Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/04/2026 09:29 AM CST

MCCORMICK HARVESTING MACHINE COMPANY V. J. D. STIRES.

FILED APRIL 9, 1903. No. 12,457.

1. **County Court:** VACATING JUDGMENT AFTER TERM. Under the provisions of section 602 *et seq.* of the Code of Civil Procedure a county court has no power, after term, to vacate its own judgment on the ground that the same is void for want of jurisdiction over the person of the defendant.
2. **Reply.** The reply of plaintiff examined, and *held* not to state a defense to the answer of defendant.
3. **Evidence.** Evidence examined, and *held* insufficient to sustain the judgment.
4. **Action for Money Had and Received.** An action for money had and received will lie, where the defendant has obtained possession of money which in equity and good conscience he ought to refund.

ERROR to the district court for Platte county: J. A. GRIMISON, DISTRICT JUDGE. *Reversed.*

Harry O'Neill and *William O. Gilbert,* for plaintiff in error.

James G. Reeder and *J. D. Stires, contra.*

KIRKPATRICK, C.

This is an action for money had and received, brought by J. D. Stires, defendant in error, against the McCormick Harvesting Machine Company, plaintiff in error, in the district court for Platte county. The petition alleged that in January, 1896, one Stores was indebted to one M. E. Beerbower in the sum of $300 on a certain lease executed by Beerbower to Stores upon a farm in Nance county belonging to the former; that on June 26, 1896, Beerbower, for a valuable consideration, assigned the lease and all of her rights thereunder to Stires, Stires ever since then remaining the owner of all the rights of Beerbower in and to the money due under the lease; that in August, 1896, Stores paid the amount of his indebtedness to Beer-

bower to the McCormick Harvesting Machine Company for the use and benefit of plaintiff, Stires; and that the defendant, the machine company, neglected and refused to account for and pay over to plaintiff the sum of money received from Stores. There was prayer for judgment in the sum of $300, with interest. To this petition an answer was filed by plaintiff in error, admitting that Stores was indebted to M. E. Beerbower in the amount alleged, which sum, however, was subject to a discount if payment was made when due; denied the assignment of the lease by Beerbower to defendant in error, and pleaded that on May 11, 1896, it recovered a judgment against Beerbower in the county court of Platte county in the sum of $234.10, with costs of action taxed at $10.45; that it procured a transcript of the judgment to be filed in the district court for Nance county, and caused a summons in garnishment to be duly issued and served upon Stores, commanding him to appear in the district court for Nance county and answer concerning his indebtedness to Beerbower; that Stores appeared pursuant to summons, admitting his indebtedness to Beerbower in the sum mentioned in the answer; that subsequently, and on December 27, 1897, the district court made an order directing Stores to pay over the amount due from him to Beerbower to the clerk of the district court, and directed payment to plaintiff in error herein of the sum due it on its judgment; that the money was accordingly paid over to plaintiff in error by the clerk, and it receipted therefor. In addition to these allegations, the answer denied generally all other allegations of the petition. Replying to this answer, defendant in error pleaded that the judgment mentioned in the answer of date May 11, 1896, was by the county court of Platte county on August 31, 1896, duly vacated and set aside, and that all proceedings had thereunder in the district court for Nance county were without authority of law, fraudulent and void. Trial resulted in a judgment generally for defendant in error, from which this proceeding is prosecuted.

Various errors are predicated upon the proceedings had in the trial court, not all of which require consideration. The record discloses that the action by plaintiff in error against M. E. Beerbower in the county court was one charging defendant therein as indorser upon two promissory notes. Judgment was rendered for plaintiff therein. From certain proceedings had in the county court, a transcript of which forms a part of the bill of exceptions herein, it appears that Mrs. M. E. Beerbower, on May 11, 1896, and prior thereto, was absent from the state; that a constable, who was directed to serve the summons, delivered the same to P. W. Beerbower, husband of M. E. Beerbower, and made return of summons showing due personal service upon the defendant in the action. It is further disclosed by those proceedings that P. W. Beerbower employed counsel, who assumed to appear in the case for Mrs. M. E. Beerbower, filing an answer, litigating the case upon its merits, judgment going, as stated, for plaintiff. These facts are set out in a petition filed by Mrs. Beerbower in July, 1896, in the county court, and also in certain affidavits filed in support thereof; the object and prayer of the petition being to have the judgment of May 11 vacated and set aside, the ground alleged being that due service of summons was never had upon M. E. Beerbower, and that she never had notice of the action, and that she had a good and valid defense thereto. The harvesting machine company appeared and answered, admitting that M. E. Beerbower was the wife of P. W. Beerbower, denied all the other allegations of the petition, and pleaded want of jurisdiction in the county court to entertain the petition of M. E. Beerbower. It seems that evidence was taken, trial had, and on August 31, 1896, the county court entered a judgment purporting to vacate and set aside the judgment rendered by it May 11, 1896. In the action under review in this proceeding, evidence of the action of the county court, vacating the judgment of May 11, was admitted over objection of plaintiff in error, the ruling of the trial court thereon being assigned as error.

The jurisdiction of the county court to vacate its own judgment entered May 11, 1896, if it exists, must be found in the third subdivision of section 602 of the Code of Civil Procedure, "for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order." Was the judgment of May 11, if entered without service of summons, and therefore without jurisdiction of the person of defendant, a judgment irregularly obtained within the meaning of the language quoted? We are of opinion that it is not. In order that the county court might have jurisdiction to vacate the judgment of May 11 the latter must have been a judgment. If the court had no jurisdiction over the person of the defendant, it is apparent that the judgment it assumed to enter was absolutely void. A plain distinction exists, running through all the authorities, between a judgment absolutely void for want of jurisdiction over the person or subject-matter and a judgment rendered by a court with jurisdiction, but because of some mistake or irregularity in obtaining it the judgment is voidable. We do not think that section 602 was intended to apply where no valid judgment had in fact been entered, and where the proceedings of the court are absolutely void for want of jurisdiction. In discussing this question, 1 Black, Judgments (2d ed.), sec. 170, it is said: "Now a 'void' judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one."

In our conclusion that section 602 has no application to void judgments, we are supported by the prior decisions of this court. *Kauffmann v. Drexel,* 56 Neb. 229.

It follows from what has been said that the county court was without jurisdiction to vacate its own judgment at the time it attempted to do so. And, if its action in that regard was wholly void, the record of its proceedings supplied no competent evidence that the judgment of May 11, in favor of plaintiff in error, was a nullity. Consequently, the reply of defendant in error, pleading the action taken by

the county court, failed to state a valid defense, and evidence of those proceedings was insufficient to entitle defendant in error to any relief. It follows that the judgment of the trial court must be reversed, because not sustained by any competent evidence.

Defendant in error in the lower court litigated his case upon the mistaken assumption that the action of the county court in its attempted vacation of the judgment of May 11 was valid, and, therefore, the record of that action was competent to show the nullity of the judgment upon which plaintiff in error based its claim to the money. On the contrary, if the judgment was in fact void, defendant in error should have tendered that as an issue, and established the same by competent proof. As stated in 1 Black, Judgments (2d ed.), sec. 170: "It is not necessary to take any steps to have it (a void judgment) reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral." We are accordingly of the opinion that defendant in error should be permitted, if he so desires, at the retrial of this cause, to amend his reply by pleading that the judgment of May 11 is void.

Inasmuch as this case must be tried again, one other question requires determination, namely, whether in this case an action for money had and received will lie. The rule supported by the better authorities is that an action for money had and received may be maintained for the recovery of money which the defendant ought in equity and good conscience to give over to the plaintiff. It is stated in the following language by our own court: "An action in the nature of one for money had and received lies wherever the defendant has obtained possession of money which *ex aequo et bono* he ought to refund; and it is proper to bring the action against the party who has received the money." *School District v. Thompson*, 51 Neb. 857.

The rule is well sustained: *O'Conley v. City of Natchez,* 1 Smed. & M. (Miss.) 31, 40 Am. Dec. 87; *Lime Rock Bank v. Plimpton,* 17 Pick. (Mass.) 159, 28 Am. Dec. 286; *O'Fallon v. Boismenu,* 3 Mo. 405, 26 Am. Dec. 678; *Goddard v. Bulow,* 1 Nott & McC. (S. Car.) 45, 9 Am. Dec. 663.

If the judgment of May 11, 1896, obtained by plaintiff in error, is void, we are of opinion that an action for money had and received will lie for the recovery of the money plaintiff in error procured by virtue of its garnishment process.

It is, therefore, recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings, with permission to defendant in error, if he so desires, to amend his reply.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings, with permission to defendant in error to amend his reply.

REVERSED AND REMANDED.

OMAHA STREET RAILWAY COMPANY V. JOHN BOESEN.

FILED APRIL 9, 1903. No. 12,649.

1. **Appeal and Error:** INSTRUCTIONS. A judgment will not be reversed on account of the number of instructions given to the jury by the trial court, unless it clearly appears that the party complaining is prejudiced thereby.
2. **Burden of Proof.** The giving of an instruction which places the burden of proof to establish some of the facts put in issue by the pleadings on the wrong party, is reversible error.
3. **Instructions.** It is error to give the jury instructions which contain inconsistent and conflicting paragraphs relating to the burden of proof. *Farmers' Bank v. Harshman,* 33 Neb. 445, approved and followed.
4. ———: THEORY OF CASE. A party is entitled to have his theory of

his case, as disclosed by the evidence, submitted to the jury, under proper instructions, and where such an instruction is tendered to the court the refusal to give it is reversible error.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, DISTRICT JUDGE. *Reversed.*

John L. Webster, for plaintiff in error.

T. W. Blackburn and *Richard S. Horton, contra.*

BARNES, C.

The defendant in error filed his amended petition in the district court for Douglas county to recover damages of the Omaha Street Railway Company, alleged to have been sustained by him by reason of the negligence of said company. It was alleged in the petition, in substance, that the Omaha Street Railway Company was a corporation organized and existing under and by virtue of the laws of this state; that at the time stated therein it owned and operated a certain street railway, known as the Omaha Street Railway, running through the streets of the city of Omaha, and extending to and through the streets of South Omaha, in Douglas county, and that it was a common carrier of passengers for hire upon said street railway; that on the 15th day of July, 1899, he became a passenger on said street railway, at the special instance and request of said company, to be carried safely from the intersection of Eighteenth and Vinton streets in the city of Omaha, to and along Q street in the city of South Omaha, on a car owned and operated by the said company, for a certain reward to be paid therefor; that while he was a passenger on one of the cars of said street railway company, the car upon which he had taken passage, when it reached a point in South Omaha at or about the intersection of Twenty-fourth and O streets, through the negligence of the said company, suddenly left the track and threw him violently to the pavement, inflicting upon him serious and permanent injuries; that by reason of the accident he was bruised and

wounded so that he became sick, sore and disabled, and was permanently injured, to his damage in the sum of $20,000, for which he prayed judgment. The street railway company filed a motion to make the petition more definite and certain, and to require the plaintiff to state in his petition more specifically the acts of negligence of which he complained. The motion was overruled, and thereupon the company filed a general demurrer to the petition, which was also overruled. An answer to the amended petition was then filed, in which it was first denied that the car of the defendant company, through the negligence of the defendant, left the track and threw the plaintiff to the pavement; and it was alleged in the answer that defendant was not guilty of any negligence whatever. And it was averred therein that at the time and place where the said accident was alleged to have occurred, that defendant's car was in good order and condition; that it had been theretofore and remained thereafter in every respect in good condition, and was of the style and manner of construction of car in common use; that the accident did not arise from any imperfection of the car, or from any cause that could have been guarded against by the use of the greatest care and skill on defendant's part. It was further averred that the track of the defendant company, at the time and place where the said accident was alleged to have occurred, was in good order and condition; that there were no breaks or imperfections therein; that it was in the same condition at the time of the accident that it had been theretofore, and remained for a considerable time thereafter; that the cars were operated over and upon said track at said point every few minutes during all hours of the day; that it had been so used for a long time before and continued to be used thereafter without any occasion for any repairs, improvements, or changes in said track; that said accident, if any there was, arose from an extraneous cause, over which the defendant company had no control, and said accident was one which could not be guarded against by the use of the greatest degree of care and skill on the part of the defend-

ant company; that the car did not leave the track, but continued on the same to the end of the journey, at the southern termination of said track, and then returned on its regular route, passing over the same point in the track, and so on, and so continued in use and operation; that plaintiff was guilty of contributory negligence by standing and riding upon the platform of the car when there was ample room for him to have occupied a seat inside of the car; that he willfully, negligently and knowingly chose of his own accord to ride on said platform of the car; and that his injuries, if any, were occasioned by his own contributory negligence. The reply contained a denial of each and every allegation of new matter contained in the answer. On these issues the cause was tried to a jury, and resulted in a verdict for $1,126 against the defendant company. A motion for a new trial was filed and overruled, judgment was rendered on the verdict, and the street railway company prosecuted error to this court.

The first assignment discussed in the brief of the plaintiff in error is that the instructions given by the court were too voluminous, were confusing and misleading, and did not confine the attention of the jury to the real questions at issue. An examination of the record and bill of exceptions discloses that there were but three questions of fact to be submitted to the jury: First—Did the car leave the track or become derailed and thereby throw the defendant in error into the street? Second—If the car did leave the track could such accident have been prevented by the use of the highest degree of care and skill on the part of the defendant company? Third—If the car did not leave the track, did the defendant in error jump from it, with other passengers, while it was in motion, and as a result thereof fall into the street, and receive the injury which he complained of? The instructions of the court should have been few and brief, and directed to the particular questions at issue. Yet they contained fourteen paragraphs, some of which were misleading and contradictory. It was stated by this court in the *City of*

Beatrice v. Leary, 45 Neb. 149, 160, 50 Am. St. Rep. 546, that the jury in that case was instructed too much. The court said: "At the request of the plaintiff the court gave the jury twelve instructions; at the request of the city, fifteen; and in addition to these there were six paragraphs or instructions in the charge given by the court to the jury on its own motion. Instructions in a case should be few in number and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. Numerous instructions, or instructions with long and involved sentences, are more likely to confuse the jury and lead it astray than to enlighten it and direct it to the material points of the case." And yet the court in that case affirmed the judgment. We think the rule stated is a correct one, but we have been unable to find a case where the judgment was reversed for the sole reason that too many instructions were given, or, in other words, because the jury was over-instructed. We are unable to say, after an examination of the instructions, that the judgment should be reversed because of the number of paragraphs contained in the charge of the court.

The second assignment of error presented is that the court erred in giving instruction No. 2 to the jury, because it was confusing and misleading. The first paragraph of this instruction is as follows:

"You are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that he was injured while a passenger of the defendant, the extent of his injuries and the damage occasioned thereby."

This part of the instruction may be corrct as a general proposition, but it was hardly correct taken in connection with the allegations of the petition and the proof adduced on the trial. The real question here was, was the plaintiff injured by the derailment of the train? Was he thereby thrown from the car and injured, or was he injured by jumping from the car while the train was in motion? There was no question but that the plaintiff had been a

passenger on the car. It was admitted that he got aboard the train at Omaha, and continued as a passenger up to the moment when he left the car either voluntarily or by force of a derailment. It was alleged in his petition that he was thrown from the car by the derailment thereof, and that such derailment was caused by the negligence of the street railway company. It may be stated, as a general proposition, that a street railway company is a common carrier of passengers for hire; that ordinarily it will be sufficient for one to show that he was a passenger, that while such passenger he was injured, and the extent of such injuries. It will then develop upon the company to show that the injury occurred without any negligence on its part, and that by the exercise of the highest degree of care it could not have prevented such injury. It will be found, however, that this doctrine has been laid down in cases where there was a collision, or where the person injured had been struck or run over by a street car—in short, in cases where the undisputed cause of the injury fairly raised the presumption of negligence. In the case at bar, however, there was no collision. The plaintiff was not run over or struck by the street car, but he alleged, as a substantive part of his case, that he was thrown from the car by a derailment of it, caused by the negligence of the company; and it would seem that before he could make his case it would be necessary to show at least that he was thrown from the car as alleged in his petition, before any presumption of negligence could arise. That this was the understanding of his counsel there can be no doubt, because in making his proof the plaintiff assumed that burden. The second paragraph of this instruction, however, is the one most complained of. It is as follows:

"And the burden of proof is upon the defendant to show by a preponderance of the evidence that such injuries, if any, were received while a passenger, by being thrown from a car because of the derailment thereof, were without fault on defendant's part, and that they could not have been avoided by the exercise of the highest degree of skill and

diligence on the part of the defendant, consistent with its business."

By this paragraph the court attempted to tell the jury on whom the burden of proof rested. It is certainly vague, confusing and uncertain. It placed the burden of proof on the defendant to show that the injuries received by the plaintiff, if any, were received while a passenger; that the injuries were received by being thrown from the car because of the derailment thereof, notwithstanding the defendant had generally and specifically denied that its car was ever derailed, or that the plaintiff was thrown therefrom by reason of its derailment; that the injuries which the plaintiff received were without fault on its part; and that the injuries could not have been avoided by the exercise of the highest degree of skill and diligence on the part of the defendant. It can not be said that the defendant company was required to prove that plaintiff's injuries were received while he was a passenger on the car when it had specifically denied that he had received any injuries at all, and alleged that if any such injuries were received they were caused by the contributory negligence of the plaintiff himself, and not by reason of any negligence of the company. Neither can it be successfully claimed that defendant was required to prove that the plaintiff's injuries were caused by a derailment of the car, when it had specifically denied that fact. That the court erred in giving this instruction can not be questioned. Again, the instruction assumed that there was a derailment of the car. Up to the time of giving the part of it above quoted, the court had not instructed the jury that it was necessary for them to find from the evidence whether the car was derailed or not. On this question there was a sharp conflict of evidence. The plaintiff, and at least three other witnesses, testified that the car was derailed, and the plaintiff stated that the derailment was what threw him from the car onto the pavement and caused his injury. Four or five witnesses for the defendant company testified that the car was not derailed at all, and

these witnesses were in a better position to observe the condition of the car, to know what occurred, and to state whether or not it was derailed, than were the witnesses who testified for the plaintiff. There was evidence introduced by the defendant which showed that the car was one of ordinary construction, and suitable for the use that was being made of it; that it was in perfect repair, in good condition as to its trucks, wheels and all of its parts; that there was no defect whatever in the street car track at the place where the accident was alleged to have occurred; and that there was nothing in the circumstances or surroundings, in the construction, equipment or condition of the car, or of the street railway track, which would have derailed the car. This testimony was undisputed, so that the court should not have assumed that the car was derailed, but should have submitted that question to the jury under proper instructions. Again, this instruction was in conflict and inconsistent with instruction No. 6, given by the court on his own motion, which is as follows:

"The jury are instructed that, under the pleadings and the proofs in this case, the plaintiff is not entitled to recover, unless he has established by a preponderance of the evidence that while he was a passenger on the defendant's car, the car left the track, and thereby threw the plaintiff from the car into the street, and that the injuries of which he complains resulted therefrom."

From an examination of the record, it is impossible for us to determine whether the jury were governed by instruction No. 2, or the instruction last above quoted, which is inconsistent therewith.

For these reasons we hold that in giving this instruction there was reversible error.

The plaintiff in error further contends that the court erred in refusing to give the third paragraph of the instruction requested by the defendant company. The request is as follows:

"The jury are instructed that if you believe from the evidence that the plaintiff was not thrown from the car,

but that he attempted to get off the car while it was in motion and fell into the street, then he can not recover damages, and your verdict should be for the defendant."

Without commenting at length on the evidence, it is sufficient to say that the bill of exceptions discloses that at the time the accident is alleged to have occurred, the train of street cars upon which the defendant in error was riding was slowing up and about to stop, so that the persons riding thereon could pass over to the Q street car, which was waiting for them, and thus proceed on their way to the packing houses where they were employed; that there were so many passengers on the train that it was impossible for them all to get into the single car on the Q street track; that they commenced jumping off and running to get seats in that car; that those who got there first thus obtained a ride to the packing houses, while those who delayed were obliged to walk; that none of the other passengers were thrown from the car or fell in the street; it appeared that no one else suffered any injury or inconvenience whatsoever. So there was at least some evidence from which the jury might reasonably have found that the defendant in error was injured by jumping from the car in his haste to run and catch the Q street car. This was the theory of the defense. The plaintiff in error, after having shown conclusively that the car from which the defendant herein claims he was thrown was in good condition in all respects and suitable for the purposes for which it was used, that its track was in perfect order and that there was no apparent cause or reason for the derailment of the car, introduced proof tending to show that it was not derailed, and that the defendant might have been injured by jumping off from the car while it was still in motion, in his haste to secure a seat in the Q street car. Under such circumstances, it was entitled to have its theory of the case submitted to the jury by a proper instruction. *Hartwig v. Gordon,* 37 Neb. 657, 662; *Cunningham v. Fuller,* 35 Neb. 58; *Hockenberger v. State,* 49 Neb. 706; *Powder River Live Stock Co. v. Lamb,* 38 Neb. 339. The refusal to give this instruction was reversible error.

The petition contains many other assignments of error, among which is the misconduct of a member of the jury. It is unnecessary, however, to pass upon any of these questions, because a new trial must be awarded on account of the errors above mentioned.

We therefore recommend that the judgment of the district court be reversed, and the cause remanded for a new trial.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

EDWIN R. SAXTON, APPELLANT, V. MICHAEL F. HARRINGTON, APPELLEE.

FILED APRIL 9, 1903. No. 12,756.

1. **Failure to Return Bill of Exceptions Not Sufficient Ground for Equitable Relief.** A failure to return a bill of exceptions within the statutory time, or within time to commence error proceedings in the supreme court, is not sufficient ground to sustain a petition in equity for a new trial.
2. **Proceedings in Error: MOTION TO DISMISS CASE OR QUASH BILL.** In such a case, proceedings in error may be commenced on the return of the bill of exceptions, and a motion to dismiss the case or quash the bill, made by the party whose fault or misconduct caused the delay, will be overruled.
3. **Loss of Files: DILIGENCE: NEW TRIAL: EQUITABLE PROCEEDING.** The loss of the files, in a case where no effort is made to substitute them, and no order is obtained for that purpose, and the only diligence to obtain a transcript is repeated requests of the clerk for one will not sustain a judgment granting a new trial in an equitable proceeding for that purpose.
4. **Evidence Sufficient to Sustain Finding.** In such an action, where there is a conflict of evidence on the material facts, and the finding of the trial court is sustained by sufficient evidence, such finding will not be set aside by a court of review.

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

J. J. King and *E. H. Benedict,* for appellant.

Michael F. Harrington, Moses P. Kinkaid and *Thomas V. Golden, contra.*

BARNES, C.

This case comes here on appeal from a judgment of the district court for Holt county denying the appellant a new trial in an action in which the appellee had obtained a judgment against the appellant in said court, and in which the time for prosecuting error to this court had expired. It was alleged in the petition for a new trial that the plaintiff in said cause had obtained a judgment against the plaintiff herein, and that plaintiff's attorney had been unable to obtain a bill of exceptions from the official reporter within the forty days allowed by the court to prepare and serve the same; that thereupon he applied to the trial judge for an extension of time for that purpose, which was opposed by the appellee; that such extension was granted; that he obtained the bill within the time allowed, and delivered the same to the appellee for examination, and amendments, if any were desired; that the appellee retained the same in his possession for more than a year thereafter, and for that reason appellant was unable to have said bill of exceptions settled until too late to prosecute proceedings in error to the supreme court. It was further alleged in the petition that appellant applied in due time to the clerk of the district court for a transcript of the proceedings in order to prepare his case for the supreme court, but that he was informed by the clerk that the files were lost, and, therefore, he could not make such transcript; that from time to time, and several times, as often as once a month, for about a year thereafter, he renewed his applications to the clerk for a transcript, but was informed each time that the files could not be found; that he was thus prevented from having his

case reviewed in the supreme court, and for that reason he prayed for a new trial.

The answer denied all of the allegations of the petition, except the fact that the judgment had been obtained, and that the bill of exceptions had been delivered to the appellant, as stated therein, and it was alleged in the answer that the bill was returned to counsel for appellant, and that it was afterwards found with other papers in appellee's office, but as to how the same came to be there was wholly unknown to him; that when the bill was found he immediately conveyed it to counsel for appellant, and offered, in order to enable appellant to have the case properly reviewed, to allow the judgment of the district court to be set aside so that the court could enter a new judgment on the verdict as of that date, and thus the time for taking the case to the supreme court would date from the entry of such new judgment; and that appellant refused to accept such offer.

The reply admitted some of the facts alleged in the answer, denied others, and alleged that the appellant refused the offer set forth therein because counsel had forgotten one of the grounds of the motion for a new trial, and therefore could not supply a motion with the same grounds contained therein that were set forth in the original.

Upon these issues the cause was tried to the court, with the result of a general finding for the appellee, and a dismissal of the action.

The petition in this case was filed under the provisions of section 318 of the Code of Civil Procedure and within one year after the rendition of the final judgment complained of. And, while its allegations do not technically embrace what may be termed "newly discovered grounds," still it has been held that this remedy is available to a party where the stenographer loses his notes, and can not furnish a bill of exceptions. *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100; *Mathews v. Mulford*, 53 Neb. 252; *Curran v. Wilcox*, 10 Neb. 449.

It has also been held that equity will not relieve a party against a judgment on account of his own negligence, or that of his attorney. *Funk v. Kansas Mfg. Co.*, 53 Neb. 450. And it may be stated that the petition must show that the plaintiff was prevented by circumstances over which he could have no control, from prosecuting his remedy at law; that he had exercised due diligence to preserve his rights and pursue his remedy; and must also set forth the particular acts of the diligence relied on.

It is contended by appellant that the matters pleaded and proved in relation to the bill of exceptions are sufficient to support a judgment granting him a new trial. It is shown by the pleadings and the proof that he had no trouble in obtaining the draft of the bill of exceptions within the time allowed by the court, and that he served it on the opposing party in due time. It is not alleged in the petition that he ever made any effort to secure its return, and the evidence fails to disclose that he ever demanded its return, or made any inquiry as to its whereabouts for more than a year after he delivered it to the appellee. Appellant, therefore, bases his whole contention on this point on the fact that it was the duty of the appellee to return the bill within ten days, and for that reason that he was relieved from making any further effort to obtain it and present it to the court for settlement. Such conduct on his part can hardly be said to constitute due diligence. Especially is this so, because it is not alleged that appellee was guilty of any fraud or misconduct in not returning the bill, and it is conceded in appellant's brief that the failure to return it was an honest mistake, or an oversight. Under such circumstances, ordinary diligence would have required appellant or his counsel to call attention to the fact that the bill had not been returned. Such a suggestion would have doubtless obviated all of the difficulties in relation thereto. Again, the bill of exceptions might have been settled and error proceedings commenced after it was found and returned to the appellant's counsel. The delay being the fault of appellee, he

could not have procured a dismissal of the cause, and an application to quash the bill of exceptions, if made by him, would have been overruled.

In *Allis v. Newman,* 29 Neb. 207, 209, it was held that where a bill of exceptions was mislaid by mistake of the clerk, the time of such loss would be deducted from the whole time between the rendition of the judgment and the filing in the supreme court. It is the duty of the adverse party upon receiving a bill to propose amendments thereto, and return it in the time limited by statute. If he fails to do so, and on that account the bill is not settled in the time allowed by statute, it will not be quashed on his motion. *Deck v. Smith,* 12 Neb. 205, 207. Where a bill is retained by the trial judge until after the time for appeal has passed, appellant will not be deprived of his appeal. *Parker v. Kuhn,* 19 Neb. 394.

We, therefore, conclude that the testimony in relation to the matter of the bill of exceptions is not sufficient to show due diligence on the part of the appellant, and that notwithstanding the facts proved he could have perfected his proceeding in this court and obtained a review of the case in the manner provided by law without resorting to this proceeding in equity.

Appellant also contends that the loss of the files, without any fault on his part, prevented him from obtaining a transcript, and thus he was deprived of his right to have the case reviewed in the supreme court. It must be conceded that if the facts shown in relation to the bill of exceptions were sufficient to require the court to grant a new trial, it would be unnecessary to rely on the difficulty encountered in obtaining a transcript.

Having held, however, that the matter of the bill of exceptions was not sufficient to sustain a judgment for a new trial, we will now dispose of the contention relating to the loss of the files. There is a sharp conflict of evidence on the question as to whether an order or demand for a transcript was ever made by appellant or his counsel. We may assume that the court found this fact against the

appellant. If so, we can not disturb the finding; but, conceding that a transcript was ordered, the loss of the files did not necessarily prevent the appellant from obtaining one. The loss of court files is a matter of frequent occurrence, and it is the common and ordinary practice to obtain an order to substitute them. No such order was asked for in this case, and it appears that every paper filed in the court could have been substituted with absolute accuracy, except, perhaps, the instructions and the motion for a new trial. As to the instructions, it is shown that no exceptions were taken to those given or the ones refused, so that their omission from the transcript would have made no difference in the result on a hearing in the supreme court. Again, there was evidence tending to show that the instructions given were the same as those given on the former trial, and they were readily accessible in case they were required to complete the transcript. As to the motion for a new trial, it is idle to say that counsel could not supply it, and set forth therein the same grounds contained in the original, and many others, if desired.

We therefore hold that the evidence in regard to the loss of the files fails to show due diligence on the part of the appellant to substitute them, and thus obtain his transcript, and there was, therefore, no necessity for a new trial on that ground.

It follows that we can not disturb the findings and judgment of the trial court in this case. The judge presiding at the trial saw the witnesses, heard their testimony, was conversant with all of the facts, and, as his judgment is sustained by sufficient evidence, we recommend that it be affirmed.

POUND and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ALICE S. DANFORTH, APPELLEE, V. LORENZO D. FOWLER ET AL., APPELLANTS.

FILED APRIL 9, 1903. No. 12,773.

1. **Appeal:** REVIEW OF MOTION TO STRIKE. In an equity cause brought to the supreme court on appeal, the ruling of the district court on a motion to strike an answer from the files can not be considered. *Frenzer v. Phillips*, 57 Neb. 229.

2. **Procedure.** To authorize the supreme court to review the rulings of the trial court on motions and other matters of procedure, the party complaining must except to such rulings, file a motion for a new trial, and present the questions by a petition in error.

3. **Appeal:** MOTION FOR JUDGMENT ON PLEADINGS. The ruling of the district court on a motion for a judgment on the pleadings, can not be reviewed on appeal if it appears that the judgment is sustained by and conforms to the pleadings.

APPEAL from the district court for Clay county: GEORGE W. STUBBS, DISTRICT JUDGE. *Affirmed.*

Thomas H. Matters, for appellants.

Joel W. West and *Leslie G. Hurd*, *contra.*

BARNES, C.

The appellee, Alice S. Danforth, commenced an action against Lorenzo D. Fowler in the district court for Clay county, and in such action attached certain property which she alleged belonged to him. She obtained a judgment against him in said suit, and also an order to sell the attached property for the satisfaction thereof. To aid the sale of the property she thereupon commenced a suit in equity in the nature of a creditors' bill against the said Lorenzo D. Fowler, Elizabeth E. Fowler, Helen L. Jones, Anna A. Fowler, Elizabeth E. Fowler, trustee, George E. Fowler, Fowler & Cowles Mortgage Company, the Sutton Building & Improvement Company and E. M. Woodruff, to set aside certain conveyances and transfers of the property, which were alleged to be fraudulent, and

without consideration. Service of summons was duly had on all of the defendants, and they were required to answer the petition in said cause on or before the 26th day of May, 1902. Answers were filed by the Fowler & Cowles Mortgage Company, George E. Fowler, Helen L. Jones and the Sutton Building & Improvement Company; and the other defendants defaulted.

It appears that the case was placed on the calendar of the district court for Clay county at its June term, and stood for hearing on June 2, 1902. It also appears that the clerk, in making out the bar docket, for the convenience of counsel noted it for trial on June 3. On the 2d day of June the appellee filed a motion to strike the answer of Helen L. Jones from the files for the alleged reason that it was sham and irrelevant, and that such facts were apparent upon the face of the record and the depositions on file. The motion was considered by the court on the evidence and argument of counsel, and was sustained. Thereupon the default of Helen L. Jones was entered, and appellee filed a motion for judgment on the pleadings according to the prayer of her petition. Default was entered as to all of the non-answering defendants, and the answers of George E. Fowler, the Sutton Building & Improvement Company, and the Fowler & Cowles Mortgage Company were held to state no defense to the allegations of her petition. The motion was sustained, and a decree was entered in favor of the appellee as prayed. Thereupon the Fowler & Cowles Mortgage Company appealed to this court, and on June 13, 1902, Helen L. Jones served notice on the appellee that she had filed a motion for leave to file a supersedeas bond. Her motion was afterwards sustained, and the matter now comes before us for review on the appeal.

The appellants contend that the court erred in sustaining the motion of the appellee to strike the answer of Helen L. Jones from the files. This question can not be considered, for the reasons hereinafter given. It appears from the record that no exception was taken to the ruling on

the motion. It further appears that no motion for a new trial was ever filed in the trial court, and that no petition in error has ever been filed in this court. A ruling on a motion to which no exceptions was taken can not be reviewed in this court, especially if such review is sought upon appeal as distinguished from error proceedings. *Frenzer v. Phillips,* 57 Neb. 229. That action was one for the foreclosure of a real estate mortgage. There was a defendant residing in the state of New York, and proceedings were had by the sheriff authorizing a person to serve the summons upon the defendant in that state. There was also service by publication. The latter service was attacked by motion on special appearance, because the affidavit upon which it was founded had been filed in May, 1895, and the publications were September 4, 11, 18 and 25, 1895, and before there had been a ruling with reference to the sufficiency of the personal service. This motion was overruled. No exception was taken to it, but the case was finally appealed to this court, and that ruling was presented for review. The court said: "We can not consider the correctness of this ruling, for two reasons: First, because of the failure to except, and second, because this case is presented for review upon appeal, and not upon error proceedings." And in support of this the court cited *Ainsworth v. Taylor,* 53 Neb. 484; *Alling v. Nelson,* 55 Neb. 161; *Village of Syracuse v. Mapes,* 55 Neb. 738.

In the case of *Zimmerman v. Zimmerman,* 59 Neb. 80, it was held that an appeal in an equity cause will not present for review the rulings made during the progress of the trial.

In *Battelle v. McIntosh,* 62 Neb. 647, 650, Commissioner POUND, speaking for the court, said: "The answer denied that these payments had been made, and the trial court rejected all evidence by which they were sought to be established. It is very clear from inspection of the record that the theories upon which these rulings were made were erroneous in view of *Adams v. Osgood,* 60 Neb. 779, and *Chicago, B. & Q. R. Co. v. Nemaha County,* 50 Neb.

393, but we can not review them in the present proceeding. The office of an appeal is only to review the judgment or final order of the district court upon the pleadings and the evidence admitted at the hearing. Review of rulings rejecting evidence must be sought by petition in error."

In order to review an action in equity on error, the errors complained of which occurred on the trial must be brought before the district court by motion for a new trial or they will be considered as waived. *Cutler v. Roberts,* 7 Neb. 4, 29 Am. Rep. 371; *Swansen v. Swansen,* 12 Neb. 210, 211.

It thus appears to be settled by this court that the rulings of the district court on the trial of a suit in equity will not be reviewed by this court unless a motion for a new trial has been presented to the district court and the alleged errors are presented in this court by a petition in error.

Lastly, it is contended that the court erred in rendering judgment on the pleadings. It appears that after the answer of Helen L. Jones was stricken from the files the other answers that remained stated no defense to the plaintiff's cause of action. This being true, it was proper for the court to render a judgment on the pleadings as they then stood. Such action was the same as rendering a judgment by default. No money judgment was sought against any of the appellants, and, the allegations of the petition standing confessed by reason of the default, it was not necessary for the plaintiff to offer any other or further proof than that which was already on file, and she was entitled to a decree in accordance with the prayer of her petition. If evidence was required to support the decree, there being no bill of exceptions in the record and nothing to show what evidence was before the trial court, it will be conclusively presumed that the evidence was sufficient to sustain the decree. In the case of *Credit Foncier v. Rogers,* 10 Neb. 184, it was held that "If a party rely upon the fact that there was no evidence in a case where evidence was necessary, he must establish it by a proper bill of exceptions."

The state of the record herein renders it impossible for us to consider either of the questions presented by the appellants, and for that reason we recommend that the judgment of the trial court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN A. CREIGHTON V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED APRIL 9, 1903. NO. 12,697.

1. **Evidence:** ADJUSTMENT OF CONTROVERSY. An amicable adjustment of a controversy between two parties is not admissible for the purpose of showing any liability of either.
2. **Right of Appeal.** Where defendant is sued in the county court, appears, files an answer, and participates in the trial by cross-examining plaintiff's witnesses, he is entitled to an appeal from a judgment rendered against him.
3. **Instructions.** Instructions examined, and *held* not prejudicial.

ERROR to the district court for Douglas county: IRVING F. BAXTER, DISTRICT JUDGE. *Affirmed.*

Charles Ogden and *Joel W. West,* for plaintiff in error.

James M. Woolworth, M. A. Low, W. F. Evans and *William D. McHugh, contra.*

OLDHAM, C.

This was an action for damages for the value of certain buildings situated on plaintiff's farm, which were destroyed by fire alleged to have been set out by the negligent operation of one of defendant's engines. The cause was originally instituted in the county court of Douglas

county and taken by appeal to the district court. It was tried in the district court, by consent of the parties, on the pleadings filed in the county court.

The petition alleges the ownership and destruction of a barn and granary by fire negligently set out by defendant. The answer was a general denial. On issues thus joined there was a trial to a jury, verdict for defendant, judgment on the verdict, and plaintiff brings error to this court.

There was no material dispute in the testimony introduced at the trial of the cause. Plaintiff's evidence showed that almost immediately after one of defendant's trains had passed through the premises on which the buildings were situated, a fire broke out on the right of way, which spread rapidly on account of a strong wind that was blowing, and reached the buildings before the witness who saw the fire start and defendant's section hands could control the fire. There was no dispute as to the amount of the loss. Defendant, on the other hand, introduced testimony tending to show that the engine propelling the train was fully and properly equipped with the best and most modern spark arresters and other appliances for the prevention of the escape of fire from the engine, and that the engine was operated in a skillful manner by a competent and prudent engineer and fireman. This condition of the testimony presented a question of fact as to whether the fire originated by any negligence on the part of the defendant.

The first complaint called to our attention in the brief of plaintiff in error is as to the action of the trial court in refusing to permit plaintiff to show that the claim agent of defendant paid the owner of the grain which was stored in plaintiff's granary for the loss thereof, destroyed by this same fire.

An amicable adjustment of the controversy, even as between the parties themselves, is not competent evidence to establish a liability. Much less would an amicable adjustment with one not a party to a settlement be admis-

sible against the other merely because the controversy arises from the same cause. Courts look with favor on the rights of parties to amicably settle differences, and they may do so with one or more of those with whom they are involved in a dispute, without prejudicing any of their rights in case they be compelled to litigate with others.

It is urged by counsel for plaintiff in error that defendant had no right to appeal this cause of action from the judgment of the county court, because it did not introduce any testimony on its own behalf in the hearing in that court. The record shows that the defendant filed a general denial at the trial in the county court; that it was represented by counsel at the hearing, and cross-examined plaintiff's witnesses, but that it did not in fact offer any affirmative testimony in its own behalf. We think this was a sufficient contest to entitle it to an appeal of its cause of action. *Baier v. Humpall,* 16 Neb. 127. The issues were not changed, because, as already stated, the case was tried on the same pleadings in the district court as were filed in the court below.

In the case at bar the court drafted its instructions substantially from those which were commented upon, with approval by this court in the case of *Union P. R. Co v. Keller,* 36 Neb. 189. These instructions, taken as a whole, we think, fairly submitted the questions of fact to the jury.

The jury were instructed, in substance, that the burden was on the plaintiff to establish the fact that the fire originated on account of defendant's negligence; that if they believed from the evidence that the fire did originate from defendant's engine, then the burden was upon the defendant to show that its engine was properly equipped with all modern appliances to prevent the spread of fire, and that it was carefully operated by the persons in charge of the engine. On the part of defendant the court also instructed that defendant was not an insurer against loss or damages that might occur by reason of fire escaping from its engines without any negligence or default on the company's part.

While the instructions were unnecessarily lengthy and can not be commended either for brevity or precision of statement, yet we are not pointed to any paragraph among them that contains a misstatement of law.

We therefore think that the case was fairly submitted to the jury under the testimony, and as there is sufficient competent evidence to sustain the verdict, we recommend that the judgment of the trial court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN CRAVEN, APPELLANT, V. MARTHA A. CRAVEN ET AL., APPELLEES.

FILED APRIL 9, 1903. No. 12,755.

1. **Tax Deed Coupled with Possession**: COLOR OF TITLE: STATUTE OF LIMITATIONS. A tax deed does not convey the title to real estate, but it is a sufficient color of title when coupled with possession to put the statute of limitations in operation against the rights of all cotenants in the land.
2. **Joint Tenants.** The right of joint tenants to participate in the benefit of a superior claim purchased by one of them in possession, is dependent on a timely offer to contribute their rightful proportion of the money expended by the tenant in possession in procuring such superior claim.
3. **Adverse Possession.** Where one tenant in common openly denies the title of his cotenants and is in possession of and claims the entire property himself by deed, such holding is adverse.

APPEAL from the district court for Merrick county: JAMES A. GRIMISON, DISTRICT JUDGE. *Affirmed.*

John Patterson, for appellant.

W. T. Thompson, J. C. Martin and *P. S. Heaton, contra.*

OLDHAM, C.

On August 29, 1881, the United States government issued a patent to William, Peter, John and Maggie Craven for a quarter section of land situated in Merrick county, Nebraska. Afterwards these parties all appear to have left the state of Nebraska, leaving an agent to look after their interests in the property. Taxes accumulated on the property, and defendant Lamb, having purchased tax sale certificates, obtained a tax deed from the treasurer of Merrick county for the land in dispute on May 27, 1887. This deed was recorded, and Lamb took possession under it, plowed a firebreak around the land, and began cultivating it. In January, 1888, Peter Craven, one of the grantees named in the patent, returned to Nebraska and purchased the land from defendant Lamb, and took a quitclaim deed for the quarter section from Lamb and wife, and recorded the same with the register of deeds of Merrick county. He thereupon executed a five-year lease of the premises to Lamb and Lamb remained in possession under this lease until after its expiration. In 1892 Peter Craven departed this life, and his wife, Martha A. Craven, for herself and the minor heirs of Peter Craven, deceased, executed a further lease of the premises for a period of five years to Lamb. Both of these leases were duly recorded; the condition of each being that Lamb would pay all taxes accruing on the property, and deliver possession in case the land was sold by the lessor. Lamb held continuous possession of the premises under these leases for about thirteen years.

On July 30, 1901, John Craven, one of the four tenants in common of the land, instituted this cause of action to quiet title to the land in himself and his other cotenants, and to cancel the tax deed from the treasurer of Merrick county to Lamb, and the quitclaim deed from Lamb and wife to Peter Craven, and asked for an accounting with defendant Lamb for the reasonable value of the rents and

profits of the premises during his thirteen years' occupancy.

Martha A. Craven and her children filed answers alleging the ownership of the premises as heirs of Peter Craven, deceased, under the deed from Lamb, and alleging that this title had been perfected by an adverse possession held under this deed for a period of fourteen years. Defendant Lamb also answered, alleging that he was rightfully in possession of the premises under the leases from Peter and Martha A. Craven, and that he had fully complied with all the conditions of the leases. The heirs of the other two tenants in common made no appearances and filed no pleadings. Under the issues thus joined, the trial court found for the answering defendants and dismissed plaintiff's petition, and plaintiff brings the cause to this court by appeal.

The contention of plaintiff is (1) that the tax deed conveyed no title to Lamb; and (2) that the possession of Peter Craven under his deed from Lamb is not adverse to his cotenants.

With reference to the first contention, we hold that the tax deed did not convey the title to the land, yet it did convey a color of title which when coupled with possession evidenced an intention to oust all the cotenants, and put the statute of limitations in operation against them. *Lantry v. Parker,* 37 Neb. 353; *Twohig v. Leamer,* 48 Neb. 247.

The general rule is that the possession of one tenant in common is not adverse to that of his cotenants. This rule does not apply, however, where the possession of one cotenant is followed by an ouster of all the others, or where it is based on the acquisition of a paramount adverse title to the entire estate. *Beall v. McMenemy,* 63 Neb. 70.

While the tax deed of the defendant Lamb was not a paramount title, yet it was an adverse color of title, coupled with possession, at the time he conveyed to Peter Craven, and the deed purported to convey the entire estate. Neither plaintiff nor any of the other cotenants

begun a timely action and offered to do equity by contributing their rightful proportion of the costs of procuring this deed, and asking to participate with Peter Craven in the rights conveyed by it; but they permitted him and his heirs to remain in open and notorious possession of this land by their tenant under leases of record for more than ten years before this action was instituted. The right of joint tenants to participate in the benefit of a superior claim purchased by one of them in possession is dependent on a timely offer to contribute their rightful proportion of the money expended by the tenant in possession in procuring such superior claim. *Sneed's Heirs v. Atherton,* 36 Ky. 276, 32 Am. Dec. 70.

The recording of the deed from Lamb to Peter Craven and of the leases from Craven and his heirs to Lamb, amounted to an open denial of the title of Peter Craven's cotenants; and the possession under these instruments was, we think, clearly adverse to the holding of the other cotenants. *Gill v. Dewitt,* 7 Ky. Law Rep. 587; *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996. It would, therefore, follow that the judgment of the district court quieting the title to the lands in dispute in the widow and heirs of Peter Craven is fully sustained by the evidence, and consequently that plaintiff had no right to an accounting with defendant Lamb.

It is therefore recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOSEPH WILLIAMS ET AL., APPELLANTS, V. JOSEPH H. MILES ET AL., APPELLEES.*

FILED APRIL 9, 1903. No. 11,630.

1. **Will in Custody of Testator: NOT FOUND AFTER HIS DEATH: PRESUMPTION.** Where a will is shown to have been made and left in the custody of the testator, if it can not be found after his death the presumption is that the testator destroyed it *animo revocandi.*

2. **Presumption of Fact Only.** But this is a presumption of fact only. It may be overcome by evidence, circumstantial or otherwise, to the contrary; and declarations of the testator may be shown for this purpose.

3. **Destruction of Subsequent Will Revoking Former by Implication: EFFECT.** If the testator destroys a subsequent will revoking a former one by implication, such act, of itself, will not operate to revive the former will.

4. **Intention of Testator.** Whether the former will is revived in such a case depends upon the intention of the testator, which is to be deduced from all the circumstances.

5. **Common Law of England: TERM AS USED IN THE STATUTE.** The term "common law of England," as used in chapter 15*a*, Compiled Statutes, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or Civil law system. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system.

6. **Subsequent Will: REVOCATION OF PRIOR WILL: DEFEAT OF PROBATE.** A subsequent will which has the effect of revoking a prior will may be shown for the purpose of defeating probate of such prior will, although by reason of its loss or destruction the exact dispositions made therein can not be shown and are incapable of execution. The revocation will be effectual, even though in other respects the will can not be carried out.

7. **Lost Will: PROOF OF CONTENTS: DECLARATIONS OF TESTATOR.** Although the contents of a lost will can not be proved solely by the declarations of the testator, such declarations are admissible to prove the existence of the will.

8. **Heirs: COMPETENCY AS WITNESSES IN WILL CONTEST.** Persons who

* Rehearing denied. See opinion, p. 479, *post.*

would take as heirs or next of kin in case of intestacy are not disqualified, under section 329, Code of Civil Procedure, from testifying as to transactions and conversations with the deceased in a contest over an alleged will. *McCoy v. Conrad*, 64 Neb. 150, followed.

9. **Evidence as to Declarations of Testator.** In such cases evidence as to declarations of the testator should be scrutinized carefully and weighed cautiously.

10. **Will:** EXECUTION. If the instrument is in fact signed, attested and subscribed as required by the statute, a formal attestation clause is not necessary.

11. ———: ———: SUBSCRIBING WITNESSES. Hence the subscribing witnesses to a lost will may testify that t he testator signed and they witnessed and subscribed in the required manner, without proving that there was an attestation clause, or establishing the contents thereof.

12. **Revocation.** A subsequent will may have the effect of revoking a prior will, either by reason of an express clause of revocation, or of an inconsistent disposition of the testator's property.

13. **Revocation by Implication.** Unless the subsequent will expressly revokes the former one, such former will is only revoked so far as it is inconsistent with the later; a complete revocation will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together.

14. ———: NOT FAVORED. Courts do not favor revocation by implication, and incline to such a construction as will give effect to both instruments.

15. ———: FACT OF MAKING SUBSEQUENT WILL WITHOUT PROOF OF CONTENTS. The fact that a subsequent will was made is not sufficient, of itself, and without some proof of its actual contents, to show revocation of a former will.

16. **Parol Evidence.** Parol evidence to show that a former will was revoked by implication by reason of a subsequent will, which can not be found, must be clear, unequivocal and convincing.

APPEAL from the district court for Richardson county: JOHN R. THOMPSON, DISTRICT JUDGE. *Affirmed.*

Jefferson H. Broady, Arthur J. Weaver, John L. Webster, John H. Atwood and *Reavis & Reavis*, for appellants.

