or board of trustees." Comp. St. 1911, ch. 14, art. I, sec. 79. Upon the alleged completion of a contract for the construction of a water-works system, the contractor presented a claim to the city council for the balance alleged to be due. A motion was made to allow the claim and issue a warrant in payment thereof. The council consisted of four members. Three were present, of whom two voted, "Yea," and the third voted, "No." The mayor declared the motion carried. Afterwards a warrant was prepared by the clerk, but the mayor refused to sign the same upon the ground that its issuance was not authorized by a legal majority of the council. *Held*, That the issuance of the warrant was not authorized by law, and that a writ of mandamus to compel the mayor to sign the same should have been refused.

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

H. M. Sinclair, W. A. Stewart and *Niles E. Olsen,* for appellant.

Isidor Ziegler and *E. A. Cook, contra.*

LETTON, J.

The Katz-Craig Contracting Company was awarded a contract for the construction of a system of water-works in the city of Cozad, a city of the second class. The constructing engineer employed by the city filed his final report with the city council showing the completion of the work, recommending its acceptance, and stating the sum of $6,959.11 was due to the contractor. By an amendment made at the time the council met, this sum was reduced to $5,099.11. The amendment credited the city

with $1,650 for damages for failure to complete the contract within the specified time, and several other minor items.

At this meeting it was moved and seconded that the amended estimate, on a slight change being made, be accepted and a warrant drawn for the amount, which motion carried by a majority of all the members of the council. No representative of the plaintiff was present at this meeting. At a later meeting the following proceedings were had: "Moved by councilman Hess, and seconded by councilman Fochtman, that the proposition of the contractors, namely, that a credit of $300 from the amount of the former estimate of the engineer be accepted, and that warrant be drawn on the water-works fund in the Omaha National Bank for $6,659.11, amount of final estimate. On this motion councilman Fochtman voted, 'Yea,' and councilman Hess, 'Yea,' and councilman Koch, 'No,' and the mayor declared the motion carried." Afterwards the city clerk drew a warrant in accordance with this motion, and the mayor refused to sign it. This action is brought to compel him to do so.

An alternative writ of mandamus was issued. In his answer to the alternative writ, the respondent pleads, in substance, that the order for the payment of the money represented by the warrant was not adopted or concurred in by a majority of all the members elected to the city council of said city, as provided by law, and respondent had no legal right to sign the same; that the warrant was in excess of the amount due under the contract; that a former order was made for $5,099.11, and this order was not repealed, amended, or in any way changed by the city council, yet thereafter, without a majority of all the members concurring in the same, the warrant which the respondent refused to sign was ordered. For a sixth defense the respondent pleaded the non-completion of the contract, and that it was not accepted by the city council of Cozad or its constructing engineer; that there was included in the warrant large sums of money for work and material for which no order in writing had been given;

and that before the warrant was presented for his signature he became aware that the contract was not fulfilled, setting forth in full a number of specifications in which the work did not comply therewith, and pleading that on account of such failure damages and costs would accrue to the city. The answer further contained a general denial to the allegations in the writ. The relator filed a general demurrer to the sixth paragraph to the answer, which was sustained. The case then proceeded to trial, and the court issued a peremptory writ commanding the respondent to sign the warrant. This order was superseded, and respondent appeals.

The first question which it is necessary to consider is whether the order directing the warrant to issue was legally made. In *State v. Gray,* 23 Neb. 365, the facts were that, in a city having four councilmen, upon the passage of an ordinance to redistrict the wards of the city, upon the calling of the "Yeas" and "Nays," two of the councilmen failed to vote, the mayor voted, "Yea," and declared the ordinance passed. The charter of the city provided that, "to pass or adopt any by-law or ordinance * * * a concurrence of a majority of the whole number of members elected to the council, or trustees shall be required." It will be observed that the language is substantially identical with that of section 79, art. I, ch. 14, Comp. St. 1911, governing the question in this case. This section provides: "All ordinances and resolutions, or orders for the appropriation or payment of money, shall require for their passage or adoption the concurrence of a majority of all members elected to the council or board of trustees." The court held that the "vote of two members of a council consisting of four members was not sufficient, and that the vote of the mayor added nothing to the significance of the proceeding." It seems to us that the same rule applies with reference to a vote of the council ordering the payment of money, and that the proceeding whereby the warrant was ordered to be issued by two members of a council of four was not in accordance with the statute. The relator insists that, since no motion for a new trial

was filed in the district court, nothing can be reviewed here except the question as to whether the pleadings support the judgment, and that the question of whether the demurrer to the sixth defense in the answer was properly sustained cannot now be considered. We think the fundamental question is whether the allegations of the petition, which set forth in full the proceedings of the council relating to the allowance of the claims and ordering the isssuance of the warrant, state a cause of action in behalf of the relator. The relator contends that the words, "or orders for the payment of money" in section 79, *supra*, "can have no reference to paying a debt already contracted, and from a fund already provided, but rather has reference to the payment of money on hand, to a purpose then for the first time considered by the council." He frankly concedes, "If it is the law that a majority of a quorum may not allow claims, then this claim was not properly allowed." He also argues that the money realized from the sale of bonds issued upon a vote of the people of the city for the purpose of supplying water-works constituted an appropriation as fully as if the same had been made by the city council. We have no quarrel with the latter contention, and have so declared. *Champion Iron Co. v. City of South Omaha*, 93 Neb. 56.

The relator also quotes section 81, providing that an order for the payment of claims shall specify the particular fund or appropriation out of which they are payable; section 86, providing for an annual appropriation bill; and also section 88, providing that the mayor and council "shall have no power to appropriate, issue, or draw any order or warrant on the treasurer for money, unless the same has been appropriated or ordered by ordinance, or the claim for the payment of which such order or warrant is issued, has been allowed according to the provisions of this chapter;" and argues that the mayor and council have the power to issue and draw an order or warrant on the treasurer for money if the same has been appropriated or ordered by ordinance, or where the claim has been allowed according to the provisions of the charter, and that in

this case the mayor and council, independent of section 79 (since the money had already been appropriated), had the power by a majority of a legal quorum to draw the warrant in question. We do not take this view. These sections of the statute must be considered in connection with section 79, and, since there is no difficulty in giving effect to all they cannot be held to be in conflict. *Fournier v. Mayor*, 94 Mich. 463. Moreover, the city council is a body created by statute with statutory powers which must be exercised in the prescribed manner. "Where the statute prescribes specifically how an act shall be performed by a statutory board, or prohibits its performance under certain conditions by such board, an act in direct violation thereof is absolutely void. *McNay v. Town* of *Lowell*, 41 Ind. App. 627, and cases cited." *Campbell v. Brackett*, 45 Ind App. 293. The issuance of the warrant being unauthorized by the required majority of the council, the alternative writ does not state a cause of action.

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

REVERSED AND DISMISSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

ANNA SCHMIDT, APPELLEE, v. WILLIAMSBURGH CITY FIRE INSURANCE COMPANY, APPELLANT.

FILED JANUARY 7, 1914. No. 17,472.

1. **Trial:** DIRECTING VERDICT. Unless plaintiff and defendant at the close of the evidence each request a directed verdict in his favor, the district court is not authorized to determine disputed questions of fact. If such a request is made by one party alone, it is only when the testimony on behalf of the other party will not support his cause of action or his defense that the court may direct the jury to render a verdict in favor of the moving party.

2. **Insurance:** VACATION OF PREMISES: NOTICE. Notice and knowledge of the existence of a vacancy in the insured premises, or of the occurrence of a fire in the same, to such an extent as to make

them uninhabitable, communicated to the local agent of the defendant, authorized to issue policies and transact the usual business of a recording agency, is the knowledge of the insurance company.

3. ———: FORFEITURE: RETURN OF PREMIUM. Where a policy provides that the policy "shall be void if the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days," and also provides: "If this policy shall * * * become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate"—the company is not bound to return any unearned premium, unless the policy is surrendered.

4. ———: ———: WAIVER. Where, under such a policy, the insurer has no notice or knowledge of the breach of a condition in the policy making it void in case the premises are vacant or unoccupied for more than ten days, and did not learn until after the premises were totally destroyed that the building had been so damaged by previous fires as to be uninhabitable and had so remained for several weeks before the loss occurred, the fact that the adjuster for the company, while declaring that the policy was void and that the insurer was not liable, offered a larger sum than the unearned premium for a surrender of the policy does not of itself constitute a waiver of the forfeiture.

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

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Albert S. Ritchie and *Charles L. Fritscher, contra.*

LETTON, J.

Action to recover upon an insurance policy for the total destruction of a house in South Omaha on April 17, 1910. The defense relied upon is that the premises were vacant or unoccupied at the time of the fire, and had been so for more than ten days, and a provision in the contract that the policy "shall be void if the building herein described, whether intended for occupancy by owner or tenant, be

or become vacant or unoccupied and so remain for ten days."

The reply pleads that the property was partially destroyed by fire within 30 days before April 17, 1910, avers that this rendered the premises uninhabitable; that defendant had the option within 30 days to rebuild or to repair; that it had knowledge of the fire of March 20, 1910, and had not on April 17 exercised the option. It further pleads that defendant had not declared a forfeiture of the policy on account of the vacancy, nor returned or tendered the unearned premiums. It also pleads an offer of $150 for the surrender of the policy and in payment of the loss before suit, and that by this offer defendant waived any breach of the conditions of the policy.

The insured property was occupied as a rooming-house. A fire occurred on March 20, which damaged the property to some extent. On March 30 another fire occurred. In extinguishing these fires the contents of the building were materially damaged, and the occupants moved out, leaving one or two old mattresses and a portion of a bedstead in the basement and lower floor. The testimony on behalf of plaintiff is to the effect that the local agent who wrote the policy was notified of the loss by the fire of March 20 within a day or two after it happened, and that he said he "would look after the matter." The agent, however, unequivocally denies that he had any knowledge or notice of this fire. Nothing was done by the insurance company with respect to repairs, and the plaintiff's agents, Gallagher & Nelson, procured repairs to be made, which were finished on the 16th of April. Proofs of loss were sent in after the fire of April 17, and soon afterwards Mr. Wilken, the adjuster for the defendant, went to the office of Gallagher & Nelson. Wilken testifies that he then told Gallagher & Nelson the building had been vacant 19 days or more; that the policy was void, and the company not liable thereon. The policy contained a mortgage clause, "loss or damage, if any, payable to the Lion Bond & Surety Company as its interest may appear."

Defendant objected all through the trial that plaintiff was not the real party in interest. The petition alleged that the surety company had given its consent to the action being brought in the plaintiff's name, and the president of that company testified to the same effect. This we think was sufficient to show authority to bring the suit. At the close of plaintiff's case, and after the testimony of defendant had been received, defendant moved the court for a directed verdict: First, because from the pleadings judgment must be for the defendant; second, because the action is not brought by the real party in interest; third, because the vacancy condition of the policy was violated and the policy was not in force on April 17, 1910. The court overruled this motion. Apparently upon its own motion the court then instructed the jury, in substance, that the defendant was not in a condition to claim that the policy had become without force until it had returned or tendered the return of the unearned premium, and therefore the insurance contract was still in force, and recognized at all times afterward as being in force, between the parties, and further directed it to return a verdict in favor of plaintiff for $844.38, being the face of the policy with interest.

The plaintiff argues that the judgment of the district court was right for two reasons: First, that, where one party moves for a directed verdict, the district court is thereby invited to settle and determine any questions of fact in the case necessary to a determination of the motion, relying upon certain cases in the state of New York; second, that, having determined that the company had notice of the fire of March 20 and failed to exercise its option to repair, it could not take advantage of the fact that the house was vacant and uninhabited by reason of the damage caused by the former fire. In the latter contention she relies upon the opinion in the case of *Lancashire Ins. Co. v. Bush,* 60 Neb. 116. The principle of that case cannot apply, unless the court was entitled to decide as a matter of fact that proper notice was given to the company on the occurrence of the former fire, so that

it might exercise the option of either paying the amount of the loss or making the repairs itself, and that such a fire rendered the building untenantable. We have decided that, where plaintiff and defendant each requests the court to direct a verdict, this amounts to a submission of the case to the court upon the questions of both law and fact. *Davison v. Land,* 89 Neb. 58; *Adler v. Royal Neighbors of America,* 90 Neb. 56. We have never held that a request for a directed verdict by one party alone has the effect of submitting all questions of fact in the case to the court for its determination. On the contrary, we have uniformly held that, "if there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. *And the converse of this is also true.*" *Grant v. Cropsey,* 8 Neb. 205. *Hunt v. State Ins. Co.,* 66 Neb. 125, and cases cited. And, also, that "this court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish." *Preston v. Stover,* 70 Neb. 632. We prefer to adhere to the rule adopted in this state rather than to announce a new one. It seems clear that it was the province of the jury to determine whether the testimony of the witness Dickey that he notified Mr. Gibson, the local agent who issued the policy, of the fire of March 20 established the giving of the notice, or whether the absolute denial by Gibson of the giving of any such notice proved that no notice was ever given. Unless, therefore, the case is determined upon other grounds we think this question should have been submitted to the jury. Of course this error would not be prejudicial if we should take the view the learned district court did that, since no offer was made to return the unearned premium, the policy was still in force at the time of the fire, although the company had no notice or knowledge that the property was vacant.

Plaintiff argues that it was the duty of the company, in order to avoid liability, to declare a forfeiture, and that

a failure to do this waived the condition. Plaintiff relies upon the cases of *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, *Hunt v. State Ins. Co., supra,* and *Farmers & Merchants Ins. Co. v. Bodge,* 76 Neb. 31. In the *Hunt* case "the evidence tended to show that the local recording agent of the defendant had full notice and knowledge of the change of occupants, and of the vacancy at the time of such change, long prior to the loss, and that after he had such notice the defendant treated the policy as in force by indorsing a mortgage clause thereon. With respect to the alleged vacancy at the time of the loss, the evidence showed that the tenant in possession of the premises had been ordered to move, and had moved out the day of the loss; the fire occurring at night not many hours thereafter." The court held that under these circumstances notice to the local agent was notice to the insurer, and that the indorsement of the mortgage clause upon the policy with such notice was inconsistent with an intention to insist upon a forfeiture.

In the *Kuhlman* case, the facts were that the fire occurred on April 11, and on April 13 the secretary of the insurance company sent a letter to Mrs. Kuhlman, inclosing a draft for the return premium under the policy, reciting: "Said policy being this day canceled on our books, and our liability terminating thereunder from and after this date." This letter being written after the fire, the court held "it was written for the express purpose of terminating the contract, and on the assumption that the contract was then in full force and effect," and sustained the recovery. Of course, if the policy was not canceled until two days after the fire, it was in force on that day, and was so recognized by the company in this correspondence.

In the *Bodge* case, the insurance company became aware of the vacancy after the loss; it thereupon returned the unearned premium and canceled the policy. The court first held (76 Neb. 31) that under a vacancy provision the policy does not become absolutely void upon a violation of the conditions, unless the insurer chooses to take

advantage of the forfeiture, and where after loss the insurer, with information of the loss, as well as breach of the conditions, cancels the policy and retains the premium, it will be held to be a waiver of the breach. On rehearing (76 Neb. 35), however, this opinion was vacated, and it was held: "The cancelation of a policy of insurance after loss and notice of facts occurring before loss constituting a forfeiture, coupled with the return of unearned premium from date of forfeiture, does not constitute a waiver of the forfeiture." In that case, as in this, at the time the policy was issued the building covered by the insurance was occupied by a tenant. It later became vacant, and was vacant at the time of the loss. The court cited *Sexton v. Hawkeye Ins. Co.*, 69 Ia. 99, and *Republic County Mutual Fire Ins. Co. v. Johnson*, 69 Kan. 146, 76 Pac. 419.

In *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380, also relied upon by plaintiff, the insured violated the policy by procuring additional insurance without the knowledge or consent of the insurer. The court held that the insurer was entitled on discovering the violation to cancel the policy, the cancelation to take effect from and after the date of the violation. "But the insurance company did not do this. By its own act, it canceled the policy on the 24th of November, * * * the day after the date of the loss." The facts, it will be seen, are substantially the same as in the *Kuhlman* case, and, hence, the company was properly held to have waived the conditions. We hold, therefore, that any insurance company, if without knowledge of the breach of a condition against vacancies until after a fire has occurred, may, if it has not waived the forfeiture, insist upon the same.

Plaintiff's argument that it was never intended the policy should become void by the premises standing vacant for a reasonable time for change of tenants, we think is not tenable. The policy does not show the property was to be occupied by a tenant, and it is provided that the policy shall be void, whether intended for occupancy by the owner or tenant, if remaining vacant or unoccupied for

ten days. That empty dwellings are ordinarily extra-hazardous, to use an insurance term, as compared with those occupied either by owners or tenants is a matter of common knowledge, and conditions avoiding the policy if such vacancy continues for more than ten days may be enforced at the election of the insurer. The clause relating to the tenancy was evidently inserted to cover the very point contended for by the plaintiff. Moreover, the vacancy was not caused by a change of tenants, but by the premises being out of repair.

As to the contention that the company recognized the policy as being in force by failing to return the unearned premium: We held in *Farmers Mutual Ins. Co. v. Home Fire Ins. Co.*, 54 Neb. 740, in a case where the insured had violated the provisions of the policy by procuring additional insurance without the knowledge or consent of the insurer, and the action was brought to recover unearned premiums for the unexpired term of the policy, that the insurance company had the right to treat the policy as void when it ascertained the breach, "but Penner's violation of his insurance contract did not invest him with a right of action against the home company to recover the premium which he had paid the company therefor, or any part of that premium. The contract of insurance did not provide that, if the insurer declared it to be at an end, because of Penner's violation of its provisions in procuring additional insurance on the insured property without the consent of the home company, it would repay Penner the unearned premium; nor is this the meaning of the statute constructively incorporated into and made a part of the policy."

Perhaps as clear a statement of the legal principles as we have found is in the case of *Pearlstine v. Westchester Fire Ins. Co.*, 70 S. Car. 75, 49 S. E. 4, in which that court say: "Where, however, the premium is paid, and in consideration of it the company contemporaneously issues its policy, which is a contract to insure on certain conditions therein mentioned, and the insured violates those conditions in a material particular without the

knowledge of the insurer, in case of loss the insurer is not bound to return the consideration of the policy before standing upon its terms. The consideration has been paid, not for an absolute promise, but for a promise of the insurer to hold itself liable for loss on certain conditions. The company does not fail *in its* promise by insisting on its conditions; not having broken its contract, it has a right to retain the consideration. The insured has received all he contracted and paid for—conditional insurance—and he has no right to demand a return of the price paid from the insurer, on pain of liability for unconditional insurance. After the loss occurs, as to the property destroyed, the policy is no longer current, but has become matured by reason of the fire, and no question of good faith is involved in retaining the premium, because the rights of the parties are then fixed." The following cases are in accordance with the principles announced. *Phœnix Ins. Co. v. Stevenson,* 78 Ky. 150; *Robinson v. Aetna Fire Ins. Co.,* 135 Ala. 650, 34 So. 18; *Smith v. Continental Ins. Co.,* 6 Dak. 433; *Houdeck v. Merchants & Bankers Ins. Co.,* 102 Ia. 303; *Harris & Cole Bros. v. Royal Canadian Ins. Co.,* 53 Ia. 236; *Todd Co. v. Farmers Mutual Fire Ins. Co.,* 137 Mich. 188; *Alabama State Mutual Assurance Co. v. Long Clothing & Shoe Co.,* 123 Ala. 667, 26 So. 655; *Shuggart v. Lycoming Fire Ins. Co.,* 55 Cal. 408; 2 Clement, Fire Insurance, rule 52, p. 431.

Brashears v. Perry County Farmers Protective Ins. Co., 98 N. E. (Ind. App.) 889, cited by plaintiff, relates to a farmers' mutual company. The vacancy condition in the policy did not by its terms render the policy absolutely void, and the ruling of the court seems to be based upon the existence of a by-law requiring affirmative notice of the cancelation to be given by the insurer. We think it is not an authority in opposition to the above cases.

Mr. Gallagher testifies that Mr. Wilken, the plaintiff's adjuster, came to his office, and said that he had viewed the property, and made an offer of $150; "that he would give $150 if we would surrender the policy to him. I told him we would not consider it; that the policy was not

then in our possession; held by the Lion Bonding Company." Mr. Wilken testifies with reference to this conversation with Gallagher and Nelson: "I told them that I had investigated the loss, and had found that the property was vacant at the time the fire occurred, and had been for something over 19 days, and that the company was not liable, but that it would probably cost—I don't know exactly what we figured it—from $125 to $250 to have it determined by the courts, and that I preferred to pay it to the insured." We are unable to see that this conversation amounted to a waiver of the condition of the policy, especially considering the fact that the policy itself contains the provision, "if this policy shall * * * become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate."

A similar contention was made in the case of *Norris v. Hartford Fire Ins. Co.*, 55 S. Car. 450, 33 S. E. 566. That court said: "Nor can we ascribe any potency to the position that defendant is estopped from raising its defense because no part of premium was restored. It is time enough to do this when policy is returned for cancelation; such is the language of the policy itself."

It is contended that the proofs of loss informed the company before it sent the adjuster that the premises were "not occupied pending change of tenants." This is a fact, but the proofs of loss failed to show that the premises had been unoccupied since shortly after the fire of March 20 until April 17, and less than ten days' vacancy without the knowledge of the company would not be a breach of the conditions of the policy. We think no waiver could be based upon knowledge of this statement in the proofs.

We think the case should have been sent to the jury to pass upon the question of fact presented as to whether notice of the former fire was given to the agent of the defendant. We are also of opinion that the district court erred in instructing the jury as a matter of law that "the insurance contract * * * was still in force, and rec-

ognized at all times afterward as being in force, between the parties," and in directing it to return a verdict for the plaintiff.

The judgment of the district court is

REVERSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

CITIZENS STATE BANK OF PETERSBURG, APPELLEE, V. S. D. WORDEN, APPELLANT.

FILED JANUARY 7, 1914. No. 17,426.

1. **Banks and Banking:** DEPOSIT: PRESUMPTION. Where the nature of a bank deposit is not shown, the law will presume that it is a general one.

2. ———: GENERAL DEPOSIT: DEBTOR AND CREDITOR. A general deposit creates between the bank and the depositor the relation of debtor and creditor.

3. ———: ———: TITLE. Under a general deposit the title to the identical money deposited passes to the bank.

4. ———: ———: OBLIGATION OF BANK. A bank is not required to return identical funds deposited subject to check, but discharges its obligation as debtor by returning the equivalent in money upon demand.

5. ———: ———: ———: DEMAND. For non-payment of a general deposit, a solvent bank is not in default, or guilty of conversion, or justly required to defend a civil action, until a demand for the deposit has been made, or waived, or shown to be unnecessary.

6. ———: ———: ACTION: SET-OFF: PLEADING. In an answer pleading a set-off for bank deposits, a general allegation that the bank converted the deposits to its own use must yield to specific allegations showing that a demand was necessary, but not made.

7. **Set-Off.** "A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." *Simpson v. Jennings*, 15 Neb. 671.

8. **Pleading**: SET-OFF. In pleading a set-off in an action on a note, defendant should conform to the rules by which the sufficiency of plaintiff's petition would be tested, if assailed by demurrer.

9. ———: ———: GENERAL DENIAL: WAIVER. In an action on a promissory note, a general denial by plaintiff in reply to a set-off pleaded in the answer does not waive the objection that defendant's plea fails to state facts sufficient to constitute a cause of action.

10. ———: SUFFICIENCY: WAIVER. The objection that a set-off pleaded in an answer does not state facts sufficient to constitute a cause of action may be raised at any stage in the proceeding.

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

H. C. Vail, F. A. Doten and *F. D. Williams,* for appellant.

M. B. Foster and *A. E. Garten, contra.*

ROSE, J.

This is an action to recover a balance of $1,678.16 on five promissory notes. Defendant is maker and the Citizens State Bank of Petersburg, plaintiff, is payee. The suit was commenced February 4, 1911. An amended answer was filed June 5, 1911. It contains a general denial, alleges that defendant was a depositor of plaintiff with an unclosed bank account, and demands judgment for deposits and for conversion of deposits. The reply was a general denial. The case was tried to a jury. The execution and delivery of the notes were proved without contradiction. A demurrer to evidence in support of the cross-demands of defendant was interposed, on the ground that his allegations do not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and directed a verdict in favor of plaintiff for $1,754.94. Defendant appeals.

Did the trial court err in sustaining the demurrer? Defendant's position below and on appeal is indicated by the following extract from his brief: "The ruling of the

court was made for the reason that the amended answer and cross-demand of defendant did not plead a demand made by him upon plaintiff for the amount claimed before the filing of the petition. Defendant concedes the general rule to be that, before an action can be maintained to recover amount of deposits, a demand is a condition precedent to a recovery; but the general rule cannot be applied under the issues of the case at bar, for the reason that defendant pleaded that plaintiff converted to its own use certain amounts of money deposited in plaintiff's bank, and prayed for a judgment against plaintiff for the amounts alleged to have been wrongfully converted to its own use, and plaintiff filed a reply denying all liability. An issuable fact was presented for adjudication, and demand became unnecessary. If plaintiff's reply had admitted receiving the amounts of the notes set forth in defendant's answer, and that it was indebted to defendant for the same, then, in the absence of a demand having been alleged and proved by defendant, the defendant could not maintain his cross-demand against plaintiff, and the ruling of the court would have been correct; but it is absurd to say that plaintiff could come into court and deny owing defendant anything, and at the same time non-suit defendant for failing to allege and prove a demand made on plaintiff prior to filing of the petition."

Where the nature of a bank deposit is not shown, the law will presume that it is a general one. *Nichols v. State,* 46 Neb. 715. A general deposit creates between the bank and the depositor the relation of debtor and creditor. *State v. Bartley,* 39 Neb. 353; *Nehawka Bank v. Ingersoll,* 2 Neb. (Unof.) 617. Under a general deposit, the title to the identical money deposited passes to the bank. *Seward County v. Cattle,* 14 Neb. 144. A bank is not required to return identical funds deposited subject to check, but discharges its obligation as debtor by returning the equivalent in money upon demand. *Union Savings Bank & Trust Co. v. Indianapolis Lounge Co.,* 20 Ind. App. 325. For non-payment of a general deposit, a solvent bank is not in default, or guilty of conversion, or justly required

to defend a civil action, until a demand for the deposit has been made, or waived, or shown to be unnecessary. *Citizens Bank v. Fromholz*, 64 Neb. 284; *Sharp v. Citizens Bank*, 70 Neb. 758; *De Lucia v. Cellilo*, 123 N. Y. Supp. 229; *Wasserstrom v. Public Bank*, 123 N. Y. Supp. 55; *Tobias v. Morris & Co.*, 126 Ala. 535, 28 So. 517. In *Koelzer v. First Nat. Bank*, 125 Wis. 595, 2 L. R. A. n. s. 571, the court said: "In case of an ordinary account it is the legal right of the creditor to have his debtor seek him out and pay him. There is no such obligation as to a bank creditor. The general custom in banking business is to pay on account of such indebtedness only upon a proper demand therefor by check or its equivalent at the banking house during ordinary banking hours. One who deposits money for his credit in such an account, without any special understanding to the contrary, is presumed to accept the undertaking of the bank to pay according to the general usage in such cases, which is known to all men. There being such a general custom, without some special stipulation to the contrary, the contract between the bank and its general depositors, by necessary implication, accords therewith. So a breach of the bank's obligation to pay upon a proper demand being made, or some act on the part of the bank dispensing with such demand, is essential to a cause of action to recover of it."

Standing alone, the general allegation of conversion upon which defendant relies might be sufficient in pleading a tort, as was held in *Sanford v. Jensen*, 49 Neb. 766; but, in an answer pleading a set-off for deposits in a suit on a note, a general allegation that the bank converted the deposits to its own use must yield to specific allegations showing a demand was necessary, but not made.

The only demand pleaded was made "prior to the time of the filing of the amended answer." There is no plea that it had been made when plaintiff brought this suit. Under section 104 of the code, providing that "a set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of a court," the rule is: "A

claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." *Simpson v. Jennings,* 15 Neb. 671; *Tessier v. Englehart & Co.,* 18 Neb. 167; *Shabata v. Johnston,* 53 Neb. 12.

In pleading a set-off in an action on a note, defendant should conform to the rules by which the sufficiency of plaintiff's petition would be tested, if assailed by demurrer. *Peck v. Trumbull,* 12 Neb. 133; *Dale v. Hunneman,* 12 Neb. 221; Bliss, Code Pleading (3d ed.) sec. 367. The set-off pleaded does not conform to the principle stated. It is not shown that defendant, when this suit was commenced, could have maintained against plaintiff an action for deposits. The law has been stated in these words: "The agreement of the bank with the depositor, as distinct and valid as if written and executed under the seal of each of the parties, *is only to pay upon demand.*" Morse, Banks and Banking (4th ed.), sec. 322; *Missouri P. R. Co. v. Continental Nat. Bank,* 212 Mo. 505, 17 L. R. A. n. s. 994, 111 S. W. 574. The debt of a solvent bank to a depositor for general deposits is not due until a demand has been made. That is the contract implied by their relation, and a suit for such deposits, like an action on an unmatured note, cannot be maintained until the debt is due. A proper demand before this suit was commenced, which is a part of the set-off, is not pleaded.

Defendant, however, insists that plaintiff waived demand by the general denial in its reply. This position is untenable. Under the code an answer containing a general denial, but not challenging the petition on the ground that it fails to state facts sufficient to constitute a cause of action, does not waive that objection. Code, sec. 96. On principle the same rule applies to an answer containing an affirmative plea in the nature of a set-off, and such an objection may be made by demurrer to evidence at any stage of the proceeding. *Brugman v. Burr,* 30 Neb. 406; *Curtis & Co. v. Cutler,* 7 Neb. 315; *Ball v.*

LaClair, 17 Neb. 39; *Gordon v. City of Omaha*, 77 Neb. 556.

Ogden v. Warren, 36 Neb. 715, holding that, "where a defendant lawfully in the possession of property denies the title and right of possession of the owners, no demand is necessary," does not apply to a case like the present, where the parties have provided by contract that the debt shall only become due upon demand.

No error has been found in the record, and the judgment is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

FARMERS & MERCHANTS NATIONAL BANK OF FREMONT, APPELLEE, V. S. D. WORDEN, APPELLANT.

FILED JANUARY 7, 1914. No. 17,424.

Banks and Banking: GENERAL DEPOSIT: PLEADING: DEMAND. In an action by a bank on a promissory note, an answer pleading a set-off for general deposits does not state facts sufficient to constitute a cause of action in favor of defendant, without alleging that, at the time the suit was commenced, a demand for the deposits had been made, or waived, or shown to be unnecessary. *Citizens State Bank v. Worden, ante*, p. 53.

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

H. C. Vail, F. A. Doten and *F. D. Williams*, for appellant.

E. F. Gray, A. E. Garten and *M. B. Foster, contra.*

ROSE, J.

This is a suit on promissory note for $1,184.61, dated March 3, 1910, payable 60 days after date, and bearing interest at the rate of 8 per cent. per annum. S. D. Wor-

den, maker, and J. J. Carey, payee, are defendants. Before maturity the note was assigned to the Farmers & Merchants National Bank of Fremont, plaintiff. Interest was paid to September 24, 1910, and, in addition, there was a payment of $90.43 on the principal. Carey made default. An amended answer by Worden contained a general denial and a set-off for bank deposits. The reply was a general denial. The parties waived a jury, and the case was tried to the court. The execution and delivery of the note in suit and the assignment to plaintiff were proved without contradiction. A demurrer by plaintiff to evidence in support of the cross-demand of Worden was interposed, on the ground that the allegations relating to the set-off do not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer. Worden refused to plead further, and judgment was rendered against both of the defendants for $1,170.63. Worden appeals.

The decision is controlled by the principles announced in *Citizens State Bank v. Worden, ante,* p. 53, and, for the reasons stated in the opinion therein, the judgment below is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

FARMERS NATIONAL BANK OF MADISON, APPELLEE, V. S. D. WORDEN, APPELLANT.

FILED JANUARY 7, 1914. No. 17,425.

Banks and Banking: GENERAL DEPOSIT: PLEADING: DEMAND. In an action by a bank on a promissory note, an answer pleading a set-off for bank deposits does not state facts sufficient to constitute a cause of action in favor of defendant, without alleging that, at time the suit was commenced, a demand for the deposits had been made, or waived, or shown to be unnecessary. *Citizens State Bank v. Worden,* p. 53.

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

H. C. Vail, F. A. Doten and *F. D. Williams,* for appellant.

M. B. Foster and A. E. Garten, contra.

ROSE, J.

This is a suit on three promissory notes. S. D. Worden, maker, and J. J. Carey, payee, are defendants. Plaintiff is Carey's assignee. In his answer Worden pleaded a set-off for bank deposits, but failed to allege facts showing that he had made a proper demand. From a judgment in favor of plaintiff for $3,920.29, Worden has appealed.

The decision is controlled by the principles announced in *Citizens State Bank v. Worden, ante,* p. 53, and, for the reasons stated in the opinion therein, the judgment below is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

PORT HURON MACHINERY COMPANY, APPELLEE, V. LEWIS J. LARSON ET AL., APPELLANTS.

FILED JANUARY 7, 1914. No. 17,440.

Fraudulent Conveyances: CREDITORS' SUIT. Real estate fraudulently transferred to prevent the collection of the grantor's debts, with full knowledge of the grantee, may be subjected to the payment of a judgment subsequently rendered against the grantor upon a claim existing at the time of the fraudulent conveyance.

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

Fred H. Free and *K. W. McDonald,* for appellants.

A. J. Sawyer, H. F. Barnhart and *Morning & Ledwith, contra.*

ROSE, J.

This is a creditor's bill. In the district court for Lancaster county plaintiff recovered a judgment against Lewis J. Larson for $862.96, and filed a transcript thereof in the district court for Pierce county, where an execution was issued and returned unsatisfied. The debtor, through a devise from his father, had previously acquired a one-fifth interest in a number of tracts of land in Pierce county. This interest, on the face of a quitclaim deed, was transferred to Weaver L. Larson, a brother of grantor, for the expressed consideration of $350, before plaintiff recovered judgment, but after the debt had been incurred. The present suit was brought in the district court for Pierce county to subject the property described in the quitclaim deed to the payment of plaintiff's judgment, on the ground that the conveyance was made for the purpose of defrauding plaintiff and to hinder and delay it in collecting its claim. All of the defendants made default, except the grantee named in the alleged fraudulent quitclaim deed, who answered that he purchased the property for value, in good faith, without knowledge of his brother's indebtedness to plaintiff. On a trial of the issues, the district court found that the quitclaim deed was made with the intent to hinder, delay and defraud plaintiff, while grantee had full knowledge of the facts. From a decree subjecting the property in controversy to the payment of plaintiff's judgment, grantee has appealed.

The sufficiency of the evidence to justify the relief granted is the only question presented. On the issue of fact, the preponderance of the evidence is clearly in favor of plaintiff. Grantor was insolvent when he made the deed, and his intention to prevent the collection of plaintiff's claim is fairly established by the proofs. The proper finding from all the circumstances is that grantee knew of his brother's intention to defraud plaintiff, and accepted the deed with full knowledge of the facts, if he did not participate actively in the fraud.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ACME HARVESTING MACHINE COMPANY, APPELLANT, V. A. E. BRIGHAM, APPELLEE.

FILED JANUARY 7, 1914. No. 17,461.

Appeal: INSTRUCTIONS: EXCEPTIONS. "Instructions will not be reviewed where no exceptions were taken to them by the party complaining at the time the charge was given to the jury." *State v. School District*, 55 Neb. 317.

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

J. R. Dean, D. P. Stough and *J. B. Dunn*, for appellant.

Sullivan & Squires and *R. E. Brega, contra.*

FAWCETT, J.

Plaintiff brought this action in the district court for Custer county upon a promissory note. From a verdict and judgment in favor of defendant, plaintiff appeals.

Counsel for plaintiff state: "Appellant presents but one question for review. It is respectfully submitted that the trial court erred in giving instruction No. 5 of its own motion (Trans. p. 10), and which was duly excepted to at the time (Trans. p. 13)." Page 10 of the transcript referred to shows the instruction as given by the court. Page 13 shows paragraph 17 of the motion for a new trial, which recites: "The court erred in giving instruction No. 5 given of its own motion duly excepted to by the plaintiff at the time." Counsel for defendant contend that plaintiff cannot now raise an objection to instruction No. 5, for the reason that no exception was taken to this instruction at the time it was given, and no exception thereto was allowed by the court, and that the record will so show. An examination of the record sustains defendant's contention. So far as the record shows, no objection was made, or exception noted, to instruction No. 5 until three days after the trial, when it was made in the motion for

a new trial. Under the settled rule in this court, the instruction cannot now be reviewed. This has been the rule ever since *Brown v. Hurst*, 3 Neb. 353, where it was held: "Exceptions to charge must be taken at the time the charge is given." In *Smith v. Kennard*, 54 Neb. 523, no exceptions were taken to the instructions given and refused by the court at the time of the trial, but exceptions were filed three days later. We held that it was too late.

No error having been assigned which we are at liberty to consider, the judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

STATE, EX REL. CLAUDE S. KELLEY, APPELLEE, V. WILLIAM H. FERGUSON ET AL., APPELLANTS.

FILED JANUARY 7, 1914. No. 18,128.

1. **Mandamus:** PETITION: DEMURRER. The rule announced in *State v. Chicago, St. P., M. & O. R. Co.*, 19 Neb. 476, that, "Where it is sought to test the sufficiency of a petition for a mandamus, the proper course is to demur to the petition upon the ground that the facts stated therein do not entitle the relator to the relief sought," reaffirmed, and the criticism of this practice announced in *State v. Home Street R. Co.*, 43 Neb. 830, is withdrawn.

2. **Schools:** SELECTION OF STUDIES. The right of a parent to make a reasonable selection from the prescribed course of studies which shall be carried by his child in the free public schools of the state is not limited to any particular school, nor to any particular grade in any of such public schools.

3. ———: AUTHORITY OF OFFICERS. The public schools of the state are entitled to the earnest and conscientious support of every citizen. To that end the school authorities should be upheld in their control and regulation of our school system; but their power and authority should not be held to be unlimited. They are required to exercise their authority over and their desire to further the best interests of their scholars, with a due regard to the natural and legal rights of the parents of such children.

4. **Mandamus:** SCHOOLS: SELECTION OF STUDIES. And when a parent makes a reasonable selection from the course of studies which

has been prescribed by the school authorities and requests that his child may be excused from taking one of such studies, the request should be granted. If the request be denied and the child is expelled or suspended for a refusal to continue such study, mandamus will lie to compel reinstatement.

5. *State, ex rel. Sheibley, v. School District*, 31 Neb. 552, reexamined and adhered to.

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

C. S. Allen, for appellants.

Frank E. Edgerton, Ray J. Abbott, William B. Price and *C. S. Kelley, contra.*

FAWCETT, J.

From a judgment of the district court for Lancaster county, awarding relator a writ of mandamus requiring defendants to reinstate his daughter in the public school in the city of Lincoln, respondents appeal.

The petition alleges: That prior to December 17, 1912, plaintiff had instructed his daughter, Eunice Kelley, "not to go to the class in domestic science; that said class was conducted in a building more than a mile distant from the Saratoga school which she was attending, and that the time consumed by said class was almost a half day, thereby causing the said Eunice Kelley to fall behind in her other studies for lack of time; that the respondents wrongfully and unlawfully and against the protests of relator required said Eunice Kelley to take said course in domestic science, and on the 17th day of December, 1912, the respondents wrongfully, unlawfully, and without cause therefor dismissed said Eunice Kelley from said school, and refused and have ever since refused to allow her to attend school of said district, although since said time relator has several times made demand upon the said school board and its officers to reinstate her." The answer admits the formal allegations in the petition, and alleges: That in the course of study adopted by the school

district of Lincoln, which, it is alleged, is substantially the same as the courses of study in all other municipal school districts of the United States, there are eight grades below the high school; that Eunice Kelley is 12 years old, and is a sixth grade pupil attending the Saratoga school; that all subjects in the sixth grade are required subjects, and one of these is domestic science; that no pupils are excused from taking any subjects in said grade except for good cause; that no cause was shown and none existed for excusing the said Eunice from attending said class; that the demand of the relator was arbitrary, unreasonable, and without just basis; that respondents could not comply with such arbitrary and unreasonable demand without undermining and destroying the discipline of the schools; that industrial training is essential to the welfare of the public, and it is the function of the state to require courses to be given affording industrial training; that in the exercise of this function a course in domestic science was prescribed for the sixth grade in the schools of the district; that in requiring attendance in classes in which this subject was taught the board of education was acting within its powers, and it could not excuse any pupils from taking said course unless a good and sufficient reason for such excuse was shown. The court found the facts as alleged in the petition, and awarded the writ as prayed.

It is urged that the petition does not state a cause of action. The ground of the contention is that it does not state the age of the child. Respondents in their answer set out the age, and relator now contends that the defect in the petition was cured by the allegation in the answer; and that the settled rule that, where the sufficiency of the petition is not attacked until after judgment, all reasonable intendments should be indulged in support of the judgment, applies. Counsel for respondents admits the general rule in civil procedure, but contends that it is not the rule in mandamus, for the reason that the latter is an extraordinary remedy and special procedure is provided

by statute, that no pleadings are allowed except the application, the writ, and the answer, and cite *State v. Home Street R. Co.*, 43 Neb. 830, in support of the contention. In that case the first paragraph of the syllabus holds: "Parties to mandamus proceedings should pursue the practice established by the code of civil procedure. The practice of attacking the application for the writ by motion or demurrer is one which will not be encouraged." Notwithstanding that statement in the syllabus, the learned commissioner who wrote the opinion said (p. 834): "This court has, however, permitted cases to be finally heard in pursuance of a rule to show cause, on the application and return thereto, and, the parties having agreed to so proceed herein, we shall treat the motion and demurrer as if they were regular, merely remarking that the practice is not one to be encouraged, and that the irregular nature of the proceeding renders the application to the case of established rules of pleading somewhat difficult." No reference is made in the opinion to the former holdings of this court upon that point. In *Long v. State*, 17 Neb. 60, we said: "Where an alternative writ of mandamus fails to state facts sufficient to entitle the relator to the performance of the duty sought to be enforced, such defect may be taken advantage of by a demurrer, the same as in any other action, and the same right to answer, in case the demurrer is overruled, will exist in favor of a respondent as in any other proceeding." In *State v. Chicago, St. P., M. & O. R. Co.*, 19 Neb. 476, we held: "Where it is sought to test the sufficiency of a petition for a mandamus, the proper course is to demur to the petition upon the ground that the facts stated therein do not entitle the relator to the relief sought." In the opinion (p. 482) it is said that the proper practice in such case is not to move to quash the petition or affidavit upon which the writ is sought, "but to demur for some of the causes stated in the code. * * * Mandamus is not a prerogative writ in this state, but a remedy given to the citizen to enable him to assert his rights and obtain justice. * * * Hence, the ordinary rule of pleading, where there are no special

provisions of the statute to the contrary, apply to proceedings by mandamus." The right to demur in a mandamus case is also recognized in *State v. Spicer,* 36 Neb. 469, and in *State v. Love,* 89 Neb. 149. We think the question of the right to assail a defective petition for mandamus by demurrer has been too long recognized to admit of a contrary holding now.

The issue presented by the pleadings and decided by the district court is clean-cut and raises the single question: Can the parent of a child in a city graded school decide the question as to whether or not such child shall be required to carry any particular study which has been prescribed by the board of education; or does the power to make such decision rest entirely in such board? Or, to state it another way, has the parent a right to make a reasonable selection from the prescribed studies for his child to pursue, and, having done so, must this selection be respected by the board of education? If the parent has such right, the judgment in this case must be affirmed, for we do not think a case could be presented where a selection made by a parent would more clearly be a reasonable selection than the one attempted to be made in this case. The relator's child was a girl 12 years of age. She was in the sixth grade. The study which the relator directed her not to take was that of cooking, which is required under the subject of domestic science. The other studies which she was required to take and was taking were reading, spelling, arithmetic, geography, general lessons, drawing and writing. The testimony of the father is that at the time the disagreement arose the daughter was studying music, which required not less than two hours a day. If the relator desired to have his daughter study music, he had the unquestionable right to have her do so, and if he thought that the taking of lessons in music, in addition to the studies she was taking in school, as above set out, was all she was able to carry, then, if he had a right to make a selection at all, it must be conceded that it was reasonable for him to select the lesson in domestic science, which took substantially one-tenth of her entire school

time, as the lesson to be dropped, in order that she might continue her music. It is contended that this selection was not made by the relator in good faith, but was made because of the fact that the school authorities declined to permit his daughter, at the close of the cooking lesson at the Capitol school, to which the class were taken in a body by the teacher from the Saratoga school, to return to her home on the Seventeenth street car line, instead of requiring her to return with the entire class to the Saratoga school and to be there dismissed. We do not think this fact, even if it were the cause which finally impelled relator to make his attempted selection, is very material. The important question to the school board and to parents generally is that of the right of a parent to make a reasonable selection from the prescribed studies for his child to pursue.

The question is not a new one. It was considered and decided by this court in *State, ex rel. Sheibley, v. School District,* 31 Neb. 552. In that case the father expressed a desire to have his daughter study grammar instead of rhetoric. His wish was respected and the change made. Subsequently he objected to her studying grammar and demanded that she be excused from continuing the study. When asked what reason he had for not wanting his daughter to pursue the study, he informed the board "that said study was not taught in said school as he had been instructed when he went to school." That was the only reason he would offer for not wanting his daughter to pursue the study. Under his direction the daughter refused to pursue the study, and as a result of such refusal she was expelled. An original application for mandamus was made in this court and the writ awarded. The syllabus holds: "The school trustees of a high school have authority to classify and grade the scholars in the district and cause them to be taught in such departments as they may deem expedient; they may also prescribe the courses of study and text-books for the use of the school, and such reasonable rules and regulations as they may think needful. They may also require prompt attendance, respectful

deportment, and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed studies for his child to pursue, and this selection must be respected by the trustees, as the right of the parent in that regard is superior to that of the trustees and the teachers." In discussing the regulations referred to in the syllabus, Judge Maxwell in the opinion says (p. 555): "Such regulations are for the benefit of all and tend to promote a common interest and the efficiency of the school. Neither has a parent any right to require that the interests of other children shall be sacrificed for the interests of his children. Therefore he cannot insist that his child or children shall be placed in a particular class, when by so doing other pupils will be retarded in the advancement they would otherwise make; neither can he require that his children be taught branches different from those in the prescribed course of the school, or be allowed to use text-books different from those required by the trustees, nor will he be allowed to adopt methods of study for his children which interfere with methods adopted by the trustees, because, in order to secure efficiency in the school, it is necessary that the different classes work in harmony and co-operate together. A high school is designed for scholars who have passed through the primary grades and are supposed to be able to read, write, and spell correctly, and to be familiar with other branches which need not be noticed. Many, if not most, of the high schools of this state are in fact preparatory schools for the university, and the course of study determined with a regard to that object. The testimony tends to show that Anna Sheibley is about 15 years of age; that she is pursuing studies outside of those taught in the school which occupy a portion of her time. Now, who is to determine what studies she shall pursue in school; a teacher, who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child? The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child.

It may be apparent that all the prescribed course of studies is more than the strength of the child can undergo; or he may be desirous, as is frequently the case, that his child, while attending school, should also take lessons in music, painting, etc., from private teachers. This he has a right to do. The right of the parent, therefore, to determine what studies his child shall pursue is paramount to that of the trustees or teacher. Schools are provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages. But no pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch, and any rule or regulation that requires the pupil to continue such studies is arbitrary and unreasonable. There is no good reason why the failure of one or more pupils to study one or more prescribed branches should result disastrously to the proper discipline, efficiency, and well-being of the school. Such pupils are not idle, but merely devoting their attention to other branches; and so long as the failure of the students, thus excepted, to study all the branches of the prescribed course does not prejudice the equal rights of other students, there is no cause for complaint." In support of his opinion, Judge Maxwell cites a number of cases, two of which, *Morrow v. Wood,* 35 Wis. 59, and *Rulison v. Post,* 79 Ill. 567, are cited and discussed in the briefs in the instant case.

In *School Board District v. Thompson,* 24 Okla. 1, 24 L. R. A. n. s. 221, the supreme court of Oklahoma, in an opinion handed down May 13, 1909, cite with approval and quote from *Morrow v. Wood, State, ex rel. Sheibley, v. School District, supra,* and *Trustees of Schools v. People,* 87 Ill. 303, and in the syllabus hold: "The school authorities of this state have the power to classify and grade the scholars in their respective districts and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and text-books for the use of the schools, and such reasonable rules and regulations as they may think needful. They

may also require prompt attendance, respectful deportment, and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers." It will be observed that this syllabus is almost a verbatim copy of our syllabus in the *Sheibley* case. The briefs cite but five states where the court of last resort have passed upon this question: Wisconsin, Illinois, Nebraska, Oklahoma and Indiana. In the first four of these states the decisions are squarely in line with our holding in the *Sheibley* case, while the fifth (Indiana) alone holds the other way.

In commenting upon *Morrow v. Wood,* and *Rulison v. Post, supra,* counsel for respondents say: "The school the Wisconsin and Illinois courts were considering had no beginning and no ending. All the children between the ages of 5 and 21 were in the same room, the older ones as a rule attending but a few days in the winter. Out of this motley gathering the teacher, whose preparation rarely exceeded that of the parents, organized a large number of classes. The attendance was so irregular that a systematic course of study was an utter impossibility. A selection of studies by the parent involved the teacher in no embarrassment, because there were no grade divisions, no definite course of study for children of the same grade." This criticism may apply to *Morrow v. Wood, supra,* as the school involved in that case was a country district school. For the same reason the criticism may apply to *Rulison v. Post, supra,* in which the Illinois court was also considering a country district school; but two years later the Illinois court had before it *Trustees of Schools v. People, supra.* In that case the court was considering the law as applied to a high school, and not only cited and followed *Rulison v. Post* but also cited with approval *Morrow v. Wood, supra.* In *State, ex rel. Sheibley, v. School District, supra,* this court was also considering a high school case, and the same is true of *School Board District*

v. Thompson, supra. In *Trustees of Schools v. People, supra,* the first paragraph of the syllabus holds: "The object of the law allowing the establishment of high schools in townships is to afford increased facilities for acquiring a good education in free schools. Such schools must be open to all pupils alike who are sufficiently advanced to need their instruction. The duties of the trustees to such schools are the same as those of directors with respect to district schools, and their powers are governed by the same law." We think this holding by the Illinois court is eminently sound. The right of the parent to make a reasonable selection from the prescribed course of studies which shall be "carried" by his child in the free public schools of the state is not limited to any particular school of that class or to any particular grade in any of such public schools. If the right exists at all, it exists at all times and in every grade.

Counsel for relator cite *State v. Webber,* 108 Ind. 31, and *State v. Bailey,* 157 Ind. 324. In *State v. Bailey* the sole question involved was the constitutionality of a compulsory education act; one of the grounds upon which the act was assailed being that it was an unauthorized invasion of the natural rights of the parent. The court sustained the law, and in support of its holding gave a very good discussion upon the duty and obligation of a parent to educate his child, and illustrated the fact that this duty the parent owes not only to the child but to the commonwealth (p. 329): "If he neglects to perform it, or wilfully refuses to do so, he may be coerced by law to execute such civil obligation. The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools for longer or shorter periods, during certain years of the life of such children, have not only been upheld as strictly within the constitutional power of the legislature, but have generally been regarded as necessary

to carry out the express purposes of the constitution itself. * * * 'The matter of education is deemed a legitimate function of the state, and with us is imposed upon the legislature as a duty by imperative provisions of the constitution. * * * The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expedience and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province which by the constitution is assigned exclusively to the law-making power.' * * * To carry out the enlightened and comprehensive system of education enjoined by the constitution of this state, a vast fund, dedicated exclusively to this purpose, has been set apart. Revenues to the amount of more than $2,000,000 annually are distributed among the school corporations of the state. No parent can be said to have the right to deprive his child of the advantages so provided, and to defeat the purpose of such munificent appropriations." In everything that is here said we heartily concur. Wherever education is most general, there life and property are the most safe, and civilization of the highest order. The public school is one of the main bulwarks of our nation, and we would not knowingly do anything to undermine it; but we should be careful to avoid permitting our love for this noble institution to cause us to regard it as "all in all" and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children. We believe in the doctrine of the greatest good to the greatest number, and that the welfare of the individual must give way to the welfare of society in general. The whole current of modern thought and agitation is "onward." The people are beginning to realize as never before that, if we continue to jog along in the ruts our fathers before us have made, little will be accomplished in the way of national and social improvement. The state is more and

more taking hold of the private affairs of individuals and requiring that they conduct their business affairs honestly and with due regard for the public good. All this is commendable and must receive the sanction of every good citizen, but, in this age of agitation, such as the world has never known before, we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home.

Our public schools should receive the earnest and conscientious support of every citizen. To that end the school authorities should be upheld in their control and regulation of our school system; but their power and authority should not be unlimited. They should exercise their authority over and their desire to further the best interests of their scholars, with a due regard for the desires and inborn solicitude of the parents of such children. They should not too jealously assert or attempt to defend their supposed prerogatives. If a reasonable request is made by a parent, it should be heeded.

In the present case, we think it was not unreasonable for the relator to request that his little girl be permitted, at the close of the cooking lessons on Friday afternoons, to be dismissed and permitted to return to her home by a car line which would require a walk of but one block, instead of being taken by the teacher a mile and a quarter and there dismissed, where she would be compelled to take a car line which would impose upon her a walk of nine blocks, a distance of nearly three-quarters of a mile. We are unable to see how the granting of this request could in any manner have embarrassed the school authorities or have caused any break in the discipline of the school. Had this slight request been granted, this controversy might never have arisen. In addition to this, if the relator desired that his little girl should take music lessons from a private instructor and devote an hour or two a day to that study, in lieu of the modern lesson of cooking in the public school, we are unable to see how excusing her from that lesson could have interfered with the discipline

of the school. However that may be, this court has expressly decided that the parent has a right to make such selection. The school authorities undoubtedly knew of that decision. They also knew that that decision had stood as the law in this state upon this point since March 17, 1891, without any attempt having been made by the legislature to change the law in that regard. We think the action of the respondents was arbitrary and constituted an invasion of the relator's rights under the law as it had been announced by this court.

The judgment of the district court is therefore

AFFIRMED.

LETTON, J., concurring in conclusion only.

I am unable to agree with a number of statements made in the opinion, and am not willing to go so far with respect to the right of parental control. I, therefore, concur only in the conclusion that the failure of the child, on her father's direction, to take domestic science is not sufficient to justify her exclusion from the schools.

The legislature has made education compulsory. While it has failed to designate directly any subjects which a child must be required to study in order to entitle it to school privileges, it has plainly indicated the branches of education in which teachers in the various grades must be qualified. The subject of domestic science is not one of those required for any grade of certificate; and, while this circumstance is not controlling, I consider it entitled to some weight. While the board of education of a city is vested with wide discretion, and may, and no doubt wisely did, include the subjects of manual training and domestic science in the course of study in the public schools, the state has by no act or letter indicated that such studies are necessary. They are not fundamentals upon which a future structure of education must be reared. In my opinion the right of parental control should apply only to such studies as are plainly essential or which are not, at least, impliedly required to be taught in the grade of school in which the pupil may enroll.

Personally, I am of the opinion that manual training and domestic science are among the most valuable studies in the curriculum, regardless of whether a boy is to become a mechanic, or a girl a housewife; and that they are of more value in preparing for the duties of life and in forming a part of a well-rounded education than some of the other studies usually required. But the legislature has not taken this view, and, as to such branches and others of like relation to the course, a reasonable latitude of choice is still allowed the parent.

MARY MAIER ET AL., APPELLEES, V. FRANCES ROMATZKI ET AL., APPELLEES; FRANK ROMATZKI, APPELLANT.

FILED JANUARY 7, 1914. No. 17,507.

1. **Pleading:** INCONSISTENT ALLEGATIONS. In an action to cancel a deed, it is not inconsistent to allege that the deed is void because of the incompetency of the grantor and because of undue influence, and also allege that there was an oral agreement between the parties that the deed should be executed.
2. ———: ———. A deed may be executed by the grantor and not be delivered, and an allegation that a deed was executed and not delivered is not inconsistent with itself.
3. ———: DEFENSES: CONSISTENCY. A defendant may plead as many defenses as he has, whether they are legal or equitable, or both, and they are not inconsistent, unless the proving of the one defense would necessarily disprove the other.
4. **Deeds:** CANCELATION: EVIDENCE. The evidence indicated in the opinion is *held* sufficient to justify the decree.

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

W. S. Morlan, for appellant.

Lambe & Butler and *L. H. Cheney, contra.*

SEDGWICK, J.

Julia Deggering died in 1909, and left three children and heirs surviving her, these plaintiffs, Mary Maier and John Mahaski, and the defendant, Frances Romatzki. An alleged will was presented for probate, but was disallowed. In October, 1908, the deceased executed a deed conveying a quarter section of land in Frontier county to the defendant, Frank Romatzki, who is and was then the husband of the defendant Frances Romatzki. Afterwards these plaintiffs began this action in the district court for Frontier county to set aside the said conveyance.

In the petition it is first alleged that the defendant Frank Romatzki "exercised a great control" over the mind of the deceased, and represented to her that the said land "did not have a value to exceed $3,000 or $3,500," when in fact the land was worth $4,500; that the deceased was not versed in business matters, and did not know the value of the land, but relied upon the said representation; that the defendant never paid anything for the land; that it was orally agreed between the deceased and Frank "that she was to deposit a deed for the said land in the bank at Eustis"; and "the said Julia Deggering did in fact, on or about the 3d day of October, 1908, execute such purported deed of conveyance, a copy of which purported deed is hereto attached, marked 'Exhibit A.' Said deed was not delivered to Frank Romatzki, and no title was intended to be passed."

The petition then alleges that the deceased, when the deed was signed, was "not of sound mind, memory and understanding, was suffering from periodical insanity, and by reason of old age, ill health, and the undue and unnatural influence of said Frank Romatzki was not possessed of sufficient mental capacity to transact business, not mentally competent to execute said deed and comprehend the nature and effect thereof, and the said deed was not her voluntary act and deed;" that the deed was signed by her "by reason of the improper and undue influence exercised upon her by said Frank Romatzki."

The defendant demurred to this petition on several grounds, and now insists upon one of them as follows: "Said amended petition does not state facts sufficient to constitute a cause of action." It is insisted that the several causes of action set up in the petition are inconsistent; that the allegation that the deed was made pursuant to an agreement and was executed by the deceased is "flatly contradictory" to the allegation that the deed was void, *ab initio,* for want of mental capacity and for undue influence and fraud. It is argued that the allegation that the deceased "executed" the deed is inconsistent with the allegation that it was never delivered, because the execution of a deed implies a delivery.

It is not inconsistent to allege that the deed was void because of the incapacity of the grantor, or undue influence, and at the same time allege that there was an agreement between the parties that the deed should be executed. An agreement fully executed, even if consummated by a delivery of the deed, may be voidable for want of capacity of the grantor, or because of undue influence in procuring the contract. The allegation that the deed was executed might under such circumstances imply that it was also delivered. If one agrees for a sufficient consideration to execute a deed, and the consideration is paid, he will be required to complete the conveyance. Under such circumstances the agreement to execute the deed would include delivery. It is equally clear that a deed may be executed and not be delivered, and the allegation in this case is that she executed the deed, and in the same connection that it was not delivered and no title was intended to be passed. A defendant may plead as many defenses as he has, whether they are legal or equitable, or both, and they are not inconsistent, unless the proving of the one defense would necessarily disprove the other. We think that the petition stated a cause of action.

The defendant, in answer, admitted the execution of the deed, and that he filed the deed for record, and denied the other allegations of the petition. He then alleged that he purchased the land from the deceased, and received the

deed in good faith, and is now the owner of the land in fee simple. Upon the trial it appeared that, in the hearing in the county court upon the attempted probate of the will, the defendant testified that he paid her $3,500 for the land, and that he paid it in the presence of Mr. Ewart, the president of the bank where the business was done. Upon the trial of this case in the district court, the defendant, so far as appears from the abstract, did not testify, and Mr. Ewart testified that he did not "know that Romatzki ever paid anything for this deed," and that the defendant gave her no check. He showed that the defendant had a deposit and check account in his bank during that time. This account shows that he drew several small checks during September, October, November, and December of that year, but no check of any considerable amount until the 31st day of December, when he drew a check for $1,000. Under this evidence it must be found that the defendant Frank Romatzki procured this deed upon some sort of misrepresentation, and paid nothing of any importance, unless the check drawn some two months later for $1,000 was used for that purpose. The trial court found that the defendant had paid $1,000, and made that amount the first lien upon the land in the defendant's favor. This is certainly all that the defendant was entitled to under this evidence. The defendant does not allege nor attempt to prove that the deed was intended as a gift, and fails to show that he has paid for the land, or has ever agreed to pay therefor.

The judgment of the district court is right, and is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. JOHN WILLIAMS, APPELLEE, V. HARLEY G. MOORHEAD, APPELLANT.*

FILED JANUARY 7, 1914. No. 18,241.

1. **Elections:** ELECTION COMMISSIONER: DUTIES. Chapter 36, laws 1913, which creates the office of election commissioner for counties having a population of 150,000 or more, places great responsibility and imposes important duties upon the election commissioner. He is required to exercise many powers theretofore confided to judges of election.

2. ———: ———: ———. It is the duty of the election commissioner to determine whether the applicant for registration is or is not entitled to vote. He is not a court nor judge, but he must consider evidence and determine questions of fact and law; his action is quasi-judicial, and he is given a reasonable legal discretion in his investigation of the qualifications of persons applying for registration.

3. ———: ———: PURPOSE OF STATUTE. The purpose of the act (laws 1913, ch. 36) was to remedy the loose and careless practices that had prevailed in conducting elections. The election commissioner is not controlled by precedents of that nature.

4. ———: REGISTRATION ACT: VALIDITY. "A registry law, to be valid, must be reasonable and impartial, and calculated to facilitate and secure the constitutional right of suffrage, and not to subvert, or injuriously, unreasonably, or unnecessarily restrain, impair, or impede the right." *State v. Corner*, 22 Neb. 265.

5. ———: ELECTION COMMISSIONER: NATURALIZED PERSONS: REGISTRATION. The election commissioner is not obliged to require foreign-born persons who have been naturalized to submit and leave with the commissioner his naturalization papers. If they are presented and the commissioner is satisfied of their regularity, he may return the papers to the applicant for registration. But in determining the fact of naturalization he is not concluded by the oath or sworn statement of the applicant. He may require the production of the papers or a duly certified copy thereof.

6. ———: ———: REGISTRATION. Decisions which hold that an absolute denial of the right to vote to all persons whose names do not appear upon the registration list is unconstitutional are not applicable. Our statute makes ample provision for full investigation by the election commissioner and his supervisors, which may be continued, if necessary, to the time the vote is offered.

*On rehearing, judgment of district court affirmed. See opinion, 96 Neb. ——.

7. ———: NATURALIZED PERSONS: REGISTRATION. Whether the applicant for registration, if the record of his naturalization is destroyed and he has lost his certificate thereof, can be required to take out new naturalization papers, or may prove the contents of the record, as in ordinary cases of lost or destroyed instruments, is not decided.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Reversed and dismissed.*

Grant G. Martin, Attorney General, Frank E. Edgerton, J. J. Sullivan, E. W. Simeral, George A. Magney and *Harley G. Moorhead,* for appellant.

Benjamin S. Baker and *L. J. TePoel, contra.*

SEDGWICK, J.

The last legislature enacted a statute for counties having 150,000 or more inhabitants, providing a system of registration of voters. Laws 1913, ch. 36. The statute created the office of election commissioner to be appointed by the governor of the state. He was clothed with extensive and perhaps unusual powers and duties, and his term of office, after the first appointment, was fixed at two years. Under this statute an election commissioner was appointed for Douglas county who entered upon the duties of the office. He was authorized to appoint a "chief deputy," and other deputies and employees, and to designate his chief deputy and others of his deputies and employees to act with himself as supervisor of registration, who should serve "as the election commissioner shall direct." The statute required the election commissioner to "provide for a new general registration of all voters in the county, who may be required by law to register." The relator applied to the election commissioner for registration as a voter and was refused. He then applied to the district court for Douglas county for mandamus to compel the commissioner to register him as a voter. The district court granted a peremptory writ as prayed, and the commissioner has appealed.

When the relator appeared before the commissioner for registration, he stated that he was foreign-born, and had been naturalized. He did not present his naturalization papers, and for that reason the commissioner refused to register him as a voter. The only defense presented by the answer and evidence is that the relator failed to present competent proof of naturalization. It is contended that oral evidence is incompetent; that the record of naturalization or a certified copy thereof is the proof required.

The right of suffrage is absolute; qualified electors cannot be deprived of the right to vote. This right is guaranteed by the twenty-second section of the first article of the constitution. "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." No statute or rule of registration of the commissioner that will necessarily prevent the exercise of the franchise can be valid. Article VII of the constitution prescribes the qualifications of electors, and no others can be required. The purpose of registration laws is to protect and purify the right of suffrage, and not to deny it. *State v. Leavitt,* 33 Neb. 285.

The act of the legislature is sufficiently broad and comprehensive to justify the action of the commissioner, which is complained of, if it would be within the power of the legislature itself to make such requirement. The act places great responsibility upon the commissioner: "Said commissioner shall be responsible for the enforcement of the provisions of this law, for the competency, integrity and conduct of his deputy, clerks, employees and all registration and election officials appointed by him, and said commissioner shall be removed when it shall appear that said commissioner has been derelict in the performance of the duties of his office whereby incompetent, negligent or corrupt officers of registration or election have been appointed or whereby in any election district of said county a fair and impartial registration or election was not ob-

tained or the election laws enforced." Laws 1913, ch. 36, sec. 5.

He is required to "make all necessary rules and regulations not inconsistent with this act in regard to general, city, special and primary elections, and registration of voters in such counties, and shall have charge of and make provisions for all elections, general, special, local, municipal, city, state and county and all others of every description to be held in such county or any part or political subdivision thereof at any time, except as herein otherwise provided." Section 1.

He must appoint a deputy, and "shall appoint such other deputies, inspectors of election, supervisors of registration, peace officers to serve at election, and such other assistants as may be necessary for the performance of the duties of his office, the registration of voters, and the conduct of elections in such counties. Such employees shall be divided between all political parties as nearly as practicable in proportion to the number of votes cast in said county at the preceding general election for the office of governor by said parties, respectively." Section 4.

"The election commissioner shall, using his own judgment and discretion and not restricted by any recommendation whatever, at least thirty days prior to the first general, city, special or primary election after this act becomes a law, select and appoint three qualified persons as judges of election for each election district in such county." Section 6.

He is required to "receive the application for registration of all such legal voters as shall personally apply for registration at the office of the commissioner or other places designated for registration, who then are or on the day of election next following the day of making such application will be entitled to vote." Section 12*a*.

This imposes upon him the duty to determine who "will be entitled to vote." Undoubtedly he is given a reasonable legal discretion in his investigation of the qualifications of the person applying for registration.

The commissioner and his supervisors are not judges, nor do they in a strict sense act as judges, but they must consider evidence, and determine questions of law and fact, and in so doing they act judicially. See note to *Blake v. Brothers,* 11 L. R. A. n. s. 501 (79 Conn. 676); *Pike v. Megoun,* 44 Mo. 491; *Perry v. Reynolds,* 53 Conn. 527; *Anderson v. Baker,* 23 Md. 531. Persons of foreign birth must furnish evidence of naturalization, or that they have declared their intention to become citizens "conformably to the laws of the United States." Const., art. VII, sec. 1. To be a citizen and voter in this country is a privilege of so great importance as to induce the most careless to preserve the evidence of his citizenship which is furnished him by the government. We cannot believe that the discretion of the legislature, and of the commissioner it has provided for, is so limited by our laws that the commissioner cannot require the production of evidence of such importance and which is so easily obtained.

It is not necessary to determine what the duty and power of the commissioner would be if the record of the applicant's naturalization had been destroyed, and his certificate was lost; whether he must take out new papers or might prove the contents of the record as in ordinary cases of lost or destroyed instruments. This question is not presented by this record.

In *State v. Corner,* 22 Neb. 265, the law is stated in the syllabus: "A registry law, to be valid, must be reasonable and impartial, and calculated to facilitate and secure the constitutional right of suffrage, and not to subvert, or injuriously, unreasonably, or unnecessarily restrain, impair, or impede the right." In the opinion, written by our present Chief Justice, the correct rule is stated: "The true rule undoubtedly is that the legislature may require registration under reasonable restrictions as proof of the possession of the qualifications prescribed by the constitution, but that the voter shall have the right to prove himself to be an elector, register and vote at any time prior to the closing of the polls on election day. It would doubtless be competent to require more proof on

that day than if the voter had previously registered, but it should be left within his power to furnish such proof, if it existed, and exercise his right." The registration laws are remedial in their nature, and are to be liberally construed to promote an expression of the will of the voters, and for no other purpose. *Bingham v. Broadwell,* 73 Neb. 605. In *State v. Boyd,* 31 Neb. 682, 710, it is said: "Naturalization cannot be established by parol" —citing many cases upholding that proposition.

It appears that the relator has been a resident of the city of Omaha for more than 30 years; that he is a man of high character and attainments; and that during all this time he has exercised the elective franchise in the city of Omaha. The object of the act in question was to remedy some of the loose and careless practices that had prevailed, and its enactment was notice to all parties interested that a reform was necessary. Upon the trial in the district court he testified that he had been naturalized in Suffolk county, Massachussetts, and that he lived at the time in Essex county, and could not remember whether he was naturalized in the "county court or the United States."

The statute (laws 1913, ch. 36) requires the applicant for registration to swear or affirm "that you will fully and truly answer all such questions as shall be put to you, touching your place of residence, name, place of birth, your qualifications, as an elector, and all other questions provided for by the laws of this state affecting your right to register and vote therein." Section 12*a*. A record must then be made of his answers "as the fact may be stated," whether he is naturalized or native, and, "under the column 'Date of papers,' the date of naturalization if naturalized, as the same shall appear by the evidence of citizenship submitted or presented by the applicant in compliance with the requirements of this act." Section 12*a*. The relator understands this statute to mean that these preliminary answers under oath are conclusive upon the commissioner, so that, if the applicant in that examination says that he is naturalized, the matter is thereby con-

cluded. We do not so understand the statute. The commissioner is required to enter in the record "the date of naturalization if naturalized." This fact he must determine from the evidence "submitted or presented by the applicant." The commissioner is not obliged to require the applicant to submit and leave with the commissioner the naturalization papers. If he presents them, and the commissioner is satisfied of their regularity, he may return the papers to the applicant. The words, "submitted or presented," are apt words to convey the idea of such a distinction. We cannot construe this clause as equivalent to "as the same shall appear by the oath (or sworn statement) of the applicant." Something as plain and direct as the latter phrase would be necessary to deprive the commissioner of all discretion in the matter, in view of the duty imposed upon him to determine who are and who are not legal voters.

In *Attorney General v. City of Detroit,* 78 Mich. 545, 562, the supreme court of Michigan says that a law that requires foreign-born residents to produce their naturalization papers, "while it permits a native-born citizen to prove his standing as a voter by his own testimony," is "not only unjust, but unconstitutional, unless applied to all." Our statute is not subject to this criticism; it requires all applicants for registration to answer the same preliminary questions as to place of birth, age and similar matters of which his oath is the best and often the only available evidence. If this evidence shows that the applicant is disqualified without something further, some solemn judicial proceeding of which a permanent record is required to be kept, and of which the best evidence is furnished to the applicant, surely it is not a violation of the constitution to give the officers, whose duty it is to determine the qualification of the applicant, power to require the production of the evidence which the law requires to be preserved for that and other purposes. Moreover, the Michigan statute was held unconstitutional upon other and distinct grounds, sufficient in themselves

to require the decision reached. This language of the court, then, may be regarded as unnecessary in that case.

Other cases are cited which hold that an absolute denial of all right to vote to all persons whose names do not appear upon the registration list is unconstitutional as restricting the franchise, But these decisions are under statutes which provide for summary action of merely administrative officers in preparing the list. Our statute makes ample provision for full investigation. Many of the duties heretofore devolved upon the judges of election are now imposed upon the commissioner and his supervisors, and they may continue the investigation, if necessary, to the time the vote is offered.

We think that under the evidence in this case the commissioner did not exceed his authority in refusing to register the relator, and the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

LETTON, J., not sitting.

HYDRAULIC PRESS BRICK COMPANY, APPELLEE, V. DOUGLAS COUNTY, APPELLANT.

HYDRAULIC PRESS BRICK COMPANY, APPELLANT, V. SARPY COUNTY, APPELLEE.

FILED JANUARY 7, 1914. NOS. 17,287, 17,288.

Taxation: PERSONAL PROPERTY OF CORPORATION: LOCATION. Where a foreign corporation had its principal place of business in the city of Omaha, in the county of Douglas, but owned clay-beds and a brickyard in the county of Sarpy, where it was engaged in the manufacture of brick, and the county of Sarpy levied a tax against the personal property of the corporation in Douglas county for the year 1910, which was paid by the corporation for the year 1910, and the county of Douglas also levied a tax against the same property for the same year, which was paid by the corporation, it is *held*, that the levy of the tax by Sarpy county upon personal property in Douglas county was illegal, and that a judgment sus-

taining the levy of such tax should be reversed; also *held*, that a judgment of the district court for Douglas county overruling the right of Douglas county to levy a tax upon the property in that county should be reversed.

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

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

George A. Magney and *Charles Haafke*, for Douglas county.

James T. Begley, for Sarpy county.

Isaac E. Congdon, for Hydraulic Press Brick Company.

HAMER, J.

The following cases were consolidated for hearing: *Hydraulic Press Brick Company v. Douglas County*, No. 17,287; *Hydraulic Press Brick Company v. Sarpy County*, No. 17,288. The facts in each case may be separately stated, but the facts in each case were before the court as alleged in each petition. Judge Travis, of Sarpy county, and Judge Kennedy, of Douglas county, sat together when the cases were argued. Judge Travis had jurisdiction in Sarpy county, and it is of the judgment rendered by him as judge of the district court in No. 17,288 that the appellant in that case complains. It is the judgment of Judge Kennedy that is complained of in the *Douglas County* case. Sarpy county taxed certain property of the Hydraulic Press Brick Company which was permanently situated in that county, and it also taxed certain personal property of the same company which was permanently situated in Douglas county. The thing to be determined in the *Sarpy County* case is, what property was properly taxable in that county. If personal property properly taxed in Sarpy county was wrongfully taxed in Douglas county, that is the separate wrong of Douglas county. The first thing to be determined is

whether Sarpy county could follow the personal property of the company into Douglas county, where it was to be found, and tax it.

The articles of incorporation of the company provide that the principal place of business of the corporation is in Douglas county. Separate petitions by the brick company were filed in the district court for each county. The judges sat together and agreed on the law, and the judgment rendered in each case was along the line of their agreement as to what the law was applicable to that case. In the *Sarpy County* case it was alleged that the brick company was a corporation under the laws of Missouri transacting business in Nebraska, and that it had complied with the laws of Nebraska concerning the transaction of business within that state by a foreign corporation; that it was engaged in the manufacture and sale of brick; that it owned an extensive manufacturing plant and clay-beds in the county of Sarpy, and also clay-beds in other counties in the state; that in connection with its manufacturing plant in the county of Sarpy it possessed machinery, tools and other personal property belonging to the equipment of a brick manufacturing plant; that in connection with its clay-beds in the county of Sarpy it possessed tools and other equipment necessary in the removal of clay; that it possessed similar tools in other counties in Nebraska other than Sarpy; that its principal office for the transaction of its business was in the city of Omaha, county of Douglas, and state of Nebraska, where it kept its books of account; that it deposited its funds in a bank or banks in the city of Omaha; that it maintained no other general office, or any office whatever, for the transaction of its commercial business in the state other than its Omaha office; that it had complied with the laws of the state of Nebraska with reference to the appointment of an agent within the state upon whom for it process might be served and notice given, and that within the state it had named an agent and given his residence as in the city of Omaha, and that it had named its principal place of business as in said city; that it maintained

no manufacturing plant in the county of Douglas, and owned no real property in said county; that it had paid its taxes to the county treasurers of the various counties in which its real property was situated, and that it had paid its yearly taxes upon its personal property to the treasurers where that property was situated; that it had returned to the assessor of the county of Sarpy its personal property situated in said county pertaining to its brick manufacturing plant; that it had also made a return to the assessor of the county of Douglas of its personal property in that county, consisting of a safe, a typewriting machine, office furniture, book accounts, money on hand or on deposit with banks, all of the value of $15,175; that such returns had been made for the year 1910; that the county of Douglas for the year 1910 taxed the personal property actually situated in Douglas county, and that the brick company paid the taxes so levied; that, without the knowledge or consent of the company, the taxing authorities of Sarpy county added to the return made by the company of its personal property in Sarpy county the personal property above enumerated which was situated in the county of Douglas, and levied a tax in Sarpy county upon the personal property enumerated and then situated in Douglas county, the total being $280.42; that prior to the first day of November, 1910, the brick company paid to the county treasurer of said Sarpy county the total tax of $280.42, accompanying the same with a written protest, and taking from the county treasurer of said Sarpy county a receipt; that the protest runs to the county of Sarpy and to its county treasurer, and recites that it pays all demands of the county of Sarpy on account of personal taxes levied by that county for the year 1910, being the sum of $280.42, and which payment of taxes is against the will of the company and is paid under protest; that the company has complied with the laws of Nebraska pertaining to the doing of business in Nebraska by a foreign corporation, and that its principal place of business is in Omaha, Douglas county, Nebraska, and that under its articles of incorporation it has

the power to maintain principal places of business in other states than Missouri, and that it has named Omaha as its principal place of business in Nebraska; that its Nebraska residence is Omaha, where it maintains its office in the Bee building, and where are kept all of its books of account and a safe and typewriting machine and office furniture; that its ready money on hand is kept in a bank in Omaha; that upon demand of the county assessor of Douglas county it had made a return of its property in Omaha, Douglas county, for the year 1910 to the assessor of that county, filling out the schedule furnished by it by the assessor thereof, and returning all personal property held in Douglas county; that none of the property described as in Douglas county had ever been located in Sarpy county; that such property was not liable to taxation in Sarpy county; that it had always paid all taxes levied against its property, whether real or personal, and that it was willing to pay all taxes that might be lawfully levied upon any of its personal property for the year 1910, situated in the county of Sarpy; that, while it made a return to the county assessor of Sarpy county of its personal property in Sarpy county, that county without its knowledge or consent had added to the return the personal property which the company owned in Douglas county, and that the county of Sarpy had taxed the personal property of the company in Douglas county, as also the property in Sarpy county; that included in the total amount of taxes, $280.42, was the tax which Sarpy county had levied against the personal property of the company situated in Douglas county; that Douglas county had levied a tax for the year 1910 upon the personal property of the company situated in Douglas county, and amounting to $66.77, and that the company had paid the same, although the levy of the same was invalid; that, through the fact that both Douglas and Sarpy counties had assessed and levied taxes upon the personal property of the company in Douglas county, the company had been compelled to pay taxes twice upon the same property in the same year.

The petition further alleged that in less than 30 days after making said payment to the county treasurer of said county of Sarpy under protest, as set forth, the company had filed its verified claim with the county clerk of said county of Sarpy, demanding from said county and its board of commissioners that the proportion of said total tax of $280.42, which was levied against the personal property of the company situated in said county of Douglas, be ascertained and refunded to the company, setting forth in said claim a copy of said written protest, and appending thereto the receipt given to the company at the time of the payment by it under protest of said total tax of $280.42; also, that the board of county commissioners of said county of Sarpy duly took said claim under consideration, and rejected the same on the ground that the brick company is a manufacturing corporation, and that the laws of the state of Nebraska compelled a listing and taxing of all property in the state of a manufacturing corporation in the county where the manufactory is situated, and that the manufactory of the brick company in the state of Nebraska is situated in said county of Sarpy; that within the time required by law the company filed with the county clerk of said county of Sarpy its notice of appeal, accompanying the same with the bond required by law, which was duly approved; that the county clerk of said county of Sarpy had transcripted all of the proceedings had before the board of county commissioners, and had filed the same in the office of the clerk of the district court.

There was a prayer that the court ascertain the proportion and amount of said total tax of $280.42 levied upon the personal property of the company situated in Douglas county, and that the county of Sarpy be ordered to refund to the company said proportion and amount, and that the company have judgment in the amount of said proportion against said county of Sarpy, together with costs. To this petition Sarpy county filed a general demurrer. The court sustained the demurrer, and the petition was dismissed.

From the judgment of dismissal, this appeal is prosecuted by the brick company.

In the Douglas County case it is in the petition alleged: That the plaintiff corporation is organized under the laws of Missouri, but is qualified to transact business in Nebraska, having complied with all the laws concerning the transaction of business within the state by a foreign corporation; that it is engaged in the state in the manufacture and sale of brick and kindred commodities, and has an extensive manufacturing plant and clay-beds in the county of Sarpy; that it has clay-beds in other counties of the state than Sarpy, and that in connection with its manufacturing plant in the county of Sarpy it possesses machinery, tools and other personal property constituting the equipment for a brick manufacturing plant in that county, and that in connection with its clay-beds in the county of Sarpy it possesses tools and other equipment necessary in the removal of clay, as also in connection with its clay-beds in other counties than Sarpy, and possesses tools and equipment necessary to the removal of clay; that its principal office for the transaction of its business, and in which it transacts its business, is in the city of Omaha and county of Douglas, where it maintains and permanently keeps its office and books of account; that it deposits its funds in a bank or banks in the city of Omaha in said county of Douglas; *that it maintains no other general office, or any office whatever, for the transaction of its commercial business in the state of Nebraska other than its general office in the city of Omaha and county of Douglas;* that it has complied with the laws of the state with reference to the appointment of an agent within the state upon whom process may be served for it and notice given; that with reference to its principal place of business within the state it has named an agent and has given his residence as in the city of Omaha in said Douglas county; that it is claimed its principal place of business is in the said city of Omaha; that, although conducting all its commercial business in and from its office in Omaha, it has and maintains no manufacturing

plant in said county of Douglas, and does not own any real property therein; that, ever since the plaintiff has been in business in the state of Nebraska and has owned property therein, it has yearly paid taxes upon its real property to the treasurers of the various counties in the state in which its real property is situated; that it has yearly paid taxes upon its personal property to the treasurers of the various counties in which its personal property is situated; that for each year, and particularly for the year 1910, it has made the returns required by law to the assessors of the various counties; that among said returns is one to the assessor of the said county of Sarpy in the state of Nebraska of its personal property situated in the said county of Sarpy pertaining to its brick manufacturing plant situated in said county; that there is also one to the assessor of the county of Douglas in the state of Nebraska of its personal property situated in said county of Douglas, consisting of one safe and office furniture and all book accounts and money on hand or on deposit with banks of the actual value of $15,175; that the county of Douglas taxed for the year 1910 the personal property actually situated in Douglas county above enumerated in the sum of $66.77; that the county of Sarpy taxed for the year 1910 the personal property actually situated in Sarpy county which was returned to Sarpy county by the plaintiff and also taxed the personal property of the company actually situated in Douglas county in the sum of $280.42, and which tax the company paid to Sarpy county; that on the 29th day of November, 1910, the company paid to the county treasurer of Douglas county the full amount of the tax levied by Douglas county upon the property returned in the company's schedule to Douglas county, the sum of $66.77, protesting against the payment thereof in writing delivered to the treasurer of said Douglas county at the time of payment; that said protest reads so as to show that it is directed to the county of Douglas and the county treasurer thereof; that with the delivery of the notice it pays to the county of Douglas all its demands on account

of personal taxes levied by said county against it for the year 1910, in the sum of $66.77, but that this payment is made against the will of the said Hydraulic Press Brick Company and under protest; that the Hydraulic Press Brick Company is a corporation organized under the laws of Missouri, and foreign to the state of Nebraska, and has fully complied with the laws of Nebraska pertaining to the doing in Nebraska of business by a foreign corporation; that as required by the laws of Nebraska it has in its certificate filed with the seceretary of state named its principal place of business at Omaha, Douglas county; that in its articles of incorporation it has the power to maintain principal places of business in other states than Missouri, and has named Omaha, in Douglas county, as its principal place of business in Nebraska; that its Nebraska residence is in Omaha, Douglas county, and its Nebraska office is in the Bee building in Omaha, in Douglas county; that in its office in Omaha are kept all its books of account, and that it keeps in its office in Omaha a safe and typewriting machine and its furniture; that its ready moneys on hand are kept in the bank in Omaha; that upon the demand of the county assessor of Douglas county said company made a return of its property in Omaha, Douglas county, for the year 1910, to the assessor of Douglas county, filling out, in harmony with the law, the schedule furnished it by said assessor, returning one safe at the valuation of $50, one typewriting machine at the valuation of $35, all book accounts at the valuation of $12,000, money on hand or deposit with banks at the valuation of $3,000, and office fixtures, furniture and equipment of the valuation of $90, the total value of the property returned to the assessor of Douglas county for the year 1910 to be $15,175; that said company is engaged in the manufacture of brick in Sarpy county, where it has a brick manufacturing plant consisting of real and personal property, such as brick, horses, wagons, tools, etc.; that it returned to the county assessor of Sarpy county for and during the year 1910 all of its personal property actually situ-

ated in Sarpy county, and Sarpy county levied taxes thereon, but that Sarpy county has added to the schedule which the company returned to Sarpy county for the year 1910 *the return of the company to the assessor of Douglas county for the year* 1910, and has taxed the property of the company, hereinbefore described, for the year 1910, which has been taxed by Douglas county for the year 1910, claiming that by virtue of section 44 of the Nebraska revenue act (Comp. St. 1909, ch. 77 art. I) the property of the company in Douglas county is taxable *only* in Sarpy county, said section being as follows: "The property of banks or bankers, or other companies, and merchants, except as hereinafter specifically provided, shall be listed and taxed in the county, township, precinct, city, village and school district where the business is done; and of manufacturers and mines in county, township, precinct, city, village and school districts where the manufactory or mine is located;" that the Hydraulic Press Brick Company has no manufactory and manufactures nothing in Douglas county; that the Hydraulic Press Brick Company has paid the tax to Sarpy county for the year 1910 which Sarpy county levied for the year 1910 upon the above described property actually situated in Douglas county; that if Sarpy county is right in its contention that, through the fact that the Hydraulic Press Brick Company is a manufacturing company and has a manufactory in Sarpy county, it has the right and power to tax the personal property of the company situated in Douglas county, then the tax of Douglas county for the year 1910 in the sum of $66.77 upon the personal property of the company situated in Douglas county is invalid, and for the reason that the property upon which the tax was levied was not liable to taxation in and by Douglas county; that, through the fact that both Douglas and Sarpy counties have assessed and levied taxes upon and against the personal property of the company actually situated in Douglas county, the company has been compelled to pay, and has paid, taxes twice upon the same property for the same year; that the company asks that

Douglas county refund to the company the sum of $66.77 now paid to the county as and for personal taxes upon its property actually situated in Douglas county for the year 1910, all of said property having been assessed and taxed by Sarpy county, and the company having paid to Sarpy county the taxes thereon. Said protest was dated November 29, 1910, and was signed "Hydraulic Press Brick Company, by Andrew J. Hazleton, Manager."

It was further set up in the said petition in the *Douglas County* case that, in less than 30 days after making said payment to the county treasurer of said county of Douglas under said protest, the Hydraulic Press Brick Company filed its verified claim with the county clerk of said county of Douglas, demanding from said county and its board of commissioners, that the amount of said tax in the sum of $66.77 which was levied upon and against the personal property of the company situated in said county of Douglas be refunded to the company, setting forth in said claim a copy of said written protest, and appending thereto the receipt given to the company at the time of the payment of the said sum of $66.77 under protest; that the board of county commissioners of said Douglas county took said claim under consideration, and rejected the same on the ground that the property of the company shown in its schedule returned to the county of Douglas was actually situated in the county of Douglas, and that the provision of law set forth in said protest by virtue of which the county of Sarpy taxed as in Sarpy county the property actually situated in Douglas county was inapplicable and without avail; that within the time required by law the Hydraulic Press Brick Company filed with the county clerk of said county of Douglas its notice of appeal, accompanying the same with the bond required by law, which was duly approved; that the county clerk of said county of Douglas has transcripted all of the proceedings had before and by the board of county commissioners of said county of Douglas in the matter, and has filed the same in the office of the clerk of the district court; and that

reference is made to said transcript as though it were fully set forth. To the petition in the *Douglas County* case there was attached a prayer that the county of Douglas be ordered to refund to the company the said sum of $66.77 paid by said company as said taxes, and that said company have judgment in said amount, together with the interest and costs.

Douglas county filed a general demurrer to the said petition on July 21, 1911, and on that day the district court for Douglas county entered its judgment, in which it found that the said demurrer ought to be overruled. The county of Douglas then elected to stand upon its demurrer, and refused to plead further. Thereupon the court found that there was due to the appellant from the appellee the sum of $66.77, with interest at the rate of 7 per cent. per annum from the 29th day of November, 1910. It was thereupon adjudged and decreed that the demurrer of the appellee to the petition of the plaintiff be overruled, and that the plaintiff company recover from the county of Douglas $69.75, with interest from the date of the judgment, and the costs of suit.

In the brief of the brick company it is said that the decisions of the district courts for Douglas and Sarpy counties, respectively, were on the whole satisfactory, but that the brick company, being advised that Douglas county would appeal to the supreme court from the judgment entered against it by the Douglas county district court, was compelled to appeal to the supreme court from the judgment entered by the Sarpy county district court.

The company sets up that it is willing to pay taxes upon all of its property in the state, but does not deem it right that it should be compelled to pay two or more different counties a tax on the same property each year.

Section 29 of the general revenue act of 1903 (laws, 1903, ch. 73; Comp. St. 1911, ch. 77, art. I) provides: "Personal property, except such as is required in this chapter to be listed and assessed otherwise, shall be listed and assessed in the county, precinct, township, city, village, and school district where the *owner resides,* except that

property having a local situs, like grain elevators, lumber yards, or any established business, shall be listed and assessed at the place of such situs. The capital stock and franchise of corporations and persons, except as otherwise provided, shall be listed and taxed in the county, precinct, township, city or village, and school district where the principal office or place of business of such corporation or person is located within this state. If there be no principal office or place of business in this state, then at the place in this state where any such corporation or person transacts business."

Section 44 provides: "The property of banks or bankers, or other companies, and merchants, except as hereinafter specifically provided, shall be listed and taxed in the county, township, precinct, city, village and school district *where the business is done;* and of manufacturers and mines in county, township, precinct, city, village and school districts where the manufactory or mine is located."

The plaintiff corporation is organized under the laws of the state of Missouri, but it is shown to have complied with the laws of Nebraska pertaining to the doing, in Nebraska, of business by a foreign corporation. In its certificate filed with the secretary of state of the state of Nebraska it has named its principal place of business and office as at Omaha, in said Douglas county, Nebraska. It seems to have provided in its articles of incorporation that it has the power to maintain principal places of business in other states than Missouri, and it names Omaha, in Douglas county, Nebraska, as its principal place of business in Nebraska. It must be considered that its Nebraska residence is in Omaha, in Douglas county, Nebraska, where it maintains its office in the Bee building of that city. That is certainly the home office. It appears from the brief that the plaintiff company not only owns clay-beds in the county of Sarpy suitable to the manufacture of brick, but it owns clay-beds in other counties, among them Cass county. The clay is taken from Cass county and sent to Sarpy county to be there manufactured into brick. The company alleges that it contemplates the erec-

tion of a brick manufacturing establishment in Cass county. It is claimed that while the company maintains its principal place of business in the state of Nebraska at Omaha, in Douglas county, it is desirous of maintaining brick-making establishments in other counties where it owns clay-beds suitable for the purpose of making brick. It seems to have been within the contemplation of the company that it would own clay-beds and brick-yards in other counties, but that the principal place of business was intended to be, and would be, in Omaha, in Douglas county, and the articles of incorporation so provide. If the principal place of business of the plaintiff is in the city of Omaha, then there is where the owner resides, under section 29 above quoted. The maintenance of a brick-yard is an established business, and the place where such business is carried on may well be considered the place of its situs. A brick-yard may need to send part of the brick which it manufactures to the city, but the transient customer may stop at the brick-yard and buy a wagon-load of brick, or any lesser or greater quantity, and to the extent of that transaction the business is an established business right there where the brick are manufactured. Under the first clause of the second section above cited the property is to be listed *where the business is done.* In this case that would be at Omaha, were it not for the subsequent clause relating to manufactories and mines. This clause provides that the property shall be listed and taxed "where the manufactory or mine is located." As the principal place of business is in Omaha, of course the manufactory is operated from Omaha. The brief of counsel for the plaintiff suggests that there is one principal place of business of the company, in Omaha, Douglas county, but that the company owns clay-beds in other counties where it desires to establish manufactories or brick-yards. We are unable to see anything in the clause referred to which prevents the state from establishing the business at the place that shall be selected by the directors of the company. They can manufacture and sell brick where they like.

It would seem that taxes are imposed because the property or person within the jurisdiction of the body imposing the tax has received, or will receive, the benefit of the protection afforded by such body. Property within the county of Douglas would in times of danger receive the police protection of Douglas county, and such other protection as might incidentally come to it from the fact that it is within Douglas county. Property that is within Sarpy county is protected because it is in Sarpy county. It is entitled to such protection as Sarpy county may give it. Suppose we apply this to the brick-yard already in existence, and that we contemplate applying it to those hereafter to be created. The land containing the clay-beds in Sarpy county from which the brick are manufactured is properly taxable in Sarpy county. It is there to be taxed, and under our system it would seem that there is no place else to tax it. After the clay has been manufactured into brick and is standing on the ground, the brick receive protection from such powers of the government of Sarpy county as may be exercised in the way of such protection. The land of the company containing the clay-beds is taxable as land in Cass county. When the clay has been manufactured into brick and the brick have been piled up in the brick-yard in Cass county, then the proper thing would be for the brick to be taxable in Cass county. If it shall be admitted that the principal place of business of the company is in Douglas county, is there any reason therefore why Douglas county should be entitled to levy taxes on the brick that are in Sarpy county? Douglas county would not be protecting those brick from being hauled away by thieves. The jurisdiction of Douglas county would not go down into Sarpy county for the protection of the brick-yard simply because the principal place of business is in Douglas county. If such a yard should be established in Cass county, Douglas county would furnish no protection to the brick-yard existing there.

In this connection it is proper to consider section 10970, Ann. St. 1911. That statute is made specially applicable

to a company incorporated under and by authority of another state, and which does business in this state. It therefore applies to the corporation in question because that is organized under the laws of the state of Missouri. "Every company incorporated by the authority of any other state or government, and doing business in this state shall, by its duly authorized agent or manager, make out and deliver to the assessor of any county, or precinct, in which the corporation owns property, a statement under oath, giving the name of the corporation, the nature of the business in which it is engaged, the name of the state or government under which it was incorporated, a description of all the real and personal property owned by said corporation in said county and the value thereof, together with the true value of its franchise in such county. Such statement shall also contain the amount of gross earnings of such corporation from its business within the state, and the expenses incurred in transacting the same." Under the provisions of the above section it seems that all foreign corporations are required to make out and deliver to the assessor of each county a description of all the real estate and personal property owned by said corporation in said county and the value thereof. Under this provision the Hydraulic Press Brick Company made out its schedule of the property which it owned in Douglas county, and the same was assessed and taxed therein. The said company also made out its schedule of property as required by this section and delivered the same to the assessor of Sarpy county. Under the section it would seem that *each county* is entitled to collect taxes upon the property therein which belongs to the brick company. It is argued that the lower courts did not have in mind the above provision of the statute.

Section 10943, Ann. St. 1911, provides, in substance, that the property of banks or bankers, or other companies, shall be listed and taxed in the particular county, township, precinct, city, village and school district where the business is done, and manufactories and mines where they are located. That section was aimed to provide the method

of listing and taxing the property of a foreign corporation. In any event, it is intended to be applicable to companies organized and doing business in the state. The reason of the imposition of a tax seems to make this provision applicable to the property of all domestic corporations. But in this case we are considering the method of listing and taxing the property of a foreign corporation. Under section 10970, above quoted, it was clearly the duty of the brick company to list its property in Sarpy county with the assessor of that county. The purpose of listing the property would be that it should pay taxes in that county where its property received its protection. Under the same section the brick company would be in duty bound to return and list its property to the assessor in Douglas county so that the same might be assessed and taxed in that county. This seems to solve the problem. The brick company had certain property in Douglas county which it returned for taxation, and that property was taxed and the company paid the tax. Sarpy county undertook to retax that same property in Douglas county. It was not authorized to do that. There is no section of the law which permits it and it is directly in conflict with the provisions contained in section 10970. It follows that the levy and collection of the tax in Douglas county was authorized by law, and that the levy and collection of the tax in Sarpy county on property of the company contained in Douglas county was illegal and wholly unauthorized. Because Sarpy county has added to the schedule which the company returned to it for the year 1910 the return of the company to the assessor of Douglas county for the year 1910, and has taxed the property of the company for the year 1910 which had been taxed by Douglas county, therefore the judgment of the district court for Sarpy county holding the levy and collection of the tax against property in Douglas county to be valid should be reversed. It also follows that Judge Kennedy should not have overruled the general demurrer interposed on behalf of Douglas county by the county at-

torney of that county, as the property in Douglas county was properly taxable there.

The judgment of the district court for Sarpy county is reversed, and the judgment of the district court for Douglas county is reversed, with directions to each court to proceed in accordance with this opinion.

REVERSED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

WILLIAM O. LYONS, ADMINISTRATOR, APPELLANT, V. GREELEY COUNTY, APPELLEE.

FILED JANUARY 30, 1914. No. 17,515.

1. **Appeal:** AFFIRMANCE. Where there is no conflict in the evidence as to the principal facts in a case, but the conclusion as to how the decedent lost his life must be drawn from inference and conjecture, the circumstances shedding little, if any, light upon the cause of the loss of life, the verdict of the jury for defendant cannot be set aside.
2. **Counties:** ACTION FOR DEATH: INSTRUCTIONS. Instructions given to the jury by the trial court examined, and found not prejudicially erroneous.

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

H. C. Vail, for appellant.

J. P. Boler and *J. R. Swain, contra.*

REESE, C. J.

This is an appeal from a judgment rendered by the district court for Greeley county. Plaintiff sued as the administrator of the estate of his father, Samuel W. Lyons, deceased, alleging that decedent lost his life by reason of a defective bridge across Freeman creek in the county of Greeley, defendant. The defect complained of is that the

side railing of the bridge was defective, rotten, decayed, and not in a safe condition, and that by reason thereof the decedent was precipitated into the water below and lost his life. Some objections are made to the averments of the petition, which are not deemed necessary to notice. There was a jury trial, resulting in a verdict and judgment in favor of defendant. Plaintiff appeals.

The facts shown as to the cause of the death of Samuel W. Lyons are very meager. It appears that on the morning of the day of his decease he took a horse and buggy and drove to Freeman creek, stopping at or near where the creek is spanned by a bridge. Evidently he unhitched his horse and left his buggy near the end of the bridge. The purpose of his trip was to engage in fishing in the creek. During the forenoon his horse, by some means, escaped, and he went to a near-by neighbor's hous and telephoned for his son, the plaintiff, to come for h n, as his horse had escaped. This was perhaps not far from ten o'clock in the forenoon, and was the last that was seen of him alive. When his son arrived, which was before noon, he found the buggy all packed ready for the return home, but the horse was gone. An examination disclosed decedent's hat in or near the water, and one length of the side railings of the bridge gone from its place and floating in the water some little distance below the bridge. His fish bait and some few fish were found upon the floor of the bridge, and his fishing rod was lying on the floor; the end to which the line was fastened projecting over the opposite side of the bridge with the baited hook in the water. The floor of the bridge was about seven feet above the surface of the water, which at that point was seven to eight feet deep. After an extended search the body was found under the side of the bridge and immediately under the place of the missing side rail. There is some doubt as to whether decedent met his death from drowning or from injuries found upon his head. If the latter, it might be inferred that in falling his head struck some of the bridge timbers just beneath, producing unconsciousness, or, practically, death. The testimony of the

physician indicates that certain signs of death by drowning alone were absent. There is no proof that death was caused by heart failure or from any other natural cause. While decedent was about 69 years of age, he was shown to be a healthy, robust man for one of his age, and it is argued that death was not from any natural cause. It is shown that the bridge was of considerable length, and that the span of railing, which was broken, or had fallen away, was inadequately fastened, and the post under its center had rotted away at the point where the side railing should have been fastened to it, to such an extent that nails or spikes could not hold it, and it was kept in place by being sprung so that at its center it bore against one side of the center post and at its ends against the other sides of the end posts, being thus held in place by its cramped condition. Whether it was knocked or pushed off by decedent is unknown. He may or may not have been leaning or resting against it when it gave way, thus precipitating him into the water, or it may have been off, when, not noticing the fact, he walked off the bridge, with the results stated. No one can tell, as no other person seems to have been there or to have seen how the accident occurred. The mind is left entirely in doubt and conjecture as to what may have been its immediate cause. Plaintiff seems to have furnished all available evidence possible as bearing on the question, but was unable to show the exact facts. That the death was a sad one is unquestioned, but whether it was caused by the failure of the county to discharge any duty in connection with the bridge was a question of fact, which was submitted to the jury, and they arrived at the conclusion that plaintiff had failed or was unable to make out his case, and they so decided. We cannot see our way to set aside their verdict on these questions of fact.

Objection is made to some of the instructions given by the court to the jury. These will be briefly noticed. The seventh instruction contained a definition of contributory negligence. This part appears to be a correct statement of the law and is not assailed. Following this is the di-

rection that, even though the jury might find that the defendant was guilty of negligence, still if they found that plaintiff's intestate did not exercise that ordinary care and diligence to prevent injury that would be expected of an ordinarily prudent person of his age, experience and opportunities situated as he was, and that injury complained of resulted by virtue of such contributory negligence and was the proximate cause thereof, they should find for the defendant. The criticism of the instruction is that there was no proof of such contributory negligence, and that it was error to give an instruction upon the subject. Ordinarily the contention may be said to be correct, but, as we have seen, there is no direct evidence as to how decedent came to his death. The question is largely one of inference and speculation. The answer alleged contributory negligence. There being an absence of evidence on that part of the case, the defense could contend that the death resulted from a want of care on the part of the decedent, as being within the issues, and inferable from the facts shown. We cannot see that, under the issues and such facts as were shown, there was any prejudice to plaintiff resulting from the instruction, nor, indeed, that it was improperly given.

Objection is made to the fifteenth instruction given. Without setting out the instruction here, it must be sufficient to say that it is an exact copy of the third clause of the syllabus in *Johnson County v. Carmen*, 71 Neb. 682, which we think correctly states the law. The evidence upon the subject of the want of care of the county officials was, to some extent, at least, conflicting, and we cannot see that it was error to give the instruction.

The judgment of the district court will have to be affirmed, which is done.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ESTELLA M. MITCHELL, APPELLEE, V. DANIEL E. KAUFMAN, APPELLANT.

FILED JANUARY 30, 1914. No. 17,541.

Death: PRESUMPTION OF DEATH: SUFFICIENCY OF EVIDENCE. The evidence examined and its substance set out in the opinion, *held* sufficient to establish the legal presumption of the death of plaintiff's father.

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

H. M. Sinclair and *W. D. Oldham,* for appellant.

N. P. McDonald, contra.

[illegible]E, C. J.

Action to quiet title to lots 8 and 9, in block 2, of Arendt's Second addition to the town of Elm Creek, in Buffalo county. It is alleged in the petition that on the 7th day of December, 1893, the premises in dispute were sold by the county treasurer of Buffalo county to W. C. Campbell for the unpaid taxes of 1892, amounting to the sum of $1.85; that Campbell afterwards assigned the certificate of purchase to Henry C. Andrews, to whom a treasurer's deed was issued on the 1st day of December, 1898, and that through mesne conveyances from Andrews his interest in the property is now held by defendant; that the tax deed was void, and defendant has no rights thereunder. There is an allegation in the petition that on the 25th day of November, 1902, the property was subsequently sold for delinquent taxes to George Arendt, but no allegation is made in any of the pleadings that a deed was ever issued upon such sale. The allegations of the petition thus far seem to be admitted in the answer, except as to the character of the treasurer's tax deed of December 1, 1898. The petition further alleges that on or about November 22, 1902, defendant's remote grantor

entered into the possession of the property, and he and his grantees, including defendant, have held possession ever since; that the premises have thereon a large livery barn, etc., the rental value of which is and has been $15 a month; that on the 17th day of November, 1902, and for a long time prior thereto, John F. Brown, the father of plaintiff, was the owner of the fee title of the property; that she is his only child and sole heir; that on the said day he disappeared from his home, and has not been heard from since, although diligent inquiries were made for him to learn his whereabouts, if still living, his absence continuing over 8 years, unheard of during all of said time by his family, friends and neighbors, and that therefore he is presumed to be dead; that in the month of April, 1908, the wife of Brown procured a divorce from him, and that she has no interest in the property, the title being alone in plaintiff; that defendant has no interest in the property, except that procured under the void tax deed of December 1, 1898. The prayer of the petition is that John F. Brown may be adjudged to be dead, and plaintiff be decreed to be his sole heir at law; that an account be taken of the rents and profits of the premises while in possession of defendant and his grantors; that the same be set off against the taxes paid by them; and that an order be made for the payment of any amount due to either party, plaintiff's title quieted, and she be declared eititled to the possession of the property.

Defendant Kaufman answered in denial of the unadmitted averments of the petition; plea of statute of limitations; the allegation that the rental value of the premises did not exceed $5 a month, that he had placed permanent improvements upon the premises to the amount and value of $300; a denial of the death of Brown, or that plaintiff has any interest in the premises; the averment that Mary E. Brown conveyed her right and title to the property to L. May Arendt, through whom defendant claims, on the 22d day of November, 1902, releasing right of dower; prayer that said John F. Brown be made a party defendant, and defendant's title quieted. An answer

was filed by Mary E. Brown denying plaintiff's right to the property; but, as it is shown that she has died pending this appeal, the issues thereon presented need not be noticed. It also appears that defendant Kaufman has died pending the appeal, and the case against him has been revived in the name of the administrator of his estate. The plaintiff filed her reply, denying unadmitted averments of the answer, admitting that Mary E. Brown executed a quitclaim deed to L. May Arendt as alleged in defendant's answer, but alleging that the deed conveyed only her inchoate right of dower, and was void. A trial was had to the district court, which resulted in favor of plaintiff. Defendant appeals.

The brief of appellant contains no reference to the tax deed executed by the county treasurer December 1, 1898, and, as it must be conceded that the deed is void, it need not be further noticed, except to say that as early as February, 1894, it was held in *Larson v. Dickey,* 39 Neb. 463, that, "until the legislature shall provide for an official seal for county treasurers, no tax deed of any validity can be executed under the present revenue law." The law had not been changed at the time of the execution of the deed in question.

The only question presented by the appeal is as to the sufficiency of the evidence to raise the legal presumption of the death of John F. Brown, the holder of the legal title to the real estate, at the time of his unexpected disappearance from Elm Creek, the place of residence of himself and family at that time. Plaintiff is his daughter and only child. The one time wife of Brown has died. Sometime after the disappearance of Brown, his wife obtained an absolute divorce from him on the ground of desertion and failure to support, and she, if living, could have no interest in the property. There is no evidence of any rupture or disagreement in the family at or prior to the time of Brown's disappearance. When he had hired help in his livery business the employee slept in the barn. At the time under consideration, having no help, he slept in the barn, taking his meals at home with his family. On the

morning of November 17, 1902, he failed to go to his breakfast, and his daughter, plaintiff herein, went to the barn to call him, but he was not there. His bed, a team and wagon were also missing. Owing to a crippled and disfigured hand, he could not write. In making investigations about the barn, certain writings were found at his desk stating that he was leaving "to parts unknown," exonerating his family from wrong, and giving directions as to the disposition of the personal property, etc. About a week after that time an envelope was received from Kansas, through the mail, containing a post office money order. No letter accompanied the money order; but the words "my lodge dues" were written. Plaintiff took the money order, visited the officers of the two lodges to which he belonged, found that the unpaid dues amounted to the sum named in the order, and turned over the order in payment. If this remittance was from Brown, it is the last that was ever heard from him by his family. After his disappearance, it was ascertained that Mrs. Lopaz, a widow, residing in Elm Creek, was missing; that she disappeared on the same night of Brown's disappearance. She has never since been heard from. The supposition, and we think the presumption, is that she went with Brown, although there is no direct evidence that such is the fact. The writings found in the barn were not in Brown's handwriting, as he could not write, and there is some slight evidence that the writing was by Mrs. Lopaz. There is some evidence that Brown has been seen in various parts of the country since his disappearance; but it is not convincing. He seems to have had a tender regard for his family, and his remittance for the payment of his lodge dues, if he did so remit, might be construed as showing, either a desire to protect them, or a purpose to return and perpetuate his insurance. It is shown that inquiries were made among his relatives; but none of them have ever heard from him. We therefore think that the decision of the district court, finding that he was presumed to be dead, is sustained by sufficient evidence. As it is shown that since the taking of this appeal the mother of plaintiff

has departed this life, if Brown is deceased, the title to the property is in plaintiff as his sole heir.

Counsel for appellant have been diligent in their investigation and citation of cases, which incline more or less strongly to their contention; but we cannot see that they are decisive of this case. While it is true that Brown, or some one else, over his name, left writings, which he neither wrote nor signed, saying that he was "going to parts unknown," we find no declaration in any of the notes that he did not intend to return; but in one it was said, "I will send you a regular bill of sale" for one of the mares, and in another, it was said, "Anything I owe here I will pay as soon as possible." So we conclude that, even if the letters were written by his dictation, they do not show a determination never to return. He was not a fugitive from justice, for there is no evidence that he was charged or suspected of having committed any crime previous to his departure. It is shown that the woman, Mrs. Lopaz, was seen at Brown's barn on several occasions; but there is no proof of misconduct on their part or evidence of undue familiarity between them. She may have been there on legitimate business. The evidence seems to indicate that the parties left the village of Elm Creek together, yet it is largely a matter of inference arising from the disappearance of both on the same date. From a review of all the evidence presented, we are unable to say that the finding of the trial court, that the death of Brown was presumed, was wrong.

There is another feature of the case which is deemed worthy of notice. If from all the evidence the presumption of death has arisen, the property belongs to plaintiff by the law of descent, and she is entitled to it. Brown not being a party to this suit, if the conclusion as to the presumption of his death is wrong, and he is still living, his right to the property will not be destroyed by the decree; the only effect will be the interruption of the running of the statute of limitations in favor of defendant, who has no interest in or title to the property, and could not have until his adverse possession has ripened into a

title. That right not having accrued, the decree, while not establishing Brown's right, might, as an incident, inure to his benefit by reason of the failure of the completion of the statutory bar. As between plaintiff and Brown, her father, and their relative rights, the decree can have no effect, should he be alive, as he is not a party to the suit. As between plaintiff and the administrator of the estate of defendant, the decree will be effective in establishing plaintiff's right, subject to that of her father. In such case less weight and convincing evidence is required than where the property might be squandered and Brown's rights therein be lost. 2 Greenleaf, Evidence (16th ed.) sec. 278*h*.

The decree of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

BRIDGEHAM C. BURGEDORFF ET AL., APPELLANTS, V. MARTHA I. HAMER, APPELLEE.

FILED JANUARY 30, 1914. No. 17,512.

1. **Appeal:** AFFIRMANCE. Where fraud in obtaining the execution and delivery of a promissory note, and the mental condition of the maker to enter into the contract for which the note was given, are submitted to a jury under proper instructions, the verdict will not be set aside, unless it is unsupported by the evidence and is clearly wrong.
2. **Bills and Notes:** VALIDITY: MENTAL CAPACITY. If the maker was under guardianship and was mentally incompetent to transact business for herself when the note was executed, this will render such note void in the hands of the payee and others who subsequently hold it as collateral security.
3. **Evidence:** MENTAL CAPACITY: OPINIONS. Persons who have known the maker of the note for a number of years, who have had business transactions for her, and have observed her conduct and demeanor with a view to ascertaining her mental condition, may, after giv-

ing the facts upon which their opinion is based, testify as to their opinion of her ability to transact business when the note was executed.

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

S. A. Dravo, James I. Rhea and *Thomas F. Hamer*, for appellants.

F. L. Carrico, A. J. Shafer and *L. C. Paulson, contra.*

BARNES, J.

This action was brought in the district court for Phelps county against the defendant, Martha I. Hamer, on a promissory note for $2,750, bearing interest at the rate of 8 per cent. per annum. The defendant, by her guardian, E. T. Grunden, and also in her own behalf, filed answers to the petition, in which she admitted signing the note in question, but alleged three matters of defense: First, that the note sued on was a part of, and attached to, a written instrument, which is set out in her answer, for the sale of a relinquishment of two certain homestead claims situated in the mountains of Colorado, and about four or five miles from Dawson Switch, and about 35 miles from the city of Denver. It was alleged in said answers that the note sued on was not to be paid until the fulfilment of the terms and conditions set out in the written contract of sale. Second, that the said note was obtained from the defendant by false and fraudulent representations made by the plaintiff Bridgeham C. Burgedorff and his son, George Burgedorff, to the defendant, relating to the value of the said claims, the amount and value of the timber, and the value of the improvements located on said claims; that the false and fraudulent representations were that the value of the timber growing upon said claims was $10,000, or thereabouts; that the value of the improvements was $1,000, and that the value of the land aside from the timber and improvements was about $1,400; that said representations were false, fraudulent, and untrue,

and defendant relied thereon to her great damage. Third, the answers further alleged that the defendant at the time of the making of said contract and the signing of said note was mentally incompetent to transact her business, and that she was under guardianship, a guardian having theretofore been appointed for her by the county court of Phelps county, Nebraska.

Plaintiffs filed a reply to defendant's answers, in which they denied that they made any false or fraudulent representations to secure the note in question, denied that defendant is or was mentally incompetent, and alleged that the appointment of a guardian for her was secured under false representations on her part that she was an incompetent person, and also that her guardian was appointed for the purpose of prosecuting a certain suit for her in Harlan county, Nebraska.

Plaintiffs further alleged, by way of reply, that they had pledged the note in question with the Colorado State & Savings Bank to secure the payment of certain moneys loaned by said bank to plaintiffs, and that at numerous times the defendant, Martha I. Hamer, went with the plaintiff Bridgeham C. Burgedorff to the Colorado State & Savings Bank, and that she then and there stated to one McCutchen, the president of the said bank, that she had given the note in question to Burgedorff, and that the same would be duly paid at maturity; that she did not at said times in any manner question the validity of the note, or the insufficiency of the consideration therefor.

The Colorado State & Savings Bank intervened, by leave of the court, and alleged that the note in suit was pledged to it as security for loans made to the Burgedorffs; that said note was duly indorsed and transferred by them to the bank to secure loans made to them, and that might thereafter be made to them; that there is due to the Colorado State & Savings Bank from the said Burgedorffs the sum of $1,511.85, with interest thereon, and prayed that the said defendant be adjudged to pay the intervener the said sum, together with interest, to which answer and

cross-petition of the intervener the defendant filed a general denial.

Upon the issues thus made there was a trial to a jury, who returned a general verdict for the defendant, and against the plaintiffs and the intervener. Motions for a new trial were filed and overruled, judgment was rendered on the verdict, and the plaintiffs and intervener have appealed to this court.

Appellants earnestly contend that the evidence does not establish fraud in the transaction by which the note in question was obtained, because the representations made to defendant were of value only, and fraud cannot be predicated thereon. It appears that the plaintiff, his son, and his son's wife represented to defendant that the buildings on the two homestead claims were of the value of at least $1,000 that there were 30 acres of good farm land on the claims; that the timber growing thereon was of the value of $10,000, and that with very little work that amount could be realized therefrom. A fair preponderance of the evidence discloses that these representations were false, and amounted to a gross exaggeration of the real facts relating to the value of the claims. It also appears that plaintiff had no knowledge such as would enable her to form a correct estimate of the value of the claims. Ordinarily fraud could not be predicated on such representations, yet, when we take into consideration the defendant's mental condition, such representations would amount to fraud.

It appears that defendant, a few years before the transaction occurred, had been divorced from her husband, and had obtained a farm worth about $16,000 as alimony; that she had so mismanaged the farm, and the proceeds arising from mortgaging and selling it, as to require the appointment of a guardian of her person and estate, and at the time the note sued on was executed she was under such guardianship in Phelps county, Nebraska, where she resided when the appointment was made. It also appears that after obtaining her divorce she became infatuated with one Fred N. Skiles, who was a widower, and had given him

$8,000 to start a saloon; that proceedings to recover this money, or a part of it, had been prosecuted to a partly successful determination; that defendant had paid Skiles' attorney's fees; that she had gone to Thomasville, Colorado, thereafter; had purchased a hotel and saloon, and had again started Skiles in business, which business had been a failure; that she was induced to purchase the relinquishment of the claims in question because she was told that Skiles could make money out of the timber thereon. These facts were in evidence, and were well known to the plaintiffs at the time the note was executed. It further appears that plaintiff, after selling the relinquishments to defendant, induced his cousin to contest the entry to the one on which the most valuable timber was situated.

The question of the defendant's mental condition, and all of the circumstances of the transaction, were submitted to the jury under proper instructions, and we do not feel at liberty to disturb their verdict.

It is also contended that the court erred in receiving the evidence of Maxey, Gustus, and Everson as to the defendant's mental condition. It appears that Maxey was the agent who obtained the loan of $9,000 for the defendant on her Iowa farm, $8,000 of which she gave to Skiles; Gustus was the sheriff of Phelps county, who had served the papers in various suits for and against her, and had known her well for a number of years; and Everson was the attorney who had conducted the litigation for her in her attempt to recover her money from Skiles. These witnesses were able to testify as to her mental condition from facts related, derived from years of observation of the defendant, and the nature of her business transactions. We therefore conclude that their evidence was properly received.

It is further contended that the court erred in giving paragraph 5 of his instructions to the jury. By this instruction the court defined the degree or extent of defective mentality necessary to avoid a contract; and, as ap-

plied to the evidence in this case, this instruction appears to have been correctly given.

Finally, it is contended that the verdict should have been for the intervener, the Colorado State & Savings Bank, to the extent of the sum of money for which the plaintiff Burgedorff had pledged the defendant's note as collateral security. It appears that when the note was first pledged to the intervener it had no knowledge of the fact that defendant was under guardianship, but soon thereafter that fact was brought to its attention. By her conversations, however, with its president, Mr. McCutchen, it appears that he ought to have made investigation. She told him that Skiles wanted her to let him have $500 in money, that she did not want to do so, and she told him not to let Skiles have the money. Such a statement should have put the president of the bank on inquiry as to the mental condition of the defendant. Again, it appears that the intervener tried to get Mrs. Hamer's money after its officers knew she was under guardianship. But, above all, the jury must have found that she was mentally incompetent to transact business when she gave the note, and it would follow that the note was void both as to the bank and as to the plaintiff Burgedorff.

Again, it is suggested that the appeal in this case is a joint one; the intervener having jointly availed itself of the appellate proceedings instituted by the plaintiffs. In *Moseman v. State,* 59 Neb. 629, it was held: "A joint assignment of error in a petition in error made by two or more persons, which is not well taken as to all who joined therein, will be overruled as to all." In *American Bank v. Hand,* 59 Neb. 273, it was said: "Joint assignments of error in a petition not good as to all who joined must be overruled"—citing *Levy v. South Omaha Savings Bank,* 57 Neb. 312. It would seem that where two persons join in an appeal, and the judgment appealed from is good as to one of the parties, it should be held good as to both of the joint appellants.

It appears that the verdict of the jury in this case has resulted in substantial justice, and the judgment of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

WILLIAM WHISKER, APPELLANT, V. VERA CRUZ COFFEE COMPANY, APPELLEE.

FILED JANUARY 30, 1914. No. 17,554.

1. **Corporations:** PAYMENT OF DIVIDEND. One who receives and accepts a note of the promoter and principal owner of a company or corportion in payment of a dividend due him from the company cannot afterwards maintain an action against the company for such dividend.
2. **Appeal:** FINDINGS: REVIEW. The finding in an action at law, tried by the district court without the intervention of a jury, is entitled to the same consideration as the verdict of a jury, and will not be set aside unless it appears to be clearly wrong.

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

B. N. Robertson, for appellant.

C. E. Herring, contra.

BARNES, J.

The plaintiff brought this action to recover the sum of $489.60, with interest thereon at the rate of 7 per cent. per annum from the 1st day of March, 1906, as a dividend due him on certain stock issued to him by the defendant company. Defendant answered that the plaintiff had received and accepted the note of one W. C. Orr in payment of the dividend. This was denied by the reply. A trial to the district court for Douglas county resulted in a judgment and finding for the defendant company, and the plaintiff has appealed.

It appears that W. C. Orr was the promoter and the principal owner of the Vera Cruz Coffee Company, and had guaranteed to the stockholders a dividend of 20 per cent. On the 1st day of October, 1906, the fifth annual dividend was declared by the directors of the company, amounting to $13,084.81. At that time there was in the treasury of the company only $9,318 with which to pay the stockholders this dividend. Certain of the stockholders were paid in full, in cash, as far as the fund would go, and the others took the notes of W. C. Orr, due in a short time thereafter, in payment of the amount then due them on the dividend.

Plaintiff in his testimony admitted that he took the note of Mr. Orr who, he testified, at that time was reputed to be a man of considerable wealth, and who for many years had been his personal friend; but he further testified that he did not accept the note as payment of the sum due him from the company.

A Mr. Gratton testified that all of the shareholders, except about a dozen, were paid in cash, and the others accepted W. C. Orr's personal notes in lieu of the dividend due them from said Vera Cruz Coffee Company. He further testified that a dividend check for $489.60 was issued to the plaintiff, William Whisker, who indorsed said check to the company, and was then handed W. C. Orr's note for the same amount, $489.60, out of which he expected to get the cash with accruing interest at a later date.

Ezra Millard, assistant cashier of the Omaha National Bank, testified that the check in question, No. 815, issued for $489.60, passed through the Omaha National Bank, and he fully corroborated the testimony of Mr. Gratton in relation to the check.

The plaintiff refused to testify that he never received the check, or that he never indorsed the same to the company, but insisted that he had no recollection of that part of the transaction.

The only question presented by this record was whether the plaintiff received and accepted the note of W. C. Orr

in payment of the fifth annual dividend, and on this question the testimony was fairly conflicting.

In an action at law the finding of the district court is entitled to the same weight and consideration as the verdict of a jury, and, in view of this fact, we find ourselves unable to set aside the finding and judgment in this case. The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ADOLPH F. DIELS, APPELLANT, V. ALBERT R. KENNEDY, APPELLEE.

FILED JANUARY 30, 1914. No. 17,561.

Sales: BREACH OF CONTRACT: EVIDENCE. Plaintiff's cause of action was based on the breach of a contract to purchase and accept a certain quantity of flour ordered by defendant from plaintiff. The evidence was conflicting, and, it not clearly appearing that plaintiff actually sustained any damages by reason of the breach of contract, *held* that the verdict of the jury should be sustained and a judgment of the district court should be affirmed.

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

Henry M. Kidder, for appellant.

J. E. Porter, contra.

BARNES, J.

This is a second appeal. When this case was before us the first time the judgment of the district court sustaining a demurrer to plaintiff's petition was reversed, and it was held that the petition stated facts sufficient to constitute a cause of action. It was further held that the plaintiff was entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they were

certain, and such as might naturally be expected to follow the breach. *Diels v. Kennedy,* 88 Neb. 777. When the mandate was returned to the district court, plaintiff amended his petition. The defendant filed an answer, in which it was alleged, in substance, among other things, that on or about the 13th day of March, 1908, one George Harms, representing himself to be a salesman for plaintiff, called upon defendant in his place of business at Crawford, Nebraska, and represented to defendant that two certain brands of flour were handled and sold by plaintiff, Monitor flour and Gilt Edge flour. This flour was in all respects equal in grade and quality to Brown Seal flour, and that it was 5 cents per hundred pounds lower than Brown Seal flour; that it was ground from the very best grades of wheat, not inferior to No. 1, or Northern, and procured the defendant to sign an order for certain Monitor and Gilt Edge flour and for corn-meal; that defendant executed and gave the order relying solely upon the representations of said Harms, and the order was subject to the approval of the plaintiff and subject to countermand by defendant; that a few days after defendant executed the order, and before the same was approved by the plaintiff, the defendant discovered that said representations of the said Harms were false and fraudulent; that said flour so ordered was not in grade equal to Brown Seal flour; that it was made up and ground from an inferior grade of wheat, and not from a grade equal to No. 1 hard or Northern; that it was not 5 cents per hundred pounds lower than Brown Seal flour, and thereupon defendant forthwith countermanded said order by notice thereof to plaintiff; that said order was executed wholly without consideration; that defendant countermanded the order before it was approved or accepted by plaintiff; that plaintiff did not tender any of said goods to defendant, and the defendant did not receive any of said goods. To this answer there was a reply, and upon the issues thus presented the cause was tried to a jury. A verdict was returned for the defendant, judgment was rendered upon the verdict, and the plaintiff has again appealed.

Appellant contends that the verdict and judgment are not sustained by the evidence; that the evidence offered by defendant was incompetent and immaterial. As we view the record, some of the evidence of both parties was incompetent, but so much of it as was competent was fairly conflicting.

Plaintiff's testimony, and that of his miller, who was his principal witness, tended to show that the difference between what it would cost to manufacture the flour ordered by the defendant and deliver it to him at Crawford, Nebraska, and the amount defendant agreed to pay for the same was $141. The evidence introduced by plaintiff, however, was not very clear or satisfactory. It failed to take into account the coal required to be used in generating the power to run plaintiff's mill, the cost of sacking the flour, the expense of advertising, the wages paid plaintiff's salesman, Harms, and other legitimate items of expense. On the other hand, the defendant produced the testimony of an experienced and competent miller, who was engaged in manufacturing flour at Schuyler, Nebraska, a short distance from Scribner, where the plaintiff's mill is situated. This witness gave evidence as to the cost of manufacturing and delivering the flour in question at Crawford, Nebraska, and by his testimony, and that of other witnesses, it was shown that there was no material difference between such cost and the sum defendant agreed to pay for the flour. Again, defendant testified that, when his order for the flour was taken, Harms, plaintiff's salesman who took it, told him that, in order to introduce plaintiff's flour, he would bill the order to him at cost. It appears, without contradiction, that, before plaintiff accepted the order, defendant by letter countermanded it. It further appears that plaintiff was engaged in the manufacture and sale of flour for the market generally; that he set apart no flour for the purpose of filling defendant's order. He testified that he had sold the flour, but failed to state the price which he received for it.

We think the evidence fails to show that plaintiff sustained any damage by reason of the cancelation of de-

fendant's order, and the jury was warranted in returning a verdict for the defendant. The case appears to have been fairly submitted to the jury under proper instructions, and the judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

ERNEST T. GRUNDEN, GUARDIAN, APPELLEE, V. FRED N. SKILES ET AL., APPELLANTS.

FILED JANUARY 30, 1914. No. 17,573.

1. **Judgment:** VACATION OF SATISFACTION: FRAUD. A settlement of a judgment will be set aside and the judgment reinstated when the settlement was obtained by fraud practiced upon a person of weak understanding, who is unable to guard herself against imposition or resist importunity.
2. ———: ———: APPLICATION OF PAYMENTS. When a judgment is reinstated under the foregoing circumstances, the plaintiff is not required to restore the payments made to secure such a settlement, but the payments will be credited on the judgment thus reinstated.

APPEAL form the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed as modified.*

J. G. Thompson and *Thomas & Shelburn*, for appellants.

F. L. Carrico and *Hague & Anderbery, contra.*

BARNES, J.

Appeal from a decree setting aside a settlement of a judgment obtained in the district court for Harlan county, and the dismissal of the appeal in that cause in the supreme court.

It appears that Martha I. Hamer, by her duly appointed guardian, obtained a judgment of the district court for Harlan county some time in the year 1909 in an action against Fred N. Skiles and the Meyer Brothers for the

sum of $4,947.97, and at about the same time the same court rendered a decree in her favor and against the defendant Skiles, requiring him to convey to her a certain house and lot in the city of Alma, in that county, for fraud practiced upon her; she being of a weak mind and incapable of transacting her business. The case against Skiles and the Meyer Brothers had been taken to the supreme court of Nebraska on appeal, and was pending in that court on May 13, 1910; and her guardian had procured his discharge, and on or about that date, while the plaintiff was visiting at the Skiles home in Holdrege, by the solicitation of Skiles and the attorney for Meyer Brothers, she made a settlement of the judgment against Skiles and the Meyer Brothers, for which they induced her to accept $663.37, in money, and the payment to her attorney, who procured the judgment, the sum of $500, and Skiles executed to her a deed to the house and lot in Alma; he not having appealed from the decree in his case. She thereupon was persuaded to execute a paper writing acknowledging satisfaction of the judgment of $4,947.97, with interest and costs, and dismissing the defendant's appeal then pending in the supreme court. As soon as Mrs. Hamer's friends ascertained what had occurred, a guardian of her person and estate was appointed by the county court of Gosper county, where she was living at that time, and this action to set aside the settlement was commenced. The issues were made up, a trial was had to the court, which resulted in a finding for plaintiff and a decree setting aside the settlement upon certain conditions, and the defendants have appealed.

It appears that when this case was tried Martha I. Hamer was a woman 46 years of age; that she was born in Michigan, from which state, with her parents, she came to Iowa at the age of 13. When she was 15 years old she was married to one W. J. Hamer. They lived in Iowa for 16 years, and then moved to Elwood, Nebraska, where they lived until about 13 years ago, when she was divorced from her husband on the ground of extreme cruelty. The husband first attempted to get the divorce, but failed. He

then made a property settlement with her out of court, by which she was given 200 acres of land in the state of Iowa, worth about $15,000, out of the estate of her husband, which was then worth from $75,000 to $100,000, and upon her application the divorce was granted. She then went to Iowa to live on the farm she had thus obtained; not being successful in managing the farm she returned to Holdrege, in Phelps county, Nebraska, where she made the acquaintance of the defendant Fred N. Skiles. Skiles kept company with Mrs. Hamer, and promised to marry her. By this means he obtained such an influence over her that she readily did anything that he suggested in regard to her business affairs. It appears that at his solicitation she went to Iowa and mortgaged her farm for $9,000, $8,000 of which she turned over to Skiles without a particle of security, and with this money he bought a saloon and the stock and fixtures therein in Alma, Harlan county, Nebraska. When Mrs. Hamer's children ascertained what she had done in regard to placing a mortgage on her farm and turning the money over to Skiles, one of her sons was appointed guardian of her person and property, and by an action in the district court for Harlan county recovered the judgment for which she made the settlement in question in this case. He also obtained a decree requiring Skiles to deed to her a house and lot in Alma, which he had purchased with a part of the money he had obtained from her.

There is considerable evidence in the record detailing the various business transactions of Mrs. Hamer, and her conduct in regard to her other affairs, from which it clearly appears that, while she was not violently insane, she was a person of weak mind, and entirely incompetent to transact business. As a proof of that fact, some $16,000, which she obtained from the sale of her Iowa farm, in a short space of time was dissipated and lost through the influence of Skiles, and by reason of her various business transactions. It appears that Skiles and the Meyer Brothers were aware of the condition and state of mind of Mrs. Hamer, and as soon as her former guardian was discharged

they set about procuring the settlement of the judgment in question. It is true that the Meyer Brothers apparently took no part in the settlement, but it is clear that they availed themselves of their codefendant Skiles and his influence over Mrs. Hamer in order to procure the settlement. It also appears that their attorney, while he practiced no fraud upon Mrs. Hamer, was very active and insistent in procuring the settlement; and, in the state of Mrs. Hamer's mind, considering the power that defendant Skiles seemed to have over her, it is clear that the settlement was obtained by fraud. She did not know the amount of her judgment; she did not seem to understand that she was not getting anything from Skiles when he made the deed, which the court had decreed to her, of the house and lot in Alma; she did not appear to understand how much or how her former attorney Everson was paid, and she knew nothing of the $500 that Skiles, one of the codefendants in the judgment for which the settlement was made, had received in order to procure such settlement. In fact she really understood nothing about the nature of the settlement; and, when she executed the paper writing by which she dismissed the defendant's appeal from that judgment in the supreme court, she had no comprehension of its force and effect. The decree in this case seems to be amply sustained by the evidence, and the settlement was properly set aside.

In *Sprinkle v. Wellborn,* 3 L. R. A. n. s. 174 (140 N. Car. 163), it was said: "Equity will cancel a deed procured from a person of weak understanding, who is unable to guard himself against imposition or resist importunity."

In *Dewey v. Allgire,* 37 Neb. 6, this court said: "While mere imbecility or weakness of mind in a grantor will not, in the absence of fraud, avoid his deed, insanity will do so if of such a character as to induce the conveyance, although such insanity may not amount to a complete dethronement of reason and understanding upon all subjects." To the same effect are *Wager v. Wagoner,* 53

Neb. 511; *Hay v. Miller,* 48 Neb. 156; *Aldrich v. Steen,* 71 Neb. 33; *Gingrich v. Rogers,* 69 Neb. 527.

When it is considered that Mrs. Hamer satisfied and released her judgment of $4,947.97, with interest and costs, for the paltry sum of $663.37, which she actually received therefor, it is apparent that her condition of mind and the fraud practiced upon her in procuring the settlement is sufficient to sustain the decree of the district court setting such settlement aside.

It is contended, upon the cross-appeal in this case, that the district court erred in requiring Mrs. Hamer to repay to the defendants William Meyer and Edward Meyer the sum of $1,167.50 paid by them to her and her attorney, John Everson, and that the court further erred in requiring the plaintiff to pay to the defendants William Meyer and Edward Meyer the costs paid by them in the case of Martha I. Hamer against Fred N. Skiles *et al.*, and the costs paid by the defendants in the case of Arthur W. Hamer, guardian, against Fred N. Skiles, Edward Meyer and William Meyer, in all amounting to the sum of $94.15. We think this contention should be sustained. Those payments cannot be said to have been made in good faith, and it was quite absurd to annul the settlement of a judgment for mental incompetency and fraud, and yet require the plaintiff to restore the money to the defendants which should be credited upon the judgment which they sought to have satisfied and released. *Englebert v. Troxell,* 40 Neb. 196; *Bloomer v. Nolan,* 36 Neb. 51; *Rea v. Bishop,* 41 Neb. 202; *Wager v. Wagoner, supra.* They obtained the settlement knowing the past and present condition of Mrs. Hamer; they paid Skiles, one of their codefendants, $500 to play upon the sentimental feelings of Mrs. Hamer; they paid the costs of procuring the judgment against them; they paid the attorney's lien claimed by Everson upon that judgment; and they paid Mrs. Hamer herself only $663.37 in order to procure the settlement, and there is nothing unjust or inequitable in requiring the trial court to credit the sums so paid upon the judgment which was reinstated by the decree.

As we view the record, the judgment of the district court should be modified in so far as it required the plaintiff to restore the money paid by the defendants to procure the settlement, with the exception of the $500 paid defendant Skiles for his services, and that court should be required to credit such payments upon the judgment. The judgment of the district court is therefore modified to that extent, and as thus modified is affirmed.

AFFIRMED AS MODIFIED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. ALVIRA E. BRITTON, APPELLEE, V. STEPHEN W. BRYANT ET AL., APPELLANTS.

FILED JANUARY 30, 1914. No. 18,129.

1. **Habeas Corpus:** CUSTODY OF CHILD. The right of a mother to the custody of her child is not lost beyond recall by an act of relinquishment performed under circumstances of temporary distress or discouragement.
2. ———: ———. The right of the parent is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown, or forfeiture clearly established.
3. ———: ———. In an application for a writ of habeas corpus by a mother to recover the possession of her child of tender years, the best interest of the child should determine its custody.
4. Evidence examined, and found sufficient to sustain the order of the district court.

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

I. J. Dunn, for appellants.

F. W. Fitch, contra.

BARNES, J.

The relator, Alvira E. Britton, brought this action in the district court for Douglas county to recover the pos-

session of her infant child, Robert L. Kendall, Jr., from the custody of the respondents, Stephen W. Bryant and Alice Bryant. The proceeding was an application for a writ of habeas corpus. A trial resulted in an allowance of the writ, and the respondents have appealed.

It appears that the relator was married to one Robert L. Kendall in the city of Lincoln, where she, with her husband, resided for a time, and where her son Robert L. Kendall, Jr., was born. The father appears to have been of a roving disposition, and, failing to support his wife and child, she went to Omaha to find employment, taking her son with her. She first obtained a position as a ticket-seller for a moving picture show. She was ill at the time, and it became necessary for her to go to the hospital for an operation. Being unable to support herself and her child, she applied to the relator Stephen W. Bryant for assistance, and an arrangement was made by which the Bryants were to take the child, Robert L. Kendall, Jr., and care for him until such time as the relator could herself furnish him the means of support. A little later on Mr. Bryant brought an agreement to the relator, which she signed, and by which she relinquished the child to the Bryants. They never adopted him, and after the relator returned from the hospital she commenced to board in the Bryant family, where she remained until she was divorced from her former husband by a decree of the district court for Douglas county, in which the care, custody and education of her minor child was decreed to her. She continued to live in the Bryant family until February 4, 1911, when she was married to her present husband, John Britton. For a time Britton and his wife boarded with the Bryant family. Later on they established a home of their own, and thereafter the relator demanded the custody of her child, which was denied her, and thereupon she brought this action.

The testimony shows that the respondents had no home of their own, and were living in a rented house. It must be said, however, that they furnished the child with the necessaries of life, and the only real complaint that is

made against them is that they failed to send the child to school, to church and Sunday school. It appears that for two years after the child reached school age he only attended school a small part of the year. It also appears that the respondents were given to attending dances, and would frequently take the child out to such places of amusement and keep him all night. It also appears that he was allowed to associate with certain persons who were in the employ of Bryant in his express business. The mother was dissatisfied with the treatment of her child, and was desirous of having him with her; she being fully able to take care of him and furnish him a good home. His stepfather was also anxious to have the child in his home, and he testified that he was able and willing to furnish suitable support and maintenance and a good home for his stepson.

It appears since the marriage of the relator to Britton she has had a good home, has been an attendant at church and Sunday school, and that she desired to have her child brought up under such surroundings and influences. It is contended on the part of the respondents that the relator is bound by the terms of her agreement to surrender her son into their possession. But agreements of that kind are seldom enforced, especially where nothing has been done in the way of the adoption of the child by the foster parents.

In *State v. Nebraska Children's Home Society,* 94 Neb. 255, it was said: "A father can, by his agreement in writing, surrender the custody of his infant child to another, so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and retain the custody of his child, unless he can show a clear breach of the agreement, or an abuse of the child, or *that the best interest of the child* requires it."

In *Norval v. Zinsmaster,* 57 Neb. 158, it was said: "The right of a parent to the custody of a child is not lost beyond recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement." It was further said in the opinion. "The right of the par-

ent is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown, or a forfeiture clearly established."

In *State v. Porter,* 78 Neb. 811, 818, speaking of contracts to relinquish a child, it was said: "Such contracts, of course, are always to be subject to the best interest of the child, and are never to be enforced to the sacrifice of its interest."