Francis Martin, Edwin Falloon and *Clarence Gillespie, contra.*

POUND, C.

The general purpose and nature of this controversy are stated in the opinion of the court on another branch of the cause. *Williams v. Miles,* 63 Neb. 859. It will be sufficient to say, for the purposes of the present opinion, that the decree appealed from was rendered in a suit begun originally in the county court of Richardson county for the purpose, among other things, of having an order admitting a certain instrument to probate as the last will of Stephen B. Miles vacated and set aside. Stephen B. Miles died at Falls City, in this state, in 1898, leaving surviving him Joseph H. Miles, one of the appellees, and Samuel A. Miles, one of the appellants, his sons, and a number of descendants of two deceased daughters. In the year 1888, he had made a will at Rulo in Richardson county, in which he gave substantially his entire estate, amounting at the time of his death to upwards of $1,000,000, to Joseph H. Miles, excluding Samuel A. Miles, the issue of his two daughters, and many others who had claims upon his bounty. During the period intervening between the execution of this will and his death, he had ceased to take an active hand in business, and lived mostly at hotels in St. Louis, Missouri, or at Falls City. After his death, Joseph H. Miles, who was present when the will known as the Rulo will was executed, in 1888, and was acquainted with its contents, made an extensive search in every place in which papers of the deceased were known to be or were likely to be found, for the purpose of ascertaining whether there was a will. As a result of this search, he testifies that he found the Rulo will in an unlocked valise in a room in a hotel at Falls City, which had been occupied by the deceased, under circumstances which, to say the least, are somewhat extraordinary. He presented the will to the county court of Richardson county and procured its probate. The appellants' case is that in 1897 the testator executed a new will at a hotel in St. Louis, where he was in the habit of spending his winters, which

had the effect of revoking the Rulo will; that Joseph H. Miles learned of the existence of this will while searching for papers left by his father; and that he fraudulently concealed and withheld his knowledge thereof, and by so doing procured the will of which he was the beneficiary to be probated. It is also charged that he obtained possession of the will executed at St. Louis and has retained the same, and concealed its contents from the plaintiffs, with the intent and purpose of cheating and defrauding them, the heirs at law, and other devisees and legatees of the testator. The later will, if there was one, has not been found.

The evidence with reference to the execution of what may be called the St. Louis will consists of the testimony of two witnesses, the manager and clerk of the hotel in St. Louis, who appear to have been well acquainted with the testator. They testify that within a few days after a conversation which one of them had with the testator regarding his will, the testator stated that he was going to make his will at once, and apparently went out of the hotel for that purpose; that several hours thereafter he came to the office in the hotel and stated that he had made a will; that either the next day or within two or three days, they were summoned to the testator's room, where they found him with some document drawn upon legal-cap paper before him; that the testator said to them, "Gentlemen, I want you to witness the signature of my will"; and that he thereupon took a pen, and, saying "This is my last will and I want you to witness the signature to it," signed his name, and procured the witnesses to subscribe theirs also. The testimony of these witnesses is very clear and circumstantial as to the execution of the instrument, but they do not claim to know anything of what the paper contained, further than the statement of the testator that it was his will. There is, however, not a little evidence as to declarations of the testator tending to show that he had made dispositions of his property inconsistent with the terms of the Rulo will, and there is

much circumstantial evidence to indicate substantial reasons moving him so to do. The trial court found for the defendants, and rendered a decree accordingly, which is now appealed from.

On behalf of the appellees it is urged that, assuming the St. Louis will has been proved, since the testimony by which it is shown establishes that the testator retained custody of or had ready access to it, and it could not be found at his death, we must take it to have been destroyed by the testator with the purpose of revoking it, and that such revocation, in the absence of a contrary statutory provision, and by virtue of chapter 15*a*, Compiled Statutes (Annotated Statutes, 6950) would have the effect of reviving the prior will. Each of these propositions requires some qualification. Where a will is shown to have been made and left in the custody of the testator, if it can not be found after his death, the presumption is that he destroyed it *animo revocandi.* 1 Jarman, Wills (5th ed.), *133; *Boyle v. Boyle,* 158 Ill. 228, 42 N. E. 140; *Collyer v. Collyer,* 110 N. Y. 481; *Behrens v. Behrens,* 47 Ohio St. 323, 25 N E. 209; *Gardner v. Gardner,* 177 Pa. St. 218, 35 Atl. 558. If the will is traced out of the testator's custody, on the other hand, the burden is on him who asserts a revocation to show that it came once more under the testator's control, or was destroyed by his direction. 1 Jarman, Wills, *133. In such cases if the person into whose hands the will is traced had an interest in procuring its destruction, some courts have suggested that they would go very far in presumptions as to the contents of the lost will and the mode of its disappearance. *Chisholm v. Ben,* 7 B. Mon. (Ky.) 408. We need not examine this subject in the case at bar. Although there is some circumstantial evidence which might create a suspicion that the St. Louis will came into the bank at Falls City, where Joseph H. Miles would have had access to it, we do not think there is enough to call for application of the authorities referred to, even if we were prepared to follow them. *Clark v. Turner,* 50 Neb. 290, 299; *Collyer v. Collyer,* 110 N. Y.

481, 486. But if we take it that the St. Louis will, assuming that there was one, remained in the custody of the testator, it does not follow that such will must be regarded as revoked. The presumption of destruction *animo revocandi* is one of fact only. It governs in the absence of circumstances tending to a different conclusion, but may be overcome by circumstantial or other evidence to the contrary. 1 Jarman, Wills (5th ed.), *133; *Legare v. Ashe,* 1 Bay (S. Car.) 464; *Davis v. Sigourney,* 8 Met. (Mass.) 487; *Minkler v. Minkler,* 14 Vt. 125; *Gardner v. Gardner,* 177 Pa. St. 218. And declarations of the testator subsequent to the execution of the will, are admissible for this purpose. *Lawyer v. Smith,* 8 Mich. 411; *Harring v. Allen,* 25 Mich. 505; *McDonald v. McDonald,* 142 Ind. 55, 41 N. E. 336; *Boyle v. Boyle,* 158 Ill. 228, 42 N. E. 140; *Behrens v. Behrens,* 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; *Gardner v. Gardner, supra.* In the analogous case of a will found among the testator's papers in a mutilated condition, declarations of the testator manifesting good will toward the beneficiaries, showing a purpose of adhering to its provisions, or that he is entirely satisfied therewith, will be received to rebut the presumption of revocation. 1 Underhill, Wills, sec. 232. In the case at bar, the declarations of the testator indicating that he had made and was adhering to dispositions not to be found in the Rulo will are numerous and well authenticated. Moreover, there are circumstances in evidence which would indicate that, in case there was a will subsequent to the Rulo will, it represented the final intentions of the testator. But even if we held that the St. Louis will, if there was one, was destroyed *animo revocandi,* would it follow that a former will, revoked by the St. Louis will, was revived by destruction of the latter? This raises a question of some difficulty, which has given rise to no little discussion.

Our statute of wills follows the Massachusetts act of 1836, which, as to execution and revocation, is modeled on the statue of frauds. We have not adopted a modern

statute along the lines of the English statute of 1837. Hence the question must be settled in this state without reference to the later statutes, and decisions thereunder, except as they indicate a sound policy, in accord with the general objects and purposes of every statute on the subject. If the first will is destroyed, and a subsequent will is revoked or canceled, it has never been asserted that the first will is revived. But if the first will remains in existence, and a second will, which operated to revoke it, is afterwards revoked or canceled, without execution of a new one, there has been much divergence of opinion. Lord Mansfield announced a rule, which was followed by the common-law courts, when questions as to wills disposing of real property came before them, to the effect that if the first will is preserved, and a subsequent will, revoking it expressly or by implication, is destroyed or canceled, the revocation is repealed, and the original will revived and continued in force by virtue of these circumstances. *Harwood v. Goodright,* 1 Cowp. (Eng.) 87, 91; *Goodright v. Glazier,* 4 Burr (Eng.) 2512. On the other hand, the ecclesiastical courts, which had jurisdiction over wills disposing of personalty, and from whose decisions our law of probate and administration is derived in large part, held to a more flexible rule; endeavoring in each case to ascertain the testator's intention, and making that intention the criterion. In a leading case, the doctrine of those courts was stated thus: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncanceled, upon the cancelation of a later revocatory will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision either way, solely according to facts and circumstances." *Usticke v. Bawden,* 2 Add. Ecc. (Eng.) 116. Counsel urge that chapter 15*a,* Compiled Statutes (Annotated Statutes, 6950), which makes the common law of England the rule of decision in all cases not governed by constitution or statutes, so far as applicable, requires us to follow the rule an-

nounced by Lord Mansfield, and that the decisions of common-law courts in England prior to the Revolution are controlling, as between such decisions and subsequent English authorities. We are unable to assent to this proposition.

What is the meaning of the term "common law of England," as used in chapter 15*a*, Compiled Statutes? Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions? We can not think, and we do not believe this court has ever understood, that the legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require. *Rensselaer Glass Factory v. Reid,* 5 Cow. (N. Y.) 587. "We may look to American as well as English books, and to American as well as English jurists, to ascertain what this law is, for neither the opinions nor precedents of judges can be said, with strict propriety, to be the law—they are only evidence of law." *Forbes v. Scannell,* 13 Cal. 242, 285. On this ground it was held, in *Sayward v. Carlson,* 1 Wash. 29, 23 Pac. 830, that a statutory provision in Washington, making the common law of England the rule of decision in all courts, did not confine the courts to the decisions of the English courts, and of those American courts which have followed them closely, for the interpretation of the law. Such has been the understanding of this court from the beginning. What Sir Frederick Pollock has called

"the immemorial and yet freshly growing fabric of the common law," is to be our guide, not the decisions of any particular courts, at any particular period. The term "common law of England," as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or Civil Law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system.

If, as between the rule of the old common-law courts and the rule of the English ecclesiastical courts, we are not required by statute to follow the former, we think the latter, on principle, greatly to be preferred; and it has the support of the weight of recent authority in America. A distinction was suggested at an early period between a will which revokes the former will expressly, and one which so operates by implication only. Leaving the question somewhat in doubt as to the latter case, the rule has been generally and vigorously assailed as to the former. 1 Powell, Devises, 528; 4 Kent, Commentaries, 531; Randolph & Talcott's note to 1 Jarman, Wills, *193; *Barksdale v. Hopkins,* 23 Ga. 332; *Beaumont v. Keim,* 50 Mo. 28; *Colvin v. Warford,* 20 Md. 357; *Scott v. Fink,* 45 Mich. 241; *Cheever v. North,* 106 Mich. 390, 64 N. W. 455. But the courts are by no means agreed on this distinction, and it has been considered as having no more force than to affect the presumption, if any there is. *Pickens v. Davis,* 134 Mass. 252, 254; Schouler, Wills, sec. 413. A few jurisdictions adhere to the rule as stated by Lord Mansfield. *Taylor v. Taylor,* 2 Nott & McC. (S. Car.) 482; *Randall v. Beatty,* 31 N. J. Eq. 643; *Peck's Appeal,* 50 Conn. 562. But the strong tendency in the United States is to follow the rule of the English ecclesiastical courts, and hold that if the testator destroys a subsequent will,

revoking a former one either expressly or by implication, such act, of itself, will not revive the former will. *In re Gould's Will,* 72 Vt. 316, 47 Atl. 1082; *McClure v. McClure,* 86 Tenn. 173, 6 S. W. 44; *Harwell v. Lively,* 30 Ga. 315; *Bohanon v. Walcot,* 1 How. (Miss.) 336; 1 Woerner, Probate and Administration, sec. 51. Following the English act of 1837, the statutes, wherever this subject has been dealt with by legislation, are all against the doctrine of constructive revival of the prior will. Hence we may well regard Lord Mansfield's rule as disapproved, and the doctrine of the ecclesiastical courts as vindicated. Preferring the latter, we think the rule should be to look to the intention of the testator in every case. Whether the former will is revived, depends upon his intention, which is to be deduced from all the circumstances. *Williams v. Williams,* 142 Mass. 515. So far as there is a presumption, it would seem that the presumption ought to be against revivor. *In re Gould's Will, supra,* p. 320; Schouler, Wills, sec. 413. Without regard to any presumption, however, we find nothing in the evidence sufficient to indicate an intention to revive the earlier will, if it had been revoked, and there is much to show that no such intention existed.

It follows that we are brought inevitably to the questions whether execution of the St. Louis will has been shown sufficiently, and, if so, whether the evidence shows sufficiently that it revoked the former will, expressly or by implication. Before taking up these questions, however, certain preliminary objections going to the mode of proof must be disposed of.

It is urged on behalf of the appellees that it is not sufficient to show a subsequent will revoking the instrument probated, but that the contents of such will must be established; that declarations of the testator are not admissible to prove the later will; that persons who would take as heirs or next of kin in case of intestacy, or as beneficiaries under the subsequent will, are not competent witnesses to transactions and conversations with the deceased; and

that appellants must fail because they have not proved an attestation clause nor established the contents thereof. As will be seen presently, the first and second of these objections have other phases, in which they are well taken. It must be shown not merely that there was another will, but also that it contained a revocation clause, or else its contents must be established so as to demonstrate an inconsistency between the instruments requiring the court to hold the one revoked by the other by implication. And the contents, whether with respect to the revocation clause, or the general provisions from which revocation is to be implied, can not be shown solely by declarations of the testator. But further than this we can not accept counsel's contentions. A subsequent will which has the effect of revoking a prior will may be shown for the purpose of defeating probate of such prior will, although, by reason of its loss or destruction, the exact dispositions made therein can not be shown, and are incapable of execution. It is enough to prove that the lost will revoked the former one. If that much is shown, the contents need not be proved further. *Brown v. Brown,* 8 Ell. & Bl. (Eng.) 876; *Nelson v. McGiffert,* 3 Barb. Ch. (N. Y.) 158; *Barksdale v. Hopkins,* 23 Ga. 332. The revocation will be effectual, even though in other respects the will can not be carried out. *In re Cunningham,* 38 Minn. 169, 36 N. W. 269; *Stevens v. Hope,* 52 Mich. 65, 17 N. W. 698. If the later will was destroyed by the testator, intending to revoke it, yet he may have intended to die intestate. *Legare v. Ashe,* 1 Bay (S. Car.) 464; Schouler, Wills, sec. 412. Consequently proof is admitted to show execution of the subsequent will, and that it revoked the former, and this proof may be by parol. *Brown v. Brown, supra.* But the burden is upon those who attack the earlier will to show that it was revoked; and, if they do not establish an express revocation clause, conjecture or probabilities are not sufficient; nor will such words as "this is my last will" have any weight whatever. 1 Jarman, Wills, *174; *Leslie v. Leslie,* 6 Ir. R. Eq. 332. As to the declarations of

the testator, we must distinguish between their competency and their sufficiency, when standing alone, to prove the contents of the lost will. The contents of a lost will can not be proved solely by the declarations of the testator. *Clark v. Turner,* 50 Neb. 290. But in the same case, it was held that such declarations are admissible to corroborate more direct evidence of the contents of the will, and, of themselves, are competent to prove its existence. The court said (p. 298): "We think all the cases hold that the declarations of a testator may be received in evidence to prove the existence of a will and in proof of issues relating to the testator's competency or to undue influence, but it has been doubted whether such declarations may be received to establish a revocation. It follows that in all proceedings to probate a lost will, such declarations are admissible in evidence because the existence of the will must necessarily be established by some such indirect method. The declarations having been admitted for that purpose their sufficiency to establish the contents of the will is another question." The suggestion of doubt whether such declarations may be received to establish a revocation has reference to the fact that a mere intention to revoke is not sufficient, unless carried out in some one of the forms required by the statute. If a new will is made, without an express revocation clause, revocation is a question of intention, to be determined from the instruments themselves and from all the circumstances. If the subsequent will is lost, then, its tenor being shown, declarations are admissible in corroboration. But an intention to revoke in some other manner must be manifested by some act prescribed in the statute, and performed as the statute requires. *Belshaw v. Chitwood,* 141 Ind. 377, 40 N. E. 908; *Boylan v. Meeker,* 28 N. J. Law, 274; *McCune v. House,* 8 Ohio 144, 31 Am. Dec. 438; *Brown v. Thorndike,* 15 Pick. (Mass.) 388. The court evidently had this rule in mind, in *Clark v. Turner,* and was not speaking with respect to such a question as that now before us. As to the competency of the testimony of those witnesses who would take

but for the Rulo will, the case of *McCoy v. Conrad,* 64 Neb. 150, is decisive. In that case it was held that persons who would take as heirs or next of kin in case of intestacy are not disqualified, under section 239, Code of Civil Procedure, from testifying as to transactions and conversations with the deceased in a contest over an alleged will. We think, however, that in such cases evidence as to declarations of the testator should be scrutinized carefully and weighed cautiously. *Clark v. Turner,* 50 Neb. 290; 1 Greenleaf, Evidence, sec. 200. As to the attestation clause, if the instrument was in fact signed, attested, and subscribed, as required by the statute, a formal clause reciting the details of the transaction was not necessary. The statute does not require an attestation clause, but only requires that the will be subscribed by the testator, and attested and subscribed in his presence by two or more credible witnesses. The necessary facts may be proved by the subscribing witnesses, although the attestation clause is omitted. *Robinson v. Brewster,* 140 Ill. 649, 656, 30 N. E. 683; *Berberet v. Berberet,* 131 Mo. 399, 33 S. W. 61; *In re Lewis's Will,* 51 Wis. 101, 113, 7 N. W. 829; *Ela v. Edwards,* 16 Gray (Mass.) 91; *More v. More,* 92 Ill. App. 465. Hence the subscribing witnesses to a lost will may testify that the testator signed and they witnessed and subscribed in the required manner, without proving that there was an attestation clause or establishing the contents thereof.

Without going over the details, we may say that the evidence produces a strong conviction that a will of some sort was made at St. Louis. There is not only the testimony of the two subscribing witnesses, but a very considerable mass of circumstantial evidence. Moreover, the declarations of the testator are well authenticated and circumstantial. Taking all these matters into account, and bearing in mind that the apparent injustice of the disposition made in the instrument admitted to probate, the suspicious character of many things connected with the finding of the Rulo will, and the disposition of the testator

to make wills, as shown in evidence, if the question were merely whether a subsequent will was executed, we should hesitate to say that the decree could stand. The testimony of several of the most important witnesses was taken by deposition, and, as the trial court neither saw nor heard these witnesses, the ordinary rule that a decree based on conflicting testimony will be affirmed does not apply with full force. *Gibson v. Hammang,* 63 Neb. 349; *Delorac v. Conna,* 29 Neb. 791, 811. But the appellants have much more to do than merely to prove that a subsequent will was executed at St. Louis in the prescribed legal form. They must show that the St. Louis will revoked the former will, and to that extent must prove its contents.

A subsequent will may have the effect of revoking a prior will, either by reason of an express clause of revocation, or of an inconsistent disposition of the testator's property. 1 Jarman, Wills, *172. Hence, to show that the Rulo will was superseded, it would be necessary to prove that the later instrument revoked it expressly, or else to show that the contents of the later instrument were such as to revoke it by implication. There is no proof of an express revocation clause. To show revocation by implication requires more detailed evidence as to the contents of the lost will, for, unless the subsequent will expressly revokes the former one, such former will is only revoked so far as it is inconsistent with the later. 1 Jarman, Wills, *175. The governing principle is the intention of the testator. It does not follow from the fact of a new will that full and entire revocation was intended; the purpose may have been to make supplemental provisions, consistent with the former will in whole or in part, to dispose of other property, or to amend and alter the prior dispositions only. Hence a complete revocation by implication will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together. *Brant v. Wilson,* 8 Cow. (N. Y.) 56; *Smith v. McChesney,* 15 N. J. Eq. 359; *In re Venable's*

Will, 127 N. Car. 344, 37 S. E. 465. Courts do not favor revocation by implication, and incline to such a construction as will give effect to both instruments. Schouler, Wills, sec. 407; 1 Underhill, Wills, sec. 251. There are cases where, from the whole instrument, the court is able to say that the later was intended as an independent and final disposition of the testator's property. 1 Jarman, Wills, *175. But in order that a court may do this, with assurance, it must have the later instrument before it, so that the testator's language may be fully and accurately apprehended. Hence it was held in a number of early cases that it was not enough to find the existence of a subsequent will, but it must be found that the subsequent will differed from the former will, claimed to have been revoked, and that the nature of the difference must be found also. *Scymor v. Northwortly,* Hard. (Eng.) 374; *Goodright v. Harwood,* 3 Wils. (Eng.) 497; *Harwood v. Goodright,* 1 Cowp. (Eng.) 87, 89, 91. This rule has been adhered to. We may regard it as well settled that the mere fact that a subsequent will was made is not sufficient, of itself, and without some proof of its actual contents, to show revocation of a former will. 1 Williams, Executors, 162, 166; *Nelson v McGiffert,* 3 Barb. Ch. (N. Y.) 158; *Lane v. Hill,* 68 N. H. 275, 44 Atl. 393. We think the same considerations justify the requirement that the contents of the lost will, to such extent as is necessary to establish a revocation by implication, be clearly shown. Where parol evidence is relied on to show that a will in existence was revoked by implication by one which can not be found, such evidence should be clear, unequivocal, and convincing, since a construction of the two, if both were actually before the court, might harmonize in whole or in part what, from the relation of those who speak from recollection of matters more or less distant in time, would appear inconsistent. *Southworth v. Adams,* 11 Biss. (U. S. C. C.) 256, Fed. Cas. No. 13,194; *Grant v. Grant,* 1 Sandf. Ch. (N. Y.) 235; *Newell v. Homer,* 120 Mass. 277. In somewhat analogous cases, where a deed absolute is sought to

be proved a mortgage, or a deed is sought to be reformed, or a trust established contrary to the terms of a written instrument, by parol, this court has uniformly insisted that the evidence be clear and convincing. *Doane v. Dunham,* 64 Neb. 135, and cases cited; *Topping v. Jeanette,* 64 Neb. 834; *Columbia Nat. Bank v. Baldwin,* 64 Neb. 732. This requirement is the more salutary where the evidence goes largely to declarations of a testator. In *Clark v. Turner,* 50 Neb. 290, 302, the court say: "On no subject perhaps are statutes so strict in requiring a writing executed and attested in certain forms as in the case of wills, and while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear and convincing. As said by the supreme court of the United States in *Lea v. Polk County Copper Co.,* 21 How. 493, 'the courts of justice lend a very unwilling ear to statements of what dead men have said.' Such evidence is always considered dangerous and subject to the closest scrutiny."

In view of the principles last discussed, we think the appellants have failed to show sufficiently that the Rulo will was revoked. Declarations of the testator alone will not suffice to show that the St. Louis will had that effect by implication, since, without showing the contents of that will, such a revocation can not be established. But, as held in *Clark v. Turner, supra,* the testimony of the subscribing witnesses in this case, except so far as they testify that the testator signed a paper, and they witnessed it in his presence and at his request, amounts only to evidence of his declaration that the paper was his will. The other testimony consists of declarations of the testator as to what he had done for or had left supposed beneficiaries of the lost will, or what would be their circumstances after his death. Beyond the declarations of the testator, which may supplement but can not entirely replace more direct proof, there is no such clear, unequivocal and convincing evidence of the contents of the will as the

law must and does require. As there is no proof of an express revocation clause, it follows that the finding of the trial court is right.

We therefore recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

On motion to modify former opinion, the following opinion was filed July 3, 1903. *Motion denied:*

1. **Will**: EVIDENCE: DECLARATION OF TESTATOR. Declarations of the testator are competent evidence on an issue whether a will was made, but will not suffice, of themselves, to prove its contents.

2. **Commissioners' Opinions.** Where opinions are prepared by commissioners, they must be permitted, necessarily, to state their reasons in their own way, without binding the court to all that is said *arguendo*, even though it concurs in the conclusions of law and express findings of fact.

3. ———: MATTERS NOT ESSENTIAL. Opinions expressed by the commissioners on matters not essential to the decision, while properly set forth to advise counsel that their arguments in briefs or at the hearing have been duly considered, do not become necessarily the law of the case, and will not preclude further investigation of such points, should they come before the court once more.

POUND, C.

The greater portion of the brief and of the oral argument in support of this motion is based upon a failure to distinguish between the competency and admissibility of evidence, on the one hand, and its probative force or sufficiency to establish the fact in controversy, on the other hand. We did not state that a will could be shown solely by declarations of the testator. What we did say, and now adhere to, is quite another proposition, namely, that declarations of the testator are competent evidence on an issue whether a will was made. In *Clark v. Turner,* 50 Neb. 290, 298, this court had said already: "We think

all the cases hold that the declarations of a testator may be received in evidence to prove the existence of a will." We quoted this language, and endeavored to make the point still more clear by saying: "As to the declarations of the testator, we must distinguish between their competency and their sufficiency, when standing alone, to prove the contents of the lost will." We perceive no ground for holding that the evidence as to execution of the alleged will made at St. Louis was incompetent. Counsel argued strenuously at the original hearing that this evidence should not have been received or considered, and the opinion sought to meet this contention.

Appellees complain of a number of statements made incidentally or *arguendo* in the course of the opinion. In particular they object to certain remarks which conceded the suspicious or extraordinary character of some of the circumstances urged upon us by appellant. We held that the evidence sustained the contentions of appellees on these points. But it does not appear wherein there was any impropriety in recognizing the force of the matters urged upon our attention by appellants. In justice to them we could do no less than state their position and concede the full weight of their case. This is one of the incidents of litigation. To suppress these features of the case in deference to the feelings of one party would be to deprive the other of his right to know precisely how and why he had failed. It is contended that some of the remarks in question may prejudice other or further litigation between the same parties. Here, again, however, were we to remain silent entirely, the appellants would have just ground of complaint. If we merely recommended a judgment of affirmance, without stating fully the views we entertained, by reason of which we were moved to make such a recommendation, the grounds thereof would be matter of speculation and conjecture, and erroneous constructions of the judgment might prejudice appellants much more than the appellees may be injured by any incidental statements in the opinion. Moreover, no such effects as

counsel appear to apprehend are involved in such remarks. It was laid down at one time that the court was not bound beyond the points stated in the syllabus to its opinion. *Holliday v. Brown,* 34 Neb. 232. And, while the court would probably not state the proposition so baldly at present, the point made in that case is unquestionably well taken, namely, that each member of the court, in the body of his opinion, must be permitted necessarily to state his reasons in his own way, without binding his colleagues to all that is said *arguendo,* althought they concur in the conclusions of law and express findings of fact. This must be true even more of opinions prepared by commissioners. The three commissioners who sat in the case at bar, came to certain conclusions, by reason whereof they recommended a judgment of affirmance. The court approved their conclusions and adopted their recommendation. What they may have thought on matters not essential to the decision, while properly set forth to advise counsel and parties that the arguments urged in the briefs and at the time of hearing were duly considered, has not become the law of the case, and will not preclude further investigation of such points, should they come before the court once more in another proceeding or on another record. *Lane v. Starkey,* 20 Neb. 586; *Missouri P. R. Co. v. Fox,* 60 Neb. 531; *State v. Paxton,* 65 Neb. 110.

We therefore recommend that the motion be denied.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the motion be denied.

REHEARING DENIED.

FIRST NATIONAL BANK OF COLUMBUS, NEBRASKA, V. STATE OF NEBRASKA, EX REL. WILLIAM O'BRIEN ET AL.

FILED APRIL 9, 1903. No. 12,740.

Assignment of Salary. An assignment of salary or fees of a public officer to be earned in the future is contrary to public policy and void.

ERROR to the district court for Platte county: JAMES A. GRIMISON, DISTRICT JUDGE. *Affirmed.*

James L. Reeder and *R. W. Hobart,* for plaintiff in error.

William O'Brien, contra.

POUND, C.

This case must turn upon the validity of four several assignments given by the relator to the plaintiff in error, intervener in the court below. Relator was county attorney of Platte county. The assignments were executed and delivered on April 23, May 1, May 2 and June 6, 1901, and purport to assign salary to be earned by relator during the year 1902. More exactly, they direct the county clerk to deliver warrants to be issued in 1902, for salary to be earned during that year, to the plaintiff in error. It would be difficult to find a proposition more thoroughly established in the reports than the invalidity of such transactions. An assignment of the salary or fees of a public officer to be earned in the future is contrary to public policy and void. *Bliss v. Lawrence,* 58 N. Y. 442; *Bowery Nat. Bank of New York v. Wilson,* 122 N. Y. 478, 25 N. E. 855; *Bangs v. Dunn,* 66 Cal. 72, 4 Pac. 963; *National Bank of El Paso v. Fink,* 86 Tex. 303, 24 S. W. 256; *State v. Williamson,* 118 Mo. 146, 23 S. W. 1054; *Township of Wayne v. Cahill,* 49 N. J. Law 144, 6 Atl. 621; *Schwenk v. Wyckoff,* 46 N. J. Eq. 560, 20 Atl. 259; *Schloss v. Hewlett,* 81 Ala. 266, 1 So. 263; *Field v. Chipley,* 79 Ky. 260; *Steven-*

son v. Kyle, 42 W. Va. 229, 24 S. E. 886; *Dickinson v. Johnson,* 110 Ky. 236, 61 S. W. 267; *State v. Barnes,* 10 S. Dak. 306, 73 N. W. 80. An assignment of a current quarter's salary before expiration of the quarter, as in *Brackett v.* Blake, 7 Met. (Mass.) 335; *Manly v. Bitzer,* 91 Ky. 596, 16 S. W. 464, might be another thing, although the court considered such an assignment void in *Stevenson v. Kyle, supra.* In the case at bar the assignments were made before any of the salary assigned had been earned, and were clearly invalid.

We therefore recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

THOMAS SORENSEN ET AL. V. ALFRED HANS SORENSEN.*

FILED APRIL 9, 1903. No. 12,753.

1. **Petition:** SUFFICIENCY AFTER TRIAL. Where issue is joined and a trial had without objection to the sufficiency of the petition, that pleading will be construed liberally, and if the essential elements of plaintiff's case may be implied from its terms by reasonable intendment, they will be regarded as alleged sufficiently.

2. **Right to Open and Close.** If any of the material facts of a petition are not admitted, but are denied, either directly or argumentatively, the right to open and close is in the plaintiff.

3. **Denial:** BURDEN OF PROOF. A party can not acquire the right to open and close by pleading a denial in affirmative form. If his denial is sufficient to prevent his adversary from obtaining judgment on the pleadings, it is sufficient to put the burden of proof upon the latter.

4. ———: RIGHT TO OPEN AND CLOSE. Nor can he acquire a right to open and close, to which he is not entitled on his pleadings, by filing an "admission" in which he assumes the burden of proving affirmatively matter amounting to a denial of plaintiff's case,

* Rehearing allowed. See opinions, pp. 490, 500, 509, *post.*

and admits that plaintiff may recover, unless an essential averment of his petition is negatived in a particular way.

5. **Heirs:** PLEADING AND PROOF. Brothers, and children of deceased brothers and sisters, of an intestate are not *prima facie* heirs and distributees, and must allege and prove that there are no persons of the several classes which would take before them and exclude them, under the statute, before they can obtain an order for distribution of the estate.

6. **Admission and Denial:** BURDEN OF PROOF. An admission that the petitioners for distribution are brothers, and nephews and nieces of the intestate, and are heirs and distributees unless a person named is proved to be the son of the intestate, in connection with a general denial and an allegation that such person is the son of the intestate and is sole heir and distributee, does not relieve the petitioners of the necessity of making a *prima facie* case.

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

Alfonso M. Robbins, Herman Westover, F. E. Bishop, E. J. Babcock and *J. W. Deweese,* for plaintiffs in error.

A. Norman, George W. Hall, Victor O. Johnson, Elliott J. Clements and *Edwin M. Coffin, contra.*

POUND, C.

A general statement of the facts out of which this controversy arises may be found in an opinion rendered in another branch of the same proceeding. *Sorensen v. Sorensen,* 56 Neb. 729. When the cause was here before, the question was, who was entitled to appointment as administrator of the estate? After that question had been determined and the claims of the alleged widow disposed of, the petitioners in the present case, who are brothers and children of a deceased brother and sister of the intestate, filed a petition in the county court praying for distribution of the estate to them as heirs and distributees under the statute. Alfred Hans Sorensen, the defendant in error, by his guardian, answered, admitting the relationship of the petitioners to the intestate as alleged, admitting certain other allegations as to the condition of the estate, the

property for distribution and the propriety of a distribution thereof, and denying generally all the other allegations of the petition. He alleged further that he was the son, and as such the sole heir and next of kin of the intestate, and prayed that all the property be turned over to him. In due course this proceeding was taken to the district court on appeal, and by order of the latter court, apparently at the instance of defendant in error, was tried upon the pleadings below. A verdict was rendered finding that Ellen Sorensen, the alleged widow, was lawfully married to the intestate, and that said Alfred Hans Sorensen was born of such marriage. Thereupon a judgment was entered in his favor, which is now before us on petition in error.

Several difficult and interesting questions have been argued, which we need not examine at this time for the reason that we think the trial court erred in its ruling as to the right to open and close. Prior to the trial, defendant in error filed a paper in which he admitted "that the brothers, nephews and nieces named in the petition for distribution in this proceeding are the heirs at law and next of kin of the said Hans C. Sorensen, deceased, and entitled to his estate, unless it be proved that said Hans C. Sorensen intermarried with one Ellen Ferguson and the cross-petitioner, Alfred Hans Sorensen, is the issue of said marriage and the legitimate son of the said Hans C. Sorensen, as alleged in the cross-petition of said Alfred Hans Sorensen." Upon this, over the objection and exception of plaintiffs in error, the right to open and close was granted to their adversary. The ruling is defended on two grounds: That the petition does not allege sufficiently there were no persons entitled to take as distributees in preference to petitioners, and hence that the general denial in the answer does not put such question in issue; and, second, that under the written admission and an oral admission in the same terms at the trial, the defendant in error had the burden of proof and was entitled to the right accorded him.

The first point, if tenable, goes much deeper than the mere question of burden of proof and right to open and close. If the petition does not set forth sufficiently that there are no persons of the several classes which, under the provisions of the statute, take precedence of and exclude brothers and sisters and the issue of brothers and sisters, as will be seen presently, no cause of action is stated. Hence, in substance, the defendant in error is contending that the petition does not state a cause of action. If a cause of action is stated, as against objection made for the first time after trial of the cause, and if the parties treated the petition as sufficient to raise an issue, and actually tried that issue, we do not see how it can be asserted that there was no issue to be joined by defendant's general denial, and that an essential element of the plaintiff's case, not expressly admitted, without which there could be no recovery, was not put in issue by such denial. Had objection been made either in the county court or the district court, a more specific statement would have been imperative. Without an allegation in the form of a statement of fact that there were no persons entitled to take under the statute in preference to the plaintiffs, the petition must have fallen before a timely objection. But no such objection was ever made. Consequently, we are compelled to look at the pleading from a different standpoint. Where issue is joined and a trial had without objection to the sufficiency of the petition, that pleading will be construed liberally, and if the essential elements of plaintiff's case may be implied from its terms by reasonable intendment, they will be regarded as alleged sufficiently. *Latenser v. Misner,* 56 Neb. 340; *Omaha Nat. Bank v. Kiper,* 60 Neb. 33; *Fire Ass'n of Philadelphia v. Ruby,* 60 Neb. 216; *National Fire Ins. Co. v. Eastern Building & Loan Ass'n,* 63 Neb. 698; *Punteney Mitchell Mfg. Co. v. Northwall Co.,* 66 Neb. 5. In the three cases last cited, this rule was applied to oral objections to petitions at the trial. Where the petition is not attacked by motion or demurrer, but its sufficiency is challenged after issue joined and at the

trial, it has been laid down repeatedly that the pleading will be "upheld if possible." *Fire Ass'n of Philadelphia v. Ruby, supra; Norfolk Beet Sugar Co. v. Hight,* 56 Neb. 162. In such case, it will be construed "in the light of the entire record." *National Fire Ins. Co. v. Eastern Building & Loan Ass'n, supra.* The language of this court in another connection, that "a pleading may be said to allege what can by reasonable and fair intendment be implied from its statements," applies here with peculiar force. *Dailey v. Burlington & M. R. R. Co.,* 58 Neb. 396. Here the defendant treated the petition as sufficient. He answered it and went to trial without objecting to it, and he filed an "admission" in which he clearly assumed that plaintiffs had alleged the essential fact that there were no persons nearer in degree to the intestate who might claim under the statute. Hence we must take that fact to be sufficiently set forth.

The right to open and close is governed by section 283, Code of Civil Procedure. That section, which in this respect is merely declaratory of the general rule, has been construed repeatedly, and we think the fair import of its language and of the decisions by which it is interpreted may be stated thus: If any of the material facts of a petition are not admitted, but are denied, either directly or argumentatively, the right to open and close is in the plaintiff. *Rolfe v. Pilloud,* 16 Neb. 21; *Mizer v. Bristol,* 30 Neb. 138; *Seebrock v. Fedawa,* 30 Neb. 424; *Suiter v. Park Nat. Bank of Chicago,* 35 Neb. 372; *Welsh v. Burr,* 56 Neb. 361; *Summers v. Simms,* 58 Neb. 579. It is obvious that if any material fact is put in issue, the plaintiff must fail, to that extent at least, unless he introduces evidence in support thereof; and this is true even where the sole issue, so far as the petition is concerned, is the amount of damages. *Summers v. Simms, supra.* Although the particular allegations of the petition put in issue are indefinite and ill stated, if they are enough to sustain a judgment, the right to open and close is in the plaintiff. *Hewit v. Bank of Indian Territory,* 64 Neb. 463. We think it very clear that

a party can not acquire the right to open and close by pleading a denial in affirmative form. If his denial is sufficient to prevent his adversary from obtaining judgment on the pleadings, it is sufficient to put the burden of proof upon the latter. Whether a defense is a denial or constitutes new matter and is affirmative, depends, under the Code of Civil Procedure, upon its substance, not upon the form in which it is stated. Matter which is in fact and substance a denial, can not be made into matter in avoidance, for the purpose of obtaining the right to open and close, by the form in which it is stated by an astute pleader. *Myers v. Binkley,* 26 Ind. App. 208, 59 N. E. 333; 1 Thompson, Trials, sec. 256, and cases cited. In the same way, a plaintiff can not obtain the right to open and close by anticipating defenses and alleging what he is not obliged to prove. *Bush v. Wathen,* 104 Ky. 548, 47 S. W. 599. Nor can a party acquire a right to open and close, to which he is not entitled on his pleadings, by filing an "admission" in which he assumes the burden of proving affirmatively matter amounting to a denial of plaintiff's case, and admits that plaintiff may recover unless an essential averment of his petition is negatived in a particular way. If the "admission" were contained in the pleadings of defendant in error in the case at bar, it would amount, so far as it had any force at all, to a denial, and would put upon the plaintiffs the burden of showing, *prima facie,* that there were none in nearer degree to the intestate. Further than that, it could not operate. The right to open and close depends upon the issues to be tried. A party can not join issue upon a material allegation of his adversary, and at the same time assume the burden of proving his denial. 1 Thompson, Trials, sec. 256. If he could do so, there is no reason why the other party should be denied this privilege; and in all cases where the right to open and close was thought advantageous, the court would be besieged with offers of this sort from the respective parties. It has been held that in order to get the right to open and close, a defendant must admit the case

made by plaintiffs' petition in his pleadings. *Heilman v. Shanklin,* 60 Ind. 424; *Woodruff v. Hensley,* 26 Ind. App. 592, 60 N. E. 312; *Dorough v. Johnson,* 108 Ga. 812, 34 S. E. 168; *Buzzell v. Snell,* 25 N. H. 474, 479. This has been doubted, however (1 Thompson, Trials, sec. 255), and we need not pass upon the question. For, unless the whole of plaintiff's cause of action is admitted, he has something to prove under any theory. A denial, coupled with an offer to assume the burden of proving it, is something unknown to the law.

Applying these principles to the case at bar, we think the petitioners should have been accorded the right to open and close. Brothers, and children of deceased brothers and sisters, of an intestate, are not *prima facie* heirs and distributees, and must allege and prove that there are no persons of the several classes which would take before them and exclude them, under sections 30 and 176, chapter 23, Compiled Statutes (Annotated Statutes, 4930, 5041) before they can obtain an order for distribution of the estate. *Emerson v. White,* 29 N. H. 482; *Stinchfield v. Emerson,* 52 Me. 465; *Gardner v. Kelso,* 80 Ala. 497, 2 So. 680; *Henriques v. Yale University,* 28 App. Div. (N. Y.) 354, 51 N. Y. Supp. 284, 289. In consequence, an admission that the petitioners for distribution are brothers and nephews and nieces of the intestate, and are heirs and distributees unless a person named is proved to be the son of the intestate, in connection with a general denial and an allegation that such person is the son of the intestate and is sole heir and distributee, does not relieve the petitioners of the necessity of making a *prima facie* case. If no evidence were introduced by either party they would fail, notwithstanding the defendant in error's gratuitous assumption of the burden of proof. A close analogy is furnished by an English case, where the question was as to the legitimacy of a person who, if legitimate, was clearly the heir at law. He offered to admit that plaintiff's lessor was the heir at law, unless he, the person whose relation to the deceased was in dispute, was the heir. The court held he could not

obtain the right to open in this way. *Doe v. Bray,* Moo. & Mal. (Eng.) 166. Such a case is very different from one where the petitioners' *prima facie* right to take as distributees is admitted, but an affirmative defense, as, for instance, an advancement under sections 34-39, chapter 23, Compiled Statutes (Annotated Statutes, 4934-4939), is interposed. The fact that there was a person nearer in degree to the intestate, who would exclude petitioners under the statute, operated to negative their case, not to avoid it.

We therefore recommend that the judgment be reversed and the cause remanded for a new trial.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

The following opinion on rehearing was filed March 2, 1904. *Judgment of reversal adhered to:*

1. **Proceedings for Distribution of Estate: RIGHT TO OPEN AND CLOSE.** In a proceeding for the distribution of the estate of an intestate, in a contest between parties, each claiming as next of kin and heir at law, to the exclusion of the other and all other persons, the right to open and close rests in the discretion of the court, disaffirming the rule announced on former hearing, *ante*, p. 483.

2. **Judgment in Rem: HOW FAR CONCLUSIVE.** A judgment *in rem* is binding and conclusive on all persons as to every matter necessarily involved in an adjudication upon the status of the person or thing which is the subject matter of the proceeding; but as to matters involved in collateral litigation in such proceedings, between particular parties, and not necessarily involved in such adjudication, it is binding only upon those who actually litigated such matters, and their privies.

3. **Privity.** Privity, so far as concerns the effect of a judgment on property rights, does not arise from mere relationship by blood or affinity, nor because two parties may have an interest in the same subject matter of litigation; it implies a relationship by succession or representation, between a party to the first action

and a party to a subsequent action, in respect to a matter adjudicated in the first.

4. **Competency of Witness.** In a proceeding for the distribution of the estate of an intestate, the administrator is an adverse party, and where one of the issues between rival claimants is a marriage of the intestate with a third party, the testimony of such third party is inadmissible on such issue, under the provisions of section 329, Code of Civil Procedure.

ALBERT, C.

On the 3d day of February, 1895, Hans C. Sorensen died intestate, leaving an estate in Valley county, where he resided at the time of his death. Some of his collateral kin filed a petition in the county court of that county for letters of administration, alleging that the intestate had left neither widow nor issue, and that they were his next of kin and heirs at law. One claiming to be his widow appeared in the proceeding, and claimed the right to nominate an administrator of his estate. From the judgment of the county court on that branch of the case an appeal was taken to the district court, where judgment was given in favor of the party claiming to be the widow of the intestate. An opinion of this court, reversing the judgment of the district court, is reported under the present title in 56 Neb. 729.

On a second trial in the district court, the court found that the party claiming to be the widow had never been married to the intestate, and gave judgment denying her right to nominate an administrator, and granting administration on the petition of the collateral kin. No appeal was taken from this judgment, and it is in full force and effect.

Afterward, two brothers, and the children of a deceased brother and sister of the intestate, filed a petition in the county court for a distribution of the assets of the estate, alleging their relationship to the intestate, and that they were his only heirs at law. Thereafter, one Alfred Hans Sorensen, by his guardian, filed an answer and cross-petition, wherein the relationship of the parties as alleged in the petition for distribution was admitted, and all the

other allegations thereof denied. He alleged, as grounds for affirmative relief, that on the 16th day of October, 1894, the intestate had married one Ellen Ferguson (the party who claimed as widow in the former proceeding) and that he is the issue of said marriage, and the son and heir at law of the intestate. He also prayed for a decree of distribution.

To the affirmative matters alleged in the answer and cross-petition, the petitioners interposed a general denial. They also pleaded the judgment rendered in the proceedings for the appointment of an administrator as an estoppel on the question of the alleged marriage.

A trial was had, which resulted in a judgment in favor of the cross-petitioner. An appeal was taken to the district court, where the petitioners filed new pleadings, which were stricken from the files, and the cause set down for trial on the pleadings filed in the county court. A trial was had, which also resulted in a finding and judgment for the cross-petitioner. The petitioners brought the case here on error, and an opinion, reversing the judgment of the district court, was filed therein, and is reported *ante,* p. 483; a rehearing was allowed, and the case is now before the court for the second time.

The recommendation in the former opinion for the reversal of the judgment, is based on the ruling of the trial court permitting the defendant in error to open and close. The opinion contains an extended discussion of the principles governing the right to open and close, but it is now thought that the discussion is not altogether pertinent to the question as presented by the record in this case. The proceeding is *in rem,* and all persons interested in the estate are parties. Such proceedings ordinarily are binding, not only upon those actually before the court, but on all the world. It is obvious, therefore, that those actually before the court may not, by their pleadings, or otherwise, bind those not before it, nor dispense with the proof of any of the ultimate facts essential to a decree of distribution. Each party must rely on the strength of his own case, and

not on the weakness of the opposition. Hence had no evidence been given, the court would not have been warranted in entering a decree of distribution. In other words, both parties must have failed. That being true, neither the statutory provision to the effect that the party who would be defeated were no evidence given on either side is entitled to open and close, nor the ancient rule, of which it is declaratory, applies to cases of this character. With that provision out of the way, neither party had the absolute right to open and close. Both asked the distribution of the estate, and each claimed the whole, to the exclusion of the other and of all other persons. The question before the trial court was not, which of the parties actually before it was entitled to a decree, but whether either of them was, and, so far as the right to open and close is concerned, they were on equal footing. They occupied a position analogous to that of rival claimants for the same fund, who have been brought before a court of equity by a bill of interpleader, requiring them to interplead for the fund, in order that their respective rights may be ascertained and determined and the plaintiff exonerated. As to the right to open and close in such cases, Mr. Thompson, in his work on Trials, section 242, says: "It is supposed that such a case must yield to the sound discretion of the court." See, also, *Loudon v. Coleman*, 62 Ga. 147. Whether such discretion is absolute, is a question that does not arise in this case, because there is nothing in the record tending to show that it was abused. We are satisfied that the conclusion reached on the former hearing upon this point is erroneous.

It will be remembered that the defendant in error claims as heir at law, on the ground that he is the issue of a marriage between his mother and the intestate. The plaintiffs in error contend that he is concluded on the question of a marriage between his alleged parents by the judgment in the proceeding had for the appointment of an administrator, wherein the court found that the mother had never been the wife of the intestate. In support of this conten-

tion it is argued, as upon the former hearing, that the proceeding for the appointment of an administrator was *in rem,* and all the world, including the defendant in error, were parties, and are concluded by the matters litigated and judicially determined in such proceeding. That the proceeding was *in rem,* and that all the world were parties thereto, may be conceded. It will also be conceded, that, ordinarily, a judgment *in rem,* rendered by a court of competent jurisdiction, is binding on all persons, and is not open to collateral attack. But it does not necessarily follow that the whole world are bound by every matter litigated and judicially determined in the proceeding of which such judgment is the product. The principal relief sought in a proceeding *in rem,* is usually an adjudication upon the status of some person or thing, and the judgment, *ipso facto,* renders the status of such person or thing what it declares it to be. *Woodruff v. Taylor,* 20 Vt. 65. From the very nature and purpose of such judgment, it is essential that it be conclusive and binding on all persons. But in addition to the principal relief sought in a proceeding *in rem,* in which, in a general way, all persons may be said to be interested, there is also commonly involved some personal right pertaining to some particular person or class, which may become the subject of litigation and adjudication in such proceedings between the parties claiming such right, and to which all other parties to the proceeding may be wholly indifferent. While it is essential to the repose and tranquillity of society that a judgment *in rem,* so far as it goes to the principal relief sought in the proceeding and concerns the rights which each person shares in common with every other person, should be binding on all persons, it would be unreasonable and oppressive to hold that all are bound by the litigation and determination of collateral questions, arising between parties litigating their personal rights in the same proceeding. If such were the law, no man could safely stand aloof while such proceedings are in progress, however indifferent as to the ultimate result, because he could

never know to what extent his rights, wholly disconnected from the main purpose of such proceedings, might be affected by the issues framed between other parties therein for the determination of questions concerning only themselves. Such a rule would lead to infinite complications.

It is true that it is allowable to reason back from a judgment. Hence, a judgment *in rem,* which, as we have seen, is binding on the whole world, stands, as to all persons, as an indisputable conclusion; and where it could only be drawn from certain premises, such premises are equally indisputable with the conclusion itself. *Burlen v. Shannon,* 99 Mass. 200. But we must view the conclusion in the light of the main purpose of the proceeding in question, namely, the grant of administration on the estate of the intestate. As to every fact essential to such purpose, the judgment is conclusive and binding on all persons, because it is a conclusion which could not have been reached without a finding of such facts. The facts essential to a grant of administration are: (1) That the person on whose estate administration is asked died intestate; (2) that at the time of his death he was an inhabitant or resident of the county in which the proceeding is brought, or a nonresident of the state, and left an estate to be administered in such county. Compiled Statutes, chapter 23, section 177 (Annotated Statutes, 5042). Such facts are the premises from which a grant of administration must be drawn as a conclusion, and, like the grantor judgment itself, are indisputable in a collateral proceeding between those claiming through such proceedings or under the intestate. *Bradley v. Missouri P. R. Co.,* 51 Neb. 653. There is one exception to the foregoing rule, which is: If the party on whose estate such proceeding is had is alive, the proceeding and all judgments and orders therein are absolutely void. Van Fleet, Collateral Attack, sec. 610, and citations. Many reasons have been given for this exception, none of which seem to be entirely consistent with those supporting the rule as to the conclusiveness of other jurisdictional facts. It is thought that the true

reason underlying the exception is to be found in this distinction between the other jurisdictional facts and the death of the intestate, namely, the former go only to the jurisdiction of a particular court, while the latter goes to the jurisdiction of any and all courts to grant administration.

But the right of any particular person to nominate an administrator, or to letters of administration, by reason of his relationship to the intestate, is not one of the essential facts upon which the grant is based. Such right is purely personal and may be renounced by the party entitled to exercise it. It is not an absolute right, because the person claiming it may be incompetent, or may be one of a class the members of which share the right in common, or, for some other reason, the case may call for the exercise of the discretion of the court. *Atkinson v. Hasty,* 21 Neb. 663; *Spencer v. Wolfe,* 49 Neb. 8. There is no presumption that one not claiming the right to nominate an administrator, or to letters of administration, has any interest in the litigation between others concerning such right. It would be absurd to require such party to embroil himself in a controversy in which he had no interest, and to resist a judgment or decree to which he had no objection, and which of itself could work him no harm, merely to prevent an objectionable finding. We think the true rule is that a judgment *in rem* is binding and conclusive upon all persons as to every matter necessarily involved in the adjudication upon the status of the person or thing which is the subject matter of the proceeding, but as to matters involved in collateral litigation therein, between particular parties, and not necessarily involved in a judgment of that character, it is binding only upon those who actually litigated such matters and their privies. That rule, as applied to the facts in this case, is fully supported by the following: *Blackburn v. Crawfords,* 3 Wall. (U. S.) 175; *Kearney v. Denn,* 15 Wall. (U. S.) 51, 57; *Shores v. Hooper,* 153 Mass. 228, 26 N. E. 846; *Spencer v. Williams,* 40 Law Jour. (Pro.)

(Eng.) 45; *In re Estate of Nugent,* 77 Mich. 500, 43 N. W. 889; *In re Lois McCarty,* 81 Mich. 460, 45 N. W. 996.

But as to the parties who actually litigated the question of the alleged marriage between the intestate and the mother of the defendant in error in the proceeding for the appointment of an administrator, the judgment rendered in such proceeding is conclusive, and precludes a reexamination of that question in any subsequent litigation between them. *Blackburn v. Crawfords and Kearney v. Denn, supra.* It is claimed by the plaintiffs in error that the fendant in error is privy to such judgment, and is, therefore, bound by it as effectually as though he had actually participated in the litigation of that question. It is elementary that a judgment is conclusive, both on the parties and their privies. But privity, so far as concerns the effect of a judgment over property rights, at least, does not arise from mere relationship by blood or affinity, nor because two parties may have an interest in the subject matter of the litigation. The term "privity" implies a relationship, by succession or representation, between a party to the first action and a party to the subsequent action, in respect to a matter adjudicated in the first. *Samp v. Franklin,* 144 N. Y. 607. The mother of the defendant in error did not, in any legal sense, represent him in the former proceeding, nor is there the slightest relationship between them by succession. Hence, so far as his rights in these proceedings are concerned, he is not a privy to the former adjudication of the question of the marriage between his mother and the intestate, and is not bound by it.

On the trial in the present proceeding, the mother of the defendant in error was permitted, over the objections of the plaintiffs in error, to testify to facts tending to show a common-law marriage between herself and the intestate, and it is now claimed that her evidence was erroneously received. Section 329, Code of Civil Procedure, provides that "no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party

is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless," etc. This section, as well as that of which it is amendatory, has been a fruitful source of controversy, and the subject of frequent interpretation in this court. The word "representative" has been held to include any person or party who has succeeded to the rights of the decedent, whether by purchase, descent or operation of law. *Kroh v. Heins,* 48 Neb. 691; *Sorensen v. Sorensen,* 56 Neb. 729, and cases cited. Those cases leave no room for doubt that an administrator, in proceedings of this character, is a representative of his intestate.

That the administrator is an adverse party, as to all persons claiming the right to share in the distribution of the personal estate, seems to us equally clear. He is in possession of such estate by virtue of his office, and the object of the proceeding is to terminate his right of possession. To that extent, at least, he is an adverse party within the meaning of the statute.

It remains to determine whether the witness has a direct legal interest in the result of the proceeding. In the consideration of that question it must be kept in mind that the right of the defendant in error to the estate, or any portion of it, hinges on the question of the marriage of his mother, the witness, with the intestate. If that marriage be established, his right to inherit the estate, to the exclusion of the plaintiffs in error, follows as a legal necessity. The fact of such marriage is the issue between the plaintiffs in error and the defendant in error in this proceeding, and a decree in favor of either of such parties will, of necessity, involve an adjudication of that issue, which, as between such parties, will operate as an estoppel and foreclose further inquiry upon that question. This follows from what has been said in a former part of this opinion on the subject of *res judicata.* The practical result of a decree in favor of the defendant in error would be to eliminate the plaintiffs in error from the list of

claimants, because, in any subsequent contest between them and the defendant in error for a share in the estate, they would be met with the plea of *res judicata* on the question of his mother's marriage with the intestate, which is decisive of his right to inherit to their exclusion. It is not difficult to see how the witness must have a direct legal interest in a result of that kind. In a contest between her and the plaintiffs in error for a share in the estate, she is concluded, as we have seen, by the adjudication in the proceeding had for the appointment of an administrator, wherein it was adjudged that she had never been married to the intestate. But an estoppel by judgment, like an estoppel of any other kind, must be mutual. That is to say, a judgment which is not binding on both parties to a proceeding, is binding on neither. We have already seen that the judgment in that proceeding is not binding on the defendant in error; therefore, in a contest between him and the witness in regard to the estate, such adjudication would not be binding upon her, and would leave the question of her marriage with the intestate open to inquiry. In short, if the present proceeding result in a final decree in favor of the defendant in error, it would eliminate from the list of claimants the only parties who may successfully invoke the doctrine of *res judicata* against the witness, and would leave her free to contest her claims with the successful party, unhampered by such adjudication. That she has a direct legal interest in such result seems too clear to admit of argument. Besides, this proceeding is not exclusively between the plaintiffs in error and the defendant in error. It is a proceeding *in rem*, and in such proceeding it is the duty of the court to protect the interests of all the parties, whether actually before the court and participating in the litigation, or otherwise, and render a decree in accordance with the evidence. Compiled Statutes, ch. 23, sec. 289 (Annotated Statutes, 5154. If the evidence justifies a finding for the defendant in error, the evidence which would warrant such finding would also warrant a finding that the witness is entitled to

a share of the personal estate as surviving widow of the intestate. Compiled Statutes, chapter 23, section 176 (Annotated Statutes, 5042). With the plaintiffs in error out of the contest, as they would be by a finding in favor of the defendant in error, there would be no one left, as we have seen, who could successfully invoke the adjudication in the proceeding for the appointment of an administrator against her claim as such widow, and it would be the duty of the court to assign her a due portion of the estate as widow of the intestate, which would at least give her the right of possession as against the administrator. There is no doubt in our minds that the reception of her evidence was error, and as the decree is based almost exclusively on her evidence, the prejudicial character of the error is obvious.

Other errors are assigned and argued, but what has already been said dispenses with the necessity for their consideration.

For this error in the reception of evidence just noticed, it is recommended that the former judgment of this court, reversing the judgment of the district court, be adhered to.

GLANVILLE and BARNES, CC., concur.

By the Court: The conclusions reached by the commissioners are approved, and it is ordered that the former judgment of this court, reversing the judgment of the district court, be adhered to.

JUDGMENT OF REVERSAL ADHERED TO.

The following opinion on second rehearing was filed October 5, 1904. *Judgment of reversal adhered to:*

1. **Administrator Not Adverse Party in Contest to Establish Heirship and for Distribution.** In a contest between rival claimants seeking to establish heirship and have distribution of the estate of a decedent, the administrator of such estate has no official interest. As the representative of the deceased person he is not an adverse party to any of the claimants in the controversy.

2. **Marriage: PROOF.** An existing agreement between a man and

woman to marry at a future day conclusively negatives the claim of a marriage *per verba de præsenti* between the same parties.

3. ———: ———. Marriage *per verba de futuro cum copula* is not consummated unless the copula is had in fulfilment of the future agreement.

4. ———: ———. An agreement to live together as husband and wife, made with the intention of being carried into effect, is not sufficient to constitute a common law marriage, unless it is acted upon by the parties living together as husband and wife.

5. **Evidence.** Evidence examined, and *held* not sufficient to establish a common law marriage.

OLDHAM, C.

This case is before us on a second rehearing. Each of the former opinions recommended a reversal of the judgment of the lower court, but for different reasons; and as the case is again before us for a general review of the entire proceedings in the court below, we shall state such facts appearing in the record as are necessary to an understanding of the conclusion which we shall presently reach.

On the 3d of February, 1895, one Hans C. Sorensen departed this life intestate, leaving an estate of the value of about $20,000. Due administration was had thereon, and the present controversy is to determine who is entitled to receive this estate; that is, who are the heirs at law of the intestate. The brothers and children of the sisters of the deceased, claim to be his only heirs at law, and as such filed a petition in the probate court for the distribution of the estate to them. In this proceeding, an infant appeared by guardian and filed an answer and cross-petition, in which the relationship of the petitioners to the deceased is admitted, but a general denial is made of every other fact therein and for affirmative relief. It alleges that he, the infant, is the minor son and only heir at law of the deceased, the issue of a marriage between the deceased and one Ellen Ferguson.

In the district court, the cross-petitioner was allowed the right to open and close. This ruling was predicated

upon a purported admission made in open court, as well as the admissions of the answer. At the beginning of the trial, counsel on behalf of the defendant stated that they admitted of record that the petitioners were entitled to the estate, unless it is proved that the deceased intermarried with Ellen Ferguson, and that the cross-petitioner is the issue of said marriage and the legitimate son of the deceased, as alleged in the cross-petition. It is elementary that an infant can not make admissions, nor can his guardian or attorney do so for him; hence this ruling can not be aided by any of these purported admissions. The question, then, is, to whom did the right to open and close belong as a matter of right, treating the allegations of the petitioners as being denied, which under the circumstances must be done? We think that the learned commissioner who wrote the preceding opinion in this case (*ante*, p. 490) rightly solved this question, and we approve the reasoning and the conclusion reached by him, that under the issues in this case the right to open and close "must yield to the sound discretion of the trial court."

It is next urged that the judicial contest (56 Neb. 729) between the alleged wife and the petitioners over the appointment of the administrator of this estate is an adjudication of the status of the alleged wife and this incidentally determined the heirship of the infant. This subject received careful and considerate attention at the hands of the learned commissioner who wrote the former opinion, and whose able elucidation we approve, as well as the conclusion reached, that "so far as his rights in these proceedings are concerned, he is not a privy to the former adjudication of the question of the marriage between his mother and the intestate, and is not bound by it." *Ante*, p. 490.

The mother of the infant was permitted, over the objections of the petitioners, to testify to conversations and transactions had with the deceased. The purpose of this controversy was to establish a common law marriage between herself and the intestate. It is claimed that she

was incompetent by reason of the statute (Code of Civil Procedure, sec. 329), which provides that "no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." It may be conceded that the witness was interested, and the testimony is of conversations and transactions had between the witness and the deceased; yet, unless the adverse party is the representative of the deceased person, the evidence is not within the ban of the statute.

This question has been considered upon the point in issue in *McCoy v. Conrad,* 64 Neb. 150, and the court said (p. 154): "If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and make the defense which the deceased might have made if living, or to establish a claim which the deceased might have been interested to establish if living, then he may be said, in that litigation, to represent a deceased person; but where he is not standing in the place of the deceased person, and asserting a right of the deceased which has descended to him from the deceased, that is, where the right of the deceased himself, at the time of his death, is not in any way involved, and the question is, not what was the right of the deceased at the time of his death, but, merely, to whom has the right descended; in such a contest, neither party can be said to represent the deceased."

Tested by the above rule, it is clear that neither the petitioners nor the cross-petitioner can be said to be the representative of the decedent in this action. But it is insisted that the administrator is, and as against him the testimony is within the bar of the statute. The administrator can have no interest by virtue of his office in the result of this action. It will not take from nor add to the estate. He is now a mere stakeholder, and the sum of his official duties is to pay over, that is, distribute, the pro-

ceeds of this estate as the court may direct. The purpose of this action is to ascertain to whom it shall be distributed. As said in a former opinion (*ante*, p. 490): "They (the claimants) occupied a position analogous to that of rival claimants for the same fund, who have been brought before a court of equity by a bill of interpleader, requiring them to interplead for the fund, in order that their respective rights may be ascertained and determined and the plaintiff exonerated." This is not the administrator's controversy; it belongs to the rival claimants, and the office should not be used by either party as a rampart to fight behind. The witness, we think, was competent to testify in this action. *Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108.

This brings us to what we now deem the essential question in this controversy, and one which heretofore has not been considered. Does the evidence in this record establish a common-law marriage between the mother of the infant and the intestate?

There was a time, perhaps, when the doctrine of a liberal construction of the testimony and slight proof of a common-law marriage subserved a useful purpose; but if it ever did, that time is long since past. There is nothing to be said in its favor now. Especially is this so in this state, where the legislature has undertaken to provide for the formal solemnization of the marriage rites, if not in public, at least in the presence of witnesses, and have the fact of the marriage preserved in records provided for that purpose by the state. This ancient doctrine is alien to the ideas and customs of our people. It tends to weaken the public estimate of the sanctity of the marriage relation. It puts in doubt the certainty of the rights of inheritance. It opens the door to false pretenses of marriage and the imposition upon estates of supposititious heirs. It places honest, God-ordained matrimony and mere meretricious cohabitation too nearly on a level with each other. In view of these consequences, that are apparent to all, it seems to us that grave considerations of public policy require us to closely scrutinize the testimony offered and the

proof adduced in support of every common-law marriage, alleged to have been consummated in this state.

It appears from the record that the intestate lived for a number of years in the town of Ord; that he was a bachelor, who lived alone and did his own housekeeping; that at the time of this alleged marriage he was about fifty years of age; that the woman was a widow, aged about forty years, and lived, together with her children, about a block away; that she did laundry work and house-cleaning for her neighbors, including the intestate. These matters are mentioned merely to exhibit the surrounding conditions of the parties. It may be well to observe here that if this alleged husband, and admits that she and the intestate had of the woman alone. There is none other. In her direct examination she testifies that the intestate, at his house, about the middle of October, 1894 (a more exact date she would not give), made a verbal proposal of marriage to her, which she accepted, and that she and the intestate then and there agreed henceforth to be husband and wife; that this marriage was to be kept secret; that she went home and lived with her children as before; that about a week after they had sexual intercourse, which was occasionally indulged in at times thereafter; that the result of this intercourse is the infant who is the cross-petitioner in this action; and that intestate gave her from time to time small sums of money.

On cross-examination she admits that she never told any one of this marriage; that she signed her children's school report in her former name; that she received aid, provisions and fuel from the overseer of the poor during the winter after the marriage and in the lifetime of her alleged husband, and admits that she and the intestate had agreed to be married on the Wednesday of the week that he went to Lincoln and there died; that she had told her neighbors, Mrs. Colby and Mrs. Briley, that she was going to be then married; and that she had engaged Mrs. Briley to keep her children until after the marriage ceremony was performed; that the intestate was in bad health, and that

he went to Lincoln for medical treatment; that she did not know at the time that he had gone, and she had not seen him for some days before his departure. The further record in this case is in the same condition as the record that was before this court upon the first contest (56 Neb. 729), of which Mr. Commissioner RAGAN then said: "The record contains no evidence of either Sorensen or Mrs. Ferguson having ever told or claimed to any one that they were married. At no time or place did either one of them introduce, speak of or hold out the other as husband or wife. The parties did not cohabit together after their marriage, but each continued to occupy their respective places of residence as before. No writing, note, memorandum, or verbal acknowledgment or statement of this marriage appears to have been made by either of the parties thereto." This excerpt expresses the true condition of the present record on this subject.

From this evidence it would seem clear that there was no marriage *per verba de præsenti.* The fact that she and the intestate had agreed to get married on a future day conclusively negatives the claim of a *de præsenti* marriage. There could not be a marriage consummated and a marriage in expectancy at the same time between the same parties, and the evidence in the record is uncontroverted that there was a marriage in expectancy between the parties at the time of the intestate's death.

Was there a marriage *per verba de futuro cum copula?* This must be answered in the negative for the same reason; that is, so long as the marriage is in expectancy, it can not be said to have been consummated. Bishop in his work on Marriage and Divorce, vol. 1, sec. 254, says: "The marriage by consent *per verba de futuro cum copula* does not differ from any other informal marriage. It is, in effect, and in its essence, a marriage by consent *de præsenti;* and the common method of designating it is only for convenience, and as indicating the sort of evidence by which it is established; so, of course, its consequences are, by all opinions, precisely the same as those of marriage by consent

per verba de præsenti." In the preceding section (253) Mr. Bishop defines the doctrine of this species of marriage. He says: "It is, that, where parties are under an agreement of future marriage, if then they have copula, which is lawful in the marriage state alone, they are presumed, *in the absence of any showing to the contrary,* to have arrived at the period of actual marriage, or to have transmuted their future to present promise; because the law always leans to the good, rather than the evil, construction of equivocal acts."

It is said in Stewart, Marriage and Divorce, sec. 87: "In states where no marriage celebration is necessary, and when such contract is followed by sexual intercourse between the parties, the law, so as not to presume fornication, presumes that parties who have promised to marry mean sexual intercourse following such promise to be the consummation of such agreement. But this presumption may be rebutted by any facts which show that the parties knew or intended their intercourse to be illicit, as where at the time they were looking forward to being married with a ceremony." See, also, *Peck v. Peck,* 12 R. I. 485; *Fryer v. Fryer,* Rich. Eq. Cas. (S. Car.) 85.

In *Stoltz v. Doering,* 112 Ill. 34, it is said that at common law the fact of sexual intercourse after an agreement to marry at a future day does not constitute marriage, and that the copula must have been in fulfilment of the agreement to marry.

From these authorities, it appears that the law, in the absence of evidence, raises the presumption that by the act of copula the parties then and there intended to consummate their existing agreement to marry; that is, to convert the future agreement into a present consummation. This is the whole doctrine of marriages *de futuro cum copula.*

There is no difference in the basic principles of the marriage contract from any other; the minds of the parties must meet, and the agreement to marry must be made. The time when the marriage shall take place may be the present, or may be in the future. If in the future, there is not

a present marriage, but an agreement to marry, and the mere act of copula does not change the agreement. The law presumes, in the absence of evidence, that the parties themselves changed the terms of the contract from the future to the then present. When, however, the evidence establishes, as in this case, that during the period of the sexual intercourse between the parties, they had set the day in the future, and were making preparations for and intending to solemnize their marriage rites in accordance with the statute of this state, there is no ground for this presumption, and the law will not indulge in it.

Furthermore, we think the evidence insufficient upon another ground. It fails to show that the parties lived together as husband and wife; in fact, it affirmatively shows that they did not so live, nor is there any act or deed of the parties that can be said to be a public recognition of the marriage relation.

It is said in *Lorimer v. Lorimer,* 124 Mich. 631, 635, 83 N. W. 609, that "Our courts have gone a good way to sustain the validity of a marriage where an agreement to live and cohabit together as husband and wife has been made and acted upon. But at no time has it been said that, in the absence of a valid marriage ceremony, a simple agreement to live together, even though the parties intended to carry out the agreement, is sufficient to constitute a valid marriage, unless acted upon by living together and cohabiting as husband and wife." Of like effect are the holdings in *People v. McQuaid,* 85 Mich. 123; *Maryland v. Baldwin,* 112 U. S. 490; *Commonwealth v. Stump,* 53 Pa. St. 132; *Hiler v. People,* 156 Ill. 511; *Cargile v. Wood,* 63 Mo. 501.

In *Maryland v. Baldwin, supra,* it is held that "In the absence of statutory regulations, a marriage is a civil contract and may be made *'per verba de præsenti';* that is, by words in the present tense without attending ceremonies, religious or civil, but some public recognition of it is necessary as evidence of its existence." The reason for this is given in the opinion of Mr. Justice Field in which he says: "The protection of the parties and their children and con-

siderations of public policy require this public recognition." It is further said in that case that this public recognition may be made in any way which can be seen and known by men, as living together as man and wife, or by public conduct which acknowledges the marriage relation.

We think that the requirement that the parties assume the marriage relation, is reasonable. It is based upon a sound regard for the public welfare. Public policy forbids all things that are inimical to the public welfare and the due administration of justice. To establish a marriage in a case like this on the evidence in this record would be to open the door to fraud and perjury, and to expose every estate to the rapacity of designing adventurers. This would be against every policy of the law, and consequently should not be done.

We therefore recommend that the former opinion be adhered to.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is adhered to.

FORMER JUDGMENT ADHERED TO.

The following opinion on third rehearing was filed May 3, 1905. *Judgment of reversal adhered to:*

1. **Common Law Marriage:** PRESUMPTION. There is a presumption of the existence of marriage which arises from cohabitation and holding each other out to the world as husband and wife, and public policy will not prevent a child born of such relations from availing himself of such presumption in a contest as to his legitimacy.

2. ———: CONSISTENT CONTRACTS. A contract for a marriage in the future can not of itself constitute marriage, and if its language imports that the marriage is to take place in the future, such contract will not constitute a marriage *de præsenti*. But two contracts, one constituting a present marriage and the other providing for a future public celebration thereof, are not inconsistent.

3. **Heir as Representative of Deceased.** The heir is not, in all litigation concerning the estate, the representative of the deceased,

To represent the deceased, within the meaning of section 329 of the Code of Civil Procedure, the heir must stand in his place so as to uphold a right which the deceased had at the time of his death.

4. **Marriage Contract: EVIDENCE.** A contract between a man and woman, competent to marry, in which it is by them mutually agreed by that contract to then become husband and wife, constitutes a valid marriage; but when there has been no subsequent cohabitation, admissions of the parties, or other evidence, except the unsupported oath of one of the parties after the other party is deceased, there is a presumption against secret marriages which must be considered as evidence against the existence of the contract. Our marriage laws aim at publicity; secret marriages are not favored.

5. **Practice: DEMURRER TO EVIDENCE.** When in a jury trial a party moves the court to instruct a verdict in his favor, which is overruled and he is compelled to submit the matter to the jury, he may assist the court in a proper submission of the matter without thereby estopping himself to afterwards contend that a verdict against him is not supported by the evidence. In such case the rule of *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, does not apply.

SEDGWICK, J.

1. Upon this motion for a rehearing both parties have filed additional briefs, and oral argument was had before the court. The principal contention of the defendant in error upon this motion is that the last opinion is wrong in holding that the evidence is insufficient to support the finding of the jury. It was said in that opinion that this is "the essential question in this controversy." The former opinion in so far as it appears to reflect upon the position of this defendant in error in this litigation should be modified. As was said by the supreme court of Indiana in *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742: "It is important to ascertain the status of the person who asserts the validity of the marriage. In this case the person who does this is free from all taint of wrong; he is asserting his mother's innocence of evil, and maintaining his right to property acquired by his father. If any right is lost to him it results from no wrong of his, but solely from the misconduct of another." If the alleged marriage is fol-

lowed by cohabitation and holding each other out to the world as husband and wife, the presumption of the existence of the marriage which arises from these facts ought to be indulged in favor of a party who is himself necessarily innocent in any view of the case.

2. Again, it is said in our last opinion (*ante,* p. 500): "The fact that she and the intestate had agreed to get married on a future day conclusively negatives the claim of a *de præsenti* marriage. There could not be a marriage consummated and a marriage in expectancy at the same time between the same parties, and the evidence in the record is uncontroverted that there was a marriage in expectancy between the parties at the time of the intestate's death." This is a correct statement of the law only in the sense that a contract for a marriage in the future is not such a contract as will of itself constitute marriage, and that the fact that the language of the contract imports that the marriage shall take place at some future time is inconsistent with construing that language to mean that the contract is for a marriage *de præsenti.* It was, of course, not intended to say that after a valid contract of marriage had been entered into, the parties could divorce themselves by agreeing to be married in the future, or that it was inconsistent for the parties to make two contracts, one that they should be married in the present and become husband and wife and the other that they should celebrate that marriage publicly at some future day. We have upon this motion been required to reexamine the whole record and it does not appear that the language last quoted from the opinion is entirely applicable to the facts as disclosed in this record.

3. It is insisted that the evidence of the alleged wife of the deceased should have been excluded. The first ground for this contention is that the litigation between her and the defendants in error here in regard to the appointment of the administrator of this estate is an adjudication of her status, and is binding upon all parties. We think that this contention is fully met by the reasoning of Mr. Com-

missioner ALBERT in the second opinion herein, which is reported, *ante,* p. 490. The second ground for this contention is, we think, likewise untenable. It is urged that this witness was rendered incompetent by the provisions of section 329 of the Code of Civil Procedure, but this court is committed to the construction of that section which is given it in the last opinion (*ante,* p. 500). It was there shown that the adverse party in this litigation is not the representative of the deceased in the sense intended in the section of the statute referred to, and the rule stated in *McCoy v. Conrad,* 64 Neb. 150, is there quoted as follows: "If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and make the defense which the deceased might have made, if living, or to establish a claim which the deceased might have been interested to establish, if living, then he may be said, in that litigation, to represent a deceased person; but where he is not standing in the place of the deceased person, and asserting a right of the deceased which has descended to him from the deceased (that is, where the right of the deceased himself, at the time of his death, is not in any way involved), and the question is, not what was the right of the deceased at the time of his death, but merely to whom has that right descended, in such a contest neither party can be said to represent the deceased."

The brief of the petitioners presents a very able argument upon this question, but it is predicated upon discussions from other jurisdictions based upon statutes essentially different from our own. Several decisions from the supreme court of Illinois are presented and strongly argued, but the difference between the two statutes is not discussed. Indeed it seems to be assumed that the statutes are identically the same. The statute of that state (ch. 51, sec. 2) is: "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when

any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending," with other exceptions.

"The heir of a deceased person" may be and often is the representative of the deceased in litigation that arises concerning the estate, but as is plainly shown in *McCoy v. Conrad, supra,* the heir is not in all litigation concerning the estate of the deceased the representative of the deceased within the meaning of our statute. It is only when he stands in place of the deceased so as to uphold a right that the deceased had at the time of his death that he may be said to represent the deceased. When the right of the deceased at the time of his death is not in controversy, but the question is to whom does that right descend, the heir, although a party to the litigation, does not in that action represent the deceased within the meaning of the statute. Under the Illinois statute if the heir is the adverse party the statute applies. In the case at bar it is not because the witness was an heir of the deceased that she was allowed to testify, but because the adverse party does not represent the deceased. It does not appear from the opinion in *Laurence v. Laurence,* 164 Ill. 367, 45 N. E 1071, which was one of the cases principally relied upon, that this witness would not there have been allowed to testify since she was not testifying "of her own motion, or in her own behalf" which is by their statute made an essential element of disqualification. Under the construction of our statute now well established this witness was competent to testify.

4. We think also that it is correctly assumed in the opinion that a contract between the parties in which the minds of the parties understandingly meet, and in which it is by them mutually agreed by that contract to become husband and wife, is sufficient to constitute a valid mar-

riage. It must also be borne in mind that this evidence has been submitted to the jury under proper instructions, and that by their verdict they have declared that these parties made such contract and became husband and wife, and the familiar rule must be applied that such verdict will not be set aside unless it clearly appears that it is not supported by the evidence. What then shall be said of this evidence as supporting this verdict? It is based wholly upon the evidence of the alleged wife of the deceased. No human being had any knowledge of it except this witness, and the deceased whose evidence was barred by death. No circumstance or condition disclosed by this evidence declares the existence of such a contract. The alleged wife had everything to gain by establishing its existence. She has no fear of contradiction, and cross-examination presents no terrors.

In a similar case the supreme court of Minnesota suggested the increasing number of common law widows raising claim (in many instances doubtless fraudulently) to the estates of deceased men of wealth, and intimated that legislation to further protect estates from such depredation might be justifiable. *Hulett v. Carey,* 66 Minn. 327, 69 N. W. 31.

This witness testified that she was married to Mr. Sorensen by an "agreement." "He promised to be my husband and I promised to be his wife." This agreement took place "at his home." She lived at that time "across the street from there." "He requested me to come, he wanted to have a talk with me." "He called at my house and requested me to come." When she went to his house he told her he was tired of living alone, he did not believe in a public ceremony, and after some other conversation of that nature said "I promise to be your husband if you will promise to be my wife." To this she agreed; she could not state the date of this contract except that it was "about the middle of October, 1894." It was also agreed that they should continue living separately and just as they had been living. She says, "I understood that I was his wife from that time on."

After his death she sought to establish an interest in his property on the ground that they were engaged to be married; she spoke of this to several persons, and did not claim that she was his wife, but alleged that he had agreed to marry her. If she knew herself to be his lawful wife, and had consented to keep it secret until a public ceremony could be performed, it is difficult to understand why, when death had prevented the public ceremony, she should fail to at once declare the truth. She did not assert that she had ever been his wife until after several attempts to obtain his property had failed, and she had learned that only as his widow could such an attempt succeed. Further details of the facts disclosed by this record may be found in the former opinions.

Our marriage laws aim at publicity. To allege that these laws have been disregarded, and that a secret marriage has been entered into, is to cast suspicion upon the conduct of the parties. Subsequent cohabitation, and holding each other out to the world as husband and wife furnish strong corroboration of the existence of the contract. Where these elements of proof are wanting, and, one party being deceased, the existence of the contract rests wholly upon the unsupported testimony of the other party, the presumption raised by the circumstances amounts to proof opposed to the marriage contract itself. We do not think that the evidence of this witness is so direct, certain and consistent as to establish the contract of marriage in the face of this presumption. *Gibson v. Gibson,* 24 Neb. 394; *Bailey v. State,* 36 Neb. 808; *University of Michigan v. McGuckin,* 64 Neb. 300; *Eaton v. Eaton,* 66 Neb. 676, are not, when rightly considered, inconsistent with the views herein expressed.

5. When this defendant in error had concluded his evidence upon the trial in the court below, a motion was made by the plaintiffs in error that the court instruct the jury to return a verdict in their favor. This motion was overruled. Afterwards the plaintiffs in error offered their evidence and, when the evidence was closed, requested the

court to submit special questions of fact to the jury, one of them being "Was Mrs. Ferguson before the death of Hans C. Sorensen ever lawfully married to him?" and other similar questions. It is now contended that the evidence introduced by the plaintiffs in error "materially strengthened that of defendant in error," and that as the plaintiffs in error did not renew their motion to direct a verdict in their favor they must be held by requesting the court to submit the question to the jury to have waived their objection that there was not sufficient evidence, and that therefore that question ought not now to be considered in this court. If, after their motion to direct a verdict, there had been substantial evidence tending to prove the alleged marriage, this argument of the defendant in error would have great weight. The testimony relied upon as corroborating evidence upon this point was developed upon the cross-examination of a brother of the deceased.

He testified that the deceased had in August, about two months before the time of the alleged marriage, and while intoxicated, said that he was "tired of baching and thought of getting married" and was "thinking of a widow with three children." This might or might not have referred to Mrs. Ferguson. No time was mentioned, and if his language was serious, it was too indefinite to be of any value as evidence. There could be no reason to suppose that a verdict would be directed on account of this testimony when it had been refused upon the evidence as it stood without it.

In *American Fire Ins. Co. v. Landfare,* 56 Neb. 482, it was said: "One who tenders an instruction which is given, which assumes the existence of evidence to establish an issuable fact in the case, cannot afterwards be heard to assert that there was no evidence received tending to prove such fact." It does not appear that the defendant in that case was compelled to submit the matter in question to the jury, and having on its own motion requested the court to submit a question of fact, it was not allowed afterwards to say that there was no evidence upon which to submit it.

But when, as in this case, a party moves for a verdict in his favor because there is no evidence to support one against him, and, his motion being overruled, he is compelled to submit the matter to the jury, he may assist the court in a proper submission of the matter without estopping himself to afterwards contend that a verdict against him is not supported by the evidence. The rule of *American Fire Ins. Co. v. Landfare, supra,* is also held in *Iowa Savings Bank v. Frink,* 1 Neb. (Unof.) 14; *Missouri P. R. Co. v. Fox,* 60 Neb. 531, and other cases. This rule is based upon the idea that when a party, by his language or conduct in the trial, induces the court to take a certain action, he can not afterwards in the same case say that there was no foundation for such action. It does not apply in this case.

We think the conclusion reached in the former opnion is right and should be adhered to.

FORMER OPINION ADHERED TO.

STATE BANK OF CERESCO, APPELLEE, V. WILLIAM BELK ET AL., APPELLANTS.

FILED APRIL 9, 1903. No. 12,311.

Creditors' Bills: NECESSARY ALLEGATIONS. There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an execution at law can not be levied; the other in aid of an execution at law, as to set aside an incumbrance or a transfer of property made to defraud creditors. In the first class of cases the creditor must allege and show that he has exhausted his remedy at law, while in the second it is sufficient to show that his claim has been reduced to judgment and docketed in the county where the land lies which he seeks to subject to the payment of his claim. The equity court in such case is merely lending its assistance to the legal tribunal to remove a fraudulent obstruction interposed to the execution of its writ.

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

Charles L. Burr and *Lionel C. Burr,* for appellants.

Albert G. Greenlee, contra.

DUFFIE, C.

This is a creditors' suit brought by the appellee against William Belk, Henrietta Belk, his wife, Nina Riggs, daughter of the said William and Henrietta Belk, and George A. Riggs, her husband. The undisputed facts are as follows:

At the May, 1899, term of the district court for Lancaster county the bank recovered judgment against Belk for about $450 and costs, taxed at upwards of $90. The basis of the judgment was a promissory note, of which the following is a copy:

"$300. CERESCO, NEB., Sept. 30, 1889.

"On demand after date, for value received, we jointly and severally promise to pay to the order of State Bank of Ceresco, Neb. three hundred dollars, with interest at the rate of ten per cent. per annum from maturity until paid. This note is given as security for a note of even date and amount of Thomas Stretch in favor of State Bank of Ceresco and the maker hereof waives protest and notice of non-payment and guarantees the payment of said note, or any renewal of the same.

(Signed) "WILLIAM BELK."

At the time of making said note Belk was the owner of some two hundred acres of land, which it is sought to subject to the payment of the judgment. On October 21, 1895, Belk and his wife deeded this land to George A. Riggs, their son in law. This conveyance was made while the suit in which judgment was finally entered was still pending. At the time of the conveyance to Riggs the land was encumbered by a mortgage for $3,000, and the consideration expressed in the conveyance was $4,000, and the assumption by Riggs of said mortgage. Riggs ex-

ecuted a mortgage back to secure the sum of $3,800 of the consideration, but this mortgage, instead of running to William Belk, was made to Henrietta Belk, the wife. The district court found the conveyance fraudulent as to creditors, and decreed a cancelation of the conveyance, making provision, however, for Belk to have his homestead interest in the property set aside previous to a sale. From this decree the defendants have appealed.

It will be noticed that the note upon which judgment against Belk was entered was given as security for the payment of another note of like date and amount executed to the bank by one Thomas Stretch, and it is earnestly insisted that a creditors' suit can not be maintained against the surety without a showing on the part of the appellee that it has exhausted its legal remedies not only against the defendant Belk, but against Stretch, the principal debtor. The rule is of universal application that a creditors' suit to come at the equitable assets of the debtor which an execution at law will not reach, can not be maintained until the creditor has exhausted his legal remedies for the collection of his debt. A court of law is the proper forum for the enforcement of legal demands, and a court of equity will not interpose its extraordinary aid until legal remedies have proved ineffectual. It has been frequently said that courts of equity are not tribunals for the establishment or collection of ordinary demands. *Sloan v. Waring,* 55 How. Pr. (N. Y.) 62; *Dawson v. Sims,* 14 Ore. 561; *Taylor v. Bowker,* 111 U. S. 110. It is also held in some jurisdictions that, where there are two or more joint debtors, it is not sufficient to exhaust the legal remedies against one of them only, but they must be exhausted against all. *Voorhees v. Howard,* 4 Keyes (N. Y.) 371; *Child v. Brace,* 4 Pai. Ch. (N Y.) 308; *Field v. Hunt,* 22 How. Pr. (N. Y.) 329.

There are, however, two classes of cases, both commonly called creditors' suits, which, although resembling each other, are clearly distinguishable. The first, a creditor's suit strictly, so called, is where the creditor seeks to satisfy

his judgment out of the equitable assets of the debtor which can not be reached on execution. Generally in that class of cases the action can not be brought until the creditor has exhausted his remedy at law by the issue of an execution and its return unsatisfied. This is required because equity will not aid the creditor to collect his debt until the legal assets are exhausted, for until this is done he may have an adequate remedy at law. The second class of cases is where property legally liable to execution has been fraudulently conveyed or incumbered by the debtor, and the creditor brings the action to set aside the conveyance or incumbrance as an obstruction to the enforcement of his lien; for though the property might be sold on execution notwithstanding the fraudulent conveyance, the creditor will not be required to sell a doubtful or obstructed title. In the latter class of cases, the prevailing doctrine is that it is not necessary to allege that an execution has been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to grant relief in such cases, but upon the theory that the fraudulent conveyance is an obstruction which prevents the creditor's lien from being efficiently enforced upon the property. As to the creditor, the conveyance is void, and he has a right to have himself placed in the same position as if it had not been made. The fact that other property has been retained by the debtor, may be evidence that the conveyance is not fraudulent, but, if the grantee's title be tainted with fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he shall be disturbed. *Wadsworth v. Schisselbauer,* 32 Minn. 84, 19 N. W. 390; *Botsford v. Beers,* 11 Conn. *370; *Weightman v. Hatch,* 17 Ill. 281; *Vasser v. Henderson,* 40 Miss. 519. This distinction as to the two classes of cases is fully borne out in *Cornell v. Radway,* 22 Wis. 260; *Beck v. Burdett,* 1 Pai. Ch. (N. Y.) 305, and *Williams v. Hubbard,* Walk. Ch. (Mich.) 28. In the latter case it is said (p. 29): "There are two classes of cases

in which a judgment creditor may come into this court for relief. First, in aid of his execution at law; as to set aside an incumbrance or a transfer of property made to defraud creditors. Second, to have his judgment paid out of choses in action, or other property of the debtor not liable to execution. Relief is given in these two classes of cases on different principles. In the first class, on the ground of fraud; and in the other, on the ground that the complainant has exhausted his remedy at law, and that it is inequitable and unjust for the debtor, under such circumstances, to refuse to apply any choses in action, or other property belonging to him not liable to execution, in payment of the judgment."

The opinion in *Fusze v. Stern,* 17 Ill. App. 429, 432, clearly draws the distinction betwen these two classes of cases. In that case it is said that the creditor, before he can have the aid of a court of equity to decree the equitable estate of his debtor subject to the payment of his debt, "must show by his bill, as in other cases where invoking equitable jurisdiction, that he has no adequate remedy at law, which can only be shown by alleging and proving that he has exhausted all the means provided by law for the collection of his debt, viz., a recovery of judgment, the issuing of execution and its return *nulla bona* by the officer charged with its collection. Another kind of bill analogous to this is where the creditor, having recovered judgment against his debtor, seeks to remove a fraudulent conveyance or incumbrance out of the way of an execution issued or to be issued upon such judgment. In such case equity will afford relief on the ground that such judgment is an equitable lien upon the real estate, nominally held by a third party under such fraudulent conveyance, and the creditor having this lien is entitled to levy upon and sell upon his execution such real estate discharged and untrammeled from the cloud upon it caused by such conveyance. In bills of this kind the complainant need not even prove return of execution *nulla bona,* as such conveyances are void by the statute, and courts of

equity do not hesitate to declare them void because of such fraud, and place the creditor in the same position, respecting his judgment, that he would have occupied if such conveyance had not been made. A recovery of a judgment which at the time of filing the bill would, in the absence of such conveyance, be a legal lien under the statute upon the land, is all that is necessary to aver and prove."

We think there is no dissent in the authorities from the principle announced in the above cases, all agreeing that a court of equity will assist the judgment creditor by removing a fraudulent obstruction placed in the way of the enforcement of his execution. In such case the equity court is not itself collecting the debt. It is merely lending its assistance to the legal tribunal in which the judgment was obtained in collecting from the debtor what is due by interposing its aid to accomplish what a court of law has no jurisdiction to do, viz., cancel a conveyance found to be fraudulent, and made for the purpose of putting the property beyond reach of the writ of the legal tribunal. It is upon the writ of the law court that the property is finally sold and the collection enforced.

We are satisfied that the decree of the district court was right and recommend its affirmance.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

MARY ALBERS ET AL., APPELLANTS, V. JOSEPH KOZELUH ET AL., APPELLEES.*

FILED APRIL 9, 1903. No. 12,732.

1. **Affidavit: CONSTRUCTIVE SERVICE.** An affidavit which contains no venue and which also fails to disclose the county of which the

* Rehearing allowed. See opinion, p. 529, *post*.

officer before whom it was taken is an official, is so fatally defective as to be worthless as a basis for the publication of a summons on a nonresident defendant.

2. **Sheriff's Deed:** NOTICE OF JURISDICTIONAL DEFECT. Where a sheriff's deed forms one of the links in a chain of title, the party claiming thereunder is charged with notice of any jurisdictional defect in the proceedings which the record in the case from which the deed emanated shows; and if the record discloses on its face that the court had no jurisdiction to enter the decree in the execution of which the deed was made, he can not claim to be a *bona fide* purchaser of the land.

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

Willard E. Stewart, for appellants.

Arthur W. Lane, Fayette I. Foss, Ben V. Kohout and *R. D. Brown, contra.*

DUFFIE, C.

About the year 1871 Henry Stately made homestead entry of the east half of the southwest quarter of section 22, township 7 north, range 5 east of the 6th P. M. in Lancaster county, Nebraska. He received a patent therefor January 20, 1876. He occupied this land as a homestead until some time in 1880, when, his wife becoming insane and an inmate of the asylum for the insane at Lincoln, he found homes for his infant children—the oldest being then about eleven years of age—and went to Colorado for the avowed purpose of earning money to pay an incumbrance upon the land of $250, existing in the form of a mortgage made January 8, 1877, to the New England Mortgage Security Company, and to earn means to support and provide for his family, which he hoped to reunite at a future date. Some time after going to Colorado he died, and one J. C. Crocker, residing in the city of Lincoln and claiming to be the assignee of the mortgage made to the New England Mortgage Security Company,

in January, 1886, brought an action to foreclose the same, obtained a decree of foreclosure, and in May, 1886, said land was sold under the decree and bid in by said Crooker, who afterwards sold the same to one Patterson, who thereafter sold and conveyed the same to the appellee Joseph Kozeluh.

James F. Lansing, a real estate and loan agent residing in the city of Lincoln, testified upon the trial, and his evidence was not contradicted, that he was doing business for the Corbin Banking Company of New York, which company was in some manner connected with the New England Mortgage Security Company, and apparently had charge of its collections, and that in the year 1882, Crooker & Gregory, claiming to act as attorneys for Henry Stately, paid in the amount due upon the Stately mortgage, which he forwarded to the Corbin Banking Company, and shortly thereafter received a release of said mortgage from the New England Mortgage Security Company, which he delivered to said Crooker & Gregory.

This action was brought by the children of said Stately, and by Royal L. Stewart, guardian of Dora Stately, his insane wife, to have the sheriff's deed made to Crooker and the subsequent conveyances of said land, canceled and set aside, and for the rental value of said premises during its occupation by the defendant.

It is first claimed that the mortgage was satisfied and discharged prior to the institution of foreclosure proceedings by J. C. Crooker. The evidence, to our mind, is quite conclusive that such is the case, but this can not avail the plaintiffs at this time. In his petition for a foreclosure Crooker alleged that he was the assignee of said mortgage, and the district court so found. If the court had jurisdiction to entertain and try the action this finding is conclusive, and can not be questioned in this action.

It is further urged that the district court had no jurisdiction to try and determine the foreclosure action, and this because no personal service was had upon the defendant

Henry Stately, and no sufficient affidavit for service by publication was made and filed in the case. The affidavit is in the following form:

"In the District Court of Lancaster County, Nebraska.

"JABEZ C. CROOKER, Plaintiff,
v.
HENRY STATELY, DORA STATELY and L. B. BRONSON, Defendants. } Affidavit.

"Jabez C. Crooker, plaintiff in the above entitled action, being first duly sworn, deposes and says, that on the —— day of January, A. D. 1886, he filed a petition in the district court of Lancaster county, Nebraska, against Henry Stately, Dora Stately and L. B. Bronson, the object and prayer of which is to foreclose a certain mortgage executed by the defendant to the New England Mortgage Security Company (and duly assigned to said plaintiff) upon the east half (½) of the southwest quarter of section 22, town 7 north, range 5 east, in Lancaster county, Nebraska, to secure the payment of a note and coupon, dated December 23, 1876, for the sum of $250 upon the note, and $18.20 upon coupon, due and payable December 23, 1881; that there is now due upon said note, coupon and mortgage, the sum of $374 and $37 attorney fees, and plaintiff prays that said premises may be decreed to be sold to satisfy the amount due thereon.

"Affiant further states that defendant, Henry Stately, is a nonresident of the state of Nebraska, and service of summons can not be made within this state upon him.

"Wherefore plaintiff prays service upon said defendant by publication. J. C. CROOKER.

"Subscribed in my presence and sworn to before me this 6th day of January, 1886. J. H. BROWN,
"Justice of the Peace."

Objection is made to this affidavit because it does not state any facts showing the absence of the defendant from the state of Nebraska at the time it was filed. It does recite

that Staley "is a nonresident of the state of Nebraska, and service of summons can not be made within this state upon him." An affidavit similar in this respect was held sufficient in *Shedenhelm v. Shedenhelm,* 21 Neb. 387.

It is further urged that the affidavit is fatally defective for want of venue. It will be observed that the affidavit does not disclose where it was made, or the county of which the justice before whom the same was executed was an officer. The authorities are conflicting as to the effect of a failure of an affidavit to disclose the venue where made. In New York and some other jurisdictions such failure is held fatal, while in Illinois and some other states it is said that the presumption will obtain that the affidavit was made in the proper county, and that the officer taking the same had jurisdiction to administer the oath. Our own decisions upon the question are not clear and satisfactory.

In *Crowell v. Johnson,* 2 Neb. 146, the affidavit was held sufficient, the court saying (p. 153): "The affidavit was sworn to before the clerk of the court in which the action was pending; and it will be presumed that the clerk administered the oath in the proper county."

In *Merriam v. Coffee,* 16 Neb. 450, where objection was made to the affidavit of an assessor, it is said (p. 451): "The first objection is, that there is no venue to the oaths of the assessors which were attached to the assessment rolls, nothing to show in what county or state they were administered. An examination of the record shows that the oath for the year 1870 was taken before the deputy clerk of Cass county, and filed in the office of the county clerk. The presumption in such case is that the oath was administered within the jurisdiction of the officer."

These cases are to the effect that where they show on their face that they were taken before an officer of the county where filed, the presumption obtains that they were made in that county.

In *Blair v. West Point Mfg. Co.,* 7 Neb. 146, 152, where objection was made to an affidavit of service of a summons,

the court said: "Objection that the affidavit of service of the summons has no venue, is well taken. An affidavit should show upon its face that it was taken within the officer's jurisdiction."

In this case it is not disclosed whether the officer before whom the affidavit was made was an officer of the county where the same was filed, but the presumption must obtain that such was not the case, or at least that the affidavit did not disclose such to be the case, else the court would have felt bound by its former holding in *Crowell v. Johnson, supra.*

In *Byrd v. Cochran,* 39 Neb. 109, the court quotes with approval the language of Judge MAXWELL in *Blair v. West Point Mfg. Co., supra,* and cites in support thereof cases from the courts of New York, in which state the doctrine is firmly established that an affidavit of the character of the one under consideration is a nullity. *Thompson v. Burhans,* 61 N. Y. 52; *Lane v. Morse,* 6 How. Pr. (N. Y.) 394.