The father and mother are the natural guardians of their minor children, and are equally entitled to their custody and to the care for their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies or is disqualified, the guardianship devolves upon the other. In the instant case, the mother having been divorced from the father of the child in question, and it having been found by the district court which gave her the decree that she was a suitable person to have the care, custody and nurture and education of her infant child, she was thereafter, so long as she remained a competent and suitable person, entitled to such care and custody.

It appears that relator has had the exclusive custody of her child since the judgment in this case was rendered; that the child is happy and contented, and is regularly attending school, church and Sunday school. This being so, it is quite apparent that it is for the best interest of the child for the mother to have its care and custody. Such was the conclusion of the district court, and as we view the evidence the finding and judgment of that court was right, and it is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JOHN RUSH ET AL., APPELLANTS, V. SMITH-LOCKWOOD MANUFACTURING COMPANY, APPELLEE.

FILED JANUARY 30, 1914. No. 17,460.

Nuisance: INJUNCTION: EVIDENCE. In this an action to restrain the operation of a hide-dressing and leather manufactory as a nuisance on account of the exhalation of noisome and offensive odors, the evidence is *held* insufficient to warrant the issuance of an injunction, and the judgment of the district court is affirmed.

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

Alvin F. Johnson and *Mahoney & Kennedy,* for appellants.

DeBord, Fradenburg & Van Orsdel, contra.

LETTON, J.

This is an action for an injunction to prohibit the defendant from using certain property in the city of Omaha as a tannery, for the purpose of receiving, tanning or preparing fresh hides, or in any manner so as to interfere with the comfortable and reasonable use and enjoyment by the plaintiffs of their property in the vicinity. The petition sets out the ownership by the plaintiffs of a family home of the value of $9,000 lying to the northwest of the defendant's factory, and also of an apartment building to the south and of cottages to the east, all occupied by tenants, and of the value of $40,000; that the defendant conducts a whip manufactory, and in conjunction therewith a tannery; that it permits hair, flesh, or other refuse from hides to accumulate; that the work of the factory is done and will continue to be done in such a manner that it fills the air in that locality with offensive and unhealthy stenches; and that the locality is residential in character. It is also alleged that plaintiffs purchased and improved their property before the factory

was established, and that if it continues to be maintained their property will be greatly diminished in value, and that plaintiffs have attempted to have the city council and health commissioner abate the nuisance, but without avail. Defendant's answer denies the existence of the alleged nuisance, avers that after certain changes and improvements were made the city authorities determined that the plant was not a nuisance and that the business was not offensive or unhealthy. An estoppel is also pleaded on the ground that the plaintiffs with knowledge of the facts stood by and without objection permitted the defendant to expend large sums of money in the purchase and establishment of machinery in the business; that Thirteenth street, where the factory is situated, even before the plaintiffs bought their property, was a business street and has so remained. In a supplemental answer the defendant pleads that at the time of bringing the suit certain changes for the betterment of the plant were being made; that since that time it has purchased new property in connection with the plant, and built a large addition thereto; that it has removed all the old vats, and constructed others which are new and sanitary, and that the whole plant is now maintained in excellent condition.

An immense amount of evidence was taken at the trial, which lasted three weeks, and more than 70 witnesses were examined. The court found, in substance, that the factory lies on Thirteenth street about one mile south of the retail district of the city of Omaha; that a double line of street cars runs on said street; that the street is of a distinctly business character to within three blocks north of the factory, and from that point southward there are several business buildings, but that the buildings in the main are residential in character; that the factory building was erected before the plaintiffs purchased their flats nearby, but was not used as a factory until 1904; that it was vacant at the time plaintiffs' flats were built; that in the spring of 1909 for a short time there were offensive odors from the factory on account of offensive matter placed on the premises during the winter time which

thawed out in the spring, but that the condition was cleared up and all offensive odors removed six or eight months before this suit was brought. The court also found that several thousand dollars had been spent before the suit was brought in erecting ventilator pipes, closing up area-ways, and improving the sanitary condition of the factory; that since the suit was brought the defendant has expended upwards of $10,000 in further improvements, and that its present equipment is as nearly as possible sanitary and in no respect a nuisance. The injunction was refused.

At the close of the evidence the court stated he would take the case under advisement, and suggested that he would go to the vicinity of the factory if plaintiffs' counsel would advise him when the odors were pronounced or perceptible. Specific objection was then made by the plaintiffs' counsel to the court making a personal examination. The court then said: "Unless it is by consent, I will not go down and view the premises as a part of the trial." On May 2, the court requested the parties interested to appear in court, and at that time rendered an oral opinion, examining and dissecting the evidence, and found generally for the defendant. This decree was set aside, special findings were requested and made, and the present decree entered on July 1. In that opinion the court made the statement: "I did not go to inspect the premises. I will, however, say to the parties and the attorneys that I have been down in the neighborhood on a number of occasions, and if I had discovered any odors I think I could have decided the case upon the testimony of the plaintiffs' witnesses, and, of course, that is all I have before me. I did not go into this factory, but I have been by it on a good many occasions when they were operating it and when they were not." The judge also stated he had been by the plaintiffs' residence when the wind was blowing from the direction of the factory, and that he went into a like factory near-by and observed the process.

A motion for a new trial was filed, which contains, in addition to the usual complaints, specific assignments of

error that the court erred in making personal examinations of the locality and of another tannery in the neighborhood without the plaintiffs' knowledge or consent and against their objection. Two points are thus presented for our consideration: First. What findings of fact should this court reach upon the evidence? Second. Was the action of the trial judge in visiting the locality and the other tannery so erroneous as to require a reversal? Of course, if the evidence leads us to the same conclusion as it did the trial judge, the latter assignment need not be considered.

We have no doubt that the operation of a factory of this kind in a residential neighborhood would ordinarily operate to reduce the value of property in the vicinity. The very name of tannery or hide-dressing factory suggests unpleasant odors, and people are not likely to rent or to purchase property for homes in the neighborhood of such industries when better can be had, and yet, the presence of such an industrial establishment in some quarters of a city might tend to increase the rental value of moderate-sized dwellings or apartments. But the establishment is not what is usually known as a tannery. The evidence shows that the defendant is engaged in the manufacture of whips, bridles, belts, etc., a large proportion of which are manufactured from what is known as rawhide. It purchases salt hides to the extent of 25 to 40 a day from the packing houses at South Omaha and local dealers. These hides are put into a vat of water to soften them, then into a revolving wheel holding about 50 hides into which water is turned for the purpose of washing the loose dirt away. They are then placed in vats of strong lime water, where they remain for some time. After being removed, they are washed and the hair and any flesh that may remain is removed by scraping. The hair is put in barrels each night and removed as garbage. The fleshings, of which about a barrel a day accumulate, are also collected, saturated with a lime solution, placed in barrels, and about once a week are shipped to a glue factory in Chicago. After being scraped, the hides are again

washed and put into a solution of alum, where they soak from eight to ten hours, and are then dried. The subsequent processes depend upon what use is to be made of the leather. Some are kneaded with tallow by a machine, and some are tanned by the use of chrome salts and other chemicals and finished with an oil preparation. The processes are speedy and entirely different from the usual method of tanning by tan-bark, etc., which takes months where this process takes days.

It is apparent that odors are rife in and about the factory. There is a strong odor of lime; there must inevitably be more or less effluvium arising from the fleshings and from the hides after being softened, especially in warm weather; the various chemicals used in the process are more or less odoriferous, and the components of the finishing oil described as "oleo substitute" have each their distinctive smell. It is clear that the odors in the factory would be offensive in and about a residence. This, however, is not decisive of the question presented. The trouble is not with the odors which exist in the factory, but with those which escape, and the question is: How offensive are such odors, and are they disseminated to such an extent as to cause a special injury to the plaintiffs other than that suffered by the public at large? It is impracticable to set forth in this opinion even a small modicum of the testimony upon this point. It may be said, however, that a number of residents in the vicinity of the factory testified to facts which, if unexplained or uncontradicted, would amply justify a court of equity in enjoining the continuance of the operations as formerly carried on. On the other hand, a much larger number of witnesses testified that they detected no offensive or unsanitary odors or smells, and failed to see anything of the nature of a nuisance about the premises. Several witnesses testified to noxious odors in 1909, more perhaps in that year than at any other time, but others testified that the changes that were thereafter made in the manner of disposing of the refuse and in the operation of the factory were instrumental in preventing the escape of

offensive odors beyond the factory. Whether the occasional suffocating odors described in the testimony of the witnesses living south of the factory were brought by a north wind from the smelter to the north of the city, or whether the noisome smell detected by other witnesses when a south or southwest wind was blowing came from the factory or from the packing-houses at South Omaha is a matter as to which there must inevitably be some doubt. The testimony of the witnesses seems to depend very largely upon their interests, their nationality, their manner of life, and their environment. Many of the defendant's witnesses are Bohemians, who testify that in their homes they make no attempt at ventilation in the winter season and who have been accustomed to work in factories or packing-houses. Some of Mrs. Rush's former tenants testify they vacated her apartment house on account of offensive odors, while a number of the present tenants testify strongly for the defense. The plaintiffs have shown that their property in that locality has depreciated in value since the time it was purchased, but it is also shown that it was bought 20 years ago during what are known as "boom times," and that it has never been worth as much as was paid for it from that time to this. The factory building in 1904 sold at a low price at a tax sale, and the starting of this industry thereafter is shown by some of the witnesses to have increased the rental value of the property in the neighborhood. We cannot believe that there is no smell in connection with this factory, but we doubt very much whether the odors which escape therefrom are so noxious and injurious and have so reduced the value of plaintiffs' property or the comfort of their residence as to warrant the issuance of an injunction. It should be a clear case to justify a decree which would entail such grave consequences upon the defendant.

Taking all the testimony together and independent of the remarks made by the trial judge as to the result of his visits to the neighborhood of the factory, we believe that the plaintiffs have failed to establish the allegations of

their petition by a preponderance of the evidence. We find it unnecessary to express any opinion as to whether his action was erroneous. In 1909 it is probable that an injunction would have been justified, and, unless diligence is used in the future to prevent the escape of noxious odors, the plaintiff may be entitled to apply for relief; but as the evidence stood at the close of the trial we are of opinion that the judgment of the district court was right. It is therefore

AFFIRMED.

ROSE, FAWCETT and SEDGWICK, JJ., not sitting.

MATTIE SHEETS, APPELLANT, V. CITY OF MCCOOK, APPELLEE.

FILED JANUARY 30, 1914. No. 17,528.

Municipal Corporations: LIABILITY: OBSTRUCTION OF STREET. Neither the city nor the officers of its board of health are liable for damages sustained by reason of acts committed in the exercise of police power for the benefit of the public health and safety; but, if in the exercise of such powers such officers place a rope barrier across a public walk or street, which becomes and remains in a defective and dangerous condition, and the city either has actual notice of the defect or it has existed for such a length of time as that notice will be presumed, the city may, if the facts in the case warrant, be held liable for its negligence in leaving the walk in an unsafe and dangerous condition.

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

C. D. Ritchie, for appellant.

C. E. Eldred, contra.

LETTON, J.

In June and July, 1910, there was an epidemic of scarlet fever in McCook. A number of houses were quaran-

tined, and, in order to prevent the further spread of the disease, the city authorities caused ropes to be stretched, extending from the porch of one of the quarantined houses across the sidewalk to posts or stakes driven at the edge of the curb, a distance of about 22 or 23 feet. Two ropes were placed at each side of the house; the lower being about 30 inches, and the upper about 4 feet high. The witnesses for the city testify that the ropes were stretched tight when put up, and were afterwards tightened twice; but it is shown that the stakes or posts at the curb were not in any manner braced. On Saturday, July 18, 1910, the plaintiff, a young married woman 24 years old, then about six months gone in pregnancy, while walking on the sidewalk about 8 o'clock in the evening, tripped and fell over one of the ropes. She testified it struck her about half-way between the ankle and knee, and that she did not know what tripped her until after she had fallen, when she discovered the rope. She makes no mention of seeing two ropes at that point. She finished her errand and returned to her home. Some time on Sunday or Sunday night, under peculiar circumstances, she gave premature birth to a still-born child. In the petition she alleges that the city knowingly and negligently permitted the sidewalk at the place where she fell to remain obstructed, with full knowledge of the dangerous condition; that it neglected to place a light upon the rope or any warning to passers-by, and that the sidewalk had remained in that condition for a long time. The defendant's answer is a general denial, and a plea of contributory negligence. At the close of the testimony defendant moved the court for a directed verdict in its favor, which was sustained, and judgment of dismissal rendered. Plaintiff appeals.

The testimony showed that the ropes were placed across the sidewalk in the latter part of June or early in July by one of the city policemen at the direction of Dr. Hare, who was a member of the board of health and city physician. The plaintiff's position is that the city negligently failed to perform its duty to exercise reason-

able care in keeping its sidewalks free from danger, both by the act of commission in placing the rope across the walk, and by its omission to warn foot-passengers either by lights, barrier, or otherwise, and by suffering the rope to sag so as to make it dangerous. The city asserts that the stretching of the ropes was performed by officers of the board of health, in the exercise of the police power, for the protection of the public health and safety, and that it is not responsible for negligent acts on the part of the board of health or of any of its officers or employees.

The ordinances of the city provide that the mayor, the city physician, the president of the city council, and the city treasurer shall constitute the board of health. They are empowered to make all needful rules and regulations relating to matters of health and sanitation in the city, and to enforce the laws of the state and the ordinances of said city in relation to such matters. The city marshal is created the health officer, with the usual powers of such official.

The board of health of the city and its officers had the right under the health ordinance to erect barriers to prevent the approach of others than the physician within nearer than 30 feet of the house. The plaintiff, while conceding that no damages are recoverable from the city which were caused by the quarantine itself, contends that the injuries which plaintiff suffered were not caused by or derived from the quarantine, but from the neglect of the city to see that its sidewalks were kept reasonably safe. The defendant insists that the rule is broader, and that the city is not liable for any negligent acts on the part of health officers, and that their act was the cause of the injury. We have held that no damages can be recovered against a city or village arising from the placing of a quarantine, for the reason that the acts of the health officer are public and governmental, and are not corporate in character. *Village of Verdon v. Bowman,* 5 Neb. (Unof.) 38. The same principle is laid down in *Murray v. City of Omaha,* 66 Neb. 279, where the facts were that certain old buildings were torn down by employees of a

board of building inspection, and the city was held not liable. Perhaps as clear a statement of the principle as we have seen may be found in the case of *Love v. City of Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64. The facts were that a small negro boy driving a fractious mule was employed by the city in the removal of garbage under the direction of the board of health; that the mule ran away, collided with the plaintiff's buggy, and caused serious injuries. The court say: "In the discharge of such duties as pertain to the health department of the state, the state is acting strictly in the discharge of one of the functions of government. If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare, not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in the exercise of such powers is entitled to the same immunity against suit as the state itself enjoys"—and humorously ends the opinion with the remark: "However incongruous it may appear to be to say that this diminutive darkey and this refractory mule were engaged in the performance of some of the functions of government, it is nevertheless true, and illustrates how even the humblest of its citizens, under the operation of its laws, may become in Georgia an important public functionary." *Watson v. City of Atlanta*, 136 Ga. 370; *Evans v. City of Kankakee*, 231 Ill. 223; *Valentine v. City of Englewood*, 76 N. J. Law, 509; *Ogg v. City of Lansing*, 35 Ia. 495.

This principle requires no further discussion. The city, however, is charged with the duty of exercising reasonable care to keep its sidewalks in reasonably safe condition for public travel. This is a duty which it must per-

form regardless of the person by whom the dangerous condition of the sidewalk is created. Neither the city nor the officers of its health department are liable for the negligent acts of such officers committed in the enforcement of the provisions for the public health; but, while the city may not be liable on account of these acts, it may be liable for its neglect of an undelegable duty committed to it. Can it with reason be said that, if a trap had been set upon a sidewalk and had been maintained there for such a length of time that the city authorities must be presumed to have notice of it, the city would not be guilty of negligence in failing to remove the trap, even though it had been placed there by a person for whose act it could not be held responsible? In this case the ropes had extended across the walk for several weeks before the plaintiff fell, and apparently long enough for the city authorities to have acquired knowledge of the existence of the unsafe condition by whomsoever placed. No effective barrier was placed against travel on the sidewalk, and no lights or other warnings were so displayed as to bring the rope to the knowledge or notice of one passing in the dusk or dark. We think it would be unreasonable to hold that a city might with impunity allow such obstructions to remain upon its walks. This view seems to be in accordance with that of other courts where an almost identical question was presented.

In *Village of Barnesville v. Ward*, 85 Ohio St. 1, the facts were that the plaintiff tripped over a low-hanging wire placed between the sidewalk and the curb for the purpose of protecting the grass and trees upon the parking. The court held that the city might properly for the public good maintain park strips between the sidewalk and the curb, and might construct proper barriers to prevent travel thereon, and that one could not complain if he had collided with a tree or a proper barrier, but that this would not authorize the city to maintain a wire in such a condition as to become dangerous; that "if a pedestrian, in the exercise of due care for his own safety, is injured by reason of the dangerous or defective condition of the

barrier, the municipality is liable in damages for such injury, if it be shown that it knew, or in the exercise of ordinary care should have known, the dangerous condition thereof." To the same effect is *City of Paducah v. Simmons,* 144 Ky. 640, where the facts were substantially identical; *City of Covington v. Whitney,* 30 Ky. Law Rep. 659, 99 S. W. 337; *City of Glasgow v. Gillenwaters,* 113 Ky. 140.

In *McDonald v. City of St. Paul,* 82 Minn. 308, where the facts were similar to *Village of Barnesville v. Ward, supra,* the court held that the city is not bound to use due care to keep the parked portion of the streets free from obvious obstructions, although they may endanger the safety of travelers thereon, but that, "while this is true, yet the municipality has no right to maintain, or permit others to do so, on its boulevards, and especially on those at the street corners, anything in the nature of a dangerous pitfall or trap, or snare, or like obstruction, whereby the traveler, yielding to the impulse of the average person to cut across the corner when in a hurry, may be injured."

In *Carrington v. City of St. Louis,* 89 Mo. 208, in a case where a police officer negligently left an obstruction in a street, the court, after stating the rule of non-liability for acts of officers exercising governmental or police functions, say: "But we do not see how these principles of law can aid the defendant here, for it is the unquestioned duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon, and it is liable in damages to one injured by reason of negligence in this behalf." *Shinnick v. City of Marshalltown,* 137 Ia. 72. Temporary obstructions in a street are often lawful or permissible; but, as said by Judge Dillon: "This will never justify the leaving of the street or way in an unsafe and dangerous condition, or its use in an unreasonable manner or for an unreasonable time." 3 Dillon, Municipal Corporations (5th ed.) sec. 1168.

Plaintiff was not engaged in an unlawful act at the time she fell, because she had no knowledge of the

existence of the quarantine or of the obstruction to the walk. If the barrier had been seen, or had it been effective and sufficient, the accident could not have happened as she testifies.

There is no doubt that the original obstruction of the street by the ropes was authorized, and not unlawful; but it is equally free from doubt that the city had a continuing duty to protect travelers upon the walk from hidden obstructions, if such existed, by means of a light or other warning. The liability of the city, if any, is not by reason of the placing of the ropes, but it is by reason of its negligence in failing to warn pedestrians of the dangerous situation created by the sagging rope. Nothing that is said here is to be taken as expressing any opinion upon the facts in the case, but only upon the legal questions presented. We think the questions whether the city had, or was charged with, notice of the defect in the barrier, and whether it was negligent with respect to the care of its sidewalks, together with all the other issues in the case, should have been submitted to the jury under proper instructions, and that it was erroneous to direct a verdict for the defendant.

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

REVERSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

GUSTAVE E. POTTRATZ, APPELLANT, V. JOHN F. PIPER, APPELLEE.

FILED JANUARY 30, 1914. No. 17,535.

1. **Brokers:** CONTRACT: EVIDENCE. The written contract required by section 2628 Rev. St. 1913, may be evidenced by letters passing between the parties.

2. ———: ———: CONSTRUCTION. "When the terms of an agreement have been intended in a different sense by the parties to it, that

sense is to prevail against either party in which he had reason to suppose the other understood it." Section 7909, Rev. St. 1913.

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

B. C. Enyart, for appellant.

James A. Clark and *E. D. Wigton, contra.*

LETTON, J.

This action was brought to recover the sum of $317.66, which plaintiff alleges is the balance of the purchase money for 317.66 acres of land sold by him; that a portion of the purchase price was paid to defendant for plaintiff's use, and that of the sum so paid the defendant retained the amount sued for. Defendant claims the $317.66 as his commission as against plaintiff for the sale of the land.

The contract between the parties is made by correspondence.

On October 24, 1909, plaintiff, who lives in the state of Oregon, wrote to defendant, who was a banker at Lyons, Nebraska, and who had looked after the renting of plaintiff's land for some years, telling him to buy a steel windmill for the farm, and in a postscript said: "If Mr. Bengston don't want to buy the place, you try and sell it. I want $115 an acre above commission, that is to sell it the next six months. I will give other agents a chance to sell it too. I looked my abstract over and it calls for this.

Sect.	Tw.	R.	Amount of Acres.
3	22	9	159 70-100
4	22	9	157 96-100

Nothing further occurred until January 18, 1910, when Piper found a purchaser for the farm and sent plaintiff the following telegram: "Sold farm for one hundred fourteen dollars per acre. Wire your acceptance. John F. Piper." On the same day he sent the plaintiff the following letter: "I just wired you that I sold the farm for one hundred fourteen dollars per acre, net to you. Wire

your acceptance. Now I am selling the place at your price and charging you one dollar per acre commission." On January 19, 1910, he received the following telegram from plaintiff: "Await my letter in answer to your telegram of yesterday." Receiving no further communication from plaintiff, Piper closed a contract with the purchaser, one Burmester, and on Feburary 8, sent the following letter, inclosing a draft for $1,000, which was received and retained by the plaintiff: "Not hearing from you since your telegram, I am sending herein duplicate contracts for you to sign and acknowledge. I signed up contracts with Burmester as your agent at the time of sale, and now send these as Mr. Burmester has decided to accept the terms of your letter to me in October. He wants the privilege of paying twice each year, and also pay the interest twice a year, which makes it better for you. When you sign please go before a notary public and acknowledge the contract. Send both back and I will have Mr. Burmester sign and acknowledge also. I am sending you draft for one thousand dollars as per your contract and will send balance March 1st. Also I wish you would send along your abstracts so that I can turn them over to Mr. Burmester. Sincerely yours, John F. Piper. Will return one of the contracts to you."

About the 18th of February the defendant received a letter from Mr. Pottratz, inclosing two abstracts of title and returning the duplicate contract signed and acknowledged. In this letter Mr. Pottratz calls attention to the fact that the land contained 1.92 acres more than specified in the contracts; that he had corrected the contracts, stating that he claimed $220.80 more on account of this shortage, and said further: "If the prospective purchaser, Mr. Burmester, is agreeable to this, well and good, the sale can be closed, but, if not, please let me know at once and I will return the draft of $1,000 that you sent me. * * * If Mr. Burmester is not agreeable to this, you may consider this sale with him as off and return to me my contracts." Burmester agreed to the changed contract, paid the remainder of the money then due to Piper,

who on March 5, sent Pottratz a draft for $5,310.10, being the whole amount paid, less $317.66 for his commission. Plaintiff received the contract and draft, cashed the draft, and retained the money. On March 14 plaintiff wrote a letter to Piper claiming that the amount of commission was still due, and inclosing a letter dated January 19, 1910, which he testifies he sent Piper on the same day he sent the telegram, but that it was by mistake sent to Lyons, North Carolina, and was returned to him by the post office department.

In the undelivered letter Pottratz says: "In answer to your telegram of Jan. 18 as to whether I will accept $114 per acre for my farm land in Nebraska, will say that in one of my letters to you I wrote that I would take $115 per acre above commission, which means that I want $115 *net* per acre to me." Piper making no reply to this letter, plaintiff brought this action. After the evidence was taken, each party moved for a directed verdict. The court was about to instruct, when plaintiff asked leave to withdraw his motion. This request was denied, and the court directed a verdict for defendant. Judgment was rendered accordingly, and plaintiff appeals.

The principal contention of plaintiff is that the correspondence does not create a binding contract under the provisions of section 2628, Rev. St. 1913; that before the plaintiff is entitled to recover he must show a written contract subscribed by the parties, wherein is set forth the compensation to be allowed by the owner in case of sale by the agent.

Taking all the correspondence together, we think it comes within the statute. *Bradley & Co. v. Bower,* 5 Neb. (Unof.) 542; *Holliday v. McWilliams,* 76 Neb. 324. Section 7909, Rev. St. 1913, provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Applying this principle, what is the condition in this case? In the first place Piper was authorized to sell the farm by the letter of October 24 for $115 an acre above

commission. On January 18 he informed Pottratz he had sold it for $114 an acre *net* to Pottratz; that he was selling the place at Pottratz's price and charging him $1 an acre commission. This was a specific and definite statement as to the purchase price and the amount of commission which he proposed to charge if the sale was completed, and was in effect a counter and modified proposition. Pottratz wired him to await his letter. No letter arriving, Piper informed Pottratz of that fact, and sent the contracts for Pottratz to sign and execute. At the time these contracts were received, Pottratz knew that Piper had not received his letter, had sold for $115 an acre, and was charging him $1 an acre commission, so that if he closed the transaction he would only receive $114 net per acre. With this knowledge he signed the contracts and accepted and retained the money which had been paid thereon. He now makes the contention that the letter of February 8 stated: "Burmester has decided to accept the terms of your letter to me in October," and that by this letter the purchase price was fixed at $115 an acre. The acceptance by Burmester *was* at $115 an acre in accordance with the price named, but this could not affect the tendered contract between Pottratz and Piper, by which plaintiff was to receive $114 and Piper to receive $1 an acre commission. At the time Pottratz accepted the money and signed the contracts, he had reason to believe that Piper expected to retain the $1 commission; he could not reasonably have drawn any other conclusion. It is true that he had indicated otherwise in his letter of January 19, but before he signed the contracts he was informed by Piper that that letter had never been received. Considering the entire correspondence, we think it fully complied with the terms of the statute, and that Piper was entitled to his commission.

Plaintiff complains of the admission of oral testimony as to the contents of another letter which Piper testified he had received in October, 1909, and also complains that he was not permitted to withdraw his request for a directed verdict and allow the case to go to the jury. These

assignments it is not necessary to consider, because the conclusion we draw as to plaintiff's liability is based upon the facts set forth and admitted in the pleadings.

The judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

WILLIAM T. DWIRE, APPELLANT, V. W. M. GENTRY ET AL., APPELLEES.

FILED JANUARY 30, 1914. No. 17,538.

Limitations of Actions: PRINCIPAL AND SURETY: PAYMENT BY PRINCIPAL. The payment of interest on a note by a principal without the authority, knowledge or consent of the surety will not stop the running of the statute of limitations as to the surety.

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

George A. Adams, for appellant.

Mockett & Peterson, contra.

LETTON, J.

Appellant states his case thus: "This case was brought upon a promissory note. The defendant Gentry was not found and no proceedings were had against him. The defendant Watkins answered, among other things, the statute of limitations, and that he was surety for Gentry. The evidence shows, and there is no controversy upon that proposition, that Watkins was surety for Gentry; that Gentry made several payments upon the note without the knowledge or consent of Watkins, and that the statute of limitations had not run after the last payment by Gentry. So the question raised, and the only question, is, did the payments of interest by the principal keep the note alive.

as to the surety?" He relies upon section 22 of the code (Rev. St. 1913, sec. 7579). While there is a conflict in the courts of other states upon this question (33 Century Digest, Limitation of Actions, sec. 624) the greater weight of authority is in accordance with the holding of this court in the cases of *Mayberry v. Willoughby,* 5 Neb. 368; *Stevenson v. Craig,* 12 Neb. 464; *Moffitt v. Carr,* 48 Neb. 403; *Omaha Savings Bank v. Simeral,* 61 Neb. 741; *Teegarden v. Burton,* 62 Neb. 639; *McLaughlin v. Senne,* 78 Neb. 631.

While the facts in all of these cases are not identical, the decision in each rests upon the principles announced in the *Mayberry* case. This was an action upon a note signed by a partnership in the firm name. The point in question was considered at length, and it was held that after the dissolution of the partnership the relation of the partners to creditors then became that of joint debtors; that a promise by one joint debtor will not take a debt out of the statute of limitations as to his cocontractors unless he is specially and severally authorized for that purpose; that the statute of limitations is one of repose, and that when the time limited by it has expired then in legal contemplation the debt is extinguished, and can only be revived by a new promise by the person sought to be charged or by some person lawfully authorized by him for that purpose.

The *Simeral* case is almost exactly in point. "The note matured December 18, 1887, and the cross-petition was filed eight years, eight months and four days thereafter. No payments were made on the note by Redick. Simeral, the principal on the note, made several payments, which were without the knowledge or consent of Redick, the surety. The payments so made did not toll the statute as to Redick."

We are content to follow the beaten track. The judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

BARBORA ZITNIK, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JANUARY 30, 1914. No. 17,958.

1. **Pleading:** AMENDMENT OF PETITION: NEW CAUSE OF ACTION: LIMITATIONS. In an action for the negligent killing of plaintiff's decedent, plaintiff may amend her petition by alleging other and additional grounds of negligence. Such amendment does not amount to a departure, and does not render the petition vulnerable to a plea of the statute of limitations, and evidence in support of the new allegations is properly receivable. *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100.

2. **Judgment:** DISMISSAL: VACATION OF ORDER: REINSTATEMENT OF CASE. The district court has the power to set aside its orders and judgments at the same term at which they are made or rendered, and error cannot be predicated on a ruling setting aside an order dismissing the case as to one of the defendants and reinstating it as to such defendant. *Bradley v. Slater*, 58 Neb. 554.

3. **Master and Servant:** NEGLIGENCE: CUSTOM: BURDEN OF PROOF: QUESTION FOR JURY. Where plaintiff alleges that it was the custom of the defendant to station a man on the footboard in front of its moving engines to warn trackmen of their approach, and that defendant was guilty of negligence in not following such custom, which negligence caused the death of plaintiff's decedent, the burden of proof is on the plaintiff to establish the existence of such a custom, by a preponderance of the evidence, and the question whether such custom actually existed is one for the jury to determine.

4. ———: ———: QUESTION FOR JURY. Where the facts in evidence showed that the deceased was a track laborer working under the direction of a foreman; that he was ordered by the foreman to clear the switches and switch points of snow and ice which might interfere with their use; that at that time the weather was inclement, a strong northwest wind was blowing, some snow was drifting, and the temperature was below zero; that, when placed at work, the deceased wore a cap with a flap to it, which was pulled down over his ears, and a knitted muffler; that the work was such as to require his close attention and to necessitate a stooping posture, *held*, that his position by reason of the circumstances was one of increased and peculiar danger, and the question whether defendant was guilty of negligence in failing to use reasonable care to warn the deceased of the approach of moving engines or cars was properly submitted to the jury.

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

Edson Rich and *John A. Sheean,* for appellant.

Smyth, Smith & Schall, contra.

LETTON, J.

This case is before us on a second appeal. It was first tried on the theory that engineer Mullen, who was in charge of the engine which ran over and killed plaintiff's decedent, was guilty of negligence in not seeing Zitnik upon defendant's track in time to have stopped his engine before the accident occurred. The jury, on the first trial, disagreed. The second trial was had upon the same issues, and resulted in a verdict for the defendant Mullen, acquitting him of the negligence charged; but plaintiff had a verdict against the defendant railroad company, and judgment was rendered on the verdict. From that judgment the defendant company brought the case to this court, where the judgment was reversed, and it was held that the verdict against the railroad company was inconsistent with the one finding that the engineer was not guilty of negligence, and, therefore, could not be sustained. The question as to whether or not the evidence would support a verdict against Mullen was unnecessary to determine, and was not involved. As to the fireman Walsh, however, the opinion seems to determine that on the evidence then presented no negligence was shown as to him. *Zitnik v. Union P. R. Co.,* 91 Neb. 679.

The cause was remanded for further proceedings, and before the third trial in the district court plaintiff filed an amended petition, in which she alleged that plaintiff's decedent at the time of his injury was within the protection of the federal employers' liability act (35 U. S. St. at Large, pt. 1, ch. 149, p. 65). The amended petition further set out specifically various acts of commission or omission on the part of the defendant as constituting negligence. It charged that Zitnik was accustomed to

work with a number of track laborers "under the direction of a foreman who, while they were at work upon the tracks, was accustomed to keep a lookout for approaching engines, cars and trains, and to give timely warning to them of danger from that source," that Zitnik "relied upon said company providing for him some person who would keep a lookout for the advance of engines;" that defendant negligently and carelessly failed to do so, although it knew that the nature of his work prevented him from keeping an effective lookout; that there was nothing to prevent the engineer and the crew of the engine from seeing Zitnik from the time the engine started until it struck him, but that they negligently and carelessly failed to see him, and thus caused the accident; that it was the custom of defendant to keep a man stationed upon the front footboard of the engine on the lookout when the engine was moving forward; that Zitnik relied upon this custom, but that on the morning of the accident the defendant negligently failed to provide a lookout; that on the morning of the accident, when Zitnik was directed by the foreman to clean out the switch points, it was extremely cold and a strong northwest wind was blowing; that it was necessary to protect his ears and head from the severity of the weather with a cap and muffler, which interfered with his hearing, as the foreman well knew, and that while engaged in the work he relied upon the defendant to provide him with some one to warn him of the approach of engines, as was the custom when working with associates, but that defendant negligently failed to provide such a person to give the warning; that the nature of the work prevented Zitnik from keeping an effective lookout, as the defendant well knew.

Defendant filed a motion to strike the amended petition from the files because it stated another and different cause of action from that contained in the original petition, which new cause of action was barred by the statute of limitations. The motion was overruled, and this ruling defendant assigns as error.

As we view the record, the amendment in question did not state a new or different cause of action from that stated in the original petition. The original petition merely contained the general allegations that, while Zitnik was engaged in the work described, "the defendants negligently and carelessly, and without any regard for the safety of the said John Zitnik, caused a locomotive switch engine belonging to the defendant railroad company to move against, upon and over the said John Zitnik, thereby negligently and carelessly inflicting upon the said John Zitnik injuries from which he died within a few hours thereafter." The amended petition merely amplified and set out more specifically the various acts of omission and commission of the defendant which it is claimed were included in the general allegations of negligence in the original petition. We think this is permissible, and that the amplification of the charge did not constitute the bringing of a new action for a different cause. *Smith v. Missouri P. R. Co.*, 56 Fed. 458; *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100.

Johnson v. American Smelting & Refining Co., 80 Neb. 255, which seems to be relied upon by the defendant, is clearly distinguishable from the case at bar. In that case the original petition charged that the injury complained of was caused by the negligence of the company to whose rights the defendant succeeded, and the amended petition alleged that the injury was caused by the negligence of the defendant. It follows that the court did not err in refusing to strike the amended petition from the files.

Defendant contends that the court erred in sustaining the motion of the plaintiff to set aside the order dismissing the defendant Mullen. It appears that at the close of the plaintiff's testimony a motion was made by each of the defendants for a directed verdict. After argument the motions were taken under advisement over night by the court. The next morning, before the court ruled upon the motions, counsel for the plaintiff in open court dismissed the case as to defendant Mullen. Defendant's attorney then asked a continuance for a few hours to enable

it to present a petition and bond for removal to the circuit court of the United States. Plaintiff's attorney, having discovered that he had made a mistake as to the date of the federal employers' liability act in asking for such dismissal, moved to set the order aside. The court sustained the motion, and reinstated the case as to Mullen, over the objections of defendant. Thereupon, Mullen appeared and renewed his motion for a directed verdict, and the motion was sustained.

A controversy arose as to when a petition and bond for removal were presented, but we are content to abide by the finding of the district court made at the time on this point. The district court had the power to vacate or modify its own orders or judgments at any time during the term at which they were pronounced. *Bradley v. Slater,* 58 Neb. 554. It follows that the defendant cannot predicate error on this ruling.

It is also contended that the trial court erred in not directing a verdict for the defendant company, and in refusing to strike from the record so much of plaintiff's evidence as supports the new allegations in the amended petition. Since we have held the amendments proper, it could not be error to allow evidence in support of them. Much stress is laid upon the contention that the evidence as to the existence of a custom in the yards to keep a man stationed as a lookout on the front footboard of a switch engine moving forward is insufficient to warrant its submission to the jury. Two witnesses, both of whom had been employed by the defendant, and one of whom said, "I live right in the yards you may say," testified to the existence of such a custom. Their testimony was much weakened on cross-examination, and there was testimony to the contrary by a number of the defendant's employees. The weight and credibility of the testimony was for the jury, and, while the writer does not consider it of much probative value, a juryman seeing and hearing all the witnesses might be of a contrary opinion. We think the witnesses were competent to testify, and that no error was committed in its admission. Furthermore,

under the other allegations in the amended petition this question is of little moment. If we omit entirely the negligence predicated upon the failure to observe the alleged custom, it seems to us that a verdict for plaintiff is sustained upon the evidence tending to prove the allegations that Zitnik was accustomed to work under the direction of a foreman who knew, when he directed him to clean out the switches, that the day was exceedingly cold; that a strong northwest wind was blowing; that it was necessary on account of the severe weather for him to protect his ears with a cap and muffler, which interfered with his hearing; and that the nature of the work and his muffled condition prevented him from keeping an efficient lookout. The foreman testified that on the morning of the accident when he set Zitnik at work removing the snow he wore a cap with a flap to it and a gray knit muffler; that the cap was pulled down over his ears; that the day was clear, but the snow was drifting; that immediately after the accident he saw a round pile of snow about two feet high just inside of the track near the place where blood showed on the rail; and that a shovel and broom lay near-by. This and other testimony was sufficient to warrant the jury in finding that Zitnik was in the performance of the duty assigned to him at the time he was struck. This being so, what was the duty of the employer? The work that Zitnik was set to perform—the removal of snow and ice from the switches and points—was such as to require his close attention and to necessitate a stooping posture more or less. He was bundled up to resist the keen northwest wind. The temperature was below zero. From his position he could not at every moment look for engines or trains and at the same time do the work assigned him. The obstruction to his hearing caused by the cap and muffler was known to the foreman, and, therefore, to his employer. The defendant, therefore, placed Zitnik in a position of increased and peculiar danger owing to the inclement weather, and was in duty bound to exercise greater care than if ordinary conditions prevailed. These facts make the case easily distinguishable from that of *Glantz*

v. Chicago, B. & Q. R. Co., 87 Neb. 60. A case very similar in its facts to this is *Murran v. Chicago, M. & St. P. R. Co.*, 86 Minn. 470. The supreme court of that state has adopted the same rule as announced by this court with reference to the assumption of ordinary risks by sectionmen and track laborers; but it held that the rule has its exceptions, and that in view of the circumstances of the strong wind, the snow in the air, the position which his work of cleaning out snow from the switches required him to assume, the work was extra hazardous, and the question as to defendant's negligence in failing to warn him of an approaching car and as to the existence of contributory negligence was for the jury. To the same purport is the decision in *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532. That court said: "The defendant had put the plaintiff in a position in which the more closely he attended to his duty the less he was able to be on the watch, and had put a foreman there for the express purpose of warning him. Under such circumstances the jury well might say that the plaintiff was justified in relying on the foreman's doing what the defendant admitted that he was bound to do, and said that he did. A man alongside another in this way can make sure of his warning being understood. The case is not like one where the only warning relied on must come from the train." There is no direct testimony that the foreman was put in charge for the express purpose of warning Zitnik; but the jury well might find that, even though not set to do so by his superiors, yet it was the duty of the foreman acting for the master, under the surrounding circumstances, to exercise the necessary care to warn him of approaching engines or cars, or that some other effective means of warning should have been provided. See, also, *St. Louis, I. M. & S. R. Co. v. Jackson*, 78 Ark. 100, 8 Am. & Eng. Ann. Cas. 328, and note on page 337. Whether it was the duty of the company to exercise more than ordinary care to warn Zitnik was a question for the jury. *Railway Co. v. Murphy*, 50 Ohio St. 135; *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Ia. 658. And the question as to the de-

fendant's negligence in failing, either by the foreman or by some other means, to warn the deceased is also for the jury. *Comstock v. Union P. R. Co.,* 56 Kan. 228, 42 Pac. 724. The rule is a variation of the principle that, where the place furnished the servant to work is safe, but the intervention of a moving force renders it one of great danger, it is the duty of the master to exercise reasonable care to warn the workman. *Aho v. Adriatic Mining Co.,* 117 Minn. 504; *Wiggin v. Northwest Paper Co.,* 119 Minn. 273.

It is not improbable that as to the movements of regular trains moving upon schedule time a stricter rule of accountability on the part of the employee would apply; but as to switch engines moving upon such a day, and at any moment, the increased hazard demanded greater care to warn. The case of *Aerkfetz v. Humphreys,* 145 U. S. 418, cited by defendant, is not applicable. It lays down a rule for ordinary occasions, and not for peculiar conditions which increase the danger.

The instructions of the court as to the duty of Zitnik and the duty of the company with regard to the exercise of proper care under the circumstances is fully as favorable to the defendant as it had a right to ask.

Complaint is also made as to the giving of each of eleven other instructions covering every issue in the case. The reasonable limits of an opinion do not admit of the consideration of each contention made. In the main, and taking the whole charge together, we think the issues were fairly submitted to the jury, and that no prejudicial error is shown.

The evidence shows that Zitnik was engaged in interstate commerce under the rule laid down in *Mondou v. New York, N. H. & H. R. Co.,* 223 U. S. 1, 32 Sup. Ct. Rep. 169. Recovery in such case is for the benefit of the surviving widow and children of the deceased employee. It is insisted that, since Julius Zitnik, a son of the deceased, was over 21 years of age and self-supporting, he was not entitled to be considered as a beneficiary, and that the court erred in refusing an instruction to that

effect. The basis of recovery was not the number of children that Zitnik left surviving, it was the pecuniary damages suffered by his family on account of his death, and this, of course, necessarily depends upon his earning capacity, the amount he contributed to his family, and his expectancy of life. He was 51 years of age, his expectancy was about 20 years, and he had earned and devoted to his family from $450 to $480 a year. When he died his wife was pregnant, and was delivered soon afterwards of a posthumous child. The jury returned a verdict for $9,500. This sum invested at 5 per cent. interest would produce each year as much as Zitnik contributed to his family, and the whole amount would still be on hand. Plaintiff introduced proof to show that the purchase of an annuity of $480 per annum would cost about $7,000. We believe the verdict is excessive, and that it should be reduced to the sum of $7,000, which under all the evidence seems to be a fair measure of recovery.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings, unless the plaintiff within 30 days enter a remittitur of $2,500, with interest on that amount from the date of the judgment. If such remittitur is filed, the judgment of the district court is affirmed.

AFFIRMED ON CONDITION.

BARNES, J., dissenting.

I find myself unable to concur in the majority opinion in this case. It appears that when the cause was remanded to the district court, after a reversal of the former judgment, the plaintiff amended her petition by adding thereto the allegation that it was the custom of the defendant to station a man on the footboard in front of its moving engines to warn trackmen of their approach, and that defendant was guilty of negligence in not following such custom, which negligence caused the death of the plaintiff's decedent. This allegation was denied, and, as I read the record, no competent evidence was produced by plaintiff tending to establish the fact alleged. This was the

only material change in the pleadings, and, aside from plaintiff's attempt to establish that issue, the evidence was the same as it was upon the former trial. On the former appeal, *Zitnik v. Union P. R. Co.*, 91 Neb. 679, it was held: "The fact that the person injured was in a situation of danger and so situated that he could have been observed by the defendant must be proved by a preponderance of the evidence. The jury is not at liberty to estimate the liabilities in that regard without substantial proof."

As I understand the record, it contains no substantial proof of any negligence on the part of the defendant company, and, in order to hold the defendant liable, it is necessary to conjecture a state of facts which the evidence itself fails to establish.

As I view the record in this case, the district court should have sustained the defendant's motion to direct a verdict in its favor. Without further comment, I respectfully dissent from the majority opinion.

HAMER, J., joins in this dissent.

STATE, EX REL. P. F. O'GARA, COUNTY ATTORNEY, APPELLEE, v. CHARLES F. FURLEY, APPELLANT.

FILED JANUARY 30, 1914. No. 18,325.

1. **Counties:** COMMISSIONERS: TERM OF OFFICE. The rule in *State v. Plasters*, 74 Neb. 652, controls the disposition of this case, and the term of a county commissioner in Cedar county is three years.

2. ———: ———: OUSTER: SPECIAL STATUTE. Where a new right is created by a special statute and a new remedy given to enforce the right, the method of enforcing the right provided by the statute is exclusive, in the absence of anything to indicate a contrary intention by the legislature.

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

F. P. Voter, R. J. Millard and *J. C. Robinson,* for appellant.

P. F. O'Gara, C. B. Willey and *A. R. Davis, contra.*

LETTON, J.

Charles F. Furley was elected county commissioner of Cedar county at the general election held in November, 1909. He entered upon the duties of the office, and was exercising the same at the time this action was begun. At the general election in 1912 Edward H. Carroll was a candidate for the office and Furley was a candidate to succeed himself. Carroll was elected, and qualified. On January 9, 1913, he appeared before the board of county commissioners and demanded to be seated and recognized as a member of the board. The demand was refused on the ground that Furley's term of office had not expired. This action was then brought to oust Furley. Judgment of ouster was rendered, and from this judgment Furley appeals.

The information pleads the facts as stated The respondent's answer is to the effect that at the time he was elected in 1909 he believed that the term of office was for only three years, but that he afterwards ascertained that under the laws of this state his term did not expire until the expiration of four years; that the election of November, 1912, was unauthorized and illegal; and that Carroll has never filed with the county clerk of Cedar county the statement required under the corrupt practice act (Comp. St. 1911, ch. 26, art. III).

The first question presented, and the most important, is whether the term of office of a county commissioner in a county with three commissioners is three years or four years. Respondent concedes that from the adoption of the Revised Statutes of 1866 until July 4, 1905, the length of term of such office was three years, but he maintains that by the provisions of sections 54 and 55, art. I, ch. 18, Comp. St. 1905, the term of office was changed from three to four years. At the 1905 session of the legislature an

attempt was made by amendments to existing statutes to do away with annual elections and to provide that elections for all offices in this state should only be held biennially. A number of statutes were amended so as to make the terms of various officers conform to the changed time of election. The identical question here presented was involved in the determination of the case of *State v. Plasters,* 74 Neb. 652, and it was held that the amendment was void. This was followed by *State v. Offill,* 74 Neb. 669, and *State v. Offill,* 74 Neb. 670. One of these cases related to the office of county supervisor, and the rule in the *Plasters* case was adhered to. The rule announced controls this case, and the attempted amendment of 1905 left the three-year term unchanged. It may also be said that the provisions of the general election law of 1879 (laws 1879, p. 240) provide that the term of county commissioners should be for three years. This act was reenacted in 1907 retaining the three-year term, and the amending statute (laws 1907, ch. 51) repealed all acts and parts of acts in conflict therewith.

It is next contended that Carroll failed to file a statement in conformity with the corrupt practice act (Comp. St. 1911, ch. 26, art. III), and therefore his election was void. A statement was actually filed which the district court found to be in substantial compliance with the statute, but it was not as full in all respects as the law requires. The county clerk determined that the statement was sufficient and duly issued the certificate of election. It is not contended that Carroll did not receive the certificate, take the oath required by law, and file a bond. The corrupt practice act does not provide that the incumbent of an office may retain it and refuse to surrender the same to the holder of a certificate of election in the absence of a judicial determination that the person holding the certificate has violated the law and has been ousted from the office in a proper proceeding. The statute provides that the person elected who fails to file the required certificates of expenses shall be liable to a fine, and also provides that if an elector presents an application verified by his affi-

davit to the attorney general charging violations of the act, accompanied by a bond to the state in the sum of $1,000, it shall be the duty of the attorney general to begin an action, or to instruct the county attorney of the county in which the public officer resides to bring an action, to have the office declared vacant, and that if the public officers do not bring such an action within a certain time the applicant may bring such action at his own expense. If successful, the judgment shall declare the election of the defendant void, shall oust him, and declare the office vacant. Rev. St. 1913, ch. 20, art. XX.

The remedy is given by a special statute and must be sought by means of the special action created in the act. If a judgment had been rendered ousting Carroll, this would have been a perfect defense, but until such judgment is rendered the respondent cannot avail himself of the claimed insufficiency of Carroll's statement.

The judgment of the district court is

AFFIRMED.

CORTRIGHT METAL ROOFING COMPANY, APPELLEE, V. WILLIAM G. MERTEN; UNITED SURETY COMPANY OF BALTIMORE, APPELLANT.

FILED JANUARY 30, 1914. No. 17,366.

1. **Principal and Surety:** CONTRACTOR'S BOND: LIABILITY OF SURETY. A departure from the terms of the initial draft of a contract for the construction of a public building *held* not to release the contractor's surety, though the change was made after the bond was signed and before it was delivered, where the terms of the bond applied alone to the executed building contract; the bond having been delivered by one to whom it had been entrusted for that purpose, with full knowledge of the change.
2. ———: ———: ———. A surety on the bond of a public contractor *held* not released from liability for a default against which it had bonded obligee.

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

Francis A. Brogan, for appellant.

S. L. Geisthardt, contra.

ROSE, J.

This is an action on the bond of a public contractor who had agreed for the consideration of $77,872 to construct for the state of Nebraska at the asylum for the insane at Norfolk a new fireproof wing, a cottage, and a non-fireproof storehouse. William G. Merten was the contractor. According to specific terms of the building contract, it obligated the contractor, under the penalty expressed in a bond thereto attached, "to furnish all labor, materials, machinery, appliances or things necessary to construct, equip and fully build, and complete ready for use," the buildings mentioned. The improvements were to conform to plans and specifications attached to and made a part of the building contract, in which the state was described as "party of the first part." In the penal sum of $25,000, with the state of Nebraska named as obligee, the bond on which the action is based, if enforceable, bound the contractor as principal and the United Surety Company of Baltimore as surety, as follows: "Now if the said William G. Merten shall faithfully keep and perform each and every one of the stipulations and agreements contained in said contract, at the times and in the manner therein specified, and pay off and settle in full with the person or persons entitled thereto all accounts and claims that may become due by reason of laborers' or mechanics' wages, or for materials furnished, or services rendered to said party of the first part in executing or performing the obligations of said contract so that each of such persons may receive his just dues in that behalf, then this obligation is to be void, otherwise to be and remain in full force and effect in law." Due execution of the building contract on the part of the state and the contractor is conceded. The contractor executed the bond, and it was signed and sealed by a duly authorized agent of the surety. Plaintiff furnished materials for the buildings, and the

contractor violated his agreement to pay for them. This is a suit on the bond for the price of the materials so furnished. The contractor, though named in the petition as one of the defendants, was not summoned, and the case proceeded against the surety alone. Two defenses were interposed: (1) The bond was never mutually executed by the state and the surety. (2) Plaintiff was not entitled to the protection of the bond. Upon a trial of the issues in the district court, without the intervention of a jury, plaintiff recovered a judgment for the full amount of its claim, amounting to $1,319.40, April 26, 1911. The surety has appealed.

1. Was the plea that the bond never became a binding contract between the state and the surety established? This defense is based on a departure from the terms of the building contract as originally drawn. The contractor and the state, acting through its board of public lands and buildings, made the change in the unexecuted, original draft of the building contract after the bond had been signed by the surety and before it had been delivered. The bond was signed in Omaha, December 3, 1907, by Edward E. Howell, agent of the surety. The building contract was executed at the capitol in Lincoln, December 4, 1907, and the change was made earlier the same day. The nature of the defense, as understood by the surety, is definitely stated by counsel as follows: "The position of the surety company in this case is that Merten and the surety company made an offer to the state of Nebraska to enter into a contract, and the state never accepted the offer in the terms in which it was made, and therefore never accepted it at all. So far as Merten is concerned, he consented to the modified acceptance, and there was no doubt a valid contract between him and the state, but the United Surety Company was not a party to it. It is not a question of the alteration of an existing contract. It is purely a question as to whether the minds of the parties have ever met upon a common ground—whether the offer made was ever accepted in the terms in which it was made; and there is lacking in this case the

elementary requisite of the meeting of the minds upon a common subject."

The departure from the original draft of the building contract is as follows:

"Lincoln, Nebraska, Dec. 4, 1907.

"To the Board of Public Lands & Buildings of the State of Nebraska: I agree to substitute stone instead of pressed brick on both the new wing and cottage through 1st and 2d stories as originally shown on all of the plans and specifications prepared by George A. Berlinghof, Architect, in exchange for the fireproof construction of cottage, substituting the slow-burning construction as called for under item 2 of page 19 on original bidding sheet. Very truly yours, W. G. MERTEN."

The evidence is undisputed that this change reduced the cost of construction. Before the building contract had been made or the surety bond signed, the contractor procured from the architect copies of the original draft with plans and specifications attached. At that time the copies correctly showed the transactions as far as they had progressed. They were in no sense contracts. Neither party was bound by them. The contractor gave one copy to O. W. Palm, an insurance broker of Lincoln, and orally applied to him for a surety bond. Palm forwarded the copy to the Brennan-Love Company, general insurance agents at Omaha, and the latter turned it over to Edward E. Howell, who signed the name of the United Surety Company to the bond in controversy, December 3, 1907, without the written application usually exacted of the principal, and entrusted the bond to the Brennan-Love Company for delivery. The latter sent it to Palm, who delivered it to the board of public lands and buildings, December 4, 1907, knowing the building contract as originally drawn had been changed in the manner described. The bond was accepted, approved, and filed in the office of the secretary of state. Palm afterward received from the contractor the premium, deducted his commission, and sent the balance to the Brennan-Love Company. After the several agents, through whom the surety business passed,

had received compensation for services, the balance of the premium reached the surety at Baltimore, and was retained until after this suit was brought. When the bond was signed by Howell, it was accompanied by the copy of the original draft of the building contract with the plans and specifications attached, and thus reached Palm, who, after delivering the bond, returned the copy unchanged to the Brennan-Love Company, and it finally reached the United Surety Company in that form. The latter asserts that it never offered to become surety on a bond to secure the performance of the building contract as changed, that Palm had no authority to consent to a change, and that it had no knowledge of the change until after the action had been instituted.

The fundamental fallacy in the defense is the assumption that the surety limited its offer of suretyship to the building contract in the hands of its agent, when the bond was signed. That was not a contract. It was not a copy of a contract. It had not been signed by either party. It was not then authenticated or certified by any public officer. It showed on its face that it was unexecuted and subject to change. The change in fact decreased the burden of the contractor. There was no public record showing its adoption by the board of public lands and buildings. There had been no act of any public officer to mislead or deceive any one. In submitting to the contractor a form for a building contract and the plans and specifications for the buildings, all of the proceedings of the state board and the acts of the officers were open and upright. What the surety signed and committed to persons of its own selection for delivery in the future upon the making of a building contract is better evidence of the offer of suretyship than the unsigned and unexecuted copy of the initial draft which correctly showed the transactions at the time the surety signed the bond. When the bond was signed, the surety knew that the building contract had not been executed. The bond and the offer of suretyship embodied therein referred alone to an executed contract. In the following words, the bond itself describes

definitely the contract to which the offer of suretyship applies: "The condition of this obligation is such that whereas the above bounden, William G. Merten, has been awarded by the board of public lands and buildings of the state of Nebraska the contract for the erection of a new fireproof wing to the hospital for the insane at Norfolk, Nebraska, also the erection of a cottage and a non-fireproof storehouse building, on the grounds of the hospital for the insane at Norfolk, Nebraska, according to certain plans and specifications on file at the office of the commissioner of public lands and buildings, at the capitol in Lincoln, Nebraska, according to the terms and conditions of said contract, a copy of which contract is made a part hereof."

This language applies to an executed contract for the construction of buildings "according to certain plans and specifications on file at the office of the commissioner of public lands and buildings." The contract awarded by the board of public lands and buildings is the one to which reference is made in the bond—not the unexecuted papers submitted by the contractor to the surety. The plans and specifications described in the offer of suretyship and in the bond are the ones "on file at the office of the commissioner of public lands and buildings"—not the unadopted ones accompanying the contractor's oral application. The contract made a part of the bond is the executed one awarded to the contractor—not the initial, unsigned draft or a copy thereof. The person entrusted with the bond for delivery held it until the contractor and the board of public lands and buildings made a binding contract conforming to the identical conditions and terms to which the offer of suretyship and the bond applied. The offer and the bond were accepted as presented to the board after the original draft had been changed, after the building contract had been executed, and after a public record of the proceedings had been made. The surety is bound by its bond.

2. The surety also denies liability on the ground that plaintiff is not entitled to the protection of the bond, be-

cause it failed to sign the building contract as required by the following provision: "Any subcontractor must acknowledge his understanding of the plans and specifications by signing his name to the original contract as subcontractor to perform the part of the work he has contracted to do."

The building contract and the bond to secure its performance were both executed before the claim of any subcontractor came into existence. Subcontractors are not entitled to mechanics' lien on state buildings, and the state properly required the contractor to give a bond to pay their claims. This provision is made for the benefit of the state as well as for the protection of material-men. It is not only just to those who furnish building materials, but it protects the executive and the legislative departments of government from the harassment or the importunities of those who are unable to collect just claims from the contractor, through no fault or wrong of public officers. It facilitates the work of erecting public buildings and gives confidence to those who are called upon for supplies or labor. In the light of these purposes and in connection with the entire building contract, the provision quoted must be construed. The surety is liable on the bond for the faithful performance of "each and every one of the stipulations and agreements" by which the contractor is bound. Among those stipulations and agreements are the following: "The contractor must notify the proprietor, corporation or firm of any contemplated subcontract before entering on the execution of the same, and any subcontractor must acknowledge his understanding of the plans and specifications by signing his name to the original contract as subcontractor to perform the part of the work he has contracted to do. The obligations of the contractor are not relieved in any manner by any subcontract which he may enter into. * * * Contractors must also notify subcontractors of the necessity of their signing the original specifications and contract."

It thus appears that it was the duty of the contractor to notify subcontractors to sign the building contract.

This duty was not performed. Its performance was an undertaking for which the surety became liable, and it cannot escape responsibility for the default against which it bonded the state and the subcontractors. There is no error in the record, and the judgment is

AFFIRMED.

SEDGWICK, J., concurring in conclusion.

I think that the judgment of the district court should be affirmed on the ground that the contract which was attached to and made a part of the surety bond itself authorized the changes made in the contract, but not upon the ground stated in the majority opinion.

FARLEY & LOETSCHER MANUFACTURING COMPANY, APPELLEE, V. WILLIAM G. MERTEN; UNITED SURETY COMPANY OF BALTIMORE, APPELLANT.

FILED JANUARY 30, 1914. No. 17,365.

Rulings in *Cortright Metal Roofing Co. v. Merten, ante*, p. 164, **followed.**

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

Francis A. Brogan, for appellant.

Burkett, Wilson & Brown, contra.

ROSE, J.

This is an action on the bond of a public contractor who had agreed for the consideration of $77,872 to construct for the state of Nebraska at the asylum for the insane at Norfolk a new fireproof wing, a cottage, and a non-fireproof storehouse. William G. Merten was the contractor. According to specific terms of the building contract, it obligated the contractor, under the penalty expressed in a bond thereto attached, "to furnish all labor, materials,

machinery, appliances or things necessary to construct, equip and fully build, and complete ready for use," the buildings mentioned. The improvements were to conform to plans and specifications attached to and made a part of the building contract. In the penal sum of $25,000, with the state of Nebraska named as obligee, the bond on which the action is based, if enforceable, required the contractor as principal and the United Surety Company of Baltimore as surety to faithfully perform the obligations imposed upon the contractor by the building contract. Plaintiff furnished materials for the buildings, and the contractor violated his agreement to pay for them. This is a suit on the bond for the price of the materials so furnished. Two defenses were interposed: (1) The bond was never mutually executed by the state and the surety. (2) Plaintiff was not entitled to the protection of the bond. Upon a trial of the issues in the district court, without the intervention of a jury, plaintiff recovered a judgment for the full amount of its claim, amounting to $4,444.32, April 26, 1911.

For the reasons stated in *Cortright Metal Roofing Co. v. Merten, ante,* p. 164, the judgment of the district court is

AFFIRMED.

NEBRASKA MATERIAL COMPANY, APPELLEE, V. WILLIAM G. MERTEN; UNITED SURETY COMPANY OF BALTIMORE, APPELLANT.

FILED JANUARY 30, 1914. No. 17,367.

Rulings in *Cortright Metal Roofing Co. v. Merten, ante,* p. 164, followed.

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

Francis A. Brogan, for appellant.

Talbot & Allen, contra.

ROSE, J.

This is an action on the bond of a public contractor who had agreed for the consideration of $77,872 to construct for the state of Nebraska at the asylum for the insane at Norfolk a new fireproof wing, a cottage, and a non-fireproof storehouse. William G. Merten was the contractor. According to specific terms of the building contract, it obligated the contractor, under the penalty expressed in a bond thereto attached, "to furnish all labor, materials, machinery, appliances or things necessary to construct, equip and fully build, and complete ready for use," the buildings mentioned. The improvements were to conform to plans and specifications attached to and made a part of the building contract. In the penal sum of $25,000, with the state of Nebraska named as obligee, the bond on which the action is based, if enforceable, required the contractor as principal and the United Surety Company of Baltimore as surety to faithfully perform the obligations imposed upon the contractor by the building contract. Plaintiff furnished materials for the buildings, and the contractor violated his agreement to pay for them. This is a suit on the bond for the price of the materials so furnished. Two defenses were interposed: (1) The bond was never mutually executed by the state and the surety. (2) Plaintiff was not entitled to the protection of the bond. Upon a trial of the issues in the district court, without the intervention of a jury, plaintiff recovered a judgment for the full amount of its claim, amounting to $978.23, April 26, 1911.

For the reasons stated in *Cortright Metal Roofing Co. v. Merten, ante,* p. 164, the judgment of the district court is

AFFIRMED.

CHARLES J. JOHNSON, APPELLEE, V. WILLIAM G. MERTEN; UNITED SURETY COMPANY OF BALTIMORE, APPELLANT.

FILED JANUARY 30, 1914. No. 17,368.

Rulings in *Cortright Metal Roofing Co. v. Merten*, *ante*, p. 164, followed.

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

Francis A. Brogan, for appellant.

S. L. Geisthardt, contra.

ROSE, J.

This is an action on the bond of a public contractor who had agreed for the consideration of $77,872 to construct for the state of Nebraska at the asylum for the insane at Norfolk a new fireproof wing, a cottage, and a nonfireproof storehouse. William G. Merten was the contractor. According to specific terms of the building contract, it obligated the contractor, under the penalty expressed in a bond thereto attached, "to furnish all labor, materials, machinery, appliances or things necessary to construct, equip and fully build, and complete ready for use," the buildings mentioned. The improvements were to conform to plans and specifications attached to and made a part of the building contract. In the penal sum of $25,000, with the state of Nebraska named as obligee, the bond on which the action is based, if enforceable, required the contractor as principal and the United Surety Company of Baltimore as surety to faithfully perform the obligations imposed upon the contractor by the building contract. Plaintiff furnished materials for the buildings and the contractor violated his agreement to pay for them. This is a suit on the bond for the price of the materials so furnished. Two defenses were interposed: (1) The bond was never mutually executed by the state and the surety. (2) Plaintiff was not entitled to the protection of

the bond. Upon a trial of the issues in the district court, without the intervention of a jury, plaintiff recovered a judgment for the full amount of his claim, amounting to $3,803.97, April 26, 1911.

For the reasons stated in *Cortright Metal Roofing Co. v. Merten, ante,* p. 164, the judgment of the district court is

AFFIRMED.

THOMAS B. MURRAY, ADMINISTRATOR, APPELLEE, V. OMAHA TRANSFER COMPANY, APPELLANT.

FILED JANUARY 30, 1914. No. 17,421.

1. **Abatement:** DEATH OF PLAINTIFF. Under section 455 of the code, a pending action for personal injuries does not abate by the death of the plaintiff.
2. **Action:** REVIVOR. Where the plaintiff dies from personal injuries for which he brought suit, the action may be revived by the administrator of his estate and prosecuted to final judgment for the benefit of such estate.
3. **Appeal:** IMMATERIAL QUESTIONS. On appeal a question not necessary to a decision may be disregarded, though argued by both parties.
4. **Damages:** ACTION FOR PERSONAL INJURIES: REVIVOR. Where the plaintiff dies from personal injuries for which he brought suit, and the action is revived in the name of the administrator of his estate, the damages to which the injured person was entitled follow the order of revivor to the administrator.
5. ———: ———: ———. Where plaintiff dies from personal injuries for which he brought suit, and the action is revived in the name of an administrator, the latter takes the decedent's place in the litigation, and is entitled to recover for the benefit of the estate what the injured person would have been entitled to recover had he survived his injuries.
6. **Harmless error** in an instruction is not a ground for the reversal of a judgment.
7. **Appeal:** OBJECTION: DEPOSITION. To make error available in the overruling of a motion to suppress a deposition, there must be an objection to such deposition, when offered in evidence.

8. **Evidence:** HARMLESS ERROR. A ruling admitting in evidence that part of the Carlisle table showing the expectancy of life at the age of 50, *held* not reversible error, under facts stated in the opinion, where there was direct, uncontradicted evidence that the deceased person was 50 years old, though a physician who did not know his age testified: "In my opinion, he was in the neighborhood of 50 years of age. I do not think he could have been over 55 years."

9. ———: ———. Admission in evidence of the photograph of a deceased person *held* not prejudicial to appellant.

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

John C. Cowin and *Isidor Ziegler,* for appellant.

John A. Moore and *H. S. Daniel, contra.*

ROSE, J.

Henry Miller commenced this action August 29, 1910, to recover damages in the sum of $15,000 for personal injuries alleged to have been negligently inflicted upon him by the Omaha Transfer Company on August 27, 1910. At the intersection of Sixteenth and Cuming streets in Omaha, he was run over and injured by a horse and wagon in charge of a driver in the employ of defendant. From resulting injuries Miller died August 29, 1910, a few hours after his petition had been filed. Later the action was revived in the name of Thomas B. Murray, administrator. After revivor, an amended petition, also demanding damages for Miller's injuries, was filed by the administrator for the benefit of decedent's estate. In an answer to the amended petition, it was admitted that Miller was struck by a horse and wagon of defendant while they were in charge of one of its employees, and that the resulting injuries were fatal; but defendant denied the negligence imputed to it, and pleaded, among other things, that the injuries were caused by carelessness on the part of Miller. From judgment on a verdict in favor of plaintiff for $4,000, defendant has appealed.

The judgment is vehemently assailed in an extended argument directed to propositions that the suit for damages arising from personal injuries abated with the death of the original plaintiff, that the action could not legally be revived for the benefit of the estate of Miller, and that after his death there was no existing cause of action except the statutory one for the benefit of the widow and next of kin. It is asserted that the legislation relating to this subject, when considered together, does not authorize a recovery for the benefit of the estate of Miller in an action by the administrator. In this connection defendant refers to sections 45, 454 and 455 of the code, relating to the abatement and the survival of actions; to Lord Campbell's Act (Comp. St. 1911, ch. 21, secs. 1, 2) authorizing a suit for the benefit of the widow and next of kin who have been deprived of the support of one who came to his death by the wrongful act of another; and to the statute (Comp. St. 1911, ch. 15*a*, sec. 1) adopting as the law of this state applicable and consistent portions of the common law of England. Counsel for defendant state their position as follows: "Section 455 simply provides: 'No action pending in any court shall abate by the death of either or both the parties thereto,' etc. It is not a survivor law. This statute of abatement, and no other statute of abatement, and no statute of survivor create a new cause of action. The death act creates an entirely new cause of action. The beneficiaries are entirely different. The rule of damages is different. Therefore, when Miller died, the cause of action then pending died with him, and a new cause of action for the injuries immediately came into being under the death act for the benefit of the widow and next of kin. As, therefore, section 455 does not create a new cause of action, it does not, nor any other provision of the statute, authorize the revivor of a cause of action that has become extinct. Section 455, or any other provision of the statute, was not intended to keep the action alive after the death of the injured party in favor of attorneys and creditors, and deprive the widow and next of kin of the bene-

fits of the so-called Campbell Act. There is no petition in this case based on the death cause of action." In support of the position thus taken, many cases are cited, among them the following: *Brown v. Electric R. Co.*, 101 Tenn. 252, 70 Am. St. Rep. 666, 684; *Perry v. Philadelphia, B. & W. R. Co.*, 1 Boyce (Del.) 399, 77 Atl. 725; *Holton v. Daly*, 106 Ill. 131; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236; *Lubrano v. Atlantic Mills*, 19 R. I. 129; *Griffiths v. Earl of Dudley*, 9 Q. B. Div. (Eng.) 357; *Martin v. Missouri P. R. Co.*, 58 Kan. 475; *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S. W. 851; *Andrews v. Hartford & N. H. R. Co.*, 34 Conn. 57; *McLaughlin v. Hebron Mfg. Co.*, 171 Fed. 269; *Gilkeson v. Missouri P. R. Co.*, 222 Mo. 173, 24 L. R. A. n. s. 844.

On the contrary, plaintiff relies on section 455 of the code, providing: "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance or against a justice of the peace for misconduct in office; which shall abate by the death of the defendant."

It is contended by plaintiff that Miller's action for personal injuries is not included in the enumerated actions which abate by the death of a party; that the right of Miller to recover damages for personal injuries survives; that the administrator takes the decedent's place and is entitled to recover what Miller would have been entitled to recover had he survived his injuries.