In the light of these decisions, we think that this court has unmistakably committed itself to the New York doctrine that the affidavit must show upon its face the proper venue, or must disclose that the officer before whom it was executed was an officer of the county where the same was filed. We conclude, therefore, that the affidavit for service by publication was fatally defective; that no legal service by publication could be made thereunder; and that the court had no jurisdiction to entertain and try the foreclosure proceedings.

It is earnestly insisted by the defendant that this is a collateral attack upon the foreclosure decree, and that the jurisdiction of the court to enter the decree will be conclusively presumed, and that neither the sufficiency of the notice or affidavit can be questioned or reviewed collaterally. We do not think that this position is tenable. The affidavit is jurisdictional to service by publication, and where there is no affidavit or where the affidavit is fatally defective the publication is void. *Atkins v. Atkins,* 9 Neb.

191; *McGavock v. Pollack,* 13 Neb. 535; *Rowe v. Griffiths,* 57 Neb. 488.

The plaintiff is not seeking to attack the decree in this case because of irregularities, but the claim is that the judgment is absolutely void; that what appears on its face as a judgment is not one, because of want of jurisdiction by the court to enter it.

In *Chicago, B. & Q. R. Co. v. Hitchcock County,* 60 Neb. 722, it is said: "In courts of general jurisdiction, the rule is that the proceedings taken, including questions of jurisdiction, are presumed to be regular and in conformity with law. Where, however, the record discloses the jurisdictional steps taken, and it is made to appear that no jurisdiction was acquired over the defendant, the rule invoked is rendered unavailing. Where a court is without jurisdiction over a defendant, the judgment rendered is void, and may be attacked as such by any one whose rights are affected by its rendition, and its invalidity shown in any action in which it may be called in question."

The decree entered in this case and the sheriff's deed based thereon, is a link in the chain of the defendant's title. All persons claiming an interest in real estate, are bound to take notice of the recitals of all duly recorded deeds in their grantor's chain of title. *Hubbard v. Knight,* 52 Neb. 400, 401. And this is true of all jurisdictional steps leading up to a transfer by judicial sale. Where a judicial sale forms one of the links in the chain of title under which a grantee claims, he is charged with notice of any fact showing want of jurisdiction in the court making or ordering the sale. *Chambers v. Jones,* 72 Ill. 275; *Stegall v. Huff,* 54 Tex. 193; *Nelson v. Allen,* 1 Yerg. (Tenn.) 360; Wade, Notice, sec. 327. A void judgment, the record in the case showing its invalidity, is certainly no better authority for making a sale than is a valid judgment which has been paid and satisfied, and numerous cases are to be found holding that in such cases the sale is absolutely void and that no one can obtain any rights under such a sale. *Hunter v. Stevenson,* 1 Hill (S. Car.)

*415; *Weston v. Clark,* 37 Mo. 568; *Laval v. Rowley,* 17 Ind, 36; *King v. Goodwin,* 16 Mass. 63; *Wood v. Colvin,* 2 Hill (N. Y.) 566.

The claim made by the defendant that he is a *bona fide* purchaser of this land without notice of any defect in his title, is disproved by record defects appearing in the very chain of title under which he claims. There could be no *bona fide* purchaser of this land claiming through the sheriff's deed made by order of a court without jurisdiction to try the case in which the order was made.

We recommend a reversal of the decree of the district court, and that the case be remanded with directions to enter a decree in favor of the appellants.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the case remanded with directions to enter a decree in favor of the appellants.

REVERSED AND REMANDED.

The following opinion on rehearing was filed December 2, 1903. *Judgment of reversal adhered to:*

1. **Affidavit for Constructive Service:** JURISDICTION. An affidavit for service of summons by publication, which contains no venue, and does not disclose the county of which the official before whom it purports to have been sworn is an officer, is void on its face, and confers no jurisdiction on the court to render a decree of foreclosure against nonresident defendants.
2. **Extrinsic Evidence.** Such void affidavit can not be cured or made valid by restoring to extrinsic evidence, when the validity of the decree rendered thereon is assailed.
3. **Statute of Limitations:** ADVERSE POSSESSION: MINORS. The statute of limitations, as to adverse possession, does not run against persons while under disability, such as minors; and an action brought to recover an interest in real estate within ten years after they arrive at the age of majority, is commenced in time.
4. Former judgment in this case adhered to.

BARNES, C.

This is a rehearing of the case of *Albers v. Kozeluh, ante,* p. 522. The original opinion was written by Commis-

sioner DUFFIE, and contains a full and complete statement of the facts. It is sufficient for us to state that the action was brought by the children of one Stately, and by Royal L. Stewart, as guardian of Dora Stately, his insane wife, to have the sheriff's deed made to one Crooker, and the subsequent conveyances of the land in question, canceled and set aside, and to recover its rental value during its occupation by the defendant. Our former opinion reverses the judgment of the trial court, and this rehearing appears to have been allowed for the purpose of again considering two questions: First, as to whether or not the judgment, on which the sheriff's deed above mentioned was based, was void; second, the further consideration of the question of adverse possession. It may be stated at the outset that the only service of summons in the foreclosure action on which the sheriff's deed to Crooker was based, was by publication, and it appears beyond question that the affidavit for such service did not contain any venue. That there may be no question about this we again quote it:

"In the District Court of Lancaster County, Nebraska.

"JABEZ C. CROOKER, Plaintiff,
v.
HENRY STATELY, DORA STATELY and L. B. BRONSON, Defendants. } Affidavit.

"Jabez C. Crooker, plaintiff in the above entitled action, being first duly sworn, deposes and says, that on the —— day of January, A. D. 1886, he filed a petition in the district court of Lancaster county, Nebraska, against Henry Stately, Dora Stately and L. B. Bronson, the object and prayer of which is to foreclose a certain mortgage executed by the defendant to the New England Mortgage Security Company (and duly assigned to said plaintiff) upon the east half ($\frac{1}{2}$) of the southwest quarter of section 22, town 7 north, range 5 east, in Lancaster county, Nebraska, to secure the payment of a note and coupon, dated December 23, 1876, for the sum of $250 upon the note, and $18.20

upon coupon, due and payable December 23, 1881; that there is now due upon said note, coupon and mortgage, the sum of $374 and $37 attorney fees, and plaintiff prays that said premises may be decreed to be sold to satisfy the amount due thereon.

"Affiant further states that defendant, Henry Stately, is a nonresident of the state of Nebraska, and service of summons can not be made within this state upon him.

"Wherefore plaintiff prays service upon said defendant by publication. J. C. CROOKER.

"Subscribed in my presence and sworn to before me this 6th day of January, 1886. J. H. BROWN,
"Justice of the Peace."

That such an affidavit is void, and confers no jurisdiction on the court to take any action in a foreclosure proceeding, has been frequently decided by this and other courts. The exact question first came before this court in *Blair v. West Point Mfg. Co.* 7 Neb. 146. In that case the affidavit, like the one above quoted, was without venue. Judge MAXWELL, speaking for the court, said: "It is clearly shown by the record that the defendants in the court below were nonresidents of this state. It also appears that the case is one that falls within the fourth subdivision of section 77 of the Code of Civil Procedure, in which service may be made by publication, or by personal service of summons out of the state. But before service can be made by publication, or by personal service of summons out of the state, an affidavit must be filed setting forth that service of summons can not be made within the state on the defendant or defendants to be served, and that the case is one of those mentioned in section 77. No affidavit was filed in this case, therefore there was no valid service of the summons. *Fiske v. Anderson*, 33 Barb. (N. Y.) 71, 75; *Litchfield v. Burwell,* 5 How. Pr. (N. Y.) 341; 1 Code Rep. (N. S.) 41; *Morrell v. Kimball,* 4 Abb. Pr. (N. Y.) 352. The objection, that the affidavit of the service of the summons has no venue, is well taken. An

affidavit should show, upon its face, that it was taken within the officer's jurisdiction. The motion to quash, therefore, should have been sustained." It was held by the court that the decree based upon the affidavit without venue was absolutely void. The question came up again in *Byrd v. Cochran,* 39 Neb. 109. In that case the question of the validity of a mechanic's lien was involved, and the court again stated, following *Blair v. West Point Mfg. Co., supra,* that the affidavit should show on its face that it was taken within the officer's jurisdiction; and cited in support of this ruling *Davis v. Rich,* 2 How. Pr. (N. Y.) 86; *Sandland v. Adams,* 2 How. Pr. (N. Y.) 127; *Snyder v. Olmsted,* 2 How. Pr. (N. Y.) 181. The rule is firmly established in New York that an affidavit of the character of the one under consideration in this case is a nullity. *Thompson v. Burhans,* 61 N. Y. 52; *Lane v. Morse,* 6 How. Pr. (N. Y.) 394. That the affidavit for service of summons by publication is jurisdictional, and where there is no affidavit or where the affidavit is fatally defective the publication is void, has been frequently held by this court. *Atkins v. Atkins,* 9 Neb. 191; *McGavock v. Pollack,* 13 Neb. 535; *Rowe v. Griffiths,* 57 Neb. 488.

A careful examination of all of the cases shows that we are unmistakably committed to the rule that the affidavit must show upon its face the proper venue, or must disclose that the officer before whom it was executed was an officer of the county where the same was filed. The affidavit in question herein does neither, and, unless we adhere to our former opinion, we must overrule all of the cases heretofore decided by us involving this question, and establish another and different rule. This we are not inclined to do. The rule has existed in this state so long that it may be said to be a rule of property. The law on this question has become fixed and certain, and it ought to be allowed to remain certain, even if in some cases it seems to work a hardship. The rule that we are asked to adopt is uncertain, and the decision of each case would be subject to the effect of such extrinsic evidence and facts

as the party desiring to support a judgment, void upon its face, might be able to produce. It is impossible to forecast the amount of mischief which might be caused by the adoption of such a rule. Again, the cases upon which we are asked to overrule our former decisions are none of them exactly in point, but all turn upon some other proposition. It is claimed, however, that we may resort to the title of the case to supply the missing venue. This we can not do, for the title always states the name of the county in which the action is brought, while the affidavit may be sworn to in any other county, or even in another state, while the venue is always laid in the county where the affidavit is in fact sworn to. It is further contended that we may go to the petition to supply the necessary facts. This can not be done, for it appears that the petition was sworn to and filed in the latter part of one year, while the so called affidavit was not made and filed until the fore part of the next year. The rule which we have established is not a harsh or unjust one. A person claiming an interest in real estate under judicial proceedings, which, of course, are a matter of record, is bound to take notice of all that the record discloses. He is charged with notice of any fact showing want of jurisdiction in the court to render the judgment, or make the order under which he claims title. Therefore he can not be said to be an innocent purchaser, or entitled to the protection of the court as such.

Lastly, it is claimed that we should recede from our former judgment, for the reason that the question of adverse possession was not considered therein. An examination of the record discloses that at the time the foreclosure proceedings were had on which the sheriff's deed in question is based, Stately's wife was an inmate of the insane asylum, and his children were all minors. It further appears that the oldest child did not reach the age of majority until some time in the year 1888, and, of course, the others became of age, in turn, much later. This action was commenced in the latter part of 1897, and ten years had not elapsed after the statute of limitations began to

run and before it was commenced. Therefore the action was begun in time. It may be further stated that limitation as to adverse possession did not begin to run while the plaintiffs were minors. This would seem to be sufficient to dispose of this question.

A careful review of the case convinces us that our former judgment was right, and we therefore recommend that it be adhered to.

GLANVILLE and ALBERT, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the former judgment is adhered to.

JUDGMENT OF REVERSAL ADHERED TO.

WILLIAM DIEDRICHS V. LAURA DIEDRICHS.

FILED APRIL 9, 1903. No. 12,749.

1. **Divorce: PETITION: DEMURRER.** In an action brought by the wife for a divorce on the ground of cruelty, a demurrer to the petition on the ground that it shows condonation of the offense charged will not be sustained unless the statements of the petition plainly show acts and conduct on the part of the wife amounting to condonation. Generally, the question of condonation in such cases should be tried on the evidence as an issue of fact.

2. **Leave to Refile Pleading.** A supplemental petition was filed by the plaintiff and a copy thereof served on the attorney for the defendant some months prior to the trial of the case. The supplemental petition was stricken from the files for the reason that no notice thereof was given the defendant, and the same was filed without leave of court. Immediately thereafter the plaintiff was given leave to file her supplemental petition. *Held*, That this did not constitute reversible error.

3. **Notice to Take Depositions: MOTION TO SUPPRESS.** The plaintiff gave notice to the attorney of the defendant of the taking of depositions in the state of Ohio. The defendant at the time was confined in a jail in Ohio, and his attorney, immediately on receipt of the notice, sent the same to him through the mail. The notice never reached him, and he was unrepresented at the taking of the plaintiff's depositions, and her witnesses were not cross-examined

in his interest. These depositions were taken three months or more before the trial of the case, and no effort was made to secure a cross-examination of the witnesses prior to the trial. *Held*, That the court properly refused to suppress the depositions.

4. **Motion for Continuance.** Where the affidavit in support of a motion for a continuance does not set out the facts and circumstances to which an absent witness will testify, and especially where it is not shown that there are no other available witnesses by whom the facts known to the absent witness can be proved, the continuance of the case should be denied.

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

Harrison & Pearne and *H. S. Ridgely,* for plaintiff in error.

Joseph S. Hoagland and *William V. Hoagland, contra.*

DUFFIE, C.

On April 20, 1900, Laura Diedrichs, defendant in error, filed her petition in the office of the clerk of the district court for Lincoln county, praying for a divorce from her husband, William Diedrichs, upon the ground of cruelty. No specific acts of cruelty are set out in the petition of a date later than December, 1899. It is first insisted by the plaintiff in error that the petition shows upon its face that the acts of cruelty were condoned, and a demurrer was interposed to the petition upon these grounds, which was overruled by the court. In his argument, the plaintiff in error assumes that Mrs. Diedrichs lived with her husband up to the date of the filing of her petition. This does not appear upon the face of the petition, and if it did we are not prepared to hold that condonation should be so conclusively presumed therefrom as to require the court to sustain a demurrer to the petition upon that ground. Under some circumstances the continued cohabitation of the wife with her husband after cruelty practiced upon her will work a condonation, but this is not always the case.

Bishop, in his work on Marriage and Divorce, vol. 2, sec. 51, formulates the following rule to be applied in such cases: "Special caution should be exercised in applying the rules of condonation to cruelty. Not their letter, but their spirit, should be the guide. We are to consider, when asked to infer condonation from subsequent cohabitation, the peculiar nature of the offense of cruelty, as generally witnessed, developing itself by degrees, and so slowly as seldom to reveal even to the sufferer the precise line between the endurable and the unendurable; the difficulty which a wife experiences in making up her mind, in an hour or day, whether she can longer bear her burden; the fact, that often she can not herself know certainly, and at once, whether or not she is in bodily peril, which is the true criterion of legal cruelty, and that while in suspense she must continue the cohabitation; and, in connection with these universal aspects, whatever is special, bearing the one way or the other, in the particular case."

We think there was no error in overruling the demurrer, and trying as an issue of fact the question of condonation. December 17, 1900, Mrs. Diedrichs filed a supplemental petition, setting up further acts of cruelty, which she alleged had occurred subsequent to the filing of her original petition; and afterward, and on February 2, 1901, the defendant filed an answer to the original petition, and a motion to strike from the files the supplemental petition, for the reason that the same was filed without notice being served upon the defendant or his attorney, and without an order of court having been first obtained therefor. This motion came on to be heard on April 17, 1901, apparently without any evidence to support it in the way of affidavits or otherwise, and was resisted by the plaintiff, who filed the affidavit of J. S. Hoagland, her attorney, to the effect that he had delivered a copy of the supplemental petition to W. T. Wilcox, one of the attorneys for the defendant, on December 17, 1900, the date of filing the same. The court sustained the motion and struck the supplemental petition, but thereafter, and on motion of the plain-

tiff, allowed the same to be refiled. Section 149 of our Code of Civil Procedure is as follows: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply alleging facts material to the case, occurring after the former petition, answer, or reply."

The object of requiring notice undoubtedly is to allow the party against whom the pleading is filed to examine the same and be advised of its contents, and to object thereto if so advised. All this was accomplished by serving the attorney for the defendant with a copy of the supplemental petition filed in the case. On the record, as we find it, we think the court was in error in striking the supplemental petition from the file; and if this be true, the order allowing it to be refiled was error without prejudice, and the defendant can not complain of the action of the court in that respect.

It appears from the bill of exceptions that shortly after filing her petition Mrs. Diedrichs left the state of Nebraska and went to the home of her parents, in Ohio, where she was delivered of a child. It is claimed that her visit to Ohio was for the purpose of being with her mother during the period of her confinement. Shortly after the birth of her child her husband appeared, and, as is claimed, took forcible possession of another child, about two years old and endeavored to escape with him from the state. Such legal proceedings were had as caused the arrest of defendant in the state of Ohio, and his confinement in the jail of the county. It was apparently during his confinement in the jail that notice was served upon his attorneys in North Platte of the taking of depositions in the case in support of Mrs. Diedrichs's petition. This notice was sent by his attorney to Diedrichs in Ohio, but was never delivered to or received by him. In consequence of his failure to receive notice of the time and place of the taking of the depositions, he was unrepresented, and the witnesses were not cross-examined. A motion to strike these depositions from the file was made upon that ground, and

overruled by the court, and this action of the court is assigned as error. We do not think that reversible error can be predicated upon the action of the court in overruling this motion. The plaintiff had done all that was required of her in giving notice to the attorneys of the defendant of the time and place where her depositions would be taken. To charge her with the misfortunes of the defendant is not allowable. It is true that the court should endeavor in every way to give a party a fair hearing, and a reasonable opportunity to procure his evidence and to cross-examine the witnesses of his adversary; but if the defendant, through his fault or misfortune, was placed in such a position that this notice failed to reach him, the fault can not be attributed to the plaintiff, who had done all that the law required of her to secure her depositions. If the defendant had moved the court for a postponement of the trial, and for an opportunity to cross-examine the witnesses whose depositions were offered, we do not say that the court, in its discretion, ought not to have granted such a request, but he had no right to demand that depositions taken in a legal way should be stricken from the file, and the plaintiff put to the trouble and expense of retaking them.

On December 11, 1901, the defendant filed an application for a continuance of the case on account of the absence of witnesses, which motion was overruled for the reason "that the same shows want of diligence on the part of the defendant in preparation for trial." It will be noticed that the petition was filed in April, 1900, and the motion for a continuance in December, 1901, some twenty months after the commencement of the action. No diligence whatever is shown by the defendant in attempting to secure the attendance of the absent witnesses, and, further than that, as to all but one of these witnesses no specific act or facts to which they would testify is contained in the affidavit, nor is it alleged that there were not other available witnesses who would testify to the same matter. There was no error in overruling this motion.

Complaint is further made that the decree is not supported by the evidence. We have examined the bill of exceptions with care, and, while the evidence is not of the most conclusive character, and the trial court may have taken into consideration his own knowledge of the habits and character of the defendant, we are not prepared to say that the evidence is not sufficient to support the decree.

We recommend the affirmance of the decree of the district court.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

ANNA HAJSEK V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.*

FILED APRIL 9, 1903. No. 12,634.

1. **Imputed Negligence.** Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state.

2. **Negligence as a Matter of Law.** Unless the inference of negligence from the conduct of a party is so direct and immediate as to be within the common and universal experience of mankind, the court may not instruct the jury that he was negligent as a matter of law.

ERROR to the district court for Valley county: JOHN R. THOMPSON, DISTRICT JUDGE. *Reversed.*

A. Norman, Elliott J. Clements and *Edwin M. Coffin,* for plaintiff in error.

J. W. Deweese, Alfonso M. Robbins and *F. E. Bishop, contra.*

* Rehearing allowed. See note at end of opinion.

AMES, C.

The plaintiff, Anna Hajsek, and her husband, Vaclav, were farmers, living a short distance northwest of the village of Ord, in Valley county. On the 22d day of December, 1900, they drove to town with their family team, a span of horses, attached to a common lumber wagon, upon the box of which was a spring seat, upon which they sat. After spending the afternoon in the transaction of business with the village storekeepers, they started toward home at about six and a half o'clock in the evening. The night was cold, dark and stormy, the wind blowing fiercely from the northwest, and carrying considerable clouds of dust. The husband sat on the eastward end of the seat and drove the team. At a short distance north of the village the road which these parties were traveling was crossed at nearly right angles, and at a distance of about three-quarters of a mile northwest of the village depot, by the track of the defendant railroad company. Westward from Ord the company operated two regular trains a day, the last of which, if running according to "schedule time," should have passed this intersection at 5 o'clock P. M. on the day in question, but without the knowledge of the plaintiff or her husband, it was an hour and forty minutes late. Just before reaching the crossing, going northward, there was a considerable depression in the common highway, and, beginning about two hundred feet eastward from the crossing, there was a cut of considerable length and from five to eight feet deep in the railroad grade. In daylight a person standing on the highway sixty feet south of the crossing could have seen an approaching train four hundred and fifty feet away, and at from thirty to forty feet from the crossing a train under like circumstances might have been seen nearly the whole distance to the station. Husband and wife both testify that when they were from thirty to forty steps—that is, from ninety to a hundred and twenty feet—south from the crossing they both looked eastward

for an approaching train, but saw none, and afterwards took no precaution, and neither saw a train nor heard any signal until they were actually on the track, and a train was bearing close down upon them, which collided with the wagon, and threw the plaintiff to the ground, causing injuries to recover for which she brings this action. Upon this state of the evidence the court instructed the jury to return a verdict for the defendant, upon the ground that the plaintiff was, as a matter of law, guilty of such negligence as to preclude her from recovery, even if it should be found that the defendant was also negligent. Was this instruction right?

In seeking an answer to this question it is unnecessary to inquire what would have been the case if the action had been by the husband to recover for injuries to himself. Some argument is advanced in support of the proposition that inasmuch as the plaintiff mentioned the team and wagon as "ours," and because the expedition into the the village was for the purpose of buying family supplies, the transaction should be regarded as a "joint enterprise," in which the negligence of each partner should be imputed to the other, within the rule of *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627. We are not impressed by this argument. Doubtless the life journey of the parties since their marriage may, in a sense, be regarded as a joint enterprise, but this fact would not be held to charge the wife with the consequences of the husband's negligence in most transactions. Why should it be so regarded in this instance? In *Huff v. Ames,* 16 Neb. 139, the doctrine of imputed negligence was distinctly repudiated by this court. The fact that the person injured in that instance was an infant we do not conceive to affect the rule now under consideration. We can see no reason why, if the negligence of the husband may be imputed to his wife, that of a father may not also be imputed to his child. The fact that the child, being under years of discretion, is incapable of negligence, while the wife is so capable, can make no difference with the application of

the rule. The sole question is whether, in the absence of the relations of master and servant, principal and agent, etc., the negligence of one person can be imputed to another. The rule, if valid, is of universal application, and unless the person guilty of negligence is the agent, servant or partner of the person injured, his delinquency can not be imputed to the latter. This question is discussed at length, and with the citation of a wealth of authorities, in *Pyle v. Clark,* 75 Fed. 644, where the doctrine is so fully elucidated as to render further comment by us uncalled for. The plaintiff in this case was a woman of discreet years, and unlike an infant, capable of negligence independently of or concurrently with her husband. Can it be said from the evidence that her conduct was such as to lead to no other inference than that she was culpably negligent, so that it became the duty of the court to withdraw the question from the jury? It seems to us that it can not. She was sitting on the side of the wagon furthest from the approaching train, her head was incumbered with wraps, on account of the cold and boisterous weather, and her attention was devoted largely to observing whether the wagon kept in the beaten path. It is not shown that she had any especial reason to apprehend danger, and the hour of the day when the train usually passed the crossing had long since elapsed. Under all the circumstances, which need not be fully detailed here, she may have been negligent in entrusting the management of the team, and the keeping of a look out for danger exclusively, or nearly so, to her husband; but we can not say that such an inference is so immediate and direct as to exclude any other presumption in harmony with the common and universal experience of mankind, and we are therefore of opinion that the instruction complained of was erroneous.

It is recommended that the judgment of the district court be reversed, and a new trial granted.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED AND REMANDED.

NOTE.—On rehearing the judgment of this court was reversed and the judgment of the lower court was affirmed. Reported in 5 Neb. (Unof.) 67, for reasons stated in reporter's note to that volume, page v.

FRANK RIIFF V. FRED RIIBE.

FILED APRIL 9, 1903. No. 12,715.

1. **General Denial:** STATUTE OF FRAUDS. The objection that a contract sued upon is void under the statute of frauds because not in writing, may be availed of by a general denial in the answer.
2. **Instruction:** VOID CONTRACT. In an action to recover for personal services under a contract void because not in writing and not to be performed within one year, it is error to instruct the jury that the wage agreed upon by the void contract may be regarded as establishing the rate of the plaintiff's compensation.

ERROR to the district court for Cedar county: GUY T. GRAVES, DISTRICT JUDGE. *Reversed.*

Addison M. Gooding and *James C. Robinson,* for plaintiff in error.

Cassius H. Whitney, contra.

AMES, C.

The plaintiff alleged in his petition that on the 10th day of March, 1896, he entered into a contract with the defendant to work for the latter as an ordinary farm laborer for the term of one year from that date for a wage of $15 a month for the first eight months, and $10 a month for the remaining four months, making $160 for the whole year; and that he fully performed the contract; and at the expiration of the term of employment he continued in

the service of the defendant upon a mutual understanding with him that he should be paid for his services at the contract rate; and that pursuant to such understanding he remained in the employment of the defendant until the 10th day of August, 1899; and that he had been paid on account of the premises $155 and no more, leaving a balance due him of $400, for which, with costs, he prayed judgment.

The defendant, by his answer, denied the contract averred in the petition, but alleged that on or about the said 10th day of March, 1896, he hired the plaintiff to work for him in the capacity mentioned for the wage of $15 a month for the term of eight months and no longer, and that after the expiration of said period the plaintiff continued in the defendant's service until the 10th day of August, 1899, and that the value of plaintiff's services after the expiration of his eight months' contract was $15 a month for the corresponding months of each year, but for the remaining four months of each year the value of such services did not exceed that of the board and lodging of the plaintiff, which were afforded to him by the defendant. The defendant also pleaded certain matters by way of set-off, and admitted a balance due to the plaintiff of $62.59.

The reply was a general denial.

It will be seen that there is no disagreement in the pleadings with respect to the length of the term of actual service, nor does either pleading allege more than one express contract, and on the trial it was disclosed that no such contract was made, unless by parol. It was testified by the plaintiff that the agreement alleged in his petition was made on the 9th day of March for a year's service, to begin on the next day, and it was therefore a contract not to be performed within one year, and, not being in writing, it was void under the provisions of the statute of frauds. The law seems to be well settled that the objection that an alleged contract is void under the statute may be availed of by a general denial. *Livingston v. Smith*, 14

How. Pr. (N. Y.) 490; *Allen v. Richard,* 83 Mo. 55; *Wiswell v. Tefft,* 5 Kan. 263; Bliss, Code Pleading (2d ed.), sec. 355.

The same infirmity inheres in the plaintiff's contention as to services subsequent to the first year. His testimony in each case is that the agreement therefor was made before the beginning of the year to which it referred.

There having been, therefore, no contract proved between the parties, unless it be that alleged by defendant, the plaintiff was entitled to recover only such sum as his services could have been shown to have been reasonably worth, less such amounts of just set-off as it was liable to. But the court, by his instruction, submitted to the jury the question whether the parties had made the contract alleged in the petition. In the light of the admission of the plaintiff's own testimony this was manifest error. It was the province of the court to rule as a matter of law, upon the undisputed facts, that the alleged contract was void. But the nature and length of the employment having been admitted by the answer, we think that the general denial in the reply may properly be construed as putting in issue only the matters which were really in controversy, namely, the value of the services and the validity and amount of the alleged set-off. Plaintiff cites authorities in support of the proposition that although the contract alleged by him was void under the statute it might be given in evidence and considered by the jury in determining the value of the services after performance. *Murphy v. DeHaan,* 116 Ia. 61; *Kiene v. Shaeffing,* 33 Neb. 21. That this principle, if valid, must be subject to some important limitations and qualifications in its application to the circumstances of a case of ths kind appears to be evident, but we have not to do with it here. The court instructed the jury, in effect, that the terms of the void agreement, if proved, established the rate of wages. This is a quite different thing from telling them that in such case they could properly be considered in ascertaining the *quantum meruit.* The jury awarded the plaintiff a sum

evidently measured by the alleged contract rate, and the defendant prosecutes error.

It is recommended that the judgment of the district court be reversed and a new trial granted.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED AND REMANDED.

CHARLES V. CRAW, EXECUTOR OF THE LAST WILL AND TESTAMENT OF GEORGE W. CRAW, V. M. M. ABRAMS ET AL.*

FILED APRIL 9, 1903. No. 12,752.

1. **Official Bond:** DENIAL OF EXECUTION: EVIDENCE. Production of an alleged official bond from the proper official custody, together with the record of its approval, are not sufficient evidence of its execution when the latter is denied.

2. **Sheriff:** PROCEEDS OF JUDICIAL SALE. The statute constitutes the sheriff making a judicial sale of real property the sole custodian of the fund derived from such sale, between the date thereof and the date of confirmation, and, upon the happening of the latter event, makes it his duty to pay the money to the person or persons entitled thereto.

3. ———: ———: CLERK OF COURT. The sheriff and the purchaser disobey this statute at their peril, but they can not by such disobedience, and the payment of the money to the clerk of the court, impose obligations upon him, as such clerk, foreign to the duties of his office.

4. **Tender.** A tender in an answer or during the progress of the trial, does not necessarily admit the validity of the plaintiff's cause of action.

ERROR to the district court for Antelope county: JAMES F. BOYD, DISTRICT JUDGE. *Affirmed in part.*

* Rehearing allowed. See opinion, p. 553, *post.*

William Vincent Allen and *Willis E. Reed,* for plaintiff in error.

Norman D. Jackson, Otis A. Williams and *Edward* D. *Kilbourn, contra.*

AMES, C.

In an action for the foreclosure of a real estate mortgage, the court entered a decree of foreclosure and sale, which concluded as follows:

"It is therefore considered, adjudged and decreed by the court that in case the defendant fails for twenty days from the entry of this decree to pay or cause to be paid to the plaintiff or clerk of this court, first the costs of this action taxed at $——, and the sum of $2,685.55, so found due, with interest thereon at the rate of eight per cent. per annum from the date hereof, * * * that the defendants be foreclosed of all equity of redemption, or other interests in said mortgaged premises; that said mortgaged premises be sold, and an order of sale shall be issued to the sheriff of Antelope county, Nebraska, as upon execution, and bring the proceeds thereof into court to be applied in satisfaction of the sum so found due, in the order of their priority as above found; that he shall execute to the purchaser of said real estate a good and sufficient deed of conveyance therefor, and put such purchaser in the actual possession of said premises."

It will be observed that the decree directs that the premises be sold "as upon execution," but whether this direction has much force may be doubted, in view of the fact that the methods of judicial and execution sales contemplated by the statutes are apparently the same, where no specific procedure is enacted. Section 498 of the Code of Civil Procedure enacts: "If the court upon the return of any writ of execution or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of

the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this title, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements; and the officer on making such sale may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto, agreeable to the order of the court; Provided, That the judge of any district court may confirm any such sale at any time after such officer has made his return, on motion and ten days' notice to the adverse party or his attorney of record, if made in vacation. When any sale is confirmed in vacation, the judge confirming the same shall cause his order to be entered on the journal by the clerk."

Section 854 is as follows: "The proceeds of every sale made under a decree in chancery, shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded, and if there be any surplus, it shall be brought into court for the use of the defendant, or of the person entitled thereto, subject to the order of the court."

It will thus be seen that the statute contemplates that in the case of a judicial or execution sale, the officer making the sale shall retain the money in his hands until confirmation, and shall then pay the same, or so much thereof as may be requisite, to the party entitled thereto, and that only the overplus thereof, if any, after making such payment, shall be paid into court. Whether, in violation of this statute, an order of the court directing the sheriff or other officer to pay the purchase money into court or to the clerk of the court, pending the confirmation, would be valid, we do not think it necessary to decide, because the order and the statute should be so construed, if possible, as to harmonize with each other, and there does not seem to be any necessary conflict between them. The sheriff is an officer of the court, and money in his hands, acquired

in the execution of judicial process, is in as true a sense money in the possession of the court as is money in the hands of any other officer of the tribunal, so that it seems to us that the order directing the officer to bring the proceeds into court was not equivalent to an order to pay it to the clerk or to pay it into the court in any specific sense, but simply a direction to retain the money in his possession, as the statute provides, and to have it with him before the court when his return of the sale should be presented for examination and confirmation. But whether the order and the statute are in harmony or in conflict, the sheriff regarded neither. Having advertised and offered the land for sale, he struck it off to one Barkdall, as purchaser, for $2,050, that sum being less than the amount of the decree, and made the usual return of sale. He did not, however, receive any part of the purchase money which was paid by Barkdall to the defendant Abrams, who was at the time clerk of the court. Abrams made an entry of the fact on the judgment record and gave the purchaser a receipt for the money, which, without fraud or censurable negligence, he deposited in a national bank at Neligh. Within a short time afterwards the bank became insolvent, and was taken into possession by a receiver appointed by the comptroller of the currency. Abrams made proof of his claim and received dividends thereon amounting in the aggregate to $1,332.50. It does not appear from the record that the sheriff's sale was ever confirmed by the court, or that the officer ever conveyed or attempted to convey the premises.

This is an action by the plaintiff in foreclosure upon the official bond of the clerk to recover the amount of the deposit. A breach of the obligation is assigned in the petition in the following words: "That on the 29th day of August, 1898, by virtue of an order of the district court in an action then pending in said court in which this plaintiff was plaintiff and Orson Fields *et al.* were defendants, there was paid into the hands of M. M. Abrams as clerk of the district court of said county the sum of

$2,050 for the use and benefit of this plaintiff," and that he had failed to account for and pay over the same.

Abrams answered, admitting the receipt of the money but denying that he received it in his official capacity, or otherwise than as an individual depositary for the personal accommodation of Barkdall, and without compensation paid or promised. He further averred his freedom from negligence in the keeping of the money on deposit in the bank, the proof of the claim against the institution, and the receipt by him of the above mentioned sum in dividends, and offered to pay that amount to the plaintiff and to assign to him the receiver's certificate in satisfaction of the demand in suit.

The separate answers of the sureties were, in substance, general denials. A jury was waived and a trial had before the court, who rendered a judgment generally in favor of all the defendants. The plaintiff prosecutes error.

On the trial the plaintiff offered and the court received in evidence an instrument purporting to be the bond in suit, together with a certified copy of the record of the county board approving it. The defendants objected to both offers, and there was no other attempt to prove the execution, delivery or acceptance of the bond. We think the evidence is incompetent and insufficient to support a judgment against the defendants upon the instrument. This court held in *Holt County v. Scott,* 53 Neb. 176, that "the fact that an official bond has been approved does not of itself constitute or evidence the delivery and acceptance of the bond." Notwithstanding this rule it might, perhaps, be held that if the execution, that is the signing of the instrument by the obligors had been proved, the custody of it by the proper officials, together with the record of its approval, would be *prima facie* evidence of its delivery and acceptance; but, the answer being a general denial, we think that until its genuineness is established, no presumption can be entertained concerning it. As respects all the defendants except the clerk, we are

satisfied that, for the reason just stated, there is in the record insufficient competent evidence to sustain a recovery against them, and that as to them the judgment should be affirmed.

As respects the clerk, he admits the receipt by him of the money during his incumbency of the office, but his answer tenders two defenses, first, that he did not become the custodian of the money in his official capacity; and second, that such liability as he is subject to therefor is upon his common law obligation as bailee. The plaintiff contends that the defendant has waived this latter defense by the tender made in his answer and repeated upon the trial. In support of this proposition the plaintiff relies upon the decisions of this court in *Murray v. Cunningham,* 10 Neb. 167; *Cobbey v. Knapp,* 23 Neb. 579, 591; *Phœnix Ins. Co. v. Readinger,* 28 Neb. 587, to the effect that "a plea of tender in an answer is an admission that the amount tendered is due the plaintiff." We are of opinion, however, that the rule thus announced is not of as broad application as the plaintiff would have us believe. The defendant does, indeed, admit that he is responsible for the money as bailee without hire; and by offering to pay the sum in his hands to the plaintiff, he may well be held to have admitted that the latter has in some way succeeded to the rights of the bailor and that the sum tendered is due upon the contract of bailment. But we do not discover anything in such admissions inconsistent with his explicit denial that he is or has been the official custodian of the fund or liable therefor upon his official bond. We have examined the authorities referred to in the decisions above cited and do not find anything in them calling for so extended an application of the doctrine as the plaintiff contends for. In those cases there was either no question about the nature or validity of the contract in suit, but only as to the amount recoverable thereon, or else, as in the case of *Cox v. Brain,* 3 Taunt. (Eng.) 95, there were several counts and the money was tendered generally. In this case Lord Chief Justice Mans-

field said that the defendant might have preserved his rights by pleading *non assumpsit* to the first count, on the special contract, and paying the money into court on the *quantum valebant*. The decision is an authority directly to the contrary of the contention of the plaintiff, and is to the effect that the tender is an admission of the defendant's common law ability as bailee only, and does not impair his defense in his official character.

This brings us to the final question in the case, concerning which we have, perhaps, already sufficiently indicated our opinion. The statute explicitly makes the sheriff the official custodian of moneys obtained upon the judicial sale of real property until the confirmation of the sale, when he is required to pay the same to the persons entitled thereto. Only an unclaimed surplus thereof, if any, is he permitted to pay into court for the benefit of those ultimately entitled. Whether in any case the court can by order relieve the sheriff of this responsibility, it is not necessary now to inquire. In our opinion, the order in the case at bar "to bring the money into court," was no more than a specific direction to the sheriff to obey the mandate of the statute. Both the officer and the purchaser were guilty of disobedience at their own peril, but their conduct in that particular did not impose upon the clerk of the court, as such, any obligation foreign to the duties of his office.

Upon the undisputed facts disclosed by the record we are of opinion that the plaintiff was entitled to judgment against the defendant Abrams for the amount tendered in his answer, but without costs or interest accruing subsequently to the date of the tender.

It is recommended that the judgment of the district court as to all the defendants except Abrams be affirmed, but as to said defendant the judgment be reversed and the case remanded for further proceeding consistent with this opinion.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court as to all the defendants except Abrams be affirmed, but as to said defendant the judgment be reversed, and the case remanded for further proceeding consistent with this opinion.

AFFIRMED IN PART.

The following opinion on rehearing was filed November 5, 1903. *Judgment of affirmance adhered to:*

1. **Official Bond:** DENIAL: EVIDENCE. The introduction in evidence of a certified copy of what purports to be an official bond, without proof of its execution and delivery, is not sufficient to authorize the court to render a judgment against the sureties thereon where its execution and delivery are denied by them.
2. **Sheriff Sole Custodian of Proceeds of Judicial Sale.** The sheriff making a judicial sale of real property under a decree of foreclosure, is the sole custodian of the fund derived from such sale between the date thereof and the confirmation of such sale, and upon such confirmation it is his duty to pay the money to the person or persons entitled thereto in conformity to the order of the court.
3. **Payment to Clerk:** LIABILITY NOT DETERMINED. Whether the payment of the money by the purchaser or by the sheriff to the clerk of the court in vacation, and before a confirmation of the sale, is payment into court so as to charge the clerk and his sureties on his official bond with its repayment, is not determined.
4. **Denial of Execution and Delivery of Bond by Sureties:** TENDER BY PRINCIPAL. Where the sureties deny the execution and delivery of the official bond, and the clerk defends on the ground that he merely received the money as bailee, and not in his official capacity as clerk, a tender of part payment by him does not impair the defense of the sureties.
5. **Confirmation is Condition Precedent to Plaintiff's Right to Proceeds.** Before a plaintiff in a foreclosure suit can recover the proceeds of a judicial sale on his decree, he must show his right thereto by proving the confirmation of the sale.
6. **Former judgment adhered to.**

BARNES, C.

The opinion written by Commission AMES in this case, by which the judgment of the trial court was affirmed, was

approved by the court and filed on April 9, 1903. A rehearing was allowed, and the case is now before us for the second time. The plaintiff in error, by this suit, sought to recover a judgment against the defendant Abrams, as clerk of the district court of Antelope county, together with the sureties on his official bond, for money which he alleged had been paid into court under a decree of foreclosure in which he was the plaintiff. The sureties denied the execution and delivery of the bond, as will appear from the facts stated in our former opinion. It is now contended:

1. That so much of that opinion as held that the production of an alleged official bond from the proper official custody, together with the record of its approval, are not sufficient evidence of its execution, is not a correct statement of the law. A re-examination of that question only serves to strengthen our belief in the correctness of this rule of law. In the case of *Holt County v. Scott*, 53 Neb. 176, we held that "the fact that an official bond has been approved does not of itself constitute or evidence the delivery and acceptance of the bond." It is further stated in the opinion therein (p. 198) that "if the bond is approved, this fact also shows that the investigation has disclosed everything to be satisfactory, but the approval does not constitute or evidence a delivery and an acceptance." We are thus fully committed to the doctrine complained of. Indeed, it would seem that there should be no question about this. It can not be contended that where the execution and delivery of an official bond is squarely denied by those sought to be charged thereby as sureties, its mere production, without any proof whatever of its execution and delivery, is sufficient evidence of such fact to bind such sureties. In such a case it would be incumbent upon the person seeking to recover upon the bond to first introduce some competent evidence of the fact of its execution and delivery, before the bond itself could be received in evidence. We are aware of no case which holds a contrary doctrine. But it is contended

in this case that because a certified copy of what purported to be the official bond on which a recovery was sought was introduced in evidence, the rule above stated can not be invoked. In other words, counsel insists that section 408 of our Code of Civil Procedure, in effect, makes the certified copy of an instrument of greater probative force than the original instrument itself. It is contended, in effect, that a certified copy of any instrument which by authority of law is to be filed or kept in any public office, may be introduced in evidence; and when so introduced, although the execution of the original, of which it is a copy, is denied, it becomes *prima facie* evidence of such execution, and dispenses with the necessity of any proof thereof. We can not approve of this doctrine. The effect of the statute in question is to authorize the introduction of a certified copy of an instrument in place of the original, and make it of equal credibility therewith. It does not purport to make it of any greater probative force, nor is it intended thereby to dispense with any of the formal proofs necessary to establish the execution of an original instrument when such execution is denied.

In *Spielman v. Flynn,* 19 Neb. 342, it was held that a certified copy of the reporter's notes taken at a former trial was admissible in evidence under a stipulation; that the testimony of the witness taken at the first trial should be read in evidence in the second trial without calling such witness.

In *Hall v. Aitkin,* 25 Neb. 360, it is stated that in a case of foreclosure of a chattel mortgage, where such foreclosure was not resisted, nor the authority of the mortgagee questioned, a certified copy would not be necessary, and that the original mortgage on file would be sufficient to justify the proceeding when collaterally attacked. The validity of the mortgage in that case was not questioned, and on page 363 of the opinion we find the statement "that a certified copy of the chattel mortgage which had attached thereto the proper certificate, was properly introduced in evidence under section 408 of the Code of Civil Procedure."

In *First Nat. Bank of Wilber v. Ridpath,* 47 Neb. 99, the court said that "a mortgage properly certified to by the county clerk as a copy of the instrument on file in his office, was competent evidence under section 408 of the Code." But in that case the execution of the mortgage was not in question.

In the case of *Equitable Building & Loan Ass'n v. Bidwell,* 60 Neb. 169, it was held that a certified copy of the articles of incorporation of a building and loan association was primary proof of the right of such association to transact business.

In *Clough v. State,* 7 Neb. 320, we said that a certified copy of the stenographer's report of the trial might be introduced in evidence.

In *Brownell v. Fuller,* 54 Neb. 586, it was held that "in cases where the clerk of the district court is authorized to settle bills of exceptions, the act may be performed by a deputy, it not being shown that the principal is absent," and leave was given to file an affidavit, which it was claimed was not properly made a part of the bill of exceptions.

In *Missouri P. R. Co. v. Baier,* 37 Neb. 235, the question was as to the admissibility of a certified copy of the letters of administration issued under the order of the county court. It was held that such copy was admissible under section 408 of the Code of Civil Procedure. These are the cases decided by this court which are cited by counsel in support of his contention, and it will be observed that in none of them was the direct question involved herein under consideration. Many cases from other jurisdictions are cited in support of this contention, but none of them touch the point under consideration, and it may be conceded that all of them state the law correctly, yet they do not go to the extent of holding that a certified copy of an instrument has any more probative force than the original. We, therefore, adhere to the rule as heretofore stated.

It is further urged that a certified copy of the official

bond was actually received in evidence. This is true, as disclosed by the record, and yet it was insufficient to prove the execution and delivery of the original bond on which the action was brought, and it was not sufficient to sustain a judgment against the sureties under the issues in this case.

2. The plaintiff further contends that so much of our opinion as holds that the sheriff making a judicial sale of real property is the sole custodian to the fund derived from such sale, between the date thereof and the date of confirmation, and upon the happening of the latter event it is his duty to pay the money to the person or persons entitled thereto, is erroneous. We adhere to this statement, because it is in direct conformity to the statute relating to such sales.

It is further contended, under this subdivision, that when the sheriff paid the money to the clerk of the court, the principal defendant herein, notwithstanding the statute, the clerk received the money by virtue of his office; in other words, that there was a payment into court, and the clerk, together with the sureties on his bond, became charged with the duty of accounting for and paying the money over to the plaintiff. The rehearing in this case was granted because the court was in some doubt as to whether or not the opinion was correct on this point. But for the reason that our former judgment must be adhered to upon other grounds, it is unnecessary to further consider this point.

3. It is contended that when the principal defendant, Abrams, made his tender in court, he thereby acknowledged the indebtedness. This doctrine is not questioned in our opinion, but it is stated therein that such tender does not impair the defense of the sureties. We think this is a correct statement of the law. The sureties were making separate defenses for themselves, while the principal was defending for himself alone, and his tender would not bind the sureties unless they participated therein. Again, such tender, so far as Abrams was con-

cerned, only admitted that he had received the money and was liable for it as bailee.

4. There is another reason why we should adhere to our former decision, which is that the record is silent as to whether or not the judicial sale, under which the money sought to be recovered was paid to the sheriff or the clerk, was ever confirmed. Without proof of confirmation, the plaintiff in a foreclosure suit is not entitled to recover the money bid at the sale, no matter in whose hands it may be. In *Trompen v. Hammond*, 61 Neb. 446, it was held that before a plaintiff can recover the proceeds of a judicial sale on his decree, he must show his right thereto by proving the confirmation of the sale by the court. That this is a correct statement of the law there can be no doubt. The sale in this case amounted to nothing more than a bid or offer to purchase the land, an acceptance thereof by the sheriff, and a payment of the money into his hands to await the approval of the court. Without such approval and a confirmation of the sale, it would be the duty of a sheriff to return the money to the bidder; and until the sale was confirmed by the court, and the sheriff ordered to make a deed to the purchaser, the plaintiff was not entitled to the money, or any part of it.

It follows that the judgment of the district court was right, and should be affirmed, and we therefore recommend that our former decision be adhered to.

GLANVILLE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, our former judgment is adhered to.

FORMER JUDGMENT ADHERED TO.

ALBERT, C., concurring.

I concur in the conclusion reached by Commissioner BARNES on the several propositions discussed by him. But it is not quite clear to me that the effect to be given to

a certified copy of an instrument as evidence is necessarily involved in this case. The original bond was introduced in evidence. The certified copy was substituted, I infer from the record, merely for the purpose of preparing a bill of exceptions, and was not a part of the evidence before the trial court.

But assuming that the certified copy was before the trial court, I concur with my associate in the proposition that its production did not dispense with the necessity for proof of the execution of the original by the sureties. Section 408, Code of Civil Procedure, upon which the plaintiff relies, is as follows: "Duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed." The object of that section is not to dispense with proof of the execution of a private writing, but to obviate the necessity of producing public records in court, which is always inconvenient, and often impossible, as they are frequently wanted in more than one place at the same time.

While the bond itself, or at least a certified copy thereof, was introduced in evidence, there was no proof of its execution, and it was received over the objections of the sureties. There was, therefore, no competent evidence before the court of the execution of the bond by the sureties. It is a familiar rule that where the findings of a trial court are assailed on the ground that they are not sustained by sufficient evidence, only competent evidence will be regarded. As competent evidence on a vital point in plaintiff's case against the sureties is wholly lacking, the findings and judgment in favor of the sureties must of necessity be affirmed, regardless of the merits of any other proposition in the case.

FAIRBANKS, MORSE & COMPANY V. CITY OF NORTH BEND.

FILED APRIL 9, 1903. No. 11,787.

1. **Municipal Corporation**: CONTRACT: ADVERTISING FOR BIDS. A city or village can enter into a valid contract for the erection or construction of any work authorized by section 69, article 1, chapter 14, Compiled Statutes, only after it has advertised for bids as required by subdivision XV of such section, and then only with some person in accordance with a bid tendered by him in response to such advertisement.

2. **Object of the Statute.** The object of that subdivision is to invite competition and to prevent favoritism and fraud; to attain that object it is essential that the bidders, so far as possible, be placed on equal footing, and be permitted to bid on substantially the same proposition, and on the same terms.

3. **Bid Changed After Expiration of Time**: ITS ACCEPTANCE UNAUTHORIZED. Where a bid, filed within the time fixed by the advertisement for receiving bids, is substantially changed and modified after such time, it is to be regarded as a new bid, received after other competitors, by the terms of the notice, had a right to presume that the contest was closed; consequently, its acceptance would be in violation of the provisions of said subdivision, as above construed, and would impose no liability on either party.

4. **Recovery of Deposit.** Where a bid, under the circumstances mentioned in the preceding paragraph, is accompanied by a deposit, as a guarantee that the bidder will enter into a contract in accordance with the terms of his bid if accepted, upon the refusal of the bidder, after his bid is accepted, to enter into such contract, he is entitled to a return of his deposit, because, under such circumstances, such bid and its acceptance can not be made the basis of a valid contract.

5. **No Estoppel.** In an action to recover such deposit, the plaintiff is not estopped to deny the validity of the bid and its acceptance, nor does the maxim, *Potior est conditio possidentis*, apply in such a way as to defeat a recovery.

ERROR to the district court for Dodge county: JAMES A. GRIMISON, DISTRICT JUDGE. *Reversed.*

George L. Loomis and *D. L. Johnson*, for plaintiff in error.

E. F. Gray, contra.

ALBERT, C.

The defendant city was about to construct a system of waterworks, and, to that end, published a notice calling for sealed bids on the labor and material required for such purpose. The notice made reference to the specifications on file in the office of the city clerk, which detailed, among other things, a steam engine and duplex pump, and stated that "bids will also be received on 20 H. P. gasoline engine; also on a triplex power pump, capacity 450,000 gal. per 24 hours, to be substituted for the steam plant." It was also stated in the notice that bids would be received until 7 P. M., June 8, 1899, and that: "Each bid must be accompanied by a certified check for $200 on any local bank of this city in favor of the city of North Bend as a forfeit in case the work is awarded to the bidder and he should fail to enter into contract and file a good and satisfactory bond within five days of notice of awarding the work to the bidder. The check is to be returned to the bidder as soon as he has complied with the above requirements."

Within the time specified in the notice for receiving bids, the plaintiff filed a sealed bid on the gasoline engine and triplex pump; the bid was accompanied by a certified check for $200, as required by the terms of the notice. The bid was as follows:

"OMAHA, June 8, 1899.

"*City of North Bend, North Bend, Neb.*

"GENTLEMEN: We hereby propose to furnish you the following:

1 22 Actual H. P. Fairbanks-Morse gasoline engine complete.

1 450,000 gal. Gould's triplex power pump

delivered and set up, for the sum of one thousand four hundred and fifty ($1,450) dollars.

"Enclosed please find our certified check for $200 on the Bank of North Bend, dated June 8th, 1899.

"Yours truly, "FAIRBANKS, MORSE & CO.,

"By EDWARD REITER, *Agt.*"

The bids were opened after 7 P. M. of June 8, 1899, there being one other bid on the machinery covered by the bid of the plaintiff. Neither bid was accepted on that day, and the city council adjourned their consideration to the following day. On the following day an agent of the plaintiff supplemented its bid with the following offer in writing, made openly to the city council:

"NORTH BEND, NEB., June 9, 1899.

"*To the Hon. Mayor & Members of the City Council of the City of North Bend, Neb.*

"GENTLEMEN: In accordance with your plans and specifications for your city waterworks and in conformity to our formal bid for power and pump, we will furnish you one of our actual twenty-two (22) horse power Fairbanks-Morse gasoline engines of latest improved make, complete with electric and torch igniter with 5 bbl. gasoline supply tank and all necessary fittings. Also one (1) Gould's triplex power pump with 8x12 cyls.—guaranteed capacity of 450,000 gals. of water, per 24 hours. All to be delivered and erected on good and substantial foundation and connect same to your suction and discharge pipe, ready to be operated successfully. The engine to be furnished with friction clutch and directly connected to the pump. You to have the privilege of specifying a Smith Vail triplex power pump with 8x10 cyls. as specified in the bid of the Fremont Foundry and Machine Shop Co.'s bid, at the same price, you to take the risk of its being the capacity required, this choice however to be determined on or before June 15, 1899. All for the sum of fourteen hundred and fifty dollars ($1,450) payable when set up and operates successfully. Your acceptance hereof and approval of bonds as required shall be a conclusion of the contract between ourselves and the city of North Bend, Neb.

"Accepted as hereinbefore stated this date.

"FAIRBANKS-MORSE & CO.,

"Per HENRY COFFEEN, *Salesman.*

"J. C. NEWSON, *City Clerk.*

"HUGH ROBERTSON, *Mayor.*"

Thereafter, on the same day, the defendant accepted the plaintiff's bid, as supplemented and modified by the open bid made by the agent of the plaintiff on the 9th day of June, 1899. Some negotiations followed, looking to the execution of a formal contract between the parties covering the offer of the plaintiff to furnish the machinery, and the acceptance of such offer by the defendant. It is unnecessary, we think, to follow those negotiations. It will suffice to say that the plaintiff finally refused to execute a contract which the defendant had caused to be prepared, insisting that its terms were more onerous than was justified by the terms of the bid and the published notice. The defendant refused to modify its terms, and negotiations were broken off, and the defendant readvertised for bids. The plaintiff afterward demanded a return of its deposit, but the demand was refused. The plaintiff then brought this action against the defendant for the amount of such deposit. The defendant answered, setting up the refusal of the plaintiff to enter into a contract in accordance with the terms of its bid, and consequent damages. It was conclusively shown that such damages exceeded the amount of the deposit. The court directed a verdict for the defendant, and gave judgment accordingly. The plaintiff brings error.

In the foregoing, we have not attempted to set out all the facts in this case; on the contrary, we have purposely eliminated therefrom everything which does not bear on one question urged by the plaintiff, which we consider decisive of this case, and that is, was the defendant bound by the acceptance of its bid on the 9th day of June, 1899? Before considering that question, it may be well to say that the authority of the plaintiff's agent who made the supplemental bid on that day is denied by the plaintiff. But in our view of the case, we do not deem it best to go into the question of the agent's authority in that behalf, and for present purposes we shall assume that he was duly authorized.

Subdivision XV, section 69, article 1, chapter 14, Com-

piled Statutes (Annotated Statutes, 8726), so far as material at present, is as follows:

"That all contracts for the erection or construction of any such work, or any part thereof, shall be let to the lowest responsible bidder therefor, upon not less than twenty days' public notice of the terms and conditions upon which the contract is to be let, having been given by publication in a newspaper published in said city or village, * * *."

It will be conceded, we think, that valid contracts, of the character mentioned in that portion of the statute quoted, can be made by the city only after it has advertised for bids, and then only with some person in accordance with a bid tendered by him in response to such advertisement. *Fulton v. City of Lincoln,* 9 Neb. 358; *State v. Saline County,* 19 Neb. 253; *People v. Commissioners of Buffalo County,* 4 Neb. 150; *State v. York County,* 13 Neb. 57; *State v. Cornell,* 52 Neb. 25, 37. The object of the statutory provision under consideration is to invite competition and prevent favoritism and fraud. *State v. York County, supra.* To attain that object it is essential that the bidders, so far as possible, be put on terms of perfect equality, and that they be permitted to bid on substantially the same proposition, and on the same terms. In the present case the notice required the bids to be filed by seven o'clock of June 8, 1899. Every bidder had a right to presume that no bids would be received after that time. The plaintiff's bid, which had been filed within that time, was never accepted as made; the bid that was accepted was that bid as materially changed and modified by the supplemental bid filed on the 9th day of June, and after the time fixed by the notice for receiving bids. Under such circumstances the bid which was accepted can be regarded in no other light than as a new bid, and as one made after all other competitiors, by the terms of the notice, had been given to understand that further bids would not be received. The bidders, consequently, were not on equal terms, and were not bidding on the same proposition, as

will be seen by a comparison of the original bid and the supplemental bid with the notice. In other words, the purpose of he statute, to invite competition and prevent favoritism and fraud, would be completely thwarted, were a bid, under such circumstances, to be upheld. It seems clear to us that by the acceptance of plaintiff's bid, the parties were placed in no different position than they would have occupied, had all the bids filed within the time fixed by the notice been rejected, and the defendant, without readvertising, had accepted a new bid, filed by the plaintiff after that time.

But now the question arises whether the plaintiff is estopped to deny the legality of the proceedings under which its bid was accepted. We do not think it is. Mutuality is of the essence of an estoppel. That being true, it would follow that if the plaintiff is estopped to deny the legality of such proceedings, the defendant is also estopped to do so. If that be true, then, in the light of the cases hereinbefore cited, the defendant could have been compelled by mandamus to enter into a contract with the plaintiff, in accordance with the bid. In other words, a court would have compelled the defendant to enter into a contract in disregard of mandatory provisions of the statute. The bare statement of that proposition carries with it its obvious refutation.

Neither does the maxim, *Potior est conditio possidentis*, apply in this case. There is no evidence that the plaintiff's bid was made or accepted with any intention to evade the statute, or to make a contract contrary to law; nor have we any reason to think it was. But, had it been made and accepted with that end in view, the most that could be said of the transaction would be that it was an agreement to enter into an illegal contract. The plaintiff refused to carry out its part of the agreement. It is the policy of the law to encourage the abandonment of an illegal project. Consequently, it has been held that where one of the parties to an illegal contract pays money thereon to the other, he may recover it back before the

contract is executed, but not afterwards. *Smith v. Bickmore,* 4 *Taunt.* (Eng.) 474; *Tappenden v. Randall,* 2 Bos. & Pul. (Eng.) 467; *Lowry v. Bourdieu,* 2 Doug. (Eng.) 468; *White v. Franklin Bank,* 22 Pick. (Mass.) 181; *Spring Company v. Knowlton,* 103 U. S. 49. Hence, putting the worst possible construction on the conduct of the parties looking towards the making of an illegal contract, they stopped short of the consummation of any illegal purpose, and the plaintiff is entitled to a return of the deposit.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

FRED HERMAN V. ALBERT BECK, ADMINISTRATOR OF THE ESTATE OF WENCIL BECK, DECEASED.

FILED APRIL 9, 1903. No. 12,554.

1. **Probate Court:** ERROR PROCEEDINGS. Error will lie from an order of the county court, allowing a claim against the estate of a decedent, although no answer or objections were filed against the claim, and the order was made in the absence of the administrator.
2. **Administrator Alone May Prosecute.** Error from such order may be prosecuted by the administrator alone.
3. **Review:** BILL OF EXCEPTIONS. Where error affirmatively appears on the face of the record proper, a bill of exceptions is unnecessary to obtain a review of such errors.

ERROR to the district court for Saline county: GEORGE W. STUBBS, DISTRICT JUDGE. *Affirmed.*

Robert S. Mockett and *Orpheus B. Polk*, for plaintiff in error.

J. H. Grimm and *J. J. Grimm, contra.*

ALBERT, C.

The plaintiff in error asks the reversal of a judgment of the district court, reversing an order of the county court, allowing a claim against the estate of which the defendant in error is administrator.

A considerable portion of the argument of the plaintiff in error is directed to the proposition that error will not lie from a judgment rendered by default. That proposition, whatever its merits, has no application to this case. The order reversed by the district court was one allowing a claim against the estate of a deceased person. In such cases there can be no such thing as a judgment by default against the administrator. He is always in court, constructively at least, for the purposes of such claims, when they are regularly reached for hearing, and no formal or written answer thereto is required. If his actual presence is required, the court has the means at hand to enforce it.

It is next urged that the defendant in error should have applied to the county court for a vacation of the judgment, under the provisions of section 602, Code of Civil Procedure, instead of applying to the district court for its reversal on error. One answer to this is that the error which justifies the judgment of reversal in the district court, namely, that the amount is excessive, is not one of the grounds enumerated in that section for the vacation of a judgment or order.

It is next argued that an administrator, as such, can not prosecute error from an order of the county court allowing a claim against the estate, and that his remedy by appeal is exclusive. That error will lie from such an order is clear from section 580, Code of Civil Procedure, and from *Rogers v. Redick*, 10 Neb. 332. The plaintiff in error appears to concede this, but contends that it will

lie only in behalf of "the real parties in interest," namely, the heirs of the intestate. In support of this contention he cites *Merrick v. Kennedy,* 46 Neb. 264, where it was held that an executor, as such, can not prosecute an appeal from a final order of distribution made by the county court, where he is not pecuniarily affected by such order. That case is not in point. It turned on a construction of section 304 of chapter 23, Compiled Statutes (Annotated Statutes, 5158), which relates specifically to appeals from an order of distribution, and confines the right of appeal in such cases to persons aggrieved by such order. Under the facts stated in that case, this court held that the executor could not be pecuniarily injured by the particular order complained of, and therefore he was not aggrieved thereby. In cases like the present the administrator is charged with the duty of protecting the estate against unjust claims and demands. He is the representative of every person interested in the estate, and, as such, has the undoubted right to test the accuracy of the judgments and orders of the county court, in the allowance of claims against the estate, either by appeal or error.

It is next urged that there was no bill of exceptions before the district court, and that there is none here. A bill of exceptions is only necessary where the error complained of does not otherwise appear. One of the errors assigned in the district court was, in effect, that the amount allowed was excessive. The basis of the claim allowed was a balance of $212.50, due on account, December 1, 1886. On this claim it would appear that a payment of $1 had been made at three different times. The amount found due, and allowed on the claim up to October 15, 1890, was $628.65. This amount, over and above the original balance, is made up exclusively of interest, computed at 10 per cent. per annum, and compounded at intervals. These facts appear of record, and show conclusively that the amount allowed is grossly in excess of the amount actually due, if any, and of themselves justify the judgment of the district court.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CYRUS GREEK ET AL. V. DORSEY MCDANIEL ET AL.

FILED APRIL 9, 1903. No. 12,637.

1. **Attorney Fee:** STATUTE OF LIMITATIONS. On the facts stated, *held* that an attorney's claim for services was barred by the statute of limitations.
2. **Attorney's Lien on Judgment:** REVIVOR: INTERVENTION. An attorney at law having a lien on a judgment may intervene in proceedings to revive such judgment, and is entitled to a revivor thereof in his own name to the extent of his lien.
3. **Error Without Prejudice.** That the court, in such proceedings, renders a judgment in favor of the attorney and against the judgment debtor for the amount of the lien, instead of entering an order of revivor in the name of the attorney to that extent, is without prejudice to the judgment debtor.
4. **Revivor:** NOTICE OF LIEN TO JUDGMENT DEBTOR. The commencement of proceedings, of which the judgment debtor has notice, to enforce such lien, while a sufficient amount of the judgment remains unpaid to cover it, is sufficient notice of the lien to the judgment debtor.

ERROR to the district court for Douglas county: LEE S. ESTELLE, DISTRICT JUDGE. *Affirmed in part.*

D. W. Merrow and *H. W. Pennock*, for plaintiffs in error.

John T. Cathers, contra.

ALBERT, C.

On the 1st day of November, 1893, Dorsey McDaniel and Winfield F. Scott recovered a judgment against Cyrus

Greek in the district court for Douglas county. Afterward, in the same year, John T. Cathers, Esquire, the attorney who conducted the litigation on behalf of the judgment creditors, filed a lien on the judgment for services as an attorney, rendered in the case. In 1901 proceedings were instituted to revive the judgment, which had become dormant. The motion to revive was denied, on what ground the record does not disclose. Mr. Cathers, the holder of the attorney's lien, then asked and obtained leave to intervene, and on the 4th day of May, 1901, filed his petition of intervention, which, omitting the formal parts and the portions stricken out on the order of the court, is as follows:

"Now comes John T. Cathers, intervener, who obtained leave of the court to intervene herein and files this his petition of intervention and for cause of action says and alleges:

"1st. That he is an attorney at law practicing his profession in Douglas county, Nebraska, and has been for more than ten years last past and that on or before the 4th day of October, 1892, he was employed by the plaintiffs in the above-stated case to bring suit against Cyrus Greek, the above-named defendant, and did bring suit as will be seen by record in the above-stated case, and prosecuted the same to judgment against the said Cyrus Greek; and that on or about the 2d day of November, 1893, upon the finding of a jury a judgment was entered in favor of the plaintiffs in the sum of $3,925.61 damages and $92.93 costs.

"2d. This plaintiff agreed to pay this intervener for his services rendered in prosecuting said action to judgment, and the same were valuable, and are worth the sum of $1,500, no part of which has been paid.

"SECOND CAUSE OF ACTION.

"This intervener further says and alleges for second cause of action that he expended in money for and on behalf of the plaintiffs and at their direction the sum of $75

in cost and expenses in prosecuting the said action to judgment; that said sum has not been paid to him and is all due and owing.

"This intervener further says and alleges that on or about the —— day of November, 1893, he filed an attorney's lien in the above-stated case in the sum of $1,575 for legal services rendered and money expended in above-stated case, the filing of which all parties, both plaintiffs and defendant, had due notice.

"2d. This intervener further says and alleges that said judgment became dormant and proceedings were had to revive the same, and this intervener was given leave to revive said judgment to the extent of his attorney's fees and money expended, as will be seen by reference to record in the above-stated case."

It does not appear that McDaniel, one of the judgment creditors, entered any appearance in the proceedings. His coplaintiff and the judgment debtor answered separately, pleading the statute of limitations. At the conclusion of the testimony, the court directed a verdict for the intervener against both the judgment creditors and the judgment debtor for the amount claimed, with interest thereon from the date of the filing of the lien, and gave a money judgment accordingly. The parties pleading to the petition of intervention, prosecute separate petitions in error to this court.

It is difficult to determine upon what theory the petition of intervention was drawn. It purports to state two causes of action; one against the judgment creditors for services rendered; the other against all the parties for a revivor of the judgment in favor of the intervener to the extent of his lien. As to the former, the statute of limitations appears to be a complete bar, and should have been sustained. In reaching this conclusion we have not overlooked the rule that, ordinarily, the authority of an attorney employed to prosecute a suit continues, by virtue of the original retainer, until its final determination, and the statute of limitations does not begin to run against

his claim for services until his relation as attorney to the suit is ended. But that rule has no application to this case. The petition alleges an express contract to pay a specific sum for the services therein mentioned. Those services, on the face of the petition, appear to have been rendered almost eight years before these proceedings were commenced. When those services were rendered, the intervener's right of action therefor accrued. The pleadings aver no payment or other fact that would interrupt the running of the statute. Consequently, that cause of action is barred. This, of course, does not reverse the judgment as to the judgment creditor, McDaniel, who did not plead to the petition.

As to the other cause of action, the statute of limitations does not run against proceedings to revive a dormant judgment, as such proceedings are but a continuation of the proceedings in which the judgment was obtained, and, to the extent of his lien, the intervener had the same right to revive the judgment as the original judgment creditors.

It is urged that no notice of the lien was given. The filing of the petition of intervention was in itself sufficient notice of the lien, so long as it does not appear that the judgment debtor had previously paid the judgment.

It will be observed, however, that the court entered a money judgment against the judgment debtor for the amount of the lien, instead of an order for revivor. This, however, goes to the form and not to the substance. As before stated, the application for revivor was denied as to the judgment creditors. The practical effect of a judgment in favor of the intervener and against the judgment debtor is precisely the same as an order reviving the original judgment in favor of the intervener to the extent of his lien. That being true, we see no good reason why the judgment against the original judgment debtor should not stand.

It is therefore recommended that the judgment of the district court as to Cyrus Greek be affirmed, and as to

Winfield F. Scott, reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court as to Cyrus Greek is affirmed, and as to Winfield F. Scott, reversed, and the cause remanded for further proceedings according to law.

AFFIRMED IN PART.

ERNEST CREWISON, APPELLANT, V. KARL H. OELSCHLEGAL ET AL., APPELLEES.

FILED APRIL 22, 1903. No. 9,767.

The decision in *Garnett v. Meyers*, 65 Neb. 287, which involved a similar state of facts, is approved and followed in this case.

APPEAL from the district court for Antelope county: JOHN S. ROBINSON, DISTRICT JUDGE. *Affirmed.*

Charles Riley and *C. C. Flansburg*, for appellant.

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

SEDGWICK, J.

The facts in this case are in all respects similar to those involved in the case of *Garnett v. Meyers*, 65 Neb. 287, decided at this term. In that case it was held that provisions in regard to the indebtedness itself which are inserted in a mortgage executed contemporaneously with the note, must be construed with the note, and if the contract, so construed, is not negotiable, the maker of the mortgage, without notice of any assignment thereof, may pay the same to the original payee in the mortgage, and is thereupon entitled to a satisfaction of the mortgage.

For the reasons stated in the opinion in that case the judgment of the district court is

AFFIRMED.

ALFRED MILLARD, TRUSTEE, ET AL., APPELLANTS, V. BERTHA WEGNER ET AL., APPELLEES.

FILED APRIL 22, 1903. No. 11,837.

1. **Unrecorded Contract: NOTICE: SUBSEQUENT INCUMBRANCER.** Inclosing an eighty-acre tract with other land, with a post and wire fence, and using the same for pasturing cattle, is sufficient notice of the rights of a purchaser who holds it by an unrecorded contract to put a subsequent incumbrancer on inquiry as to the purchaser's rights.
2. **Evidence.** Evidence examined, and *held* sufficient to sustain the findings and judgment of the trial court.

APPEAL from the district court for Merrick county: JAMES A. GRIMISON, DISTRICT JUDGE. *Affirmed.*

Arthur C. Wakeley and *William T. Thompson*, for appellant.

George W. Ayres and *J. W. Sparks, contra.*

SEDGWICK, J.

This action was begun in the district court for Merrick county by the plaintiffs, Alfred Millard *et al.*, to foreclose a mortgage upon eighty acres of land. The trial resulted in findings and decree in favor of the defendant Bertha Wegner, from which the plaintiffs have appealed to this court. July 10, 1883, one Taylor, who was then the owner of this land, conveyed it by mortgage, together with another tract of 120 acres in the same township, and other lands, to the Omaha Savings Bank, to secure the payment of a note for $15,000. This mortgage was immediately placed upon record. In September, 1886, Taylor contracted to sell eighty acres in question to the defendant's

husband, who then paid a part of the purchase price. It does not appear whether the contract was oral or in writing. Prior to 1891 and during that year, Taylor paid the said note, principal and interest, except $900 and the land embraced in the said mortgage, except the two tracts above named, was released therefrom. In August, 1891, Taylor mortgaged the 120-acre tract of land to the Commercial National Bank to secure the payment of $3,540.35. This mortgage was subject to the first mortgage above described, and was recorded on the 5th day of September, 1891, but the deed to the 80-acre tract to this defendant was not recorded until March 9, 1898. The first mortgage was sold and assigned to one Davis, and by her afterwards, on the 24th day of December, 1898, to the plaintiff Alfred Millard, as trustee for the Commercial National Bank. On August 31, 1901, payments having been made on the second mortgage, and there being still due the sum of $1,895, the Commercial National Bank bought Taylor's equity in the 120-acre tract of land, released its mortgage thereon, and sold the land and applied the proceeds of the sale upon the second mortgage. Upon these facts the defendant insists that the proceeds of the sale of the 120-acre tract should have been applied upon the first mortgage, thus releasing her land from the lien of that mortgage. This contention appears to depend upon the question of notice to the savings bank, at the time it took the second mortgage, of the rights of the defendant in the 80-acre tract. If Taylor, at the time of giving that mortgage, had been the owner of the 80-acre tract, the holder of the first mortgage, having two funds from which to pay the same, would not be allowed to exhaust the security of the second mortgage without applying upon his claim the other fund upon which he had security. Since Taylor appeared by the record to be the owner of the 80-acre tract, the Commercial National Bank, in taking the second mortgage, might rely upon this principle of the law to protect its securities, unless it had notice, either actual or constructive, of the defendant's interest in the land when its mortgage was taken. It

no doubt might purchase the first mortgage and make disposition of the securities therein in protecting its second mortgage, as the law would have required the first mortgagee to do. If, however, it took its second mortgage with notice of the defendant's interest in the land, it would have taken no greater equity against the defendant than Taylor himself had, and Taylor had agreed that defendant should have full title to the 80-acre tract. It is conceded that the bank, at the time of taking this second mortgage, had no actual notice of the rights of defendant and her husband therein, and it is insisted that the defendant and her husband did not take such exclusive and notorious possession of the land as to constitute notice to innocent purchasers thereof.

"The doctrine seems quite firmly established, by successive judicial decisions, both in this country and in England, that open, notorious and exclusive possession of real estate, under an apparent claim of ownership, is notice to those who subsequently deal with the title, of whatever interest the one in possession has in the fee; whether such interest be legal or equitable in its nature." Wade, Law of Notice, sec. 273. The same authority shows (section 274) that the supreme court of Massachusetts, in construing a peculiar statute, has adopted a different rule, but the courts of the states of Missouri and Maine, having a similar statute, have refused to follow the construction placed upon it by the courts of Massachusetts. Section 277.

Mr. Wegner took possession of the land at the time of making his contract with Taylor, and began to inclose it, but soon after died, and the defendant succeeded to his right in the land. She completed the inclosure of the land, together with another tract adjoining it, with a post and two-wire fence. The tract in question was wild land; no other improvements were made thereon. The defendant used the land to pasture cattle during the summer, and at times during the winter kept her horses thereon. This was the condition of the possession at the time that the second mortgage in question was given by Taylor. The defendant

afterwards paid the balance of the purchase price in full, which appears to have been the full value of the land, and Taylor and wife conveyed the land to her in pursuance of the contract.

In *Truesdale v. Ford,* 37 Ill. 210, 215, a case relied upon to sustain appellants' argument, the court said that the question was whether the possession "was so open, visible, notorious and exclusive as to be calculated in its very nature, to inform persons in the vicinity, and those seeing the property, that some person had appropriated it, and was using and occupying it for his own use."

Clearly, to fence it with a substantial fence, including the piece of land with another piece not owned by the grantor, would be sufficient to inform persons in its vicinity that some one had appropriated it.

In *Williams v. Sprigg,* 6 Ohio St. 585, another case relied upon to sustain the position of appellants, the complainant bought a vacant lot adjoining his hotel property. He removed some lumber and rubbish therefrom, which had accumulated during the building of the hotel. The court said (p. 594):

"He does not build upon it; he does not fence it; but his tenant of the other lots and hotel, hangs out clothes there to dry after being washed. This is the extent of the possession held and exercised by complainant." And, further, the court said: "Living on the premises, raising crops on them, the employment of persons there in the making of improvements, accompanied by frequent acts and expressions of ownership, would produce such notoriety, undoubtedly, as should put purchasers upon their guard, and induce investigation to acquire knowledge sufficient to enable them to deal safely." But no one of these things specified by the Ohio court, and perhaps not even all of them, would be a more definite act of ownership and exclusion than to inclose the land with other land, as was done in this case, with a substantial fence. There can be no doubt that such an act was an act of one who claimed an interest in the property, and must certainly be sufficient

to "produce such notoriety as should put purchasers upon their guard." That the act of surrounding a piece of land with a substantial fence is notice that the party so doing claims an interest in the land, and is sufficient to put purchasers upon inquiry as to who has asserted such an act of ownership, seems so self-evident as not to admit of argument.

The defendant's possession of the land was exclusive and notorious, and was clearly sufficient to put a purchaser upon inquiry as to her rights therein.

The judgment of the district court is

AFFIRMED.

MINNIE H. FOWLER V. HENRY THOMSEN, JR., ET AL.

FILED APRIL 22, 1903. No. 12,589.

Entry of Judgment: JUSTICE OF THE PEACE. A justice's docket contained the following: "One hour after the time stated in the summons, this cause came on for hearing. Plaintiff in court. Defendant failed to appear one hour after the time stated in the summons, and the plaintiff filed his bill of particulars, and I find from the bill of particulars that there is due the plaintiff the sum of fifty-eight dollars and all costs taxed at $2.40 (two and forty cents)." On the margin was a taxation of costs, and a charge for the entry of judgment. *Held*, Sufficient to protect succeeding justice in the issuance of an execution, and a constable in levying that execution.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, DISTRICT JUDGE. *Affirmed.*

W. J. Courtright and *S. S. Sidner*, for plaintiff in error.

Enos F. Gray and *George L. Loomis, contra.*

HASTINGS, C.

The questions arising in this case all grow out of the following record:

"In Justice Court, before Lemuel Doane.

"THE STATE OF NEBRASKA, } ss.
DODGE COUNTY, }

"October 24, 1896. Summons issued on the part of the plaintiff to defendant. I hereby certify that on the 27th day of October, A. D. 1896, I served the within summons on the within named David Fowler by leaving at his usual place of residence in North Bend, Dodge county, Nebraska, a true and certified copy of the same, with all the indorsements thereon, this 27th day of October, 1896.

"J. E. NEWSOME, *Constable.*

"October 31, 1896. Plaintiff filed his bill of particulars.

"October 31, 1896. One hour after the time stated in the summons this cause came on for hearing. Plaintiff in court. Defendant failed to appear one hour after the time stated in the summons, and the plaintiff filed his bill of particulars, and I find from the bill of particulars that there is due the plaintiff the sum of fifty-eight dollars and all costs, taxed at $2.40 (two and forty cents).

"LEMUEL DOANE, *Justice of the Peace.*

"For value rec'd I hereby sell, assign and transfer unto George E. Ladd the above judgment and authorize him to collect and discharge the same. WM. K. GAGE.

"January 11, 1898.

"Execution issued November 28, 1898, made returnable in thirty days, and the court duly deputed and authorized Henry Thomsen to serve the same."

On the margin appears the following:

"William K. Gage, Plaintiff, v. David Fowler, Defendant.

"Plaintiff's Costs. "Justice's Fees.		Sheriff's or Constable's Fees.	
Summons	.50	Summons	.50
Docketing	.25	Copy	.25
Filing papers.....	.20	Mileage	.10
Judgment	.50	Execution	1.75
Swearing	.10		
Execution	.50	JOHN MCCONNELL.	
	$2.05		
Execution.....	.50		

"J. E. Newsome Rec'd 50 cts.
"Defendant's Costs.
"Constable, Justice's Fees.
"Received $2.05, my costs, Jan'y 10, 1899.
"LEMUEL DOANE."

Across the face of the record, in red ink, is the following:
"Received full payment of this judgment.
"GEO. E. LADD.
"Signed in my presence this 26th day of Jan'y, 1899.
"J. E. NEWSOME,
"Justice of the Peace.
"Rec'd satisfaction. GEO. E. LADD, by E. KERN."

As shown here, the defendant J. E. Newsome, as successor to Lemuel Doane, justice of the peace, issued an execution on November 28, 1898, and delivered it to the other defendant, Henry Thomsen, Jr. He proceeded to levy it on five stacks of hay, which he sold under the execution December 19, realizing $82.50. The plaintiff, Minnie Fowler, brought suit against both the constable, the justice of the peace and one Chris Cusack; alleging that the hay was the property of David Fowler, and that the defendants unlawfully took and converted it, and that David Fowler had assigned his right of action to her. Judgment was rendered in the county court against Thomsen and Newsome, an appeal was taken by them and in the district court answer was filed for Newsome, denying any conversion, denying the good faith of the assignment by David Fowler to the plaintiff, and justifying the taking of the property on the ground that Newsome was a justice of the peace, and had upon his docket the judgment, and, at the request of the assignee of the judgment, issued an execution upon it, and delivered it to Henry Thomsen, who was appointed special deputy constable to serve it; that the execution was levied upon the hay, the hay sold under it and the proceeds applied in the payment of the judgment. Thomsen also answered, setting up the same facts. Reply was filed, denying generally, and setting up that the con-

stable was advised before the sale that there was no judgment, and did not rely upon his execution but took an indemnifying bond, and that both defendants acted with full knowledge of the fact that there was no judgment. The allegations with reference to the indemnifying bond were stricken from the pleading, and the proof of it from the record. The jury, under the instructions of the court, returned a verdict for the defendants. Plaintiff brings the case to this court, asserting that under the facts as shown defendants are liable for the hay.

It is conceded that the right of David Fowler in the hay was by oral pledge from the execution defendant, and was subject to levy at the time it was taken, if there had been a judgment on which a valid execution could be based. The judgment is claimed to have been without jurisdiction because at the time of the issuance of summons there was no bill of particulars on file. We are unable to see how this at most could be other than a mere irregularity, a bill of particulars being on file at the time of the rendition of the judgment. We find nothing in the statute that requires the filing of a bill of particulars before the issuance of summons.

It is also claimed that the judgment is void because it does not state in express terms the day and hour of the return day of the summons. The docket, however, recites that a summons was issued, and recites that on October 31, and one hour after the time stated in the summons, which appears to have been served and returned, the cause came on for hearing. The language of the docket distinctly indicates the issuance and service of summons and that the alleged judgment was entered on the day of the return, and one hour after default. It seems, however, necessary to admit that under the holding in *Denslow v. Dodendorf*, 47 Neb. 328, there is no judgment. There is no statement from whom the alleged amount is due. It is not declared that a judgment is rendered, except as can be gathered from the placing of this finding at the end of the proceedings, and from the marginal entries.

It is claimed by defendants that the cases of *Lewis v. Watrus,* 7 Neb. 477, and *Rhodes v. Thomas,* 31 Neb. 848, hold such a judgment as this to be good.

In *Lewis v. Watrus* the form held good was: "Judgment decreed in favor of plaintiff in the sum of, principal $174.70, interest 85 cents, judgment $175.55," and costs $9.30.

It must be admitted that this differs from the one that we have now in question only in using the word "judgment" instead of the word "find." Like the one now before us, it fails to indicate, except by implication, against whom it is rendered. Nevertheless it was held to be "a final determination of the rights of the parties" and to support an appeal.

In *Rhodes v. Thomas,* the following is the form: "After hearing the evidence, it is therefore considered by me that the plaintiff have and recover from the defendant the sum of $69.15, together with costs taxed at $49.15." This was complained of in error proceedings on the ground that there was no finding to support it. This court held that it would serve as both finding and judgment, citing with approval from *Garrett v. Woods,* 3 Kan. 231, 236: "Their acts, however informal, if substantially in accordance with law, are to be upheld. When it can be ascertained from their dockets that they have in substance carried out the requirements of the law, a mere technical defect or informality should not be held sufficient to vitiate the proceedings."

In *State v. Myers,* 70 Minn. 179, 72 N. W. 969, a mandamus was allowed to compel an execution where the justice had merely copied into his docket the verdict of the jury, set down the date, and taxed the costs. The court say (p. 182): "This was informal, but no one can fail to understand from the docket that the plaintiff was entitled to recover $40 [the amount found by the jury] damages and $47.39 costs. Effect must be given to the entries in the docket according to the manifest intention of the justice in making them, which was that the amount of the verdict and costs should constitute the judgment."

In *Denslow v. Dodendorf* before mentioned, a judgment by a justice of the peace in these terms, "Upon the hearing of the evidence I find that there is due the plaintiff from the defendant the sum of $82.41, and costs of this action, taxed at $6.05," was held to be a finding, but not a judgment, and that from it no appeal would lie. The question, however, was not raised by counsel. The appeal had been dismissed by the district court for the reason that it was filed out of time, and error had been taken from that conclusion of the district court. The propriety of that conclusion was questioned on the ground that the transcript had been mailed in ample time, in the ordinary course of the mails, to have reached the clerk of the district court within the period allowed by law. This court declined to decide the question presented, but held that the appeal was rightfully dismissed for the reason that there had been no final judgment. No cases from this state or elsewhere are cited.

In *Daniels v. Tibbets,* 16 Neb. 666, the following entry is held not to constitute a final judgment of the district court: "The defendant herein elects to stand on his demurrer heretofore overruled by the court, and excepted to at the time. And now comes the plaintiff by counsel, and the defendant being in default for want of an answer, the court finds the allegations of the petition are confessed by him to be true." It is impossible to see how this holding as to an entry in the district court, so manifestly inconclusive, can be given any weight in deciding whether or not the judgment of the justice of the peace in question here would support an execution.

Nichols v. Hail, 5 Neb. 194, is also cited, but seems to have no application to the state of facts now before us. It was an attempted judgment of the district court which failed to dismiss an action, but merely taxed costs against the plaintiff.

In *Ransdell v. Putnam,* 15 Neb. 642, 643, the following is held sufficient to serve as both judgment and finding: "After hearing and duly weighing the testimony and au-

thorities, it was found by this court that the plaintiff have and recover of the defendants Ransdell and Reed the sum of twenty-nine dollars and fifty cents, as due him for services and labor done and performed, and for costs of this suit, taxed," etc.

In *Michaut v. McCart,* 55 Neb. 654, 655, this case of *Ransdell v. Putnam* is cited with approval in sustaining a judgment in this form: "After hearing the evidence on both sides, and argument, it is considered by me that the plaintiff shall recover of the defendant the sum of $18.15 and costs of this action." This is held to import a sufficient finding.

In all the foregoing cases the judgments were directly attacked by proceedings in error. Certainly a somewhat stronger rule is applied to sustain such judgments against a collateral attack, as in the case before us. They all, except *Denslow v. Dodendorf,* seem to rest upon the doctrine of Freeman, Judgments, sec. 50, that an entry is sufficient if it shows the relief granted, and that it was made by the court whose record it is. This is to be applied liberally to justices' proceedings. Freeman, Judgments, sec. 53. Resort may be had to the marginal notes, to the files in the case, and to the entire record, to ascertain what was done and who did it. Freeman, Judgments, sec. 55, and cases cited. If this doctrine is applied to this case, there seems no doubt that this entry was intended as a judgment, and is full enough to indicate that intention unmistakably, as to parties and amount. If so, it will support an execution. Black, Judgments (2d ed.), sec. 115; *Barron v. Tart,* 18 Ala. 668; *Marcy v. Russ,* 1 Root (Conn.) 176; *People v. Gorman,* 60 Hun (N. Y.) 578, 14 N. Y. Supp. 547. The holding in *Denslow v. Dodendorf,* so far as it conflicts with this conclusion, should be overruled. No doubt this judgment was voidable on error for want of a sufficient finding, as its recital shows its basis was not the evidence, but plaintiff's bill of particulars. Such defect, however, did not subject it to collateral attack by a third party. *Breading v. Boggs,* 20

Pa. St. 33; *Doty v. Sumner Brothers*, 12 Neb. 378; *Maryott v. Gardner*, 50 Neb. 320; *Lubker v. Grand Detour Plow Co.*, 53 Neb. 111; Black, Judgments (2d ed.), sec. 115, at end.

That the recital of a finding "from the bill of particulars" renders the action of justice of the peace so void that third parties may question it on the levy of an execution, we can find no authority. If the defendant was not satisfied with this method of ascertaining the amount of his debt, he should have appealed or taken error. He not having done so, third parties can not afterward complain.

In this case the question is not how the justice reached his conclusion that there was "due the plaintiff the sum of $58 and all costs, taxed at $2.40," nor as to the rightfulness of that conclusion. The question is, does this transcript, taken as a whole, show that he reached that conclusion as a final determination of the action then pending before him? If it shows that he did, and that he entered it as such determination, until it is reversed, it will support an execution.

It is suggested that it was his duty to dismiss the action, and it should not be presumed that he did anything else. That, no doubt, is true, but it is clear from these entries, as we think, that he did not dismiss the action, but entered what he intended as a judgment for plaintiff, and that intention seems to appear plainly enough, so that his successor was bound by it. If, as the authorities seem clearly to show, it is purely a question of intention to render a particular judgment for an ascertained amount in favor of a definite party, and against a certain defendant, and the presence or absence of that intention is to be gathered from the record as it stands, there seems not much room for presumptions either way. If there is any judgment here at all, it certainly is not one for dismissal of the action, but is one for $58 and costs. To hold at the same time that the justice's intention, if it can be gathered from the entire record and proceedings, must govern, and that the presumption that he meant to do only

the right thing must control such intention, if the latter appears to have been to do the wrong one, is too manifest an inconsistency. From the marginal entries and the circumstances there can be no doubt that this, while in form a finding, was intended as a judgment for the amount named. As suggested by Freeman in the passage above, it has been held that the entry of a judgment of a justice of the peace may be aided by reference to the margin. *Elliott v. Morgan,* 3 Harr. (Del.) 316; *Clothier v. Clark,* 4 Harr. (Del.) 365; *Clay v. Clay,* 7 Tex. 250.

The marginal statement clearly shows that the entry here was intended as a judgment. If it be held to be a mere finding, it has been frequently decided that the entry of a finding by a jury, with a statement of costs by the justice of the peace, will support an execution without any formal judgment whatever. Black, Judgments (2d ed.), sec. 115; *Lynch v. Kelly,* 41 Cal. 232; *Gaines v. Betts,* 2 Doug. (Mich.) 98; *Davis v. Pinckney,* 20 Tex. 340; *Stemmons v. Carey,* 57 Mo. 222; *State v. Myers,* 70 Minn. 179, 72 N. W. 969; *Overall v. Pero,* 7 Mich. 314. This seems to be on the ground that entering the verdict in this way shows an intention to enter a judgment.

We do not see why a similar effect should not be given to the finding of the justice himself, which has been entered, like the verdict of the jury, with the evident intention of determining the rights of the parties, and to which is appended a proper computation of costs.

If it is objected that in the present case the finding is not against an individual party, *Titus v. Whitney,* 16 N. J. Law, 85, 31 Am. Dec. 228, holds a judgment for plaintiff generally, without stating against whom it was rendered, is sufficient in a justice court.

In *Parker v. Swan,* 20 Tenn. 88, 34 Am. Dec. 619, a similar judgment is held good where there are two defendants. In both cases it was on the ground that the whole record sufficiently showed against whom judgment was intended.

In *Madison County v. Rutz,* 63 Ill. 65, a judgment

against defendant, without indicating in whose favor, is held sufficient to support an execution.

In *Stowers v. Milledge,* 1 Ia. 150, 63 Am. Dec. 434, the following judgment was held good on appeal: "After hearing all the testimony on both sides, it is believed that the plaintiff is entitled to seventy-five dollars debt, and costs of suit, which is taxed as follows." The court say: "We must look to the substance, and mere form becomes immaterial." The parties, the matter in dispute and the result, are held to appear sufficiently, and that to be all which is required. The case is cited and followed in *Moore v. Manser,* 9 Ia. 47, *Barret v. Garragan,* 16 Ia. 47, and *Lavalle v. Badgly,* 33 Ia. 155.

In *Kase v. Best,* 15 Pa. St. 101, 53 Am. Dec. 573, an entry: "Therefore plaintiff for costs" is held to be a sufficient final judgment. "To hold that the word 'judgment' must appear would be to put form before substance."

It would seem to be doing no violence to the Nebraska cases relating to this subject, with the sole exception of *Denslow v. Dodendorf,* to adopt the Texas rule, that the test of the sufficiency of a judgment of a justice of the peace is its intelligibility. *Davis v. Bargas,* 12 Tex. Civ. App. 59, 33 S. W. 548. If this test is applied, the judgment here considered must be held sufficient to support the execution.

The reason for the relaxation in respect to these magistrates of the rule that all of the essentials of a judgment must appear in the record seems to be twofold. These records are made by magistrates presumably not learned in the law, and whose intention must be held to govern if it can be ascertained with certainty; and, too, the entire record, being the work of a magistrate without a clerk, is presumably that of the court itself, and therefore marginal notes, assisted by the files of the case, are used to ascertain this intention, somewhat in the manner of construing contracts. They are not courts of record, and the certainty of records should not be required of them.

Of course, if the judgment is held to be sufficient to base

an execution upon, that disposes of the case. The two questions as to whether the issuance of the execution was a judicial act on the part of the justice, Newsome, and is protected on that ground, and as to Thomsen, whether his execution is a sufficient protection, notwithstanding any notice from the plaintiff of defects in the judgment, would be out of the case, and anything said upon them would be mere dictum. It is therefore not thought worth while to discuss them.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WALTER W. HACKNEY, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JULIUS M. ERLENBORN, V. FIRST NATIONAL BANK OF LINCOLN, NEBRASKA, ET AL.*

FILED APRIL 22, 1903. No. 12,794.

1. **Trustee in Bankruptcy: ACTION TO RECOVER PROMISSORY NOTE.** An action by a trustee in bankruptcy to recover a negotiable promissory note from one to whom it had been transferred by the bankrupt's wife pending bankruptcy proceedings, must develop either fraud or an intended preference to entitle plaintiff to recover.
2. **Evidence:** Evidence in this case *held* to support the trial court's finding that neither of the above grounds of recovery are shown in this case.

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

John S. Bishop, Robert S. Mockett and *Orpheus B. Polk,* for plaintiff in error.

Andrew J. Sawyer and *N. Z. Snell, contra.*

* Rehearing allowed. See opinion, p. 594, *post.*

HASTINGS, C.

This is a suit in equity to avoid the transfer of a note for $290 given by the defendant Kettering to Julius M. Erlenborn, payable in two years, without interest. This note Kettering gave to Erlenborn in part payment for a stock of groceries and a set of store fixtures purchased in January, 1900. The petition alleges that prior to January 15, Erlenborn was in business as a retail grocer in the city of Lincoln, and was then and had been for some time insolvent, as the defendants well knew; that Erlenborn then had the grocery stock, of the value of $1,000, together with the furniture in the store, and three horses and two wagons, of the value of $800, and book accounts of the value of $500, but was indebted to divers persons in the sum of $3,500 and more; that the First National Bank of Lincoln held his note for $100, payable February 22, with interest from maturity; that he owed Hargreaves Bros. $919.60, Raymond Bros. Clarke Company $278.12, and Rudge & Morris Company $25.81—all three on book accounts; that for the purpose of evading the bankruptcy act, and defrauding his creditors, he sold the grocery stock, furniture and fixtures to Kettering, and in consideration of such purchase Kettering assumed the indebtedness to Hargreaves Bros., Raymond Bros. Clarke Company and Rudge & Morris Company, to the extent of $900, which the three creditors agreed to accept in full, and gave in addition this note for $290, payable in two years, without interest, as above stated. It is further alleged that about March 1, creditors of Erlenborn filed a petition in bankruptcy, under which, on May 10, 1900, Erlenborn was adjudged a bankrupt; that plaintiff was appointed as trustee in bankruptcy June 7, 1900, and duly qualified and has ever since acted as such; that the Rudge & Morris Company paid to the plaintiff the amount they received on their indebtedness due from Erlenborn; that the defendant bank, to avoid the provisions of the bankruptcy law and defraud Erlenborn's creditors, obtained possession of the

$290 note, and concealed and refused to surrender it, and refused to give the plaintiff trustee any information in regard to it. It is charged that the bank held the note simply as collateral security for the payment of its claim, and in violation of the bankruptcy law, and obtained it subsequently to the institution of the bankruptcy proceedings. A demand upon the bank for the note is alleged, and its refusal, and that the bank was threatening to and about to transfer the note in fraud of plaintiff's rights. Plaintiff asks that the note be declared to be the property of the bankrupt's estate, and be delivered to him, or that the bank pay in its value, in the sum of $290, and for general relief.

The answer of the defendant bank admits its incorporation, the indebtedness alleged, the ownership of the property on January 15 by Erlenborn but not its value, the sale by Erlenborn to Kettering and the receipt in part payment on this sale of the $290 note, and denies the remainder of plaintiff's allegations. The bank also alleges that Erlenborn was indebted to his wife, Lizzie Erlenborn, for money borrowed from her at different times, to the amount of $290 and more; that sometime in February, in payment or as security for such indebtedness, he indorsed and delivered to her the note in question, and on April 10, the bank purchased this note from her, paying $137.33 in cash, and her husband's note of $100, on which there was then acrued $1.28 interest. The bank also says that it bought the note in good faith and in the usual course of business, without notice of the facts stated in plaintiff's petition, and gave for it $137.33 in cash, and the $100 note of Julius M. Erlenborn; that the note was duly indorsed to the bank by Lizzie Erlenborn, who then was its owner, and that the note then bore the indorsement of Julius M. Erlenborn, and was a negotiable promissory note, and was purchased by the bank without knowledge of any defenses thereto. It is also alleged that Julius M. Erlenborn was a married man and the head of a family; that neither he nor his wife owned any real estate whatever;

that after the sale to Kettering, Erlenborn had no property other than the said note, of the face value of $290, and the actual value of less than $250, and certain book accounts, of less value than $250; that prior to April 10, 1900, Erlenborn had collected and used in support of his family a portion of these accounts, so that the remaining part was of no value whatever; that the note was exempt property, and its transfer in no way fraudulent as to his creditors, or as to the plaintiff trustee. The answer was demurred to as to all but the general denial in the first paragraph, and the demurrer overruled, and a general denial filed by way of reply.

The court made a general finding in favor of the defendants and dismissed the action. A motion for new trial was filed on the ground that the judgment was contrary to law, contrary to the evidence, error in overruling the demurrer to the answer and errors of law occurring at the trial. This motion was overruled, and the plaintiff now complains of error in the judgment upon the same grounds, which are, practically, that the evidence does not sustain the finding and judgment of the court, and that there was error in overruling the demurrers to the several defenses. The latter ground of error is no longer urged, and the present contention of plaintiff is that, under the evidence, he was entitled to have the $290 note or its face value.