It is apparent from an examination of analogous cases that the courts of different states are not harmonious in their rulings on the point in controversy. The question, however, does not seem to be an open one in this state, where it has been held that, under section 455 of the code, a pending action for personal injuries does not abate by the death of the plaintiff. *Webster v. City of Hastings*, 59 Neb. 563; *Cleland v. Anderson*, 66 Neb. 252, 270; *Sheibley v. Nelson*, 83 Neb. 501. The opinions in these cases

do not make an exception to the right of revivor, where plaintiff died from the injuries for which he brought suit. The statutes, as already construed, make no such exception, and the court should not. *Mahoning V. R. Co. v. Van Alstine,* 77 Ohio St. 395; *Frame v. State,* 53 Ohio St. 311; *Alpin v. Morton,* 21 Ohio St. 536. The action not having abated, the statutes make provision for revivor. Code, secs. 459, 460, 463.

It is further argued that the recovery in favor of Miller's estate for personal injuries, if sanctioned, may subject defendant to double damages in another suit for the benefit of the widow and next of kin. This question is not necessary to a decision. If the allowance of an erroneous measure of recovery has been properly challenged on this appeal, the error will be corrected. The record does not disclose any purpose on behalf of the widow and next of kin to sue defendant for damages for the death of Miller.

Instructions relating to the measure of damages are criticised as erroneous. Having determined that the action did not abate and that its revival was authorized by statute, the damages to which the injured person was entitled followed the order of revivor to the administrator of his estate. The correct rule seems to be that the administrator takes the decedent's place in the litigation and is entitled to recover for the benefit of the estate what the injured person would have been entitled to recover had he survived his injuries. *Maher v. Philadelphia Traction Co.,* 181 Pa. St. 391; *McCafferty v. Pennsylvania R. Co.,* 193 Pa. St. 339; *Edwards v. Gimbel,* 202 Pa. St. 30; *City of Belfast,* 135 Fed. 208; *Kyes v. Valley Telephone Co.,* 132 Mich. 281; *Olivier v. Houghton County Street R. Co.,* 134 Mich. 367; *Vicksburg & M. R. Co. v. Phillips,* 64 Miss. 693, 2 So. 537; *Muldowney v. Illinois C. R. Co.,* 36 Ia. 462; *Brown v. Chicago & N. W. R. Co.,* 102 Wis. 135. The rules for determining the measure of damages, had Miller survived his injuries, are well settled, and there was no substantial departure therefrom in the instructions.

An instruction of considerable length is pointed out as erroneous, because by it "the jury are told that upon certain facts the defendant was guilty of negligence, while other most material facts bearing upon that issue are entirely omitted." There are a number of reasons why the judgment should not be reversed for the giving of the instruction thus criticised: The overwhelming weight of the evidence tends to show that the negligence of defendant's servant was the proximate cause of Miller's injuries. The charge as a whole directed the jury to consider all of the evidence. They found for plaintiff on the issue of negligence. It seems clear from the whole record that the verdict would not have been different without the instruction criticised. An instruction on the same subject, conforming to defendant's view of the law and the proofs, was not offered. Error is not assigned in a manner conforming to the rules of this court. Other instructions are criticised, but no prejudicial error has been found therein.

Complaint is made because the court below, previously to the trial, overruled a motion to suppress a deposition on behalf of plaintiff. Neither the abstract nor the bill of exceptions shows that the objection to the entire deposition was renewed when it was offered at the trial. Parts of it were read to the jury without objection. This assignment of error is therefore unavailing for the following reason: "Where a motion to suppress a deposition has been erroneously overruled, in order to make such error available, the party against whom such ruling is made must, when such deposition is offered in evidence, object thereto and save his exception." *Dawson v. Dawson,* 26 Neb. 716; *Starring v. Mason,* 4 Neb. 367.

Was that part of the Carlisle table showing the expectancy of life at the age of 50 erroneously admitted in evidence? The affirmative of this question is argued by defendant, and reference is made to the following testimony of a physician in regard to the age of Miller at the time of his death: "In my opinion, he was in the neighborhood of 50 years of age. I do not think he could have been

over 55 years." It is insisted that the ruling in regard to the Carlisle table took from the jury the question of Miller's age and arbitrarily fixed it at 50 years, while the evidence was that he was about 50, and not more than 55. This testimony is merely the opinion of a physician who did not know the age of decedent. Defendant offered no proof on that issue, but there is uncontradicted, direct evidence that Miller was 50 at the time of his death. Plaintiff asserted that this was his age, and had a right to prove his expectancy on that basis. To aid the jury in ascertaining the probable duration of life, had death not resulted from violent means, part of the table was introduced. Defendant did not offer tables showing the expectancy of life between the ages of 50 and 55, nor request an instruction limiting them to its view of the evidence as here asserted. In *Pearl v. Omaha & St. L. R. Co.*, 115 Ia. 535, it is said: "The tables, to be admissible, need not show the precise age, but approximately that of the person involved. As defendant did not ask an instruction limiting the force and effect to be given these tables, it is not in a situation to complain of the court's omission to so instruct." On the record presented for review, the ruling under consideration does not seem to call for a reversal.

A photograph of Miller, taken after his death, was admitted in evidence, and the ruling is also assailed. Plaintiff attempts to justify the admission of this exhibit by asserting that it was within the discretion of the trial court to admit it as indicating Miller's appearance with respect to age and vigor. However this may be, the jury's consideration of the photograph could only affect the measure of damages. Aside from the questions of negligence and contributory negligence, the manner in which Miller was fatally injured is not in dispute. Unless the recovery is excessive, prejudicial error does not appear, and no substantial ground for interfering with the verdict as excessive has been found.

AFFIRMED.

BARNES, LETTON and SEDGWICK, JJ., not sitting.

AUGUSTA ERICKSON, APPELLANT, V. CARL GUSTAV CARLSON ET AL., APPELLEES.

FILED JANUARY 30, 1914. No. 17,500.

1. **Descent and Distribution:** TREATIES: CONSTRUCTION. The French words "*fonds et biens*," translated as "goods and effects," include realty, as they appear in the following terms of a treaty between the United States and Sweden: "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even *ab intestato*, either in person or by their attorney." 8 U. S. St. at Large, p. 64, art. VI.
2. **Treaty rights** of non-resident aliens must be enforced by state courts without regard to conflicting statutory provisions.

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

Frank A. Anderson, George W. Stockwell and *Carl O. Beroth*, for appellant.

C. J. Beedle and *Adams & Adams, contra.*

ROSE, J.

This is a suit to quiet in plaintiff title to 120 acres of land in Phelps county. The action was dismissed, and plaintiff has appealed.

When Carl Peterson owned the land in controversy, he died intestate November 13, 1906. Plaintiff is his daughter and resides in Chicago. His two sons are the defendants. They live in Sweden. Plaintiff asserts that her brothers are non-resident aliens who are prohibited by the laws of Nebraska from inheriting land in this state, and that therefore her father's realty descended to her, the only heir capable of taking it under the statutes of descent.

The dismissal from which she appealed to this court is without error for the following reasons: A treaty between the United States and Sweden protects defendants

from the statute prohibiting non-resident aliens from inheriting land in this state, the sixth article being in part as follows. "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even *ab intestato,* either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *'droit de detraction'* on the part of the government of the two states respectively." 8 U. S. St. at Large, p. 64, art. VI.

The original treaty is written in French. The term "goods and effects" is a translation of the French expression *"fonds et biens,"* and has been construed to include real estate as well as personal property. *Adams v. Akerlund,* 168 Ill. 632. In French law *biens* "includes all kinds of property, real and personal." Black, Law Dictionary, p. 131. A text-writer says: "The term *biens,* in the sense of the civilians and continental jurists, comprehends not merely goods and chattels, as in the common law, but real estate." Story, Conflict of Laws (8th ed.) sec. 13, note 1. The words "heirs," "succession," and "inheritances," as they appear in the treaty, may be properly used in connection with the descent of realty. *Adams v. Akerlund,* 168 Ill. 632. Treaty rights affecting real estate were as important as those relating to personal property. Both were within the spirit of the treaty. The context indicates that the word *biens* includes realty. "Effects" should be construed to include real estate, where that meaning is shown by the entire instrument in which the word appears. *Page v. Foust,* 89 N. Car. 447; *Morgan v. Morgan,* 6 Barn. & Cr. (Eng.) *512; *Dowdel v. Hamm,* 2 Watts (Pa.) 61. The holding, therefore, is that the term "goods and effects," as used in the treaty, includes

real estate. For the purposes of the treaty defendants inherited their proportionate shares of their father's land in Phelps county.

Treaty rights must be enforced by the courts without regard to conflicting statutory provisions. *Butschkowski v. Brecks*, 94 Neb. 532.

Plaintiff was not entitled to relief in this action, and her suit was properly dismissed.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

G. A. ENOS ET AL., APPELLANTS, V. A. L. HANFF, APPELLEE.

FILED JANUARY 30, 1914. No. 18,195.

Intoxicating Liquors: LICENSE: CONTROL OF BUILDING BY MANUFACTURER. Under the act making it unlawful to sell at retail intoxicating liquors in a building owned or controlled by a manufacturer of beer, the owner's conveyance of a building, so owned or controlled, to a grantee not engaged in that business does not make the premises a lawful place for a licensed saloon, where grantor retains control of the building. Comp. St. 1911, ch. 50, sec. 30*e*.

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

G. A. Eberly, for appellants.

W. W. Young and *A. R. Oleson, contra.*

ROSE, J.

The question to be determined is the validity of a license to sell intoxicating liquors in the city of Stanton. A. L. Hanff is licensee, and G. A. Enos and others are remonstrators. From the municipal action granting the license, remonstrators appealed to the district court, where the license was sustained. The record of the proceeding is now presented here for review by appeal from the district court.

One of the objections to the license is that it was issued in violation of the Gibson act (laws 1907, ch. 82), which makes it unlawful to conduct a saloon in a building owned or controlled by a manufacturer of beer. Comp. St. 1911, ch. 50, sec. 30*e*. It is conceded by remonstrators that the Independent Realty Company, which is not a manufacturer of beer, holds title to the building wherein licensee is engaged in selling intoxicating liquors, but it is insisted that the building is nevertheless owned or controlled by the Storz Brewing Company, a manufacturer of beer. Licensee frankly admits that prior to the passage of the Gibson act the building was owned by the Storz Brewing Company, but he insists that, for the purpose of complying with the law, and without any intention of evading it, the property was transferred with many other pieces of real estate, which had been used in different parts of the state for saloon purposes, to the Independent Realty Company of Omaha, a corporation organized in June, 1907, after the Gibson act was passed and approved, but before it went into effect July 5, 1907. Comp. St. 1911, ch. 50, sec. 1. There is direct testimony on part of stockholders of the Independent Realty Company that, in incorporating it and in taking title to real estate formerly owned by the Storz Brewing Company, the transactions were all conducted in good faith and that the property so transferred is not owned or controlled by a manufacturer of beer.

It would be unusual for those who participated in the incorporation of the new company, or in the transfer of the property of the old, to testify frankly in direct terms to an intention to violate the law. The transactions themselves must be scrutinized in the light of all of the circumstances, giving due weight to forms and to evidence of good intentions. An issue presented by the remonstrance to the licensing tribunal required the determination of this question: Is the building in which the saloon is to be conducted controlled by a manufacturer of beer? That it was so controlled before the passage of the Gibson act is admitted. The transfer of title did not change the busi-

ness to which the property had been devoted. The managing officer of the grantee testified that he had no offer to lease the building in question for any other purpose and that he presumed its use for a saloon would be continued. On premises purchased from the Storz Brewing Company by the Independent Realty Company in many different places in the state, Storz beer had been generally kept for sale. A purpose on the part of licensee to continue the sale of the products of the Storz Brewing Company under his license may fairly be inferred. The business interests which prompted the brewer to purchase a great number of saloon sites in different localities were the same before and after the passage of the Gibson act and before and after the transfer. It was understood that the new company should respect the leases of the old. . Shares of stock of the Storz Brewing Company, each of the par value of $100, were issued as follows: To George Tierney, one; to John Buck, one; to Charles F. Weymuller, one; to Adolph Storz, one; to Gottlieb Storz, 3,061. The five stockholders named are directors. Gottlieb Storz is president, and Charles F. Weymuller, secretary and treasurer. Shares of stock of the Independent Realty Company, each of the par value of $100, were issued as follows: William F. Webber, one; Maggie Buck, one; Minnie G. Storz, 3,058. The three stockholders named are directors. Minnie G. Storz is president, Maggie Buck, vice-president, and William F. Webber, secretary and treasurer. The president of the Independent Realty Company is the wife of the president of the Storz Brewing Company. The husband of the vice-president of the Independent Realty Company is the brew-master of the Storz Brewing Company, and a cousin of Minnie G. Storz. For four years the secretary and treasurer of the Independent Realty Company did general office work for the Storz Brewing Company, and did not sever his relations with his employer until June 1, 1907. According to the testimony of Maggie Buck, she was told by Minnie G. Storz at the time of the organization of the Independent Realty Company that under the new law the Storz Brew-

ing Company could not hold the property used for saloon purposes, and that Gottlieb Storz wanted the three persons who became the incorporators of the Independent Realty Company to take the property. A few days before the transfer from the old corporation to the new, the Storz Brewing Company declared a dividend of 55 per cent.—an unusual transaction. In the Storz Brewing Company, Gottlieb Storz is the controlling factor. His wife, on the face of the new organization, controls the Independent Realty Company. The husband and the wife control both corporations. Within the meaning of the Gibson act, does the Storz Brewing Company, a manufacturer of beer, still control the building wherein A. L. Hanff is licensed to sell intoxicating liquors in the city of Stanton? The domestic relations between Gottlieb Storz, president of the Storz Brewing Company, and his wife, Minnie G. Storz, president of the Independent Realty Company, are harmonious. In a business sense the interests of the controlling factors in both corporations are identical. Where the financial interests of husband and wife are thus united, the court, in furtherance of a public policy established by the legislature, will look beyond the legal entity of a corporation to the relations of the individuals behind it and enforce the law according to its terms. Legislative emancipation of married women in regard to property and business did not terminate a husband's natural influence over his wife, where marital relations are ideal. In this view of the law, when all of the circumstances are considered, the building in which the licensing tribunal of Stanton attempted to legalize the sale of intoxicating liquors is still controlled by a manufacturer of beer, within the meaning of the Gibson act. In reaching this conclusion none of the evidence tending to establish the good faith of the transfer, and the purpose of the incorporators to obey the law, has been overlooked.

The judgment of the district court is reversed and the cause remanded, with directions to cancel the license.

REVERSED.

LETTON and FAWCETT, JJ., not sitting.

HAMER, J., dissenting.

The principal question in this case would seem to be whether the license to sell liquor in the particular building mentioned was properly granted. Under the provisions of the act of 1907, known as the Gibson act (laws 1907, ch. 82), no license for the sale of liquors by retail may be granted by the corporate authorities of any city in a *building owned or controlled* by any manufacturer or wholesaler of intoxicating liquors. In this case the legal title of the lot and building described in the application for the license is vested in the Independent Realty Company. It is claimed that the Independent Realty Company is a holding company created by the Storz Brewing Company, or those interested in that company, and that the purpose of the conveyance to the Independent Realty Company was to avoid the provisions of the law and to defeat the purpose of the Gibson act. There was a trial in the district court for Stanton county and the judgment of that court was for the license. It should be remembered that in all cases of this character the findings of the district judge, who is generally acquainted in the neighborhood and has an opportunity to learn the character of those seeking the license, is entitled to careful consideration. It is contended that the evidence shows that just prior to the taking effect of the Gibson act the Storz Brewing Company was the owner of a large amount of real estate located in the different towns, cities and villages of the state. It is also contended that a large part of this real property was occupied by retailers of intoxicating liquors who got their supplies from the brewing company.

Charles F. Weymuller, the secretary of the corporation, testified that the Storz Brewing Company had no contracts with their tenants which compelled the tenants to purchase the Storz beer. He, however, is of the opinion that the tenants were willing to take the products of the Storz Brewing Company to the exclusion of other beers.

This, of course, might be without any agreement with either the brewing company or the realty company. The brewing company was largely owned by Gottlieb Storz, who held 3,061 shares of the stock. He held all the shares except four. The vice-president of the realty company, Mrs. Buck, testified that the realty company was formed at the instance of Gottlieb Storz. She testified that she was told by Mrs. M. G. Storz that under a law which had been recently passed by the legislature the Storz Brewing Company could no longer hold its saloon buildings and that her husband, Gottlieb Storz, desired that she, his wife, and Maggie Buck and William F. Webber form a corporation to take over the real property of the brewing company. Mr. Webber was an employee of the brewing company until June 1, 1907. After that he became an employee of the Independent Realty Company. The real estate of the brewing company was conveyed to the Independent Realty Company. The testimony shows that on the 28th of June a dividend of 55 per cent. was declared by the Storz Brewing Company. This had never been done before. It is claimed that this immense dividend was a result of the sale of the real estate held by the Storz Brewing Company to the Independent Realty Company. It is argued that this 55 per cent. dividend was used by Storz through his wife to finance the Independent Realty Company. The testimony of Mrs. Buck concerning what Mrs. Storz told her is not good evidence so far as the Storz Brewing Company is concerned. It is the good faith of that corporation that is on trial. If it has sought to evade the law, then that fact should be shown by competent evidence. It is hearsay when Mrs. Buck testifies to what Mrs. Storz told her concerning the purpose of the Storz Brewing Company. The evidence in a case of this kind should be competent. There is no presumption against the brewing company because of what Mrs. Buck might say concerning an alleged communication received from Mrs. Storz. (a) "Admissions of a conspirator are not admissible in evidence in an action against his coconspirator, unless there is other evidence

tending to prove conspiracy." *State v. Merchants Bank,* 81 Neb. 704, 81 Neb. 710. (b) "Before the acts and declarations of a conspirator are entitled to be considered as evidence against his associates, the conspiracy itself must be established; but the order of proof is a matter within the discretion of the trial court." *O'Brien v. State,* 69 Neb. 691. Section 476 of the criminal code reads: "In trials for conspiracy, in cases where an overt act is required by law to consummate the offense, no conviction shall be had unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts so alleged be proved on the trial; but other overt acts not alleged in the indictment may be given in evidence on the part of the prosecution."

Section 7168, Ann. St. 1907, regulates the amount of proof required in an action to recover damages for injuries received while under the influence of liquor. If less evidence is required to maintain such an action, it does not apply to this sort of a case.

In *Davis v. Borland,* 83 Neb. 281, it is said: "In an action against the vendors of intoxicating liquors to recover damages suffered from the acts of an intoxicated person, it is sufficient, under the provisions of section 7168, Ann. St. 1907, to plead and prove that the defendants sold or gave intoxicating liquors to the intoxicated person, from whose act the damage arose, on the day or about the time the injuries to the plaintiff were received. In such cases the statute by its terms supplies allegations and proofs required in other actions for damages." In the instant case the statute supplies nothing. The case is to be tried as any other case is tried. "The burden of sustaining the affirmative of an issue involved in an action does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there till the end." *Vertrees v. Gage County,* 75 Neb. 332; *Rapp v. Sarpy County,* 71 Neb. 382. A corporation organized under the laws of this state which engages in a business forbidden by statute or unlawful as against public policy may be deprived of its charter and dissolved

by a proceeding in *quo warranto* under section 715 of the code. *State v. Nebraska Home Co.*, 66 Neb. 349.

It is undoubtedly true that, where the forms of corporations are made use of for the purpose of defeating the ends of justice, such forms will be disregarded. It is said in the argument for appellants that when the notion of legal identity is used to defeat public conveyance, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons, and that where one corporation is organized and is owned by the officers and stockholders of another the interest between the two corporations becomes identical, and that they may be so considered if justice requires it. Mr. Storz' wife appears to have been the principal owner of the stock in the realty company. It would not be strange if the realty company had been organized expressly to enable it to avoid the conditions of the statute. At the same time we are not at liberty to jump to a conclusion not warranted by the evidence, and that conclusion should not be reached unless the evidence sustains it.

Mrs. Storz became the leading stockholder in the Independent Realty Company. Seven other stockholders held one share each in the company. Before the license should be denied to the building in question there should be evidence to establish the bad faith of the officers or manager of the Independent Realty Company. It is shown by the evidence that the keg beer sold in the building was Storz beer, but other kinds of beer were kept for sale. The other kinds were bottled beer. It is argued in the appellants' brief that the interests of Gottlieb Storz and his wife in the brewery and in the realty company are essentially identical. *Lusk v. Riggs*, 65 Neb. 258, and *Powell v. Morrill*, 83 Neb. 119, are cited by counsel for the appellants to show that this court recognizes the identity of the interest which exists between a wife and her husband in business matters. *Lusk v. Riggs, supra*, was a case where a debtor alleged to be in failing circumstances made a transfer of his property to near relatives. It was held in such case that the burden of proving a

sufficient consideration and good faith in the transfer was upon the defendants. In that case the entire mercantile stock of an insolvent firm was transferred apparently to avoid the payment of a debt. It was held to be transferred to avoid an execution on a judgment rendered in favor of one of the firm's creditors. The trial court in that case excluded all inquiry into the organization and conduct of the business of the new corporation. After reading the evidence, Commissioner Oldham, who prepared the opinion of this court, said that the corporate body looked like a creature "conceived in sin and brought forth in iniquity." In that case there were other conveyances made without any consideration whatever. There were badges of fraud in evidence from every angle of view, and this court held that the evidences of fraud were sufficient. In *Powell v. Morrill, supra,* there was a petition for a liquor license where, in order to get a sufficient number of freeholders to qualify as petitioners, there was a conveyance of a lot in an addition to a town where this court had previously held that the addition was laid out and maintained "in the interest of the liquor traffic and for the sole purpose of furnishing lots for colorable freeholders to sign petitions." Also, in that case the wife of the applicant signed his petition. It was held that she did not pay any consideration for the lot, and also that she never claimed title to the real estate. We do not think the cases cited justify the conclusion in this case that the organization of the Independent Realty Company was in bad faith, and that as a matter of fact it held the property in trust for the Storz Brewing Company with a view of enabling that company to occupy the real property of the Independent Realty Company. If it had been shown by competent evidence that the realty company had a monopoly of the business of the Storz Brewing Company—that is, that the realty company furnished to the brewing company many places in which to sell beer and intoxicating liquors—then there would be some basis upon which to reach the conclusion that both the realty company and the brewing company were acting in bad faith. The mere or-

ganization of the realty company with a view that it should become the grantee of the real property of the Storz Brewing Company would not of itself be any reason for the condemnation of either the Storz Brewing Company or the realty company. The purpose may have been to receive title to the property with a view of selling it at retail to whomsoever might buy. It may be generally to furnish places of business of all kinds—dry goods stores, grocery stores, butcher shops, and other places of a commercial character. There does not appear to be any affirmative evidence that the realty company was not organized for such a purpose as this, which is a good enough purpose. There is no evidence of an intention to violate the law. The element of bad faith seems to be wholly lacking. It is easy to jump at the conclusion that the only purpose was the purpose to do a wrong. I submit that a liquor license case should be heard and determined by the same rules of evidence that are made to apply to other cases, and to establish an unlawful purpose there should be sufficient evidence of a convincing character, and circumstances which merely cast suspicion upon the parties do not go far enough.

After a careful reading of the evidence, I am unable to reach the conclusion that any bad faith is established by the proof. It may be the fact that the realty company was organized for the purpose of taking over the real property of the Storz Brewing Company, but unless it was done with the further purpose of furnishing the Storz Brewing Company places in which to do business, and have their customers, then there is no violation of the law. I am unable to reach the conclusion contained in the majority opinion, and regret that I am compelled to dissent.

HARRISON FRAZER, APPELLEE, V. JOHN E. MYERS, APPELLANT.

FILED JANUARY 30, 1914. No. 17,364.

1. **Pleading:** AIDER BY ANSWER. "A defective or ambiguous petition may be aided and its infirmities cured by the averments of the answer." *Beebe v. Latimer*, 59 Neb. 305.
2. **Costs.** In an action at law in the district court, where a verdict is returned in favor of the plaintiff for an amount within the jurisdiction of a justice of the peace, the jury fee and trial fee are costs made by plaintiff, and should be so taxed.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Reversed as to costs, with directions.*

Silas A. Holcomb and *Edwin F. Myers*, for appellant.

N. T. Gadd, contra.

FAWCETT, J.

From a judgment of the district court for Custer county, for damages sustained by plaintiff by reason of the breach by defendant of a contract to employ plaintiff upon his ranch, defendant appeals.

The suit as originally commenced was against the defendant John E. Myers and one Edwin F. Myers. It appears from the transcript that at the trial the jury were instructed to find in favor of defendant Edwin F. Myers, for the reason, as stated, that the undisputed evidence showed that defendant, Edwin F. Myers, was the agent of John and had no personal interest in the ranch. The verdict and judgment were against defendant, John E. Myers, and the appeal here is prosecuted by him alone.

But two questions are presented by defendant in his brief and argument: First, that the petition does not state a cause of action; and, second, that the court erred in overruling his motion to retax costs. We will consider these two assignments in the order named.

The "Myers Ranch," as it is termed in the briefs, was, according to the fair inference to be drawn from the pleadings, the property of defendant. The contract of employment, upon which plaintiff relies, rests in a correspondence by mail between himself and Edwin F. Myers, the agent of defendant. This correspondence is more or less voluminous and will not be set out. We deem it sufficient to say that it establishes a contract on the part of Myers to give the plaintiff employment on the Myers ranch, plaintiff to work upon the ranch, and his wife to do the cooking, not only for plaintiff's family, but for three adult persons, two of whom were designated as defendant John E. Myers and his wife. Defendant was to furnish a house and the board for all, and was to pay plaintiff $40 a month. He was also to employ plaintiff's son, a young man 19 years of age, a portion of the time, and during such time furnish his board and pay for his services from $25 to $30 a month, according to the capabilities shown by him. Plaintiff was requested to arrive at Broken Bow "by May 3d." The petition alleges that plaintiff and his wife and son arrived at Broken Bow on that day, and were directed by Edwin F. Myers to proceed to the ranch; that he hired a team and buggy, and with his wife and son proceeded to the ranch; that upon arriving there defendant refused to permit him and his family to remain, and refused to give them employment as agreed. The petition then sets out in detail the damages which plaintiff claims to have sustained, in the sum of $433. The verdict and judgment were for $154. In the judgment it was ordered that each party "pay his own costs."

The complaint made to the petition is that the letters do not contain an acceptance that is definite, unqualified and in the terms of the offer. In this we think counsel is in error. After plaintiff had received and answered two letters, he received a third letter, the opening sentence of which is: "We still want you to come, so come ahead." The letter then proceeds to describe the location of the ranch and the best way to reach it. He was told that he

could reach Broken Bow, 20 miles from the ranch, on the Burlington railroad, or he could go to Oconto, which is eight miles from the ranch, on the Union Pacific, and upon arriving there he could telephone to the ranch and they would send a team after him. The last letter written was short, and shows that Mr. Myers considered the contract completed. It contained a single sentence: "I hope that you can get here by May 3d." The next complaint is that the allegation in the petition, that plaintiff "accepted the offer of the defendant set out in the letters," is a mere conclusion of the pleader. We think, in the light of the correspondence set out, that the allegation quoted cannot properly be so characterized.

It is next urged that defendant did not sign any of the letters; that, while Edwin F. Myers in writing the letters used the pronoun "we," no allegations are made in the petition as to who is meant by that word, and that there is no allegation in the petition that defendant had anything to do with the employing of plaintiff; that the petition contains no allegation which made defendant a party to the contract except what might be inferred from the allegation that "John E. Myers and Edwin F. Myers are managers of what the defendants call the Myers Ranch." This, it is contended, is not sufficient; that it does not say that John E. Myers owned the ranch or owned the business; that it does not charge that John E. and Edwin F. are partners in business, or that they are liable for any contract in behalf of any owner of the business, and is insufficient to charge John E. Myers as an undisclosed principal represented by Edwin F., as agent. If the judgment depended for support upon the petition alone, we might have some hesitancy in sustaining it, but the principal deficiency in the petition, viz., an allegation as to the true relation existing between defendant and Edwin F. Myers, is cured by the averments in defendant's answer. The answer alleges: "That the John Vaughn referred to in the correspondence set out in plaintiff's petition was and is the son-in-law of said plaintiff, and, acting for him on his behalf and as his agent, sought em-

ployment, on what the defendants call the 'Myers Ranch' for the plaintiff in this action; that the defendant, through his agent, Edwin F. Myers, informed the said Vaughn on or about the first day of April, 1910, that if said Harrison Frazer and his wife were good hands about the farm he would give them $40 per month, Mr. Frazer to work on the farm and Mrs. Frazer to work in the house." This statement to Vaughn, by defendant's "agent, Edwin F. Myers," was followed a few days later by a letter from this "agent" to plaintiff. This letter was the one which opened the correspondence. It was dated April 8, 1910, and in its opening sentence stated: "You have been recommended to me as a good man to work on a ranch and farm by John Vaughn." The averment quoted from the answer is a clear admission of the agency of Edwin F. Myers, and supplies the only deficiency we have been able to discover in the petition. We therefore hold that the petition, as thus aided, states a cause of action.

In taxing the costs under the judgment rendered by the court, the clerk taxed the jury fee, $5, and trial fee, $1, to the defendant. Defendant by proper motion asked that these costs be retaxed and taxed against plaintiff. This motion was overruled. In this we think the court erred. Plaintiff voluntarily went into court and demanded a trial and judgment upon his cause of action. Defendant by the process of the court was compelled to appear. Plaintiff could not obtain his judgment without a trial. He could not have a trial without a jury, unless the intervention of a jury was waived, not only by himself, but by the defendant. No cases in point are cited, and we have neither the time nor inclination to look for them, but as a case of first impression it appears to us quite clear that these two items were costs made by plaintiff, and, under the judgment of the court, that each party should pay his own costs, they should have been taxed against the plaintiff.

The judgment upon plaintiff's cause of action is affirmed; upon the question of costs it is reversed, and the cause

is remanded, with directions to the district court to sustain the motion to retax costs and to tax the two items in controversy to the plaintiff; each party to pay his own costs in this court.

REVERSED AS TO COSTS.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

MITCHELL A. ROBINSON, TRUSTEE, APPELLANT, V. NELLIE S. R. TOWER ET AL., APPELLEES.

FILED JANUARY 30, 1914. No. 17,408.

1. **Trusts**: COMPENSATION OF TRUSTEE: CONVERSION: ELECTION OF REMEDIES. The amount due a trustee of an estate, appointed by a foreign court in which such estate is being administered, for services as trustee must be determined by that court and an order therefor duly made before such trustee may properly withdraw any sum as compensation for such services from the trust fund; and the withdrawal of the same before such allowance is made constitutes a conversion of the sum so withdrawn, for which the beneficiaries of such fund, or succeeding trustees, have an election of remedies—a suit in equity to impound the money, when it can be traced, and have it declared a trust fund, or an action at law for a conversion.
2. **Executors and Administrators**: TRUST FUNDS: CONVERSION: REMEDY. And in the event of the death of the trustee both remedies survive; but the method of procedure in the remedy at law for conversion becomes changed, and such remedy must be enforced in the manner required by the statute in relation to the presentation of claims against the estates of decedents, in force at the time of the death of such trustee.

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

Arthur C. Wakeley and *Merritt E. Haviland*, for appellant.

James T. Begley, contra.

FAWCETT, J.

This action was brought in the district court for Sarpy county, against the defendant, Nellie S. R. Tower, and the sureties on her bond as executrix of the last will of William Robinson, deceased, who in his lifetime was executor of the last will of one Ann Maria Dunham, of Essex county, New Jersey, deceased, and trustee of the trusts created in the will of said Ann Maria Dunham, to recover the sum of $1,064.57, which it is alleged was collected by the said William Robinson as trustee in his lifetime and converted by him. From a judgment of the district court finding in favor of the defendants and dismissing plaintiff's action, plaintiff appeals.

Mrs. Dunham died October 23, 1893. Mr. Robinson qualified as executor of her last will and as trustee of the trusts therein provided, and continued to act in that capacity until his death, August 23, 1905. No complaint is made as to the manner in which Mr. Robinson executed his trust during the nearly 12 years that he acted as trustee. On the contrary, the evidence would indicate that he had executed it faithfully and well. After his death there was found among his papers a statement signed by him entitled "Present Estate." This statement listed four mortgages held by him, aggregating $6,538, a certificate of deposit in the United States National Bank, $1,600, and "Balance held as my interest in estate $1,064.57," making a total of $9,202.57. After giving the above figures, the statement recited: "The above 'Present Estate' is subject to the payment of the amounts to be paid the annuitants, for relinquishment of their claims, the compensation to be paid executor and the costs to be made in surrogate court. My interest in the estate is for compensation due me as executor and trustee and as assignee and heir of two residuary legatees." The four mortgages and the certificate of deposit in the United States National Bank were all in proper form, and payable to Mr. Robinson in his official capacity as trustee. The last item, $1,064.57, covered moneys which Mr. Rob-

inson had collected as trustee, but which he had withdrawn from the assets of the trust estate under a claim that a portion of it was due to him for compensation as executor and trustee, and the other portion as assignee and heir of two residuary legatees. This item represents the money sought to be recovered in this action. The record shows that the only compensation which Mr. Robinson had received during his many years' service as trustee was an allowance which had been made to him by the New Jersey surrogate court in 1897, which would be about four years after his appointment as trustee; so that at the time of making the statement just prior to his death he had received no compensation for the last seven years or more of his service. While this fact is perhaps not very material, we speak of it as a moral justification on the part of Mr. Robinson in withholding what he thought was justly due him. His legal duty, of course, was to obtain from the surrogate court an allowance for his services, which amount he could have deducted from the money on hand. So far as anything was due him as assignee or heir of any of the residuary legatees of Mrs. Dunham, he would have been obliged to wait until the amount was ascertained and ordered paid. His withholding from the funds of the trust estate the sum in controversy was, therefore, as found by the district court, a conversion, for which there was an election of two remedies in behalf of the Dunham estate.

Counsel for plaintiff in his brief says: "Upon the facts disclosed, and the law of our state applicable thereto, the plaintiff had, before the death of Robinson, an election of remedies to enforce his claim to the money in dispute. He could either bring a suit in equity to impound the money while in the bank's possession, and have it declared trust money, or he could have sued Robinson for a conversion of the funds." He further says: "It is equally clear, as will now be shown that, after the funds were received by Mrs. Tower, as executrix of Robinson, the same remedies were available in behalf of the Dunham estate." In these unqualified statements we concur,

but we are unable to agree with counsel's next statement: *"While the fund was still in the bank,* it could have been reached by a suit in equity between the proper parties, and impressed with the trust to the extent of the $1,064.57." It was immaterial whether the fund was still in the bank or in the hands of Mrs. Tower as executrix. Until the money passed out of her hands as executrix, under the order of distribution entered by the county court, it was as much subject to being impounded and declared trust money as while it was in the bank.

Both of the remedies which existed for the benefit of the estate before Mr. Robinson's death survived, but the method of procedure under the latter became changed. Prior to the death of Mr. Robinson this remedy would have been by an ordinary action at law in the district court. After his death it could only be by filing a claim against his estate and the remedy at law thus enforced, as would be required of any other legal claimant. Comp. St. 1905, ch. 23, secs. 214, 226. The equitable remedy would be the same either before or after Mr. Robinson's death. As stated, Mr. Robinson died August 23, 1905. Mrs. Tower, defendant, was appointed executrix of his will September 5, 1905. On the same day the county court entered an order allowing creditors six months within which to file claims, and fixing October 23, 1905, December 31, 1905, and April 6, 1906, as days for hearing claims. Two months after her appointment, on November 8, 1905, Mrs. Tower, in answer to a letter received from plaintiff, Mitchell A. Robinson, who had not yet been appointed trustee, wrote to him as follows: "Your letter duly received, and in reply will say that the Dunham estate consists of mortgages on real estate in this county, except a certificate of deposit in the U. S. National Bank, all of which are in the name of William Robinson, Trustee. A new executor will have to be appointed, and papa's lawyer advises me that the simplest way is for some one of the legatees to file a petition in the surrogate court at Newark, presenting some one's name." It appears from this that the present plaintiff, knowing that Mr. Robin-

son was dead, had written to Mrs. Tower in relation to the estate; and by Mrs. Tower's letter his attention was called to the necessity of action on the part of Mrs. Dunham's legatees. All this was four months before the time for filing claims against the Robinson estate had expired, and ten months before the estate was finally closed and Mrs. Tower discharged as executrix, which was on September 10, 1906. During all of this time no attempt was made to pursue either of the remedies which existed in favor of the Dunham estate. Neither plaintiff nor any of the legatees appear to have made any move until the spring of 1907, when on March 9 plaintiff was by the orphans' court of Essex county, New Jersey, appointed trustee. Some correspondence then ensued between him and his attorney on the one side, and Mrs. Tower and her attorney on the other. Still another year was allowed to go by before proceedings of any kind were instituted, when on April 23, 1908, plaintiff filed in the county court of Sarpy county a petition to reopen the estate of William Robinson, "and for leave to file the claim herein sued upon as a claim against said estate." Over nine months more time was allowed to elapse, when on January 27, 1910, plaintiff filed an amended petition, to which on the next day a demurrer was sustained. On March 1, 1910, plaintiff dismissed his petition without prejudice, and on July 16, following, commenced the present action. The record discloses that at the time of Mr. Robinson's death the money in controversy was on deposit in the United States National Bank, on his individual account, subject to check; that after his death, and after the appointment of Mrs. Tower as the executrix of his will, she, as executrix, withdrew the money from the bank and redeposited it to her account as executrix, and that she inventoried it as a part of the assets of the estate. This money was held by her, as executrix, until September of the following year, when, on the order of the county court, it was distributed in accordance with the provisions of Mr. Robinson's will. No part of the money ever went into her hands as an individual. It was collected, re-

tained, and paid out by her in her official capacity as executrix. We are unable to discover any theory upon which Mrs. Tower's bondsmen could be held, as she had in all respects executed her trust under the order and direction of the court; and we think the district court rightly held that, by not pursuing either of the remedies existing in behalf of the Dunham estate until after the fund, the whereabouts of which was well known, had been dissipated by distribution, so that it could not be reached in equity, and until after the time for filing claims had elapsed and the estate had been finally closed, so that it could not be reached at law, plaintiff's action could not be maintained. This holding renders a consideration of the other points raised in plaintiff's brief unnecessary.

For the reason above stated, the judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

FLORENCE E. BETHEL, ADMINISTRATRIX, APPELLEE, v. PAWNEE COUNTY, APPELLANT.

FILED JANUARY 30, 1914. No. 17,414.

1. **Evidence** examined and set out in the opinion, *held* sufficient to sustain the verdict.
2. **Appeal:** RULINGS ON EVIDENCE. The rulings of the trial court in the admission and exclusion of evidence, examined and set out in the opinion, sustained.
3. **Witnesses:** CROSS-EXAMINATION. It is not error for the trial court to refuse to permit evidence in support of an affirmative defense to be elicited on cross-examination.
4. **Appeal:** INSTRUCTIONS. The rulings of the court in the giving and refusing of instructions, set out in the opinion, sustained.
5. **Counties:** REPAIR OF BRIDGES: LIABILITY. Where a bridge is built in a public road upon the line between two counties, part of such public road having been established by each county, it is the duty

of each county to use reasonable diligence to keep such bridge in a reasonably safe condition for the use of the traveling public, regardless of the fact that such bridge may have been built by and at the separate expense of one of the counties; and for a failure to perform this duty such counties are jointly and severally liable.

6. **Trial:** WITHDRAWAL OF REST: DISCRETION OF COURT. It is within the sound discretion of the trial court to permit either party, after both sides have rested, to withdraw his rest and introduce further evidence; and its action in so doing will not be ground for a reversal unless it clearly appears that the granting of such permission was, under the particular circumstances of the case, an abuse of such discretion.

7. **Executors and Administrators:** FOREIGN ADMINISTRATORS: RIGHT TO SUE: REVOCATION OF LETTERS. Under section 5189, Ann. St. 1909, an executor or administrator duly appointed in any other state may commence and prosecute an action or suit in any court in this state in like manner and under like restrictions as a nonresident may be permitted to sue; and the fact that, subsequent to commencing an action in this state, such foreign executor or administrator removes from the state where he was appointed into this state will not *ipso facto* revoke his letters testamentary or of administration.

8. **Evidence:** STATUTES OF ANOTHER STATE: PRESUMPTION. The statutes of another state must be pleaded and proved to be of any avail. In the absence of such pleading and proof the laws of the sister state will be presumed to be the same as our own.

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

S. J. Graham and *J. C. Dort,* for appellant.

Frank A. Barton, contra.

FAWCETT, J.

From a judgment of the district court for Pawnee county, in favor of plaintiff, for damages occasioned by the death of plaintiff's decedent, Robert Bethel, which resulted from the giving way of a bridge in one of the public roads of defendant county, defendant appeals.

The road in which the bridge was located is on the state line between the states of Nebraska and Kansas. It was

four rods wide. Two rods of this width were in the state of Kansas and two in the state of Nebraska, so that the center of the road was the state line between the two states. At the point where the accident occurred there was a creek or ditch. During portions of the year this creek, as we will term it, was dry, while at other times in the year, and particularly after heavy rains, a considerable body of water would flow through it. It had a watershed of about 100 acres of land. Some four or five years before the accident, the road supervisor in Nemaha county, Kansas, constructed a bridge over this creek. His testimony is that it was built with short posts, six in number, about three feet long, with two-inch plank for caps, upon which were placed nine stringers, fourteen feet long, upon which was placed "two-inch stuff flooring fourteen feet long." He testified that at the time he built the bridge the creek was about four feet deep and four feet wide; that in building the bridge it had at least five feet on each bank for support. This testimony shows that the bridge, as originally constructed and placed in position, was a safe structure. The testimony of the witnesses produced at the trial fairly establishes the fact that at the time of the accident the washing of the water under this bridge from time to time had increased the depth of the creek to eight feet and its width to twelve feet. The testimony of the witness Lepley was that he lived about three and a half or three and three-quarters miles east of the bridge; that for six months prior to the accident he farmed one place east and one west of the bridge, and went back and forth, he thought, once a week. He said: "I noticed the ditch, but not in particular. I think it was practically the same size for several weeks or months." It appears from this testimony that for a period of several weeks at least this fourteen-foot bridge was spanning a creek twelve feet wide. The condition of the bridge had thus been changed so that, instead of each end having a support of five feet, on a bank four feet high, one end at least had a support of not to exceed one foot, on a bank eight feet high.

On the morning of the accident, which was on May 7, 1910, Mr. Lepley was approaching the bridge with one or more loads of corn. When he reached the bridge he discovered it was out, and found a Mr. Mitchell at work trying to extricate the decedent, in which work he immediately assisted. When asked what part of the bridge decedent was lying under, he answered: "The north end of the bridge, pretty well to the north end of the bridge, on the west side. The bridge stood about a third pitch. The east end was still on the bank." At the time of the accident the decedent and his young son were traveling westward in a light spring wagon, and, according to the boy's testimony, as they neared the west end of the bridge it collapsed, with the result shown by the testimony of Mr. Lepley. Mr. Lepley further testified that he noticed the construction of the bridge the morning of the accident. He said: "I think the east side had a few stakes, they call them piling, about three feet long, and I think it was the east side was spiked to that, and the west side, the stringers were just on the bank, cut in the dirt, and set there. I don't think there was any piling. I never noticed any on the west side at all. I did not examine the bridge in particular to see if any remains of any posts or piling. I just looked the bridge over. * * * The bank had given away so the end piling could be seen exposed. I didn't notice the one under the bridge. It was not so you could see it. Could see the one at the southeast corner of the bridge, not full length. Q. Could you tell where the bottom of that piling was? A. Well, it was rotted off. I walked up and looked at it, but didn't examine it in particular. * * * Q. You say it was rotted off. What was rotted off? A. This piling or posts. Q. Where? A. At the east end of the bridge. It was rotted all along. The post was all rotted. I could not tell what its length had originally been. I did not examine the one at northeast corner. I had been using this bridge for three years, hauling heavy loads over it. Q. All these three years did you ever hear any suggestions whether it was safe or unsafe? A. I never did this bridge in par-

ticular." On cross-examination he testified that he did not examine the post of which he had spoken to see if it was rotten clear through or not, "but by the appearance it had rotted clear through. I didn't examine it; it was just a matter of opinion; it was not broken off." He further testified that he did not know how much of a bank there was at either end; that he had never noticed whether the bank was caved away; that the morning of the accident the roads were pretty heavy. "There had been very heavy rainfalls. There didn't seem to be much water in this creek at this time. I think the water had been pretty high. This is a short creek, would fill quickly and empty quickly; that very heavy rainfall precipitated in a very short time filled it full. That is the nature of all these streams. That high water would naturally work in the banks and wash them out continually."

It is not claimed that the county commissioners or road officers of defendant county had ever received actual notice of any dangerous condition of the bridge, so that the question is: Had the bridge and approach thereto been in an unsound and unsafe condition for so long a time prior to the accident that the county officials, had they used reasonable care and diligence in inspecting and caring for the bridge, would have known of its unsafe condition long before the accident occurred, as charged in the petition? We think the testimony of Mr. Lepley, which in some points was corroborated by other witnesses at the trial, was sufficient to take the case to the jury upon that point; and, the jury having found for the plaintiff, the verdict cannot be disturbed on the ground that it is not sustained by sufficient evidence. This holding necessitates a consideration of the several questions of law urged by defendant.

It is first urged that counsel for plaintiff was permitted to ask and obtained answers to leading questions; as, for instance, Mrs. Bethel was asked: "What were his character and habits as to industry, sobriety, etc.? A. He was industrious. Q. You didn't answer the full question. A. He had good health. Q. Mrs. Bethel, state to

the jury what was the earning power per year of Mr. Bethel. A. He was able to earn $1,000 a year." The latter question and answer were perhaps objectionable; but, when we consider that the jury returned a verdict of but $2,000 in a case where the man who was killed was but 46 years of age, and left surviving him a widow, and five children ranging in age from ten years down to eight months, we are unable to see how the question and answer complained of could have prejudiced the defendant. It is claimed the court erred in permitting an answer to the question: "What means of support had you and those children at the time of Mr. Bethel's death, other than his efforts?" We are unable to discover any error in this ruling.

It is further urged that the court refused to allow defendant to show the heavy rainfall "just immediately preceding the fall of the bridge in question." The questions to which the court sustained objections were propounded by counsel for defendant to one of plaintiff's witnesses on cross-examination. They were objected to as not proper cross-examination. We think this ruling was right. The fact sought to be elicited from the witnesses, if a defense at all, was an affirmative defense, which defendant could not establish upon cross-examination.

It is next urged that the court erred in refusing to give the first instruction asked by defendant. This was a peremptory instruction to find for defendant, and was properly refused.

It is next urged that the court erred in refusing to give the second instruction asked by defendant. In this instruction the court was asked to tell the jury that the county is not an insurer against accidents to those who travel upon the public highways, and that if from the evidence they believed "that shortly before the accident complained of there was heavy rainfall, causing high water in the stream or branch spanned by said bridge, and that the bridge in question was undermined by reason of such heavy rain which fell during the few days just preceding

the injury complained of, causing high water in said branch, and that defendant, through its officers whose duty it is to maintain and keep its bridges in a reasonably safe and suitable condition for the use of the traveling public, had no actual notice or knowledge of the undermining of said bridge, leaving it in an unsafe condition, in time that defendant's officers might have repaired the same before the accident, that such heavy rainfall and high water, causing such undermining, is the act of God, and the defendant would not be guilty of negligence and is not liable under the law, and you should find for the defendant." The trouble with this instruction is that the the evidence did not justify the giving of it. There was no evidence of any such unprecedented rainfall as would constitute an act of God; and, even if the rainfall, which is shown to have been sustained during the two or three days immediately preceding the accident, had caused the west bank of the creek to soften so that when the decedent drove upon it the bridge gave way, the testimony had shown the creek and bridge to have been in such a condition for several weeks or months prior thereto (if the jury believed such evidence to be true) as to have caused the officers of the defendant, if they had during that period of time made an examination of the bridge, as it was their duty to do, to have guarded against just such a contingency; a contingency which we think any reasonable man would, upon inspection, have immediately anticipated.

It is next urged that the court erred in refusing to give the third instruction asked by defendant. Everything proper in this instruction had been already covered by instruction No. 6, given by the court at the request of plaintiff.

It is next urged that the court erred in giving the second instruction offered by plaintiff. By this instruction the jury were told: "If you find from the evidence in this case that the bridge in controversy was upon and a part of a public highway in the county of Pawnee, in the state

of Nebraska, and was a bridge which the said county was liable to maintain and keep in a suitable state of repair, and was out of repair at the time of the accident, and was defective and unsafe, and that because of said defective and unsafe condition the bridge gave way and caused the injury to the said Robert Bethel, from which he soon thereafter died, without his fault, and that such defective and dangerous condition of said bridge was such that it could have been discovered or detected by reasonable inspection and examination of the bridge, then you are instructed that this defendant would be liable because of such condition of said bridge." The only criticism of this instruction which we see is that the court possibly should have told the jury, that, if the defective and dangerous condition of the bridge was such that it could have been discovered or detected by reasonable inspection and examination of the bridge "in time to have repaired the same," the defendant would be liable. But, when this oversight is considered in connection with the testimony that the condition of the bridge immediately preceding the accident or the recent rainfall had existed for so long a time, we are unable to say that the omission of the words above suggested were prejudicial.

It is next urged that the court erred in giving the sixth instruction asked by the plaintiff. In this instruction the jury were told: "For an injury caused by an unsafe and defective condition of a county bridge, a county is liable for damages, notwithstanding the fact that no actual notice of such condition had, previous to the occurrence of the accident, been given to any officer of the county concerned, where the defects are of such a nature or have existed for such a length of time that, by the exercise of ordinary diligence, they might have been discovered and repaired." We think this was a concise and accurate statement of the law. It certainly is in harmony with *Hollingsworth v. Saunders County*, 36 Neb. 141, and *Raasch v. Dodge County*, 43 Neb. 508, and even with *Johnson County v. Carmen*, 71 Neb. 682, cited by counsel for defendant. The only reason why we reversed the judgment in

the *Carmen* case was that the defect shown in that case was a latent defect, which we there held would, if established, relieve the county from the charge of negligence. That is not the case here.

It is next urged that the court erred in giving the seventh instruction asked by plaintiff. This instruction involves another question arising in the case, which question will at once be discovered from a reading of the instruction: "If you find from the evidence in this case that the bridge in controversy was upon a part of a public highway, located upon the line between Pawnee county, Nebraska, on the north, and the state of Kansas on the south, part of said public highway being north of said interstate line and part of said highway being south of said state line, and that the said bridge in controversy was located partly north of said state line and partly south thereof, then and in that event you are instructed that the said defendant was under obligation to maintain and keep the said bridge in reasonable repair and in a reasonably safe condition, the same as if the said bridge and highway were located entirely within the said county of Pawnee; and that the liability of the defendant for damages resulting from the defective, insufficient and unsafe condition of said bridge is the same as it would have been had the said bridge and highway been entirely within the said county of Pawnee." The road ran east and west. The course of the creek was not at right angles with the road, but in going west veered a little to the north and west. That the bridge was substantially in the middle of the road and therefore directly on the state line, the northern part of the bridge being in the defendant county and the southern portion in Nemaha county, Kansas, was established by the testimony of Mr. Howe, the county surveyor of defendant county. After describing the manner in which he made his survey, he testified: "I located a point above east and west of that bridge on the ground, and there located a point exactly at the middle of the bridge, a point where this state line crossed the bridge. The latter line crossed the whole length of the bridge. The bridge

is not quite straight east and west; it varies a trifle, but not so far as to throw either end off the line. At the middle of the bridge I measured five feet and nine inches north from the line to the north side of the bridge. I didn't measure the south side; it was that distance at the side of the bridge at the middle point. The northwest corner of the bridge is a little farther from the line than the northeast corner. The bridge slants a little to the northwest and southeast, but not a great deal." Without going into the details, we think Mr. Howe's explanation of the manner in which he located the points from and to which he ran his line indicates that he had located the state line correctly.

This bridge was originally built by Nemaha county, Kansas. There is no evidence in the record to show that defendant county paid any portion of the cost of construction of the bridge, or that its officials were consulted in relation to its construction, or that they ever exercised any actual control over or made any repairs upon the bridge. It is the contention of the defendant that by reason of these facts it could not be held liable for any defects which might exist in the bridge or for any failure to keep it in proper and safe repair. We think in the instruction complained of the trial court took the correct view of the law. There is no question but what this road had been declared a public road by the proper officials of defendant county. The proceedings of the board were introduced in evidence, from which it appears that a petition locating this road was filed, a commissioner appointed who took the oath and filed his report; that notice to file claims for damages was given and notice to the sheriff to serve landowners along the line of the proposed road was given and served and return thereof made; that proof of publication was made; that on January 26, 1899, the county commissioners entered their final order locating this particular road, two rods in width north of the section line, along the south line of section 31, township 1, range 11. The order concludes: "And county clerk is directed to notify proper overseers of highways to

cause said road to be opened and put in condition for public travel and worked in same manner as other roads are worked." Indeed, counsel for defendant in his brief concedes that the road in controversy "is a public road laid out by the county commissioners of Pawnee county, Nebraska, two rods in width, which was intended to be located with its south line upon the south boundary line of the state of Nebraska, which Nebraska road extends along and past the place where Mr. Bethel lost his life in the going down of the bridge;" but adds that "this Nebraska road has never been bridged or worked by Nebraska officials so far as we know or are enlightened by the evidence." This bridge being built upon the line between the two counties, part of the bridge being in each county, it was the duty of each county to use reasonable diligence to keep the road in reasonably safe condition for the use of the traveling public. If both failed, both were culpable, and the fact that the bridge had been built by one of the counties would be immaterial. If the evidence had shown that defendant county had used reasonable diligence to keep that portion of the bridge located within its boundaries in safe condition, there are authorities which hold that that would have relieved it of liability, but that is not this case. If defendant county had made proper inspection of this bridge, it would have discovered its dangerous condition, and, if it had placed proper supports under that portion of the west end of the bridge within its boundary, it is difficult to see how this unfortunate accident could have occurred.

In *Village of Marseilles v. Howland,* 124 Ill. 547, 548, it is held: "But where a toll-bridge has been constructed over a stream in a public street, and the bridge company surrenders its franchise and rights, and the bridge becomes free to the public, and is used by the public, no formal acceptance of the dedication is required of the village in order to hold it responsible for the safety of the bridge, as would be required in the case of a new street."

"In such case, the village may avoid liability for not keeping such bridge in repair, but some affirmative action

on its part is necessary to show that intention. It might condemn the bridge as a nuisance and close it up, or vacate the street upon which it is located. If it takes no action, but suffers it to be used as part of the street, it must see that it is kept in a safe condition, or be liable for an injury from its neglect of duty."

In the opinion, on page 556, it is said: "The law imposed upon the village the duty to keep its streets and bridges in reasonable repair, in order that the public might safely pass over them. That duty could not be shifted upon another. The fact that the bridge was not built by the village does not relieve it of responsibility. An incorporated town is not bound to build a sidewalk upon a public street, but if one is constructed by an individual, and is used by the public with the knowledge of the town authorities, the law would require them to remove the walk or assume responsibility for its reasonably safe condition."

We think the reasoning in that case is quite in point here. It matters not who built the bridge in question. The fact that it was built by the officers of Nemaha county, Kansas, makes the case no different than if the bridge had been built by some adjacent landowner at his own expense, or by some person who had occasion to make frequent trips over the road. The fact that the bridge was built partly upon a public road which it was the duty of defendant county to keep in repair, and that the bridge was permitted to remain there for four or five years as a standing invitation to the public to pass over it, made it the duty of the defendant to see that it was kept in reasonably safe condition for such travel. The fact that Nemaha county, Kansas, was also derelict in its duty in this regard is immaterial. The duty rested upon both counties, jointly and severally, and their liability for a failure to perform their duty was in like manner joint and several.

It is next contended that the court erred in permitting plaintiff, after both sides had rested, to withdraw her rest and introduce further and different evidence upon

cross-examination, and complaint is made of the fact that plaintiff at that time sought to introduce an exhibit which the court, upon defendant's objection, excluded; but it is said the exhibit was so manipulated in the hands of counsel that some of the jurors saw it and were able to read portions of it. This exhibit was a claim which had been presented by Clear Creek precinct, Nemaha county, Kansas, against defendant county, for labor and work furnished and performed on the road in question, which was allowed by the county commissioners of defendant county. The court was not guilty of any abuse of discretion in permitting plaintiff to withdraw her rest. The error, if any, committed by the court was in not permitting plaintiff to introduce the exhibit referred to. While it did not refer directly to any expense in repairing the bridge, it did have a tendency to show that defendant had recognized its liability to reimburse the Nemaha county officials for work which they had performed upon this particular road.

It is next contended that plaintiff wholly failed to show any legal right or authority to maintain the action. The ground of this objection is that at the time the action was begun plaintiff was a resident of Kansas and had been appointed administratrix of the estate of decedent by the Kansas court. She was therefore a foreign administratrix, and as such had a right under section 5189, Ann. St. 1909, to commence and prosecute this action. Section 5188 of the same statute provides that when an executor or administrator shall die, be removed from office, or resign, or when his letters shall be revoked during the pendency of any suit in which he is a party, the suit may be prosecuted by or against the executor or administrator appointed in his place, if any shall be appointed, in like manner as if it had originally been commenced against such last executor or administrator. Counsel for defendant argues that plaintiff's letters of administration had been revoked by force of the Kansas statute when, after the commencement of the action, she removed from the state of Kansas into Pawnee county. There are two reasons why this contention must fail: (a) The Kansas

statute was neither pleaded nor proven. Hence, we must presume that the law of that state is the same as this, and in this state we have no law which *ipso facto* revokes letters of administration when an administrator removes from the state. (b) Conceding that the Kansas statute provided, as counsel argues, that the court "shall not appoint a non-resident, and shall revoke letters when executor or administrator becomes a non-resident," her removal would not, even under that statute, *ipso facto* revoke her letters. It would require an order of the court to make such revocation, and no such order is shown to have ever been entered. It follows, therefore, that, so far as this record discloses, plaintiff is still the administratrix of the decedent's estate, duly qualified to prosecute this action.

After a careful examination of the record, of the law applicable to the facts, as shown therein, and of the various points so ably urged and discussed by counsel for defendant, we are unable to discover any prejudicial error in the record. The question as to whether or not Nehama county is, under the law of that state, also liable to plaintiff, is not before us, as the law of that state is neither pleaded nor proven. When, however, we consider the fact of the decedent's age and the wife and family of small children whom he left without any means of support, in the light of the amount of the verdict of the jury, it becomes apparent that the jury adjudicated the question of contribution in the jury-room and returned their verdict for no more than half of the damages sustained which they could properly have found.

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

TAYLOR & WILLIAMS, APPELLANT, V. JAMES STEINMAN; HARRY BARBAZETT, APPELLEE.

FILED JANUARY 30, 1914. No. 17,458.

1. **Partnership:** EVIDENCE. Evidence set out in the opinion examined, and *held* sufficient to establish the copartnership of the defendants.
2. **Sales:** ACTION FOR PRICE: DEFENSE: PLEADING. In an action by a vendor to recover the price of intoxicating liquors sold, if the vendee relies on illegality of the sale as a defense, he must specially plead and prove it. He cannot show it under a general denial.

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

Lambe & Butler, for appellant.

W. S. Morlan, contra.

FAWCETT, J.

Appeal from a judgment of the district court for Red Willow county. The petition alleges that plaintiff is a wholesale liquor dealer organized under the laws of Kentucky, with its principal place of business in Louisville; that the defendants Steinman and Barbazett were partners doing a retail liquor business in McCook, under the firm name and style of James Steinman; that in November, 1910, plaintiff sold and delivered to defendants merchandise consisting of 50 cases of whiskey, of the aggregate value of $535, no part of which has been paid, and for which it prays judgment. Defendant Barbazett answered by general denial. Defendant Steinman made default. At the close of the trial the court directed a verdict in favor of defendant Barbazett, and submitted the case to the jury as to the defendant Steinman. The verdict of the jury was in favor of defendant Barbazett, as directed, and in favor of the plaintiff and against defendant Steinman. Judgment was entered accordingly, and from the judg-

ment in favor of defendant Barbazett plaintiff appeals. The controversy here is between plaintiff and defendant Barbazett; no appeal having been prosecuted by defendant Steinman. The parties will, therefore, be designated simply as plaintiff and defendant.

Counsel for defendant correctly concludes that there are but two questions involved in this appeal, and has, accordingly, subdivided his brief into two parts: "(1) The defendants were not partners. (2) Where plaintiff knowingly sells liquor for the purpose of an unlawful resale thereof by the vendee, it cannot recover the purchase price." A disposition of these two points will dispose of the case. We will, therefore, consider the points in the order stated.

1. The evidence shows that the building in which the saloon business was conducted belonged to defendant; that the retail liquor dealer's license was issued to James Steinman. Defendant furnished the building, and was to receive therefor as rent $15 a week. Steinman conducted the business, and was to receive for his services a like sum of $15 a week. When they entered upon the business they purchased a stock amounting to $610, and each paid one-half of the purchase price. When the license was obtained each contributed $600, making the total of $1,200 for the license. The consideration for the bond given was $55, which was paid out of the profits of the business. At the end of each month, if there was any profit, it was to be and was equally divided. Under this arrangement Steinman paid Barbazett from $100 to $200 as his share of the profits each month, in addition to the $15 a week which he was to have for the use of the building. Steinman testifies, and his testimony is not contradicted, that during the period of about three years that the business was conducted he paid to the defendant as his share of the profits the aggregate sum of $6,000; that defendant told Steinman to buy stock on time when he did not have the money, "and to buy it from anybody that he could buy from;" that Barbazett had knowledge from time to time of purchases of liquor on credit; that the partner-

ship arrangement between the two was still in force when the goods in controversy were purchased from plaintiff; that Steinman put his labor against the use of the building, and the profits were equally divided; that "Barbazett got a statement each month as to the expenses and debts;" that the debts were to be paid out of the proceeds; that the business was done in Steinman's name and the goods purchased in that manner because the license was taken out in his name; that all of the goods purchased from plaintiff were sold over the bar, "except six pints of Yellowstone, and the profits of said sales were equally divided" between them; that "In January, 1911, Barbazett asked about the outstanding bills, and Steinman gave him an itemized statement of all bills and invoices of stock, the indebtedness to the plaintiff, which was then $535, and after this notice to Barbazett, the sale of goods so purchased of the plaintiff and unpaid for were divided equally between Steinman and Barbazett." Steinman also testifies upon re-cross-examination that he told the salesman of plaintiff, before he bought the goods in suit, that the witness was buying the goods in his name because the license was in his name; that Barbazett was a silent partner. Defendant did not take the witness stand. We think every essential element of a partnership was present and covered by the contract entered into and carried out by these two defendants.

2. Counsel for plaintiff contends that the question as to whether or not plaintiff sold liquors to the defendants, knowing that they were to be sold in an unlawful manner by the defendants, is not in this case. We think their contention is sound, and, without deciding the question as to whether or not the sale of the liquors by Steinman and Barbazett, as a copartnership under the name of Steinman, was an unlawful sale, we are compelled to decide this point adversely to defendant, for the reason that no such issue was tendered by defendant in his answer, the answer being simply a general denial. In 23 Cyc. 342, it is said: "In an action to recover the price of liquors sold, the declaration or complaint need not allege that

the sale was authorized by law or by plaintiff's license, for, if defendant relies on the illegality of the sale as a defense, he must allege and prove it, and this cannot be done under the general issue, but must be specially pleaded, and by a plea setting forth every fact essential to show that the sale was contrary to law." In *Rohlff v. Bice,* 84 Neb. 141, we said: "The plaintiff was not required to allege that he was duly authorized to sell the liquor in controversy. It is the rule that, in actions to recover the price of liquors sold, plaintiff need not allege that the sale was authorized by law, or that he was a licensed liquor dealer. If the defendant seeks to defeat plaintiff's action on the ground that the sale was illegal, he must allege its illegality as a defense. Black, Intoxicating Liquors, sec. 250; 23 Cyc. 342. We find no cases to the contrary, nor can we find any reason requiring the plaintiff to allege this fact. In this state, where persons may be authorized to sell intoxicants, the court will not presume that one suing to recover the price of liquor sold had made the sale illegally." In *Darling v. Kipp,* 93 Neb. 781, we held: "It is not a defense to an action to recover the price of goods sold that the vendor knew that the purchaser was conducting an illegal business, when it is no part of the contract that the goods shall be used for such illegal purpose, and the vendor has done no act in aid or furtherance of the unlawful design." The opinion in that case was handed down so recently that we deem it unnecessary to quote from it. Suffice it to say that, under the authority of that case, the sale of these liquors by plaintiff to defendants, with knowledge that the defendants were conducting the business in Steinman's name because of the fact that the license stood in his name, is not sufficient to defeat a recovery. See, also, *Frankel v. Hillier,* 16 N. Dak. 387, on both points above considered. There is no evidence even tending to show that plaintiff, or its agent, was in any manner a party to the contract entered into between Barbazett and Steinman, or in the slightest degree responsible for the manner in which they were conducting their business. Coupled with the statement of Steinman, to

plaintiff's agent, that the business was being so conducted because the license was in his name, was the additional statement that Barbazett was a silent partner in the business. This was insufficient to make the sale of the goods by plaintiff illegal. On both points, therefore, we hold that the trial court erred in directing the verdict.

The judgment is reversed and the case remanded for further proceedings in harmony with this opinion.

REVERSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

ARTHUR G. LANGMANN, APPELLEE, V. A. J. GUERNSEY ET AL., APPELLEES; F. E. BROWN, APPELLANT.

FILED JANUARY 30, 1914. No. 17,473.

Appeal: EQUITY: CREDIBILITY OF WITNESSES. Where the examination of the record on appeal in a suit in equity leaves an appellate court in doubt as to the equities between the parties, the doubt depending solely upon the credibility of material witnesses who testified orally upon the trial, such doubt will, ordinarily, be resolved in favor of the correctness of the judgment of the trial court.

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

Allbert & Wagner and *Frank D. Williams,* for appellant.

Harrison & Prince, H. C. Vail and *W. H. Thompson, contra.*

FAWCETT, J.

From a decree of foreclosure in the district court for Boone county, in favor of appellee, defendant Brown appeals.

The petition is in the usual form for the foreclosure of a real estate mortgage. The answer admits the execution

and delivery of the mortgage and of the note secured thereby, and for defense alleges that the consideration for the note was an automobile, which at the time was owned and in the possession of plaintiff by virtue of a contract between him and Ricker, the original payee named in the note; that plaintiff and Ricker, for the purpose of inducing defendants to buy the automobile, made false representations as to the quality and value of the automobile, and warranted the same to be as represented; that defendants were wholly ignorant of the true condition and value of the automobile and, relying upon the representations made by plaintiff and Ricker, and believing the same to be true, and upon the faith and strength of their warranty, bought the automobile and executed and delivered the note and mortgage in suit; that if the automobile had been as represented and warranted it would have been of the fair and reasonable value of $2,700, but that said representations were wholly false; that the automobile was old, in bad condition, and was worth not to exceed the sum of $350, all of which was well known to plaintiff at the time the note and mortgage were transferred to him. The reply was a general denial.

This case was filed and briefed while the abstract law was in force. Defendant filed an abstract of ten pages, with which was bound his brief consisting of two pages. Plaintiff did not prepare and file an additional abstract, as he might have done under the rules, but in his brief objects to the abstract prepared by defendant on the ground that it contains "only a most meager review of the evidence. It does not purport to contain a final judgment." In the latter contention counsel is in error. The abstract recites that the court upon the issues joined between the plaintiff and defendants found for plaintiff in the full amount of his note and interest and decreed a foreclosure of the mortgage. This was sufficient. If the abstract contained so "meager" a review of the evidence as to render it objectionable, it was the duty of plaintiff to prepare an additional abstract, and ordinarily we would not look to the bill of exceptions.

Counsel for defendant, however, in discussing one of the important points in the case in his brief said: "As to plaintiff's posing as an innocent purchaser, the court will have to read the whole record to appreciate the humor of that contention." We have accepted this invitation of counsel "to read the whole record." Having done so, we are impressed with the idea that it presents a case of two professional traders, one owning a more or less worthless automobile, and the other owning some heavily mortgaged sand hills in Boone county. Ricker saw fit to accept the sand hills without examination. Defendant saw fit to accept the automobile after examination. Reading the whole record, we are left in grave doubt as to whether either of the parties profited or suffered to any great extent in this trade. After examining the record, we are compelled to say that, while we think the sand hills were worth a little more than the automobile, we cannot say that the district court, who saw the witnesses upon the stand and is more familiar with the surroundings than we possibly could be, erred in entering a decree foreclosing the mortgage.

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

LOUISA A. PORTER, APPELLANT, V. PACKERS NATIONAL BANK OF SOUTH OMAHA, APPELLEE.

FILED JANUARY 30, 1914. No. 17,491.

Petition examined and set out in the opinion, *held* not vulnerable to a general demurrer.

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

Edgar M. Morsman, Jr., for appellant.

Murphy & Winters, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county, sustaining a general demurrer to plaintiff's petition, and dismissing her action, she prosecutes this appeal.

The only question presented is: Does the petition state a cause of action? It alleges the corporate capacity of defendant, and that plaintiff on January 20, 1911, was the owner of lot 10, block 114, in the city of South Omaha, "and, being desirous of selling said property plaintiff, on or about the said date, executed a warranty deed conveying said property to one Mrs. Dolezal; that said plaintiff forwarded said deed to the defendant in a letter, whereby defendant was instructed to deliver said deed upon receipt of $1,650 and which said letter was in words and figures as follows: " 'Oskaloosa, Iowa, Jan. 20, 1911. Packers National Bank, 24th & O. Sts., South Omaha, Neb.—Gentlemen: I am inclosing herewith warranty deed, which you will please turn over to Joseph F. Murphy upon payment of $1,650 less $25 commission and a reasonable charge for bringing the abstract covering this property down to date, together with a receipt showing the expense of preparing abstract. Forward to me the net returns as soon as settlement is made. Yours truly, Mrs. L. A. Porter.' That the defendant delivered the aforesaid deed to Joseph F. Murphy, agent for Mrs. Dolezal; paid the sum of $14.50 for extending abstract and $25 commission to Joseph F. Murphy, but remitted to plaintiff only the sum of $1,489.18; that plaintiff has repeatedly demanded and defendant has refused to pay the balance due plaintiff, to wit, $121.32. Wherefore, plaintiff prays judgment against defendant for the sum of $121.32, with interest at 7 per cent. from January 24, 1911, and costs of suit."