The evidence disclosed the institution of bankruptcy proceedings in March, 1900, against Julius M. Erlenborn, and that on May 10, he was adjudged a bankrupt, and the appointment of plaintiff as trustee. In his list of creditors filed in the bankruptcy proceedings April 25, 1900, he makes no mention of any indebtedness either to his wife or to the First National Bank. Attached to his schedule of property is a claim of exemptions in the sum of $500 and the $290 note is not included. Edward Camack testified that he was an attorney at law, residing at Lincoln, January, February and March of 1900; that in February, 1900, he called on Harry Freeman, cashier of the defendant bank, and told the latter that he desired to get enough claims

together against Erlenborn to force him into bankruptcy, and asked the cashier if the bank had any claim against him. He was answered that they had a claim, but did not wish to join in such a petition. Mr. John S. Bishop testified to a conversation with the cashier in February, 1900, in which the latter stated that the bank held a note for $100, not yet due. When asked if the bank would join in the petition in bankruptcy, they said, no, it might be paid at maturity. The witness had another talk with the cashier after the note matured, and the cashier again declined to join in the bankruptcy proceedings, on the ground that the preferred creditors, Hargreaves Bros. and Raymond Bros. Clarke Company were customers of the bank; that before the filing of the petition in the present case he asked Mr. Freeman if the bank had the $290 note; the cashier replied "No," but when the witness told the cashier he had information that the note was in the bank, the cashier admitted that it might be true, and finally went and got the note, but refused to surrender it, and advised witness to see the president, Mr. Burnham; Mr. Burnham, also, refused to give up the note, and referred the witness to the bank's attorneys. The latter, also, refused to surrender it.

Mr. Erlenborn testified to the sale of the stock and what he got for it, viz., the assumption of the accounts due Hargreaves, Raymond Bros. Clarke Company and Rudge & Morris and the $290 note; that he retained outstanding accounts of the aggregate amount of about $800; that he indorsed the $290 note and delivered it to his wife, in consideration of money he had borrowed from her. He testified from his ledger as to money received from his wife to the amount of $195. He also testified to $28 paid by her for a stove, and one other advancement of $50 in addition; that the indorsement of the note to her was made early in March, when he himself was going south. He testified that by this time his accounts were more than half collected and exhausted; that what were left were of little or no value.

The president of the bank testified that the note, on April 10, was brought in by Erlenborn's brother, who asked if the bank would buy the note, and was told that the bank would buy the note if Erlenborn's note for $100 was taken in part payment, and if discount, for the time which the note was to run without interest, was deducted; that the proposition was accepted; that the note bore Erlenborn's indorsement, and was indorsed by Mrs. Erlenborn. Mrs. Erlenborn testified that she had loaned money to her husband, but she did not know how much; that some little had been repaid to her, but she did not know how much. She also said on cross-examination that she supposed this money was a gift. Most of it was claimed to have been gotten before her marriage to Erlenborn, which seems to have been in 1899.

It is clear that a recovery in this case must be based either on fraud in the obtaining of this note on the part of the bank, or else upon the proposition that the obtaining of it, no matter how, was a preference, and that the bank accepted it, having reasonable cause to believe that it was intended as a preference. The note itself was a negotiable one, indorsed by the payee, and in the hands of a third party. It was purchased by the bank with $137.33 in cash, and the surrender of Erlenborn's obligation which the bank held. That Erlenborn himself had transferred this note, or arranged for its transfer, with any intention to prefer the bank, there is nothing to indicate. Mrs. Erlenborn had just been confined, and her disposition of the paper is easily accounted for. That, under the circumstances, and as a last resort, she should be willing to take up her husband's obligation in order to get this $137.33, is not surprising. It seems impossible, therefore, to allow plaintiff to recover on the ground of an intended preference.

It seems equally impossible to allow a recovery on the ground of fraud. No evidence is tendered to show any purpose to defraud on the part of the bank, and it seems clear that its purpose was to buy paper and use Erlen-

born's obligation to get it if it could. It does not appear that plaintiff could have secured this note in any event.

It is clear that at the time it was transferred to the wife, all the remaining property of Erlenborn, including the $290 note, would not amount to the $500 covered by his exemptions.

In the case of *Chamberlain Banking House v. Turner-Frazer Mercantile Co.*, 66 Neb. 48, it was held that the advancing of $500 in cash in consideration of obtaining a mortgage to secure defendant's new indebtedness by a corporate creditor, who had notice of other outstanding debts of the mortgagor, which would be left unsatisfied, rendered the mortgage fraudulent; that while a party was entitled to hold $500 of property exempt, to give him $500 cash in his pocket would leave him at liberty to claim another $500 of exemptions, and would materially assist him to defeat his creditors.

In this case, however, it is impossible to see how the taking of this note by the bank could have in any manner assisted Erlenborn to deplete the funds available to the trustee, as there was not property enough left, including the note, to cover the amount of the debtor's exemptions.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed February 4, 1904. *Judgment of affirmance adhered to:*

1. Bankrupt: BONA FIDE PURCHASER FROM PREFERRED CREDITOR. Where one creditor of a bankrupt has secured a preference in the payment of his claim, the trustee may recover the property, or its value, from such preferred creditor, but he can not pursue the property into the hands of a third party, who is a *bona fide* purchaser, or recover from such third party the value of the property.

2. ———: ———. Assuming that property was fraudulently conveyed by a husband to his wife, the same can not be recovered from a *bona fide* vendee of the wife.

DUFFIE, C.

This case grows out of a bankruptcy proceeding instituted against Julius M. Erlenborn, and the facts are fully stated in the opinion heretofore filed by Mr. Commissioner HASTINGS, and are briefly as follows: Erlenborn, within four months previous to the filing of a petition to have him declared a bankrupt, assigned to his wife a note for $290, taken by him on a sale of his grocery stock and fixtures, in payment, as he claims, of money borrowed from her prior to their marriage. At this time Erlenborn was owing the First National Bank of Lincoln $100, evidenced by his note for that amount. Mrs. Erlenborn, desiring to raise some money during her husband's absence from home, requested the bank to purchase the $290 note received from her husband. The bank agreed to make such purchase provided she would accept as part payment her husband's note for $100, held by the bank. She consented to this arrangement and transferred the note to the bank, receiving her husband's note for $100 and the balance in cash. The case was argued and submitted upon the theory that by the purchase of the $290 note from Mrs. Erlenborn the bank obtained payment in full of its claim against Julius M. Erlenborn, and thus secured a preference over the other creditors of the bankrupt, and that the transaction was fraudulent.

Subdivision *b*, of section 60 of the bankruptcy act, is as follows: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

This statute defines the rights of a trustee in bankruptcy in avoiding a transaction by which one creditor of the bankrupt obtains a preference over other creditors. He may, in the words of the statute, "recover the property or its value from such person"; that is, from the preferred creditor. The act does not allow the trustee to follow the property or the value of the property by which the preference was secured, into the hands of third persons. The secured creditor, in our view, may use money or property coming from the bankrupt to him as he would any other money or property, even though its receipt by him constitutes a preference within the meaning of the bankrupt act. The property received is liable to be taken in his hands, or, if disposed of, its value may be recovered. But the trustee can not reach third parties to whom the money may have been paid or the property transferred, the act giving him an action against the preferred creditor alone. If Mrs. Erlenborn was a preferred creditor of her husband, the plaintiff should have proceeded against her and not against the bank, her assignee of the note. There is no authority, as we understand the bankruptcy law, for pursuing the assignee to recover property received from a preferred creditor. We have been unable to find any cases where this question was raised and decided, but Collier, in the fifth edition of his work on Bankruptcy, page 461, makes the inquiry, against whom shall the action be brought? and, in answer to the question, says: "Here the words of the statute are clear: 'The person recovering it or to be benefited thereby.'" Again, at page 462 it is said: "Suits to recover the property in specie should only be brought where it can be identified and is found in the hands of the person preferred." It seems clear to us that if the specific property can be recovered only when found in the hands of the person preferred, suit for its value can only be maintained against the same person. Neither can the action be maintained upon the theory that the assignment of the note by Erlenborn to his wife was fraudulent as against creditors. While the rule is well established that

property transferred by a debtor in fraud of the rights of his creditor may be recovered in the hands of any one having notice of the fraud, and while the transfer of this note might well be held to be fraudulent as between Mr. and Mrs. Erlenborn, there is no evidence whatever in the record to charge the bank or any of its officers with notice of such fraud. No attempt in this direction was made, and, so far as the evidence discloses, the bank was a good-faith purchaser of the note prior to its maturity, without any knowledge or notice of any fraud in the assignment from Erlenborn to his wife.

We recommend that the former opinion be adhered to.

KIRKPATRICK and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion in this case is adhered to.

FORMER JUDGMENT ADHERED TO.

STATE OF NEBRASKA, EX REL. UNION FUEL COMPANY, V. CITY OF LINCOLN ET AL.

FILED APRIL 22, 1903. No. 12,583.

1. **Mandamus**: INFERIOR BOARD: DISCRETION. Mandamus will not lie to compel an inferior board or tribunal to do an act in the performance of which discretion or judgment is required to be exercised.

2. ———: CITY COUNCIL: AWARD OF CONTRACT. Under section 120, chapter 13, article 1, Compiled Statutes, 1901, mandamus will not lie to compel the city council to award the contract to supply coal for the city water department to a bidder on the ground that he is the lowest and best bidder, as, in passing upon the question who is the best and lowest bidder, the council exercises a discretion not controllable by mandamus.

ERROR to the district court for Lancaster county: LINCOLN FROST, DISTRICT JUDGE. *Affirmed.*

Lionel C. Burr and *Elmer E. Spencer,* for plaintiff in error.

Edmund C. Strode and *D. J. Flaherty, contra.*

KIRKPATRICK, C.

This is an application for a writ of mandamus addressed to the district court for Lancaster county by relator, the Union Fuel Company, seeking to compel the city council of the city of Lincoln to award it a contract to furnish for the use of the city 3,500 tons of Rich Hill mixture nut coal, or so much thereof as might be needed at $2.10 per ton. The trial court denied relator's application.

The basis of relator's contention is that it was the lowest and best bidder, and that, this fact being established, it was mandatory upon the city council, under the statute, to award it the contract. There were only two bids for nut mixture coal, namely, that of the Whitebreast Coal Company upon Cleveland nut mixture, at $2.15, and that of relator upon Rich Hill, at $2.10. In order that contention of relator may be clearly apprehendeded, it is necessary to quote, in part, section 120, chapter 13, article 1, Compiled Statutes of Nebraska, 1901 (Annotated Statutes, 7819):

"It shall be the duty of the city clerk, on or before the first day of June, annually, to prepare separate estimates of all kinds of supplies, personal property and material, required for the use of the city during the following fiscal year, and during the first week in June he shall publish a brief advertisement in one newspaper published in the city, stating the probable amount and kind of supplies, personal property and material required by such city during the following fiscal year and inviting bids therefor which bids shall be filed with said clerk on or before the first day of August. The council shall on or before the tenth day of August, succeeding such advertisement, open said bids and accept the bid or bids of the

lowest and competent bidder, * * *. The city council shall at its first meeting in September award a contract or contracts for such supplies, personal property and material to the best and lowest bidder or bidders competent under the statute."

Pursuant to this statute the city clerk published the following notice:

"Notice for Bids. Sealed bids will be received at the city clerk's office, Lincoln, Nebraska, for personal property, material and supplies for the water department of the city of Lincoln for the year commencing September 7, 1901, as per schedule on file in the city clerk's office. All bids must be filed with the clerk on or before the first day of August, 1901. The city reserves the right to reject any and all bids. (Signed.) Thomas Pratt, City Clerk."

As we apprehend contention of counsel for relator, it is that under the statute quoted the city council has no discretion, but the duty devolves imperatively upon it to award the contract to the lowest responsible bidder. The respondents contend that the city council is vested with discretion in the premises, and that under the evidence upon which the trial court acted, it is shown that that body exercised the discretion wisely and honestly, and for the best interests of the city.

We do not understand that any dispute arises in this case as to the law, settled by numerous decisions of this court, that mandamus will not lie to govern the conduct of an inferior tribunal or board in any action wherein judgment or discretion is required to be exercised. We regard it as elementary that where mandamus is sought, relator must show clearly and conclusively that he is entitled under the law to the particular act or thing desired, and that the respondent is legally obligated to give him what he asks. *State v. Kendall,* 15 Neb. 262; *State v. Wenzel,* 55 Neb. 210; *Laflin v. State,* 49 Neb. 614.

The crucial question herein, accordingly, is whether the city council in awarding the contract exercises discretionary power, or acts wholly ministerially. The section

just quoted says that: "The council shall * * * accept the bid * * * of the lowest and competent bidder"; and again: "The city council shall * * * award a contract * * * for such supplies * * * to the best and lowest bidder." The fundamental principle of statutory construction is ascertainment of the intent of the legislature. *People v. Weston,* 3 Neb. 312. And all the language of the statute should be given effect where possible. *Follmer v. Nuckolls County,* 6 Neb. 204. These rules should be kept in mind in considering the statute under consideration. We take it to be generally understood that the several kinds of coal now on the market possess certain individual characteristics, one adapted to one purpose, another specially adapted to some different purpose. Where fuel in large quantities is consumed by one management, it is matter of economic necessity to look to the kind of coal best adapted to the purpose for which it is needed. Disregard of this consideration would certainly not be consistent with prudence or common sense. It can not be said that, all prices being equal, it would be immaterial from the standpoint of cost what particular kind of coal respondents used in the water plant. Certainly the aim of the law framers must have been that the city council should purchase the cheapest coal. A careful reading of the section quoted has convinced us that the legislature, to accomplish this purpose, did not undertake to make it incumbent upon the council to award the contract to the bidder who offered to sell at the lowest price per ton, as long as in reason a question could remain whether another coal at a higher price, taking into consideration the use to which the fuel was to be devoted, and the conditions under which it must be used, would not be cheaper. Stated differently, we do not think it was intended that a mere comparison of the prices, regardless of the quality, should be decisive of the question of cheapness.

The peculiar facts in this record are illustrative of the truth of what we have just said. It appears practically without dispute that the coal which the city council de-

cided to buy is better and cheaper at $2.15 than that of relator at $2.10, if the present grates in the boilers are continued in use; because, as the testimony of respondents tended to show, the present grates were not adapted to Rich Hill nut.

As to the qualities of the two coals for steam power purposes the testimony shows considerable conflict, but the testimony that the Cleveland nut mixture is cheaper at the price paid is more than ample to support the conclusion that the council did not abuse its discretion in selecting it. Such a discretion they doubtless possessed. The statute we are considering uses language clearly implying that the council should go beyond mere price, and test the quality with reference to the price. The peculiar needs and conditions of the plant, the adaptability of the different coals to those conditions, the necessity for changes in equipment in case a change were made in the kind of fuel, all these considerations were of importance as well as the price. Manifestly the legislature, in saying that the contract should be awarded to the best and lowest bidder, contemplated that the council should pass judgment upon the question who was the lowest and best bidder; and doing so, we are clear, they exercised functions which can not, under the law, be controlled by mandamus.

Counsel complain in brief of the notice for bids already quoted, the objection being that the notice refers to a schedule on file in the clerk's office, instead of setting out in the notice the exact kinds of material called for. Clearly the notice is objectionable in this respect. A faithful compliance with the statute would have led the clerk to state in such notice "the probable amount and kind of supplies." No doubt, in a proper and timely proceeding the court would have required the clerk to give notice as provided by statute. But his failure to comply strictly with the statutory directions in this regard does not make the right of relator to the relief asked any clearer. The relator submitted its bid, and it is established by the evidence that

it was not in a position to supply the kind of coal which was accepted. We do not see in the manner of the notice anything prejudicial to the rights of relator in this proceeding.

The same may be said with reference to relator's complaint that the contract to the successful bidder was actually awarded at a later date than that directed in the statute. Whether or not this is fatal to the validity of the contract entered into between respondents and the successful bidder need not be determined; but we are satisfied that this fact does not in any way tend to show that relator is entitled under the law to the relief prayed for in its application.

We think that the council in this case possessed a discretion in deciding upon the best and lowest bid, that this discretion was not abused, and that the trial court did not err in denying the writ. It is recommended that the judgment of the district court be affirmed.

HASTINGS and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ELLA M. MAVITY, APPELLEE, V. GEORGE W. STOVER ET UX., APPELLANTS.

FILED APRIL 22, 1903. No. 12,692.

1. **Forged Deed:** EVIDENCE. Evidence examined, and found sufficient to sustain the conclusions of the trial court that the deed in question was a forgery.

2. **Wrongful Possession of Land.** A surety who pays a debt and wrongfully takes possession of the principal debtor's land can not require, as a condition precedent to yielding possession to the principal's heir, that the latter should reimburse him for such payment.

3. **Action for Rents and Profits:** SUBROGATION: CREDITS. One who pays a mortgage covering land in which he has no legal interest, and who is in no way liable for the mortgage, is not entitled to

be subrogated to the rights of the mortgagee; but if the former is in possession he may be allowed a credit for such payments as against an action by the mortgagor for an accounting for rents and profits.

APPEAL from the district court for Phelps county: ED L. ADAMS, DISTRICT JUDGE. *Decree modified.*

W. P. Hall, Hector M. Sinclair and *S. A. Dravo,* for appellants.

G. Norberg and *A. J. Shafer, contra.*

LOBINGIER, C.

Appellee sued appellant in the district court for Phelps county, alleging that she was the owner by inheritance of a certain tract of land situated in said county; that appellant had placed on record a deed purporting to convey said premises from appellee to himself; that appellee had never knowingly executed or delivered such deed, and that appellant had been for some time collecting the rents and profits of the property. Appellee prayed:

"That said deed may be declared fraudulent and void; that the same may be vacated and set aside, and that the title to said property may be declared and quieted in this plaintiff as the sole and only heir of the said Molly Stover, deceased; that an accounting may be had of the rents and profits received from said premises by the said George W. Stover since the death of the said Molly Stover, deceased, and that the said George W. Stover may be decreed to pay said amount so found due to this plaintiff, and that a writ of possession may issue placing this plaintiff in possession of said property, and that the costs of this action may be taxed against the defendant, George W. Stover, and for such other and further relief as justice and equity may demand."

Appellant answered denying generally the averments of the petition; alleging that the deed in question had been executed and delivered voluntarily by appellee; that ap-

pellant had paid off certain indebtedness against said land and erected valuable improvements thereon. The answer also set up other matters which will be more fully noticed hereafter. The court found generally for appellee, and specifically that the deed was never executed or delivered by her, and that she received no consideration therefor. A decree was accordingly entered declaring the instrument void, quieting title in appellant, awarding her possession, and directing further:

"As to the prayer for the accounting for the rents and profits received from said lands and received by the defendant George W. Stover, that the defendant be given thirty days to file an answer to that part of the petition and this cause is hereby continued for the term as to the said accounting for the rents and profits so received, to the next term of this court."

The undisputed evidence discloses that at the time of the execution of the deed in controversy, appellee, who was then a little past nineteen years of age, was attending school at Oberlin, Ohio, where she had been sent by relatives after the death of her mother, who had been married to appellant; that the latter came to Oberlin unannounced and that at his request, appellee accompanied him to a certain office building in the town. Here the testimony diverges, appellant claiming that appellee there executed and acknowledged the deed in question, which he had previously filled out in his own handwriting, while appellee testifies that she never executed or acknowledged any such instrument; that no one else was present in the office to which they went together, but that appellee stepped into an adjoining room, leaving her alone for a time; and that when he returned he stated that he did not need her further, having previously said that he might wish to have her identify him in a transaction connected with some papers. She also testifies that her name, which is appended to the deed, is not only not in her handwriting, but is wrongly spelled.

These were the only witnesses called as to the alleged

execution of the deed. Their statements are utterly irreconcilable and there are reasons, peculiarly strong, why we should not disturb the finding of the trial court. The demeanor of appellant while on the stand may have been such as to render his testimony unworthy of credence, while that of appellee may have carried conviction. Then there are other circumstances which may have influenced the trial court. It may have considered the fact that one of the parties to this alleged transaction was a mature man, whom the record shows to have had more than ordinary experience in business affairs, while the other was a young school girl, not out of her teens, who was at the time hundreds of miles away from relatives and trustworthy advisers. It may have taken into account, as affecting his credibility, the admitted fact that appellant went under an assumed name before coming to this state. Moreover, though the alleged deed bears the names of two witnesses, neither of these were called, nor were their depositions taken; nor does the record contain any explanation as to why this was not done. Then, although a specimen of appellee's handwriting was taken as if to impeach her denial of the genuineness of the signature, this was not introduced in evidence. We must accept the finding of the trial court that the instrument was a forgery.

But it is urged that even if we uphold appellee on this point, we should require her, as a condition precedent to the relief obtained, to reimburse appellant for moneys expended in discharging certain indebtedness against the land, and that this case requires the application of the maxim, "He who seeks equity must do equity." But the facts on this point are likewise disputed, though the conflict is not so pronounced as upon that just reviewed. Appellant testifies that appellee's mother, who was at the time appellant's wife, borrowed the purchase price of the land in controversy from a Mrs. Walser, who was married to appellant shortly after the death of appellee's mother. It is claimed that the amount originally borrowed was $2,000, of which $450 were afterward returned as unin-

vested; that the debt was evidenced by a note executed by appellant and his wife, the former signing as surety; and that the debt was paid by appellant. This is substantially the testimony of appellant, and in this he is corroborated by the depositions of Mrs. Stover, formerly Mrs. Walser, and her sister. At the time of the hearing below, Mrs. Stover had been divorced from appellant, who went to Oregon to supervise the taking of the depositions of Mrs. Stover and her sister, at which there was no appearance on behalf of appellee. On the other hand, there were some circumstances which might have justified the trial judge in rejecting the claim. Aside from the want of credibility which he must have ascribed to appellant, as evidenced by his finding on the point first above reviewed, the court might have taken into account the fact that there was no written evidence whatever of this alleged transaction. Though the loan was said to have been of a considerable size, no mortgage was taken, and the note was claimed to have been destroyed, and neither party, apparently, kept any record or receipts of payments. Appellant's own statement with reference to this phase of the matter is as follows:

"The fact is—the transaction between Mrs. Stover, my wife—when I had any money and she wanted any money I paid it to her on that claim, and I didn't keep any record of that as I would if it was a stranger."

His other testimony as to how he paid this debt to his wife is equally indefinite. After testifying that he deeded her seven acres of land, which he afterward bought back, his examination proceeded as follows:

Q. How much did you actually pay, though?

A. I don't know what I paid her.

Q. How much cash did you pay her?

A. I paid her the difference between that land and the money borrowed.

Q. How much was it?

A. I would have to look at the records.

None of the parties who testified as to this alleged loan

give any specific instance of payment after the alleged deed was placed on record, except one item of $75, which appears to have been paid about the time appellant and his last wife were arranging the details of their separation and settling the award of alimony. Again, Mrs. Stover's former husband, from whom she had been divorced previous to her marriage with appellant, testifies that when they separated in January, 1883, he gave her $500 in cash and $6,500 in notes, payable at different times, and that she had no other means whatever. As this was the year in which the alleged loan was made, the court might have believed from this evidence that Mrs. Walser could not possibly have made the loan of $2,000. It is true that appellant testifies in rebuttal that a subsequent settlement was made between Walser and his wife, by which the latter accepted fifty cents on the dollar in the summer of 1883, but he also says that he, as assignee, sued Walser on the first $1,000 note, which, according to Walser's testimony, was not due until July, 1884, and not sued on until 1886, which would seem to discredit the theory of a general cash settlement in 1883.

But even if we were permitted to disregard all this contrary showing, and accept appellant's claim that appellee's mother borrowed from Mrs. Walser the money which paid for the land in controversy, and that appellant repaid it, we do not think that the case permits of an application of the doctrine for which he contends. His real claim here is that he, as a surety, should be subrogated to the creditor's rights against the land, because he has paid the debt. The authorities he cites on this point are cases where the debt was secured by a mortgage or some similar security. According to the testimony, the creditor had no rights against the land. It is admitted that no mortgage was given, and that the claim was evidenced by a mere note. By paying such a debt appellant would, at most, be subrogated to the creditor's rights in the note, and his remedy would have been to present it as a claim against the debtor's estate. *Robinson v. Leavitt,* 7 N. H. 73, and other

authorities cited by appellant, have no application to such a case.

Appellant, however, testifies that the land in controversy was subject to a mortgage for $400 to a loan company, and that he paid this off. This testimony was clearly incompetent, as the mortgage, or, in its absence, the record, would have been the best evidence of such an incumbrance, and the court might have been justified in declining to consider this. But even had the incumbrance been properly proved, we do not see that it affords any basis for applying the doctrine of subrogation. There is no claim that appellant was liable on this mortgage, but, on the contrary, the answer alleges that "the payment of that was assumed by the said Molly Stover as a part consideration of the purchase price." The benefits of subrogation can not be invoked by one who pays under such circumstances. 24 Am. & Eng. Ency. of Law (1st ed.), 281.

"A mere stranger or volunteer can not, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor. *Hough v. Ætna Life Ins. Co.*, 57 Ill. 318; *Young v. Morgan*, 89 Ill. 199, 203; *Beaver v. Slanker*, 94 Ill. 175. A stranger within the meaning of this rule is not necessarily one who has had nothing to do with the transaction out of which the debt grew. Any one being under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt, a mere volunteer." *Suppiger v. Garrels*, 20 Ill. App. 625, 629.

But it is claimed that appellant had an interest in the land as tenant by curtesy, "and as such had the right to pay off the mortgage to protect his own estate." Appellee's mother died in 1883, and our statute relating to curtesy then in force contained the following proviso:

"That if the wife, at her death, shall have issue by any former husband, to whom the estate might descend, such issue shall take the same, discharged from the right of the surviving husband to hold the same as tenant by the curtesy." Compiled Statutes (1883), ch. 23, sec. 29.

By virtue of this statute, appellee's rights vested immediately on her mother's death, and appellant acquired no estate of curtesy.

For the same reason the court was justified in awarding possession to appellee. Whether appellant might not have been entitled to demand a jury trial as to his right of possession, we need not now determine as no such demand was made. *Davis v. Snyder,* 45 Neb. 415; *Lounsbury v. Catron,* 8 Neb. 469, 477.

But while this does not seem to be a case in which we can apply the doctrine of subrogation, we nevertheless think that if appellant has actually paid a mortgage on the land, and can show this by competent evidence, he should be permitted to offset the amount of such payment against any claim for rents and profits. We think it would be inequitable to charge him for the latter, and deny him any credit for expenditures which he may have made, thereby preventing a sale of the land under the mortgage, and its loss to appellee. He would also, of course, be entitled to a similar credit for improvements which he may have placed on the land.

We therefore recommend that the decree be so modified that in the subsequent accounting therein provided for, he may be entitled to credit for any payments he may have made on the mortgage, with interest and for any improvements placed on the land, but that in all other respects the decree be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified so as to provide that appellant shall be entitled, in the subsequent accounting, to a credit for any payments he may have made to discharge any mortgage covering the land, with interest, and also for improvements placed thereon.

DECREE MODIFIED.

SCHOOL DISTRICT OF OMAHA V. JOHN MCDONALD.*

FILED APRIL 22, 1903. No. 12,807.

1. **Contract:** CONSTRUCTION. In an action for damages for a breach of contract between a school district, in a metropolitan city, and an architect, for his services for the period of one year, the contract will be construed according to the plain import of its language, viewed in the light of the circumstances and the apparent understanding of the parties at the time it was made.
2. **Directing Verdict:** MEASURE OF DAMAGES. In such a case, where no evidence is introduced in support of the only defense properly pleaded, it is the duty of the court to construe the contract, and determine the measure of damages, and direct the jury to return a verdict accordingly.
3. **Contract an Entirety:** PERSONAL SERVICES. Where the contract is entire, is one for personal services only and the breach of it is total, the measure of damages is what the plaintiff would have earned, less what it would have cost him to perform it according to its terms. *Brodie v. Watkins*, 33 Ark. 545; *Wirth v. Calhoun*, 64 Neb. 316.
4. **Cross-examination.** A witness can not be interrogated on his cross-examination as to the length of time it took him to perform another contract, different from and independent of the one which is the basis of the action.
5. **Non-reversible Error.** It is not reversible error to refuse to allow a defendant to introduce in evidence plaintiff's original petition, where there is no substantial difference in the statement of the facts contained therein, and in the one on which the suit is tried.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, DISTRICT JUDGE. *Affirmed.*

Carl E. Herring and *John P. Breen*, for plaintiff in error.

Howard H. Baldrige, William A. De Bord and *Timothy J. Mahoney, contra.*

BARNES, C.

At the general election held on November 8, 1898, the school district of Omaha voted bonds for the purpose of

* Rehearing denied. See opinion, p. 623, *post.*

creating additional high school facilities on its high school grounds known as "Capitol Square," and for the construction of three new school buildings in other places in said city. The bonds were issued and sold, and with the funds thereby provided, the board of education was authorized to secure additional high school facilities, by additions to the building already constructed, or the erection of a new building. Acting under such authority, on May 8, 1899, the board entered into a contract with John McDonald, as architect, to draw plans for and superintend the construction of a high school building, for which he was to receive as compensation a sum equal to five per cent. of its cost. Under this contract, McDonald drew the plans and specifications for a building of certain dimensions, which was to face south on the high school grounds. These plans were adopted, and McDonald was paid for his work from time to time as it progressed. However, the building provided for by these plans was never erected. It appears that theretofore a contract had been entered into between the school district and one John Latenser, as architect, to draw plans for and superintend the construction of the three school buildings above mentioned—one to be located on Cass street, one on Pacific street and one on Davenport street. It further appears that in November, 1898, the board of education, at a regular meeting, passed the following resolution:

"WHEREAS, The policy of employing an architect by the year, or for a longer term, instead of letting contracts for plans and specifications by competition, has been adopted by nearly all metropolitan school districts in this country as the wisest, best and most economical plan, such policy giving to said board the benefit of practical schoolhouse construction which open competition does not, and

"WHEREAS, The law warrants and precedent and good business judgment demands that this board should follow the policy adopted by other cities: Therefore, be it

"*Resolved,* That this board employ the services of some practical and thoroughly competent architect whose duty

it shall be to draw all plans and specifications for the alteration or remodeling of school buildings already erected, when in the judgment of the board of education of this school district such alterations or remodeling become necessary, and to draw all plans and specifications for the construction of such new buildings as may be ordered by vote of the people, or the board of education.

"And be it further resolved, that this board deems it essential to put the policy suggested by this resolution in force at once by contracting with an architect for the term of one year, commencing December 1, 1899, and upon the selection of such architect, the president and secretary of this board are instructed to at once enter into a contract with such architect for the term stated in this resolution, the basis and conditions of said contract to be the same as fixed by this resolution. Said architect shall receive, as compensation for his services, a commission of five per cent. of the total cost of the work done in the remodeling or alteration of the buildings and five per cent. of the total cost of any new buildings constructed. The compensation herein fixed shall be in full for all services rendered in drawing plans and specifications and in supervision of work. Before entering upon his duties, the architect shall file with the secretary of this board a bond in the penal sum of three thousand dollars ($3,000) for the faithful performance of his duties, such bond to be issued by some surety company and to be approved by the board. These resolutions shall in no way conflict with or annul any contracts at present existing with architects."

Thereupon John McDonald was elected by the board to the position provided for by this resolution, and on December 1 of that year entered into a contract with the school district in accordance with its terms, and by which it was further provided, that he should serve the district in the capacity of architect for the period and upon the terms and conditions following, to wit: That he should draw all plans and specifications for the alteration or remodeling of school buildings already erected, and draw all plans and

specifications for such new buildings as might be ordered by a vote of the people, or of the said board of education; that he should furnish, at his own cost and expense, all plans, specifications, details, copies and blue prints, and all alterations thereof, and all other papers and materials such as might be ordered by the board necessary and convenient for the use of the said school board, its officers, superintendents of buildings, bidders and contractors, and all such copies as should be necessary to be furnished under the laws of the state and ordinances and rules of the city of Omaha, and under the rules and regulations of the board of education then in force or thereafter to be in force during his employment. He also agreed to furnish all information desired by any interested person of or about any or all of such plans, specifications, details, copies, blue prints and alterations thereof, and other papers, and all materials therein designated or provided for, and to have a copy of each of said papers and documents at all times accessible to any member or officer of the board of education on file at the office of the board, and the plans, specifications, details and alterations thereof, and all other papers from the beginning of their drafting, it was agreed should be the absolute property of the said school district with the right to use them during the term of the contract, and at any time thereafter, and either in the form drafted and made by McDonald or in any alterative form without any liability to him or any one for such use. It was further provided that McDonald should serve the school district in such capacity for the period of one year from the 1st of December, 1899; that he should so serve the district as employee and agent solely, and be in no sense an arbiter between the school district and any contractor; and that so much of his time as the school district should desire during the existence of the contract should be at the service of the district for all purposes and in any way pertaining to the business and occupation of an architect. It was further provided that at all times during the existence of the contract McDonald should be

subject to the immediate order of the board of education, and he agreed to do and perform all the things to be done by him within the time allotted to him by the board, without regard to the cost to him, provided the time limited by the board should not be unreasonably short; and that he should do all of these things under his employment faithfully, honestly, fully and skillfully as a skillful architect. He was further required to give bond in the sum of $3,000 for the faithful performance of his duties. And in consideration of the services so rendered by McDonald, and of his full compliance with all the terms and conditions of the contract, it was agreed therein that the school district should pay him, as compensation for his services, a commission of five per cent. of the total cost of the work done in the remodeling or alteration of buildings, and five per cent. of the total cost of the new buildings ordered constructed; that this compensation should be in full for all services rendered in drawing plans and specifications and in supervision of work; and that the contract should in no way conflict with or annul any contract then in force with any architect employed by the board.

McDonald gave his bond as provided, which was duly approved, and by these acts he abandoned his contract of May 8, 1899, and agreed to give his whole time and services, if necessary, to the school district, and in all things to be subject to the orders of the board of education. On the 5th day of February, 1900, the board adopted the following resolution:

"WHEREAS, The records of the board of education of the school district of Omaha show that a resolution providing for the appointment of an official architect for the said board was presented on the 20th day of November, 1899, and that thereafter, and in accordance with the tenor and effect of said resolution the board entered into a pretended contract with one John McDonald as architect for said school board for the period of one year, commencing December 1, 1899.

"Now therefore, be it resolved, that said resolution and all and singular the acts of said board in or about or connected with the employment of, or the contracting with said McDonald, as architect of the school board under and in pursuance of said resolution be, and the same are hereby rescinded, set aside and held for naught, and the said McDonald is hereby released from and discharged from any and all obligations to said board that may exist under said resolution and act thereunder. And the said board of education hereby disclaims and denies any contractual relation existing between the said board and said McDonald under said resolution and premises herein."

And thereby the said McDonald was discharged from his said office and employment. It further appears that the board at the same meeting adopted another resolution wholly annulling and setting aside his May contract. McDonald was notified of the adoption of these resolutions, and at once wrote the board a letter, stating that he considered his December contract in full force; that he was ready, willing and able to perform it; and that he still considered himself the official architect of the board. An indorsement made by the attorney for the board of education appears on this letter as follows: "John McDonald considers himself official architect."

Immediately thereafter John Latenser was elected architect in McDonald's place, and entered into a contract with the school district, which was, in form and substance, the same as McDonald's contract of December 1, 1899, and provided for the payment of the same compensation. In pursuance to the orders of the board of education, Latenser immediately drew plans and specifications for a new high school building, facing east on the high school grounds, which were adopted. The contract was let for the construction of the building, which was commenced in July of that year, and cost, when completed, $189,743.16. After the erection of the building McDonald commenced this suit against the school district to recover the damages

alleged to have been sustained by him by reason of the violation of his contract of December 1, 1899, on the part of the school district, by and through the acts and resolutions of its board of education. The petition fully set forth the foregoing facts, pleaded the contract, alleged its violation on the part of the defendant, and prayed judgment for the sum of $10,000, with interest from December 1, 1900. The school district, by its answer, admitted the adoption of the resolution set forth and attached to the petition; admitted the execution of the contract sued on, but denied the construction placed on it by the allegations of the petition; and set forth the construction and meaning thereof contended for by defendant. The adoption of the resolution annulling and rescinding the contract was also admitted, and it was alleged that the defendant was justified in the termination of the contract for the reasons that the plaintiff was so unskilled in architecture, and in the drawing of plans and specifications for school buildings, as to render him wholly incompetent to perform the work and duties of an architect. The answer further alleged that in the performance of the duties of an architect, and in the performance of the duties of a superintendent of the construction of public buildings, such as school buildings, in addition to skill and good workmanship, a high degree of honesty, good faith, integrity and truthfulness is required; nevertheless plaintiff is wholly lacking in honesty, good faith, integrity and truthfulness, which facts became known to defendant shortly after December 1, 1899.

The reply fully traversed the matters of defense contained in the answer; denied specifically the allegations of the last paragraph thereof, and alleged, in substance, that the contract was rescinded after certain new members of the board had been elected, for the purpose of showing favoritism to John Latenser, and for the sole purpose of giving him the contract for drawing the plans and specifications for the erection of the high school building; because of his personal and political services rendered to

many members of the board of education. Defendant filed a motion to strike certain paragraphs of the reply, which was properly sustained in part, and overruled as to the other matters contained therein. And thereupon, on the issues thus formed, the cause was tried to a jury. After the introduction of the plaintiff's evidence, counsel for the school district moved the court for an instruction directing the jury to return a verdict for the defendant. The motion was overruled, and the district thereupon introduced its evidence. Plaintiff produced his rebuttal, and at the close of all of the evidence moved the court to direct the jury to return a verdict for him for the amount sued for. The defendant objected to the motion. The objection was overruled, the motion was sustained, and the jury was instructed to return a verdict for plaintiff for five per cent. of $187,743.16, less $40, the amount which the evidence showed it would have cost the plaintiff to carry out and perform his contract, with interest on the same from December 1, 1900, to wit, $10,225; and the jury returned a verdict for the plaintiff for that amount. Judgment was entered on this verdict. The school district prosecuted error to this court, and hereafter will be called the plaintiff. We have made the statement of facts somewhat prolix, but it seemed necessary for a correct understanding of the questions presented for our decision.

1. Plaintiff contends that the court erred in directing the jury to return a verdict for the defendant herein. It must be observed that there is no conflict in the evidence as to any material question of fact put in issue by the pleadings. The plaintiff specifically admits the adoption of all the resolutions pleaded and offered in evidence; that it entered into the contract in question with the defendant, McDonald, as alleged in the petition; that it was valid; and that by the resolutions above mentioned the board of education annulled, canceled and set it aside, without McDonald's consent. This entitled him to maintain an action for damages, and unless a valid defense was pleaded, and established by some competent evidence, he

would be entitled to recover. The first question for determination is the meaning of the terms of the contract—in other words, its construction. This was for the court, and it would have been reversible error to have submitted that question to the jury. *Simms v. Summers,* 39 Neb. 781; *Rosenthal v. Ogden,* 50 Neb. 218, 223; *Western Mfg. Co. v. Rogers,* 54 Neb. 456, 460; *Meyer v. Shamp,* 51 Neb. 424; *Ricketts v. Rogers,* 53 Neb. 477.

The trial court held that for the performance of the duties which McDonald assumed, and which are all explicitly set forth in the contract, he was entitled to receive as compensation a sum equal to five per cent. of the cost of all the work done in remodeling buildings already constructed, and five per cent. of the total cost of all new buildings ordered constructed by the board of education, during the term of his contract.

We are unable to say that the court was wrong in his view of the meaning of the agreement. McDonald had given up his contract of May 8, 1899, and had accepted in lieu thereof his election as architect for the district for the term of one year; had agreed to give his entire time to the business of the plaintiff, if required to do so; to furnish whatever it desired in the way of plans, specifications, drawings, blue prints and everything necessary to construct its high school building, and as well as plans and specifications and all matters necessary for remodeling any school buildings already constructed. These plans were to belong to the plaintiff absolutely, with power to change or alter them without McDonald's consent, during the term of his contract or afterwards; he was to have no charge or superintendency of construction, so that when the plans, specifications, maps, blue prints, drawings and estimates were furnished in such numbers as were required for the district, the board of education, contractors, builders and superintendents of construction, erection of the building could go forward to completion without further service on his part, and his contract would be fully performed. Plaintiff does not seriously question this view of

the agreement, but contends that the compensation mentioned therein should be held to apply only to the amount of money actually expended in improvements during its term. This view of the matter is so unreasonable that we can not give our consent to it. It could not have been the understanding of either the board of education or McDonald. It was conceded, as a matter of course, that the contract which Latenser, as architect, had for the erection of the school buildings on Cass, Pacific and Davenport streets, could not be interfered with; and that McDonald had the contract for the high school building, which would compensate him to the amount of about $10,000; and, deeming it better to secure his services for all purposes, including the high school building, as well as the contemplated improvements in the way of remodeling and altering its other school buildings, the board resolved to enter into a general contract with him for one year from December 1, 1899, during which time it was contemplated that the high school building would be ordered, would in fact be constructed, and all other needed improvements made. McDonald, with this understanding, could well afford to give up his former employment, and accept this general contract for a year, with the compensation agreed upon therein. Any other view of the matter would be so unfair and unjust that it should not receive our serious consideration. We therefore approve of the construction placed on the contract by the trial court. It being thus settled that the defendant herein was entitled to recover, the court did not err in directing a verdict in his favor.

2. This brings us to the consideration of the matters of defense contained in the record. It appears that the only matter pleaded as a defense, which was entitled to any consideration, or in the support of which any evidence could have been introduced over McDonald's objections, was that of unskillfulness and incompetency. The district offered no proof to sustain these allegations. No one attempted to testify that McDonald was incompetent or unskillful, but on the contrary, the evidence discloses that

he was an architect of many years' experience; that he had received proper preliminary training, and during the sixteen years he had been practicing his profession in Omaha he had planned and constructed many fine and costly buildings, both public and private, to the entire satisfaction of those concerned therewith. As to the question of his honesty and integrity, that matter was not pleaded in such a manner as to state a defense, and was therefore not an issue in the case. If the answer had alleged that by dishonesty and fraud he had procured the contract in question, or that he had been guilty of dishonesty or want of integrity in the performance of his duties thereunder, evidence on these points should have been received. The court properly ruled that the offer of evidence of that general nature, by the members of the board of education, could not be received under the issues made by the pleadings. Therefore no substantial defense to the action was established.

3. We now come to the measure of damages. The trial court held that McDonald was entitled to recover the amount of the compensation provided for by the terms of the agreement. The contract in this case was an entirety, was one for personal services, and the breach of it was total. In such a case the measure of damages is what the plaintiff would have earned if the contract had been carried out, less what it would have cost him to perform it according to its terms. *Ennis v. Buckeye Publishing Co.*, 44 Minn. 105, 46 N. W. 314.

The case of *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49, is in point. It was one where an attorney had contracted with a client to prosecute a suit, and was to have, as compensation therefor, ten per cent. of the amount of money recovered. He filed a bill, commenced the action, and was proceeding to prosecute it in a proper manner, when his employer discharged him. It was held that he was entitled to recover as damages ten per cent. of the amount afterwards recovered by the client, less the actual expense he would have incurred in prosecuting the suit.

In the case at bar, McDonald was entitled to five per cent. of the total cost of the building constructed by order of the board of education, less the sum of $40, which the testimony showed would have been his actual expense in performing his contract. *Webster v. Wade,* 19 Cal. 291. And as to this amount there is no conflict of evidence.

In the case of *Wirth v. Calhoun,* 64 Neb. 316, it appeared that Wirth had made a contract with the Calhouns whereby the latter were to give certain performances, consisting of music, at Wirth's place of amusement in Omaha. The Calhouns were discharged prior to the termination of the contract, and sued for damages; claiming that they were damaged in the amount of the contract price which they would receive for the remainder of their engagement. We held as follows (p. 318):

"As to the failure to allege that they [the Calhouns] were unable to find other employment, that is a matter of defense, and they were not required to anticipate it." The lower court instructed the jury as follows: "If you find for the plaintiffs you will assess their damages at the sum of $60 per week from July 24, 1898, to October 31, 1898, together with the reasonable value as shown by the evidence of their board and lodging for the same period." The Calhouns were to be paid $60 per week, and Wirth was to furnish them with board and lodging. Referring to this instruction, Commission ALBERT said: "The instruction was proper, under the pleadings and evidence in this case. It is not claimed that there was any evidence tending to show that the plaintiffs had, or, by the exercise of due diligence might have secured, other engagements, or of any other fact in mitigation of damages. Under such circumstances, the contract price is the measure of damages."

In the case at bar there is nothing in the pleadings or evidence tending to show that McDonald had, or by the exercise of due diligence might have secured, other employment. The record shows conclusively that he had the time to fully perform his contract with the school board

within the year mentioned therein, and that during that period he could have drawn the plans and specifications for the new high school building, and would have drawn them had he been permitted to do so, in accordance with the terms of his contract. The only proof introduced to reduce the measure of his compensation was his own evidence that it would have cost him $40 in the way of expense to have performed his contract. Adopting the above rule, there was nothing for the court or jury to do but to make the computation and announce the amount, and it was unnecessary to require the jury to perform that duty.

4. Counsel for the plaintiff contends that the court erred in refusing him the right to cross-examine McDonald on the May contract. The questions put to him by way of cross-examination only tended to show how long it took him to draw the plans and specifications for the building contemplated by that contract. Surely this had nothing to do with the matter in controversy. The May contract had been abandoned by both parties, and this action in no manner depended on it.

Latenser's plans for the high school building, which were adopted by the board, were introduced in evidence, and McDonald testified as to the length of time it would have taken him to draw them, in order to show that he could have fully performed his duties in that behalf during the life of his contract and the term of his employment. His evidence on this point was not disputed by any one. This evidence was competent and proper to show that, in addition to the fact that he was willing to perform the contract on his part, he was able to do so.

5. It is alleged that the court erred in refusing to receive McDonald's original petition in evidence. We do not so view the matter. The allegations of the original petition were, in substance, the same as those contained in the one on which the case was tried; the only difference being in the statement of the items on which he claimed damages, and its exclusion was in no way prejudicial to the interests of the plaintiff in er or.

An examination of the record convinces us that the case was fairly tried; that the construction placed on the contract, and the rulings of the court as to the measure of damages, were correct; and for the above reasons we recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

On motion for rehearing, the following opinion was filed December 2, 1903. *Rehearing denied:*

Rehearing. If a correct conclusion has been reached, even by a wrong course of reasoning, the unsuccessful party is not entitled to a rehearing.

SULLIVAN, C. J.

It is said in the opinion that the May contract was superseded by the November contract. This conclusion is challenged as obviously unsound, and it is, perhaps, indefensible. It is, at least, contrary to the understanding of the parties as disclosed by this record. But conceding it to be unwarranted, conceding that neither contract impinges upon the other, there is still good reason for holding that the case has been rightly determined, and that the judgment of affirmance should stand. McDonald has, beyond question, a cause of action upon one contract or the other. Whether he has a right of action upon the May contract, depends upon whether he was bound by that contract to do what John Latenser did in furnishing plans, specifications, etc., for the high school building. Evidently he was not so bound. He had already furnished plans, specifications, details, copies and blue prints in accordance with the requirements of the May contract, and he was not bound by that contract to furnish others. He

might, of course, have been required to make alterations, but that was the farthest limit of his obligation. He was bound to do the work done by Latenser, but he was bound by the contract made in November, and not the one made in May.

REHEARING DENIED.

WALTER W. HACKNEY, TRUSTEE, V. RAYMOND BROTHERS CLARKE COMPANY.*

FILED APRIL 22, 1903. No. 12,644.

1. **Error**: REVIEW. A much stronger case is necessary to warrant this court in interfering with a second verdict and judgment on the merits by reason of alleged error in setting aside a prior verdict and granting a new trial, than where a motion for a new trial has been denied.

2. **Instruction**: NOTICE OF INSOLVENCY. An instruction, that notice of facts sufficient to lead a prudent man to the conclusion that a debtor "could not meet his obligations as they matured in the ordinary course of business" is notice of the insolvency of such debtor, within the meaning of the bankruptcy act, is erroneous.

3. **Preferred Creditor**: RECOVERY OF ASSETS. The trustee in bankruptcy may recover money paid by the bankrupt as a preference, only when the person receiving it had reasonable ground to believe that a preference was intended.

4. ———: NOTICE. If the creditor has reasonable ground to believe that the debtor is insolvent, and the obvious effect of receipt of the money under those circumstances is to give him an advantage over other creditors, he is chargeable with notice of intent to prefer.

5. **Bankruptcy Act**: INSOLVENCY: QUESTION OF FACT. Whether a creditor had reasonable cause to believe his debtor insolvent within the purview of section 60 of the bankruptcy act is a question of fact.

6. **Notice.** In determining this question, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose.

---

* Rehearing allowed. See opinion, p. 633, *post.*

7. ———: SUFFICIENCY. But a mere knowledge that the debtor has other liabilities, or of circumstances which could operate no further than to create a suspicion of possible insolvency, will not necessarily suffice.

8. **Preference: COLORABLE DEVICE.** A creditor will not be permitted to obtain a preference indirectly by transfer of his account, procuring a third party to loan money to the debtor for payment of such creditor, or other colorable device or transaction intended to evade the provisions of the bankruptcy act.

9. **Transfer of Account: GOOD FAITH.** But an absolute transfer of an account against the insolvent debtor, in good faith, to one who afterwards buys the latter's stock of goods and obtains credit for such account on the purchase price, without any agreement or understanding that such use was to be made thereof, or that the purchaser of the account was to be protected by the creditor in any way, does not constitute a preference of the creditor to the extent of the money he received on sale of his claim.

10. **Remedy.** In such case the remedy is against the purchaser of the stock, who received credit on the purchase price for the account so transferred, in case he had reasonable ground to believe that a preference was intended.

11. **Evidence.** A schedule of liabilities filed by the bankrupt in bankruptcy proceedings, is not competent evidence on an issue between the trustee and third persons as to the financial condition of the bankrupt three months before such proceedings were instituted.

12. **Good Faith: INTENTION: EVIDENCE.** While a person's intention is to be determined primarily from his acts, where such acts are ambiguous and good faith is in issue, he may testify what his intention was.

13. **Cross-examination of Hostile Witness: DISCRETION OF TRIAL COURT.** How far, if at all, a party shall be permitted to cross-examine, or put leading questions to his own witnesses, where they appear to be hostile or unwilling, is in the discretion of the trial court, and its rulings in such matters will not be disturbed except for manifest abuse of discretion.

14. **Questions Not Raised in Briefs.** This court is not bound to examine questions not so raised in the briefs as to state specifically what is complained of, the reason and basis of the complaint, and the exact portions of the record material thereto.

ERROR to the district court for Lancaster county: LINCOLN FROST, DISTRICT JUDGE. *Affirmed.*

John S. Bishop, Robert S. Mockett and *Orpheus B. Polk*, for plaintiff in error.

Henry H. Wilson and *Elmer W. Brown, contra.*

POUND, C.

This is an action by the plaintiff, as trustee in bankruptcy of one Erlenborn, to recover an alleged preference claimed to have been received by the defendant as a creditor of said Erlenborn. The transaction by reason whereof a preference is alleged to have resulted was, in substance, this: Erlenborn was a retail merchant, and was indebted to several wholesalers, among others, to the defendant. One Kettering bought out Erlenborn, and, as part of the purchase price of the latter's stock, put in the account of the defendant against Erlenborn, which he had purchased at a discount of 25 per cent. The principal issues were whether Erlenborn was insolvent at the time of this transaction; whether Kettering and the defendant had reasonable ground to believe him insolvent; and whether the transfer of the account from the defendant to Kettering was an absolute transfer, made in good faith, without any understanding that Kettering was to be protected, and without any agreement or understanding that the account was to be used as part of the purchase price in a contemplated purchase of Erlenborn's stock, or was merely a colorable device for the purpose of evading the bankruptcy law and enabling the defendant to obtain a preference. The sale took place three months prior to the institution of bankruptcy proceedings, and consequently would be within the terms of the act in case we should hold the transaction amounted to a preference. There were two trials in the court below. At the first trial a verdict was rendered for the plaintiff. A new trial was granted, which resulted in a verdict and judgment for the defendant. The plaintiff has come to this court on error, and complains of the order of the district court granting a new trial after the first verdict, and of its rulings and judgment at the second trial.

A much stronger case is necessary to warrant this court

in interfering with a second verdict and judgment on the merits by reason of alleged error in setting aside a prior verdict and granting a new trial, than where a motion for a new trial has been denied. *Weber v. Kirkendall,* 44 Neb. 766. The new trial appears to have been granted because the district court was of opinion that one of its instructions at the first trial was erroneous. We think this conclusion was correct, and that the error in the instruction was sufficient to justify its action. Among other things, the jury were instructed that notice of facts sufficient to lead a prudent man to the conclusion that a debtor "could not meet his obligations as they matured in the ordinary course of business" was notice of the insolvency of such debtor within the meaning of the bankruptcy act. This was clearly erroneous. Under a former statute insolvency was so defined; but the present act gives a materially different meaning to that term. In section 1 it is provided that "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient in amount to pay his debts." Manifestly, a person may not be able to meet current obligations and yet his property at a fair valuation may be sufficient to pay his debts. So long as the insolvency of Erlenborn at the time of the transfer was in issue, we can not say this was not prejudicial error. Notice that a debtor has not paid a claim at maturity is not necessarily and conclusively notice of insolvency under the present law. *In re Eggert,* 102 Fed. 735, 43 C. C. A. 1. As one of the facts relied on was that Erlenborn was not meeting his account with the defendant promptly, this point became very material.

The principal controversy with respect to the second trial turns upon the instructions of the court. The plaintiff contended that the necessary effect of the sale of defendant's claim against Erlenborn to Kettering was to prefer the defendant, while the defendant contended that it had a right to sell its claim to whom it pleased, the same as any other property, so long as it made an absolute trans-

fer without any intent to evade the bankruptcy law, and without any secret understanding or agreement which would give it such effect. The court took the latter view, and instructed the jury, in substance, that it was a question of fact whether the transfer of the account was absolute and in good faith, or a mere colorable device for the purpose of securing a preference indirectly. Whether or not the defendant had reasonable ground to believe Erlenborn insolvent, and to believe that the purchase of the account by Kettering would operate as a preference, becomes an important question in connection with the issue as to the nature and effect of the transaction. The trustee in bankruptcy may recover money paid by the bankrupt as a preference only when the person receiving it had reasonable ground to believe that a preference was intended. Such is the language of the statute, and the courts so hold. *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438. If the creditor has reasonable ground to believe that the debtor is insolvent, and the obvious effect of receipt of the money under those circumstances is to give him an advantage over other creditors, he is chargeable with notice of intention to prefer. *Pirie v. Chicago Title & Trust Co., supra.* A person must be held to intend the obvious results of what he does. Notice that such results will follow is notice of the intention with which the act is done. *Johnson v. Wald*, 93 Fed. 640; *In re Fort Wayne Electric Corporation*, 99 Fed. 400. In *Johnson v. Wald* the court say:

"Where an insolvent debtor transfers to one of his creditors, in payment of his debt, personal property sufficient in value to satisfy the debt in full, his 'intent to prefer such creditor over his other creditors,' necessary to make such transfer an act of bankruptcy, will be presumed; the preference being the natural result of the transfer." Hence, in such cases, the crucial point is reasonable cause to believe the debtor insolvent. Whether a creditor had reasonable cause to believe his debtor insolvent within the purview of section 60 of the bankruptcy act, is a question of fact. *In re Eggert*, 102 Fed. 735, 43

C. C. A. 1. In determining this question, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose. *In re Eggert, supra.* But a mere knowledege that the debtor has other liabilities, or of circumstances which could operate no further than to create a suspicion of possible insolvency, is not always sufficient. In the *Eggert* case the circuit court of appeals say:

"The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor shall have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose. * * * The only fact brought home to the creditor, and which it is claimed should have aroused inquiry, is that he was somewhat behind in the prompt payment of his obligations. We can not say, as a conclusion of law, that knowledge of that fact standing alone was sufficient to put the creditor upon inquiry. Indeed, it may be said that a majority of merchants absolutely solvent, in the sense in which the term is employed in the bankruptcy act, are not at all times able to promptly meet their obligations as they mature."

The same position is taken in *Lyon v. Clark,* 129 Mich. 381, 88 N. W. 1046. Under these authorities, with which we fully agree, the court was right in refusing to direct a verdict for the plaintiff. The mere fact that defendant's

account was overdue, and that its collector had been seeking to obtain payment, was not sufficient to charge the defendant with notice of insolvency on the part of Erlenborn, or an intention on his part to make a preference.

With respect to the nature of the transactions between defendant and Kettering on the one hand, and between Kettering and Erlenborn on the other hand, we think the question was peculiarly one for the jury. A creditor will not be permitted to obtain a preference indirectly by transfer of his account, procuring a third party to loan money to the debtor for payment of such creditor, or other colorable device or transaction intended to evade the provisions of the bankruptcy act. As was said in the case of *In re Beerman,* 112 Fed. 663, 666. "If transactions of this sort are to be permitted, then, instead of a creditor taking a mortgage himself, when a debtor is in failing circumstances he will get some one else to advance the money, agreeing that the person advancing the money shall suffer no loss, and thereby obtain by indirection a preference which he would be unable to get if he had acted directly with the debtor."

But an absolute transfer of an account against the insolvent debtor, in good faith, to one who afterwards buys the latter's stock of goods and obtains credit for such account on the purchase price without any agreement or understanding that such use was to be made thereof, or that the purchaser of the account was to be protected by the creditor in any way does not constitute a preference of the creditor to the extent of the money he received on sale of his claim. To construe the bankruptcy act as preventing creditors from disposing of their claims absolutely in good faith, as they undoubtedly may do where the debtor is solvent, would, as the court well expressed it in *In re Eggert, supra,* "put at hazard many business transactions and make the act oppressive." In the somewhat similar case of *North v. Taylor,* 61 App. Div. (N. Y.) 253, 70 N. Y. Supp. 339, a husband gave his own note to his wife for a note which she held against the bankrupt, and then turned

in the note to the bankrupt upon the purchase price of the latter's stock of goods. The evidence did not show that the husband acted as the wife's agent, or that she was aware of the insolvency of her debtor. It did not appear that she received the proceeds of the transfer to her husband. The court held that the trustee could not recover the amount of the note from the wife, on the ground that she had received a preference. In *Lyon v. Clark, supra,* another case involving a transaction not unlike that in the case at bar, the court held that the question was one of good faith, and that such a transaction could not be pronounced a preference as a matter of law. We think this must be so clearly. The remedy in case the transaction was *bona fide* is against the purchaser of the stock, who received credit on the purchase price for the account so transferred. He, not his assignor, was preferred. In case he had reasonable ground to believe that a preference was intended, the trustee has a cause of action against him. It can not be said that his assignor was preferred unless the assignment was entered into to evade the bankruptcy law, with some secret understanding or agreement whereby the assignor was to be protected, or was to be a mere figure-head, while the real and substantial transaction was between the debtor and the assignor. We are of opinion that the instructions of the court are fully in accordance with the views above expressed, and that its rulings in giving and refusing instructions were free from error.

A number of errors are assigned upon rulings on evidence. A schedule of liabilities filed by Erlenborn in the bankruptcy proceedings was offered on behalf of the plaintiff, and excluded by the court. This ruling was right. It is not perceived how the schedule could be competent evidence on an issue between the trustee and a third person as to the financial condition of the bankrupt three months before. Complaint is made, also, that one of the officers of the defendant was permitted to testify as to his intention in making the transfer of the account to Kettering. While a person's intention is to be determined pri-

marily from his acts, where such acts are ambiguous and good faith is in issue, he may testify what his intention was. 1 Greenleaf, Evidence, sec. 462; *Sweet v. Tuttle,* 14 N. Y. 465; *Seymour v. Wilson,* 14 N. Y. 567; *Starin v. Kelly,* 88 N. Y. 418. In the case at bar, the evidence was conflicting upon the issue whether the assignment was absolute and in good faith, or was a mere device to evade the bankruptcy act. The act of assignment, taken by itself, is consistent with either view. Hence it was proper to permit the parties thereto to testify to their intention, and it would have been error to exclude such testimony. *Seymour v. Wilson, supra.* The plaintiff produced Kettering as a witness on his own behalf, and subjected him to a severe examination, which, in substance, was a cross-examination. The trial court ruled somewhat strictly at many points in the course of this examination, and complaint is made as to a large number of these rulings. How far, if at all, a party shall be permitted to cross-examine or put leading questions to his own witnesses, where they appear to be hostile or unwilling, is in the discretion of the trial court, and its rulings in such matters will not be disturbed except for manifest abuse of discretion. *St. Joseph & G. I. R. Co. v. Hedge,* 44 Neb. 448; *Welsh v. State,* 60 Neb. 101.

Many other assignments of error are referred to in the brief, but they are not argued in such manner as to make it necessary for us to take them up in detail. This court is not bound to examine questions not so raised in the briefs as to state specifically what is complained of, the reason and basis of the complaint, and the exact portions of the record material thereto. Such, we think, is the fair import of the numerous decisions of this court to the effect that it will not consider errors not argued in the briefs. We come to the conclusion that these several assignments of error need not be gone over in detail, the more readily, because, from examination of the record, we are of opinion that the instructions of the court and its rulings on evidence were more than usually careful and

circumspect, and that the plaintiff had a fair trial in every way. The evidence is sufficient to sustain the verdict, and the record discloses no prejudicial error.

We therefore recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing in *Hackney, Trustee, v. Hargreaves Bros.*, 3 Neb. (Unof.) 676, and in *Hackney, Trustee, v. Raymond Bros. Clarke Co., ante*, p. 624, was filed May 5, 1904. *Judgment of reversal in Hackney, Trustee, v. Hargreaves Bros. adhered to; judgment of affirmance in Hackney, Trustee, v. Raymond Bros. Clarke Co. vacated. Both cases remanded:*

1. **Bankruptcy Act:** UNLAWFUL PREFERENCE. A creditor of a bankrupt can not escape the consequences of the bankruptcy act regarding unlawful preferences by assigning his account to a purchaser of the property of the bankrupt under an arrangement whereby such purchaser offers to assume the liability, and satisfy such account contingent upon the purchase of the bankrupt's property, and where in the sale of such bankrupt's property, as a part of the consideration, such purchaser agrees to and assumes such liability, and reserves from the purchase price an amount sufficient to satisfy the same.
2. **Legal Effect of Conditional Transfer of Account.** In such a case the legal effect of the transaction is to appropriate out of the assets of the bankrupt the amount required and used in the satisfaction of such claim by the purchaser assuming the liability, and other essential elements not being lacking, an unlawful preference in favor of such creditor results therefrom.
3. **Schedule Admissible in Evidence.** In a contest between a trustee in bankruptcy and one sought to be charged as a creditor having received an unlawful preference, the schedule of liabilities filed by the bankrupt in the bankruptcy proceedings is admissible in evidence on the issue of insolvency as tending to prove the insolvency charged.
4. *Hackney v. Hargreaves Brothers*, 3 Neb. (Unof.) 676, adhered to.

HOLCOMB, C. J.

What is here said regarding the two cases as above entitled is to be considered in connection with the two opinions heretofore announced: *Hackney v. Hargreaves Bros.*, 3 Neb. (Unof.) 676, and *Hackney v. Raymond Bros. Clarke Co., ante,* p. 624. The facts as disclosed by the two records in all material respects are essentially the same, so much so that the conclusion as to the ultimate fact in controversy, properly deducible in one case, must necessarily be the same in the other, and the principles of law applicable are identical in each case. We have therefore deemed it proper and a lessening of labor to consider both cases together. A thorough consideration of the two records convinces us that the conclusion reached and announced in the opinion heretofore rendered in the first-mentioned case is correct and should be adhered to, and that the second opinion, in so far as it conflicts with the first, must give way to that extent. Counsel in both cases have very ingeniously, and with more or less plausibility, argued that the controlling proposition and question for determination is with respect to the right of a creditor in good faith to sell and dispose of an account or other obligation held against a bankrupt debtor, regardless of the question of insolvency or notice thereof, and that in such a transaction none of the provisions of the bankruptcy law are infringed upon. The soundness of the proposition is readily conceded, but its applicability to the facts as disclosed by the records in the two cases at bar is seriously questioned. The arguments thus advanced to sustain the transactions under investigation are beside the mark. While an attempt is made to clothe the transactions out of which the controversies arise in the garb of a legitimate contract of bargain and sale of an account wholly independent of and free from any of the provisions of the bankruptcy law, yet when they are stripped of the covering thus sought to be thrown around them, and exposed to view

in their real character, the conclusion is inevitable that the transactions resulted in a preference in favor of the defendants, other essential elements not being lacking, and that these creditors of the bankrupt received more of his estate than other creditors who were under that law entitled to share equally in the distribution of the assets of the bankrupt. It is conceded that if it be determined that the transactions in question are not such as to bring them within the rule invoked which permits any creditor to make a *bona fide* sale of his claim or account against a bankrupt as he sees fit, then the transactions in the case at bar result in a preference which is inhibited by the law of bankruptcy, assuming that the creditors had knowledge or reasonable cause to know the financial condition of the bankrupt. It is indisputably established by the records that the defendants Hargreaves Brothers and Raymond Brothers Clarke Company are wholesale merchants in the city of Lincoln, dealing in grocery supplies; that the bankrupt Erlenborn, was conducting a retail grocery store in the same city, and was indebted to the two firms mentioned in a considerable sum of money to each on account, at the time of the transactions forming the basis of the present action. One Kettering began negotiations to purchase the grocery stock and good will of Erlenborn. During the negotiations, knowledge of the indebtedness owing to the two wholesale firms was conveyed to Kettering, which caused him to confer with both defendants about their respective accounts against Erlenborn before he had completed the purchase of the latter's stock of groceries. Kettering then entered into negotiations with both firms, with a view to his assuming these obligations and agreeing to satisfy the indebtedness owing by Erlenborn. The negotiations resulted in an agreement whereby Kettering was to become the debtor in place of Erlenborn, and satisfy the two accounts by the payment of 75 cents on the dollar, a part of which was to be paid in cash, and the remainder by accepting his personal obligations payable in stated instalments. These negotiations with the defendants were

qualified and contingent upon his consummation of the negotiations then under way with Erlenborn the bankrupt. Hargreaves Brothers frankly admit that the assignment of their account to Kettering was with the understanding that it was to be used in part payment by Kettering in his purchase of the Erlenborn stock of groceries.

It is equally patent from the record in the other case that Kettering offered to pay 75 cents on the dollar for the account held by Raymond Bros. Clarke Company against Erlenborn, provided he succeeded in buying the stock, and that his offer was accepted with this understanding. It is vain to talk about Kettering buying these two accounts unqualifiedly and unconditionally, as such accounts might, in the ordinary course of business, be sold and transferred from one person to another. The fundamental basis of the negotiations between Kettering and the defendants was the successful conclusion of the contemplated purchase of the grocery stock of the bankrupt. The antecedent agreement in each case was made to depend on the consummation of the negotiations then in progress with Erlenborn. Kettering was not buying stale demands or bad debts as such, but was desiring to purchase a stock of groceries, the owner of which was indebted to these defendants, and as a part of the transaction, entered into the negotiations with the defendants with a view to the satisfaction of their demands against the seller in the event a purchase was effectuated. This was obviously known to all the parties to the transaction, and herein lies the determining factor which takes the transaction out of the class which involves only a simple business proposition of buying and selling a book account against a third party, or other similar subjects of bargain and sale. But what followed? After Kettering and the defendants had agreed upon the terms by which he could satisfy the accounts of the defendant against Erlenborn, and which agreements were contingent upon his purchase of the Erlenborn stock of groceries, he reaches an agreement with Erlenborn concerning the terms of the sale

of the latter's stock, and, as a part of the consideration for the purchase, agrees with the seller that he will satisfy the two accounts owing by Erlenborn to the defendants, and reserve from the agreed purchase price for the stock the total amount of the face of both accounts. The terms of the sale between Erlenborn and Kettering were agreed upon on Saturday. On Sunday an invoice of the goods sold was taken—the city sales agents of the two defendants assisting in the invoice—and thereafter the key to the store was turned over, and possession given to Kettering and his agent. On Monday morning, papers evidencing the executed contract of sale were made and exchanged between Kettering and Erlenborn, and thereafter Kettering went to the two defendants herein, arranged for the satisfaction of the two accounts in controversy, in pursuance of the prior arrangements, by paying a part in cash and giving his personal obligations for the remainder, and he was given a formal assignment of the accounts. These transactions are denominated unqualified and *bona fide* sales of the accounts which Kettering thus satisfied wholly disconnected and unrelated to any of the provisions of the bankruptcy law. If the provisions of the bankruptcy law may, by an arrangement so transparent as those under consideration, be evaded, then, indeed, has the law failed of its purpose as if it were a sieve designed to hold water. The labeling of the transaction a simple sale of an account does not make it so. A court will not hesitate to throw off the covering and ascertain the true nature of the transaction under inquiry. If the transactions are in truth and substance plans whereby creditors secure a preference, and which result in violations of the provisions of the bankruptcy act, a court ought not to hestitate so to characterize them. The act was designed to bring about equality between creditors of a bankrupt, and to prevent one creditor by any method, either direct or indirect, from securing an unlawful preference to the exclusion of others. The act was designed for the protection, more than any others, of the very class to which the defendants belong.

In the final analysis of the transactions under consideration, the conclusion is inevitable that the estate of the bankrupt was depleted to the extent of the amount required to satisfy the claims of the defendants, and that the debtor Erlenborn surrendered his property to that extent for the very purpose of, and with the express agreement for, the payment of these claims then owing to the defendants. To constitute a preferential transfer, it is immaterial to whom the transfer is made, if it be made for the purpose of paying the claims of one creditor in preference to those of others. 5 Cyc. 294, par. *b; Goldman v. Smith,* 93 Fed. 182. The observation, therefore, in the first opinion to the effect that the defendants were parties to the transfer of the stock, and that the arrangement by which they took 75 per cent. of their claims against Erlenborn was a part of the transaction, and the assignments were made with the understanding that the accounts were to be used in payment of the goods, is pertinent and correctly stated. Looking to the substance rather than the form, it at once becomes obvious that the logical and legal effect of the transactions as a whole was to appropriate out of the proceeds of the sale of the bankrupt's estate a sufficient amount to satisfy the claims of the two creditors who are defendants in these actions. The true nature of the transactions is not open to question, and, if the defendants knew that Erlenborn was insolvent, or had reasonable grounds to believe that he was, they must have known that a preference would result, and must be held to have so understood and intended it. Intent, in one sense of the word and in the sense in which the witness Raymond was permitted to testify as to his intent in transferring the account, is wholly outside the case as made by the record. The bankruptcy act makes the result obtained by a creditor, and not the specific intent of the debtor, the essential fact. An intent to prefer is not required to be specifically proved, but is conclusively presumed from the effect of the transaction in giving one creditor a greater percentage of his debt than any other

creditor of like class. If a preference would inevitably result, then it is conclusively presumed that a preference was intended. *Wilson v. Nelson,* 183 U. S. 191; Brandenburg, Bankruptcy (2d ed.), 562, and authorities cited. Where a creditor has reasonable ground to believe that the debtor is insolvent, and the obvious effect of the receipt of money in satisfaction of the obligation under those circumstances is to give him an advantage over other creditors, he is chargeable with notice of intention to prefer. *Pirie v. Chicago Title & Trust Co.,* 182 U. S. 438. We are, for the reasons given, of the opinion, as was held in the first opinion in *Hackney v. Hargreaves Bros.,* 3 Neb. (Unof.) 676, that the trial court erred in submitting to the jury the question of whether the transactions between Kettering and Erlenborn and the defendants were or were not *bona fide* sales of accounts, or whether they were entered into with a view to securing a preference in violation of the bankruptcy law.

One other question seems to require consideration. This refers to the ruling of the trial court in excluding as evidence the schedule of liabilities filed by the bankrupt in bankruptcy proceedings. In the former opinion in the Raymond case this ruling was approved. The authorities hold such evidence admissible, not as conclusive of the alleged insolvency, but as tending to prove that issue. The schedule was a part of the pleadings in the bankruptcy proceedings, and defendants in these actions are sought to be charged by the trustee as having been given an unlawful preference as creditors of the bankrupt. All the creditors of the bankrupt were parties to the bankruptcy proceeding. *In re Pekin Plow Co.,* 112 Fed., 308, 50 C. C. A. 257; *In re Frasier,* 117 Fed. 746; *In re Beerman,* 112 Fed. 662; *Logan v. Nebraska Moline Plow Co.,* 3 Neb. (Unof.) 516.

"The books of a bankrupt are competent evidence on the question of his insolvency within four months of the date of the filing of the petition, and while not conclusive are ordinarily important evidence entitled to much weight;

the schedules and inventory and appraisement are also evidence on the same question." *In re Docker-Foster Co.*, 123 Fed. 190.

See, also, *Martin-Brown Co. v. Henderson*, 9 Tex. Civ. App. 130, 28 S.W. 695; *Ball v. Bowe*, 49 Wis. 495; *Von Sachs v. Kretz*, 72 N. Y. 548; Lowell, Bankruptcy, sec. 98. The adjudication of bankruptcy is manifestly admissible in evidence for the purpose of establishing the fact of insolvency, and it can scarcely be doubted that the schedule of liabilities, as against the parties to the controversy, and upon which the adjudication is based, are likewise admissible, not only as evidence of the same class or character as the books of the bankrupt but also for the purpose of showing the grounds upon which the judgment of bankruptcy was rendered. The defendants in the actions are not third parties in the sense that they are in no wise connected with the bankruptcy proceedings, because, for the purpose of these controversies, and in determining their liability, they are sought to be charged as creditors of the bankrupt having received unlawful preferences, and for such purposes were necessarily parties to the bankruptcy proceedings. The schedule of liabilities of the bankrupt should have been, on the issue of insolvency, admitted in evidence.

It follows from what has been said that the opinion and judgment announced in the first above mentioned case should be adhered to, and that the judgment in the case of *Hackney, Trustee, v. Raymond Bros. Clarke Co.*, heretofore entered, should be vacated, and a judgment rendered reversing the judgment of the trial court, and both causes remanded for further proceedings not inconsistent with the views herein expressed.

JUDGMENT ACCORDINGLY.

FIRST NATIONAL BANK OF HOLDREGE, NEBRASKA, V. JOHN A. JOHNSON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF NELS ANDERSON ET AL.

FILED APRIL 22, 1903. No. 12,816.

1. **Mortgagee:** ATTACHMENT. A mortgagee of chattels does not waive or lose his lien by causing an attachment to be levied upon the mortgaged property.

2. **Chattel Mortgage:** RECORDING: BANKRUPTCY. A chattel mortgage executed and delivered more than four months prior to bankruptcy of the mortgagor, is not voidable because not recorded until a subsequent date within such period of four months.

3. ———: DEFECTIVE DESCRIPTION. A chattel mortgage which would be invalid as against creditors and purchasers in good faith by reason of defective description of the property mortgaged, may be good as between mortgagor and mortgagee, where the property in fact mortgaged is identified.

4. ———: INDEFINITE DESCRIPTION. Such a case differs from one where no specific chattels are mortgaged, but there is an attempt to mortgage a certain number out of a mass without separating or identifying them.

5. **Lien:** ARTICLES NOT SEPARATED FROM MASS. No lien upon specific chattels is created in a case of the latter sort until they are separated or identified and it is agreed that the mortgage shall apply to them.

6. **Bankruptcy:** PREFERENCE. If a chattel mortgage is executed more than four months before bankruptcy, which creates no lien on specific chattels, and afterwards, within the four months, while the mortgagor is insolvent, he separates or identifies certain chattels and agrees that the mortgage shall apply to them, the lien is created then for the first time, and constitutes a preference within the meaning of section 60 of the bankruptcy act.

7. **Question for Jury.** Evidence examined, and *held* to present a question for the jury whether the specific chattels in controversy were mortgaged in the first instance, or were afterwards agreed upon as the mortgaged property.

ERROR to the district court for Phelps county: ED L. ADAMS, DISTRICT JUDGE. *Reversed.*

James I. Rhea, John L. McPheeley, John M. Stewart and *Thomas C. Munger*, for plaintiff in error.

Hector M. Sinclair and *William P. Hall, contra.*

POUND, C.

One Anderson, whose trustee in bankruptcy is plaintiff in this case, executed a chattel mortgage to the cashier of the First National Bank of Holdrege, the defendant herein, on June 23, 1900, whereby he mortgaged "76 head of fat steers now in my feed lots, mostly reds, average weight about 1,500 pounds, branded 6 on side." This mortgage was given to secure a note made in renewal of prior indebtedness and for an additional loan of money. Shortly thereafter Anderson, who was hopelessly insolvent, disappeared. The officers of the bank, becoming aware of his absence, went to look at the cattle, and were unable to find any which entirely answered the description. Thereupon they sued out an attachment, which was levied upon sixty-eight fat steers, the property now in controversy. On November 8, following, Anderson's creditors filed a petition to have him adjudged a bankrupt, and an adjudication to that effect followed on February 16, 1901. The bank, after obtaining possession of the cattle levied upon, proceeded to ship them for sale, and applied the proceeds upon its note. The attachment suit was dismissed on December 20, 1900, presumably by reason of the pendency of proceedings in bankruptcy.

A verdict for the plaintiff was directed in the trial court upon the ground that the defendant had lost whatever lien it might have had upon the cattle under its mortgage by causing an attachment to be levied upon them. There is a long line of cases holding that a mortgagee waives or loses his lien by attaching the mortgaged property. *Evans v. Warren,* 122 Mass. 303; *Whitney v. Farrar,* 51 Me. 418; *Libby v. Cushman,* 29 Me. 429; *Haynes v. Sanborn,* 45 N. H. 429; *Dyckman v. Sevatson,* 39 Minn. 132, 39 N. W. 73; *Cox v. Harris,* 64 Ark. 213, 41 S. W. 426; *Dix v. Smith,* 9 Okla. 124, 60 Pac. 303. On the other hand, there is equally

good authority for the contrary view. *Byram v. Stout,* 127 Ind. 195, 26 N. E. 687; *Barchard v. Kohn,* 157 Ill. 579, 41 N. E. 902; *Howard v. Parks,* 1 Tex. Civ. App. 603, 21 S. W. 269. The leading cases on the respective sides of this question are *Evans v. Warren,* and *Byram v. Stout.* In *Evans v. Warren,* the ground of decision was, in substance, that under the laws of Massachusetts the equity of redemption of personal property was not subject to attachment, and hence, when the mortgaged property was attached, there must necessarily be a waiver of the mortgage lien. The court said:

"The liens respectively created by mortgage and by attachment on the same property are essentially different, and can not coexist."

The subsequent cases followed this decision without much independent examination of the subject, and in *Cox v. Harris, supra,* and *Dix v. Smith, supra,* the latest decisions supporting this view, no reference is made to the subsequent cases taking a contrary position, but the rule, as announced in *Evans v. Warren,* is treated as settled. The first to question the universal applicability of the doctrine of *Evans v. Warren* was Mr. Jones, in his work on Chattel Mortgages. Jones, Chattel Mortgages, sec. 565. He suggested that where the statute made a chattel mortgage a mere lien upon the property without creating any title, it was probable that an attachment of the mortgaged property would not amount to a waiver of the lien, but would be regarded merely as a cumulative remedy. This view was adopted in *Byram v. Stout, supra,* where the question was re-examined somewhat thoroughly. In *Barchard v. Kohn* the ground was gone over once more, and *Byram v. Stout* was followed. To our minds, the reasoning of these cases is much more satisfactory, and more in accordance with the law in this state as to the nature of a chattel mortgage. Mortgaged chattels in this state are undoubtedly liable to execution or attachment, subject to the mortgage. There is no reason why the mortgagee himself may not proceed

against the property by either of these writs, the same as any other person. If he has other debts which he wishes to enforce against the surplus, or if the security of the mortgage is limited to a portion of his claim, and he desires to enforce such claim for the deficiency against any surplus that may accrue, or if, as in the case at bar, he is in doubt whether the property which he finds in the possession of the mortgagor is the property mortgaged or some other property, and is desirous to protect his claim by prompt proceedings, we see no ground for thinking that he has done anything inconsistent with the claim of lien under his mortgage. It is not a case of asserting title in himself in one proceeding and title in the mortgagee in another. Both the mortgage and the attachment recognize a title in the mortgagee. We are therefore of opinion that a mortgagee of chattels does not waive or lose his lien by causing an attachment to be levied upon the mortgaged property.

It is contended, however, that the cattle seized and sold by the bank are not the cattle covered by its mortgage. There is no controversy as to the cattle seized and sold. They are described in the petition and admitted in the answer to be those upon which the attachment was levied, described in the return of the sheriff as "68 head of fat steers, 4 black and 64 red and white spotted, of various brands." This is obviously a different description in some important particulars from that contained in the mortgage, and the question arises whether the bank can justify under the mortgage in view of this discrepancy. If there was merely a defect or error of description so that the mortgage created a lien on these specific cattle as between the parties, and they were afterward identified by the parties as being the cattle actually mortgaged at the time the instrument was executed, the bank is entitled to judgment; if, on the other hand, these cattle are not the cattle which were mortgaged, or if the mortgage did not create a lien upon them when executed, but they were afterward agreed upon as the subject of the lien, and a lien upon

them was created in this manner, an entirely different question is presented. The mortgage was executed more than four months prior to bankruptcy, and the fact that it was not recorded until subsequently, and within the period of four months, does not render it voidable. *Stewart v. Hopkins,* 30 Ohio St. 502; *Clark v. Hezekiah,* 24 Fed. 663; *Folsom v. Clemence,* 111 Mass. 273; *Asbury Park Building & Loan Ass'n v. Shepherd,* 50 Atl. (N. J. Eq.) 65; *In re Wright,* 96 Fed. 187.

A chattel mortgage which would be invalid as against creditors and purchasers in good faith for defective description of the property mortgaged may be good as between mortgagor and mortgagee where the property in fact mortgaged is identified. *Leighton v. Stuart,* 19 Neb. 546. In the case at bar the bank seized certain cattle, which it now asserts were the cattle actually mortgaged, and it offered to prove that Anderson afterwards acquiesced in the sale of these cattle under the mortgage, and treated them as such. If this was nothing more than an identification of cattle which had always been subject to the mortgage, we think such evidence admissible, and that on proof of this fact the bank would have sustained its defense. Such a case differs, however, from one where no specific chattels are mortgaged but there is an attempt to mortgage a certain number out of a mass without separating or identifying them. No lien upon any specific chattels is created in a case of the latter sort until they are separated or identified, and it is agreed that the mortgage shall apply to them. *Price v. McComas,* 21 Neb. 195; Jones, Chattel Mortgages, secs. 56, 60. If the cattle seized and sold were, as there is much in the evidence to suggest, merely part of a larger number of cattle in the feed lots of the mortgagor at the time the instrument was executed, and were not at that time in any way separated or identified, but afterwards and within four months of bankruptcy, and while the mortgagor was insolvent, they were separated or identified through the seizure made by the bank, and the mortgagor acquiesced in such separation

and identification, and expressly or by acquiescence agreed that the mortgage should apply to them, it is obvious that the lien was created then for the first time, and that there was a preference within the meaning of section 60 of the bankruptcy act. *In re Ronk,* 111 Fed. 154. Such would be the case even more clearly, if there was a substitution of the cattle now in controversy for others contemplated by the instrument as executed. In either case the bank has not justified, and its defense under the mortgage must fail. From an examination of the record we are unable to say which view should be taken. The evidence is meager on this point, and no little reliance must be placed upon circumstances. Anderson's testimony is in the form of a deposition, in which he speaks of the cattle mortgaged as if a specific lot of cattle had been intended from the first. But this is rather an inference from all of his testimony than anything which is directly testified to. On the other hand, he speaks of them as having been on his farm, "mixed up with a lot of other cattle," and the evidence shows that there were a number of steers attached which are quite as much within the description in the mortgage as at least some of those taken and sold. The bank seems to have been unable from the mortgage, or from such information as it could obtain at the time it brought the attachment suit, to identify any cattle as subject to its mortgage. There is circumstantial evidence on each side. Under these circumstances we think the question was one for the jury, and that the direction of a verdict can not be upheld.

It is suggested that at the time the bank sold the cattle an attachment suit was pending, so that it had no right to foreclose by sale, and that the sale had was not authorized by the mortgage, in that it was private, and out of the state. But it appears that the value of the cattle was less than the amount due upon the note secured by the mortgage, and hence, even if the bank were liable for conversion by reason of improper foreclosure sale, so long as it would be liable only for the difference between the

amount of the debt and the value of the property, plaintiff has nothing to complain of.

We therefore recommend that the judgment be reversed, and the cause remanded for a new trial.

BARNES, C., concurs; OLDHAM, C., did not sit.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED.

CHARLES M. PARKER, ADMINISTRATOR, v. JOHN T. WELLS ET AL.

FILED APRIL 22, 1903. No. 12,662.

1. **Action by Administrator:** DEFENSE: PAYMENT. An account need not be presented to and allowed by the probate court in order to entitle the holder to plead it as payment upon a note made to a party since deceased, provided the deceased in his lifetime agreed that the account should be credited as a payment on the note.
2. ———: COMPETENCY OF WIFE AS A WITNESS. A wife may testify in favor of her husband in relation to conversations and transactions had with a person since deceased in all cases except where the result of the suit, if favorable to the husband, would invest her with some direct legal interest in the subject of the controversy.
3. **Instruction:** EVIDENCE. It is error to submit to the jury as an issue of fact a question material to the case, regarding which there is no evidence to support a finding.
4. **New Trial:** DISTRICT COURTS. The rule acted upon by the supreme court that it will not interfere where the trial court has overruled a motion for a new trial grounded upon the insufficiency of conflicting testimony, does not apply to the district courts. These courts should independently exercise their power in this respect, without restraint from the rule which governs appellate tribunals, and, taking care not to invade the legitimate province of the jury, grant new trials whenever it appears that substantial justice has not been done between the parties.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, DISTRICT JUDGE. *Reversed.*

Willard E. Stewart and *Allen W. Field,* for plaintiff in error.

Lionel C. Burr and *Elmer E. Spencer, contra.*

DUFFIE, C.

Plaintiff in error is administrator of the estate of John E. Haas, who departed this life June 28, 1896. Among other effects of the deceased, the administrator came into possession of a note made by the defendants in error for the sum of $118, drawing interest at the rate of ten *per cent. per annum,* upon which this action was brought.

The answer alleges payment, and sets out four different items of work and labor performed for the deceased in his lifetime at an agreed price, and which, it is alleged, he agreed to credit upon the note; also one cash payment of $25.

The case was submitted to the jury under instructions which we regard as fair to the plaintiff in error so far as relates to the payments thus claimed, and the jury returned a verdict for the defendants.

Carrie E. Wells, wife of one of the defendants in error, was allowed to testify to conversations had with the deceased, over the objections of the plaintiff in error, and it is now insisted that she was incompetent, under the provisions of section 329 of the Code of Civil Procedure, and *Wylie v. Charlton,* 43 Neb. 840, is cited as an authority in support of this contention. That case went to the extent only of holding the wife incompetent as a witness in favor of her husband in an action to establish his title to real estate in which she would have a dower interest. The court said (p. 851):

"In this state a woman by marriage becomes entitled to an inchoate estate of dower in all the land whereof the husband is seized of any estate of inheritance during the coverture. (Compiled Statutes, ch. 23, sec. 1.) This is an interest which, when it once attaches, remains and

continues a charge or incumbrance upon the real estate, unless released by the voluntary act of the wife or extinguished by operation of law. A sale of land under execution upon a judgment against the husband alone will not defeat it. *Butler v. Fitzgerald,* 43 Neb. 192. While the estate thus acquired is not one in possession, it is such a present vested interest of a legal character, and creates such a direct legal interest in an action to establish title in her husband, as falls within the inhibition of section 329. The object of this section was to prevent a party testifying against the representatives of a deceased person, where the interest of such party in the result of the action is of such a character as to hold out a temptation to perjury to such an extent as to run counter to the policy of the law. Surely the acquisition of an estate, even one to take effect *in futuro,* but of such a character as to be recognized at law, and not capable of being defeated by any act of the tenant, presents such an interest. We are aware that at common law it was held that the interest of an heir apparent did not disqualify him, but no one could be the heir of a living person. No present interest was recognized in the heir apparent. His estate might be defeated by the conveyance or will of his ancestor. The law does recognize an inchoate estate of dower and no act of the husband can defeat such estate."

This language makes it clear that it is only in actions involving the title to real estate and where the success of the husband would invest the wife with a present estate of dower in the land involved, that the statute is applicable, or where she can be said to have such a direct legal interest as would disqualify her as a witness.

A further objection is made that the items set out in the answer as a payment on the note were never presented to the probate court as a claim against the estate of the deceased and allowed by the court. If these items were pleaded as a set-off this objection would be good; but such is not the case. The items are set up as payments made upon the note, it being specifically alleged in the answer

that Haas agreed to credit these several items on the note as a payment of so much cash.

One item of work and labor amounting to $22 is alleged to have been done after the death of Haas, at the instance and request of Elmer J. Burkett, the special administrator of the estate at the time.

It appears from a stipulation made between the parties on the trial that Burkett was not appointed administrator of the estate until some months after the alleged agreement and after the work was done. Notwithstanding this state of the record the court in its sixth instruction submitted to the jury the question whether Burkett was administrator of the estate of Haas at the time and whether he made the agreeement as alleged.

The rule is of universal application that it is error to submit to the jury as an issue of fact a question material to the case regarding which there is no evidence to support a finding.

The record entry made by the court on its order overruling the plaintiff's motion for a new trial contains a recital to the effect that where there is any evidence to support the verdict it will not be disturbed. Relating to this matter, we can not forbear quoting from the opinion in *Dewey v. Chicago & N. W. R. Co.*, 31 Ia. 373, 377, with the suggestion that it announces a rule for the guidance of trial courts which should be unhesitatingly followed in all cases. It is as follows:

"We therefore avail ourselves of this occasion to correct what we understand to be a very general misapprehension on the part of district and circuit judges in respect to the rule as to new trials in the *nisi prius* courts. This court has repeatedly declared the rule for itself (and such is the rule in most appellate tribunals), that where the evidence is conflicting and the *nisi prius* court has overruled a motion for a new trial, grounded upon the insufficiency of the evidence, we will not interfere. And this because, first, the jury have found the verdict and given credit to the witnesses on the one side of the con-

flict; second, the judge, who also heard the testimony from the mouths of the witnesses, and weighed the same in the balance of his more cultured and accurate legal judgment, has, by overruling the motion, given his approval and indorsement to the verdict; and third, this court can never have the benefit of observing the conduct and deportment of the witnesses while testifying, nor even the peculiarity of their expressions, but generally only the substance of their testimony and often in the language of the attorneys interested in the cause. A mention of these considerations upon which the rule for the appellate courts is (in part) founded, is sufficient to show that the rule ought not and does not have any application whatever to the *nisi prius* courts. Those courts ought to independently exercise their power to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case. Whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy, they have failed to do their duty, and the verdict ought to be set aside and a new trial granted. But while the greatest freedom on the part of *nisi prius* judges should be exercised in setting aside verdicts, in order to secure and effectuate justice, yet judges ought to use caution in the exercise of the power so as not to invade the legitimate province of the jury when they have manifested a fair and intelligent consideration of the evidence submitted to them, nor to injuriously protract litigation in pursuit of invariable and absolute justice in every case, for this can not be attained."

We recommend a reversal of the judgment.

AMES, C., concurs.

ALBERT, C., concurring.

I concur in the conclusion, but I do not think the sug-

gestion from the supreme court of Iowa embodied in the opinion is necessary to a decision in the case, or that it is called for at this time. It seems to me to savor of a license to ignore the verdict of a jury in any case where it does not meet the approval of the trial judge.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

A. B. BENNETT ET AL. V. WILLIAM OTTO ET AL.

FILED APRIL 22, 1903. No. 12,874.

1. **Proceeding in Error: MOTION FOR NEW TRIAL: LICENSE BOARD.** A motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on the hearing of an appeal taken from the order of a license board granting or refusing a license to sell intoxicating liquors.
2. **Appeal from License Board.** On the hearing of such appeal, the district judge should exercise his independent judgment, being governed by the evidence found in the record alone; his judgment should not be controlled or influenced by the finding made by the board from which the appeal is taken.
3. **Evidence.** Evidence examined, and *held* not to support the finding of the district court.

ERROR to the district court for York county: SAMUEL H. SORNBORGER, DISTRICT JUDGE. *Reversed.*

F. C. Power, for plaintiffs in error.

T. L. Norval, Richard S. Norval and *B. F. Norval, contra.*

DUFFIE, C.

May 13, 1901, William Otto filed a petition with the clerk of the village of Waco, asking that a license be granted him for the sale of intoxicating liquors in said village for the ensuing year. A remonstrance was filed,

upon which a hearing was had, and the village trustees awarded the applicant a license for the sale of liquors for one year from May, 1901. From the order allowing the license, an appeal was taken to the district court and upon a hearing the order of the board was affirmed. From this order a writ of error has been taken to this court.

The defendants in error first insist that the plaintiffs in error have no standing in this court because no motion for a new trial was filed and passed on by the district court. We do not think that a motion for a new trial is required in actions of this character. Section 4, chapter 50 of the Compiled Statutes (Annotated Statutes, 7153), among other things, provides that "the testimony on said hearing shall be reduced to writing and filed in the office of application, and if any party feels himself aggrieved by the decision in said case he may appeal therefrom to the district court, and said testimony shall be transmitted to said district court and such appeal shall be decided by the judge of such court upon said evidence alone."

Is this hearing in the district court a trial, within the meaning of the law requiring a motion for a new trial?

In *Slobodisky v. Curtis,* 58 Neb. 211, 214, it is said:

"It has been often asserted by this court that a motion for a new trial is essential to a review of alleged errors occurring upon a trial of a cause. By this it is not meant that a motion for a new trial must be made in the court below to entitle a party to review any case by petition in error, although language in some of our opinions is seemingly in conflict with this statement. The motion is indispensable where a review of alleged errors and rulings occurring during the trial is sought, but the rule has not been extended to every order or decision. Thus it has been held that no motion for a new trial is necessary to review an order sustaining a demurrer to a pleading (*Hays v. Mercier,* 22 Neb. 656; *O'Donohue v. Hendrix,* 13 Neb. 255; *Scarborough v. Myrick,* 47 Neb. 794), a decision on a motion to vacate an award (*Graves v. Scoville,* 17 Neb. 593), a ruling on a plea in abatement (*Bohanan v.*

State, 15 Neb. 209), a judgment affirming or reversing in an error proceeding the decision of an inferior court or tribunal (*Newlove v. Woodward,* 9 Neb. 502; *Leach v. Sutphen,* 11 Neb. 527)."

The case at bar falls clearly within the ruling of the case of *Leach v. Sutphen, supra.* A case of forcible entry and detainer before a justice under the old proceeding was taken to the district court upon petition in error; the evidence being preserved and the district court determining the case from the record thus presented. From the decision of the district court the case was brought to this court by petition in error. In that case it is said (p. 528):

"Objection is also made that no motion for a new trial was made in the district court. This is unnecessary except in cases where questions of fact are tried and determined, and as the judgment of the justice was affirmed, there was no trial of questions of fact, and no motion was necessary."

By the express terms of the statute the district court is required to pass upon the appeal from the evidence certified to it by the license board alone. Of necessity there could have been no rulings by the district court either in admitting or excluding evidence; and a trial, as we understand the word, means an original investigation by the district court, and the examination of evidence produced by the parties, including the ruling of the court, which, if not satisfactory, must be brought to the attention of the court by a motion for a new trial. Here there was a mere examination of the record presented, and a motion for a new trial could have alleged nothing except that the court erred in deciding the matter incorrectly upon the record.

Otto prepared his petition and sought to have the same signed by thirty freeholders of the village of Waco for some time prior to May 13, when the same was finally filed with the clerk of the board. It appears that there was some difficulty in getting the requisite number of freeholders to his petition. Before the petition was finally signed by the thirty freeholders, thirty-four persons pur-

chased about three acres of land lying within the corporate limits of the village of Waco—the object being, as the witnesses testified, to obtain title to said tract for the purpose of a base ball and picnic ground; each subscriber pledging himself for one or more shares, at five dollars each, as he felt disposed. A deed was made jointly to the subscribers to the purchase fund, of date May 12, 1901, one day previous to the final completion and filing of the petition. It is now insisted that the purchase of this park was a scheme instituted by the defendants in error for the purpose of qualifying the subscribers for shares to sign Otto's petition, and that their subscription and payment of five dollars each toward the purchase of this land was for the express purpose of making them freeholders; that they were not *bona fide* freeholders within the meaning of the statute and their names should not be counted on the petition.

The statute undoubtedly contemplates that thirty *bona fide* freeholders shall sign a petition for the granting of a license to sell intoxicating liquors, and if thirty of the signers of Otto's petition were not *bona fide* freeholders within the meaning of the statute, then the village trustees had no jurisdiction to entertain his petition and award him a license.

In *Austin v. Atlantic City,* 48 N. J. Law 118, it is said:

"A deed for lands to many persons for a single consideration, and with the purpose of qualifying them to sign recommendations for inn and tavern licenses, is fraudulent, and will not constitute them reputable freeholders within the statute."

And to the same effect is *Smith v. Elizabeth,* 46 N. J. Law 312.

It is evident, then, that the question whether the eight persons to whom objection was made were *bona fide* freeholders, within the meaning of the law, was one of the material questions to be determined in the case. The village trustees found that they were, and granted the license. The district court, however, refused to express his inde-

pendent judgment upon this question, but in an opinion filed, and which we have examined to ascertain the theory upon which he disposed of the case, he expresses the following views in relation to the consideration to be given the evidence and the finding of the license board:

"Objection No. 4, as I have before stated, has given me much concern, and I am free to say that if the court were sitting as a court of original instance in hearing the testimony, I am inclined to believe that the court might and probably would have reached a different conclusion from that reached by the trustees in hearing and determining the question as to whether six of the petitioners named in the remonstrance were such *bona fide* freeholders as to entitle them to participate in petitioning for a license. The policy of the law is to permit only such class of citizens and residents of a village to participate in a final determination of whether there shall be a saloon petitioned for as own the real estate of such village, and to exclude those not visited with that dignity of citizenship known as a freeholder from participating therein. But it makes no distinctions as to degree or duration, prior to the time of making such application, of such ownership or such freeholdership. That all of the petitioners, thirty-four in number, [who] signed said petition were, technically at least, freeholders at the time of signing the petition, there is no question in the record. But it is claimed that they are not *bona fide* freeholders and that the petitioner and others interested with him procured to be conveyed to them certain real estate for the express purpose, and only purpose, of making them eligible as petitioners for a license. And to the mind of the court it is a very suspicious circumstance at least that this is possibly true, since the real estate was conveyed to them not longer than a day before the time when they must have signed the petition. That, together with the smallness of the holding, constitutes the particular reason urged as the facts upon which is grounded the declaration of the remonstrance that they were by the connivance of the petitioner made to appear

as such freholders only for the purpose of being eligible to petition for a license. But this question must necessarily have been flatly and squarely before the village trustees as one of the facts for their determination, and they were in a situation, it seems to the court, much better able to judge of the value of the testimony bearing upon this point than this court; at all events it is one of the recognized rules of appellate jurisdiction that where upon a controverted question of fact there is evidence supporting the finding of the tribunal from which appeal is taken, such finding will not be disturbed by the appellate court, simply because the evidence does not, in the judgment of the appellate court, appear to preponderate in support of the conclusion reached by the lower court or tribunal; and applying this rule to the question in controversy, the court feels bound to hold that, there being evidence to sustain the *bona fides* of the transaction before the board of trustees, such finding should not be set aside or reversed."