The contention of appellee, which apparently was the theory upon which the district court sustained its demurrer, is that the petition did not allege that the bank had collected the full $1,650, nor allege facts to show that the bank did not collect the full sum, nor allege facts to show

that, by reason of the failure of the bank to collect the full amount, plaintiff was damaged. Authorities are cited upon the point that, where a bank acts as a collection agent and through its negligence the debt is lost, the measure of damages is the actual loss sustained by reason of such negligence. We do not think these cases apply. *Tacoma Mill Co. v. Gilcrest Lumber Co.*, 90 Neb. 104, is more nearly in point. The directions from plaintiff to defendant were plain and explicit. There is nothing in the petition to show that plaintiff had actually sold the property to Mrs. Dolezal. The allegation is that she was "desirous of selling said property." In furtherance of that desire, she sent defendant a warranty deed, the delivery of which would divest her of her title to the property therein described, with explicit directions that it was to deliver that deed upon payment of a certain specified sum, less two specified deductions; that the bank delivered the deed, paid the two specified amounts, and had refused to pay plaintiff the balance of the consideration which it was instructed to collect before delivery of the deed. The petition stated a good cause of action. If the rule contended for by defendant should be adopted, no one would be safe in sending a deed to a bank for delivery, as the bank could deliver the deed for a less sum than that specified in the deed and in its letter of instructions, and, when called upon to settle, sit back and say: "We got all your property was worth; hence, you have not been damaged." This is not the law. If defendant has any defense in the way of offset, counterclaim, or otherwise, to this cause of action, those defenses must be set up by way of answer.

The judgment of the district court is reversed and the cause remanded, with directions to overrule the demurrer.

REVERSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

JOHN H. MEYER, APPELLANT, V. T. D. MEESE ET AL., APPELLEES.

FILED JANUARY 30, 1914. No. 17,527.

Malicious Prosecution: EVIDENCE: DIRECTING VERDICT. In an action for damages for malicious prosecution, where the evidence offered by plaintiff in his case in chief is clearly insufficient to show either malice or want of probable cause on the part of the defendant in causing the prosecution complained of, it is the duty of the district court to direct a verdict for the defendant.

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

G. N. Anderson, for appellant.

A. L. Bishop and *J. R. Swain, contra.*

FAWCETT, J.

From a judgment of the district court for Wheeler county, upon a verdict directed for the defendant, in an action for damages for malicious prosecution, plaintiff appeals.

The case, succinctly stated, is this: One W. H. Inness obtained a judgment against the plaintiff in this action for wages. Upon this judgment execution was issued and placed in the hands of the sheriff, who levied the same upon certain personal property of the present plaintiff. Thereupon the plaintiff replevied the property, or a portion of it at least, and in his affidavit for the writ swore that the property "is wrongfully detained by one Ernest A. French, sheriff of Wheeler county. That said property was not taken in execution, or any order of judgment against the plaintiff." After the property had been taken under the writ of replevin, Inness went to the defendant, who had been his attorney in his suit against the plaintiff, and who was also county attorney, called his attention to what plaintiff had done, and asked him if as county attorney he would allow the man to perjure himself without

prosecuting him; told him that if he did he would consider him as bad as the perjurer himself. Defendant told him he would look into the matter. The result was that defendant, as county attorney, filed an information against the plaintiff, charging him with making the affidavit, as above set out, and alleging that the sheriff did not wrongfully detain the goods and chattels alleged in the affidavit of replevin, but that the property was taken in execution, issued by the clerk of the district court to the sheriff "upon a judgment rendered in the district court of said county on the 25th day of June, 1910, against the said John H. Meyer," etc. This information was sworn to and filed on June 20, 1910, which was ten days before the date which the information alleges was the date when the judgment was rendered, upon which the execution had been issued. In other words, the information alleged an impossible date. Plaintiff was arrested, and preliminary examination had before a justice of the peace, at which, so far as the record shows, the error in the date stated in the information was either not detected or not pointed out. The justice, after taking the testimony of several witnesses, found that there was probable cause to believe that the accused had committed the crime charged, and bound him over to the next term of the district court. When the district court convened, defendant, still acting as county attorney, filed a new information, from which the date on which the judgment had been entered was omitted. A plea in abatement filed by the plaintiff was sustained, and he was discharged; the county attorney stating that he did not care to plead further. No new complaint was ever filed. When plaintiff rested in the present action, defendant's motion for a directed verdict was sustained. It would serve no good purpose to give any extended review of the evidence. We deem it sufficient to say that it utterly fails to make out a case for plaintiff, sufficient to entitle him to go to the jury. Plaintiff's own testimony upon the witness-stand shows that, when he swore to the affidavit for replevin, he knew that the sheriff had taken the property on execution, and knew that his affidavit con-

tained the statement that it had not been so taken. In the light of this admission, it is idle to contend that plaintiff was entitled to go to the jury on the question of want of probable cause. The simple fact that the county attorney, through a clerical error, inserted a wrong date in his complaint, and thereby fixed the date of the judgment at a time in the future, and the further fact that, when the plea in abatement was sustained in the district court, he elected not to prosecute the plaintiff further and send him to the penitentiary, as his crime justly merited, are far from constituting either malice or a want of probable cause. The case is so utterly without merit that we will not waste further time considering it.

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

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

FRANK E. WHITEHOUSE, APPELLANT, V. JOHN GERDIS, APPELLEE.

FILED JANUARY 30, 1914. No. 17,475.

1. **Brokers: CONTRACT: CONSTRUCTION.** The use of the words "sale," "sell," or "to sell" in a contract between the owner of land and his agent is not necessarily decisive as to the authority of the agent to execute a contract of sale for and in the name of his principal. The whole writing is to be taken together, and in the light of existing circumstances and conditions the meaning is to be ascertained.

2. ———: ———: **BURDEN OF PROOF.** Such a contract is to be proved as other contracts are proved; the burden being upon the person who asserts the existence of the contract. When fairly construed, giving force and meaning to all expressions in the contract as far as possible, and considering all conditions and circumstances, if it shows that the owner intended to authorize the agent to make and enter into a valid contract of sale for the owner and in his name, a contract so executed by the agent will be binding upon the principal.

3. ———: ———: CONSTRUCTION. The owner of a farm advertised that he desired to sell it, and that parties interested might address him (the owner), who resided in another county, "or call on Dan Sheets," who resided near the land, "for terms and prices." He then wrote Mr. Sheets that he would sell the farm for $100 an acre, stating definitely the terms and conditions upon which he wished to sell, and added, "should you sell you get an abstract made out in Neligh if the party demands," and "if you sell the farm for me at 100 doll per acre you get 50 doll if you can get more I give you 5 cents on the dollar for what you get above one hundred per acre." *Held*, That under the existing conditions as alleged in the petition the agent was authorized to make a written contract of sale for his principal.

4. ———: ———: ACTION FOR BREACH. The agent made a written contract in the name of his principal, agreeing to convey the land to the plaintiff for the price named by the owner and upon the specified terms of payment, upon which the plaintiff paid $5,335, and demanded a completion of the contract. The contract with the plaintiff omitted some of the minor particulars specified in the contract of agency. The defendant was notified of the sale, and agreed to complete it "as soon as my wife is able to sign," and gave no other reason for delaying completion of the transaction. The plaintiff contracted to sell the land at a higher price, and the defendant refused to complete the transfer, without giving any further reason for his refusal. *Held*, That the petition alleging these facts states a cause of action requiring the defendant to plead and prove a defense, if any be had.

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

J. F. Boyd, for appellant.

O. A. Williams, contra.

SEDGWICK, J.

The petition in this case alleges that the defendant, through his agent, contracted to sell to the plaintiff a tract of land in Antelope county for $16,000, one-third cash, and the balance on five years' time; that plaintiff paid the required cash, and defendant refused to complete the sale and execute and deliver the deed as agreed, and asked for damages in the sum of $1,800 and interest. The trial

court sustained a general demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action, and from the judgment dismissing the case the plaintiff has appealed.

It is contended that the agent had no authority to make the contract. The petition alleges that Dan S. Sheets was authorized to sell the land for the defendant; that Sheets lived near the land, and the defendant lived at Pickrell, Nebraska; and that the defendant caused to be published in a newspaper in Antelope county a notice as follows: "Farm for sale. For a short time I will offer my farm, situated one mile west of Elgin, for sale. For terms and price address me at Pickrell, Neb., or call on Dan Sheets. John Gerdis." It also alleged that this farm is situated about one mile west of Elgin in said county, and that afterwards the defendant wrote a letter to Mr. Sheets, in which he stated that he would sell his farm near Mr. Sheets "for $100 one hundred dollars per acre cash or on time to suit on time I want about 1-3 one third down balance to run 5 years or less to suit purchaser drawing 5 1-2 five and one half per cent. interest from date of sale subject to lease party that buys will get all the grain rent but I keep the fifty dollars paid for pasture * * * should you sell you get an abstract made out in Neligh if the party demands * * * if you sell the farm for me at 100 doll per acre you get fifty doll if you can get more I give you 5 cents on the dollar for what you get above one hundred per acre." This letter was signed by the defendant. The contention is that "mere authority to a real estate agent to sell real estate does not carry with it the implied power to make a contract for sale. And the use of the words 'to sell,' as, 'I hereby authorize you to sell same,' does not authorize the broker to make a binding contract of sale, but merely to find a purchaser." *Jones v. Howard,* 234 Ill. 404, and *Bacon v. Davis,* 9 Cal. App. 83, 88, are relied upon by the defendant.

It is alleged in the petition that Mr. Sheets entered into a written memorandum of sale with the plaintiff in the name of the defendant by Mr. Sheets as agent. This mem-

orandum recited that John Gerdis, party of the first part, "has this day sold to the party of the second part (describing the land) * * * for which the party of the second part agrees to pay the sum of sixteen thousand and no/100 dollars ($16,000) payable as follows: Cash in hand fifty-three hundred thirty-five dollars, receipt whereof is hereby acknowledged, balance ten thousand six hundred and sixty-five ($10,665) 5 years 5 1-2 per cent. annually from date. The party of the first part is to furnish a warranty deed, a good and sufficient abstract of title, pay all taxes assessed against said land, except 1910, and will give possession by June 1st, 1910." It did not provide that the seller should "keep the $50 paid for pasture," nor reserve the grain rent after the first of June, and the use of the crib and "the right to sell and haul the corn any time this summer." In these respects it did not comply with the authority given to the agent, and no doubt, if the purchaser had insisted upon the letter of his memorandum of sale, the defendant might have refused to comply with it as not fully authorized in his contract with his agent. The petition, however, recites that the agent wrote the defendant: "I have sold your place to Mr. F. E. Whitehouse for $100 per acre, and am inclosing herewith deed to be executed by yourself and wife. After executing the deed, kindly return it with the abstract to the Elgin State Bank, and the cash payment, $5,335, and the mortgage for $10,665, at 5 1-2 for five years, will be returned promptly. I have reserved a crib for your corn for this summer." To this the defendant answered: "I am sorry I cannot comply with your request. My wife is now so low that she is not able to sign the deed. * * * if this spoils the deal I hope you will bear me no ill will or have any hard feelings against me, but there is one way we can fix it. * * * I will agree to furnish a deed as soon as my wife is able to sign or should my wife die I will give Mr. Whitehouse a deed soon thereafter on his demand he in return to give me a mortgage for balance due." He also wrote a letter to the plaintiff: "My agent Mr. Sheets sold you my farm I am sorry to say that my

wife's health has bin poor for some time and at present is so low she is not able to sign a deed. * * * I further agree if my wife is able to sign at any time before the 5 years are up to hand to you on demand a warranty deed in exchange for contract and mortgage for balance due me without any expense to you." The contract referred to in these letters from the defendant was one which he forwarded for the plaintiff to sign and to accept temporarily in lieu of a deed. It does not appear what the nature and terms of this proposed contract were. Soon afterwards, at the request of Mr. Sheets, a letter was written to the defendant, in which it was said that Mr. Sheets asked the writer to look after the transfer of the land, and "I have seen Mr. Whitehouse today and he says that if you can make the deed by about the middle of July that he can get along first rate; * * * he wishes me to ask if you think you could make a deed by about the middle of July." The defendant replied to this letter that his wife was still unable to sign the deed, and "I agree to give a deed as soon as my wife is able to sign," and stated, "If Mr. Whitehouse cannot accept a contract or bond for deed the deal is off." On the 7th of July the defendant wrote to Mr. Sheets that "Seymour wrote me that, if I could give a deed by the 15th of July, Whitehouse would take the place but could take no contract if my wife improves a little more so she can sign I have a notary public come to my house for acknowledgment and if Whitehouse want the farm then yet he can have it otherwise no harm done." A telegram was sent to the defendant at the request of Mr. Sheets, asking if the deed had been made out, and the defendant answered by telegram: "Yes, deed signed and acknowledged. A letter to follow." Afterwards on the 25th of July the defendant came to Elgin with a deed for the purpose of delivering it to the plaintiff, and the plaintiff offered to deliver a promissory note secured by mortgage on the premises for the remainder of the purchase price in accordance with the terms of the contract, and demanded the deed, and the defendant refused to deliver the deed. It does not appear from the

petition that the defendant ever refused to execute the deed because of any variance between the contract signed by his agent and the instructions which he had given to his agent. He gave no other reason for refusing to complete the sale than that his wife was unable to sign the deed, and that the plaintiff refused to receive a contract, the terms of which are not indicated, in place of the deed. The petition further alleges that after the plaintiff had purchased the land he contracted to sell it for an advance of $1,600.

The defendant cites some of the former decisions of this court in the brief, and criticises them quite severely. He says: "The technical meaning of the expression 'to sell' was not discussed," and that many "apparent differences on the subject exist." There are no doubt many differences of expression in the cases cited, and this naturally follows from the differences of expression in the contracts that were being construed. These contracts, whereby a principal is alleged to have authorized his agent to make a sale of the principal's property for him and in his place, are to be construed like other contracts; the object being to ascertain the real intention and meaning of the parties. Such contracts are often made by correspondence, and not with the greatest possible care, and it is sometimes quite difficult to ascertain what was the real intention of the parties. The whole writing is to be taken together, and in the light of the existing circumstances and conditions the meaning is to be ascertained. The use of the words "sale," "sell," and "to sell" is not always decisive of the meaning of the whole contract. The direct and apparently unequivocal expression, "you are hereby authorized to sell my property," has been held, in the light of the other provisions of the writing, to amount to no more than to authorize the agent to find a purchaser and assist the owner in selling his property. *Armstrong v. Lowe*, 76 Cal. 616.

In *Bacon v. Davis*, 9 Cal. App. 83, there is an extensive and quite exhaustive discussion of the matter. It was held that the agent was authorized by a written contract to make a sale of the property in the name of his principal. The court state many of the common and accepted

general rules for the construction of contracts, and in regard to the case being discussed say: "It is not a question of express or implied authority. The fair import of the terms used, measured according to the established rules of interpretation, must clearly reveal the intention of the owner specifically to empower the agent to enter into a contract of sale of the property, in the ordinary acceptation of that term, or else the case of the defendant must fail. Of course, no one could reasonably contend that any particular formula of words is required to convey such authority, that the owner must say, for instance, *in hæc verba,* 'I authorize you as my agent to enter into an executory contract of sale,' but the language used must reach the same measure of potency when tried by the recognized standards, and must positively authorize that very act." This statement is perhaps correct, but it seems to us to have a little unnecessary vigor and emphasis. If the words "clearly," "specifically," and "positively" were omitted, there would perhaps be less danger of misunderstanding the real meaning of the statement. It is needless to say more than that such a contract must be proved as any other contract is proved, the burden being on the person who asserts the existence of the contract, and that, when fairly construed, giving force to all expressions in the writing so far as is possible, and considering all conditions and circumstances existing, it must show that the owner intended to authorize the agent to make and enter into a valid contract of sale of the land for the owner in his name. When the contract, so construed, has that meaning, the act of the agent in selling and contracting to convey the land is authorized. Each case must be determined upon its own facts, and decisions which construe a different state of facts are not of much assistance.

In this case the owner of the land first published the notice informing the public that his land was for sale, and advised those who desired to purchase to negotiate with himself or with Mr. Sheets. Afterwards he wrote Mr. Sheets telling him that he desired to sell the land, and stated with precision his price and terms, giving all of

the details necessary to be inserted in the contract of sale. Pursuant to this authority the agent contracted to sell the land, and the defendant, being notified of the fact that the land was contracted, made no objection to the terms of the contract, evidently considering that the details, if any had been inadvertently omitted, could be readily supplied, and promised definitely to execute a deed pursuant to the contract which his agent had made. He delayed the execution of the deed because, as he asserted, of the illness of his wife, and not for any other reasons. The deed was afterwards executed by the defendant and his wife, and the defendant, when he went to Antelope county with the deed for the purpose apparently of completing the contract, refused to do so for some reason which is not disclosed. If a sufficient reason existed to justify his refusal, he should make it appear by proper pleadings and proof. We think the petition on its face states a cause of action, and that the court erred in sustaining the demurrer thereto.

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

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

WILLIAM E. MCJUNKIN, APPELLEE, V. W. F. WALDO, APPELLANT.

FILED JANUARY 30, 1914. No. 17,590.

1. **Forcible Entry and Detainer:** ACTION BY LANDLORD: DEFENSES. In an action of forcible entry and detainer on the sole ground that the defendant is a tenant of the plaintiff and has failed to pay rent according to the terms of his lease, it is a good defense that the plaintiff has agreed with the defendant to offset certain claims of debt against the rent and that such claims exceed the amount of rent accrued.

2. ———: ———: DEFENSE OF RES JUDICATA. In such action it is also a complete defense if the plaintiff has brought suit in a

court of competent jurisdiction to recover such rent, and the defendant pleaded in such action his claims against the plaintiff as an offset against the claim for rent, and final judgment was entered therein against the plaintiff.

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

Brown & Venrick, for appellant.

J. L. Grimm and *Bartos & Bartos, contra.*

SEDGWICK, J.

This is an action of forcible entry and detainer to recover the possession of a hotel building in the town of DeWitt, Saline county, Nebraska. The plaintiff had leased the premises to the defendant, and the term of the lease had not expired when the action was begun. The sole ground for the action was that the defendant had failed to pay the rent according to the terms of the lease. There was a verdict and judgment in favor of the plaintiff, and defendant has appealed.

The defendant offered to prove that while he had occupied the hotel he had boarded the plaintiff in the hotel, and that the plaintiff was indebted to him for the same and other like services in more than the rent claimed to be unpaid. The defendant also offered in evidence a transcript of an action in the county court of that county, in which the plaintiff had sued the defendant for the rent claimed to be in arrears, and the defendant had answered alleging payment of the rent by board and other valuable considerations furnished to the plaintiff, and in which action the court found the amount of the rent as claimed, and found the amount due the defendant from the plaintiff to exceed the amount of rent, and entered a judgment in favor of the defendant for the sum of $50.48. This evidence was objected to as incompetent and immaterial, and was excluded by the court. If this evidence had been admitted, it would establish by the judgment of a court of competent jurisdiction that there was no rent due the

plaintiff from defendant, and yet the plaintiff recovered possession of the premises because of nonpayment of rent.

Apparently the court, and perhaps the counsel, were misled by the opinion of this court in *Connolly v. Giddings,* 24 Neb. 131. Mr. Justice Maxwell, in the opinion in that case, apparently does not state the facts in the case, nor the reason of his conclusion, with his usual clearness. Apparently the plaintiff had leased the premises orally for a short term, which had expired, and he attempted to hold possession by virtue of his supposed lien upon the premises for money expended by him at the request of the plaintiff for the purpose of making some improvements thereon. This question is disposed of in the opinion in the following words: "The contract in regard to the bake-oven does not seem to be set up as defense to this action. If Giddings agreed to purchase the bake-oven and other property, he no doubt may be compelled to do so at a fair price." It does not appear from the opinion to be an action seeking to terminate the lease for the nonpayment of rent when there was no rent due. It is not necessary in this case to determine what claims of the defendant may be offset against the claim for rents in such an action. It would seem that section 7678, Rev. St. 1913, would apply in such cases; but, even if it does not apply, manifestly where the parties have agreed to offset the one claim against the other, or there has been a judgment in an action between the parties determining that there was no rent due the plaintiff, he cannot terminate the lease on the ground of the nonpayment of rent.

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

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JOHN HOFFMAN, APPELLEE, V. MCKEEN MOTOR CAR COMPANY, APPELLANT.

FILED JANUARY 30, 1914. No. 17,169.

Appeal: REVERSAL. Where there is a conflict of evidence upon material facts which touch the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict of the jury or the findings and judgment of the trial court unless it is clearly wrong. *O'Chander v. Dakota County*, 90 Neb. 3. But where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside. *Garfield v. Hodges & Baldwin*, 90 Neb. 122.

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

John A. Sheean and *Charles L. Dundy*, for appellant.

Weaver & Giller, contra.

HAMER, J.

The plaintiff alleges his employment by the defendant as a common carrier; that he and another were directed to move certain boxes from one point to another, and that the removal was to be accomplished through the use of a truck; that he was without experience in such work; that among the boxes which were required to be removed was one which, with its contents, weighed from 500 to 600 pounds; that the plaintiff was placed between the handles of the truck, and that when the box was tilted onto the truck it fell with such force as to cause the plaintiff to fall, and that the truck and the box both fell upon the plaintiff and injured him; that the negligence of the defendant is responsible for the injury; that the defendant failed to provide suitable appliances for the accomplishment of the work, and failed to furnish sufficient help to safely perform the labor. The answer alleged the as-

sumption of risk on the part of the plaintiff; contributory negligence on his part; and that the injury was due to the negligence of a fellow servant. The reply was a general denial.

It is claimed by the plaintiff that the injury occurred because of the failure of the defendant to furnish a proper appliance for the removal of the box and sufficient help to assist in its removal. The plaintiff began the work on the 6th day of July, 1909. In company with other laborers he was moving boxes of supplies from the platform where they were unloaded from the cars. Twelve boxes had been removed before there was an attempt to remove the particular box which it is claimed caused the injury. This box appears to have been larger than the others. The evidence shows that the box was tilted up on one side and the nose of the truck was pushed under it, and then that the box and truck were pushed back together. The box appears to have been 50 inches in height, 38 inches in width, and 20 inches thick, or thereabouts. It is especially emphasized by the plaintiff that only one man assisted him in handling this box which caused the injury. There is evidence in the record that the plaintiff had two men to assist him; but the plaintiff contends that there was only one and the jury have so found. The jury found specially that the truck used was a "standard truck." They also specially found that such truck was a reasonably safe appliance. Therefore the question of the truck being a reasonably safe appliance is eliminated from the consideration of the case.

The plaintiff in his testimony seems to think that the box was too heavy for two men to handle. He does not testify that there was anything about the truck or about the box that he did not understand. He was raised on a farm in Bohemia. He was a blacksmith by trade, and followed his calling in Bohemia before coming to America. He had used a wheelbarrow at the smelter nearly six years in carrying lime, ore and slag. He was therefore used to the labor of lifting and wheeling heavy loads. He testified that the loaded wheelbarrow which he was in the

habit of using weighed 400 pounds, and that he was accustomed to handling it himself.

Anton Hanus, a witness for the defendant, testified that just before the plaintiff started to move the box it was standing upright on the platform; that two men tilted it over, and that the plaintiff put the nose of the truck under the box, and that after the nose was shoved under the box the box itself was tipped back by the two men who were helping to load it and that they let it onto the truck; that the plaintiff made a movement to pull the box toward him on the truck; that it was stationary when he started to pull it toward him, but that as he "broke the truck," that is, when the truck received on its upper framework the weight which the plaintiff was compelled to support, or to partly support, the truck and the box went down; that a Mr. Bell and a Mr. Haddakin assisted the plaintiff to handle the box at the time he was hurt. At this point it should be remembered that it is not claimed by the plaintiff that the man or men who helped him was or were careless in the manner of handling the box; neither is it claimed that the box was pushed by them or either of them with needless force over onto the framework of the truck. Anton Hanus also testified that he saw the box in the box car before it was unloaded, and that he and Mr. Vitlock took the box out of the box car on a "standard truck," and that they did so without help; that Vitlock had the handles of the truck, and that the witness tipped the box to permit the nose of the truck to go under; that Vitlock then took the box out of the car and placed it on the framework; that the witness helped him to stand it up.

There appears to have been nothing in the construction of the truck calculated to make it a dangerous implement, and the jury specially found that the particular kind of truck used was a proper appliance for the purpose intended. In supporting the truck, after the nose was pushed under the box, the box would rest upon the nose and base of the truck, and the framework to which the handles are attached would stand up in the air nearly

perpendicular, and then there would be no weight on them. If the truck should be so held that the center of gravity is in that part of it which may properly be designated as the base, then there is no danger of the man who holds the handles being hurt. When the man who operates the truck takes hold of the handles, he gradually lets them down towards the ground so that he may be enabled to wheel the truck, and as he does so the box comes over with the framework of the truck, and the center of gravity moves back from the base of the truck toward the handles. As long as the man who operates the truck controls it, he cannot possibly be hurt, because the weight that he is called upon to support depends upon how far he lets the handles down. When he takes hold of the handles with the box resting on the base of the truck, he does not have to support any weight. If he should discover, as he attempts to let the handles down, that the weight is likely to be greater than he can comfortably support, all he has to do is to push up the handles so that the framework of the truck resumes its former upright position, and he is at once relieved.

As the plaintiff had long been in the habit of handling a wheelbarrow that, when loaded, weighed 400 pounds, it will be seen that he was not required in handling this truck to handle much, if any, greater weight than he was accustomed to. It is true that he would have to hold the handles sufficiently near the ground to push the truck along, and as he let them down for that purpose the center of gravity would move back along the framework toward the handles, but the greater share of the weight would still rest on the front wheels, so that approximately the plaintiff would not have to support by a direct lift more than about one third of the entire weight held by the truck, being about 200 pounds if the box weighed 600 pounds, and correspondingly less if the box weighed less. As long as the box was handled prudently it could not have occasioned injury to the plaintiff. If we are right in our conclusion, the evidence shows that the injury oc-

curred because of the plaintiff's inefficiency or carelessness in handling the truck. We do not consider that the case is a doubtful one. To us it seems very plain. Just so long as the plaintiff handled the truck with ordinary judgment and discretion, with just ordinary common sense, he was in no danger whatever and could not be hurt. There is no reason why the defendant should have anticipated this carelessness or inefficiency of the plaintiff, whichever it may have been.

In *Fremont Telephone Co. v. Keeler,* 72 Neb. 613, it is said: "He (the plaintiff) was not working with either defective or dangerous implements. He himself borrowed the ladder on which he ascended to his place of duty. There was no hidden defect, either in the ladder on which he stood, or in the hand-ax with which he drove the plugs, or in the plug furnished him, that in any manner contributed to the injury. It is not claimed that he was either blind, or insane, or of such very tender years as to be incapable of understanding the danger which must have been obvious to one having eyes to see, when he undertook to drive the plug. We therefore conclude that there is no evidence in the record tending to show any breach of any duty owed by the master to the employee, and, although we doubt not that plaintiff received a painful injury from the accident his misfortune is not, by any evidence in the record, connected with any negligent act on the part of his master."

In *Vanderpool v. Partridge,* 79 Neb. 165, *Lynn v. Glucose Sugar Refining Co.,* 128 Ia. 501, was cited with approval. It is said in the body of the opinion in the last named case: "This case, so far as the evidence for plaintiff shows, may be well considered as close to the boundary line between accident and negligence; but we are satisfied that the cause of the injury was not anything which it was the duty of the defendant to anticipate and prevent, if it might have been prevented in the exercise of reasonable care, but was one of those uncertain happenings as to which every one must take his chances." We think the view of the case which we feel called upon to adopt

is supported by *Whalen v. Rosnosky,* 195 Mass. 545; *Central Granaries Co. v. Ault,* 75 Neb. 249; *Omaha Bottling Co. v. Theiler,* 59 Neb. 257; *Kilpatrick v. Richardson,* 40 Neb. 478; *Patton v. Texas & P. R. Co.,* 179 U. S. 658. In the last named case it is said: "If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

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

In *Roberts v. City of Lincoln, supra,* it was said by Judge Maxwell, delivering the opinion of this court: "As the finding is clearly contrary to the evidence, the judgment is set aside and a new trial awarded."

In *Garfield v. Hodges & Baldwin, supra,* it was said by Judge Fawcett, delivering the opinion of the court: "The rule is well settled in this state that, where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside and a new trial granted.

The evidence in the case at bar comes strictly within that rule."

In *Frerking v. Thomas, supra,* the seventh paragraph in the syllabus reads: "In reviewing a cause on appeal, where the findings and decree of the trial court cannot be reconciled with any reasonable construction of the testimony, the same will be set aside as unsupported by sufficient evidence."

In *Tyler v. Hoover,* 92 Neb. 221, there was a verdict against the defendant and a judgment in favor of the plaintiff. There was an examination of the evidence, and the verdict and judgment were set aside.

In *Garfield v. Hodges & Baldwin, supra,* there is a full examination of the evidence in that case, and on such examination it was determined that the verdict should be set aside. The evidence was involved and required a careful analysis, and this was clearly made by Judge Fawcett.

In the face of the above decisions of this and other courts, we are unable to conclude that the verdict and judgment are sustained by the evidence. The judgment of the district court is

REVERSED.

ROSE, J., dissenting.

In my opinion the judgment reversed is sustained by sufficient evidence that defendant was negligent in failing to furnish its employee with necessary assistance in the performance of his duties.

REESE, C. J., concurs in this dissent.

GEORGE FRIEDERICH, APPELLANT, V. HENRY C. KLISE, APPELLEE.

FILED JANUARY 30, 1914. No. 17,381.

1. **Negligence:** FIRES: TRACTION-ENGINE. One who threshes grain by means of power communicated to the threshing-machine from a steam traction-engine should, in respect to the setting of fires,

exercise a degree of care and prudence commensurate with the danger to which farm property is exposed by him in the lawful conduct of his business as such thresher.

2. ———: ———: ———: EVIDENCE. Where in such case a screen called a spark-arrester is placed over the top of the smoke-stack for the purpose of preventing the escape of sparks and fire, it should be frequently and vigilantly examined for the purpose of seeing whether it is in good repair and with the view to keeping it in that condition. Where such spark-arrester is found in a defective condition a few minutes after the fire occurred so that the fire might have originated therefrom, and there is evidence tending to prove that the fire which occasioned the damage was communicated from the engine, such evidence, if not controverted, will sustain a charge of negligence in the operation of such engine.

3. ———: ———: ———: BURDEN OF PROOF. Where the defendant, who was engaged in threshing grain for the plaintiff, used a traction-engine which furnished power to run the grain separator, and there was evidence which tended to show that the spark-arrester which covered the top of the smoke-stack was in a defective condition so that fire and sparks might escape therefrom, and it was further shown that the engine was placed near the grain stacks containing the grain to be threshed, and that the wind was blowing from the engine toward the stacks at the time the engine was running, and that the stacks caught fire and were destroyed, such facts establish a presumption of negligence, and cast upon the defendant the burden of establishing, as an affirmative defense, that the engine was not faulty in construction, and was, at the time of the fire, properly equipped, in good repair, and properly operated; and the jury should have been so instructed.

4. ———: ———: ———. Before starting in to do the job, it was the duty of the defendant to see that the engine was properly equipped with a spark-arrester then in a state of repair sufficient to answer the purpose for which it was intended, so far as the same might be practicable.

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

H. C. Brome, Clinton Brome and *W. C. Fraser,* for appellant.

C. H. Stewart and *M. H. Leamy, contra.*

HAMER, J.

This case involves the consideration of an appeal by the plaintiff from the judgment of the district court for Pierce county. The plaintiff sued to recover damages sustained by reason of the burning of six stacks of oats and incidental injury connected with the loss. The full damage sought to be recovered was $800 claimed to be sustained by reason of the negligence of the defendant in the careless handling and management of his traction-engine while threshing grain for the plaintiff. It is alleged that the threshing outfit came upon the premises in pursuance of an oral contract with the plaintiff, and that the threshing-machine was set near the six stacks of oats which were destroyed by fire from the engine; that the engine did not have upon the smoke-stack a proper or suitable spark-arrester; that the spark-arrester had become out of repair and was broken and injured to such an extent that it was no longer suitable or effective for the purpose intended; that its defective condition was known to the defendant or could have been known to him by the use of ordinary care and diligence; that prior to the time the damages were sustained by the plaintiff the defendant and his agents negligently permitted the said traction engine to become unsafe and dangerous with respect to the escape of fire and sparks and with full knowledge of said condition; that said condition was unknown to the plaintiff until after the burning of the stacks; that said damages or any part thereof were in no manner contributed to, or caused by, the plaintiff, but were the sole result of the defendant's negligence; that the defendant with full knowledge of the defective condition of the said engine set the same within 10 or 12 feet of the grain stacks and to the windward of the same so that the fire and sparks escaping from the engine fell immediately upon said stacks.

The defendant answered, admitting that he was the owner of the threshing outfit, and stating that the position which the engine occupied was the only one in which it could be placed and operated on account of the position

of the grain stacks and their nearness to each other; that the plaintiff was present and saw the position and location of the engine and offered no objection to the same, but permitted and ordered the defendant to start the engine and proceed with the threshing; that if sparks of fire escaped from the engine, as alleged in the petition, it was owing to the fact that the plaintiff, contrary to the express order and direction of the engineer operating the said engine, provided said engine with a kind and quality of coal which, when burned in any engine, would form into small particles and most likely cause the escaping of fire sparks. The reply was a general denial.

The question to be determined is whether the defendant, under the facts alleged and shown by the evidence, was guilty of negligence.

It is contended by the plaintiff that the true rule to be applied to this thresher is the same rule that this court has applied in measuring the responsibility of railroad companies regarding the escape of fire from locomotive-engines; that the rule is that, when it is established that sparks escaping from a locomotive-engine have originated the fire, then the law puts upon the railroad company the burden of proving that its engine was properly constructed and operated, and that it was in good condition; and it is further said that the law does not permit the owner of the locomotive-engine to escape liability if the spark-arrester be broken or defective by showing that the defective condition of the spark-arrester had not been discovered or was not known.

It is said in the brief of plaintiff that the rule that imposes upon the railroad company the absolute duty of keeping its engines in repair to the end that fire may not escape therefrom ought not to be relaxed when the court is dealing with the engine used to propel a threshing-machine; that the engine for threshing is generally operated at a place where much combustible material is located, and that the danger of fire caused by escaping sparks is much greater than in the case of the use of the locomotive-engine. And it is contended that because of this difference

there ought to be a greater degree of care required in the case of the threshing-machine than in the case of the locomotive-engine. The defendant contended that it was immaterial whether the spark-arrester was in proper repair or not at the time the fire originated; that as a matter of fact the defendant was not liable because the spark-arrester was defective and fire originated therefrom, unless he *actually knew* of the defect, or unless a jury should find from the evidence that the defect had existed so long that he *ought to have known it.* The district court took the view that was favorable to the contention of the defendant and instructed the jury upon that theory. The verdict and judgment were against the plaintiff, and because, as it is claimed, of this error in the instructions. The following instructions were given:

"No. 4. If you are satisfied by a preponderance of the evidence that the fire originated from the engine, as claimed by plaintiff, then the burden of proof is upon the defendant to remove a presumption, though small indeed, of negligence, to show you that the engine of the defendant from which fire escaped was provided with a spark-arrester, to prevent the escape of fire, which was suitable, in good order, and properly constructed, or that defendant, or his agents and employees, were not negligent in failing to discover its defective condition in order to prevent the same, and, if you so find, then it is your duty to find for the defendant, as defendant would not be liable if there was used a proper and suitable spark-arrester, in good order, and it was carefully handled and managed by the servants of defendant; unless the jury believe the defendant, or his employees, were guilty of actual negligence in not knowing of a defect therein, if there was any such defect."

"No. 1. Notwithstanding the fact that the jury may believe from the evidence that the spark-arrester which was on the smoke-stack of defendant's engine was in fact defective, at the time of the starting of the fire complained of by the plaintiff herein, yet this alone would not be sufficient evidence of negligence on the part of the defendant to entitle the plaintiff to recover therein. In

order to charge the defendant with negligence, it must appear from the evidence, not only that the spark-arrester was defective at the time said fire was started, but it must further appear that such defect was actually known to the defendant, or his agents or employees in charge of said engine, or it must appear from the evidence that such defect had actually existed for such a length of time before the said fire that defendant or his employees would or should have known of such defect, had he exercised ordinary diligence and caution. And if you find from the evidence that neither the defendant nor his servants who were in charge of his engine at the time in question knew that there was a defect in the spark-arrester on said engine, and you further find from the evidence that such defect had not in fact existed for a length of time sufficient to charge the defendant or said servants with knowledge of the same, then your verdict should be for the defendant."

The stacks stood three on a side. The separator was placed in the vacant space between the two rows of stacks. It was between the first two in the rows. The engine was to the south of the stacks. The wind was from the south, or perhaps slightly from the southwest. The owner of the stacks seems to have made no objection to the position of the machine or the engine. This is urged as a justification by the defendant. The machine had only been running 10 or 15 minutes when the fire was discovered. It was then climbing the southeast stack and was half way up to the top. There was also a fire in a bundle on the ground by the stack. There were holes in the old screen, and it was repaired about a week before the fire by putting on a new top. Immediately after the fire there was a hole in the screen three or four inches long and an inch wide. There seems to be no dispute about this. The wire seems to have been pulled from between the parts intended to hold it together. The top had been covered with a new screen, which Henry Klise, one of the defendant's sons, testified was put on the week before. All the witnesses testified to the size of this hole in the screen.

It was abundantly large to allow sparks and "trash" on fire to escape. One witness testified he could put his hand in the hole, and another said four fingers. Herbert Friederich testified that he put his hand through this hole. George Friederich testified that he noticed the engine imediately after the fire started and saw that the spark-arrester let a lot of "trash" through the wire. The gist of the plaintiff's charge is that the defendant, with full knowledge of the defective condition of the spark-arrester, or having the opportunity to acquire such knowledge by the exercise of ordinary care and diligence, yet neglecting so to do, set the engine to the windward of the grain stacks and within 10 or 12 feet of the same, so that fire and sparks escaping from the engine by reason of the defective condition of the spark-arrester fell upon the stacks, set them on fire, and destroyed them, without any fault upon the part of the plaintiff.

It is contended by the plaintiff that the defective condition of the spark-arrester was fully known to the defendant, or that it could have been known to him by the exercise of ordinary care and diligence, and therefore that he is liable. As to the actual fact of whether the defendant *did know,* Herbert Friederich, the plaintiff's son, and Martha Friederich, plaintiff's wife, both testified to a conversation at the dinner table between the engineer in charge of the engine and the defendant's son just before the machine was set up at the stacks. The latter two denied the conversation. The defendant also produced evidence tending to show that the engineer and fireman examined the spark-arrester every morning, and that such an examination was made on the morning of the fire.

Whether the same degree of diligence should be required of one who operates a threshing-machine as of the railroad company which operates a locomotive-engine need not necessarily be determined in this case. It may be remarked, however, that the threshing-engine is likely to be surrounded by more combustible material than the locomotive, and this may make its position and operation more dangerous. This court may not have established a

precise rule determining the degree of negligence which makes the operator of a threshing-machine liable. When such a rule is established, it would seem that it ought to be a reasonable rule calculated to furnish reasonable protection to the owner of grain and farm premises, and that the care required of those in charge of the machine should be commensurate with the danger. The instructions quoted seem to contemplate that, when the engine was brought to the stack-yard, the spark-arrester was out of repair, or may have been out of repair, and that such fact might be excused by the failure of the defendant to examine it and so to have knowledge of its condition. Vigilance is expected of the man in charge of the machine because the consequences of his negligence may be most disastrous. The instructions do not put the burden where it belongs. The instructions are wrong.

In *Rogers v. Kansas City & O. R. Co.*, 52 Neb. 86, this court held: "The rule in this state is that, when fire is set out by sparks from a passing engine, negligence may be inferred, and that the burden of proof is upon the company to establish that the engine was not faulty in construction, and was properly equipped and operated." This case follows the former case of *Burlington & M. R. R. Co. v. Westover*, 4 Neb. 268. In the case first cited an extra went over the defendant's road at about the rate of 25 miles an hour, and immediately after the engine passed, the fire which occasioned the damages, started near the edge of the grass and spread rapidly and burned to within a few rods of the plaintiff's house. There had been no other fire in the vicinity that spring. In that case there was a directed verdict, and the court held that the verdict and judgment should be set aside and the proofs submitted to the jury for their consideration and under proper instructions.

"The law imposes upon the company and its employees the duty of keeping a vigilant, careful watch to see that the engine is kept in proper repair, * * * and unless the defendant has shown, by a preponderance of evidence, that the engine in question was in such good repair and

condition at the time of the injury complained of, or that all reasonable precautions had been taken to have it in such repair and condition, then the defendant has not rebutted such *prima facie* case made against it." 2 Sackett, (Brickwood) Instructions to Juries (3d ed.) sec. 1988. *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389.

In *Bradley v. Chicago, B. & Q. R. Co.*, 90 Neb. 28, the court held: "It is the duty of a railroad company to equip its locomotive-engines with such appliances for the control of sparks as the progress of science and improvement demonstrate are the best for that purpose, and which are generally known, or should be known, by those in control of the construction and repair of its engines." In the body of the opinion it is said: "If, at the time the fire escaped from the engine, the locomotive was equipped with the best or most improved appliances that were known, or that should have been known, by the defendant, and in general practical use under such circumstances as surrounded the particular locomotive, and these appliances were in good repair, the defendant was not guilty of negligence in the matter of that equipment"—citing authorities. The court then say: "The evidence is uncontradicted that at the time the plaintiff's barn was destroyed the locomotive was thus equipped. The assignment must, therefore, be overruled." In that case the judgment of the railroad company was affirmed.

In *Kelsey v. Chicago & N. W. R. Co.*, 1 S. Dak. 80, the court held: "If a damaging fire is shown to have been propagated by sparks or fire from a locomotive engine of a passing railroad train of a chartered company, such proof raises a presumption of negligence upon the part of the company, so as to cast the burden of proof upon it of showing that the locomotive engine was properly constructed and managed at the time of the fire." In the body of the opinion it is said: "The rule of the English courts and of many of the American states is that the burden of making this proof rests upon the company (citing cases). The law upon the subject is that the companies, in the construction of their engines, are bound not only to

employ all due care and skill for the prevention of mischief arising to the property of others by the emission of sparks or any other cause, but they are also bound to avail themselves of all discoveries which science has put within their reach for that purpose, provided they are such as, under the circumstances, it is reasonable to require of companies to adopt. The reason given for requiring the companies to show that this duty has been performed on their part is that the agents and employees of the road know, or at least are bound to know, that the engine is properly equipped to prevent fire escaping, and that they know whether any mechanical contrivances were employed for that purpose, and, if so, what was their character." Further discussing the case, the court said: "The plaintiff, by proving that the defendant's locomotive-engine had set fire to dry grass or other combustible matter along its road-bed, made a *prima facie* case of negligence; and, had defendant failed to introduce any proof, the plaintiff would have been entitled to a verdict in his favor under the direction of the court."

In *Grand Trunk R. Co. v. Richardson*, 91 U. S. 459, the action was brought against the railroad company by the defendants in error to recover damages for the destruction of their sawmill, store, lumber and boarding house. It was held in the syllabus: "The determination of an issue, as to whether the destruction of property by fire communicated by a locomotive was the result of negligence on the part of a railroad company, depends upon the facts shown as to whether or not it used such caution and diligence as the circumstances of the case demanded or prudent men ordinarily exercise, and not upon the usual conduct of other companies in the vicinity." It is said in the body of the opinion: "The issue to be determined was, whether the defendant had been guilty of negligence; that is, whether it had failed to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise." In that case there was a statute (Gen. St. Vt. 1870, ch. 28, sec. 78) providing that the "corporation shall be responsible in damages for

such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury."

In *Martin v. McCrary,* 115 Tenn. 316, it was held: "Persons engaged in a lawful business and using therein a dangerous instrumentality, such as a steam-engine in threshing wheat, are required to use that degree of care and prudence commensurate with the danger to which property is exposed by them in the lawful conduct of their business." In that case it was also held that the operators of the machine were guilty of negligence if they failed to make at least a daily inspection of the same. There was the usual spark-arrester, but in addition to that there was a "fine inner netting." This was resupplied from time to time. It had been replaced three times prior to the date of the fire. There was testimony that the spark-arrester had been examined a day and a half before the fire occurred, and that at that time there was no hole in either the inner netting or in the spark-arrester proper. The case was tried to the court without a jury. The trial court found that the defendants were not negligent in the operation of the engine and that the accident was not a result of negligence. The reviewing court set aside the judgment of the lower court and rendered a judgment for the amount of the damages claimed. In that case it is said: "It was not sufficient for the defendants to show that neither they nor their servants had knowledge of the hole in the netting. They had the means of knowledge, and should have used those means."

When they started in to thresh, the hole which let the fire out was probably in the spark-arrester. It was there 10 or 15 minutes afterwards. If the defendant had made an examination, then, before beginning to thresh, he would probably have discovered the hole, mended the screen, and saved the loss. We are of the opinion that, immediately before starting in to thresh, the operator of the machine, after he reached the stack-yard, should have examined the spark-arrester for the purpose of ascertaining whether it was in good repair. The instructions com-

plained of probably suggested to the jury a way by which they might avoid rendering a verdict against the defendant. We regard these instructions as highly prejudicial.

The judgment of the district court is

REVERSED.

BARNES, LETTON and ROSE, JJ., not sitting.

SEDGWICK, J. I think that the syllabus states the law of the case, and that the conclusion is right, and therefore I concur.

JOHN SHOFF, APPELLEE, V. CHARLES C. ASH, APPELLANT.

FILED JANUARY 30, 1914. No. 17,542.

1. **Appeal:** REVIEW. In the absence of a motion for a new trial in a law action, the only question to be considered on appeal is the sufficiency of the pleadings to sustain the judgment. *Lau v. Lindsey*, 3 Neb. (Unof.) 681.
2. **Brokers:** COMMISSION: SUFFICIENCY OF PETITION. The pleadings, examined and set out in the opinion, *held* sufficient to sustain the judgment.
3. ———: CONTRACT: VALIDITY. A contract sufficient to meet the requirements of the statute may be created by letters between the parties, and may be sufficient to create a contract between principal and agent for the sale of real estate though the same papers are not signed by both parties. *Holliday v. McWilliams*, 76 Neb. 324; *Bradley & Co. v. Bower*, 5 Neb. (Unof.) 542.

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

George H. Merten, for appellant.

Charles H. Sloan, Frank W. Sloan and *J. J. Burke, contra.*

HAMER, J.

The action in this case was brought in the district court for Fillmore county to recover $80 commission for

the alleged sale of the E. 1-2 of the N. E. 1-4, of 30-8-3, west of the sixth P. M., in Fillmore county, Nebraska. No motion for a new trial was filed by appellant in the court below. The only question therefore for our consideration is the sufficiency of the pleadings to sustain the judgment. *Lau v. Lindsey*, 3 Neb. (Unof.) 681.

The petition alleges that the defendant on or about the 11th day of August, 1908, entered into a written contract with the plaintiff whereby the plaintiff agreed to find a purchaser for said land at the agreed price of $5,000, and the defendant agreed that the plaintiff should have as a commission for said services all over and above the said sum of $5,000 secured for said land. The petition shows that the contract consisted of four letters, the first of which was written by the plaintiff to the mother of the defendant in Lucerne county, Pennsylvania; that in the letter the plaintiff inquired of the mother of the defendant, Mrs. John Ash, the widow of John Ash, deceased, who was the owner of the land prior to his death, if it was for sale, and at what price, and offered to secure a purchaser if the price was satisfactory. That letter is not copied in the petition, but its substance is set out, and in response to it the defendant wrote a letter to the plaintiff, which reads, in substance: "As I got your letter that you wrote mother, as I am settling up father's estate, I will make you an offer to sell that eighty out there. You can have (all) over $5,000 you get for it. There is three other parties after it. They haven't set any price on it yet. Now I am buying the rest of the heirs out. I might move out on it myself. I remain Your friend, Charles C. Ash." The plaintiff wrote to the defendant accepting the terms of his letter, and the letter is copied into the petition as follows: "Grafton, Neb., Sept. 14, 1908. Mr. Chas. C. Ash, Wilkesbarre, Pa. Dear Sir: Your letter received this morning and I have sold your eighty for $5,000, the buyer to pay the commission. I have accepted $500 on the deal which is deposited at the Grafton State Bank for you. I inclose herewith contract which I have signed for you as agent, and also contract for you to sign

before some witness and return to me at once. Upon receipt of deed at the Grafton bank your money is ready if abstract is found satisfactory. Your very truly. John Shoff, Agent. $500 deposited at this bank as per above. The Grafton State Bank, M. I. Hall, Asst. Cashier." In reply to this letter the defendant wrote a letter which is copied into the petition and reads: "John Shoff, Dear Sir: I will try and answer your letter. I am sorry to tell you that before father died he gave a party an option on the place and I did not know it when I made you the offer. They are going to take for the offer that father made them. I would like you to had it, but the rest of the heirs want it the way father wanted it to go. I am coming out in a short time and will pay you for the trouble I have made you. Yours truly, C. C. Ash." In addition to the foregoing copies of letters there is the statement in the petition that in pursuance to said contract the plaintiff found a purchaser for said land for $5,080, and that said purchaser, H. R. Porter, was ready and willing to take said land at said price and deposited $500 in the Grafton State Bank as earnest money on said purchase; that said defendant refused to convey to said purchaser, but sold and conveyed said premises to Nicholas Rolfus, garnishee; that by reason of the premises the defendant became indebted to the plaintiff in the sum of $80 as a commission for finding said purchaser under said contract; that said sum is long past due and defendant refuses to pay the same. There was a prayer for judgment for $80 and interest and costs of suit. The defendant filed a general demurrer to the petition. The demurrer was overruled, and the defendant answered by a general denial. After the testimony was taken the plaintiff rested, and the defendant moved the court for judgment. The motion was overruled, and judgment was rendered for the plaintiff as prayed. From this judgment the defendant has appealed.

The defendant contends that the letters do not constitute a contract in writing as provided by section 2628,

Rev. St. 1913 (Comp. St. 1909, ch. 73, sec. 74) which reads: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent."

In *Holliday v. McWilliams,* 76 Neb. 324, it was held that the written contract required by this section might be evidenced by letters passing between the parties. In that case *Bradley & Co. v. Bower,* 5 Neb. (Unof.) 542, was cited with approval. In the last named case it was held that a contract sufficient to meet the requirements of the statute might be created by letters between the parties, and might be sufficient though the same papers were not signed by both parties.

In *Howell v. North,* 93 Neb. 505, it was said in the body of the opinion: "The purpose of the statute was to protect landowners from the fictitious claims of real estate dealers who actually never sold the land they claimed to sell and never earned the commissions for which they were claimants, but it was never the intention of the legislature to protect the real estate owner against legitimate claims for services which he authorized in writing and which were honestly rendered." This shows that the first objection is not well taken.

The second point is that there is no description of the land in the letters as required by the statute. The letter written to Shoff by the defendant shows that the defendant had received Shoff's first letter; the same being turned over to him by defendant's mother. In that letter the land was described. There is therefore no uncertainty about the land intended. There was only one tract of land.

The third objection is that there is no amount of money set forth to be paid to the agent in case he should sell the land. The letter to Shoff specifically stated that he could have all over $5,000 that he might get for the land. That

clearly meant that if he sold it for $5,080 the sum of $80 was to be his. This disposes of that contention.

We are unable to ascertain any sufficient reason for setting aside the judgment of the district court. The judgment of the district court is right. Judgment

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

ALBERT T. KENNEY ET AL., APPELLEES, V. JOSEPH F. KRAJICEK, APPELLANT.

FILED FEBRUARY 13, 1914. No. 17,555.

Vendor and Purchaser: LAND CONTRACT: FORECLOSURE: DEFENSES: SUFFICIENCY OF EVIDENCE. In an action to foreclose a written contract for the purchase of real estate, the defense pleaded was that the contract was procured by false and fraudulent representations as to the quality and value of the land; that the defendant was intoxicated at the time of making the contract, and that the same was procured by the undue influence of plaintiffs' agent, who procured the contract. The evidence is examined, the substance set out in the opinion, and it is *held* that the findings of the district court against defendant are sustained by the evidence.

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

F. Dolezal and *W. W. Young,* for appellant.

G. A. Eberly, contra.

REESE, C. J.

Appeal from the district court for Stanton county. The action is to foreclose a contract for the sale of real estate situate in Stanton county. The contract is in writing, signed and acknowledged by the parties, Albert T. Kenney and Minnie A. Kenney, his wife, as vendors, and Joseph F. Krajicek, as purchaser. The land described as

the property sold is the northwest quarter and the west half of the northeast quarter and the southeast quarter of the northeast quarter of section 27, township 23 north, of range 3 east of the sixth P. M., situated in Stanton county, containing 280 acres. The consideration named as the purchase price is $16,500. At the time of the execution of the contract defendant paid the sum of $1,000. The contract is dated October 7, 1909, and stipulates that the deferred payments were to be made as follows: $5,000 on the 1st day of March, 1910, and $6,000 at the end of five years, the latter to be secured by a second mortgage on the premises, drawing 5½ per cent. interest, and also the assumption of a prior mortgage on the property for $4,500; that upon the payment of the $5,000, due upon the 1st day of March, 1910, plaintiffs were to execute a deed of conveyance to defendant, and at which time the mortgage securing the $6,000 was to be made. Outside of the provisions of the written contract, but a part of the transaction, plaintiffs delivered to defendant a team of mules, harness for same, and a wagon, all valued at about $500. The defendant resides at Howells, in Colfax county, some 16 miles from the land. Upon his failure and refusal to complete the contract of purchase, and upon his notifying plaintiffs that he would not do so, plaintiffs commenced action to recover the whole amount of the purchase price, it being stipulated in the contract that, upon failure to make the payments by defendant, the whole amount should become due. The petition is in the usual form, with prayer for the foreclosure of the contract, the sale of the property, that the proceeds be applied to the payment of the amount found due, and, in case of failure to sell for a sufficient amount to satisfy the decree, that a judgment for the deficiency be rendered.

Defendant answered, admitting the signing of the contract, the receipt of the team of mules, the payment of $1,000, and denying all other averments of the petition. It is pleaded as a defense to the action that the contract was procured by one Sinkula, the agent of plaintiffs, by fraud and undue influence; that defendant was addicted

to the excessive use of intoxicating liquors, and, when under the influence and effect of drink, he lost control of his judgment and will power, and became subject to the influence of others, all of which was known by Sinkula; that Sinkula plied defendant with strong drink, obtained influence over him, and by false representations of the value of the property and his promise that he could sell the land for a substantial advance, and thereby secure a profit to defendant, he induced defendant to enter into the contract; that defendant did not know or understand the nature of the transaction, but was subject to the influence and control of Sinkula, and, through the undue influence of Sinkula, was induced to enter into the contract without knowing the nature of his act; that the contract finally entered into provided that, should defendant fail or refuse to carry out the same the sum of $500 was agreed to as being the liquidated damages to be applied by the vendors upon any sum previously paid by the purchaser, and this fact was urged upon defendant as an inducement to make the purchase. It is alleged that by the fraud and undue influence of Sinkula defendant was induced to purchase the land at a price far in excess of its value; that the quality of the land was sandy, with sand-hills and "blow-outs," and was of little value for the purpose of agriculture; that, upon the discovery of the frauds practiced by Sinkula, defendant had notified plaintiffs that he would not proceed further with the contract, and had offered to tender back the team, harness and wagon, but plaintiff refused to receive them; that defendant is a Bohemian, does not comprehend the English language perfectly, either orally or written, and by reason thereof, and in his drunken condition, he did not comprehend the nature of the contract, nor what he was doing when he signed the contract.

The answer is quite voluminous, consisting of many repetitions, but the foregoing is thought to fairly present its purport. It is accompanied by a cross-petition, by which it is sought to have the contract declared null and void, and that defendant recover judgment for the $1,000 paid

plaintiffs, with interest thereon, and for costs of suit. Plaintiffs filed a lengthy reply denying the allegations of the answer generally, followed by specific denials, and affirmative allegations, which, in effect, deny certain averments of the answer, and plead laches on the part of defendant. The cause was tried to the court, the trial resulting in a decree in favor of plaintiffs, finding the amount due to be $12,222.25, foreclosing the contract, and ordering the property to be sold for the payment of the same, with costs. Defendant appeals.

While it is apparent that defendant has entered into a contract which is probably beyond his ability to perform, we are unable to find any legal or equitable reason why the decree of the district court should be molested.

While the evidence shows that defendant was addicted to the excessive use of intoxicating liquors, the proof largely preponderates in favor of his sobriety at the time of making the contract. It is shown that plaintiffs' agent called his attention to the land, with the statement that it was for sale at a bargain. The defendant seems not to have relied thereon, but with his grown son, accompanied by the agent, he went and examined the land, inspecting it thoroughly. He returned home the day of his examination, and the next day returned to the farm with the agent, his wife and another grown son, and again he and the other son made another inspection, and after satisfying himself, he went to Stanton to plaintiffs' office and entered into the contract. His wife and son were present. He procured the "throwing in" of the team, harness and wagon, objected to the rate of interest to be charged on the $6,000 deferred payment, signed the contract, and wrote his check upon a bank in Howells for $1,000 cash payment. The evidence of his sobriety is convincing, both by his actions and the testimony of the witnesses present, among whom was the disinterested attorney, who was called and who prepared the written contract. He, his wife and son returned to the farm in question, arriving there late in the evening, and returned to their home the next day. A few days thereafter he sent to the Stanton county farm

for the team; harness and wagon, and had them taken to his farm in Colfax county, caused a letter to be written plaintiffs inquiring about insurance upon the buildings on the farm, placed the land in the hands of Sinkula, as his agent, for sale, and, so far as appears, was satisfied with his purchase, until the 20th day of December, when he caused a letter to be written to plaintiffs refusing to carry out his contract. The evidence as to the value of the land is contradictory, defendant's witnesses placing their estimates of the value as low as $40 to $45 an acre, while plaintiffs' witnesses testify to the value at about what the land sold for. It must be conceded that it is not of the best land in Stanton county, being sandy, and parts of it of little value, other parts being the equal of good lands of the county, the price being well below the ruling prices and values of the better land.

Considering the whole case as shown by the evidence, we are persuaded that the decree of the district court should be affirmed, which is done.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

EDWARDS & BRADFORD LUMBER COMPANY, APPELLEE, V. MARY LAMB, APPELLANT.

FILED FEBRUARY 13, 1914. No. 17,570.

1. **Payment:** NOTE AS PAYMENT. "The giving and acceptance of a promissory note for a prior indebtedness will not be regarded as payment, unless there be an express agreement between the parties to that effect." *Chicago, B. & Q. R. Co. v. Burns*, 61 Neb. 793.

2. ———: ———: HUSBAND AND WIFE. The fact that the person executing the promissory note was the husband of the defendant would not change the rule.

3. **Trial:** INSTRUCTIONS. Where an instruction is given to a jury, which it is claimed did not fully state the rule of law upon the subject involved therein, but did not misstate any rule to be ap-

plied, the attention of the court should be called to the omission, as claimed, by an instruction containing the alleged omission. If not, there can be no ground for reversal therefor.

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

J. R. Swain, for appellant.

G. N. Anderson, contra.

REESE, C. J.

This is an appeal from a judgment rendered by the district court for Greeley county in favor of plaintiff and against defendant for the sum of $124.30 upon a book account. Defendant appeals.

The petition is in the usual form in cases of this kind. The answer denies all indebtedness to plaintiff, which is probably no denial of the averments of the petition, and it is contended by plaintiff that this is in effect an admission thereof. However, as the answer in another paragraph denies "each and every allegation contained in plaintiff's petition not hereinbefore specifically admitted or qualified," the denial of indebtedness may be treated as surplusage. There are averments in the answer, which, though stated in an affirmative form, amount to nothing more than a cumulative denial. No averment contained in the answer had the effect of changing the issues from those presented by the general denial. The whole contest was centered upon the one issue as to whether defendant had purchased the goods described in the petition. Proof that they were purchased by a third party, and for which said party executed his promissory note, without the knowledge of defendant, raised no new issue; those facts constituting circumstances provable under the general denial as tending to show the nonliability of defendant. The reply is a general denial.

At the close of plaintiff's evidence the defendant moved the court for an instructed verdict in her favor, which the court denied. This action of the court is assigned for

error; but, as the whole matter can be disposed of upon a review of the final result, we need not pass upon the isolated question. The verdict returned was in favor of plaintiff for the whole amount of principal claimed, but allowed no interest. Judgment was rendered accordingly.

Defendant is the wife of "Mike" Lamb, and it is claimed that he purchased the goods upon his own credit, and not upon the credit of his wife, who owned a large farm near plaintiff's place of business, and that her husband subsequently gave his promissory note in payment of the claim. It is conceded that he gave his note, as alleged; but the evidence does not establish the fact that the note was either given or received in *payment* of the account. The note has never been paid. The mere giving of a note for a prior indebtedness will not be regarded as payment, unless there is an express agreement between the parties to that effect. *Harvey v. First Nat. Bank*, 56 Neb. 320; *Chicago, B. & Q. R. Co. v. Burns*, 61 Neb. 793. There is no such proof in the record. The matter of giving the note may be eliminated from the case (defendant not being a party to it), except as a circumstance from which it might be argued that, if defendant owed the debt, plaintiff would not have called upon her husband to pay it, and, if unable to pay it, that his note should be demanded and accepted for the purpose of closing the account on the books of plaintiff. The account runs against "M. Lamb." Defendant's name is "Mary," and her husband's name, so far as this record shows, is "Mike." It is shown by the evidence that at least a part, if not all, of the items charged in the account were taken to and used by defendant on her farm. It was conceded by defendant that she had, before the running of this account, traded with plaintiff, running an account at the store; but she insisted that all her prior indebtedness there had been paid, and she seems to have supported that contention. The case was not as skilfully tried as is the custom of the attorneys representing the parties upon the trial; but it is possible that they made use of all available evidence, and the issues were as well presented as could have been done. The

result is not very satisfactory; but in many respects the testimony of the witnesses was conflicting, and it may be that the conclusion arrived at by the jury reached the point of substantial justice, and we are not inclined to interfere with the verdict upon the ground that it was not sustained by the evidence. Of course, if plaintiff was entitled to recover at all, interest on the debt should have been allowed; but of this defendant cannot and does not complain.

Objection is made to instructions 7, 8, 9 and 10, given by the court to the jury. Nos. 7, 8 and 9, are objected to as not being a full statement of the law applicable to this case; that as to each one a certain modifying clause as suggested by counsel should have been added to the instruction. The question is not before us, for the reason that it was incumbent upon defendant to have presented instructions completing the statements of the law, thus calling the attention of the court to the desired instruction in order that the omission, if it existed, might be corrected. *Olmstead v. City of Red Cloud,* 86 Neb. 528; *Suiter v. Chicago, R. I. & P. R. Co.*, 84 Neb. 256. No such instructions were requested. The objection to the tenth instruction is that it is not a correct statement of the law. It is as follows: "You are instructed the burden of proof is upon the party who alleges payment, and, if the defendant asserts that she paid in anything besides money, she assumes the additional burden of proving that what was received was taken in payment, and at the risk of the creditors. A note given by a third party for a preexisting debt is not payment, unless it be expressly agreed to be taken as payment, and at the risk of the creditors. There must be a clean and special agreement that the creditors shall take the note absolutely as payment, or it will not be payment, if it afterwards turns out to be of no value." While in some parts of the instruction there is an unnecessary use of emphatic words, yet we cannot say that their use was prejudicially erroneous. We understand it to be the law that, in order to constitute a payment by the receipt of a promissory note, it must be

given and received under an express agreement that it is so given and received, and that the statement that "there must be a clean and special agreement" that it was so received is not an infraction of the legal rule. If it is a "payment" of the demand; it terminates the existence of that claim; and no action can be founded upon the original claim, because it is paid. Otherwise, it simply changes the form of the evidence of the existence of the debt, and an action may still be maintained upon the original demand, but which could not be done if the debt is paid. We can see no reversible error in the instruction. Had the question of fact been submitted to the writer hereof in the first instance, it is probable that he would have concluded that the evidence establishing the liability of defendant for the payment of the debt would hardly be sufficient, yet the facts, with the inferences to be drawn from them, were submitted to the jury, and we hesitate to interrupt their finding.

It follows that the judgment of the district court must be affirmed, which is done.

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

HESSIG-ELLIS DRUG COMPANY, APPELLEE, V. HARLEY DRUG COMPANY, APPELLANT.

FILED FEBRUARY 13, 1914. No. 17,553.

1. **Trial:** INSTRUCTIONS: EXCLUSION OF DEFENSE. Defendant alleged that plaintiff had not performed the conditions of the contract on its part, and evidence was introduced tending to prove such allegation. *Held*, That the defense should have been submitted to the jury under proper instructions.

2. **Sales:** MISBRANDED GOODS: ACTION FOR PRICE: RETURN OF GOODS. Plaintiff sold certain drugs to the defendant which were shown by the evidence to have been misbranded, and the defendant was prosecuted for offering the drugs for sale. *Held*, That plaintiff

should be required to take back the goods and credit the defendant with the price thereof in accordance with the terms of the contract of sale.

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

C. Petrus Peterson, for appellant.

Mockett & Peterson, contra.

BARNES, J.

Action to recover the sum of $720, with interest thereon at 7 per cent. from November 7, 1908, alleged to be due plaintiff from defendant for the sale of a quantity of patent medicine called "Notts Melon Seed Kidney Cure." Plaintiff alleged, in substance, that it was a corporation organized and doing business in Memphis, Tennessee, and defendant was a corporation organized and doing business in the city of Lincoln, Lancaster county, Nebraska; that on or about the 24th day of September, 1908, the defendant entered into a written contract with the plaintiff for the purchase of a certain product known as "Notts Kidney Cure," to wit, eight gross of said product at $48 a gross, and three and one-half gross of said product at $96 a gross. A copy of the contract was attached to the petition as exhibit A, and it was alleged that said contract was signed by the defendant in pursuance of an agreement marked exhibit B, also made a part of the petition. It was further alleged that the contract was subsequently modified by the agreement of both parties, so as to change the advertising part thereof from the Journal and News to the Lincoln Star, as indicated by exhibits C and D attached to and made a part of the petition. It was further alleged that on or about the 29th day of October, 1908, plaintiff billed the goods in question to the defendant at the freight depot of the Chicago, Rock Island & Pacific Railway Company at Memphis, Tennessee; that on or about the 7th day of November, 1908, the defendant received and accepted the goods, paid the freight thereon,

and is now in the possession thereof; that plaintiff had complied with all of the conditions and stipulations of said contract on its part to be performed, and that there was due from the defendant the sum of $720 with interest as above stated; that plaintiff had made repeated demands on defendant for payment, and that defendant had refused, and still refuses, to pay the same.

The defendant, for answer to the petition, alleged, in substance: First, that the plaintiff ought not to be permitted to maintain or prosecute this action because the plaintiff, at the time the alleged contract was made, was a foreign corporation; that is to say, a corporation organized and incorporated under the laws of the state of Tennessee, and not under the laws of the state of Nebraska, and was not an insurance company or railroad company having or maintaining an agent or agents in this state; and that plaintiff had not, on or before the time said contract was entered into, named or appointed any agent or agents in this state upon whom service of process or notice of any legal proceedings might be served, and was not authorized to transact any business of any kind in this state. As a second defense, it was alleged that on or about the 24th day of September, 1908, a representative of the plaintiff came to the city of Lincoln, where the place of business of the defendant then was, and now is, and then and there proposed to sell the defendant the property mentioned in the petition know as "Notts Kidney Cure," and produced blank forms of contract and filled up one of each of said blanks, which he retained, whereby it was agreed between plaintiff and defendant that none of the goods mentioned in exhibit B were to be shipped to the defendant until the advertising mentioned in exhibit A (which was attached to plaintiff's petition) was commenced, and the said advertising was to be from 10,000 to 20,000 lines agate measurement of advertising in the Nebraska State Journal and Lincoln Evening News; that, contrary to the agreement of the parties, the plaintiff shipped said goods mentioned in said exhibit B to this defendant before said advertising was commenced,

and the said advertising was never done in the Nebraska State Journal and Lincoln Evening News, nor the Lincoln Star, as provided by the terms of said contract. It was further alleged that, when the goods arrived in the city of Lincoln, defendant paid the freight thereon, aggregating the sum of $20.09, before said goods were examined by defendant, and before it had an opportunity of knowing, and before it knew, that the same were fraudulently misbranded. It was further alleged that the said Notts (Melon Seed) Kidney Cure is a liquid, and is contained in bottles which had blown thereon the words "Dr. Notts Melon Seed Kidney and Bladder Cure;" and on the reverse side thereof was a printed label with the words "Dr. Notts Melon Seed Compound, Kidney & Bladder Remedy, 7% alcohol, guaranteed under the Food and Drug Act of June 30, 1906. Guarantee No. 1221;" that each bottle was inclosed in a paper container or wrapper bearing these words: "This remedy is a scientific preparation, skilfully prepared, containing the active principle of Melon Seed so long and favorably known by physicians of the United States as Nature's corrective for Kidney and Bladder Diseases, combined with the most effective drugs known to modern science." On the reverse side of the wrapper or container were printed the words: "Dr. Notts Melon Seed Compound, Contains 7% alcohol."

It was alleged that said drug was fraudulently misbranded in this: That it did not contain any melon seed or active principle of melon seed; that instead of containing 7 per cent. alcohol the same contained not more than 3½ per cent. of alcohol, as the plaintiff when it shipped said property to defendant well knew; that the labels on said bottles were false and fraudulent and untrue, because in truth and in fact the contents of said bottles contained not more than 3½ per cent. of alcohol, and that said label was false and fraudulent in this: That the statement on said label affixed to said bottle that the contents of the bottle were guaranteed under the Food and Drug Act of June 30, 1906, guarantee No. 1221, was false and untrue, and was known to be false, fraudulent and untrue by the plaintiff

at the time and date of the shipment of said order. It was further alleged that, after the goods mentioned in plaintiff's petition were received by defendant and placed in defendant's store on sale, the defendant was prosecuted by the state of Nebraska for having said goods for sale, for the reason that the same were misbranded and were offered for sale in violation of the laws of the state of Nebraska, and this defendant was convicted of having said goods in its possession for sale, and was fined in the sum of $10, and costs of suit taxed at $1.80; that, as soon as defendant learned that said goods were misbranded, defendant notified the plaintiff of that fact, and that the sale thereof in this state was in violation of law, and that offering the same for sale would be unlawful, and notified the plaintiff to immediately remove said goods and repay to it the said sum of $20.09 which it had paid as freight on said goods; but that plaintiff refused, and ever since has refused, to either remove said goods or repay the defendant the amount paid as aforesaid; that defendant has said goods and has kept them in its store ever since on or about the 15th day of November, 1908, and the fair and reasonable charge for storing said goods for said time is $10 a month, and that defendant is indebted to plaintiff on account thereof in the sum of $60. Defendant denied each and every allegation contained in the petition not expressly admitted by its answer, and prayed that plaintiff's cause of action be dismissed, and that defendant have judgment against the plaintiff for the sum of $20.09, with interest thereon from November 15, 1908, and for the further sum of $60 for the storage of said goods.

Plaintiff's reply was, in substance, a general denial of the facts set forth in the defendant's answer. Upon the issues thus presented the cause was tried to a jury. A verdict was returned for the plaintiff for the sum of $797.75. Judgment was rendered on the verdict, a motion for a new trial was overruled, and the defendant has brought the case to this court by appeal.

Defendant's first assignment of error, which relates to plaintiff's right to enter into the contract without having complied with the provisions of section 725, Rev. St. 1913, need not be decided in order to properly dispose of this case, and its determination is reserved for another time.

It appears that the district court instructed the jury that the only question which they could consider was whether the drugs in question were misbranded, and this is the second error of which defendant complains. It is contended that the defendant did not agree to the change in the contract alleged in plaintiff's petition, but insisted that a new contract should be entered into, and a corrected bill be sent by the plaintiff. The record discloses that plaintiff wrote a letter to the defendant, which is designated as exhibit D. This letter does not state that a new contract is inclosed, signed by the plaintiff, as per the offer of the defendant, and no new or corrected bill was sent the defendant. Exhibit D says: "Accept this letter as a part of your contract without affecting the rights of either party other than is expressed in this letter." This is an offer to amend the existing contract, and is not a new contract. This letter was produced as an agreement for a modification of the old contract. It does not conform to the offer of the defendant. As shown by exhibit C, that offer calls for a bill dating from the time the advertising started, and defendant at all times, after it was ascertained that the Journal and News would not print the plaintiff's advertisement, insisted upon the execution of a new contract. The contract sued on provided that, in case of default by the plaintiff to carry out the terms of the contract, the plaintiff would accept the goods returned at the full invoice price. It appears that the plaintiff defaulted, and was not able to carry out the advertising part of the contract as it had agreed; and the advertising part of the contract was never completed by the Lincoln Star; that plaintiff, though requested to take back the drugs, has at all times refused to comply

with its agreement. In view of these facts, that defense should have been submitted to the jury.

It is further contended that the verdict is not sustained by the evidence. It was alleged in the answer that the remedy in question was misbranded in that, it was said to contain 7 per cent. of alcohol, whereas it contained only 3½ per cent. of alcohol. The evidence of State Chemist Redfern, who is a graduate chemist of the University of Nebraska, shows beyond all question that the drug contained only 3½ per cent. alcohol. Mr. Ellis, a witness for the plaintiff, testified that he was a practical druggist; that, while he did not manufacture the compound himself, it was done under his direction; that he did not see the medicine compounded, but, according to his instructions and the manner in which the work was done, he was sure that it contained 7 per cent. of alcohol when it was billed out to the defendant. It is a significant fact, however, that plaintiff sent a letter to the defendant in which there was inclosed a bunch of labels to be pasted over the one upon each bottle stating that it contained $3\frac{5}{21}$ per cent. of alcohol. It also appears that the defendant was prosecuted by the state for having this misbranded article for sale in its store; that it was fined $10, and required to pay the costs of the prosecution; and it would seem that defendant was justified in refusing to further offer the drug for sale.

By the fifth instruction the jury were directed to find for the plaintiff in the sum of $699.91 with interest, unless they should find that the goods were misbranded. This instruction removed from the consideration of the jury the question of performance by the plaintiff, and in fact every other question except that of misbranding. On that question, we are of opinion that the evidence that the drug was misbranded was conclusive.

As we view the record, the case was not properly submitted to the jury, and for the errors complained of by the defendant, and discussed in this opinion, the judgment of

the district court is reversed, and the cause is remanded for further proceedings.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

LUCY BELLE CILEK, APPELLEE, V. NEW YORK LIFE INSURANCE COMPANY, APPELLANT.

FILED FEBRUARY 13, 1914. No. 18,275.

1. **Insurance Contract:** ENFORCEMENT. An insurance contract, where there is no uncertainty as to its meaning, and the same is legal and not opposed to public policy, will be enforced as it is made.
2. ———: CONSTRUCTION: DEFAULT. It was provided by the terms of a twenty-year endowment life insurance policy that at the end of the twenty-year accumulation period, which was June 13, 1919, if the premiums have been duly paid to that date, and not otherwise, the company will apportion to the insured his share of accumulated profits. The assured, having paid seven annual premiums, and having borrowed from the company the full amount of the reserve accredited to the policy, defaulted in the payment of his annual premium, and after the lapse of more than 30 days from the date of his default died. *Held*, That the beneficiary is not entitled to have indefinite and uncertain profits credited to such policy in order to keep it in force.
3. ———: VALIDITY. The insurance laws of the state of New York and the charter of the insurance company examined, and found to contain nothing which is in conflict with the terms of the insurance contract as written.
4. ———: NOTICE OF FORFEITURE: LAW GOVERNING. The provision of the insurance laws of the state of New York requiring notice to be mailed to the policy-holder in that state as a condition of forfeiture for nonpayment of premiums has no application to insurance contracts made in this state.
5. **Insurance:** LOAN ON POLICY: ESTOPPEL. In case the beneficiary has joined with the insured in the application for a loan upon the insurance policy, she cannot afterwards claim that the loan was made without her knowledge or authority.

APPEAL from the district court for Sheridan county WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

Switzler, Goss & Switzler, A. W. Crites and *James H. McIntosh,* for appellant.

Fisher & Rooney and *A. M. Morrissey, contra.*

BARNES, J.

This case is before us on a second appeal. When it was heard the first time, the plaintiff was Lucy Belle Rye, since that time she has remarried, and is now Lucy Belle Cilek. Our former opinion is found in *Rye v. New York Life Ins. Co.*, 88 Neb. 707, where the facts are fully stated, and therefore they will not be restated in this opinion.

When the mandate was returned to the district court, the plaintiff, instead of dismissing the case, filed an amended petition. The defendant amended its answer, and the plaintiff replied. The issues, however, were not materially changed. The cause was thereupon tried to the court without the intervention of a jury. There was a finding for the plaintiff, and a judgment was rendered against the defendant for $7,362.50, and the defendant has again appealed.

The only change of consequence in the petition is the allegation that at the death of the assured there had accumulated a profit to the credit of the policy in question in an amount sufficient to continue it in force until after his death, and therefore plaintiff was entitled to a judgment against the defendant. This allegation was denied, and the burden of proof to maintain that issue was on the plaintiff. To prove that fact the plaintiff produced the deposition of one Eldridge, who testified that on accumulations on the premiums actually paid by the assured and the company's statement as to its gain and loss exhibit from 1899 to 1906, both inclusive, of the proposition of loading used for expenses and the actual loading in its total business, and the ratio of the actual mortality in each year, to the expected mortality of that year, and the ratio of interest actually earned to the interest required to maintain the reserve, the value of the policy above the amount loaned to the assured was $194.63. But

on cross-examination the witness admitted that the reserve on June 13, 1906, was $1,365, and this was the exact amount of money which the assured had borrowed from the defendant company.

Plaintiff also produced the deposition of Horace S. Wiggins, a public accountant, who testified that, estimating the gain and loss, the value of the policy in question on June 23, 1906, over and above the reserve, was $195.40, which was a different amount than that testified to by the witness Eldridge. On cross-examination Wiggins testified that the reserve on this policy on June 13, 1906, was just $1,365. It thus appears from the testimony of plaintiff's own witnesses, as applied to the terms of the contract, that on June 13, 1906, when the assured defaulted in the payment of his annual premium, he had borrowed of the insurance company the entire amount of the reserve available for the purpose of continuing his policy in force; and by the terms of his contract, counting 30 days of grace, after June 13, 1906, the policy had lapsed, and the beneficiary was not entitled to recover in this action.

As was said in our opinion on the former appeal (88 Neb. 707), quoting from the policy itself: "'If any premium or interest is not duly paid, and if there is any indebtedness to the company, this policy will be indorsed for such amount of paid-up insurance as any excess of the reserve held by the company over such indebtedness will purchase according to the company's present published table of single premiums, upon written request therefor within six months from the date to which premiums were duly paid. Such paid-up insurance shall be payable either if the insured shall die before the termination of the endowment period, or if the insured shall then be living; or, if no such request is made, an insurance equal to the net amount that would at that time be payable under this policy as a death claim, will automatically continue for as long a period of time as any excess of the reserve held by the company over such indebtedness will pay for as a single premium for term insurance, according

to the company's present published rates, and no longer; but, if such excess of reserve, applied as a single premium for term insurance, be more than sufficient to continue the insurance to the end of the endowment period, and if the insured survives that period, the remainder shall be paid in cash at the end of said period.' * * * It is claimed, however, that at the death of the assured there was a surplus or profit to the credit of the policy, which continued it in force, and therefore the plaintiff was entitled to a judgment for the full amount named therein. The policy provides in express terms: 'If the insured is living on the 13th day of June, 1919, which is the end of the twenty-year accumulation period of this policy, and if the premiums shall have been duly paid to that date, and not otherwise, the company will apportion to the insured his share of the accumulated profits.' It appears that no surplus or profits could be ascertained or credited to this policy until the date of its maturity, which is the 13th day of June, 1919. Therefore plaintiff's claim to additional insurance upon this ground must fail." It will be seen that by our former decision this question was fully disposed of. That opinion is the law of this case, and we see no reason at this time to depart from what was there said.

The plaintiff contends, however, that the legislature of the state of New York passed an act in the year 1906, providing, among other things, that life insurance companies organized in that state should, within 60 days subsequent to the first of January of each year, cause an estimate to be made of the true state of affairs of the company, as near as may be, for the preceding year, which estimate shall be conclusive upon all persons entitled to share in any distribution of surplus which shall be made in accordance with the general provisions of law, either in cash or in reduction of premium on the reversionary insurance payable with the policy, on *the same conditions as therein expressed;* and that the defendant company, in compliance with that act, amended its charter, and therefore she was entitled to recover in this action. We find no provision of this law or the amended charter which in

any manner conflicts with the express terms of the policy on which this action is brought, or which requires us to change or modify its provisions. The reserve at the time of the lapse of this policy was $1,365, and precisely equaled the indebtedness of the assured to the company at that time. There is no uncertainty in the meaning of the insurance contract in this case. It is legal in all respects, and by its terms is not against public policy. Therefore it is the duty of the court to enforce the contract as made. *Imperial Fire Ins. Co. v. Coos County,* 151 U. S. 452; *Swarts v. Siegel,* 54 C. C. A. (U. S.) 399; *Dwight v. Germania Life Ins. Co.,* 103 N. Y. 341.

It is also contended by the plaintiff that by the laws of the state of New York the policy in question could not be forfeited without a notice to the beneficiary. But, as was said in our former opinion, that law only applies to persons residing in the state of New York, and has no extraterritorial force. By the terms of the policy in question it automatically lapsed for the nonpayment of the premium due June 13, 1906, in 30 days after that date.

Finally, it is claimed by the plaintiff that, while the assured borrowed the full amount of the reserve accredited to the policy, she never consented that he should do so, and therefore her rights have been invaded, that she is not bound by the acts of the assured, and is entitled to have the judgment affirmed. Answering this contention, it is sufficient to say that the plaintiff joined with the assured in making the written application for the loan on his policy, and she cannot now claim that she did not consent to the making of such loan, and this contention must fail.

It is suggested by plaintiff that the appellant's brief does not comply with the rules of this court, and ought not to be considered. Objections made to the form or matter of a brief made for the first time upon the final hearing will not be favorably considered by the court.

As we view this case, every question presented by this appeal was fully disposed of by our former decision in *Rye v. New York Life Ins. Co.,* 88 Neb. 707. No new facts are

contained in the record, and therefore the judgment of the district court is reversed and the plaintiff's action is dismissed.

REVERSED AND DISMISSED.

WILLIAM D. ABEL, EXECUTOR, APPELLANT, V. ALMIRA J. GILL ET AL., APPELLEES.*

FILED FEBRUARY 13, 1914. No. 17,550.

1. **Specific Performance:** SUFFICIENCY OF EVIDENCE. Findings of fact made by the district court examined and approved.
2. **Vendor and Purchaser:** CONTRACT: CONSTRUCTION. Contract set forth in the opinion *held* to be an executory contract of sale and not a mere option.

APPEAL from the district court for Merrick county: GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

W. T. Thompson and *Martin & Bockes,* for appellant.

E. E. Ross and *Reeder & Lightner, contra.*

LETTON, J.

This action is brought by the assignee of the contract hereinafter set forth to specifically enforce its terms. She afterwards died, and the action was revived in the name of her executor. The defendants plead that the land described in the contract is their family homestead; that they are aged and in feeble health; that Robert Gill is unable to read or write, and Almira J. Gill by reason of defective eyesight can only read with great difficulty, and that neither are familiar with the transaction of business; that on the evening of July 28, 1909, George Beardsley and James Wolfe came to their home; that defendants offered to sell their land for $60 an acre, and Beardsley and Wolfe agreed to purchase at that price, informing defendants that Wolfe was to be the purchaser; and that a written agreement was prepared which the defendants

*Modified. See opinion, p. 285, *post.*

were unable to read, and, believing the statements of Wolfe and Beardsley, they attached their signatures to the paper. They deny that they executed and acknowledged the instrument set forth in the petition, and aver that as soon as they learned that the instrument provided for a consideration of $9,000 instead of $9,600 they repudiated it and offered to return the $100 paid to them; that the plaintiff was aware of these facts before she took the assignment.

The district court found, in substance, that the property was the family homestead, that the defendants duly signed, executed, acknowledged, and delivered the written contract sued upon to Wolfe; that the consideration actually agreed upon was that stated in the contract; that the defendants were paid $100, which they retained, and in January, 1910, tendered back to Wolfe, and that at such time the defendants knew that the contract had been assigned to Susan M. Abel; that Mrs. Abel paid $1,500 for the assignment; that she, afterwards, was notified that defendants repudiated the contract, would not perform its terms or conditions, and would not receive any further money as payment upon the same, and that she was thereby relieved from the obligation to tender strict performance; that Mrs. Abel was at all times prior to her death ready, able and willing to fully perform all the terms and conditions of the contract, and has tendered full performance. The court also made the following findings of law: "Eighth. That the contract sued upon is, in legal effect and construction, an option contract selling only the right to purchase, and is not a contract of purchase and sale of land. Ninth. That the defendants in making and entering into such contract did not know or contemplate that they were making and entering into an option contract selling only the right to purchase this land, but in so doing did contemplate and intend thereby to make and enter into a contract of sale and purchase, and the contract sued upon herein is therefore not the contract of these defendants and ought not therefore to be enforced in equity." A decree was then

entered canceling the contract upon the defendants paying $100 with interest into court and dismissing plaintiff's action. Plaintiff excepted to the eight and ninth findings, and to the judgment, and brings this appeal.

The matters actually put in issue by the pleadings and the evidence were: (1) Whether the consideration actually agreed upon was expressed in the contract; (2) whether the contract was duly acknowledged; (3) whether the contract in evidence was the identical paper which had been signed by the defendants.

The evidence shows that the defendants were owners of a farm which originally consisted of 160 acres. The right of way of the Union Pacific Railroad Company ran diagonally through the land, taking about ten acres. The defendants testified the price they agreed to take for the land was $60 an acre, or $9,600, and that they understood that Wolfe was willing to buy at that price and that the contract was for that amount. They further testify that no acknowledgment was taken. The contract price is not shown to have been so disproportionate to the value of the farm as to raise any presumption of fraud. A day or two after the contract was signed the defendants told a neighbor they had sold the farm for $9,000. They were given a copy of the contract about August 12, 1910, and several months afterward they held a sale of the personal property on the farm and negotiated for a house and a small tract of land for a home. It was shown that, while Mr. and Mrs. Gill were over 70 years of age, Mr. Gill had always conducted his own business affairs with the help of his wife when any correspondence was required; that Mrs. Gill was in poor health, but no mental failure or infirmity is shown. There is a direct conflict upon almost every material point in the case. In such a controversy the observation of the living witness often determines in the mind of the court the truth or falsity of his story, and we are disposed to give consideration to its judgment in this respect. Taking the testimony as a whole, we believe the district court was warranted in its finding of facts.

Whether the conclusions of law can be supported is a more serious question. The contract is as follows: "In consideration of the sum of one hundred dollars in hand paid receipt whereof is hereby acknowledged, the undersigned Almira J. Gill and Robert Gill, her husband, hereby grant, bargain, sell and agree to convey to James Wolfe, or assigns, following described real estate, to wit: The southeast quarter (S. E. ¼) of section two (2), township fourteen (14) north, of range five (5) west of the 6th P. M., situated in Merrick county, Nebraska. The said James Wolfe shall have until the first day of January, 1910, and March 1, 1910, within which to pay the remainder of the consideration of said land, which is as follows: Nine hundred dollars ($900) on January 1, 1910, four thousand ($4,000) March 1, 1910, and the balance $4,000 in notes of even date with the deed maturing March 1, 1913, to be secured by first mortgage on said land, said notes to bear interest at the rate of 6 per cent. per annum from date. The undersigned also hereby agree to furnish a good and sufficient abstract showing perfect title to be in Almira J. Gill. Should said Wolfe fail or refuse to fulfil this contract, the amount this day paid is to be forfeited to the undersigned as liquidated damages. Signed this 28th day of July, 1909. Witness to all signatures: George Beardsley.

Almira J. Gill.
Robert Gill.
James Wolfe."

The judgment of the district court is based upon the proposition that the contract is an option contract and not one of bargain and sale, and that defendants did not so understand it. Of course, an option contract, if fairly entered into and its conditions performed, may be specifically enforced. But is this an option contract? It is an elementary rule in the construction of contracts that the construction given to a contract by the parties themselves will ordinarily be given to it by the courts. Another principle is that, in construing a contract, a construction which will make it binding and operative will

be preferred to one which would make the contract void. *Shuman v. Willets,* 17 Neb. 478.

We agree with the trial court that it was the intention of the parties to enter into a contract of bargain and sale. The only objection made to the contract by the defendants until after suit was begun was that it should have been for $9,600, $60 an acre for the whole 160 acres, instead of $60 per acre, or $9,000, for the 150 acres exclusive of the right of way. The assignee of the contract has been at all times, ready and willing to perform the contract according to its terms, but the defendants refused to perform unless the $600 additional to the amount specified was paid to them. The vendee entered upon the land and plowed about 28 acres by oral agreement, as he testifies, and defendants were given the privilege of using firewood from the place. The contract has evidently been considered by both parties at all times as a contract of purchase and sale and not as a mere option.

Aside from these considerations, we are of opinion that there is mutuality in the contract, and that it does more than grant a mere option to purchase. By its terms defendants "grant, bargain, sell and agree to convey" the land described therein. The language is that of a sale of the property with a condition subsequent that the price shall be paid, and not that of a sale of the mere privilege of buying the property. The $100 paid down and the $900 to be paid on the 1st of January is in consideration of the sale, and not until the subsequent condition that the sum of $4,000 is to be paid and a $4,000 note secured by mortgage given is the agreement to convey to be complied with. If an actual deed of conveyance had been made with the provision in a written paper signed by both parties that "Wolfe shall have until the 1st of January, 1910, and March 1, 1910, to pay the remainder of the consideration," could it with any reasonable basis be said that an obligation did not arise on the part of Wolfe to make the specified payments? The mere fact that the contract provides that if Wolfe fails to fulfil the contract the amount paid is to be forfeited as liquidated damages is not of much importance. Upon a de-

fault by Wolfe the defendants might declare the contract at an end and retain that portion of the purchase money, but it was at their option whether they would do so or would insist upon the terms of payment specified.

It is undisputed that before the 1st of January the Gills had knowledge of the assignment and notified the assignee that, unless $600 was paid in addition to the $9,000, they would not accept any more money or recognize the contract in any way. On the 3d of January the $900 was taken to defendants' residence in the attempt to tender it, but, suspecting this, they refused to answer the door or to communicate in any way with Mrs. Abel or her husband. Time was not made of the essence of the contract, and a reasonable performance is all that was necessary. Pomeroy, Specific Performance of Contracts (2d ed.) secs. 387, 388; note to *Wells v. Smith,* 31 Am. Dec. 274 (7 Paige Ch. (N. Y.) 22). We think sufficient tender has been made. There can be no objection raised as in *Rice v. Gibbs,* 40 Neb. 264, to the mortgage to secure the deferred payments being made by a third party, for two reasons: First, the contract runs to Wolfe, or his assigns; second, the date of the final payment of the note to be secured by the mortgage is long since past, so that the payment of the money with interest must be made before the defendants can be required to convey. Of course, unilateral option contracts for the sale of real estate made upon a sufficient consideration will be enforced in equity if there is no good reason for refusing the relief, and it is really immaterial as to the defendants' duty to perform whether the contract was mutual or unilateral. But this is not the reason for our decision, as we prefer to place it upon the reasons stated. Even if the contract were unilateral at first, as held by the district court, its conditions became absolute and mutual as soon as its terms were accepted. *Johnston v. Trippe,* 33 Fed. 530. A case the converse of this in some respects is *Lenman v. Jones,* 222 U. S. 51, where it was held the vendor was not relieved from a contract to sell because he thought it was an option.

Apparently Mrs. Abel and her representatives have acted in entire good faith in the matter, even to the extent of offering to submit to the demands of defendants made at the time they first repudiated the contract, in order to avoid this litigation.

Under the findings of fact made by the district court, we are of opinion that Mrs. Abel was entitled to specific performance and that her legal representatives, whether by will or descent as the case may be, are equally so entitled, upon compliance with the terms of the contract.

The judgment of the district court is therefore reversed and the cause remanded, with directions to grant the relief prayed.

REVERSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

The following opinion on motion for rehearing was filed May 29, 1914. *Former opinion modified:*

LETTON, J.

To avoid a possible misapprehension, suggested by the appellee in the brief on motion for rehearing, the directions to the district court are modified so as to read, "with directions to specifically enforce the contract upon full compliance with its terms, except that the right of way of the Union Pacific Railroad Company across the land shall not be included in the conveyance."

In other respects the opinion and judgment of this court is adhered to, and the motion for rehearing is

OVERRULED.

SEDGWICK, J., not sitting.

CARL W. BOELTER, APPELLANT, V. GEORGE G. WILLIAMSON, APPELLEE.

FILED FEBRUARY 13, 1914. No. 18,251.

1. **Intoxicating Liquors: LICENSE: PETITION.** In a village where there are less than 60 resident freeholders, a majority of the resident freeholders of the village must sign a petition for a license to sell intoxicating liquors in order to authorize the village board to grant the same. Rev. St. 1913, sec. 3869.

2. ———: ———: ———. The fact that one or more of such freeholders is disqualified to sign a petition for the issuance of a license can have no effect to waive or modify this statutory requirement, and, when there are 58 resident freeholders in a village, such a petition signed by 29 resident freeholders is insufficient to authorize the granting of a license.

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

C. S. Aldrich, for appellant.

Matthew Gering, contra.

LETTON, J.

Appeal from a judgment of the district court affirming the action of the board of trustees of the village of Murdock in issuing a license to applicant George G. Williamson. The petition for license is signed by 30 persons. A remonstrance was filed, which denied that the signers of the petition are resident freeholders of the village, that the petition is signed by the requisite number of freeholders and alleged that the applicant has violated the liquor law by permitting the windows and doors of the saloon conducted by him in the village for the past year to be obstructed.

We are satisfied that the evidence does not support the charge that the applicant kept the windows and doors of his saloon obstructed, and that the real question in the case is whether the petition is signed by the requisite number of freeholders. The applicant claims that there are only 57 *bona fide* resident freeholders in the village, while the remonstrant insists that there are 62. There are 30 signers upon the applicant's petition. One of them is the wife of the applicant, and, as we held in *Powell v. Morrill,* 83 Neb. 119, is not qualified to sign a petition for the issuance of a license to her husband. This leaves 29 qualified petitioners. The village board and the district court found against the remonstrant upon the contention as to whether there were 62 *bona fide* resident freeholders of the village. Whether this conclusion is sound is really

immaterial, because upon the showing made by the applicant there is still a lack of qualified petitioners.

Much of the evidence produced to establish the number of resident freeholders in the village and the qualifications of the signers of the petition is incompetent, and, if tested by the rules laid down in *Starkey v. Palm,* 80 Neb. 393, *Batten v. Klamm,* 82 Neb. 379, and *Rosenberg v. Rohrer,* 83 Neb. 469, would not authorize the granting of a license. The evidence as to Mrs. Williamson is of the same defective character, but, assuming for the argument that the proof is sufficient and competent as to all (except the four whose deeds were placed upon record between hearings), the number of petitioners is still insufficient. The statute requires that the petition be signed by a majority of the resident freeholders. The whole number of freeholders is taken as the basis of computation, regardless of whether each is qualified to sign a petition or remonstrance or not. The applicant himself, or the respective members of the village board, though not qualified to sign the petition, may each constitute a freeholder in the village, and must be taken into account in ascertaining the number of *bona fide* resident freeholders therein. The status of being a resident freeholder is all that must exist in order to his enumeration. And so with the applicant's wife, if she is a resident freeholder she must be counted. The fact that she is not qualified to sign the petition can have no effect upon her status or qualification as a freeholder, since no such exclusion is made by the statute. Without Mrs. Williamson's name there were only 29 qualified signers to the petition, and, since there were 58 *bona fide* resident freeholders in the village, the petition did not bear the signatures of a majority. The margin is narrow, but it exists, and we must follow the statute.

The village board was without power to issue the license, and the judgment of the district court is

REVERSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

HENRY C. RADBRUCK, APPELLE, V. FIRST NATIONAL BANK OF OMAHA, APPELLANT.

FILED FEBRUARY 13, 1914. No. 17,530.

1. **Homestead: SALE: JUDGMENT LIEN.** A purchaser of a homestead of the net value of not to exceed $2,000 takes the same free from the lien of a judgment docketed prior to such purchase and during the existence of the homestead right.
2. ———: CONVEYANCE: ESTATE CONVEYED. A warranty deed conveying a homestead, which is duly executed and acknowledged by both husband and wife, passes all the interest of the grantors therein, including the estate of homestead, although that particular estate is not specifically mentioned in such deed.
3. ———: ———: QUIETING TITLE: ESTOPPEL. A statement by a purchaser of real estate, which at the time of purchase was a homestead, subsequent to his purchase of the same, to the holder of a judgment against his grantor, that had he known of the judgment he would not have purchased the property, does not estop him from subsequently denying the validity of the judgment and proceeding in equity to quiet his title against the same.

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

Duncan M. Vinsonhaler, for appellant.

McGilton, Gaines & Smith, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county, to restrain defendant from selling lots 6 and 7, in block 1, in Lake View Addition, in the city of Omaha, or from levying execution thereon for that purpose, and to quiet plaintiff's title against any and all claims of defendant bank against the property described, by virtue of a certain judgment which it had obtained against plaintiff's grantor. The district court entered a decree as prayed, and defendant bank appeals.

The petition alleges that plaintiff purchased the lots in controversy August 6, 1908, from one Henry A. Wilson; that at the time of such purchase Wilson and his wife and family were occupying the premises as their homestead; that the gross value of the property was $2,700, upon which there was a mortgage of $1,200; that

plaintiff paid Wilson for the property $1,500, which it is alleged was the fair and full value of the property at that time, and assumed and agreed to pay the mortgage for $1,200; that the mortgage was executed September 17, 1906; that in the month of February, 1907, defendant bank obtained a judgment against Henry A. Wilson in the district court for Douglas county for $1,950; that on May 20, 1911, defendant caused an execution to be issued and a levy to be made upon the property described; that the property was about to be offered for sale under such levy, to satisfy the judgment of the bank; that at the time of the rendition of the judgment and for a long time prior thereto Wilson, with his family, had occupied, and at the time of the sale to plaintiff was occupying, the property as a home and the same constituted his homestead; that by reason of this fact the judgment referred to was not a lien upon the property; that if the property be sold under the execution the same will constitute a cloud on the title. The defense relied upon here is stated by counsel in his brief thus: "Plaintiff alleged that the lots in controversy at the time of his purchase and at the time of the judgment were the homestead of Wilson. The defendant denied this and claimed that Wilson was the only party who could make the claim of homestead, and alleged that, before the bank issued execution and caused the levy to be made, plaintiff had stated that, had he known of the bank's judgment, he would never have purchased the property, and that, having taken this position, the bank altered its position in reliance thereon; that the plaintiff was therefore estopped from claiming that the property was a homestead, and thus shifting his position."

The evidence is undisputed that at the time the bank obtained its judgment Wilson, with his family, was occupying the property in controversy, consisting of two lots, as a homestead; that he did not own any other contiguous property; that the value of the property over and above the mortgage was less than $2,000; that he continued to occupy it as a home and was so occupying it at

the time of the sale to plaintiff; that when the sale was consummated Wilson with his family moved out, and on the same day plaintiff with his family moved in. These facts clearly establish the homestead character of the property in Wilson at the time of the sale to plaintiff. Such being the fact, defendant's judgment was not, at the time of the sale, a lien upon the property. A judgment while the premises are impressed with the homestead character is not a lien thereon, even after their sale and abandonment by the debtor. *Horbach v. Smiley,* 54 Neb. 217. A purchaser of real estate consisting of not more than two town lots, held and occupied at the time of the conveyance as the homestead of the grantor, and which do not in the aggregate exceed in value the sum of $2,000, takes the same free from the lien of a judgment docketed prior to such purchase, but during the existence of the homestead right. *Giles v. Miller,* 36 Neb. 346; *Corey v. Plummer, Perry & Co.,* 48 Neb. 481; *Bank of Bladen v. David,* 53 Neb. 608; *Hoy v. Anderson,* 39 Neb. 386.

But, it is contended in effect, the deed from Wilson and wife to plaintiff did not convey or assume to convey the homestead. The deed recites that the property described is sold "together with all tenements, hereditaments and appurtenances to the same belonging, and all the estate, title, dower, claim or demand whatsoever of the said Henry A. Wilson and Mary A. Wilson of, in or to the same, or any part thereof." Then follow the usual covenants of warranty. This deed conveyed all interest of every kind which the grantors or either of them had in the property conveyed. Comp. St. 1907, ch. 73, sec. 50. The contention that Wilson was the only party who could make the claim of homestead is not sound. All the plaintiff is asserting is, that at the time he bought the property from Wilson the bank's judgment was not a lien upon the property because of the fact that at that time and at the time the judgment was obtained Wilson had himself impressed the homestead character upon it. What Wilson may have done after selling the property

free from the lien of the judgment, in the way of establishing another home elsewhere, is immaterial.

The next contention is that plaintiff is estopped from claiming that the property was the homestead of Wilson at the time of plaintiff's purchase. This estoppel is sought to be based upon the fact that, after plaintiff had purchased the property and had gone into possession of the same, a collector for the bank called upon plaintiff, told him that he represented the bank, and asked what was done about the judgment at the time plaintiff bought the place "or what was said about it;" that plaintiff said he knew nothing of the judgment, that the representative of the loan association that held the mortgage told him that the title to the place was clear, and said to defendant's collector that he would not have bought the property had the fact of the judgment been brought to his attention. It is said by counsel that, after this statement by plaintiff, defendant, relying upon what plaintiff had said, "altered its position, incurred the cost of issuing execution, making the levy, advertising the sale, and employing attorneys to protect its interests;" and it is argued that these facts bring the case within the rule, oft repeated by this court, that, "where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped, after litigation has begun, from changing his ground and putting his conduct on another and different consideration." *Frenzer v. Dufrene,* 58 Neb. 432. We cannot agree with counsel that this rule has any application to the facts here. What plaintiff said, when approached by the bank's collector, falls far short of being a recognition of the validity of the judgment or a waiver of his right to dispute such validity. It amounts to no more than a declaration that if he had known of the judgment he would have avoided the possibility of his becoming involved in litigation, by refusing to purchase the property. The rule invoked does not apply.

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

BARNES, ROSE and SEDGWICK, JJ., not sitting.

JAMES MCMARTIN V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1914. No. 18,109.

1. **Bribery**: PUBLIC OFFICER. A county attorney is a public officer within the meaning of section 176 of the criminal code.
2. **Criminal Law**: INSTRUCTIONS. Instruction No. 2 examined, and set out in the opinion, *held* not prejudicially erroneous.
3. **Bribery**: SUFFICIENCY OF EVIDENCE. Evidence examined, and set out in the opinion, *held* sufficient to sustain the verdict.
4. **Criminal Law**: INSTRUCTIONS: COMMENT OF COURT. Upon concluding its charge to the jury, the trial court in the hearing of the jury announced: "The instruction asked by defendant is refused." *Held* not prejudicial error.
5. ———: MISCONDUCT OF PROSECUTING ATTORNEY: EXCEPTION. The rule is settled in this state that misconduct on the part of a prosecuting attorney in the trial of a case or in his argument to the jury must be objected to and exception taken to the ruling of the court in order to obtain a review in this court.
6. ———: INSTRUCTIONS. The rule announced in *Keezer v. State*, 90 Neb. 238, in relation to a cautionary instruction as to the testimony of officers, whose duty it is to pursue, arrest and prosecute criminals, reaffirmed.
7. ———: EVIDENCE: MOTION TO STRIKE. A motion to strike an entire answer of a witness "as hearsay and not responsive" is properly overruled where a separate and distinct part of the answer is not vulnerable to the motion.

ERROR to the district court for Sarpy county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

A. E. Langdon, for plaintiff in error.

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

FAWCETT, J.

Defendant was convicted in the district court for Sarpy county of the crime of attempting to bribe the county attorney of that county. From such conviction he prosecutes error to this court.

For the sake of brevity plaintiff in error will be designated in this opinion as defendant. The several errors argued for reversal will be considered in the order in which they appear in defendant's brief.

1. "The indictment did not contain statements sufficient to constitute a cause of action." This point is not argued and will not be considered.

2. Section 176 of the criminal code "is void because of indefiniteness, and does not include or refer to a prosecuting attorney, or any attempt to bribe such officer." The argument upon this point is that the law is void as to the matter of attempting to bribe a county attorney, in that it does not point out what officer, if any, is intended to be referred to; that section 176 "refers to 'county officer', not 'a county officer.'" We are unable to grasp the distinction. Section 176 provides: "Every person who shall offer or attempt to bribe a public officer and every public officer who shall solicit a bribe or who shall propose or agree to receive a bribe in any case shall be fined in a sum not exceeding five hundred dollars ($500) nor less than three hundred dollars ($300) and shall be imprisoned in the penitentiary for the period of one year." If a county attorney is a public officer, which is too plain to admit of a doubt, he is included within this section of the criminal code.

3. "The court erred in giving instruction No. 2." Instruction No. 2 is a literal quotation of section 176 of the criminal code. The objection to the instruction is that the court should not have included that part of the section which provided that "every public officer who shall solicit a bribe or who shall propose or agree to receive a bribe in any case shall be fined," etc. It is said that there was no evidence on which to base this portion of the instruction; that it was sufficient to instruct the jury on the law as to offering or attempting to bribe a public officer; that the inclusion of the language last above quoted had a tendency to confuse the jury; that the jury may have conceived the idea "that Judge Begley, a popular officer, elected by the people, may have been accused of

having solicited a bribe, or having proposed or agreed to receive a bribe, and for the purpose of protecting him from blame it became essential to convict the defendant." We do not think the instruction could have had this effect, and we cannot say that it was erroneous.

4. "The verdict is contrary to the evidence and is not sustained thereby." The evidence against the defendant consisted largely of the testimony of the county attorney, corroborated to some extent by the testimony of Mr. Chase, who held the office of sheriff. The evidence shows that the offices of the sheriff and county attorney were in adjoining rooms in the courthouse; that on the day alleged the defendant called at the courthouse to see Mr. Begley, the county attorney. At the time he called, Mr. Begley was in his office, but was engaged in conversation with the county attorney of Saunders county; that defendant took a seat in Mr. Chase's office to wait until he could have an interview with Mr. Begley; that while in Mr. Chase's office he said he wanted to see the county attorney; to quote Mr. Chase's language: "He said he wanted to see the county attorney—see him alone so his word would be just as good as the county attorney's." When Mr. Begley's visitor departed defendant was admitted. Mr. Begley testified: "Mr. McMartin came into my office, and he said, 'I have come to see you about a matter, and I am going to talk plain.' He says, 'There has been all kinds of rumors down in Fort Crook as to what you are going to do, what you are going to do when you got in, and I came up to see you. We are all up in the air. There are reports down there that you have got the dope on all of us.' I said, 'Mr. McMartin, I have the dope on all except you. I have sent a man down there, and have found out about everybody else, but I haven't anything against you.' Mr. McMartin said, 'I am glad of that. I have been arrested once, and just finished paying the fine.'" He further testified that, when defendant asked him what he was going to do, he answered: "I said, 'You know what the law is with reference to selling at Fort Crook, with reference to selling within two and a half miles of a

military post.' He says, 'We know that.' I said, 'That is all the advice on the matter I can give you.' He says, 'Would you let me get by for $150 a month.' I said, 'No, sir; I wouldn't let you get by for any amount.' He says, 'You can go down there and find out my reputation, and that I have always run a good place down there.' He says, 'We can't sell unless we have some protection.' I stated that I would make no arrangements with him; that I didn't consider they were entitled to run, and if I got the evidence on him I would surely prosecute him, and if he continued to run I would get the evidence." He further testified: "After I told Mr. McMartin that I refused to take anything, he said, 'You are a fool if you don't get it. Everybody gets it. There is nothing in this office except the money, and you might just as well get the money. The people down there all want saloons, and there will never be anything said.' He said, 'All you have to do is just to let us go by, and nobody will ever bother you if you don't bother us.' * * * I said, 'When I went into office I knew what the salary was. If I don't like the salary I can resign.' * * * We then talked further about some matters, and finally he returned to the subject. He said, 'You take this $150 a month and don't be foolish about it. Nobody will ever know anything about it. All we are after is the money anyway. These fellows want their beer, and we consider the law isn't good down there.' I said, 'No, sir; I refuse to take any money, and don't want to hear any more of the proposition. You have got to obey the law if you don't want to get into trouble.' Mr. McMartin then started to go, and he said, 'Come down and have a drink with me.' I said, 'No; I am busy and don't care for anything.' He said, 'Come down and have a cigar.' And I said, 'I don't care for any.' As he started to go by the desk, he reached down in his pocket and pulled out a purse and opened it. When he opened it I saw that it contained a good deal of gold. He pulled out a five-dollar gold piece and threw it on the desk. He said, 'Take this and have a good treat on me.' I said, 'No; take your money, you don't owe me anything. I haven't ren-

dered you any service.' He said, 'Go ahead and take it.' I said, 'No; come back and get your money, it is your money.' He walked out and left the money lying there on the table." This testimony is in part contradicted by defendant, and the $150 a month attempted to be explained by his testimony that what he was seeking was to have some arrangement made by which he and others, who were selling around Fort Crook, might pay a certain stipulated amount in the way of fines and thus avoid prosecution. He testified: "I says, 'Ain't there some way where they can be fined and let them run?' I said, 'The farmers like a glass of beer when they come to town.' I says, 'Ain't there some statute where they can be fined, and still keep going?' 'No;' he says, 'there ain't.' I says, 'I understand down in Iowa they have got a law where they can be fined;' and he says, 'They have got a different law in Iowa. There is no such law in the state of Nebraska.' I says, 'If there is no such law in Nebraska, there is no use talking about it; let's quit talking about it; and we sat down and talked on general topics; never said nothing about that transaction. I had bothered him talking with him so long that I felt kind of foolish, and I said, 'Begley, come down and have a cigar.' He says, 'I haven't got time.' I stuck my hand down in my pocket, and I thought I gave him a quarter, but he claims I gave him a five-dollar gold piece; the transaction was all over; the talk was all over; there was no dickering afterwards. I got up and walked out of the door."

In connection with this assignment we will consider defendant's assignment that the court erred in admitting in evidence the five-dollar gold piece above referred to. It is argued that it was not shown that this money was given for purposes of attempting to bribe; that Judge Begley himself stated that it was given for purposes of treating; that the sum was insignificant, and when the larger sum was not considered there could be no presumption that the insignificant sum was left for an illegal purpose. We do not think the court erred in admitting the gold coin in evidence. The jury had a right to determine

the probability of defendant's having done the improbable thing of throwing out a five-dollar gold piece, thinking it was a "quarter." Moreover, the testimony of Mr. Begley was that defendant took the five-dollar gold piece out of a purse containing a large quantity of gold. The leaving of the gold coin on Begley's desk over the latter's protest was so closely connected with the offer of $150 a month as to make it a part of the same transaction, and would tend strongly to show that defendant realized that he had made a mistake, had approached the "wrong man" with his offer of a bribe, and that he was endeavoring as he left to mollify "his man" with a liberal treat. Taking the testimony, therefore, as a whole, the defendant's declaration in advance to Mr. Chase that he wanted to talk to the county attorney alone, so that his word would be just as good as that of the attorney, the unqualified testimony of Mr. Begley as to the offer of the bribe, his unqualified denial of the testimony of the defendant that defendant's talk was along the line of paying a stipulated fine similar to the Iowa law, and the gold coin episode at the end of the interview, were sufficient to satisfy the jury, as it has us, beyond a reasonable doubt, that the defendant was guilty.

5. The next complaint is that, when the court had finished reading its charge to the jury, it announced to counsel in the presence and hearing of the jury the following language: "The instruction asked by defendant is refused." This did not constitute reversible error, nor does *Jones v. State,* 87 Neb. 390, cited by defendant, so hold.

6. It is next urged that the case should be reversed because of remarks made by Attorney W. R. Patrick, who was conducting the prosecution, in his closing argument to the jury. No objection was made to the language at the time it was used, nor any ruling of the court requested. The only objection appearing in the record is in the motion for a new trial, and in the affidavit of defendant's counsel in support thereof, which recites that Mr. Patrick in his closing argument "uttered the following language

with a great deal of force, viz.: 'It is your duty to return a verdict of guilty, and, if not, it is (or will) be your duty to make a report to the court that Judge Begley is guilty of perjury, and recommend that the matter of his perjury be presented to the grand jury of Sarpy county,' or words almost identical, and to that full effect." We have frequently held that misconduct must be objected to and exception taken to the ruling of the court before it will be considered in this court. *Bradshaw v. State,* 17 Neb. 147; *McLain v. State,* 18 Neb. 154; *Hill v. State,* 42 Neb. 503; *Catron v. State,* 52 Neb. 389; *Connolly v. State,* 74 Neb. 340; *Goldsberry v. State,* 92 Neb. 211. In *Clark v. State,* 79 Neb. 482, we held: "It is only in the most flagrant cases of the use of improper language by a prosecuting attorney, even in the prosecution of capital offenses, that defendant's counsel can apparently acquiesce in the language used by remaining silent until the trial is finished, and then cause the trial and verdict to be set aside by complaining of statements to which he seemed at the time to consent." Even if it were to be conceded that the language of Mr. Patrick was somewhat outside of the pale of legitimate argument, we cannot say that it was such a flagrant case of the use of improper language as to call for a reversal under the circumstances shown.

7. It is next argued that the court erred in refusing the only instruction tendered by defendant. The instruction reads: "The jury are instructed that, in considering the testimony of an officer, or officers, whose duty it is to pursue, arrest, and prosecute criminals, you should consider it with caution, because of the tendency of such officers to hear and remember those portions of conversations and evidence against the defendant, and not hear or remember such portions as may be in favor of the defendant." This instruction was properly refused for two reasons: (a) Mr. Chase was not testifying as to anything which occurred at a time when he was acting in his capacity as a sheriff. He was simply testifying, as an ordinary citizen, to a conversation had with the defendant prior to the time the crime was committed. (b) In

Keezer v. State, 90 Neb. 238, we distinctly held that the rule announced in the proposed instruction "will not ordinarily apply to a county attorney, a sheriff, or to his deputy."

Finally, it is argued that "the court erred in not striking out Mr. Begley's answer to question No. 129, which follows No. 131." Counsel has these two questions transposed. On cross-examination counsel for defendant, by question No. 129, asked Mr. Begley: "Didn't you tell Mr. Rushart you had sent down six or seven times to catch Mr. McMartin, to get evidence against him, but failed to do it? A. When and where? (130) Q. Along about this time? A. No; I don't recall of having told Mr. Rushart that. (131) Q. Along about the time you sent Mr. Hamilton down there? A. No, sir; I don't recall of telling anybody about sending any one down there. Since the day Mr. McMartin was at my office, I remember Mr. Rushart's coming up there and telling me that he heard a conversation over the 'phone where Mr. McMartin was coming up to offer me money. MR. LANGDON: I move to strike the answer out as hearsay and not responsive. THE COURT: Overruled. Exception." In this ruling the court did not err. The motion is to strike the entire answer. The first sentence was clearly responsive to counsel's question, and not hearsay; hence, the motion was bad and was properly overruled. Moreover, since counsel had asked Mr. Begley about a conversation with Mr. Rushart, it was not an abuse of discretion for the court to permit an answer to remain in the record which told what the conversation actually was that he had had with Mr. Rushart.

AFFIRMED.

SEDGWICK, J., not sitting.

HAMER, J., dissenting.

1. I am not able to concur in the majority opinion, although quite willing to concede its plausibility and strength of argument. I conceive it to be the duty of this court to grant a new trial in a criminal case where it is

apparent that the trial has been unfair, and that the defendant in the case has been prejudiced by the fact of such unfairness. The defendant was charged with attempting to bribe a public officer, the county attorney of Sarpy county. Section 176 of the criminal code, under which the defendant was prosecuted provides: "Every person who shall offer or attempt to bribe a public officer (and every public officer who shall solicit a bribe or who shall propose or agree to receive a bribe in any case) shall be fined in a sum not exceeding five hundred dollars ($500) nor less than three hundred dollars ($300) and shall be imprisoned in the penitentiary for the period of one year." The part of the section which I have included in parentheses relates to the public officer who *solicits a bribe or proposes to receive one.* It was enough for the court to have quoted that part of the section relating to an *attempt to bribe* a public officer, and it was wholly unnecessary to encumber the jury, and perhaps confuse it, with that part of the section which I have included in parentheses. The danger was that the jury, fancying there was an issue between the county attorney and the defendant, might deem it necessary to find the defendant guilty in order to express their faith in the county attorney. Of course, the county attorney and the defendant were to some extent arrayed against each other concerning just what was said; and, when the trial judge put *foreign matter* into his charge which tended to create an issue between the county attorney and the defendant, it must have been calculated to confuse the jury as to what was the *real* issue. This was further aggravated by what the able and zealous prosecutor, Mr. Patrick, said. He was *specially* appointed to prosecute. It is undisputed that he said to the jury: "It is your duty to return a verdict of guilty, and, if not, it is (or will) be your duty to make a report to the court that *Judge Begley is guilty of perjury,* and recommend that the matter of his perjury be presented to *the grand jury of Sarpy county.*" It is easy to imagine the florid and forensic force which accompanied this impassioned outburst. It was a "foul" in the contest which cannot be

justified. The legal game should be fair, always fair. The jury could not help being influenced by the judge and the prosecutor co-operating together; the one instructing the jury on a subject which did *not come before them,* that is, telling what the penalty might be for the one who *solicited the bribe,* and the prosecutor emphasizing the idea that it was their *duty,* if they *failed to find the defendant guilty, to report the case to the grand jury against Begley.* It is said in the majority opinion that that sort of misconduct must be objected to and exception taken to the ruling of the court at the time it is made or that it will not be considered by this court. I do not think the rule is uniform; but the better authorities give a new trial if the misconduct is likely to have done an injury. It should be remembered that, if counsel for the defense should arise in court to object, he does so at the risk of the prosecutor saying: "I told you so. That is where the shoe pinches." As certainly as counsel object, just so certainly they hurt their case with the jury, and counsel for the state should not be allowed to burden the defense with the task of making an objection which is certain to injure the defendant. A technical rule which tolerates the mistreatment of the prisoner in the presence of the jury deserves no defense. And to maintain the right to put a burden on the defendant which is sure to injure him whatever course he pursues seems to the writer indefensible and cruel. It is like throwing stones at one who is swimming for shore.

In *Carr v. State,* 23 Neb. 749, the present chief justice, delivering the opinion of this court, said: "It cannot be believed that, in this advanced age of our jurisprudence, any court could be found who would permit such conduct, without visiting the severest penalty of the law upon the parties indulging in such actions. It matters not how guilty a defendant may be of crime, our constitution and laws guarantee to him a fair trial."

In *Leahy v. State,* 31 Neb. 566, the defendant was on trial for rape, alleged to have been committed on one Lizzie Schultz. On cross-examination the defendant was asked if on the day succeeding that on which it was al-

leged he committed the crime he did not go to the residence of one B, and, there finding the daughter of B. alone, he did not attempt to drag her to a lounge. And counsel then said to the court, in the presence of the jury: "'We intend to follow this matter up, and show that he went right over to B.'s, and there tried to kiss and hug Miss B. and drag her to the lounge;' Miss B. having been summoned as a witness for the state, and being then present in the court." Judge Maxwell, delivering the opinion of this court, said: "It was error, therefore, for the prosecuting attorney to make the statement which he did in the presence of the jury. * * * He acts in a semijudicial capacity, and is supposed to act alone from principle and without bias or prejudice. The state has guaranteed to every one a fair trial, and such trial cannot be had if the prosecution can resort to tricks to secure a conviction."

In *Elliott v. State,* 34 Neb. 48, there was a reversal of the judgment, because the county attorney in the cross-examination of the defendant asked him certain questions which were of a prejudicial character. "Q. Is it not a fact that you stole horses in Burnett county, Texas? A. I never did; no, sir. Q. Don't you know that the sheriff has a warrant for you for stealing a horse in that county? A. I don't know it; no, sir." An examination of the original bill of exceptions, now on file in the office of the clerk of the supreme court, shows that no objection was made to these questions and no exception taken. It is not claimed in the original brief of the plaintiff in error, also on file in the same office, that there was any objection. This court, by Judge Maxwell, said: "The emblem on every courthouse, of justice holding the scales in equipoise, would be a meaningless symbol if even one of the poorest and most abject of humankind was unjustly deprived of a right." It will be seen that the district judge made no ruling of any kind. He was not asked to do so. *The reversal was simply because of misconduct of the county attorney.* The following cases are along the same line as *Elliott v. State, supra; Chicago, B. & Q. R. Co. v. Kel-*

logg, 55 Neb. 748; *Ashland Land & Live Stock Co. v. May,* 59 Neb. 735; *Nickolizack v. State,* 75 Neb. 27; *Ashland Land & Live Stock Co. v. May,* 51 Neb. 474.

In *Chicago, B. & Q. R. Co. v. Kellogg, supra,* it was said in the body of the opinion: "We do not, however, wish to be understood as holding that a rebuke from the court, or a complete retraction by the offending counsel, is in all cases of this kind a sovereign remedy. *If the transgression be flagrant—if the abusive remark has stricken deep,* and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence—a new trial should be promptly awarded, *regardless of the want of an objection and exception.*" In that case a reversal was not granted because of misconduct of plaintiffs counsel; but the court said: "We have concluded * * * that the damages are excessive, and must have been assessed while the jury were yet under the sway of counsel's superheated eloquence." A reversal was ordered, unless there was a remittitur for $2,500, or leaving the judgment to stand affirmed for $6,500.

In *Ashland Land & Live Stock Co. v. May,* 59 Neb. 735, it was said in the body of the opinion: "We have little patience with counsel who deliberately seek to achieve success by lawless methods; and we do not hesitate, *in any case, to deprive them of advantages thus obtained.*" In the syllabus of that case it is said: "Where there is reason to believe that the jury may have been influenced in any degree in favor of the prevailing party by the *misconduct of his counsel in arguing the cause,* the verdict should be set aside and a new trial awarded."

In *Ashland Land & Live Stock Co. v. May,* 51 Neb. 474, it is said: "In no instance did the trial judge rebuke counsel for plaintiff on account of his misconduct, nor was he directed to desist from using improper language, nor was the jury, either at the time, or in the instructions, admonished not to be influenced by them. The misconduct of counsel for the *prevailing party in this case could not have been otherwise than prejudicial to the defendant,*

especially in view of the conflicting character of the evidence."

In *Nickolizack v. State, supra,* the accused was a witness in his own behalf in a rape case, and the prosecuting officer on cross-examination asked him, in substance, "if he had not at a previous time been guilty of a like offense upon another young girl, naming her, and other like questions, and thereafter called the person named to the witness-stand and examined her, for the purpose of not only impeaching the accused but of proving him guilty of such independent offense; *held,* that such conduct was improper and prejudicial, for which the *accused should be granted a new trial.*"

In *Ashland Land & Live Stock Co. v. May,* 59 Neb. 735, it is said: "When this case was here before, a judgment in favor of the plaintiff was set aside because of the pernicious tactics of his counsel; and we would certainly reverse the judgment *now* under review, if there were reason to suppose that the jury were *at all influenced in giving their verdict by the statements in question.*" It will be noticed that it is not a question of whether objection has been made. It is the flagrant wrong done by counsel for the prosecution that determines the action of this court.

In *Stratton v. Nye,* 45 Neb. 619, counsel for the defendant made the charge in his opening address to the jury that the defendant Nye was the owner of one-half interest in a corn sheller, and that he "sold that half interest to Mr. Gilchrist, and after this he came to town and mortgaged the same half interest which he had sold to Gilchrist." While there was an objection in that case, this court said: "The court should, especially when objection is made, reprove the parties in the hearing of the jury, and as far as possible remedy the mischief by instructing the jury to disregard the prejudicial statements." It will be noticed that the court does not confine the right of the injured party to such cases as those in which he has made objection. *He is entitled to the relief whether he made objection or not.*

In *Martin v. State,* 63 Miss. 505, the assistant prosecuting attorney said in his argument to the jury: "Martin * * * is a man of bad, desperate, and dangerous character. But I am not afraid to denounce the butcher boy, although I may, on returning to my home, find it in ashes over the heads of my defenseless wife and children." There was no objection to this, and no exception, and the presiding judge did not interfere. The judgment was reversed. The supreme court said: "It is the duty of the presiding judge, as stated in *Perkins v. Guy,* 55 Miss. 153, and *Cavanah v. State,* 56 Miss. 299, to interfere of his own motion to prevent a breach of the privilege of counsel, and if he fails to do so, and the abuse of privilege is of such character as to produce the conviction that injustice resulted therefrom, the duty of this court is to apply the corrective by awarding a new trial."

"The worst criminal is entitled to be judged by the laws; and, if his conviction is secured by means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than his being allowed to escape altogether." Cooley, Constitutional Limitations (7th ed.) p. 478.

In *McKay v. State,* 90 Neb. 63, the court quoted briefly the language of Chief Justice Christiancy in *Hurd v. People,* 25 Mich. 405. "The only legitimate object of the prosecution is 'to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence.' The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success." In that case Judge Fawcett, in dwelling upon the fact that the court permitted Mr. M. F. Harrington to assist in the prosecution, said: "The mere fact that the court permitted Mr. Harrington to assist in the prosecution cannot be held to be a compliance with the statute which provides that private counsel may be procured by the county attorney under the direction

of the court. This provision of the statute calls for affirmative action by the county attorney and the court." The judgment of the court below in that case was reversed, apparently because the prosecution was not considered to have been fairly conducted, and it was not considered that Mr. Harrington had been properly employed.

It is well to remember that it is a serious thing to go to the penitentiary even just one year. Mr. Harrington went into the case of *McKay v. State,* 90 Neb. 63, at the "request" of the county attorney, at least the county attorney was not unwilling, and by "the order of the court * * * is permitted to assist the county attorney in the prosecution of this case." Now the substantial objection to Mr. Harrington was the *private interest* he had in the case, being employed and "paid by the brothers and sisters of the deceased." This same objection to private counsel is further emphasized in *Flege v. State,* 93 Neb. 610, where it is held that "no attorney should be appointed who is known to be a partisan as against the accused, and who has theretofore been employed and paid by another suspected person." If the doctrine applied to the *McKay* and *Flege* cases, and which seems mainly responsible for their reversal, should be applied to the instant case, it is difficult to see how McMartin had a fair trial, because Mr. Patrick had a *private interest* to sustain by securing McMartin's conviction, not a private interest existing because of fees which had been paid him in some other proceeding, but Mr. Patrick was not the county attorney of Sarpy county, and he was in the case as Mr. Harrington was in the *McKay* case, and as private counsel was in the *Flege* case, by request of other counsel, and by permission of the court, and he had a *personal interest* in the enforcement of the amendment of which he was the author. We quote from page 295, chapter 81, laws 1907: "(Senate File No. 295. Introduced by Mr. Patrick.) An act to amend section 25 of chapter 50 of the Compiled Statutes of Nebraska for the year 1905 (C. A. S. 7175) and to repeal said original section." The act contains this clause, which is the part of the act pre-

pared by Mr. Patrick: "Provided, that no license shall be granted by the authorities of any village for the sale of any liquor within two and one-half miles of any United States military post." Rev. St. 1913, sec. 3869. In speaking of the relation of private counsel to the duties of a prosecutor in *Flege v. State, supra,* Reese, C. J., says that it is impossible to conceive of an attorney, situated as he was, entering "upon the trial with the single purpose of impartially seeking to know the truth, protecting the rights of defendant, and seeing that they were maintained, if need be, at all hazards." The journal entry shows that the district judge appointed Patrick because "the county attorney is the prosecuting witness in the case." Some one had to be appointed as prosecuting attorney for that case, and ordinarily no one could take exception to Mr. Patrick; but when he became a prosecutor, under the amendment which he drew, it is not at all strange that his zeal carried him beyond the calm discussion of the facts to imaginary duties that required the conviction of Begley as a perjurer if the defendant should not be found guilty. He was not after Begley; he was after McMartin.

The great danger was that the zeal of the private prosecutor in a liquor case where *his amendment* to the law was on trial for the first time, and the zeal of the witness who felt that his honor was at stake, were such that together they defeated justice. I have read all the evidence. If Judge Begley's evidence is to be analyzed and compared with the other testimony, the case is essentially weak. No doubt Judge Begley testified just as he felt and saw; but he may have looked through colored glasses, and he may have been unduly sensitive. In any event Begley's testimony should be considered as a *whole.* It should not stand *alone upon his conclusions.* The defense is that McMartin did not intend to offer a bribe to any one. He testified in a manly way, and apparently without concealment. He admitted that he was selling liquor without license. He says that he told Judge Begley so; and Begley admits it. He says he wanted to know of Beg-

ley if they could not agree on a sum to be fined, and still keep going. He told Begley that "Patrick is the cause of that law. He was the father of the bill." Judge Begley no doubt knew that. It should be remembered that the adoption by the legislature of the Patrick amendment to the liquor law meant a "dry" spot about Fort Crook five miles in diameter, and that as the spirit of the amendment was not in accord with the other parts of an act, which was in favor of *local option* the farmers and other people in the vicinity of the Fort may have complained. The amendment was probably unpopular with very many people besides the officers and soldiers of Fort Crook. McMartin probably had the sympathy of the community, which may have considered that its rights were invaded by the unpopular amendment which had not been voted upon by the people of the locality or their representatives. The public may have expressed their approbation of McMartin's place of entertainment. There seems to have been three other places of the same kind. McMartin should not be prejudiced in the bribery case by his conduct in selling liquor, although that may have deserved punishment. He told Begley: "The people didn't vote for this law, but it was forced on them without their consent, and you can't blame them for violating it." "I says, 'Ain't there some statute where they can be *fined,* and still keep going?' I said, 'The farmers like a glass of beer when they come to town.' * * * I says, 'I understand down in Iowa they have got a law where they can be *fined.*'" McMartin testified: "Q. When you asked him (Begley) if the parties could be made to pay fines that would go to the county, what did he say? A. He said it couldn't be done—there was no law to that effect. I says, 'They do it in Iowa.' He says, 'They have got a different law in Iowa.'" Why did they talk about Iowa if they were not talking about adopting the Iowa plan, and if they talked about adopting the Iowa plan what necessity was there for such talk if it was just a plain case of offering to bribe? This supports McMartin's claim.

Judge Begley testified: "Q. Didn't Mr. McMartin also admit in his testimony down there that he was engaged in the traffic down there at that time? A. Yes, sir; on cross-examination. Q. Did McMartin say anything in the lower court as to his object in trying to get fines for himself and two other fellows? A. Yes, sir; he said in his testimony on cross-examination that he came up there to see me for the purpose of offering to pay me a fine of $50 apiece for himself and two other gentlemen to operate down there continually." Judge Begley only admits the truth of part of McMartin's testimony, and that is that McMartin admitted that he was then engaged in the liquor traffic. Judge Begley's testimony, fairly considered and taken altogether, might have acquitted the defendant under impartial conduct by Mr. Patrick.

2. In *Langdon v. Clarke*, 73 Neb. 516, this court set aside the verdict where the district court had instructed the jury that *words of provocation may be considered in mitigation of damages* where there actually *were no* words of provocation. Langdon had been struck by Clarke with his fists, and sued Clarke to recover damages for the assault. The only testimony of anything said by Langdon prior to the time when he was struck was that he (Langdon) was not a liar, that he was not afraid, and that the plaintiff could not make him run. We quote from the opinion: "There was no evidence of any words used by the plaintiff which the jury were entitled to take into consideration in mitigation of damages. Hence, this portion of the instruction was not warranted by the evidence, and was, we think, prejudicially erroneous. The jury may well have thought the words used were proper to consider in mitigation of damages, and in consideration thereof reduced the recovery to nominal damages, and by reason of the request of counsel hereinbefore discussed rendered a verdict for the defendant instead of for reduced damages." The instruction as quoted in the brief in the instant case is: "Where there is no evidence of provocative words, it is error to instruct the jury that mere words of provocation are not sufficient to justify a person in committing an as-

sault and battery upon another, but the words may be considered in mitigation of damages."

3. Grant Chase, the sheriff, testified on behalf of the state that he had a conversation with McMartin in his office when McMartin was waiting to see the county attorney, Judge Begley; that McMartin said: "He wanted to see the county attorney—see him alone so his word would be just as good as the county attorney's." He was then telling the sheriff of the county that he was going to talk to the county attorney about something of a criminal character, and that, if the county attorney should testify about it, there would be his testimony against the testimony of the county attorney as to what was said. McMartin apparently did not consider the proposed subject of enough importance to be very secretive about it, or he would not have been telling the sheriff, whose duty it is to arrest offenders, and to assist in procuring them to be punished. The way that McMartin talked to the sheriff tends to show that he came to see the county attorney for the purpose of preventing a future prosecution for selling whiskey without license. He was willing to close up if the county attorney wished him to do so. It is shown by the questions asked that the prosecutor asked the defendant many questions with a view to emphasizing the fact before the jury that he was *guilty of selling liquor without license,* and that he had been convicted of *that offense.* Questions 162, 163, 164, 165, 166, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, and 178 show the purpose to emphasize *such* conviction. Question 180 is directed to the inquiry as to whether the defendant paid $12 a month for the privilege of illegally selling liquor without license. Mr. Patrick also inquires if the *other* "bootleggers" at Fort Crook did not pay the village $12 a month *for the privilege.* The effort to try the defendant on some *other* charge than that contained in the information was rather persistent, and could not well have been otherwise than prejudicial. *Kaucrt v. State,* 92 Neb. 14.

The attorney for the defendant requested the giving of the following instruction, which was refused: "The jury are instructed that, in considering the testimony of an officer, or officers, whose duty it is to pursue, arrest, and prosecute criminals, you should consider it with caution, because of the tendency of such officers to hear and remember those portions of conversations and evidence against the defendant, and not hear or remember such portions as may be in favor of the defendant." This instruction or one of like character should have been given. *Kastner v. State*, 58 Neb. 767; *Sandage v. State*, 61 Neb. 240, 87 Am. St. Rep. 457. The interest of a police officer in securing the conviction of the person he prosecutes is usually not greater than the interest of a sheriff. The office which the man holds who does the work of ferreting out the evidence should not determine the question of his interest. That is determined by *what he does*. In the latter case it is said in the syllabus: "Where informers, detectives, or *other persons* employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested." An active sheriff, because of increased efficiency, is generally more dangerous to the defense than even an active policeman. He often has a wider range of vision, and, not infrequently, he is more in the habit of managing men with a view to securing results. The dignity of his office makes him nearly always in the employ of the state.

JOHN BERANEK, APPELLANT, V. CHARLES BERANEK, APPELLEE.

FILED FEBRUARY 13, 1914. No. 17,558.

1. **Payment.** The defendant unconditionally paid money into the bank, where plaintiff had a deposit and check account, to plaintiff's credit, and caused the plaintiff to be notified that the money was there for him as payment on the plaintiff's claim in this ac-

tion. The plaintiff refused to accept the money, giving as his only reason that the amount was insufficient. *Held*, That the defendant was entitled to a credit of the amount on plaintiff's claim.

2. ———: INSTRUCTIONS. In such case, an instruction in effect that the plaintiff would not be required to receive the money in the absence of an express agreement between the parties that the money might be so paid is not prejudicial to the plaintiff.

3. **Trial:** INSTRUCTIONS. In an action to recover money, if the defendant alleges and proves a distinct claim in his favor against the plaintiff, and the court instructs the jury that, "unless the jury find from the evidence that the defendant discharged his obligations to the plaintiff for the balance of the payments due under the contract for the year 1910, in some other manner, as claimed by him, then the jury should allow the plaintiff the balance, if any, due," and neither party asks a more definite instruction as to the defendant's claim, such instruction, being in effect to allow defendant's claim as a set-off, will not be held prejudicially erroneous requiring a reversal.

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

Burr, Greene & Greene, J. H. Barry and *Frank Dolezal*, for appellant.

Simpson & Simpson and *Charles H. Slama, contra.*

SEDGWICK, J.

The plaintiff was the owner of a farm of 220 acres in Saunders county, and deeded it to his son, the defendant, and took a contract from the defendant whereby it was agreed that the defendant should, among other things, pay to the plaintiff $300 annually in two equal semiannual payments. The petition alleged that afterwards a supplementary contract was made whereby the payments were increased to $500 a year, payable as before. The petition also alleged various other causes of action, and asked judgments for $6,535.25, including the $500 annual payments as provided in the contract and amendment thereto. Upon trial in the district court for Saunders county, there was a verdict and judgment for the defendant, and the plaintiff has appealed.

The plaintiff's brief discusses only alleged errors affecting his claim for the $500 annual payments for the year 1910. The defendant paid into the bank at Morse Bluff for the plaintiff upon this claim $300. The plaintiff insists in the brief that he never agreed with the defendant that these payments might be made to the bank instead of being made to him personally, and that therefore the defendant is not entitled to credit therefor. It appears from the evidence that each of these parties had a personal account in that bank, and that when the defendant paid this money into the bank he requested the banker to notify the plaintiff that it had been paid to the plaintiff's account, and that the banker did so notify the plaintiff, and the plaintiff testified: "I told them (the bank and defendant) myself that instead of $500 being deposited that he only deposited $300 and I couldn't therefore take it." Having refused to take the money from the bank for the sole reason that the amount was insufficient, he cannot now be heard to complain that the money was not paid to him personally. Under such circumstances, no agreement between the parties that the money might be paid into the bank was necessary. The error of the court in assuming in his instructions that such agreement was necessary was prejudicial to the defendant, but not to the plaintiff.

The plaintiff insists that the pleadings and evidence will not justify the finding that the remaining $200 was paid by the defendant. The answer alleged that defendant purchased for the plaintiff $200 worth of furniture, and the plaintiff received the same upon a contract between them that the plaintiff should deliver certain personal property of that value to the defendant therefor; that the plaintiff never delivered the property to the defendant, nor any part thereof, and asked that he might have judgment for the same. The court instructed the jury: "Unless the jury find from the evidence that the defendant discharged his obligations to the plaintiff for the balance of the payments due under the contract for the year 1910, in some other manner, as claimed by him, then the jury

should allow the plaintiff the balance, if any, due for said year over and above the payments made to the bank for plaintiff." Neither party asked for a more definite instruction. The plaintiff makes no contention in the brief that the defendant's claim for the money paid for the furniture was unjust, or that the evidence is insufficient to establish it. The court virtually allowed the jury to offset the amount of the defendant's claim against that of the plaintiff, which, under the evidence in this case and the manner of the trial, it was proper for the court to do.

The foregoing matters appear to be the only ones presented by the briefs, and in regard to them we find no errors. The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

WILLIAM OSTENBERG, APPELLANT, V. JOHN KAVKA, APPELLEE.

FILED FEBRUARY 13, 1914. No. 17,567.

1. **Bills and Notes: BONA FIDE PURCHASERS: BURDEN OF PROOF.** In an action against the maker upon promissory notes, when it is shown that they were obtained by fraud practiced upon the maker and were without consideration, the plaintiff in order to recover must allege and prove that he took the notes in good faith in the usual course of business and paid value, without notice of any defense thereto.

2. ———: ———: **QUESTION FOR JURY.** In such case the question of the good faith of the plaintiff is for the jury, and their verdict cannot be controlled and directed by the court, if one might reasonably derive inferences from the character and circumstances of the transaction which would lead ordinary minds to a different conclusion.

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

George W. Wertz, for appellant.

Cain & Mapes, contra.

SEDGWICK, J.

This is an action upon four promissory notes for $50 each. The defendant alleges that the notes were obtained by fraud, and that he has received no value therefor. The plaintiff denied that the notes were obtained by fraud, and alleges that he is an innocent purchaser and as such is entitled to recover thereon. Upon trial in the district court for Colfax county, there was a verdict and judgment in favor of the defendant, and the plaintiff has appealed.

It appears that in July, 1908, the defendant was in business in Surprise, Nebraska, and entered into a contract with the Overland Manufacturing Company for the purchase of a bill of jewelry. The contract provided that the defendant might at any time after four months and within a year return any or all of the articles so purchased and receive credit therefor on certain conditions. The defendant sold a small amount of the jewelry, and afterwards returned the remainder under the contract and paid the company for the jewelry that he had sold. The contract price for the jewelry was $220, and the last three lines of the contract were, in substance, a promissory note, and, while they were a part of the contract and were evidently so signed, these lines were so arranged and the paper was so perforated that they could be easily detached and would then appear as a promissory note. After the defendant had returned the goods and the transaction was apparently closed, one R. B. Zachery appeared with this detached note and presented it to the defendant for payment.

The original contract signed by the defendant was manifestly fraudulent, and this appears to be conceded. The uncontradicted evidence was that, when Zachery presented this paper to the defendant for payment, the defendant refused payment, and Zachery represented to him that the paper which he held was the property of a responsible Omaha bank; that the bank was an innocent purchaser;

that he was acting for the bank and would proceed to enforce payment; and that upon these representations the defendant executed the notes sued upon.

It is suggested that this evidence is not sufficient to show that the notes in suit were obtained by fraud because there is no evidence that the paper which Zachery presented was not the property of a responsible bank, nor that the bank which owned it was not an innocent purchaser, nor that Zachery did not represent the bank in good faith. If the defendant was liable upon the paper as presented by Mr. Zachery because the owner of the paper was the holder thereof in good faith, having so purchased it for full value in the usual course of business, it would furnish sufficient consideration for the notes in suit; but that was an issue that it devolves upon the plaintiff to establish to enable him to recover upon the strength of the title and possession of the bank, and there is no evidence in the record of the truth of Zachery's representations, or that the paper which he presented was the property of any bank, much less that the bank was the owner and holder of the paper as a purchaser in good faith. It follows that these notes were fraudulently obtained, and that the plaintiff cannot recover thereon unless he was a purchaser of the notes in good faith, for value, in the usual course of business, and without notice. Our negotiable instrument act (Rev. St. 1913, secs. 5369-5377) has not changed this rule. *Piper v. Neylon*, 88 Neb. 253.

The plaintiff does not allege in his petition that he purchased the notes in good faith, in the usual course of business, for a valuable consideration, and without notice of any defense thereto; nor does he plead in the language of the statute "that he became the holder of it before it was overdue; * * * that he took it in good faith and for value; * * * that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Rev. St. 1913, sec. 5370. He alleges that Zachery sold the notes in good faith, for a valuable consideration, and transferred them to the plaintiff, and that the plaintiff is now the

owner and holder thereof. The only evidence as to the purchase of these notes by the plaintiff is in his own deposition, which was taken in Omaha and was in evidence upon the trial. He was not cross-examined. He testified that he did not know the defendant, had never met him; that he had known Mr. Zachery eight or ten years in Omaha and South Omaha, and had dealings with him "in a banking way through sales of live stock quite a bit;" that he had never had any business personally with Mr. Zachery until he purchased the notes in suit; that he had never been advised or informed that Zachery "was not honest or square;" that he (the plaintiff) was in the habit of discounting paper and had handled a considerable in Omaha; that he questioned Zachery about the notes, and asked him what they were given for, and that Zachery told him they were "for value received on the notes," and "were for merchandise purchased by this Kavka." He asked Zachery no further questions, but examined as to the standing of the defendant in Dun's Mercantile Agency, and found that he stood well in a business way. He was induced to buy the notes because he could "discount them to a fair advantage and knew they were perfectly good in the mercantile world." He paid $190 for the four notes in cash to Mr. Zachery. He indorsed them all in blank, "I guess at that time." He testified that he did not know anything about any fraud or misrepresentation, and did not know that the Overland Manufacturing Company "were the ones who sold the goods to the defendant," nor that Zachery was connected with that company. He then answered "No, sir" to a series of questions in regard to his knowledge of the terms of the original contract for the purchase of the jewelry, and testified that he did not know anything about the circumstances under which the notes in suit were executed, nor that the defendant had any defense to the payment of these notes. It does not appear from the evidence what his supposed interest in the several banks was, nor where he was when he bought the notes in suit, nor whether it was in business hours. He does not state what he found in the commercial reports

as to the standing of the defendant. The notes were indorsed by Zachery "without recourse." This fact is not mentioned in the testimony. Neither Zachery nor the plaintiff appeared before the jury. Should the court upon this evidence direct the jury to find a verdict in favor of the plaintiff? If the witness had testified directly that he bought this paper in good faith, in the usual course of business, without any notice of any defense, the jury were at liberty still to disbelieve him if the character and the circumstances of the transaction were such that one might reasonably draw inferences therefrom discrediting the testimony of the witness. The jury cannot be controlled and directed as to the verdict, if one might reasonably derive inferences from the character and circumstances of the transaction which would lead ordinary minds to a different conclusion.

We do not find that in this case we must overrule the judgment of the trial court and direct and control the jury as to the verdict. It follows that the judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

DAVID E. MCFADDEN, APPELLEE, V. CEDAR COUNTY, APPELLANT.

FILED FEBRUARY 13, 1914. No. 17,591.

1. **Appeal:** ISSUES: REVIEW. If a case is fully tried by the parties in the district court as though the answer contained only a general denial, and without objection to the manner of trial by either party, it will be so considered upon appeal in this court, and admissions in the answer will not be regarded.

2. **Officers:** SHERIFFS: DEPUTY: DE FACTO OFFICER. If the sheriff designates a person to occupy the residence furnished for the jailer by the county, and gives such person the care of the jail and of the prisoners therein, and authorizes him to receive persons upon mittimus from the courts and confine them in the jail,

and to perform other such duties as can only be performed by authority of the sheriff, the person so appointed should qualify as deputy; but in the performance of such duties he is a *de facto* officer, although he fails to take the oath of office.

3. ———: ———: COMPENSATION OF JAILER. When the sheriff does not perform the duties of jailer in person, but appoints another, who performs the duties of that office and who gets all of his compensation from the county, the sheriff is not entitled to fees as jailer.

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

P. F. O'Gara and *F. P. Voter,* for appellant.

H. E. Burkett, contra.

SEDGWICK, J.

The plaintiff, who is sheriff of Cedar county, filed a claim with the county board of that county for an allowance of compensation as jailer. Upon the appeal to the district court, and trial to the court without a jury, his claim was allowed in full, and the county has appealed.

Section 13, ch. 46, Comp. St. 1911, provides: "The jailer or keeper of the jail shall, unless the sheriff elect to act as jailer in person, be a deputy appointed by the sheriff, and such jailer shall take the necessary oath before entering upon the duties of his office; provided, the sheriff shall in all cases be liable for the negligence and misconduct of the jailer, as of other deputies." Section 5, ch. 28, Comp. St. 1911, provides: "Where there are prisoners confined in the county jail, one dollar and fifty cents per day shall be allowed the sheriff as jailer." The same section requires the sheriff to report the amount of his fees and "pay all fees earned to the county treasurer." In *Dunkel v. Hall County,* 89 Neb. 585, it was held that, when the sheriff acts as jailer in person, he is entitled to compensation as jailer in addition to his salary as sheriff.

The petition in this case alleged that the sheriff had no deputy and "acted and was the jailer in and for said county." The answer admitted this allegation, and de-

nied "that there is due the plaintiff from the defendant the sum of $541, or any other sum whatever." The plaintiff now insists that the answer states no defense, and that he is entitled to judgment upon the pleadings. The attorney for the defendant contends that the allegation that there is nothing due the plaintiff from the defendant is sufficient to put the plaintiff upon his proof. It might be said that under the decision in *Dunkel v. Hall County, supra*, the admission that the plaintiff had no deputy and acted and was the jailer for the county would be an admission that the plaintiff was entitled to recover in the case, and the subsequent denial that he was entitled to recover would amount to a conclusion not justified under the law. It is, however, unnecessary to consider these nice questions of practice in this case, since these questions were not presented nor suggested to the court below, but the case was tried by both parties upon the merits as though the allegations in the petition were all denied. Under these circumstances, it is the settled rule of this court to determine the case here as it was tried in the court below, and the only question for us to determine is whether under this evidence the judgment of the lower court can be sustained. The sheriff testified in his own behalf, and from his evidence it appears that the county had provided a jail building with the jail proper on the lower floor, and living-rooms for the jailer on the second floor, and that he has never occupied the living-rooms in the jail building, and that the men whom he has appointed from time to time have occupied those rooms with their families; that these men took care of the prisoners and fed them, and did the general work about the jail, and had charge of the jail during his absence from the county, and that he had on several occasions been absent for some little time. He testified that he went up to the jail "three or four times a week," and that the county furnished fuel for the living-rooms of the jail building. When he was asked what he meant by "appointing" these men, he said: "Well, I just got them to live in the jail;" and he also testified that he allowed them to live in the jail

in consideration of their assisting him. John Fleming testified that he was living in the county jail building with his family, and had done so for some time, and had charge of it continuously during the time he had lived there; that the sheriff appointed him, and that his duties were to feed the prisoners, to look after them and take care of them, and to look after the sanitary condition of the cells, and their clothing; that he paid no rent or light bills, and that the county furnished him with coal and water; that he boarded the prisoners and received the pay for boarding them. When he was asked upon cross-examination what he meant by the sheriff appointing him, he said that the sheriff "told me I could go up there and live and take care of it." He testified that he had a garden on the grounds on which the jail stands, and that all he did around the jail was done under the direction of the sheriff. He also testified that in the absence of the sheriff, he had general charge of the jail and prisoners, and that when the sheriff was away no one else took care of them but himself; that when prisoners were brought there he received them and put them in the jail; that he brought prisoners down to the court for hearing; and that the mittimus would be delivered to him, and he would take them back to jail. There was other evidence of this kind which it is not necessary to recite here.

The statute requires that when the sheriff appoints a jailer he shall make him his deputy, and that as such deputy he shall take an oath of office. The sheriff did not make these men his deputies, and they did not take any oath of office. They were, however, appointed by the sheriff. They performed duties, and in controlling the prisoners and committing them they exercised authority that is inherent in the office of sheriff, and could not be exercised by any one without the authority of the sheriff. It is, of course, true that in designating an individual for such important duties the sheriff should have legally appointed him as deputy, and such deputy should have taken the oath of office; but in assuming and performing the du-

ties of jailer under the authority of the sheriff he became a *de facto* officer, and he has been compensated for his services as such by the county in furnishing him a residence without rent, and other similar advantages. The sheriff in this case has not performed the duties of jailer in person as contemplated by the statute. He has appointed others to perform those duties, and has given them authority necessary for the performance thereof. He has paid them nothing for their services. Their compensation has come from the county, and he cannot require the county to compensate him also for those services by the mere neglect to qualify them as the law provides.

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

REVERSED AND DISMISSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

MARY FENLON, APPELLEE, V. ANN FENLON, APPELLEE; ANGELA ROCK, APPELLANT.

FILED FEBRUARY 13, 1914. No. 18,337.

1. **Adoption:** CONTRACT: CONSTRUCTION. A contract by husband and wife to take an infant child into their family and provide for it is to be construed like other written contracts to ascertain the meaning and intention of the parties thereto, and if the parties so taking such child by the terms of their contract reserve the right to determine, when the child becomes of legal age, whether they will make such child their heir or will provide for her as specified in the contract, and one of them dies before the child becomes of age without taking any further action to make the child his heir, such child will not inherit as the heir of the deceased.

2. ———: ———: ———. This case, by the pleadings and trial below, and by the briefs of the parties, is made to depend upon the meaning and intention of the parties as expressed in the contract set out in the opinion by which the plaintiff and her husband took the defendant Angela Rock into their family, and that contract is construed to mean that the plaintiff and her husband have the option to determine, when the child becomes of age, either to make her their heir or to provide for her as expressed in the first article of their agreement.

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

W. H. Kelligar and *Edgar Ferneau,* for appellant.

Reavis & Reavis, contra.

SEDGWICK, J.

In July, 1911, the plaintiff and her husband, John Fenlon, since deceased, entered into a contract with the New York Foundling Hospital, under which they took the care, custody and control of the defendant, Angela Rock, a female child then of the age of a little less than three years. They had no children of their own, and this child was a member of their family until the death of the said John Fenlon, which occurred about seven months thereafter, and the child has since been, and now is, in the care and custody of the plaintiff, Mary Fenlon. The defendant Ann Fenlon claimed the right to inherit the one-half interest in the property of John Fenlon, deceased, as his sister and only heir. The plaintiff was duly appointed administratrix of the estate of John Fenlon, deceased, and applied to the district court for Richardson county to have the rights and interests of all parties in the real estate of the intestate determined by the court, and for a partition of the real estate; it being conceded that as widow of the deceased she took one-half interest therein. The plaintiff attached to her petition a copy of the contract under which she and her husband had taken the child into their family, and the question that she desired to have determined was whether under that contract the child was entitled to inherit the one-half interest in the real estate, or the sister of the deceased was so entitled. The court appointed a guardian *ad litem* for the child, who, by way of answer and cross-petition, alleged that the contract attached to plaintiff's petition "is a true and correct copy of the contract between the New York Foundling Hospital and John Fenlon and Mary Fenlon, his wife," and made that contract a part of his answer

and cross-petition, and alleged that under the contract the child was entitled to inherit as the heir of John Fenlon, deceased, and asked the court to construe the contract. The defendant, Ann Fenlon, also answered, and alleged "that, as the surviving sister of the said John Fenlon, she is entitled to inherit and is the owner of an undivided one-half interest in fee simple in said real estate." The defendant, Ann Fenlon, demurred to the answer of the guardian *ad litem*, "because, by the terms of the said written contract between the said New York Foundling Hospital and the said John Fenlon and Mary Fenlon, it is still executory, and therefore is not the subject for judicial action in this case looking to its specific performance; that said contract was so executory and incomplete at the time of the death of John Fenlon, one of the contracting parties named therein, and, being an incomplete contract, it is not susceptible of being enforced by a proceeding for its specific performance, and therefore no right whatever thereunder had accrued to the said Angela Rock, and the answer and cross-petition of the guardian *ad litem* of said Angela Rock should be dismissed." The court sustained this demurrer, and found that the defendant Ann Fenlon was entitled to a one-half interest in the real estate, and appointed a referee to partition the same, and, if partition could not be had without injury to the property, to advertise and sell the same. The referee reported that the real estate could not be equitably divided between the parties, and that he had advertised and sold the real estate to the plaintiff, Mary Fenlon, for $11,200. This sale was confirmed by the court and a deed ordered made to the purchaser. The guardian *ad litem* for the minor child has appealed to this court.

By the record made as above stated, and by the briefs and arguments of counsel, the decision in this case is made to depend wholly upon the construction of the said contract, and it is conceded that this contract, like other contracts, is to be construed so as to ascertain the real intention and meaning of the parties thereto, as disclosed by the contract itself. The contract is as follows:

"This indenture, made this 11th day of July, in the year of our Lord one thousand nine hundred and eleven, between the New York Foundling Hospital, a corporation incorporated and organized under the laws of the state of New York, party of the first part, and John Fenlon and Mary, his wife, of Dawson, state of Nebr., parties of the second part; whereas, Angela Rock, female child, now of the age of two years and ten months, was heretofore, pursuant to the provisions of the charter of the aforesaid corporation, received and taken, and now is under its care and custody, and has now, in the judgment of its board of managers, arrived at a suitable age for the said corporation to indenture; now, therefore, this indenture witnesseth, that the said party of the first part, in and by virtue of the power and authority conferred upon and possessed by it, under and by chapter three hundred and nineteen of the laws of the state of New York for the year 1848, chapter six hundred and thirty-five of the laws of the said state for the year 1872, and chapter nineteen of the laws of said state for the year 1909, being chapter fourteen of the Consolidated Laws known as the Domestic Relations Law, do hereby put, place and indenture the said Angela Rock unto the said parties of the second part, as their own child in every respect, until the said Angela Rock shall arrive at her legal majority, to live with, and be employed by the said parties of the second part in and about their house and household, and the affairs thereof, and to be instructed therein, and also as hereinafter specified, during all of which time the said female child shall reside with and obey said parties of the second part, and according to her power, will and ability shall honestly, orderly and obediently in all things demean and behave herself toward the parties of the second part.

"The parties of the second part agree as follows:

"1. That during all the time aforesaid they will provide said Angela Rock with suitable and proper board, lodging and medical attendance, and all things necessary and fit for any indentured child, and in all respects similar to what would ordinarily be provided and allowed by the said

parties of the second part, or one in their station of life, for their own child or children. If the said child is returned to the party of the first part when she shall reach her legal majority, then the parties of the second part will give to said child a new Bible, a complete suit of new clothes, together with all those she shall then have in use, and an outfit of at least the same as their own child.

"2. That the said parties of the second part will teach and instruct, or cause to be taught or instructed, said child in all branches of education ordinarily taught to the children of persons in the station of life of the said parties of the second part, such being the ordinary branches of school education and such as are required by law, including reading, writing and general rules of arithmetic, and will bring her up in a moral and correct manner, and in the Catholic faith, and cause and procure said child to behave herself in all things as all minor children should demean themselves during their minority, and generally that said child shall be maintained, clothed, educated, treated with like care and tenderness as if she were in fact the child of the parties of the second part, and will provide for said child, financially and in every other way, as if the said child were adopted by the said parties of the second part under the laws of the state of New York.

"3. That the said parties of the second part will not, nor will their legal representatives or assigns, assign or transfer this indenture to any other person without the consent in writing of the party of the first part.

"4. That the said parties of the second part will, at least once in every six months during the said term, report in writing to the board of managers of the said party of the first part, or the treasurer thereof, the conduct or behavior of said child, and whether said child is still living under the care of the parties of the second part, and, if not, where and with whom said child is living, and will in such case further state why said child is not then living with them and under their care and protection; but neither such report nor its receipt or acceptance by the party of the first part shall be deemed a consent to an

assignment of this indenture or a waiver of any forfeiture thereof.

"5. That the officers and managers of the said party of the first part may from time to time visit and see said child, and ascertain to their own satisfaction whether said parties of the second part are fully carrying out and performing all the conditions of this indenture, and whether said child is in all respects properly cared for.

"6. And it is further provided that this present indenture shall not be construed to render the said party of the first part responsible in damages for any cause whatever, but shall operate only as the full exercise of the powers conferred by its charter or act of incorporation for the purpose herein expressed.

"7. And it is hereby mutually agreed by and between the parties hereto that in case of any breach by said parties of the second part of the stipulations, agreements or covenants herein contained, set forth and implied, then this indenture, and each and every part thereof, shall, at the option of the said party of the first part be null and void, and that the waiver of one breach of forfeiture shall not operate as a general waiver, but only and exclusively of the breach of forfeiture thus waived.

"8. And the parties of the second part further agree, that if the said child be not returned to the party of the first part when she attains her legal majority, or shall not have been so returned before she shall have attained such age, and this agreement of indenture be duly canceled and annulled by the consent of both parties, or if said child be not legally adopted by said parties of the second part before said child attain such age, then the parties of the second part, in consideration of this indenture, and being permitted by the party of the first part to keep such child, shall be deemed to have elected to keep, treat and maintain said child as if it were their own natural and legitimate child. And the parties of the second part further agree that, if the parties of the second part shall die intestate, said child shall inherit and succeed to such share of the property, real and personal, of which the parties

die seised and possessed, as would have descended or would have been distributed to said child if she had been the natural and legitimate child of the parties of the second part; and that, if the parties of the second part shall die leaving a last will and testament, such will shall contain a provision, or provisions, giving, bequeathing and devising to said child at least as large a share of the estate, real and personal, of the testator as she would have received if said testator had died intestate and said child had been the natural and legitimate child of the parties of the second part.

"In witness whereof the said party of the first part has hereunto caused its corporate seal to be affixed and this indenture to be signed by its treasurer, and the said parties of the second part have hereunto set their hand and seal, the day and year first above written."

By the first article of the contract on the part of the Fenlons they agree to do the things therein specified for the child until she should become of legal age, and that, if she was returned to the hospital when she became of legal age, they would then furnish her with the things therein specified. This provision of the contract would of course by itself be construed to give them the option, when the child became of legal age, to return her and furnish those things which they agreed to furnish on such contingency, or to make her their heir, as they saw fit. The difficulty in the case is to determine whether there are other provisions in the contract which modify this one, so that upon the whole contract they did not reserve the right to elect, when she became of age, whether they would make the child their heir or would furnish her as provided in this first article.

By the seventh article the hospital authorities reserved the right at their option to declare the contract null and void in case it was not performed by the Fenlons according to its terms, but this article is entirely indefinite as to what should be the liability of the Fenlons in such case.

It is insisted that by the eighth article the Fenlons agreed to "keep Angela Rock as their own child until she

attained her majority, and, if either should die with this contract in full force and effect, Angela Rock should receive a child's share of the estate of the deceased party, whether such party died testate or intestate." In construing this eighth article, we should consider whether the clause, "and this agreement of indenture be duly canceled and annulled by the consent of both parties," limits all that preceded it in the article, or limits only the nearest clause, "or shall not have been so returned before she shall have attained such age." By the ordinary rules of construction, when two clauses are connected by the conjunction "or" and are followed by a modifying clause, the modifying clause is considered as limiting only the one to which it nearest stands. If this rule is followed here, there is no limitation in this article upon the right of the Fenlons to return the child when she becomes of legal age.

This article eight contains the only direct agreement on the part of the Fenlons that the child shall inherit their property, and we must determine whether their intention was that, if they died intestate while the child was a member of their family and this contract was in full force, and they had not legally adopted the child, she should inherit their property as an heir. What is the force and effect of the clause, "or if said child be not legally adopted by said parties of the second part before said child attain such age?" If the child was legally adopted, that of itself would ordinarily entitle her to inherit. If this clause is construed as an independent clause, and to entitle her to inherit if she is not legally adopted, then it is equivalent to an agreement that at all events she shall be entitled to inherit. This could not have been the intention of the parties. If the conjunction "and" was intended instead of the conjunction "or," then the construction is that, if the child shall not have been returned before she arrived at the legal age and the agreement of indenture duly canceled and annulled by the consent of both parties, *and* the child is not legally adopted, then they "shall be deemed to have elected to keep, treat and maintain said child as if it were their own natural and legitimate child." If we

adopt this construction, then we must consider the force of the following clause: "And the parties of the second part further agree that, if the parties of the second part shall die intestate, said child shall inherit." If this clause is construed literally by itself, it is an absolute agreement that if they "die intestate" the child shall inherit. Of course this could not have been the intention of the parties. If they had surrendered the child to the authorities of the hospital with the consent of those authorities, or if the contract had been annulled by the authorities under the seventh article, or if it had been transferred with the consent of the authorities under the third article, the child could not inherit, though both Mr. and Mrs. Fenlon should die intestate. The only possible construction to be given to this clause of the contract under the other provisions is to read it in connection with the immediately preceding clause. They agree that under the conditions named they will be "deemed to have elected to keep, treat and maintain said child as if it were their own natural and legitimate child, and (in such case) the parties of the second part further agree" that the child shall inherit.

We think that in the light of the whole contract this eighth article should be construed as though it read: "And the parties of the second part further agree that if the said child be not returned to the party of the first part when she attains her legal majority, or shall not have been so returned before she shall have attained such age, and this agreement of indenture be duly canceled and annulled by the consent of both parties, and said child be not legally adopted by said parties of the second part before said child attain such age, then the parties of the second part, in consideration of this indenture, and being permitted by the party of the first part to keep such child, shall be deemed to have elected to keep, treat and maintain said child as if it were their own natural and legitimate child, and in such case the parties of the second part further agree that, if the parties of second part shall die intestate, said child shall inherit and succeed to such share of the property, real and personal, of which the

parties die seized and possessed, as would have descended or would have been distributed to said child if she had been the natural and legitimate child of the parties of the second part."

It follows that there is no limitation in this contract upon the right of Mr. and Mrs. Fenlon to elect, when the child becomes of age, whether they will make her their heir or provide for her as agreed in the first article of their contract. This being the case, this child would not become their heir until the parties upon her becoming of age elected to make her such.

The judgment of the district court is therefore right, and is

AFFIRMED.

ROSE, J., not sitting.

LOUP VALLEY LAND COMPANY, CROSS-APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE; CHARLES C. CONNELY, APPELLANT.

FILED FEBRUARY 13, 1914. No. 18,372.

Railroads: SHIPPING FACILITIES: STATE RAILWAY COMMISSION: JURISDICTION. Section 1, ch. 68, laws 1881, as finally amended by section 1, ch. 138, laws 1913, requiring railroad companies to furnish a switch or side-track for the use of companies or individuals, upon specified terms and conditions, does not deprive the state railway commission of jurisdiction to require the construction and maintenance of suitable stock-yards, side-tracks and loading and unloading facilities for the general public.

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

Hoagland & Hoagland, for appellant.

W. D. Oldham, for cross-appellant.

Edson Rich, contra.

SEDGWICK, J.

In April, 1912, Mr. Connely, who is intervener and appellant in the case at bar, made complaint to the state railway commission to require the defendant, Union Pacific Railroad Company, "to construct and maintain a depot and side-track on its Callaway-Stapleton line at a point called Hoagland." There was a hearing before the railway commission, and upon full consideration the commission ordered "that the Union Pacific Railroad Company be, and the same is, hereby notified and directed to construct and maintain suitable and adequate side-track and stock-yards, loading and unloading facilities, at Hoagland, Nebraska." This plaintiff and cross-appellant then began an action in the district court for Logan county to enjoin the railroad company from complying with the order of the railway commission. That court allowed a temporary injunction restraining the railroad company as prayed, and Mr. Connely then applied to this court for a writ of mandamus to compel the judge of the district court to vacate the injunction on the ground that that court had no jurisdiction to allow the same. An alternative writ was allowed by this court, and before the return day of the writ the district court heard the case and entered a judgment for the defendant therein, dissolving the temporary injunction. The district court allowed the defendant therein to supersede the judgment dissolving the injunction upon execution of a bond to the plaintiff therein in the sum of $500. From this order allowing the supersedeas, Mr. Connely appealed to this court, and the plaintiff in this action, Loup Valley Land Company, has appealed from the judgment in favor of the defendant.

If the judgment for the defendant is right, it is unnecessary further to consider the jurisdiction of the district court to allow a temporary injunction and to allow a supersedeas of the order dissolving the injunction.

Various matters are discussed in the brief, but the plaintiff rests his case upon the contention that the state railway commission had no jurisdiction to entertain the com-

plaint and make the order. It is argued that section 1, ch. 138, laws 1913, has taken from the railway commission all jurisdiction in such cases, and has conferred that jurisdiction upon the district court. The purpose of this section, when originally enacted, as stated in the title, was "to prevent unjust discrimination." Laws 1881, ch. 68, sec. 1. As amended in 1905, ch. 105, it was held by the supreme court of the United States to violate the fourteenth amendment of the federal constitution because it required the "railroad company to put in switches at its own expense on the application of the owner of any elevator erected within a specified limit." *Missouri P. R. Co. v. State of Nebraska,* 217 U. S. 196. It has been several times since amended, and by the amendment of 1913 (laws 1913, ch. 138, sec. 1) it provides that every railroad company "shall afford reasonable and equal terms, service, facilities and accomodations to all persons and associations who are engaged or desire to engage in the operation of grain elevators or any other industry, or in the handling or shipping of merchandise, produce, commodities or other property, at, near or contiguous to any railroad or any station of its road," and that such person or association may apply to the company to construct a side-track, and, "if the compliance with or allowance of said application shall be reasonable and will not unreasonably or unnecessarily interfere with the railroad company's operation of its road or the performance of its duty to the public as a common carrier, it shall be granted," and the company "may require the applicant to pay or secure payment for said construction or such portion thereof as may be just and equitable, * * * and if such person or association shall feel dissatisfied with or aggrieved by reason of the amount required to be paid or contributed for the construction of said side-track or switch or the future maintenance thereof, said person or associations may file their petition in the district court of the proper county * * * and have the reasonableness of said charges judicially determined."

It is also provided that, if the applicant makes request for the construction of a side-track or switch and the company fail for 60 days to comply with it, the applicant may file his petition in the district court, and that the district court shall "grant any appropriate relief authorized by law and shall not be limited or restricted to the relief or remedy provided for herein, but may grant such relief as may be just, proper or appropriate to carry out the provisions, purposes and intent of this act and prevent discrimination, favoritism or partiality on the part of said railroad in any manner or respect. If it shall appear upon hearing in said district court that the request hereinbefore provided for is fair and reasonable and that the allowance thereof will not place an unreasonable burden upon said railroad company, or unreasonably interfere with the operation of its road or in the performance of its duties to the public as a common carrier, and shall in all other respects be just, fair and reasonable, the court shall enter such decree as may be necessary and impose such conditions concerning payment for the construction and equipment of said side-track or switch and for the proper construction and maintenance thereof or otherwise, and provide such security for the faithful performance of the conditions thus imposed as may be just and reasonable under the circumstances."

It will be seen that this section as amended deals only with the application of individuals or companies for private side-tracks and switches, and has nothing to do with the duties of the railway commission in determining the propriety and necessity of depots, stations, side-tracks, stock-yards, and loading and unloading facilities for the general public. The complaint in this case asked that the defendant be required "to construct and maintain a depot and side-track on its Callaway-Stapleton line at a point called Hoagland." This complaint was not granted to the full extent asked, but was modified so as to require the construction and maintenance of "suitable and adequate side-track and stock-yards, loading and unloading facilities" for the general public.

Such matters appear to be so clearly within the jurisdiction of the railway commission as to require no further discussion. The judgment of the district court dissolving the injunction and dismissing the action was therefore right, and is

AFFIRMED.

LAURA BLANCHE WINTER, APPELLANT, V. LEONARD WINTER, APPELLEE.

FILED FEBRUARY 13, 1914. No. 17,390.

Divorce: ALIMONY: REMARRIAGE: EXEMPTION. Where a decree of divorce and for the payment of alimony is granted the wife, the derelict husband cannot defeat the collection of alimony by remarrying and claiming the benefit of the exemption law.

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

M. O. Cunningham, for appellant.

J. L. Kaley, contra.

HAMER, J.

The appellant, Laura Blanche Winter, obtained a decree of divorce from the appellee, Leonard Winter, in the district court for Lancaster county at the October term, 1909. The care, custody and control of Leota Winter, their little child, was given by the district court to the plaintiff.

A default was taken on the 4th day of October, 1909, and subsequently the plaintiff proved up, and the court found generally in favor of the plaintiff and against the defendant; also, that due notice of the filing and pendency of the petition was given the defendant by personal service and a summons to which he failed to answer or demur; that the defendant had been guilty of extreme cruelty

to the plaintiff; that the defendant wantonly and cruelly failed, refused and neglected to provide suitable maintenance for the plaintiff; that the issue of said marriage was Leota Winter, a daughter three years of age; that the plaintiff was entitled to a divorce from the defendant, and to the care, custody and education of their child, Leota Winter. The decree annulled the marriage relation. Afterwards at the April term the case came on further to be heard upon the application of the plaintiff to modify the decree so as to provide for the payment of alimony at the rate of $15 a month at the date when the decree was entered. There was a decree giving the plaintiff $15 a month from the 10th day of January, 1910, until the further order of the court. A transcript of the decree was filed in the office of the clerk of the district court of Douglas county, and an execution was issued to the sheriff of that county commanding him to cause to be levied of the goods and chattels of Leonard Winter the sum of $105. There was a return on the 14th day of December, 1910, of no goods and chattels, lands or tenements found in Douglas county upon which to levy and collect the said judgment. Thereupon a garnishee summons was issued upon the application of the plaintiff. The application alleged the amount due on the judgment; that execution had been issued and returned unsatisfied for want of sufficient property belonging to the defendant whereon to levy; and that the plaintiff had good reason to believe that the Bennett Company, a corporation, had property of the defendant and was indebted to him. The Bennett Company was duly served, and the defendant, Leonard Winter, then set up that on the 31st of October, 1910, he was married to Jean McBurney, in the city of Omaha, and that ever since that time he had been living with his said wife in said city of Omaha, Nebraska, and that the defendant therefore was the head of a family; that he had neither lands, town lots, nor a house subject to exemption as a homestead under the laws of the state; and that he and his wife were boarding, and that they had no household furniture or other property, except the defendant's

wearing apparel, which was alleged to be of a value not exceeding $50. There was a judgment in the district court discharging the garnishee, and finding against the plaintiff and for the defendant, and from this order the plaintiff has appealed.

While it is alleged that the defendant had no notice of the modification of the decree by which the judgment for alimony was rendered against him, he fails to sustain his contention. In the absence of evidence upon the subject, it will be taken that the decree is valid, and that it was rendered in the regular way. Whether the husband by his remarriage may obtain exemption from the liability which he incurred by reason of his first marriage, as set forth in the decree, is to be determined.

In *Foster v. Foster,* 130 Mass. 189, the court held: "A husband may be lawfully arrested on an execution issued upon a decree for alimony; and, upon his application to take the oath for the relief of poor debtors, charges of fraud may be filed against him by his wife."

In *Hoon v. Hoon,* 82 Neb. 688, it was held: "A wife who is a non-resident of the state, and who is separated from her husband without fault on her part, may maintain in the courts of this state an action *in equity* against her husband for support and maintenance."

In *Earle v. Earle,* 27 Neb. 277, it was held: "The law of the land having made it the legal duty of a husband to support his wife and children, *courts of equity* within this state have the power, in a suit by the wife for alimony and support, to enforce the discharge of such duty, without reference to whether the action is for a divorce or not." In the body of the opinion it is said: "But the authority to grant alimony grows out of the equity powers of the court."

In *Galland v. Galland,* 38 Cal. 265, it was held: "The provision for alimony, made in the statute concerning divorces, was not intended to be a prohibition to the granting of alimony in *other* cases. The power to decree alimony falls within the general powers of a *court of*

equity, and exists independent of statutory authority. And, in the exercise of this original and inherent power, a court of *equity* will, in a proper case, decree alimony to the wife, in an action which has no reference to a divorce or separation."

In *Garland v. Garland,* 50 Miss. 694, the court said: "Courts of equity in America will *always* interpose to redress wrongs when the complainant is without full, adequate and complete remedy at law. * * * If a wife is abandoned by her husband, without means of support, a *bill in equity* will lie to compel the husband to support the wife, without asking for a decree of divorce."

In *Rhoades v. Rhoades,* 78 Neb. 495, the question for determination was: Did the district court have jurisdiction upon service by publication to subject the interest of the non-resident husband to the maintenance and support of his wife and child? The court said in the body of the opinion: "And it is clear that the district courts of this state, being courts of *general equity jurisdiction,* are not limited in the exercise of such jurisdiction by statute. *Cochran v. Cochran,* 42 Neb. 612. * * * It is here sought, under the general equity powers of the court, to appropriate property of a non-resident which is situated within the jurisdiction of the court, to the maintenance of his wife and child." It was held that the object sought to be accomplished could be accomplished.

In *Cochran v. Cochran,* 42 Neb. 612, the wife had no knowledge of the divorce proceedings until after the date of the decree. Two years after the date of the divorce the wife brought suit in equity against the husband for alimony. Held, among other things: "Our divorce laws are liberal and should be liberally construed; but they are not designed for and should not be used to enable designing husbands, without cause, to legally discard their wives, whether domiciled in this or other states, or to escape the performance of their marriage contracts."

In *Smithson v. Smithson,* 37 Neb. 535, it was held by Judge Post: "It is not the object of the code to abolish existing remedies in cases where no provision is made

therein for the prosecution of actions. Cases involving substantial rights, which are clearly outside the provisions of the code, may be prosecuted in accordance with the practice previously recognized in courts of common law and equity."

By section 11, ch. 25, Comp. St. 1911, it is provided that a suit (a) "for a divorce shall be conducted in the same manner as *other suits in courts of equity;*" also, that (b) "the court shall have power * * * to enforce its decrees as in other cases." It will be seen by this section that a divorce case is one to be tried in the same manner as other suits in courts of equity. Then in the same section the court is given the specific power to enforce its decrees as they are to be enforced in other cases.

In *Berdolt v. Berdolt,* 56 Neb. 792, there is a discussion of what may be done in a divorce case. In the body of the opinion in that case it is said: "The issues were tried and the plaintiff in error denied relief. A decree of divorce was granted defendant in error, and all the household furniture was given to her, and the plaintiff in error ordered to pay her the sum of $5,000." There follows in the opinion a discussion of the subject as to what may be done. The court then quotes from the Compiled Statutes the section to which we have just referred, and which we give here in full: "Suits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as other suits in courts of equity; and the court shall have the power to award issues, to decree costs, and *enforce its decrees* as in other cases."

In section 12, ch. 25, Comp. St. 1911, it is provided that, in every suit brought for a divorce or for separation, the court may require the husband to pay any sum necessary to enable the wife to carry on or to defend the suit. It is also provided that the court may decree costs against either party, and that it may "direct such costs to be paid out of any property sequestered, or in the *power of the court,* or in the hands of a receiver." It would seem that the legislature intended to give the trial court the widest sort of jurisdiction.

In *Brasch v. Brasch,* 50 Neb. 73, it was held, that the amount to be allowed a wife for the expense of the suit as a condition precedent to the right to further prosecute or defend was within the jurisdiction of the trial court, and that its action would not be disturbed, unless an abuse of discretion should be shown.

In *Pedersen v. Pedersen,* 88 Neb. 55, it was held: "When a divorce is granted to the husband on any ground except adultery committed by the wife, the court may allow permanent alimony to the wife out of the property of the husband."

In *Best v. Zutavern,* 53 Neb. 604, it was said by Sullivan, C. J.,: "The husband's right to an exempt homestead cannot, we think, be urged against the wife who has been forced by his aggression to leave his domicile, and who, in an action for divorce, has obtained a judgment for alimony against him. The homestead law is a family shield, and cannot be employed by either spouse to wrong the other." It was distinctly held in that case that a judgment for alimony in favor of the wife was a lien on the family homestead where the title was held by the husband. Judge Sullivan, in delivering the opinion of this court, cited two Kansas cases, in one of which a decree declared to be a lien on all the husband's realty was held to be a valid lien on the family homestead (*Blankenship v. Blankenship,* 19 Kan. 159). He then said: "The logic of these decisions is that exemption statutes are not designed to protect the husband against the wife's claim for alimony. To the same effect are the cases of *Mahoney v. Mahoney,* 59 Minn. 347, and *Daniels v. Morris,* 54 Ia. 369." *Fraaman v. Fraaman,* 64 Neb. 472, follows *Best v. Zutavern, supra.*

In the light of the cases cited, it would seem that the same reasons which allow the homestead exemption to be sold for the support of the family should apply. The duty of the defendant to comply with the decree to the extent of $15 a month is as strong as the duty which binds him to the wife in Omaha. A consideration of sections 8099-8106, Rev. St. 1913, relating to exemptions, shows that the protection of the family, and not the husband,

is the object of the statute. It could never have been designed to allow a man to escape his obligations to his family. Why, then, should it not protect the family against him as well as protect it against a creditor.

In this case there is no justice in permitting the defendant to deny support to his first wife and to his little daughter. If the defendant can create a condition with which to successfully defend himself against the decree of the court, then it may well be doubted whether the decree is of any use. The defendant knew that he was under obligations to satisfy the decree that the court had rendered against him for alimony, and he knew that he was bound to support his little child and to aid in the support of his wife as provided by the decree. The law ought not to permit him to construct a shield that will protect him in his marital and domestic recklessness. By getting married again, he ought not to be permitted to relieve himself from the burden of supporting the child that he caused to come into the world. When the legislature passed the act providing for the exemption of the "head of a family," it certainly did not contemplate that, after a man had failed to provide for his wife and the children born to them, he could in defiance of the decree of the court avoid the natural duty of providing for his children. The $15 which the wife was allowed was meant to drive the wolf from the door. The defendant should be compelled to pay it.

That branch of jurisprudence which treats of marriage is most important. Marriage furnishes the basis of a permanent and Christian civilization. The duties assumed under it should be conscientiously discharged. Courts of equity will compel the enforcement of marriage obligations, and no mere rule of law sought to be interposed by him will permit the derelict husband to escape the burden of supporting his wife and children.

In England it is said always to have been the accepted doctrine that marriage as an institution is the keynote of the commonwealth and the highest expression of morality; that "if a wife secures an order for alimony against her

husband, he being a man of property, the court may require him to give security for its payment, or direct him to make a transfer of money to a trustee or trustees for the convenient payment to the wife." Ringrose, Marriage and Divorce Laws of the World, p. 26.

The right of exemption is based purely upon a law remedy. In the instant case the defendant is separated from his wife because of his neglect to perform the obligations that are incumbent upon him as a husband. He neglected to provide for his wife and child. He neglected to comply with the decree of the court. He undertook to stand above the court and to disregard its decree. In doing this he interposed, or attempted to interpose, the exemption law as a shield to protect him from doing that which the court had clearly decreed that he should do.

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

REVERSED.

BARNES, LETTON and SEDGWICK, JJ., not sitting.

ALONZO A. WRIGHT, APPELLEE, V. THOMAS HOCTOR, MAYOR, ET AL., APPELLANTS.*

FILED FEBRUARY 13, 1914. No. 18,069.

1. **Constitutional Law**: MUNICIPAL CORPORATIONS: CONTRACTS: STATUTORY PROVISIONS: UNION LABOR CLAUSE. The city of South Omaha let certain contracts for public work under section 178, ch. 17, laws 1901, which as since amended (laws 1909, ch. 17, sec. 123) reads: "That in all cities governed by this act, where work is performed upon the streets, sewers, boulevards, or in parks, etc., or by virtue of any contract with any person, company or companies, or corporations, for such cities, shall be done by union labor and be paid for at the rate of two dollars ($2) per day; provided, that when skilled labor is employed by the city said labor shall be paid the current scale of union wages; provided, that eight hours shall constitute a day's labor. And it shall be the duty of the city clerk or other person or persons authorized

*Rehearing denied. See opinion, p. 355, *post*.

to advertise for bids for contracts for city work to insert these provisions in said advertisement."

The plaintiff, a taxpayer, brought this suit to enjoin the said city officials and the defendants, who were contractors, from proceeding with said work, and that the contracts should be canceled. *Held*:

(a) That the said union labor clause is void, because it is undemocratic in its plan, in conflict with the constitution of the state, and contrary to the spirit of our republican form of government.

(b) In effect the said provision excludes the unskilled laborer from the work to which he is entitled, and compels the taxpayer to sustain the burden of an arbitrary rate not based upon the actual value of labor, and without reference to the going wages of the time, place and kind of labor to be performed.

(c) It takes the private property of the taxpayer without due process of law, and is in violation of section 3, art. I of the Bill of Rights.

(d) It undertakes to support a privileged class at the expense of the taxpayer, and puts upon the latter a burden not contemplated by the laws of the state.

(e) It takes the property of one person and gives it to another without attempting just compensation.

(f) The contracts are not let under such terms as to admit of competition, and there is a disregard of that part of section 128, ch. 17, laws 1909, which provides that the mayor and council "shall award such contract to the lowest responsible bidder of the class (of material) so designated."

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

H. C. Murphy, S. L. Winters and *John P. Breen,* for appellants.

W. R. Patrick, contra.

HAMER, J.

The district court for Douglas county enjoined the mayor, the members of the city counsel, and the city clerk, of South Omaha, their successors in office, and certain other defendants. The purpose of the injunction was to prevent the carrying out of certain contracts relating to

the labor to be performed upon the streets, sewers, etc., of South Omaha. The petition shows that the plaintiff as a taxpayer brought the action to obtain an injunction against the city officials of South Omaha restraining them from carrying on public work under a large number of paving contracts, which are described in the petition, and from paying for such work. There are 18 paving contracts in 18 paving districts and 12 grading contracts in 12 grading districts. They are all described in the plaintiff's petition, and it is set forth that the contracts had been awarded to the several defendants who are joined with the city officials as defendants in the case. It was prayed that the court adjudge the contracts to be illegal and that they be canceled. The chief ground alleged is that the statute provides the following in all cities of the South Omaha class: "That in all cities governed by this act, where work is performed upon the streets, sewers, boulevards, or in parks, etc., or by virtue of any contract with any person, company or companies, or corporations, for such cities, shall be done by union labor and be paid for at the rate of two dollars ($2) per day; provided, that when skilled labor is employed by the city said labor shall be paid the current scale of union wages; provided, that eight hours shall constitute a day's labor. And it shall be the duty of the city clerk or other person or persons authorized to advertise for bids for contracts for city work to insert these provisions in said advertisement." Laws 1909, ch. 17, sec. 123. It is claimed in the petition that, because of this statute and the insertion of a reference to it in the advertisement for bids as the statute itself provides, competition in respect to the proposed improvements was restricted to such contractors as were able to employ *union labor,* and that fair and free competition in respect to the proposed improvements was destroyed; that the rate of wages so prescribed and required to be paid is excessive and unreasonable, and would increase the cost of improvements to the plaintiff and to other taxpayers of the city; that said contracts are therefore null and void. The ground was taken by the plaintiff that the union labor

provision of the statute was unconstitutional because of the provision for hiring only union labor; also, because of fixing eight hours for a day's work. It was also alleged that certain of the contracts were fraudulently procured, but the details need not be set out for the reason that the case is disposed of on other grounds. The appeal to this court is from the judgment of the district court for Douglas county making the injunction perpetual.

It is said in the argument of counsel for the defendants that the city officials, in advertising for bids for the public work specified, drew attention to the said union labor clause, but did so only to comply with the command of the statute, but with no intention on behalf of the city to seek the actual enforcement of the law. As evidence of that fact it is claimed that since the original enactment of the said labor union clause more than $1,000,000 worth of public work has been done upon the streets, sewers, parks, boulevards and other public works in the said city of South Omaha, and that during all that time no attention whatever had been given to the enforcement of the said labor union clause. It is further claimed that there was no union labor procurable, and that the kind of laborers ordinarily employed to do such work are not unionized laborers; that ever since the enactment of the statute the city has taken no affirmative action in the matter of its enforcement, and has made no demand upon the officers having charge of the public work, or the contractors, that this provision be enforced; that this provision has not resulted in any increase in the bids nor deterred bidders from bidding, and that all contractors who have done any contracting with the city, including those mentioned in the petition, have disregarded said provision and have not considered it in making their bids or carrying out their contracts, and that as far as the results are concerned the business has been carried on just as though the statute was not in force.

It is also set up by the defendants that there are no laborers organized in the union covering the class of labor to be performed under the contracts set out in the plain-

tiff's petition, and that, there being no such class of laborers, it is impossible to comply with the statute whether it is valid or invalid.

In the decree the district court found that the union labor provision was unconstitutional and void so far as it required the public work in the city to be done by union labor only; that there was inserted, pursuant to the command of the union labor provision, a notice calling the attention of bidders to the existence of said union labor provision in the statutes; also, that there was inserted a clause which bound the contractor, except Daniel Hannon, to comply with such union labor provision; also, that the different contractors in bidding for the contracts involved in the litigation did not add any amount of money to their respective bids on account of such union labor provision, although it is implied that this might have been done. It was also found that the union labor provision had generally been ignored in the actual performance of such contracts, "but the court nevertheless finds and concludes that the natural tendency of such union labor provision and its insertion in the advertisements calling for bids is to limit and restrict the field of labor and to limit and restrict competitive bidding; and that the presence of said union labor provision in the statutes and the reference to it in the advertisements for public bids to do public work, as found in paragraph two herein, are alone sufficient to render the contracts void."

It is now argued that the provision in the law concerning union labor will make no difference in the cost of improvements. While this may be true, the method proposed is undemocratic. The tendency to exclude bidders by providing that laborers shall belong to a certain restricted class is to prevent competition and increase the probable cost of improvements.

It is argued that the law cannot be unconstitutional for the reason alleged that no man may put his finger upon that section of the constitution which forbids this manner of letting the contract.

The trial judge gave care and study to the preparation of his opinion, and it is deserving of careful consideration.

In *Adams v. Brenan,* 177 Ill. 194, 42 L. R. A. 718, there was a contract let by the board of education of the city of Chicago to one John A. Knisely for the repair of a schoolhouse. Before the making of the contract with Knisely the board of education had entered into an agreement with an organization in the city of Chicago, known as the "Building Trades Council," by which the board of education agreed to insert in all contracts for work upon school buildings a provision that none but union labor should be employed in such work, and that none but union workmen should be employed and placed upon the pay rolls of said board. The board advertised for bids for the construction of a roof on an addition to Bryant's school. In the advertisement it was stated that "none but union labor shall be employed on any part of the work where said work is classified under any existing union." The contractor, Knisely, submitted two bids for the construction of the roof. In the first of these he offered to do the work according to the plans and specifications for $2,090, and to be bound by said condition touching the employment of union labor. In the second bid he offered to do the work "for the sum of $1,900, provided all conditions as to the employment of none but union labor are stricken from the specifications and contract let accordingly." The higher bid of $2,090 was accepted by the board of education. It had the restriction attached to it. The board and Knisely entered into a contract according to the terms of the higher bid. There was a bill filed for a preliminary injunction. The application was denied and the trial court dismissed the bill for want of equity. The supreme court of Illinois said: "The taxpayers are in equity the owners of the fund, and the board can only hold and apply it to legitimate purposes of the trust. The law is established, beyond doubt or controversy, that a bill to enjoin public officers so situated from misappropriating the fund in their charge is a proper remedy for a taxpayer. Courts of chancery will interfere to restrain such authorities

from a misuse of the fund entrusted to them, or its appropriation to a purpose not warranted by law (citing cases)." It appears from the facts stated in the case that the "treaty" of the board of education with the Building Trades Council was for the purpose of calling off a strike. It was claimed that this "treaty" would do away with strikes upon school buildings. Continuing, the court said: "It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work. It is unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should by a statute undertake to require this board, as the agency of the state in the management of school affairs in the city of Chicago, to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void as in conflict with the constitution of the state. If such a restriction were sought to be enforced by any law of the state it would constitute an infringement upon the constitutional rights of citizens, so that the state in its sovereign capacity, through its legislature, could not enact such a provision. (Citing authorities.) There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church." It is said that the complainant as a taxpayer is not deprived of a remedy for his wrong because neither the contractor nor excluded laborer has questioned the contract. It is also said that there is another ground upon which complainant has an undoubted right to maintain the bill, and that is that the contract tends "to create a monopoly, and to restrict competition in bidding for work." The Illinois supreme court determined that the decree of the trial court in dismissing the bill was wrong, and its decree was reversed.

In *Price v. City of Fargo,* 139 N. W. (N. Dak.) 1054, it was held that, if there is no law requiring competitive bidding nor that the contract be let to the lowest bidder, then the contract need not be let to the lowest bidder, and that where it is awarded to a higher bidder a taxpayer cannot have the contract set aside, unless there is proof of fraud. In that case there was an election for the purpose of voting water bonds to aid in the construction of a filtration plant.

In the case of *City of Atlanta v. Stein,* 111 Ga. 789, it was held: "A municipal corporation, though not required by its charter to let contracts for public work to the lowest bidder, and though clothed as to such matters with the broadest discretionary powers, has no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a specified class." In that case it was held that the ordinance cut off the power to fully and freely exercise that discretion which the public good requires the mayor and the general council to exercise in making the contracts.

In *Holden v. City of Alton,* 179 Ill. 318, the city charter required the contracts to be let to the lowest bidder, and it was held that an ordinance like the one in the Georgia case last above cited was illegal, and that it tended to create a monopoly and to impose an additional burden on the taxpayers. In *Holden v. City of Alton, supra,* the ordinance required all contracts for city printing to be be awarded to union shops only, or to such as were able to show the union label.

In *Fiske v. People,* 188 Ill. 206, it was held: "An ordinance requiring the employment of union labor only, upon public improvements, is unconstitutional and void, because an unjust discrimination between classes of citizens, which restricts competition and increases the cost of the work." Of the ordinance in that case it was said: "The requirement that the bidder for doing the work on a public improvement shall agree to hire only members of labor unions in the performance of such work, and that, in all contracts executed by the commissioner of public

works on behalf of the city, the contractor shall agree to hire only members of labor unions, amounts to a discrimination between different classes of citizens, and lays down a rule which restricts competition and increases the cost of work. Under our constitution and laws, any man has a right to employ a workman to perform labor for him, whether such workman belongs to a labor union or not, and any workman has a right to contract for the performance of labor irrespective of the question whether he belongs to a labor union or not."

In *Miller v. City of Des Moines,* 143 Ia. 409, 23 L. R. A. n. s. 815, it was held that it was an abuse of the council's discretion to give a contract to union labor alone, under an ordinance, because of the tendency of such a contract to create a monopoly, and because it involved a denial of the equality of right and opportunity to which every bidder is entitled.

In *Lewis v. Board of Education,* 139 Mich. 306, it was held that the board of education had no power to require contractors constructing public buildings to employ union labor exclusively; that to do so tended to increase the cost of the taxpayer.

In *State v. Toole,* 26 Mont. 22, 55 L. R. A. 644, it was held that, as the statute required the contract to be let to the lowest responsible bidder, a municipal contract could not be rescinded because the man who got the contract would not employ union labor.

In *Paterson Chronicle Co. v. City of Paterson,* 66 N. J. Law, 129, there was a resolution requiring the work to be done by union labor, and the court held the ordinance requiring union labor to be invalid. The law of New Jersey then required such contracts to be let to the lowest bidder.

In *Davenport v. Walker,* 57 App. Div. (N. Y.) 221, it was held that a provision requiring work to be done by union labor without legislative sanction would be declared void because it increased the cost to the taxpayer. The same thing was also held in *People v. Edgcomb,* 112 App. Div. (N. Y.) 604.

In *Marshall & Bruce Co. v. City of Nashville,* 109 Tenn. 495, 71 S. W. 815, it was held that the ordinance providing for union labor was void because it interfered with competitive bidding.

In *Goddard v. City of Lowell,* 179 Mass. 496, it was held, in a case where the statute required the contract to be let to the lowest bidder, but the council sought by ordinance to require the printing to bear the union label, that the council could not require the work to be done by union labor.

In *People v. Metz,* 193 N. Y. 148, 24 L. R. A. n. s. 201, the supreme court of New York holds that the statute regulating the hours upon public works by a municipality is constitutional, and not in violation of the federal constitution, and that there is no unconstitutional discrimination where persons employed on public works are prohibited to labor more than eight hours, while others employed by private citizens are not restricted in the duration of the hours of labor. The decision is based upon the proposition that, as a municipality is but an arm of the state and is carrying out the work of the state, and as no one has a right to work for the state except upon the terms that the state may see fit to employ him, therefore no one may complain because the state may discriminate as it sees fit.

In the case of *Goodrich v. Mitchell,* 68 Kan. 765, 64 L. R. A. 945, it was held that the law, which provided that those who have served in the army and navy and who have been honorably discharged therefrom shall be preferred for appointment in every public department and upon the public works of the state and in the cities and towns thereof, was constitutional on the ground that office holding is a *political privilege,* and not contrary to the fourteenth amendment of the federal constitution, and that the power of the legislature is supreme in respect to appointment, save as the constitution has limited it. To the same effect was the decision of the supreme court of Iowa in *Shaw v. City Council of Marshalltown,* 131 Ia. 128. In that case the statute of Iowa provided for the pref-

erence of honorably discharged soldiers and sailors of the civil war in any employment in the public service.

In the instant case Judge Kennedy, who heard the case in the district court, held that it was *ruled* by *Woodruff v. Welton,* 70 Neb. 665. In that case it was held that a resident taxpayer, without showing any interest or injury peculiar to himself, might enjoin illegal expenditures by a public board or officer. There was a provision in the law that the county board should prepare estimates of books and blanks and stationery required for the use of county officers during the coming year, and that there should be a brief advertisement published in a newspaper of the county stating the probable gross number of each item of books, blanks and stationery required by such county during the following year, and inviting bids therefor. There was a failure to comply with that provision, and it was held that any resident taxpayer might enjoin the illegal expenditure which would follow from the letting of such contract. The taxpayer should have the right to object to the manner of letting any contract for public work which places, or may place, an unjust burden upon his property. To the same effect is *Tukey v. City of Omaha,* 54 Neb. 370.

It is maintained in the brief of defendants that the digging in the streets contemplated by the contracts is common labor. If that be true, that is an additional reason why the contract should not exclude it in favor of union labor. The common people should be given an opportunity to perform common labor. They are interested in the question as wage-earners. They need the labor for the support of themselves and their families. If they are denied a chance to support themselves, they suffer directly, and the state is injured by their loss; the taxpayer is liable to be compelled to pay more taxes than he otherwise would, and he therefore sustains an injury; and lack of prosperity to both wage-earner and taxpayer brings loss and lack of prosperity to the state. The thing done is contrary to the spirit of our government, which contemplates the best that may be honestly and fairly done for all its citizens. The

courts are not without a duty to perform. That duty includes the protection of all the people under the law from the ill-advised action of those who would despoil them of their rights or their property.

An illustration of the proper way to treat the wrongs inflicted on the taxpayer is furnished by the case of *Malette v. City of Spokane,* 68 Wash. 578. The legislature of the state of Washington, in fixing the hours of labor upon public works, passed an act declaring "eight hours in any calendar day shall constitute a day's work done for the state." There was also a prior act providing that work done for any political subdivision of the state should "be performed in workdays of not more than eight hours each." The city of Spokane by ordinance declared: "Hereafter eight (8) hours in any calendar day shall constitute a day's work on any work done for the city of Spokane." By the second section of the ordinance it was provided: "Hereafter all laborers employed by the day on municipal work, either directly by the city, or by contractors, subcontractors, individuals, partnerships, associations, or corporations, on all work for the city, shall receive and be paid not less than $2.75 for a calendar day's work of eight (8) hours." On March 10, 1910, the city passed an ordinance providing that "all work done by common laborers for the city of Spokane, or for any contractor, subcontractor, or other person doing work by contract, or otherwise, for the city of Spokane, shall receive the sum of three dollars ($3) per day for eight hours' labor." "On March 25 the city council passed an ordinance calling for the improvement of Sixteenth avenue, by constructing a sewer therein, creating an assessment district, and providing for the payment of the cost thereof by special assessments to be levied against the property benefited. A contract was thereafter let to one James C. Broad, who finished the work under his contract." At the time the contractor under this ordinance was compelled to pay $2.75 to $3 a day for common labor. The going wages for that class of labor ranged from $1.85 to $2.25 for a ten-hour day. There

was an appeal by a taxpayer. He based his contention on the proposition that the ordinance was unreasonable, and contrary to public policy, and that it was in contravention of the constitution of the state and of the constitution of the United States, because it took property without due process of law. The supreme court said: "Abandoning legal phraseology, the concrete question, put in plain English, is whether a city can improve the property of a citizen, either upon his petition or against his will, and tax an arbitrary sum therefor that puts the cost unreasonably above the cost of like work if done through the instrumentality of a private agency. * * * Here we have an ordinance saying, not that a sum no less than the going wage for like labor shall be paid, but that a fixed sum irrespective of going wages or the worth of the employee shall be paid. In the instant case, the wages paid are from 50 to 90 cents higher for eight hours than are wages paid in private employment for like labor for ten hours. To hold this arbitrary resolution to pay an excess of wages to be reasonable, reference to some fixed principle of law must be had. It would seem that no such reference can be had. * * * If a council can pay $3 when the current wage is $2.25, they can fix the price of commodities entering into the construction of a public work and provide that material must be purchased of certain persons or firms when the same commodity might be had of others at a less price. Under such a system there would be no limit to the 'discretion' of the city officers, who to serve personal or political ends might burden the taxpayer beyond the point of endurance. In cases of this character it is well to recur to fundamental principles for our guidance, one of the most salutary of these being that all municipal ordinances shall be reasonable, to the end that a favor to one citizen shall not find sustenance in the burden of another."

A favor to one citizen ought not to be sustained by the burden placed upon the shoulders of another. Therefore in this case the unskilled laborer who can dig in the streets ought not to be cut off from that work by a provision

which calls for union labor; neither should the taxpayer be compelled to pay a higher rate because only union labor can be employed by the contractor. And there should be no fixed rate of wages provided by the legislature, without reference to the going wages for that kind of work at the time and place where it is to be performed. The contracts were not let so as to admit of competition. Section 128, ch. 17, laws 1909, contains a provision that contracts of this character shall be awarded "to the lowest responsible bidder of the class (of material) so designated." The manner of letting these contracts would take the private property of the taxpayer without due process of law, and is in violation of section 3, art. I, of the Bill of Rights.

We are of the opinion that the evidence fully sustains the findings and judgment of the district court on behalf of the plaintiff; that the so-called union labor provision found in the law governing cities of the South Omaha class is unconstitutional and void; that the tendency of such provision and its insertion in the advertisements calling for bids is to limit and restrict the sources of labor and to limit and restrict competitive bidding; that the contracts are void so far as they have been so declared by the judgment of the district court; and that the plaintiff is entitled to the relief given him.

The judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

The following opinion on motion for rehearing was filed April 17, 1914. *Rehearing denied:*

HAMER, J.

The two motions for a rehearing in this case, supported by briefs, require consideration. Counsel are entitled to much credit for the labor performed. The opinion, *ante*, p. 342, heretofore adopted declares the statute unconstitutional, not because of its provision that "eight hours shall constitute a day's labor," but because the provision

to employ only union labor "is to limit and restrict the sources of labor and restrict competitive bidding." The statute does away with competitive bidding, because it provides that the work "shall be done by union labor," and this clause cuts off the employment of common laborers and the use of common labor in the construction of work performed upon the streets, sewers, boulevards, and parks in cities of the class of South Omaha. Section 3561, Rev. St. 1913, provides: "Ten hours shall constitute one day's labor, so far as it concerns laborers and mechanics, throughout the state."

In the opinion nothing is said concerning the fact that eight hours shall constitute a day's labor, and section 3561, above cited, disposes of the question as to the number of hours that may constitute a day's labor in this state. Having determined that the statute was unconstitutional because it did away with competitive bidding, we need not discuss the eight-hour provision. The writer of the opinion undertook to show what these cases referred to in the brief for a rehearing had decided, and to allege that they were not adverse to the rule announced in the opinion. There is a short statement as to each case. These cases are not cited for the purpose of showing that they are in point, but to distinguish them and their provisions as compared with the instant case.

In *Malette v. City of Spokane,* 68 Wash. 578, it appears that a rehearing was granted, and a new opinion is found in 137 Pac. 496. This provides, among other things, that, if the work is done by contract after the reception of bids, it is not required that the contract shall be let to the lowest bidder. This new opinion is a consideration of the subject as applied to "common labor," and does not refer to union labor or to any restricted class of labor. The legislature of the state of Washington passed an act providing that "eight hours in any calendar day shall constitute a day's work on any work done for the state or any county or municipality within the state (Rem. & Bal. Code, sec. 6572)." It was also provided that "all work done by contract or subcontract on any building or improvements or

work on roads, bridges, streets, alleys, or buildings for the state, or any county or municipality within the state, shall be done under the provisions of this act. * * * And for this purpose, this act is made a part of all contract, subcontracts or agreements for work done for the state or any county or municipality. (Rem. & Bal. Code, sec. 6573)." Later there was another amendment re-enacting the number of hours constituting a day's work, and limiting the number to eight hours for each work day (Rem. & Bal. Code, sec. 6575). This act contained a penalty providing that all contracts for such work "might be canceled by the officers of the state, county, or city having supervision of the work, in case of a violation of the statute (Rem. & Bal. Code, sec. 6576). It was further provided in the act that it should be the duty of such officers to incorporate in all such contracts stipulations, "as provided for in this act, and to declare any contract canceled, the execution of which is not in accordance with the public policy of this state as herein declared (Rem. & Bal. Code, sec. 6577)." Following the foregoing acts of the legislature of the state of Washington, the city of Spokane passed an ordinance on August 24, 1909, providing that "eight hours in any calendar day shall constitute a day's work on any work done for the city of Spokane." It was provided in section 2 of the ordinance: "Hereafter all laborers employed by the day on municipal work, either directly by the city or by contractors, subcontractors, individuals, partnerships, associations or corporations, on all work for the city, shall receive and be paid not less than $2.75 for a calendar day's work of eight hours." Afterwards, on March 10, 1910, the city of Spokane passed another ordinance providing "that hereafter all work done by *common laborers* for the city of Spokane, or for any contractor, subcontractor or other person doing work by contract or otherwise for the city of Spokane, shall receive the sum of three dollars ($3) per day for eight hours' labor." The act and the ordinance nowhere mention union labor. Apparently they are gotten up for the benefit

of the "common laborers" doing work for the city of Spokane.

We have carefully examined the authorities cited in the briefs, and we are unable to find a reason for reaching a different conclusion than that we announced in the opinion. The motions for a rehearing are therefore

OVERRULED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

JOHANNA M. ANDERSON, ADMINISTRATRIX, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 27, 1914. NO. 17,374.

1. **Master and Servant:** INJURY TO SERVANT: CONTRIBUTORY NEGLIGENCE: INTOXICATION. That a section foreman of a railroad company, who was injured in the company's yards, was in a state of intoxication at the time is evidence of contributory negligence.
2. ———: ———: DUTY OF MASTER. Where the foreman of a gang of section-men employed by a railroad company is found in the company's yards in disobedience of the orders of his superior officer, the company owes him no other duty than not to purposely or wantonly injure him.
3. ———: ———: LIABILITY OF MASTER: EMPLOYERS' LIABILITY ACT. Where a section foreman is supposed by his superior officer to be intoxicated, and is ordered by him to go home and stay there, and in disobedience to such orders afterwards returns to the company's yards in an unfit condition to work, and attempts to take charge of the section-men, he becomes a mere volunteer or trespasser, and, if injured, the employers' liability act (laws 1913, ch. 198) affords him no grounds for recovery.
4. ———: ———: RAILROAD SECTION-MEN: DUTY OF ENGINEER. An engineer operating his engine in the yards of a railroad company has a right to assume that the section-men in the yards will take notice of and look out for moving trains, and no duty or obligation rests upon the engineer to assume that they will not get out of the way of such trains.
5. ———: ———: LAST CLEAR CHANCE. The doctrine of the last clear chance has no application to the case where a section fore-

man in a railroad company's yards suddenly goes upon the track in front of a moving engine and train of cars, at a point so near the engine that it was impossible to stop and avoid injuring him.

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

Edgar M. Morsman, Jr., J. A. C. Kennedy and *B. P. Waggener,* for appellants.

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

BARNES, J.

The plaintiff, as administratrix of the estate of her deceased husband, Carl A. Anderson, brought this action to recover damages for his death, which she alleged was caused by the joint negligence of the defendant, the Missouri Pacific Railway Company, and the engineer in charge of the locomotive, which struck and killed him. By their answers defendants admitted the allegations of the petition setting forth the representative capacity of the plaintiff, the corporate character of the defendant, that it owned and operated the engine and train of cars referred to in the petition, that plaintiff's decedent was struck by the defendant's engine and received injuries from which he died. All of the other allegations of the petition were denied, and it was alleged that the plaintiff's decedent was not in the defendant's employ at the time he received his injury, but had been discharged prior thereto, and at the time he was injured Anderson was a trespasser, was intoxicated and under the influence of liquor, and stepped directly in front of defendant's moving train, thereby receiving the injuries resulting in his death. The reply put in issue the averments of the answer. The cause was tried to the district court for Douglas county and a jury, and a verdict was returned against both defendants for $9,999. Motions for new trials were overruled, a judgment was entered upon the verdict, and both of the defendants have appealed.

It appears that the defendant railroad company owns large yards and terminals in Omaha located in the north-

ern part of the city, and extending northward from what is called Webster street station for the distance of more than a mile. There are four tracks, one of which was known as the main passenger track, another as the roundhouse track, and the other two as holding or switch tracks, near and parallel to each other in the defendant's yards. Plaintiff's decedent was foreman of a gang of men who had charge of that part of the defendant's yards, lying between Locust street and the Webster street station, and it was his duty, with the help of his gang, to keep the tracks in condition in that part of the yards. The tracks north of Locust street were under the care of another foreman, who had his own gang of men. In addition to the two gangs just mentioned, there was present at the time of the accident a third or extra gang in charge of a separate foreman. Anderson was hired by, and directly subject to, the orders of defendant's roadmaster, J. L. Buzzard, who was in charge of the Omaha yards and terminals, having full power to hire and discharge the section-men. On the evening of the 30th day of December, 1909, the rails of the main track at a point a short distance north of the Webster street station spread, thereby derailing a couple of freight cars. This derailment blocked the main line, and compelled passenger trains going between the yards and the station to use the roundhouse track for the purpose of passing the derailment. Ordinarily it would have been Anderson's business to take his gang to the place of the derailment and repair the main track after the cars had been removed therefrom by the wrecking crew; but roadmaster Buzzard had his attention called to the fact that Anderson was intoxicated, and specifically ordered him to go home and keep away from the work. He sent a Mr. Grandinett, Anderson's assistant, and his gang, to the place of the derailment to repair the main track. E. C. Ciol, sometimes called "Rugge," was the foreman of the extra gang, and when Buzzard sent Anderson home he superseded his authority and put all of the men in charge of the foreman of the extra gang.

It appears from the testimony that when Anderson was ordered to go home he started in that direction, and was not seen again by the men at the place where they were working until a short time before he was injured. The two gangs of men sent to repair the main track worked by torch light. About 8 or 9 o'clock Anderson turned up, and attempted to again boss the job. There is evidence in the record from which it appears that he was badly intoxicated, while it is shown by other evidence that he might have been sick. In any event, he was not in his natural or normal condition. Buzzard was not then present, and never saw Anderson after giving him his orders to go home. About 9 o'clock the regular passenger train came down the roundhouse track to the station, and as it passed the point where the men were working on the main track Anderson got in front of the moving train and was injured so badly that he died about three hours later. Defendant, Peter Gannon, was the engineer in charge of the engine which struck Anderson, and, together with the railroad company, he was made a party defendant to this suit. The accident occurred in the yards and upon the private property of the defendant, the Missouri Pacific Railway Company.

It is contended that the trial court erred in giving the tenth paragraph of his instructions to the jury. By this instruction they were told that intoxication of itself did not constitute negligence on the part of Anderson, but if the jury believed Anderson was under the influence of liquor, and if they further found that such condition was the cause of his remaining about the yards, or was the cause of his getting upon the track, then such condition of intoxication was a matter to be taken into account in determining whether or not the injury resulted from the negligence of the deceased. It appears that Anderson was notified of the derailment, and instructed to act immediately. He was at the scene of action and undertook to direct the men, when his superior officer, the roadmaster, came and ordered him to go home. He testified that Anderson was intoxicated, and he told him to go home and

stay there, that he was not fit to attend to the work. Several witnesses testified to having heard this order, and that Anderson at the time was drunk. The plaintiff claims that a question of fact was raised as to whether Anderson was drunk, and her brief refers to evidence in the record to show that there was a conflict of the testimony upon that point. The evidence that the plaintiff relied upon was the cross-examination of the defendant's witnesses. One witness, after testifying that Anderson was drunk, was asked upon cross-examination whether it was not possible that Anderson was sick and overworked that made him act as he did, and the witness answered that he thought that was possible. This is the kind of evidence by which plaintiff sought to prove that Anderson was not drunk. If Anderson was sick, or for any reason acted like an intoxicated man, and the roadmaster thought he was drunk, and told him that he was not fit to work, to go home, and thereupon put another man in Anderson's place, who took charge of the work, it would make no difference whether Anderson was really drunk or was sick. If the roadmaster thought he was drunk, and others also thought so, he should have gone home and stayed there as directed by the roadmaster. It is argued, however, that he was not discharged, and was still in the employ of the defendant. Of course his discharge was not complete until he was given his time and pay. He was still technically an employee of the railroad company, but this does not help the plaintiff's case. It was supposed by the roadmaster that Anderson was not in a condition to be in such a dangerous place, and he was ordered home. If he was an employee, he disobeyed orders that were wholesome and were necessary for his own protection, and it makes no difference whether he was intoxicated or was sick. If the jury believed that he was intoxicated, that was evidence of negligence on his part; for it may well be said that, if an intoxicated person enters a railroad yard where trains are constantly running in all directions and upon different tracks and is injured, his intoxication in such case is evidence from which negligence may be inferred.

It is also contended that Anderson's presence in the yards at the time he was injured was in defiance of and contrary to the orders of his superior officer; that the roadmaster had directed him to go home, and had delegated to another the duty of repairing the main track, and under those circumstances the defendant owed Anderson no duty other than not to wantonly run him down and injure him. The evidence shows, without dispute, that Anderson usually stopped work at 6 o'clock p. m.; that at the time of the accident he was not in charge of his gang of men; that they were under control of "Rugge;" that about 7:10 p. m. Anderson was specifically told by the roadmaster, Buzzard, to go home and stay, and not to come back any more, and "Rugge" was sent to take charge of the work of repairing the main track. Several witnesses testified that they heard the instructions given to Anderson, and no witness contradicted that testimony. It may be that those instructions did not constitute a discharge; but surely they were explicit and not capable of being misunderstood in reference to the fact that Anderson was told to go home, and was instructed to have nothing to do with the work. Disobedience of express orders has always been held to bar a recovery by a servant who is injured under circumstances where, had he obeyed the instructions, he would not have been injured.

Anderson's acts and disobedience of the express orders of his superior officer were such that it is hardly consistent with justice to say that his acts constituted slight negligence within the meaning of the employers' liability act. Laws 1913, ch. 198. It was erroneous to submit this case to the jury under the provisions of that act, for Anderson's presence at the place where he was injured on the evening of December 30 was in direct disobedience of the orders given him by his superior officer.

In *Western Mattress Co. v. Ostergaard*, 71 Neb. 572, it was said: "If a servant's injury is the direct result of his own disobedience of orders given by one in charge of the work in which he is engaged, he is guilty of contributory negligence and is not entitled to recover therefor." This

rule is supported by *O'Brien v. Staples Coal Co.*, 165 Mass. 435; *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. 94; *Mendota Light & Heat Co. v. Lafferty*, 92 Ill. App. 74; 1 Labatt, Master and Servant (2d ed.) secs. 2-13*a*.

Anderson was hired to perform such duties and such work as the master had prescribed. When Buzzard told him to go home, and turned the work over to another, the employment of Anderson did not extend to the doing of the work in question. There was no occasion for his being in the yards on that evening, and his act in going there was clearly beyond the scope of his employment. Hence, he became a mere volunteer or trespasser, and the employers' liability act has no application to this case.

It is further contended that the evidence fails to disclose any negligence on the part of the appellants. The petition avers that defendants were negligent in four respects: First, no signal or warning by bell, whistle or otherwise was given of the approach of the engine; second, that the engineer was running at a dangerous rate of speed; third, the engine was not stopped before injuring the deceased, though by exercise of proper care the engine and train could have been stopped in time to prevent the injury; fourth, no lookout was kept or maintained at the place where deceased and his gang of men were working.

There seems to be no evidence in the record tending to support the first allegation of negligence. All of the witnesses who testified either heard the whistle blow, or heard the bell ring, though some of them did not hear both warnings. The engine could have been seen for a distance of a mile northward from the place of the accident. It had one of those brilliant electric headlights which of itself was sufficient warning to everybody. Under this testimony it was erroneous to permit the jury to find appellants negligent for a failure to give a signal of the approach of the train.

It must be conceded that there are some dangers in the various activities of life which cannot be eliminated, and a railroad yard presents such a case. The effort to give adequate warning to workmen in a railroad yard would of-

ten add to the confusion and danger, in that so many engines and trains would be sounding bells and whistles that a workman would be more confused than under the present system of procedure, where the workman is expected at all times to be on his guard for trains and keep out of their way.

In *Ives v. Wisconsin C. R. Co.*, 107 N. W. 452 (128 Wis. 357), it was said: "That a train was running within city limits at a speed greater than that allowed by law did not relieve a section-man from the rule that section-men on railroads assume the risk of trains of all sorts, regular or wild, running over the tracks at all times and at such speeds as are attainable, without notice or warning except such as results from the noises of the train, including customary signals. That a train by which a section-man was struck and killed was running at an unusual rate of speed in the place where the accident occurred does not relieve the section-man of the assumption of risk of injury from trains."

We think it is reasonably clear that the defendant was not guilty of any negligence in that regard. The foregoing also disposes of the question of the rate of speed alleged in the petition, and, in any event, there seems to have been no competent evidence that the train which struck and injured Anderson was running at an excessive rate of speed.

As to the averment of negligence on the part of the defendant in not keeping a lookout at the place where the deceased and his gang of men were working, there seems to be no evidence in support of that averment, and if, as contended by the plaintiff, Anderson was in charge of his gang of men at the time of the accident, it was his duty to have kept and maintained such a lookout. Therefore, it was erroneous to permit the jury to hold appellants guilty of negligence for failing to maintain a lookout where Anderson and his gang of men were working.

The foregoing discussion, and the authorities cited, apply with equal force to the contention of appellant Gannon. He had the right to assume that Anderson and his

section-men would keep out of the way of his train, and it is clearly manifest that the doctrine of the last clear chance can have no application to the facts of this case. An engineer operating his engine in the yards of a railroad company has the right to assume that the workmen in the yards will take notice of and look out for moving trains, and no duty or obligation rests upon him to assume that the workmen will not get out of the way of the locomotive. Any suggestion that the engineer must know that the workmen will not get out of the way would mean the destruction of the rule which applies to workmen in railroad yards. Again, engineer Gannon testified that he brought the train from the roundhouse to the depot; that he was sitting on the right-hand side of the engine; that all at once there was a man that stood the farthest from the gang, who started to walk up the track a little, then turned and fell across the track he was on. He was about two car lengths from the engine when he started to walk along the track. "When he got to the track I was on, he was about 15 feet from the engine. Then I threw the engineer's brake valve emergency and blowed the whistle. I did not think I hit the man at all. I did not think I got up to him." On cross-examination he testified: "When I whistled at Ohio street all the men seemed to look up; they were working 15 or 20 feet west of the track I was on. Q. What did you next see him do? A. Well, he kind of turned and looked at the engine again, and then made kind of a cut and fell across the track. The engine was about three car lengths away. * * * I observed him fall, and it looked as if he were going toward the track; as he fell he was 15 feet away." This evidence was undisputed except by the testimony of one of the witnesses, who placed the distance between the engine and Anderson, when he got upon the track, at several car lengths. There was another witness who testified that he thought the engineer was looking toward the men at the side of the track, and not in front of his engine. But this testimony was entitled to very little, if any, weight, as against the positive testimony of the engineer. It therefore seems clear that when

Anderson got upon the track he was so near to the moving engine that it was impossible to have stopped it in time to have avoided the injury.

Many other errors are alleged, which we have not the time or space to discuss, but from what we have already said it is apparent that neither of the appellants had a fair trial, and for the errors herein pointed out the judgment of the district court is reversed as to both of the defendants, and the cause is remanded for further proceedings.

REVERSED.

REESE, C. J., dissenting.

I find myself unable to agree to the opinion of the majority of the court in this case, and will briefly state the grounds of my dissent.

I think it must be conceded that the evidence establishes beyond question that the track yards, where the spreading of the rails and derailment of the freight cars occurred, were in very bad condition. Snow had fallen, and the ground was soft and muddy. Both the passenger track and the roundhouse track, paralleling each other, were uneven, and, in reality, unsafe for the passage of cars or trains, except by the exercise of great care. Decedent was the foreman of a gang of men in charge of those particular tracks and others within his territory. After the completion of the day's work the men constituting the force under decedent's care had gone to their several homes and lodging-houses. After they had separated the derailment occurred. The roadmaster, having been informed of the spreading of the track and derailment of the cars, ordered decedent to call out his men and assist in restoring the track and removing the wrecked or derailed cars. Decedent did as directed, and, instead of returning to his home for his evening meal, he went to a telephone, and by its use, directed his son to bring his supper to him. It was then night, and the men, not only of his force, but another gang of track men, were assembled to remove the derailed cars and restore the track. Probably about the time the

men were being assembled the roadmaster concluded that decedent was intoxicated and ordered him to go home. Upon the particular question as to what that order was, there is a conflict in the testimony. The roadmaster and some others testified that the order was to go home and keep away from the work. Others testified that all that was said was for him to go home. The roadmaster testified that he made use of language substantially as stated in the majority opinion, but upon cross-examination it was shown by him that he was a witness at the coroner's inquest, held very soon after the accident, where the subject of the extent of this order was under investigation, and the question was asked him as to what he said, and he answered that he simply told decedent to go home. The question was asked him: "Didn't you say before the coroner's inquest, 'I simply ordered him to go home?'" His answer was: "Yes, sir; I said that." "Q. You simply ordered him to go home? A. Yes, sir." This did not amount to a discharge, nor was it an order to "keep away from the work," as contended by defendant.

There is a direct conflict in the evidence as to decedent's intoxication at all. Witnesses who observed him stated that there seemed to be something wrong with him at the work of clearing and restoring the track, but whether intoxicated or sick they could not say. Immediately upon being run over by the train, he was taken up and conveyed to a hospital, and no one detected any evidence of inebriety about him, notwithstanding special investigations were made before his death. He had never been known to be intoxicated during the time he was under employment by defendant. Under the evidence submitted, the question of his intoxication was solely for the consideration of the jury.

It was shown that the track known as the roundhouse track was in a bad condition, not suitable for the rapid movement of trains or cars. This was known to the engineer, for he had but a few minutes before passed over it on his way to the roundhouse for the passenger coaches to be used in making up the train at the Union station

for the run to the south. Not only so, but in passing out to the roundhouse he had seen the men at work removing the wreck from the adjoining track and relaying the rails, guided in their work by the use of torches, but he seems not to have sounded his whistle nor rung his bell announcing his return, to warn those men, who, in the confusion of the removal of the derailed cars and the restoration of the track, by the light of their torches, were working immediately by the side of the track over which he was to pass. There was a bright headlight upon his locomotive, the track was straight, and, had he been on the lookout to the front, he could have seen decedent at work upon the track upon which his train was approaching, but no attention seems to have been given to what was in front. Was he negligent? The rule that all questions of fact were for the consideration of the jury seems to have been forgotten. In addition to this, it was shown that decedent was engaged in inspecting and measuring the track, over which the train was passing, in a stooping position, with his back toward the approaching train, the immediate approach of which he had no notice by bell or whistle, until he was run down, and his life destroyed. Was he guilty of negligence? This question was solely for the jury.

As I read the bill of exceptions, the evidence was conflicting upon every material point in the case, and the verdict of the jury and judgment of the district court should not be set aside. What are juries for if not to settle controverted questions of fact upon conflicting evidence?

GEORGE SVETKOVIC, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,633.

1. **Appeal:** CONFLICTING EVIDENCE. In an action for personal injuries, where the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff is conflicting, the verdict

of the jury will not be set aside, unless it is shown to be clearly wrong.

2. **Railroads:** ACTION FOR PERSONAL INJURIES: INSTRUCTIONS. The refusal of the district court to charge the jury that, unless they found that the bell on the defendant's engine was not ringing when the accident occurred, they should find for the defendant, was not reversible error under the circumstances shown by the evidence.

3. **Damages:** INSTRUCTIONS: HARMLESS ERROR. The use of the word "permanent" in an instruction relating to the measure of damages, where from the amount of the verdict it clearly appeared that the jury considered the plaintiff's injuries were of a temporary nature, was error without prejudice.

4. **Evidence:** EXPERT WITNESSES: CROSS-EXAMINATION. It was not error to exclude the evidence of the doctor as to the nature of his treatment of the plaintiff's wound as improper cross-examination, where the doctor was called by the plaintiff to testify solely as to the nature and extent of the injury at the time it occurred.

5. ———: DEMONSTRATIVE EVIDENCE. It was proper for the court to refuse to require the plaintiff to submit the scar of a wound, which he received when a child about 40 years before the trial, to the inspection of the jury.

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

Edson Rich, E. H. Crocker and *John A. Sheean,* for appellant.

Smyth, Smith & Schall, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Douglas county rendered on a verdict for $1,000 in favor of George Svetkovic against the Union Pacific Railroad Company, in an action for injuries to the plaintiff caused by being struck by one of defendant's switch engines on or about November 14, 1908, while he was working for the Cullen-Friestedt Company in filling a sewer trench, which the last named company was constructing in the defendant's railroad yards in the city of Omaha.

It appears that the company for which the plaintiff was working was engaged in constructing a sewer across the yards of the defendant company. The sewer ran in a general east and west direction, and across several switch tracks of the defendant company, which ran in a general north and south direction through its yards. As the sewer trench was excavated under the tracks, temporary bridges were constructed to hold the tracks up until the sewer was finished and the trench refilled. Among the tracks crossed by the sewer was one known as No. 26, and it was near the bridge carrying this track over the sewer that the defendant's switch engine struck and injured the plaintiff.

As above stated, the plaintiff was engaged in filling the sewer trench, and was working close to and on the west side of the track in question. The defendant's switch engine attached to a string of cars pushed them northward on the track above mentioned, and after crossing the sewer some distance the engine was cut off and returned southward through the yards. After the engine passed northward with the string of cars over the sewer, plaintiff resumed his work, and was stooping down close to the track shoveling dirt into the trench when the switch engine returned to the south, and plaintiff, failing to discover its return, was struck by the footboard of the engine and received the injuries of which he complained.

The plaintiff testified that no warning was given of the approach of the switch engine at the time he received his injuries, and, owing to the pile of dirt which was being shoveled into the sewer trench, he was unable to see the engine as it approached, and this was the cause of his injury.

Defendant's witnesses testified that the bell on the switch engine in question was ringing at the time it passed over the trench to the north, and continued ringing until the train of cars was stopped; that the bell was ringing when the engine was cut off from the train of cars, and continued ringing on its return south until it passed the point where the plaintiff was struck and injured. It is not con-

tended that any other warning than the ringing of the bell was given by the defendant of the approach of its engine prior to the time it struck the plaintiff. At the close of the evidence the defendant requested the court to direct the jury to return a verdict in its favor. The request was refused, the cause was submitted to the jury, and a verdict was returned as above stated.

It is defendant's first contention that the court erred in refusing to direct the jury to return a verdict in its favor. On the question of the defendant's negligence there was a conflict in the testimony. It is conceded that the engine struck the plaintiff on the head, knocked him down, and severely injured him, and if the jury believed plaintiff's testimony it was justified in finding that the railroad company did not discharge its duty to him, but was negligent in failing to do so. Plaintiff was rightfully at the place of the accident. He was an employee of the company that was constructing the sewer in defendant's yards, and was there by the invitation of the defendant company to do the work in which he was engaged at the time he sustained his injuries, and it was the duty of the defendant company to look out for him, and operate its locomotives with reference to his presence at the place where the accident befell him.

It may be that the testimony of the defendant's witnesses was more credible than the plaintiff's evidence, but that was a question to be determined by the jury, and not by the court. *Habig & Spiler v. Layne*, 38 Neb. 743; *McKinney v. Hopwood*, 46 Neb. 871; *Allen v. Cerny*, 68 Neb. 211. But, if it be assumed that the bell upon the defendant's engine was ringing, still that would not be adequate warning; for, according to the testimony, engines were running to and fro in the yards and bells were ringing at all times during working hours, and it would be difficult, if not impossible, for the plaintiff to distinguish which track the engine was on by reason of the ringing of the bell. In place of warning him of danger, plaintiff might consider it an assurance of safety. No one was stationed at or near the excavation to warn the men who were work-

ing there of the approach of trains, and if they were to depend alone upon the ringing of the bell it would take all their time and attention to avoid danger, and little, if any, progress could be made in their work. Again, it appears that no one was stationed upon the front running-board of the engine to give warning of its approach to the men who were working in the yards, not as employees of the company, but as laborers for an independent contractor, and who were there by the invitation of the defendant company. We are therefore of opinion that the court did not err in refusing defendant's request for a directed verdict.

It is contended that the court erred in refusing to give to the jury instruction No. 5, requested by the defendant. By this instruction the court was requested to charge the jury that, unless they found that the bell was not ringing, they should find for the defendant. From what we have already said, it appears that the giving of this instruction would have been clearly erroneous.

It is also contended that the court erred in giving the jury instruction No. 14. It is argued that the instruction was rendered erroneous by the use of the word "permanent" in respect to the measure of damages. We quote the following excerpt from the instruction: "In ascertaining what damages plaintiff has sustained by reason of his injuries, you are to take into consideration the character and extent of such injuries as shown by the evidence, whether permanent or temporary, his physical pain and mental suffering, if any, which the evidence shows he has endured, or which it is reasonably certain from the evidence he may endure in the future as a natural and direct result of such injuries, taking into consideration the age of the plaintiff at the time said accident happened, and his reasonable expectancy of life, and the loss of time occasioned by said injury, and the impairment of plaintiff's earning capacity, if any such impairment you find from the evidence."

It is argued that there was no evidence tending to show that plaintiff's injuries were permanent, but on the contrary there was evidence that they were not permanent.

It was shown by the testimony of Doctor Coulter that plaintiff received a severe injury and a shock to his nervous system, which had existed for a period of something like three years, and from which he was suffering at the time of the trial. The injury inflicted was described by Doctor Harris, in substance, as follows: I then found a wound about the hair line and running back over the top part of the head—two pyramidal flaps of the scalp about 2½ or 2 inches on each side being torn loose from the skull exposing quite an ugly-shaped wound; the whole space between these lines being uncovered next to the bone. The wound was cut down the full depth of the scalp, which is ⅜ to ½ inch in thickness. The edges of the wound were not sharp like a sharp-edged instrument, like a knife or a razor would make, but they were well-defined, showing a rapid tearing like a hard substance would make. Whatever made it had a good deal of force behind it. The wound was bleeding; his whole scalp or hair was filled with clotted blood, cinders and dirt. I don't remember how many stitches we put in, nothing but drawing the flaps up to the proper place. It healed up, and did not leave a deep scar.

Doctor Coulter further testified, in substance, that the plaintiff should have proper treatment for his nervous condition, which would consist of the rest cure, to be put in the hospital, and massaged over the parts where he complained of the pain; to have baths and proper medicines and diet, and be kept away from friends and anything that would irritate and bring to his mind these conditions; that this treatment would have to be applied for several months at least before a cure would result, and would require the daily attendance of a physician during the time he was in the hospital.

The plaintiff testified that his head hurt him in the winter time, but did not hurt him much in the summer. He said: "I could work if I had some kind of an easy job. It hurts me now as I sit on the stand. I wear my cap and rags when I go to bed and if the rags fall off my head at night it causes me pain and I wake up."

With this testimony in the record, it is difficult to say whether the injury was permanent or not; but, assuming that the instruction was wrong, it was error without prejudice. Compensation is the measure of damages—that which would make good the plaintiff's loss. In view of the amount allowed by the jury, the verdict was not excessive, and might have well been fixed at that amount, although there was no evidence in the record tending to show the injury permanent.

It is further contended that the court erred in refusing to permit Doctor Harris to testify, on cross-examination, regarding his treatment of the plaintiff after the injury. It appears from the record that Doctor Harris was called by plaintiff for one purpose only, which was to show the extent of the wound shortly after the accident occurred, and the testimony sought to be brought out on the cross-examination in no way tended to dispute the fact of the injury. It appeared that the plaintiff had a scar on the back of his head which was caused by an injury when he was a child. Defendant's counsel requested Doctor Aikin to point out that scar and exhibit it to the jury. The plaintiff had not pointed out the scar on the back of his head, nor had he brought that scar to the attention of the jury in any other way, and it is difficult to see how a scar on the back of plaintiff's head, which was produced by an injury some 40 years before, could have in any manner aided the jury in determining the extent of the injuries received by the plaintiff for which this suit was brought. Counsel for the plaintiff also made this fact plain by stating that the action was not based upon the old injury, and that he claimed nothing whatever on that account. It therefore seems clear that all of that evidence was properly excluded.

The wound which plaintiff received from his contact with the defendant's engine was upon the front and top part of his head. It was entirely independent from, and in no way depended upon, the condition of the scar on the back of the plaintiff's head, and therefore it was proper for

the court to refuse the defendant's request to have the jury examine it.

The record discloses that this case has been twice tried. Every question in it seems to have been fairly and clearly submitted to the jury. The verdict is not excessive, and, finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

PEOPLES NATIONAL BANK, APPELLANT, V. AUGUST L. RING, APPELLEE.

FILED FEBRUARY 27, 1914. No. 17,636.

1. **Foreign Judgment:** ACTION: DEFENSES. "A judgment of a court of a sister state, authenticated as prescribed by act of congress, is conclusive here upon the subject-matter of the suit. An action thereon can only be defeated on the ground that the court had no jurisdiction of the case, that there was fraud in procuring the judgment, or by defenses based on matters arising after the judgment was rendered." *Snyder & Dull v. Critchfield*, 44 Neb. 66.
2. **Process:** SUMMONS: VALIDITY. The service of a summons upon the defendant by the sheriff of Fall River county, South Dakota, signed in the firm name of the plaintiff's attorneys, is sufficient to confer jurisdiction upon the circuit court of that state and county to render a judgment against the defendant so served.
3. **Judgment:** EVIDENCE: FRAUD. Testimony produced by the defendant examined, and found to show no fraud in procuring the judgment against him.
4. ———: ACTION: DEFENSES. The record examined, and found to contain no defense relating to any matter occurring after the judgment sued on was rendered.

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

Eastman & Dudley and *G. T. H. Babcock*, for appellant.

Fisher & Rooney, contra.

BARNES, J.

Action on a judgment rendered by the circuit court of South Dakota within and for Fall River county, in that state, on the 18th day of May, 1910. The petition filed in the district court for Sioux county, while it is not in the precise form provided for by section 7695, Rev. St. 1913, contained all the averments necessary to entitle the plaintiff to recover a judgment in the district court of this state. The defendant's original answer was, first, a general denial; second, a special denial that the plaintiff was incorporated as alleged in the petition.

When the cause came on for trial, a jury was waived, and a trial was had to the court. Pending the hearing, leave was granted the plaintiff to amend its petition by changing the allegation relating to its incorporation, and the defendant was given leave to amend his answer, by interlineation, so as to allege that the circuit court for Fall River county, South Dakota, was without jurisdiction of the person of the defendant, by reason of the fact that no complaint was on file in the office of the clerk of the circuit court of that county until after the supposed judgment was signed; that the summons was not signed by a licensed attorney, but was signed by the firm of Eastman & Dudley, and that no summons was signed or complaint filed in compliance with the statutes of South Dakota and the rules for the circuit court as prescribed by the supreme court of that state; that the summons and proof of service and complaint were not on file for more than ten days before the judgment was given; that the complaint was not filed in the same year in which the summons was signed, although there remained more than 30 days after the summons was served in the same year; that defendant was not in default when the judgment was signed, and the court was without power to give judgment upon said complaint.

After the testimony was introduced, the court took the case under advisement, and on April 29 rendered the following judgment: "It is therefore considered, ordered and adjudged by the court now here that the defendant go

hence without day, and recover of the plaintiff his costs herein, taxed at $——; and that he have execution therefor." A motion for a new trial was overruled, and the plaintiff excepted, and 40 days were allowed from the rising of the court wherein to serve his proposed bill of exceptions. From that judgment the plaintiff has brought the case to this court by appeal.

As we view the record, we are unable to ascertain on what evidence the judgment of which complaint is made was based. The plaintiff introduced in evidence the judgment roll of the South Dakota court, which contained a copy of the original summons served upon the defendant by the sheriff of Fall River county on the 22d day of December, 1909; a copy of the original complaint filed by the plaintiff on the 25th day of February, 1910, which stated a good cause of action against the defendant; and the affidavit prescribed by the statutes of South Dakota made by Charles S. Eastman, wherein it was stated that no answer or demurrer had been received, or appearance in any manner made by the defendant, and that more than 30 days had elapsed since the service of the summons on the defendant; together with a statement of the plaintiff's costs and disbursements. The judgment roll recited that thereupon, on the 18th day of May, 1910, the court proceeded to render the judgment on which this suit is brought, as follows: "The Peoples National Bank, a Corporation, Plaintiff, versus August L. Ring, Defendant. Judgment. The summons in the action having been personally served on August L. Ring, the defendant, on the 22d day of December, A. D. 1909, and no answer or demurrer to the complaint having been served on the plaintiff's attorney as required by the summons, and no appearance in any manner having been made by the defendant, August L. Ring, or any one in his behalf: Now, on motion of Eastman & Dudley, plaintiff's attorneys, it is hereby adjudged that the Peoples National Bank, a corporation, the plaintiff, recover of August L. Ring, the defendant, the sum of two hundred and forty-six dollars and eighty-three cents, and twenty-two dollars and thirty-five cents, costs and disburse-

ments, amounting in the whole to two hundred and sixty-nine and 18/100 ($269.18) dollars. By the court: Levi McGee, Judge. 5/18/10. Attest: F. J. Dudley, Clerk, by Aion Shouse, Deputy."

The judgment roll was certified in due form, and it thus appears that the judgment on which this suit was brought was duly rendered on the default of the appearance of the defendant. Defendant contends that the circuit court of South Dakota was without jurisdiction to render the judgment, because no complaint was filed within the time provided by the statutes of South Dakota. It is sufficient to say that the record discloses that this contention is not well founded. It is also contended that the summons was void, because it was signed by the firm name of plaintiff's attorneys, instead of by an attorney in his own proper name. As we understand this question, the summons was properly signed according to the established practice of the courts of South Dakota, and we are not aware of any case which holds to the contrary. Where a suit is brought upon a foreign judgment but two defenses are available: One is the lack of jurisdiction in the court wherein the judgment sued on was rendered, and the other is fraud in obtaining the judgment. As we view the record, neither of these defenses were established, and it follows that the plaintiff was entitled to a judgment in his favor.

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

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

PEOPLES NATIONAL BANK, APPELLANT, V. AUGUST MEIER, APPELLEE.

FILED FEBRUARY 27, 1914. No. 17,635.

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

Eastman & Dudley and *G. T. H. Babcock,* for appellant.

Fisher & Rooney, contra.

BARNES, J.

The facts of this case are the same as those found in the opinion in *Peoples Nat. Bank v. Ring, ante,* p. 376. It was there stipulated and agreed that the judgment or decree entered herein by the supreme court shall be in all things governed by the opinion in that case.

Following the judgment in *Peoples Nat. Bank v. Ring, supra,* the judgment in this case is reversed and the cause is remanded for further proceedings.

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

LELA COWAN, APPELLEE, V. CLARENCE J. ERTEL, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,638.

1. **Bastardy:** REVIEW: CONFLICTING EVIDENCE. A verdict of guilty, in a prosecution on a charge of bastardy, where the evidence is conflicting, will not be set aside unless it clearly appears to be wrong.
2. ———: ———: STRIKING EVIDENCE. A judgment will not be reversed because of excluding evidence or striking out evidence, after it has been admitted, unless it appears that such evidence was competent and relevant to the issues, and materially supported the cause or defense of the complaining party.
3. ———: ———: MISSTATEMENTS OF COUNSEL: CORRECTION OF ERROR. Nor will a judgment be reversed for misconduct of an attorney in making unwarranted statements of fact in his argument to the jury, if the court immediately, upon his attention being called to the matter, rebukes the attorney for his statements, and directs the jury to disregard the same.
4. ———: ———: ARGUMENT OF COUNSEL. Record examined, and *held* that other statements of the attorney for the prosecution, of which complaint was made, did not amount to misconduct, and were within the limits of legitimate argument.

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

C. H. Sloan, F. W. Sloan, J. J. Burke and *L. L. Raymond,* for appellant.

Morrow & Morrow and *W. W. White, contra.*

BARNES, J.

The defendant, Clarence J. Ertel, was tried in the district court for Scott's Bluff county on complaint of Lela Cowan, an unmarried woman, charging him with being the father of her illegitimate child. The trial resulted in a verdict of guilty, and the court rendered judgment on the verdict, requiring defendant to pay the complainant the sum of $1,200 for the support of the child. A motion for a new trial was overruled, and the defendant has brought the case here by appeal.

Appellant's first contention is that the verdict is not sustained by the evidence. The record discloses that the complainant told a consistent story, and her evidence was strongly supported by the testimony of other witnesses as to admissions made by the defendant, and also by the letters of the defendant introduced in evidence. It was also corroborated by the conduct of the defendant after he was confronted with the charge. The question of the defendant's guilt was one for the jury to determine; and if the jury believed the complainant and her witnesses there was ample evidence to justify the submission of the case to the jury. Therefore, it cannot be said that the verdict is not sustained by the evidence.

The defendant produced one Fred Fulton as a witness in his behalf, who testified that he was working for complainant's brother-in-law in March and April, 1910, helping haul potatoes from a distant farm and unloading them in a sod building about 250 yards from the residence; that one evening, about April 27, 1910, he was unloading potatoes, and complainant came down there. He said: "I was talking to her, and I asked her what kind of a guy Ertel was.

* * * She said she was playing him for straight; she wanted to marry him." When asked the direct question, "Did you, or did you not, have sexual intercourse with the prosecutrix at that time?" the witness said, "I refuse to answer." By the court: "Do you desire to claim your privilege? A. I claim my privilege." This testimony was stricken out of the record on the motion of complainant's counsel, and the ruling is assigned as error. At the time the transaction, which the witness attempted to describe, took place, the prosecutrix had been pregnant more than a month, and it is difficult to see how his testimony would in any manner disprove the fact that the defendant was the father of her child.

It is also contended that so much of the testimony of this witness as related to the statement of the prosecutrix that she was playing Ertel for straight, that she wanted to marry him, was an admission against her interest; that it was competent; and therefore it was error to strike out all of Fulton's testimony. It is unnecessary to comment on the effect of this evidence. It proves nothing more than that the prosecutrix had confidence in the defendant and wanted to marry him.

It is also contended that the court erred in striking out the testimony of the witness Patterson. The testimony of that witness was that he saw the complainant and Fulton on or about April 27, 1910, at the sod house in question. The fact that Fulton's testimony was properly stricken from the record renders the testimony of the witness Patterson immaterial. It was incompetent for the same reason that Fulton's evidence was excluded.

It is further contended that the court erred in refusing to receive the testimony of one Fred Conklin, by whom defendant offered to prove that he saw Joe Patterson at the sod house on the same occasion. It is argued that this testimony was corroborative of the facts told by Patterson; but, when Patterson's testimony was stricken from the record, of course it was proper to refuse to receive the testimony of the witness Conklin.

Error is also assigned for the misconduct of counsel for the complainant in his closing argument to the jury. It appears that when counsel commenced his argument he made the following statement: "I am going to comment, however, at considerable length as to the conclusions that have been drawn by counsel for the defense in this case. But before proceeding to argument of this case I am going to make the charge now, and I think I can substantiate it from the evidence, that this defense has been fixed up. Just who fixed this defense I think will appear before I get through with this argument." Defendant's counsel promptly objected to the statement as unwarranted by any evidence or conclusion to be drawn from the evidence. The court in passing upon the objection said: "Counsel seemingly does not seem to be basing the conclusion that he mentioned upon his own statement, but he seems from the statement to be basing it upon the evidence as he will hereafter review and examine the same, and try to establish his conclusion from the evidence. And so long as he keeps within the rule of staying by the evidence the court believes that he is within the rule." So far as we can determine from this record, counsel for the prosecution by this statement did not violate the rule of legitimate argument.

It further appears that counsel in his argument made use of the following language: "Why, you remember this man Patterson on the stand. He did not know anything when it came to cross-examination. I presume that he got his consideration for what he did. I presume the other fellow (referring to the witness Fulton) did likewise." Counsel for the defendant objected to the statement as unfair. By the Court: "There is no evidence of that kind or character, and nothing on which counsel can base such an assertion shown by the evidence, and therefore counsel is outside of the record, and he should not make any charge of that kind or character, and the jury will dismiss from their minds any charge of that kind or character made." By this ruling the court withdrew from the jury the statement last above referred to, and told them to dis-

miss it from their minds. We think that was the proper way to dispose of the objection, and we are unable to see how the defendant could have been prejudiced thereby.

As above stated, if the jury believed the testimony of the plaintiff and her witnesses, they were fully justified in finding the defendant guilty. The cause seems to have been fairly tried, and submitted to the jury under proper instructions, and as a reviewing court we are unable to set aside the verdict.

The judgment of the district court is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JOSEPHINE WUSTRACK, APPELLEE, V. BERT M. HALL, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,609.

1. **Fraud:** EXCHANGE OF PROPERTIES: MISREPRESENTATIONS: INSTRUCTIONS. Instruction No. 7, the purport of which is set out in the opinion, examined, and *held*, under the facts in the case, not to be prejudicially erroneous.
2. **Judges:** DISQUALIFICATION: OBJECTIONS: WAIVER. A litigant who voluntarily goes to trial and proceeds without objection until after an adverse verdict is rendered, with knowledge of facts which he alleges disqualify the judge from acting and render the office vacant, is estopped to raise such question thereafter merely to prevent the trial judge from ruling upon his motion for a new trial.

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

L. S. Hastings and *E. A. Coufal,* for appellant.

C. M. Skiles and *F. H. Mizera, contra.*

LETTON, J.

This was an action for damages which it is alleged resulted to plaintiff by reason of defendant's false and fraud-

ulent representations as to certain of his property which was conveyed to plaintiff in exchange for property belonging to plaintiff. The petition alleges that the plaintiff owned 160 acres of land in Merrick county, Nebraska, of the value of $4,000, encumbered with a mortgage for $650; that the defendant then owned a black stallion worth $190, a block of lots in David City worth $1,000, encumbered with a mortgage to the same amount, and was the equitable owner of a small tract of land in Missouri of the value of $2 an acre; that, in order to induce plaintiff to exchange her land for this property, defendant falsely represented that the stallion was all right, was 9 or 10 years old, was worth $1,600, that a short time before the exchange it had been sold for $3,200 and that it was capable of earning $1,000 a year; that the block in David City was worth $2,400, that he had just purchased it for that sum; and that he owned the Missouri land, which was covered with blue grass, contained 40 acres, rented for $2.50 an acre and was worth $40 an acre, that he had paid the sum of $1,600 for the land, and that he had a letter from a bank stating it was well worth $40 an acre. The falsity of these allegations is then alleged; that the plaintiff believed and relied upon the same, and exchanged the Merrick county land for this property, to her damage in the sum of $3,260.

The defendant admits the exchange, pleads that the value of the Merrick county land did not at the time of the exchange exceed the sum of $800, subject to a mortgage of $650, and alleges that the property exchanged for the same by the defendant exceeded the value of the lands. He further pleads that the plaintiff acted upon the advice and counsel of her husband and her agent, and not upon his representations, and that defendant made no representations of any kind or character that were either false or untrue. An amendment was filed to the petition before judgment to conform to facts found as to a secret agreement of defendant with plaintiff's agent, Deland, and one Macurek. The jury returned a verdict for plaintiff for

the sum of $1,735.66. From a judgment on this verdict defendant has appealed.

Two errors are assigned. The first is that the court erred in giving instruction No. 7. Instruction No. 7 is concerned with the block of land in David City. It tells the jury that, "although you may believe from the evidence that the defendant Hall fraudulently misrepresented the cost and value thereof to plaintiff, and you further find from the evidence that the plaintiff had a fair opportunity to investigate the cost and value thereof, and was not prevented or induced by the defendant or his agents to refrain from investigating the value and cost thereof, but that the plaintiff failed to do so by reason of her own want of diligence, she cannot recover as to this item of damage." It is conceded by defendant that this portion of the instruction is a correct statement of the law. The latter part of the instruction is the portion which is complained of. In substance it states that false representations of cost and value made by defendant or by Deland and Macurek, if relied upon by plaintiff, would relieve her from the duty of making an investigation as to the value of the block. Plaintiff asserts and there was evidence from which the jury might find that Deland was secretly in the employment of defendant at the time of the exchange, and that the witness Macurek, who pointed out the block to plaintiff, was also an agent of defendant, and that he misstated facts and misrepresented its value when showing the property to plaintiff.

Defendant argued that false representations of value, made either by the defendant himself, or by Macurek or Deland if acting as agents for him, would not constitute actionable fraud, since ordinarily a mere assertion concerning the value of the property made by the vendor or his agent is not actionable, even though known by him to be untrue, citing *McKnight v. Thompson,* 39 Neb. 752, and other cases. No doubt this is the general rule. The evidence, however, shows that Deland had been employed by plaintiff to procure a buyer for the land, and was present when defendant, Hall, made the representations com-

plained of; that Hall and Deland afterwards divided the profits on the transaction, and were both interested in the exchange. There is also proof that Macurek was paid $25 for showing plaintiff the lots and "giving her a value" on them. Plaintiff had the right to believe and rely upon the representations and to be governed by the conduct of the person whom she believed to be occupying a confidential relation to her. If that person had been tampered with by the defendant so as to give him a profit if the exchange was made, and the plaintiff was thereby deceived into making the exchange, such conduct would give her a right of action for fraud and deceit if damaged thereby. So, also, as to statements made to her by Macurek, who, so far as she knew, was disinterested, but who in fact was secretly acting in the interest of defendant. While the language of the instruction is not technically accurate to the finest degree, when considered in connection with this evidence, we see nothing in it prejudicial to the defendant.

The next assignment of error is that Honorable Benjaman F. Good, the judge who presided at the trial of the case, was disqualified to rule upon the motion for a new trial and to enter judgment. The question was raised in the district court before the motion was ruled upon. It was shown that, while the family residence of the judge had been removed to Lincoln in September, 1911, his library and office furniture, and all the papers, documents, and records pertaining to his office as judge still remained within the district; that a large portion of the time since the family removed the judge had been occupied in the discharge of his duties in the district, and that the title to his office and his right to act as judge in this case had never been questioned until after the rendition of the verdict. Section 2275, Rev. St. 1913, provides: "Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows: * * * Fifth: His ceasing to be a resident of the state, district, county, township, precinct or ward in which the duties of his office are to be exercised, or for which he may have been elected."

Appellant insists that under this section the office became vacant *ipso facto* by the removal of Judge Good from the district, and that his authority to perform any of its functions ceased. Throop, Public Officers, secs. 424, 425, is quoted to the effect that, under such a provision, it has been held that an office becomes vacant when the incumbent ceases to be a resident of the district, and that his successor may be appointed without an adjudication that his office is vacant.

The appellee contends: First, that, according to the stipulations of fact, Judge Good had not removed from the district at the time the motion was ruled upon; second, that he was a *de facto* officer; third, that defendant, by failing to make the objection at the beginning of the trial, or until after the verdict was rendered, waived the objection, and is now estopped from asserting the same. We think that, under the circumstances of this case, we need only consider the latter point. It does not appear that the defendant and his counsel were without knowledge of the facts with respect to the residence of the judge at the time the trial began, and a fair implication from the record is that they knew the facts at that time. During the trial, which proceeded for four days, ending November 25, 1911, no objection was made, and it was not until December 9, when the motion for a new trial was about to be passed upon, that any objections were raised with reference to his qualifications.

Defendant insists that the action of a usurping officer may be questioned directly in the proceedings in which the action is taken, but he concedes that the only exception to the case is when the complaining party is estopped. He maintains that in the case at bar the objection was made and the question raised before the judge acted upon the motion for a new trial, which is severable from the main case. While another judge may rule upon a motion for a new trial, efficiency is served by the motion being passed upon by the trial judge, and this is the better procedure. We are convinced that a party cannot split a trial into sections to serve his own ends; that, having

tacitly invited the judge to preside with knowledge of the facts, public interest requires that he should not be permitted to disavow his authority until the conclusion of the proceedings; and the defendant, having voluntarily submitted the conduct of the trial to Judge Good with knowledge of the alleged disqualification, is estopped, after an adverse verdict, to seek to prevent the further conduct of the case by the same judge for no other reason than that given. If the judge was qualified to preside at the trial, he was also qualified to rule upon the motion for a new trial. We think no good reason has been shown for a reversal upon this ground.

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

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

CLAY COUNTY V. EZRA E. HOWARD ET AL., APPELLANTS; CARL L. WIBERG ET AL., APPELLEES.

FILED FEBRUARY 27, 1914. No. 17,614.

1. **Eminent Domain:** OPENING HIGHWAY: RIGHT TO COMPENSATION. In 1894 a county board ordered a section-line road opened. Damages were claimed by the then owners of the land, the amount of the same litigated, and an order made that the damages be paid out of the county funds. As the law then stood, damages were payable only out of the road fund of the district. The road was not opened, and no damages were paid to the landowners. More than ten years afterwards they conveyed the premises through which the road was ordered by warranty deed, without reservation of the highway. Afterwards the county, desiring to open the road, brought the damages awarded with interest into court, and asked that the court determine whether the present or the former owners of the land were entitled to the same. *Held*, That the appropriation was not complete at the time the land was sold; that the purchaser took the land unencumbered by the highway, and he was entitled to the compensation when the land was actually taken.

2. ———: ———: ———: ESTOPPEL. In such case the present owner of the land is entitled to file a claim with the county board and have appraisers appointed to determine the amount of damages; but, if he accepts the money brought into court by the county for the payment of damages, he thereby consents to opening the road, and is estopped from making any further claim.

3. **Attorney and Client:** RIGHT TO LIEN: CONDEMNATION MONEY. An attorney's lien, filed in proceedings to ascertain the damages awarded to the then owner of the land, when the proceedings were begun, does not constitute a lien upon the amount brought into court and accepted by the present owners of the land in payment of damages.

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

S. W. Christy and *L. E. Cottle,* for appellants.

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

LETTON, J.

A petition was filed by the county of Clay, alleging that it had established a public highway, and that defendants Howard, then owners of the land taken for the highway, were awarded the sum of $315 as damages; that the land has been sold and conveyed to the Howards, and that the defendants Wiberg and McClellan are now the owners; that the road is about to be opened, and the county desires to pay the damages awarded; that the defendants Howard claim the full amount of damages; that the present owners of the land also claim the money, and that the defendant Christy claims and asserts an attorney's lien against the award made in favor of the Howards; that the plaintiff does not know who is entitled to the fund; that it had deposited the money with the clerk of the court, and tenders payment to whoever is entitled to the same. It prays that the court shall find and determine who is entitled to share in the fund, and the amount to which such person is entitled. Afterwards an amended petition was filed, setting out the proceedings more specifically, and bringing into court and tendering $315, with interest thereon at

7 per cent. from January 11, 1894. Answers to this petition were filed by the respective defendants. General demurrers to the same were filed. The demurrer to the answer of the Howards was sustained. Those filed to the answers of Wiberg, McClellan, and Christy were overruled. Judgment was rendered in accordance with these rulings awarding the fund to Wiberg and McClellan, less $150 attorney's fee awarded Christy. The essential facts alleged in the answers are as follows: In January, 1894, the county board of Clay county ordered a road established and opened for public travel on a part of the section line between sections 26 and 35, township 5, range 6, in Clay county. The land on both sides of the proposed road at that time belonged to the defendants Howard. Damages were claimed and were allowed by the board to the amount of $170, payable out of the county funds. An appeal was taken to the district court, where the damages were raised to $315, and on April 8, 1898, on appeal to this court, the judgment of that court was affirmed. More than ten years afterwards, the Howards sold and conveyed the land to one Grant. Early in the year 1911 Grant conveyed the land to defendants Wiberg and McClellan. All of these conveyances were by warranty deed; no reservations were made as to a highway, and no assignment of the damages awarded was ever made. It is also alleged that knowledge of the proceedings was had by the respective grantees before they purchased the land. From 1894 until 1911 no attempt was made by the county authorities to open the highway, nor was any land actually taken.

The Howards insist that the order establishing the road and allowing the amount of damages constituted the taking and appropriating of the land, and that they, being then the owners of the land and prosecuting the claim for damages, were entitled to receive the amount awarded, citing *Harlan County v. Hogsett,* 60 Neb. 362, and *Chicago, B. & Q. R. Co. v. Englehart,* 57 Neb. 444, to the effect that damages for land appropriated for a highway accrue at the date of condemnation, without regard to the time the road is actually opened.

It is also argued that the subsequent vacation of the road could not prevent the Howards from collecting their damages, and that the county cannot abandon the land, and thus escape payment therefor. *Drath v. Burlington & M. R. R. Co.*, 15 Neb. 367. We fully agree with the principles laid down in the cases cited, but the facts in this case require the application of different principles. At the time that the Howards conveyed the land to Grant, and he conveyed to Wiberg and McClellan, no portion of it had been taken for a public highway. No actual easement existed over the land at the time the Howards conveyed it away, so that the cases holding that one who buys land with an existing easement takes the land as he finds it, and the right to damages remains with the vendor, do not apply. Under such circumstances the owner of the land at the time it was actually taken is the person who is entitled to recover the damages. *Hogsett v. Harlan County*, 4 Neb. (Unof.) 310. In that case the facts were that in 1892 Harlan county attempted to establish a highway over the land of one Stewart; that nothing was done toward opening the road until in 1894; that in the meantime the plaintiff had purchased the land of Stewart, and had entered and taken possession of the premises. When an attempt was made to open the road in 1894, the plaintiff filed his claim for damages, which was rejected both by the county board and by the district court. This judgment was reversed by this court, and it was held that there could be no appropriation of the plaintiff's land until the road was actually opened; that until then the land was not taken for public use, and that the plaintiff was entitled to recover. *Ashley v. Burt County*, 73 Neb. 159; *Johnson v. Peterson*, 85 Neb. 83.

Furthermore, no valid provision was made for the payment of damages, so far as is shown, until after the present owners bought the land. At the time the road was established and proceedings were had to ascertain the damages, there was no provision in the statutes whereby a county could become liable for damages to the owners of land taken for public highways, and the money could only be

paid out of the road fund of the road district in which the land taken for the highway was situated. *Ackerman v. Thummel,* 40 Neb. 95; *Palmer v. Vance,* 44 Neb. 348.

In 1901 the statute was amended so as to provide that all damages caused by the laying out, altering, opening, or discontinuing any county road shall be paid by warrant on the general fund of the county, etc. Rev. St. 1913, sec. 2881. In *Sittler v. Board of Supervisors of Custer County,* 91 Neb. 111, the county board had ordered damages paid out of the road fund of the road district. This order was made after the amendment of 1909, whereby it was provided that damages "shall" be paid out of the general fund of the county. It was held that no provision for the payment of damages had been made by the appropriation of money from the proper fund, and the opening of the road was enjoined. Tested by this principle, at the time the road was established and the land sold by the Howards, no legal provision had been made for the payment of damages, since there was no authority to pay the same out of the county funds. The owners of the land in 1909 had a right to stand upon their constitutional rights and refuse to allow the road to be opened until their damages had been ascertained by the appointment of appraisers in the legal manner.

The county, however, having brought money into court for the purpose of paying the damages, and the present owners of the land having signified their desire to accept the amount tendered and to allow the opening of the road, the right to a new appraisement has been waived by them, no right to further damages exists, and the county is vested with full authority to open the road. This authority is derived, not from the proceedings in 1894 to ascertain damages, but from the order of the county board opening the section-line road and the acceptance of the money tendered for damages. We are of opinion, therefore, that the district court was right when it held against the right of the Howards to the damages, and in favor of the present owners of the land.

Coming now to the claimed attorney's lien, since we have decided that the right to damages of Wiberg and McClellan arises, not by virtue of the previous award to the Howards, but really by virtue of an estoppel, no service rendered by Mr. Christy operated to aid them in obtaining the fund. They allege the land taken is now worth $1,500, but say that, as the amount tendered now amounts to over $700, they are willing to accept it. While the attorney's lien would probably be effective if the Howards were entitled to the fund, since the recovery of the present owners is based upon the proposition that the land of the defendants Howard never had actually been taken and appropriated, we can see no logical reason for holding that the legal services rendered by Mr. Christy inured to their benefit. For these reasons, we are of opinion that the district court erred in allowing the attorney's lien.

The judgment of the district court is therefore reversed and the cause remanded to the district court, with directions to render a judgment in favor of the appellees Wiberg and McClellan for the full amount of the money paid into court by the county in payment of damages; costs in the district court to be taxed as before.

REVERSED.

Reese, C. J., dissents, but only upon the ground that in his opinion Mr. Christy is entitled to his attorney's lien.

J. S. GABEL LUMBER COMPANY, APPELLEE, V. IDA M. WEST ET AL., APPELLEES; OCCIDENTAL BUILDING & LOAN ASSOCIATION, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,634.

Mortgages: MECHANIC'S LIEN: PRIORITIES. A material-man began the delivery of material for which he claimed a lien upon November 30, 1909. Defendant Occidental Building & Loan Association took a mortgage from the landowner, dated November 26, 1909, which it admits was given as security for a loan to provide a fund with which to improve the real estate. The mortgage was

acknowledged on December 1, 1909, and recorded December 6, 1909, and the money was paid upon the mortgage between December 9, 1909, and the following March. *Held*, That the defendant was charged with notice of the intended improvement, and of the fact that plaintiff's right to the lien had attached before the mortgage was acknowledged, recorded, or any money paid upon the loan, and that its lien was junior and inferior to that of plaintiff.

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

T. F. Wiles and *C. S. Polk*, for appellant,

Samuel B. Iiams and *Morning & Ledwith, contra.*

LETTON, J.

Action to foreclose a mechanic's lien. The only question in the case is as to whether the plaintiff's lien or the lien of a mortgagee given to the Occidental Building & Loan Association, defendant, is entitled to priority. The district court found that the plaintiff had the first lien. The Building & Loan Association appeals.

It was admitted at the trial that the first delivery of material under plaintiff's lien was upon November 30, 1909. It is also admitted "that the mortgage of the Occidental Building & Loan Association was delivered to it upon the day of its execution." The note and mortgage are dated November 26, 1909; the acknowledgment was taken December 1, 1909, and the mortgage was recorded on December 6, 1909. Defendant insists that the admission that the mortgage was delivered "upon the day of the execution" means that it was delivered on November 26, before any of the material was delivered; while plaintiff insists that the mortgage was not "executed" until it was acknowledged, and that, since it was not recorded until December 6, it was junior to the plaintiff's lien by virtue of the recording act. There is no testimony in the record showing what took place as to delivery when the mortgage was signed. In *Brown v. Westerfield*, 47 Neb. 399, it was held that "an acknowledgment is no part of the deed con-

veying land other than the grantor's homestead, but an unacknowledged deed to such real estate, otherwise perfect, as between the parties, passes the title." In the case of a homestead, we have held that to *execute* a deed to the same means to sign, deliver, and acknowledge, since each of these acts is essential to the validity of the instrument. *Solt v. Anderson*, 67 Neb. 103. Since both signature and delivery are essential to the complete execution of a mortgage, the admission throws no light upon the date when the mortgage was completely executed. The meaning is the same as if it were admitted that the mortgage was delivered on the day it was signed and delivered. It is improbable that the loan company accepted the mortgage before it was acknowledged, and we may presume that it was delivered at that time, which was after the rights of the plaintiff accrued.

In *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207, 217, the owner of the property made a mortgage to one D., dated August 1, 1889, but not recorded until August 26, and executed about that date. The material-men delivered materials before the date of recording of the mortgage. It was held their lien was prior to that of the mortgage. While the language is not entirely clear, it seems that the recording of the mortgage, and not its execution, was considered as the determining date.

In *Bradford v. Anderson*, 60 Neb. 368, under a similar state of facts, the material-man's lien was held subject to the lien of a mortgage because he had actual knowledge of the unrecorded mortgage before any materials were furnished. It is said, after quoting section 16 of the recording act: "It is obvious that under this section a mortgage is effective from the date of its execution as to all persons having actual knowledge of the execution of the mortgage, but only from the date of the record of the instrument is it effective as to creditors and subsequent purchasers in good faith having no notice of the mortgage." See, also, Phillips, Mechanics' Liens (3d ed.) sec. 234.

Furthermore, the petition alleges that the mortgage was given to secure a loan of money made to Neefe "to provide a fund with which to improve said real estate," and that defendant has paid only a small part of that money. The answer "admits that said mortgage was given to this defendant to secure a loan of money made by this defendant to said Adolph C. Neefe to provide a fund with which to improve said real estate, but denies that this defendant has paid only a part of the amount secured by said note and mortgage, * * * alleges the fact to be that this defendant, on and between December 9, 1909, and March 14, 1910," paid to Neefe the full amount secured by the note and mortgage. From these admissions it is clear that, before the mortgage was acknowledged, or recorded, or any money was paid upon it, the defendant was charged with notice of the intended improvements, and of the fact that plaintiff's right to a lien had attached. This being the case, the lien of plaintiff was entitled to priority.

The judgment of the district court was right, and is

AFFIRMED.

WALTER C. JOSEPH, ADMINISTRATOR, APPELLANT, V. CUDAHY PACKING COMPANY, APPELLEE.

FILED FEBRUARY 27, 1914. No. 17,393.

1. **Trial:** DIRECTING VERDICT. The trial court should direct a verdict in favor of defendant, where the evidence is insufficient to sustain a judgment for plaintiff.

2. **Master and Servant:** DEATH OF SERVANT: ASSUMPTION OF RISK. In actions not governed by the employers' liability act (laws 1913, ch. 198), "an employee assumes the risks arising from the unsafe condition of premises where his labor, or a portion of it, is to be performed, when the risks and conditions are known to him, or are apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment, or, after commencing, makes no complaint or objection in respect to the hazards." *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb. 649.

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

Nelson C. Pratt, for appellant.

Greene, Breckenridge, Gurley & Woodrough, contra.

ROSE, J.

This is an action to recover $15,000 in damages for alleged negligence resulting in the death of John Czuba, who had been an employee of defendant. While engaged in wheeling into a tank-room truck-loads of materials used in manufacturing glue, he fell into a vat and was scalded with hot fluid. Defendant denied the negligence imputed to it. The issues were tried to a jury. The district court gave a peremptory instruction in favor of defendant, and from a judgment of dismissal plaintiff appeals.

The tank-room was 40 feet wide and 90 feet long, extending north and south, with a row of 10 open vats below the surface on each side. From the southeast corner they were numbered consecutively up the east side and down the west from 1 to 20. Between the rows there was a platform 16 feet wide. The entrance and the exit were at the southwest corner by vat 20. In the tank-room there were five lights along each side and three in the middle. One of those along the west side was between vats 19 and 20, and another near the platform at the entrance and the exit. Czuba came into the tank-room with a truck-load of materials, went north, and emptied the contents of his truck into vat 13. He then turned to go back the way he had entered. On his way out he mistook the light between vats 19 and 20 for the one at the exit, and fell into vat 19.

Was the peremptory instruction erroneous? It is alleged in the petition that defendant was negligent in failing to protect employees from the vats by railings. There is no proof to sustain this charge. It is not shown that defendant did not conform to the usual and ordinary

methods and customs in respect to railings, nor that railings were reasonably necessary for the protection of employees in the exercise of ordinary care for their own safety under the circumstances. On the contrary, the evidence shows without contradiction that railings sufficient to prevent employees from falling into hot liquids would interfere with the work of dumping ingredients into the vats as needed in manufacturing glue. A platform 16 by 90 feet had been provided for workmen. The seething vats along the sides gave their own signals of danger. On this issue the evidence would not support a judgment against defendant.

Plaintiff also charges that defendant was negligent in allowing too much steam from the vats to accumulate in the tank-room. During the forenoon on the day of the accident a fan, which had been used to blow steam out of the tank-room, was for some unexplained reason not in operation. A witness, who was on the platform at the time, testified the steam was so dense that it obscured lights at a distance of six feet. The explanation of Czuba, after he had been taken out of the vat, was proved by plaintiff. When asked, "What was the matter?" and, "Couldn't you see the way?" Czuba replied: "It was my mistake. I made a mistake of the lights." The import of this evidence, in connection with other undisputed testimony, is that Czuba went southward until he approached the light between vats 19 and 20, and, mistaking it for the light at the exit, turned toward the west, the direction of the passageway out, and fell into vat 19.

One of the answers of defendant to the charges of negligence is that Czuba assumed the risks of his employment. Is recovery defeated on this ground? There is no proof that the fan, when in operation, cleared the tank-room of steam. The only difference between the conditions of the steam when the fan was in motion and when it was not was in the degree of density. Czuba's regular duties kept him in the hog-killing department, but, when work there was slack, he was transferred to the tank-room. He had been working in the latter place a week or

two at a time for a year and a half. He had been at work there the last time three days or more. The accident occurred at 11:30 in the forenoon, and he had come on duty at 7 o'clock in the morning. Between those hours he came into and went out of the tank-room at intervals of about 15 minutes. There is nothing to show that the conditions as to steam in the morning had changed before 11:30. The foreman testified that he had a conversation with Czuba before the accident. The account of the former as to what he said is: "I just said to him, 'Kind of watch out. It is kind of steamy.' I says, 'Look around a bit.'" He also said that Czuba answered: "I know this about as good as you." The conditions were not only obvious to Czuba, but were in fact known to him. With nothing to show a change in the hazards of his employment, he had been in and out of the tank-room at short intervals for nearly half a day. He voluntarily continued to perform his duties with knowledge of their risks. He made no complaint in respect to them. There was no attempt by plaintiff to show that defendant had promised to improve existing conditions. On the undisputed evidence the case falls within the following rule of law: "An employee assumes the risks arising from the unsafe condition of premises where his labor, or a portion of it, is to be performed, when the risks and conditions are known to him, or are apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment, or, after commencing, makes no complaint or objection in respect to the hazards." *Chicago B. & Q. R. Co. v. McGinnis*, 49 Neb. 649.

The accident cannot be contemplated without emotion; but the record contains no evidence of actionable negligence on the part of defendant, and consequently the peremptory instruction must be approved.

AFFIRMED.

REESE, C. J., dissenting.

It cannot be inferred that it was the "custom" of defendant to allow the tank-room to become so filled with

steam as to render the lights invisible at a greater distance than six feet. If the lights were rendered invisible at that distance, it must be apparent to any thinking person that the tank-room was shrouded in almost total darkness. A large fan had been placed in an opening in the far end wall for the purpose of carrying the steam out of that room, evidently in order that the employees could see their way and protect themselves from the great danger of terrible accidents. So far as appears, that fan had been kept continually in motion, accomplishing the purpose of its use, until the day of the accident, when, "for some unexplained reason," it was not in operation. Perhaps of all days on that day that fan should have been kept in operation, so that employees could see and avoid the lurking danger. Whose duty was it to keep that fan in operation? Surely not the employees. Negligence was a question of fact for the submission to the jury. If so, was not the failure to perform that duty evidence of negligence on the part of the employer? Should not the question have been submitted to the jury? It seems to me that there can be but one answer to the question, and that answer in the affirmative.

Did the decedent assume the risk by continuing to work on that day? Had he not the right to expect that the fan would be put in motion when the extraordinary accumulation of steam became apparent? If "custom" is to govern, he certainly had, for it is clearly shown that it was the custom of defendant to keep the fan running. It is contended that decedent knew of the condition and consequent danger in time to have avoided the accident; that he was informed of the danger by the foreman. What was that information? The foreman said to him: "Kind of watch out. It is kind of steamy. Look around a bit." The answer of decedent was: "I know this about as good as you." Knew what? That it was "kind of steamy." I apprehend that he knew it was "kind of steamy," for such was, no doubt, the case all the time, but that was no proof that he knew there was so near a condition of total darkness

before he entered. He knew it was a bit steamy in there, and that he should look around a bit. That meant to him that, if he would look around a bit, he could see his way in and out and avoid all danger. It could have meant nothing else.

Before his death he said he had made a mistake; that he had "made a mistake of the lights." Of course he made a mistake. Could any one think he would deliberately walk, or jump, into the seething caldron? He mistook the dim light over the tank for the one near the door. This was his mistake. He could see nothing but the light, else he would not have fallen into the tank and lost his life.

I think the case should have been submitted to the jury, and that the district court erred in withdrawing it from them.

HAMER, J., dissenting.

The plaintiff's decedent fell in the vat of boiling glue and was cooked to death because he was unable to find his way out of the tank-room filled with steam. He could not see. It was the duty of the defendant to furnish a reasonably safe place in which to conduct his business of glue making, and, when the fan failed to remove the steam from the room so that the occupants could not see where to go, the place was then not "reasonably safe," and it was the duty of the defendant company to shut down until the necessary repairs were made and the room was in a normal condition. The failure of the fan to remove the steam produced a temporary condition that found these men working there, and not likely to insist on being at once discharged. They naturally would want to go along with the work while it continued, and, as the interference was supposed to be only temporary, they were not likely to make objection on that account. It cannot, I think, for that reason be said that a fair foundation was laid for an *assumption of risk*. The workers could not have contemplated it. That the injured man may have said something when spoken to about being careful that indicated

that he was impatient was but a natural expression of one not used to receiving instructions. In any event the question of negligence was clearly in the case, and it should have been submitted to the jury for their verdict. A verdict for the plaintiff under the testimony would not have been "so wholly unsupported by the evidence that we can say, as a matter of law, that it is clearly wrong," following *Armstrong v. Union Stock Yards Co.*, 93 Neb. 258. Therefore, if rendered, the verdict would have to stand.

The question of negligence is clearly one to submit to the jury. *Neice v. Farmers Co-Operative Creamery & Supply Co.*, 90 Neb. 470. In that case it was said in the body of the opinion: "The matter is peculiarly within the province of the jury, and, when the evidence is conflicting, this court cannot interfere with the verdict of the jury, unless upon the whole evidence the verdict is clearly wrong."

As to the assumption of risk, it is held in *Elliott v. General Construction Co.*, 93 Neb. 453, that "An employee does not ordinarily assume risks arising from conditions beyond his knowledge and not obvious to a person of his experience and understanding." That seems to hit this case squarely.

G. A. CRANCER COMPANY, APPELLANT, V. WILLIAM COMBS, APPELLEE.

FILED FEBRUARY 27, 1914. No. 17,442.

1. **Bailment**: GRATUITOUS BAILEE: RIGHT TO COMPENSATION. While "an involuntary bailee of goods may conserve the same, and for so doing recover from the owner what such service is reasonably worth" (*Moline, Milburn & Stoddard Co. v. Neville*, 52 Neb. 574), a voluntary, gratuitous bailee is not entitled to storage charges or to compensation.

2. ———: ———: ———. To change a voluntary, gratuitous bailment to one for storage or for compensation, bailee must notify bailor to take the property away or storage charges will be exacted.

3. ———: REPLEVIN: STORAGE CHARGES: SUFFICIENCY OF EVIDENCE. Verdict for storage charges for a piano set aside as unsupported by the evidence. *Crancer Co. v. Combs*, 94 Neb. 655, overruled.

OPINION on motion for rehearing of case reported in 94 Neb. 655. *Former judgment of affirmance vacated and judgment of district court reversed:*

ROSE, J.

The action is replevin, and the property is a piano which plaintiff seized under the writ. Defendant in his answer admitted, among other things, that plaintiff was the owner of the piano and entitled to its possession, but pleaded a counter-claim of $45 for nine months' storage. Plaintiff is a dealer in pianos, and on September 22, 1909, or on a later date, left the instrument in controversy at the home of defendant in Butler county, where it remained until taken by plaintiff under his writ, July 6, 1910. Upon a trial of the issues raised by the counter-claim and reply thereto, the jury rendered a verdict in favor of defendant for $25. From a judgment thereon plaintiff appealed. The hearing of the appeal resulted in an affirmance. *Crancer Co. v. Combs*, 94 Neb. 655. A rehearing was granted upon motion of plaintiff, and the case is again presented for determination.

The controlling question is the sufficiency of the evidence to sustain the verdict. In attempting to justify the judgment below, defendant asserts that he was an involuntary bailee, and that as such he is entitled to reasonable compensation for storage. He denies that he claims a lien on the piano, and insists on confining the issue to charges for storage. He relies on the rule of law that "an involuntary bailee of goods may conserve the same, and for so doing recover from the owner what such service is reasonably worth." *Moline, Milburn & Stoddard Co. v. Neville*, 52 Neb. 574. A voluntary, gratuitous bailee, however, is not entitled to storage charges or to a lien for compensation. *Burk v. Dempster*, 34 Neb. 426; *Morris v. Louis' Ex'r*, 33 Ala. 53; *Preston v. Neale*, 12 Gray (Mass.) 222;

Amory v. Flynn, 10 Johns. (N. Y.) *102; *Etter v. Edwards,* 4 Watts (Pa.) 63.

In the present case the evidence is undisputed that the piano was left at the home of defendant with the permission of his wife, and that he ratified the bailment thus created. Defendant was to pay no rent for the piano and there was no agreement by plaintiff, either express or implied, to pay for storage. The wife of defendant testified that she allowed the instrument to be left at her house. At the outset, therefore, the bailment was voluntary and gratuitous. To make it involuntary, notice to plaintiff to take the piano away or storage charges would be exacted was necessary. In discussing a voluntary bailment to the defendants in *Dale v. Brinckerhoff,* 7 Daly (N. Y.) 45, the court said: "They had agreed to keep it gratuitously, and if unwilling to do so any longer and they meant to charge for keeping it thereafter, they were bound to show that they had notified the plaintiff to that effect." In the case at bar plaintiff testified positively that he had never been notified to take the piano away. Defendant attempted to prove that he had given notice by letter, but neither the letter nor its contents can be found in the record. There is no proof that the voluntary, gratuitous bailment was changed to an involuntary one. The verdict, therefore, is without support in the evidence. It follows that the former opinion, based as it is on a contrary view of the record, is set aside, the judgment of the district court reversed, and the cause remanded for further proceedings.

REVERSED.

Reese, C. J., dissents for the reasons stated in the former opinion.

JAKE WIELINGA, APPELLEE, V. BEATRICE CREAMERY COMPANY, APPELLANT.

FILED FEBRUARY 27, 1914. No. 17,563.

Appeal: AFFIRMANCE. On appeal the judgment below will be affirmed, where appellant's brief does not comply with the court's rules, and no error in the proceedings or judgment of the trial court is assigned or pointed out in the brief of appellant, and no plain error appears in the record.

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

Talbot & Allen, for appellant.

George A. Adams, contra.

ROSE, J.

This is a controversy over a lot 100 feet long and 33 feet wide in the village of Holland. Plaintiff pleads ownership and right of possession. Under a lease from an adverse claimant, defendant asserts the right to use a building on the lot for a milk station. Plaintiff recovered judgment, and defendant has appealed.

In the brief of appellant no effort has been made to comply with the statutory provision that "the brief of appellant shall set out particularly each error asserted." Code, sec. 675*c*. The court's rules relating to assignments of error are also ignored. The record does not disclose a plain error within the meaning of the enactment that the supreme court may consider such an error, though not specified in appellant's brief. Code, sec. 675*c*. The name of the judge before whom the cause was tried in the court below is also omitted from appellant's brief. It follows that the judgment below is

AFFIRMED.