This court has authority to review the judgment of the district court only; it has no authority to review the reasons given for the judgment; and, while this is so, we think that we should not dismiss this matter without expressing our opinion of the rule which should govern the district courts of the state on the trial of such appeals in the future.

The statute makes it the duty of the district court to determine the appeal from the evidence alone. The effect of this statute is not alone to prohibit the introduction of additional evidence upon the appeal, but is to require the district court to pass upon questions of law and fact presented by the record, and give an independent judgment thereon. If, as intimated by the district judge in his opinion, he should be governed by the rule that where there is any material evidence to sustain the finding it will not be disturbed, then an appeal from the finding of the village board would be a useless proceeding, because the cases are rare indeed where some evidence would not be found to support the finding of the license board. The

appellant in such proceeding is entitled to the judgment of the district judge uninfluenced by the finding of the license board, and he is to pronounce judgment from what is disclosed by the record before him; being governed solely by what he finds therein. The undoubted intent of the legislature was that the evidence certified in the record should of itself be sufficient to warrant the granting of a license.

The reasons calling upon this court to sustain the findings of a jury where there is evidence to sustain the verdict do not exist in favor of the findings of a license board. The evidence going to the jury and on which its finding is based is carefully guarded by the judge presiding at the trial, who is watchful to exclude all hearsay, incompetent and immaterial evidence and to guard the rights of the parties by the strict rules of law governing the trial of a case, and to see that nothing which may improperly influence the verdict is allowed either in the hearing or in the argument of counsel. Not only is this so, but in the consideration of the case the jury are aided and advised by carefully prepared instructions covering the questions in issue, and their duty is applying the evidence that has been submitted to their consideration; and after the opinion of the jury has been taken, the court, on a motion for a new trial, adds the seal of his approval to the findings of the jury by entering judgment on the verdict. The trial of a case in a court of record is so carefully guarded that the judgment, when finally entered, comes to this court with the very strongest presumption in its favor, and, under the circumstances, it should not be set aside unless evidence for its support is so wanting as to make it evident that an injustice has been done. These reasons do not exist in favor of the finding of the license board, and such finding should not, therefore, control or influence the action of the district judge in passing upon an appeal from an order granting or refusing a license. The legislature evidently took all these matters into consideration when it framed the statute.

Coming now to the evidence in the case, we incline to the opinion that at least six of the petitioners were not *bona fide* freeholders. The circumstances under which the deed to the park was made, the fact that so many of the grantees are young men with no property or other interests in the town of Waco to be benefited by the purchase of this ground for park purposes, and the fact that they pretend that a five dollar interest in this land was taken as an "investment," are all inconsistent with the *bona fides* of the transaction. We can understand why property owners, permanent residents of Waco, would contribute something toward a park for the town, and why the young men of the village should desire a ball ground to which they might resort for ball play and other sports, and that this might induce them to contribute or donate from their means toward the purchase of such grounds; but when they assert that such investment of their money was for profit and that that was the inducement which led them to put five dollars in such an enterprise, we are led to look for some other motive for their action; and the signing of Otto's petition the same evening that the deed was made, or at latest the next day, indicates quite conclusively that a desire to qualify themselves as such signers was the principal inducing cause.

We recommend a reversal of the judgment of the district court, and that the case be remanded with directions to that court to enter judgment reversing the order of the license board and revoking the license granted to Otto.

ALBERT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the case remanded with directions to that court to enter judgment reversing the order of the license board and revoking the license granted to Otto.

REVERSED AND REMANDED.

MODERN WOODMEN OF AMERICA V. ASA COLMAN ET AL.*

FILED APRIL 22, 1903. No. 11,294.

1. **Fraternal Insurance Association.** A benevolent association which issues benefit certificates to its members, payable from a fund maintained by assessments upon the certificate holders, is, in effect, a mutual life insurance company, and is governed by the general rules of law applicable to such companies. *Supreme Lodge Knights of Honor v. Davis*, 26 Colo. 252.
2. **Waiver of Forfeiture.** A forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on acount of the contract, and retains them without objection until after the death of the insured.
3. **Duty of Agent to Principal.** It is the duty of an agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed. This is the foundation of the rule, necessary to the public safety, that notice to an agent in the course of his employment is notice to his principal.

REHEARING of case reported in 64 Neb. 162.

ERROR to the district court for Cass county: BASIL S. RAMSEY, DISTRICT JUDGE. *Reaffirmed.*

J. W. White, C. A. Atkinson, Jesse L. Root, J. G. Johnson and *Thomas S. Allen*, for plaintiff in error.

Samuel M. Chapman and *Mathew Gering, contra.*

AMES, C.

This cause is resubmitted after the allowance of a motion for a rehearing. A statement of the facts will be found in the former decision, published in 64 Neb. 162. The employment in which the deceased was engaged at the time of his death was not prohibited by his contract of insurance, but it was stipulated that if he should engage

* Rehearing denied. See opinion, p. 665, *post.*

therein he should forfeit his beneficiary interest unless he should file with the head clerk of the order a written waiver of any liability by it for loss by death as the direct result of such occupation. He did not file such a document, but the clerk of the local camp, through an assistant, continued to collect the monthly assessments or dues, and to remit them to the head clerk, with full knowledge of the circumstances, for a period of three months, and until the death of the insured. Correctly speaking, the question is not whether the association by this conduct of its agent waived a forfeiture, but whether it waived the waiver required of the insured. In support of its contention that it did not do so the plaintiff in error, upon the reargument, relies principally upon three decisions. The first of these is the opinion of the United States court of appeals for this circuit, filed after reargument, in *Modern Woodmen of America v. Tevis,* 117 Fed. 369, on August 28, 1902. From the statement of facts contained in that opinion it does not appear to be in point in this controversy. As we gather from that statement, the contract provided for a suspension of the obligations of the company when and so long as the insured should be and remain delinquent of an assessment which had fallen due on the first day of the month of August, on the 10th day of which he died. He had also defaulted for one day in the payment of an assesment which came due on the first day of the preceding June, and the contract provided that in such case he should not be reinstated without furnishing a written warranty that he was in good health. He did not furnish the warranty, but the local clerk accepted and remitted his June assessment, and it was contended that in consequence thereof the warranty was waived, and the insured reinstated. The court decided against this contention, but how the question became material is not explained and we are unable to understand. If a reinstatement had been effected in June, still the deceased would have been at the time of his death under suspension for delinquency of the August assessment. It could not have

been successfully urged that a formal reinstatement after one forfeiture or suspension, or a waiver of it, would operate as a waiver of a suspension subsequently incurred; and besides, a reinstatement after suspension would have amounted substantially to a new contract of insurance based upon the warranty of good health. The contract of insurance was already abrogated and it could not have been renewed by any act of the insured alone. The warranty, if it had been made, would not have restored the obligation of the contract if it had been intentionally untruthful—a matter into which the officers of the company would have had a right to inquire. But in the case at bar Colman could have continued his contract in force by an act of his own volition, and without the concurrence of the other party thereto. The *Tevis* case, as it is described in the opinion cited, does not appear to us to be in any respect analogous to that now under discussion. But if it is so, it is in conflict with principles which have for many years been enforced by this court, and it therefore ought not to be regarded as an authority here.

The decision next relied upon is that of this court in *Field v. National Council of K. & L. of S.*, 64 Neb. 226. In that case the deceased had at the time of her death been delinquent for more than a year of six monthly assessments and of quarterly dues, and had been stricken from the roll of membership, of all of which facts she had full knowledge, but had made no attempt at reinstatement, either by discharging her delinquencies or otherwise. The sole claim in support of the plea of waiver was that through her husband she had made an oral agreement with the secretary of the local body that she should have an extension of time in which to make her payments, without affecting her standing or membership. It can not be said that the case resembles this in any particular.

The decision next relied upon is by this court in *Royal Highlanders v. Scovill*, 66 Neb. 213. In that case the contract provided that in case of delinquency the beneficiary certificate should be forfeited and should not be reinstated

without full payment, nor unless the holder should be at the time in good health. The deceased was critically ill of a disease of which she shortly afterward died. She was in default of an assessment, which her husband paid to the clerk of the local body, who received it in ignorance of the illness. It was held that the payment was not made in good faith, but fraudulently, and was therefore ineffectual. The case does not appear to resemble the one at bar.

Finally it is earnestly insisted that inasmuch as the plaintiff in error is a mutual benevolent association, it should not be held to the same strict rules as respects forfeitures and the waiver of them as are applicable between regular insurance companies and their policy holders. This consideration would appeal to us with greater force if these principles of mutuality and benevolence more frequently survived the holders of certificates, and were uniformly regarded by the associations as being applicable to, and as including, the persons named as beneficiaries. A charitable organization which collects its funds with avidity, but is astute in finding excuses for not bestowing them upon the designated objects of its bounty, is not entitled to any exclusive or especial consideration at the hands of the court. The enormous volume of litigation with which associations of this kind have flooded the country and the extremely technical character of their defenses, in many cases, to actions upon their beneficiary certificates are a sufficient commentary upon an appeal for tender consideration by the judiciary. We agree, rather, with the opinion in *Supreme Lodge Knights of Honor v. Davis,* 26 Colo. 252, that "a benevolent association which issues benefit certificates to its members payable from a fund maintained by assessments upon the certificate holders, is, in effect, a mutual life insurance company, and is governed by the general rules of law applicable to such companies."

The certificate held by Colman was not void, but voidable. It was optional with him to continue it in force by filing a written waiver, and it was optional with the as-

sociation so to continue it without such waiver. He was not delinquent of dues or assessments, or otherwise liable to suspension. The association acted through its agents, and being a corporation, it could not act by other means. It demanded, received and retained his assessments with full knowledge of all the circumstances until after his death. It can not be supposed that it intended to take and keep his money without consideration. The knowledge of its agent, authorized to make the collection, was the knowledge of the company of all the circumstances under which the payments were made. This is not the same as saying that the agent waived the forfeiture. It was waived by the association by taking and retaining the money of the insured with notice of all the facts within the knowledge of its agent. It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is, with exceptions not necessary to be here noted, conclusively presumed to have performed. This is the foundation of the doctrine, necessary to the public safety, that notice to an agent is notice to his principal. Mechem, Agency, pars. 719, 720; Bradley, J., in *The Distilled Spirits,* 11 Wall. (U. S.) 367.

Such is the rule with respect to other like agencies, and we can see no reason why it is not applicable in this case. To hold otherwise would, we think, be to put certificate holders to a great disadvantage, and to do them a grave injustice. If the plaintiff in error was a regular insurance company, there can be no doubt that under the repeated decisions of this court it would be held bound. *Modern Woodmen of America v. Lane,* 62 Neb. 89; *Home Fire Ins. Co. v. Kuhlman,* 58 Neb. 488; *Nebraska & Iowa Ins. Co. v. Christiensen,* 29 Neb. 572; *Phœnix Ins. Co. v. Lansing,* 15 Neb. 494; *Phenix Ins. Co. v. Covey,* 41 Neb. 724; *Home Fire Ins. Co. v. Hammang,* 44 Neb. 566; *Mee v. Bankers' Life Ass'n* of Minnesota, 69 Minn. 210.

The foregoing by no means exhausts the list of authorities enforcing these principles by this and other courts, and we can see no reason why an exception should be made in favor of beneficiary associations.

It is recommended that the former decision of this court be adhered to and the judgment of the district court affirmed.

DUFFIE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court be adhered to and the judgment of the district court

AFFIRMED.

On motion for rehearing the following opinion was filed July 3, 1903. *Rehearing denied:*

Opinions Prepared by Commissioners. Where opinions are prepared by commissioners, they must be permitted, necessarily, to state their reasons in their own way, without binding the court to all that is said *arguendo*, even though it concurs in the conclusions of law and express findings of fact. *Williams v. Miles, ante*, p. 479.

HOLCOMB, J.

In this application for a rehearing by the plaintiff in error, some objections are presented to the opinion last filed, in which a former judgment of affirmance was adhered to. *Modern Woodmen of America v. Colman, ante*, p. 660. Most of the propositions urged as grounds for granting a rehearing have, we think, been fully discussed and correctly disposed of in the opinion last filed. While it is urged that the opinion in the case at bar is in conflict with the principles controlling in the cases of *Field v. National Council of K. & L. of S.*, 64 Neb. 226, and *Royal Highlanders v. Scovill*, 66 Neb. 213, we entertain the view, as pointed out in the opinion in this case, that the cases referred to are readily distinguishable and that there

exists no inconsistency or conflict of a substantial character between these several cases. Upon the main points decided in the present case, it is not to be denied that there is a conflict of authority between the holdings in this and other jurisdictions. This is especially noticeable by reference to some of the recent decisions of the federal courts where kindred questions were under consideration and determined. *Northern Assurance Co. of London v. Grand View Building Ass'n,* 183 U. S. 308, and *Modern Woodmen of America v. Tevis,* 117 Fed. 369. This court, however, after mature consideration, has chosen to adhere to the rule as announced by a long and unbroken line of decisions in this state, notwithstanding some other courts have recently adopted a contrary doctrine. *Hartford Fire Ins. Co. v. Landfare,* 63 Neb. 559; *Hunt v. State Ins. Co.,* 66 Neb. 121. This rule, so far as this jurisdiction is concerned, may now be considered as too firmly established to admit of further discussion.

Our attention is also challenged to certain portions of the opinion formulated by the commissioner wherein it is suggested that the language used does an injustice to the plaintiff in error and the business in which it is engaged, and that these remarks of the commissioner, which are sanctioned by the court, are an animadversion, not properly a part of or belonging to the opinion, and for these reasons they should be eliminated therefrom.

The objectionable portion of the opinion is as follows:

"Finally it is earnestly insisted that inasmuch as the plaintiff in error is a mutual benevolent association, it should not be held to the same strict rules as respects forfeitures and the waiver of them, as are applicable between regular insurance companies and their policy holders. This consideration would appeal to us with greater force if these principles of mutuality and benevolence more frequently survived the holders of certificates, and were uniformly regarded by the associations as being applicable to, and as including, the persons named as beneficiaries. A charitable organization which collects its funds with

avidity, but is astute in finding excuses for not bestowing them upon the designated objects of its bounty, is not entitled to any exclusive or special consideration at the hands of the court. The enormous volume of litigation with which associations of this kind have flooded the country and the extremely technical character of their defenses, in many cases, to actions upon their beneficiary certificates are a sufficient commentary upon an appeal for tender consideration by the judiciary."

These remarks were apparently called forth by what was said in briefs of counsel for plaintiff in error. While it is insisted that nothing was advanced in briefs warranting the remarks complained of, it is at once apparent that otherwise they have no legitimate bearing on the decision rendered and at most, we think, can be regarded as voicing only the individual views of the writer of the opinion. The commissioner deemed it proper to speak as he did in meeting an argument which he regarded as having been advanced by counsel in their briefs. The remarks do not bear directly on any of the essential legal propositions discussed and decided. By reference to the syllabus, which mentions the points decided, and on which the judgment was based, it will be observed that none refer to the discussion indulged in to which exceptions are taken. It must be at once apparent to all that the court is not committed to all that may be said *arguendo* by one formulating an opinion. Much that is said by way of argument and even in stating a legal proposition must necessarily be left in a great measure to the individual judgment and discretion of the author of the opinion. The views of the commissioner, as expressed in the excerpt we have herein copied, should not be understood as reflecting the views of the court, nor that it is committed to the statements contained therein. The essential points discussed necessary to a decision in the case were accepted and adopted as a correct exposition of the law. That which was said by the commissioner in answer apparently, to propositions advanced by counsel should not be taken as

expressing other than the individual views of the writer and is not binding on the court, nor does it wish to be understood as indorsing the same. The rule adopted in the case of *Williams v. Miles, ante,* p. 479, is applicable here.

The motion for a rehearing is

DENIED.

NEW OMAHA THOMPSON-HOUSTON ELECTRIC LIGHT COMPANY V. ANNA DENT, ADMINISTRATRIX OF THE ESTATE OF JAMES R. DENT, DECEASED.*

FILED APRIL 22, 1903. No. 12,667.

1. **Defense: CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF.** In an action for negligence, when contributory negligence is relied upon as a defense, the burden of proof is upon the defendant to establish such defense, unless contributory negligence is disclosed by the petition, or by the evidence introduced by the plaintiff in making his case.

2. **Finding.** Where the evidence on the question, either of negligence or contributory negligence, is of such a character that reasonable minds might honestly differ as to the inference to be drawn therefrom as to such questions, a finding either way thereon can not be said to be insufficiently supported by the evidence.

3. **Employer and Employee.** An employee has a right to assume that his employer has taken due precautions to insure his safety, and that the tools, appliances and material furnished by the employer are reasonably safe. *Aliter*, where the employee has notice of the defective condition of such tools, appliances or material or of facts sufficient to put a man of ordinary prudence on inquiry.

4. **Refusal to Give Instruction.** The refusal to give an instruction, proper in form, is not ground for reversal where such instruction is based on a fact the existence of which the jury negative by a special finding supported by the evidence.

ERROR to the district court for Douglas county: WILLIAM W. KEYSOR, DISTRICT JUDGE. *Affirmed.*

* Rehearing allowed. See opinion, p. 674, *post.*

Edson Rich and *Charles E. Clapp,* for plaintiff in error.

Timothy J. Mahoney and *James A. C. Kennedy, contra.*

ALBERT, C.

On the 2d day of August, 1900, Thomas R. Dent commenced work as a lineman for the New Omaha Thompson-Houston Electric Light Company, which at that time owned and operated an electric light system in the city of Omaha. On the same day, in the course of his employment, he was engaged in fastening wires on insulators on the crossbars of a pole, upon which a number of wires were strung, radiating therefrom to the four points of the compass. The wires were strung on four sides of the pole, and wires of different polarity were on each of the four sides. The insulating material on the wires was old and rotten, and while Dent was fastening one of the wires to the glass insulator, the insulating material on the wires broke or cracked on the side of the glass insulator opposite to him, as he supported himself at work on the pole at some distance from the ground. In attempting to fasten another wire, he used a pair of iron or steel pliers to handle it. While thus engaged his elbow came in contact with the other wire at the point where the insulation was cracked or broken, and the wires being alive and of different polarity, the current passed through his body and killed him. The widow of the deceased was appointed administratrix of his estate and brought this action against the electric light company for damages on account of the death of her husband, charging that death was caused by the negligence of the defendant company.

The petition contains three specifications of negligence: (1) the use of wires on which the insulation had become old and unsafe; (2) placing wires of opposite polarity on the same side of the poles upon which the deceased met his death; and (3) not cutting off the current from wires on which the deceased was at work when killed. The answer

denies any and all negligence on the part of the defendant, and charges contributory negligence on the part of the deceased. The reply is a general denial. The jury found for the plaintiff and judgment was given accordingly. The defendant brings error.

The court, among other things, instructed the jury as follows:

"10. An employee is under the same legal duty to care for his own safety that his employer is to provide for his protection from accidents. It was the duty of James R. Dent while in the performance of his work as a lineman to exercise ordinary and reasonable care and caution under the circumstances of his situation to avoid electric shocks and consequent death. While he had a right to assume that the defendant had used ordinary care and diligence to make it reasonably safe for him to work on live wires, yet he was not at liberty to close his eyes to defects of insulation which were open and obvious, or which he might have seen by using ordinary and reasonable care and caution. If you believe from the preponderance of the evidence that the insulation on wire called No. 2 was broken by said Dent when he tied said wire around the glass insulator; and if you further find from the preponderance of the evidence that said break in the insulating material on said wire was open and obvious to said Dent, or that he ought to have seen it by an exercise of ordinary care on his part before he attempted to tie on the next wire; then your verdict must be for the defendant, even though defendant might have been negligent."

The defendant insists that the verdict is contrary to the foregoing instruction, because the evidence is undisputed that the break or crack in the insulation, which permitted the deceased's arm to come in contact with the wire, was on the top of the turn in the wire and in full sight, so that if he did not see it, he should have seen it and protected himself against it. But there is sufficient evidence to sustain a finding that the insulation on this wire was about ten years old; that the ordinary life of

insulation is from three to four years; that the use of such wire by the defendant was negligence; and that if insulation had been reasonably good, the break would not have occurred. Now, while it is true that the employee assumes the ordinary risks incident to his employment, it is also true that he has a right to assume that his employer has taken due precautions to insure his safety. The deceased was at work on a pole some distance from the ground; his feet rested on a crossbar, and he maintained his position by means of a supporting belt; the wire on which the break occurred was about opposite his shoulders, and another wire passed between his body and the pole. In order to see this break he would have had to lean forward and look around or over the glass insulator on which the wire was fastened. The break of the insulation, therefore, was not obvious in the sense that it was directly within range of his vision. As before stated, he had the right to assume that his employer had taken due precautions to insure his safety. Acting on that assumption, he was not required to guard against dangers arising from the use of defective material or appliances, and it can not be imputed to him for negligence that he failed to look for a break in the insulation, which would not have occurred had his employer taken due precautions to insure the safety of its employees.

But it is urged that he knew the insulation was defective, because he had called attention to it in the forenoon, and had been told that it could not be trusted. But the evidence on this point is that at another point on the line and some hours before the accident, the deceased had called attention to the fact that the insulating material was hanging in strips from the wire at this point, and was then told that it was defective and unsafe. But the defect at that point was patent and of a character to arrest the attention of ordinary persons, because, as before stated, it was hanging in strips from the wires. But there is no evidence that the insulating material on the wires at the point where the accident occurred was obviously defective, or that there

was anything about it to indicate to a person not an expert that it was old or unsafe. It is contended, however, that the deceased was an experienced man and must have known from the appearance of the insulating material on the wire on which he was engaged that it was old and defective. The evidence does show that the deceased was an experienced lineman, but it falls far short of showing that his experience was of such a character as to enable him to judge of the age or quality of insulating material. In fact, it does not appear that he had any experience with insulated wires, or wires carrying dangerous currents. His experience, so far as is disclosed by the evidence, was confined to telephone and telegraph lines. Neither the pleadings of the plaintiff nor the evidence in support thereof disclosed any negligence on the part of the deceased. Therefore, on the question of contributory negligence, the burden of proof was upon the defendant. That being true, in the face of an adverse verdict, the complaint that a finding involved therein is not sustained by sufficient evidence is unfounded, unless the evidence on that point is of such a character that the only reasonable inference to be drawn therefrom is that the negligence of the deceased directly contributed to the injury. The evidence before us is not of that character.

The defendant contends that the second and third specifications of negligence in the petition are not sustained by the evidence. As to the third, the court directed a finding in favor of the defendant, so it requires no further notice. As to the second, there is evidence sufficient to sustain a finding that had only wires of the same polarity been strung on the same side of the pole, the accident would not have occurred. It is true there is a substantial conflict in the evidence as to whether it would have been practicable or advantageous to put only wires of the same polarity on the same side of the pole. But the gist of the action is whether the defendant did or omitted to do that which a man of ordinary care and prudence, under like circumstances, having a due regard for the safety of his

employees, would not have done or omitted, and whether the injury complained of was the proximate result of such act or omission. Such questions, on the record presented, are questions of fact, and having been resolved against the defendant on conflicting evidence, the findings should not be disturbed.

The defendant complains of the refusal of the court to give the following instruction:

"The jury are instructed that if the insulation upon the wires on this pole upon which Dent was injured, which wires have been designated in the testimony as Nos. 2 and 3, was rotten and brittle, and for that reason liable to crack or break upon bending around the glass insulators on the arms, and this fact was known to Dent when he undertook to attach the wires Nos. 2 and 3, and with this knowledge Dent undertook, without protest to this defendant, to attach said wires to said insulators, the plaintiff herein can not complain of the condition of the wires as to insulation, and as to that issue you will find for the defendant.

"By knowledge is meant not only what Dent actually knew but what, from the knowledge of insulation on that subject he possessed either from experience, observation or the warnings or cautions of creditable persons he ought to have known."

This instruction is practically the same as the paragraph hereinbefore quoted, given by the court on its own motion, consequently it was not error to refuse to give the one in question.

The defendant tendered instructions to the effect that if the deceased knew that the wires with and among which he was working were live wires, and proceeded to his work without protest, the jury should find for the defendant as to the third specification of negligence. These instructions were refused and rightly, because, as we have seen, the court of its own motion directed the jury to find against the plaintiff as to that specification.

Other instructions were tendered to the effect that if the

deceased knew that wires of different polarity were strung on the same sides of the pole on which he was working, and proceeded with his work without protest, the jury should find for the defendant as to the second specification of negligence. The court refused to give these instructions, but submitted a special interrogatory to the jury as to whether the deceased knew that wires of different polarity were strung on the same sides of the pole. The jury answered that interrogatory in the negative and their finding on that point is sufficiently sustained by the evidence. The jury having specially found that the deceased did not know such fact, the refusal of the court to give the instructions covering that hypothesis was error without prejudice.

Numerous other errors are assigned, but the foregoing shows only the assignments argued.

It is recommended that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed June 8, 1905. *Judgment of affirmance adhered to:*

1. **Contributory Negligence:** INSTRUCTION. Whether plaintiff's intestate, an experienced lineman with telephone and telegraph wires, had such knowledge and experience respecting the handling of wires charged with heavy currents of electricity and used for lighting and power purposes, and of the character and pliability of the insulation thereon as to its being brittle and liable to break when twisted in fastening because of age and wear, and whether he acted without due care and caution under the circumstances and was chargeable with contributory negligence, *held*, not to be so conclusively proved as that there is no reasonable chance of different minds reaching different conclusions, and to have been properly submitted to the jury for its determination.

2. **Employee:** ASSUMPTION OF RISKS. An employee assumes only the

risks arising from the appliances and materials to be used by him or from the manner in which the business in which he is to take part is conducted, when such risks are known to him or are apparent and obvious to persons of his experience and understanding. *Union Stock Yards Co. v. Goodwin*, 57 Neb. 138.

3. **Instruction.** Whether or not the employee exercised due care and caution in looking for breaks in the insulation on the wire he was working with and fastening, and whether he was guilty of contributory negligence in respect thereto, *held*, under the evidence, to have been properly submitted to the jury for its determination.

4. **Defective Insulation:** NOTICE. A break occurring in the insulation on the wire which was being handled and fastened around a glass insulator by the plaintiff's intestate is not an open and obvious defect, notice of which will be imputed to him where, under the evidence, there exists reasonable grounds for difference of opinion as to his being able to observe such break in the prosecution of the work in which engaged in the ordinary way and without making an extra effort specially for the purpose of ascertaining the condition of the insulation where the break occurred, after the wire was fastened.

5. **Case Distinguished.** The rule announced in *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, *ante*, p. 71, on the evidence in that case as to the duty of a lineman of an electric light company to inspect wires with which he was working to discover defects, *held*, not applicable to the case at bar and the case cited is therefore distinguished.

6. **Judgment Affirmed.** The judgment of affirmance heretofore entered, *ante*, page 668, adhered to.

HOLCOMB, C. J.

It is insisted by counsel for the electric light company, plaintiff in error, that the testimony in this case, when interpreted by the rules of law properly applicable, discloses that the death of the plaintiff's intestate was caused by his own negligence contributing thereto, and, for that reason, that the verdict of the jury is against the weight of the evidence and contrary to law. In the former opinion in this case (*ante*, page 668), the question of contributory negligence was given consideration and the conclusion reached was that the evidence as disclosed by the record was such as to warrant the inference that the de-

ceased was free from negligence of a contributory character and that the finding of the jury in that regard in favor of the plaintiff can not be said to be insufficiently supported by the evidence. A rehearing having been granted, the cause has been again submitted for further consideration. A statement of the facts essential to a proper consideration of the errors relied on for a reversal of the judgment obtained in the court below is found in the former opinion and need not here be restated. In the petition it is alleged that "at said time [when plaintiff's intestate was killed] said James R. Dent was entirely without experience in working among electric light wires charged with electricity enough to make the same dangerous; that it was then and there the duty of the defendant, as the employer of the said James R. Dent, to exercise reasonable care and caution in the control, management and direction of its employees sent by it to work among said wires to the end that the said employees should be furnished a reasonably safe working place and to not be subjected to unusual and unnecessary dangers." It is strenuously contended that the evidence is undisputed to the effect that the deceased was an experienced lineman, and that, at the time he went to work for the defendant, he told its foreman that he had had eleven years' experience with a telephone company, and that he had had experience as a lineman for an electric light company at Salt Lake and was familiar with the duties of a lineman. Some confusion in the argument of this case has, it seems to us, grown out of the use of the term "experienced lineman." The assertion that the deceased was experienced in the duties pertaining to linemen among wires carrying light currents of electricity and regarding which there is no specal danger to life by coming in electrical contact with such wires, such as employment when the duties are those of linemen working among wires belonging to telegraph and telephone companies, is no doubt true. The evidence, we think, is not such as to compel the inference that the deceased was an experienced lineman when applied to those working

among wires carrying heavy currents of electricity such as are a menace to life and which are used for light and power purposes as were the wires of the defendant company in the case at bar. The situation we have confronting us then is that of a person having several years' experience in working with and among telegraph and telephone wires and who presumably has acquired that degree of knowledge and experience usually possessed by men of ordinary intelligence and capacity engaged in such employment. We do not find from the evidence in the record that it is indisputably established that the deceased represented himself to be an experienced lineman in respect of prior employment requiring him to work with and among electric light or other similar wires carrying a heavy voltage of electrical currents. While it is in evidence that the deceased represented that in addition to his employment with a telephone company he had worked for another company at Salt Lake, it does not appear positively that such a company was engaged in electric lighting or a similar business in which it is required to use wires charged with strong currents of electricity. From the whole record it is rather to be inferred that the company referred to was a telegraph company. At least the evidence is not so clear and convincing as to lead irresistibly to the conclusion that the deceased had experience in working among and with electric light wires prior to the time he was employed by the defendant in the case at bar and it is made to appear that on the first day of his employment he came to his death by an electrical shock from a pair of wires he was working with. It is contended on behalf of plaintiff in error that the deceased was charged with notice of the defective and decayed condition of the insulation on the electric light wires where he was working at the time of his death and assumed the risks and dangers incident to the handling of wires in such condition. Also that the breaking of the insulation, when one of the wires was changed and fastened around the glass insulator and then twisted, which permitted the wire as

thus exposed to come in contact with his elbow and produce a short circuit through his body, thus causing his death, was an open and obvious danger which he was bound to assume and must be held to have assumed as a matter of law and for which the defendant can not be held legally responsible. It is obvious that the deceased knew he was working with wires charged with heavy currents of electricity—that they were "hot wires" as he was informed. On this point the jury were told in the trial of the case, that the deceased having knowledge that the wires with which he was working were live wires, he assumed all risks and dangers incident to an employment requiring one to handle and work with wires so charged with heavy currents of electricity and that the defendant company could not be charged with legal responsibility because of such fact. The fact, therefore, that the wires were at the time carrying currents of electricity of a dangerous character is material only in so far as it may have a bearing on the defendant's duty to keep them properly insulated in places where employees were required to work with them while in the discharge of their duties in and about the work of their employment, or to take other precautionary measures such as placing wires carrying currents of opposite polarity on opposite sides of the poles on which they were strung.

1. It may be said, then, that without previous experience with electric light wires, the deceased began his employment with the defendant company by being directed to engage with others in the work of changing from one place to another on a junction pole, to which was attached a large number of wires running in all four directions of the compass, some of the wires thereon which were charged with a heavy voltage of electricity used for lighting and for power purposes. It was the deceased's duty at the time to receive the wires from another employee above him on the same pole and attach them to glass insulators by wrapping the wire around the glass insulator and fastening it by twisting it around itself. Before the

wires were handed to him, the insulation was examined by the other workman just above him and taped wherever the wire was exposed and then handed to the deceased to be fastened in the manner stated. Two of the wires thus prepared and handed to him were successfully and without incident attached where they were to be placed. After the third wire had been handed him and while fastening it in the manner stated, such wire being one of a pair the other being the second wire placed in position, the deceased allowed his elbow to come in contact with the upper side of the second wire where twisted, the insulation of which had been broken in wrapping; and he, having hold of the other wire with the instrument he was using in such a manner as to permit the current of electricity to pass from one wire to the other through his body, received a shock which was sufficient to produce death. While it appears that the deceased had observed that the insulation at other places removed from the place where he was working was decayed and hanging down in shreds, we find nothing in the record that would necessarily acquaint one, with the experience and knowledge the deceased apparently possessed, with the fact of the probability of the insulation cracking and breaking in being fastened around the glass insulators in the manner stated, and of the likelihood of receiving a dangerous shock by coming in contact with the exposed wire because of such breaking. Manifestly the object of the taping of the exposed places on the wire before they were handed to the deceased was for the purpose of protection to those engaged in the work of changing the wires from one place to another on the junction pole, and it is a fair inference that the deceased handled the wires under such belief. This is as we understand counsel for defendant in briefs conceded. It is there said: "The undisputed testimony shows that the insulation on the wires with which Dent was working was sufficient to prevent short circuiting by coming in contact with them and became dangerous only when a defect or split had been made in the insulating by the performance of the work

upon which Dent was engaged." When called upon to handle the wires in this manner and to replace them as he was required to assist in doing he may, we think, be justified in assuming that the conditon of the insulation when taped in the manner stated was reasonably well fitted to be handled for the required purposes, without additional risk or danger from the breaking of the insulation and the exposure of the unprotected wire with its attendant extraordinary hazards and dangers while the work was being performed. See *Choctaw, O. & G. R. Co. v. McDade,* 191 U. S. 64.

We do not think it can be said as a matter of law that the deceased was, under the circumstances, guilty of contributary negligence because he handled the wires as though the insulation would remain intact and serve as a protection because of its qualities as a non-conductor of electricity. It can not be said that with the experience and knowledge he is shown to have possessed that he must, like others with much larger experience, be charged with knowledge of the decayed and brittle condition of the insulation and its liability to break when the wires around which it was placed were twisted and this additional strain put upon it. The witness Ripley, a witness apparently fair and competent to testify, says that he supposes that all linemen who had much experience with insulated wire would know that the insulation, in the decayed condition as was that with which the deceased was working, was likely to crack if given a short twist and that it was dried out so that it would not give like new insulation. He says he knew such to be the fact, but that he did not mean that this would be apparent to everybody, but only to those of experience in handling insulated wires, and then they would have to have experience with old and new insulation in order to distinguish the difference. This we regard as a fair statement of the situation and of the deceased's knowledge in respect of the condition of the insulation on the wires on which he was at work. Taking the knowledge and experience of the

deceased as disclosed by the evidence, can it be said that the dangers from the defective or decayed insulation were so apparent that the deceased was negligent in respect of the manner in which he handled the wires he was working with, or assumed these extraordinary risks incident thereto? This court has said in speaking with reference to the rights, duties and liabilities of master and servant: "An employee assumes the risk arising from defective appliances used, or to be used by him, or from the manner in which a business in which he is to take a part is conducted, when such risks are known to him or are apparent and obvious to persons of his experience and understanding." *Union Stock Yards Co. v. Goodwin,* 57 Neb. 138. It is only the risks and conditions known to him or apparent and obvious to persons of his experience and understanding, that the employee assumes, when he voluntarily enters into or continues in the employment in which he is engaged. *Chicago, B. & Q. R. Co. v. McGinnis,* 49 Neb. 649. Judged by the principle of the decisions cited, we think the conclusion must inevitably follow that the deceased can not be said as a matter of law to have assumed the risks incident to the defective or decayed condition of the insulation on the wires with which he was working, or that he was guilty of contributory negligence in engaging in the work and handling the wires when alive or charged with strong currents of electricity while covered with such defective or decayed insulation. The questions of negligence and contributory negligence are questions of fact for the jury and not for the court, unless, on the facts admitted or conclusively proved, there is no reasonable chance of different minds reaching different conclusions. 2 Cur. Law 1011, and authorities cited.

2. It is also contended that there was a want of care and caution on the part of Dent, required of him while engaging in the work he was performing, in that after he had fastened the wire on which the insulation became split or broken, he ought to have looked at it and examined it to ascertain whether the insulation remained intact before

he proceeded to tie the wire which he was engaged in fastening when he received the electrical shock producing death. It is urged that the imperfection caused by the breaking of the insulation was an open and obvious defect, the risk and danger of which he was bound to and did assume in the further prosecution of the business in which he was engaged. This latter question in a measure is controlled by the one already discussed. If the insulation had been in such condition as to serve the purpose for which it was placed on the wire, it presumably would not have broken while being fastened to the glass insulator to which it was attached. To require the deceased to look for a break of this kind assumes that the insulation was defective and that he had knowledge of, or should have known of its decayed condition and liability to break while being fastened in the manner it was, or that it was in view of the deceased while doing the work in which he was engaged and therefore it was open and obvious. In respect of the latter phase of the question it appears that the deceased was standing on a lower cross-arm with a supporting belt around his body and fastened to a cross-arm farther up. This permitted his body to swing outward from the cross-piece and between which and his body extended some wires running parallel with the cross-bars on which he was standing and to which the wires he was handling were being fastened. The glass insulators to which the wires were attached, some three inches in diameter by four and a half inches in height, were about even with the top of his shoulders and the break in the wire was on the opposite side from where he was standing. It seems reasonably clear that the break in the insulation produced by the wrapping of the wire was beyond his range of vision and that the condition of the twisted wire at the point where the break occurred could not be observed save by making a special effort for that purpose, by putting his hands on the arms and pulling himself up closer and above or to one side of the glass insulator behind which the break was found. It was only by drawing

himself up and looking over the crossbars and the insulator that he could inspect the wire if he so desired and determine the effect on the insulation with which it was covered by the twisting which he gave it in fastening it on the glass insulator. The break, therefore, when it occurred, was not, under the evidence, so open or obvious that it could be seen by the deceased in the ordinary prosecution of the work in which he was engaged. The jury was warranted in concluding as a matter of fact that this break could only become open and obvious by the deceased's taking the extra precaution to ascertain whether the insulation had stood the strain put upon it in twisting the wire when fastening it upon the glass insulator. On this point the court instructed the jury that "if you believe from the preponderance of the evidence that the insulation on wire called number two was broken by said Dent when he tied said wire around the glass insulator, and if you further find from the preponderance of the evidence that said break in the insulating material of said wire was open and obvious to said Dent and that he ought to have seen it by the exercise of ordinary care on his part before he attempted to tie on the next wire, then your verdict must be for the defendant even though the defendant might have been negligent." This instruction was in harmony with the evidence as disclosed by the record, was a correct statement of the law and the finding of the jury can not be said to be so unsupported by the evidence as that it can not be upheld. Whether the deceased exercised due care in making these fastenings and in observing the break in the insulation on the second wire fastened by him were matters regarding which reasonable minds could very justly differ, and therefore they became questions peculiarly within the province of the jury and were properly left to it for its determination. *New Omaha Thompson-Houston Electric Light Co. v. Rombold, ante,* p. 54.

In this connection it is to be observed that whether the deceased knew at the time he was working with a pair of live wires strung on the same side of the poles was a mat-

ter having a material bearing on his conduct in the determination of the question of contributory negligence on his part. By a special finding the jury answered the question in the negative and thus found upon sufficient evidence as a question of fact that he was without knowledge that he was handling two wires carrying currents of opposite polarity. Had he known this fact his conduct would, in all probability, have been different and of course it would have been his duty to exercise that degree of care and caution commensurate with the known dangers to which he was exposed, which a reasonably prudent and cautious man of like knowledge and experience would have exercised under like circumstances.

3. It is also argued that instruction number six given by the court on its own motion is obnoxious to the rule announced in the *New Omaha Thompson-Houston Electric Light Co. v. Rombold, ante,* p. 71. The two cases are altogether different and the rule applicable in one does not necessarily apply to the other. In the case cited, the rule was announced because of testimony therein introduced tending to show that it was the duty of linemen to make an inspection for defects such as were found there to exist. The question therein ruled upon does not arise in the case at bar. That was an exceptional case growing out of the relative duties and liabilities of master and servant, because of the character of the evidence respecting the servant's duties in that particular case, relative to the inspection of lines in order to discover and have remedied defects found to exist. That is, there was in that case evidence tending to show that in addition to the general duties of the lineman, the employee was in a sense an inspector of lines and that it was a part of his duties to discover defects and to repair or report them for reparation.

As applied to plaintiff's intestate and the character of the employment in the case at bar, no such questions arise. The issues in the present case relate only to the negligence of the master as alleged and the alleged contributory negli-

gence of the servant pleaded in the answer, as well as his assumption of the ordinary risks incident to his employment and those of an extraordinary character which were open and obvious. The rule announced in the *Rombold* case can not be successfully appealed to in the case at bar. Upon a consideration of the questions presented and argued as grounds for a reversal of the judgment obtained in the court below in the light of the whole record, we are constrained to the view that the judgment of affirmance heretofore rendered was rightly entered and it is accordingly adhered to.

AFFIRMED.

HARRISON MCCAULEY V. EDITH TYNDALL.

FILED APRIL 22, 1903. No. 13,022.

Allottee of Indian Lands: RIGHTS OF WIDOW. Under an act of congress entitled "An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the state of Nebraska," etc., the widow of an allottee dying before the issuance of a final patent, and without issue, takes a life estate in the allotment to her husband, remainder over to his father.

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

Hiram Chase, for plaintiff in error.

Thomas L. Sloan, contra.

ALBERT, C.

In the case of *Porter v. Parker, ante,* page 338, it was held that the allottee of lands in severalty, pursuant to an act of congress entitled, "An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the state of Nebraska and for other purposes," approved August 7, 1882, is seized of an equitable estate in fee which, upon his death before the issuance of a final

patent therefor by the United States, descends to his heirs at law, according to the laws of inheritance of this state. In that case the allottee died intestate before the final patent had issued, leaving a widow and one child. The child afterward died intestate, and the contest in that case was between the widow and the father of the allottee, the former claiming both as widow of the allottee and as next of kin of her intestate child; the father as next of kin of the allottee. This court resolved the question in favor of the widow, placing the decision on the ground that on the death of the allottee the land descended to the child, and upon her death it descended to the widow as next of kin to the child. It was not found necessary in that case to determine the rights of a surviving widow, as such, under the grant in question.

The present case differs in no essential feature from the one just mentioned, save that the allottee died without issue, and the contest is between his father and widow, the former claiming the entire estate as next of kin, the latter a life estate as widow of the deceased.

It does not seem that the case referred to leaves any debatable question in the present case. If, as stated in that case, the estate of the allottee was one of inheritance, descending to his heirs according to the laws of inheritance of this state, it would seem that section 30, chapter 23, Compiled Statutes (Annotated Statutes, 4930), would be decisive of the question presented by the record in this case. That section provides that if the deceased dies intestate, without issue, his estate shall descend to his widow during her natural life, and after her death to his father. In view of that provision, and the terms of the grant as construed by this court, we think it is clear that the widow, the defendant in this case, took a life estate in the land, with remainder over to the plaintiff. As that was the conclusion reached by the trial court, we recommend that the judgment be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. FRANK A. KENNEDY ET AL., v. WILLIAM J. BROATCH ET AL.

FILED APRIL 30, 1903. No. 12,916.

1. **Power of Legislature:** BOARD OF FIRE AND POLICE COMMISSIONERS: APPOINTMENT. The legislature may by statute confer upon the governor the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class. *Redell v. Moores*, 63 Neb. 219.

2. **Res Judicata.** A judgment, rendered by a court of competent jurisdiction, determining the rights of the litigants on a cause of action or defense, is an effectual bar against future litigation over the same right determined by such judgment, and is for all time, unless reversed or modified, binding on the parties and their privies in estate or in law.

3. ———. A "right, question or fact" distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies, and this even though the second suit is for a different cause of action.

4. ———. The right, question or fact which when put in issue and determined, to become the subject of the rule of *res judicata*, must be a question of fact as distinguished from an abstract proposition of law; and the determination must be with reference to such question or questions of fact, although the decision itself may be a question purely of fact or a mixed question of fact and law or a legal deduction arising from a state of facts common to both actions, as for example a decision construing, as a matter of law, an agreement is binding between the parties and their privies where the same instrument is urged as a ground of recovery or defense in a subsequent suit on a different cause of action.

5. **Abstract Question of Law.** Abstract questions of law can not be made the subject of litigation. There must be real parties and a *res* in dispute that will become *res judicata* when the litigation is determined. *State v. Savage*, 64 Neb. 684.

6. **Quo Warranto.** In an action by proceedings in *quo warranto* to try title to an office, the claim or demand on which the judgment of

the court is asked, the subject matter of the controversy, is the right to the office for the term in controversy, and the action is personal as to the parties claiming the office.

7. ———. In such action there is no adjudication or determination of official rights, duties and powers of the person adjudged to be entitled to the office, but solely an adjudication of his right to hold the office for the term in controversy and perform its functions.

8. ———: JUDGMENT. Such an adjudication determining the right of a claimant to an office for a specified term does not determine the right of a successor to the office, holding by appointment from the same authority for a different term; nor is the successor, with respect to the right to the office adjudicated in a prior suit for a different term, deemed in privity with his predecessor; nor is the subject matter the same in the two suits.

9. **Interveners.** Interveners Peabody and O'Connor *held* to have no valid claim to the office as members of the board of fire and police commissioners for the terms which are in controversy in the present action.

10. **Finding and Judgment.** *Held*, in the case at bar, that the respondents, appointees of the governor, are the lawfully constituted board of fire and police commissioners of the city of Omaha.

ORIGINAL proceeding in the nature of *quo warranto* to determine the rights of the several parties to office as fire and police commissioners of a city of the metropolitan class. Frank E. Moores, mayor, *et al.* intervene. Dismissed as to relators and interveners. *Judgment for respondents.*

W. J. Connell and *James H. Adams*, for relators.

Carl C. Wright, *Frank T. Ransom* and *William F. Gurley*, *contra*.

HOLCOMB, J.

This action is brought in this court in the exercise of its original jurisdiction, by the filing of an information in the nature of *quo warranto*. The object of the proceeding is to try and determine the respective rights of the relators and the respondents to office as members of the board of

fire and police commissioners of the city of Omaha. The relators' claim of right and title to the office is based on appointments thereto made by the mayor and confirmed by the city council in pursuance of a city ordinance enacted for such purpose. The respondents lay claim to the office by virtue of appointments made by the governor under the provisions of sections 166 and 167, chapter 12*a* of the Compiled Statutes, 1901 (Annotated Statutes, 7635, 7636), said sections being a part of the charter act passed by the legislature for the government of cities of the metropolitan class to which the city of Omaha belongs. The mayor and city council have intervened in the action, but by their pleadings present no question or issue different from those presented by the pleadings of the respondents and the relators.

The power and authority to appoint members of the board of fire and police commissioners by the governor has been a subject fruitful of much litigation in this court, as is evidenced by the following cases: *State v. Seavey,* 22 Neb. 454; *State v. Moores,* 55 Neb. 480; *State v. Kennedy,* 60 Neb. 300; *Redell v. Moores,* 63 Neb. 219; *State v. Savage,* 64 Neb. 684. All the above cited cases have a bearing either direct or remote on the present controversy and should be referred to for a better understanding of the questions herein presented for consideration and discussion.

The prior litigation as well as the present is directly traceable to a difference of opinion prevailing in respect of the power of the legislature to authorize the appointment of members of the board of fire and police commissioners of the city of Omaha by the governor, as is provided he shall do by the sections of the charter act to which we have referred. It is the contention of the relators and the interveners, the mayor and the city council, as it has been by one of the parties litigant in these several prior cases, that the act authorizing appointments to be made by the governor is unconstitutional and void, as being violative of the principles of "home rule" or the

"right of local self government" of the municipalities of the state. But two fundamental questions are presented for consideration in the present action; one being the alleged unconstitutionality of the act referred to, and the other, the question of whether the rights of the parties herein are not to be controlled and determined by the application of the doctrine of *res judicata*. It is insisted that by reason of the matters litigated and the judgments rendered in two of the cases heretofore cited, namely, *State v. Moores* and *State v. Kennedy, supra,* the respondents can not now be heard to assert title and right to the office of which they are the present incumbents.

Regarding the first question presented for our consideration, namely, the alleged unconstitutionality of the act under which the governor appointed the respondents to the office now held and claimed by them, it would serve no useful purpose to again discuss the subject at length. While the act was held unconstitutional in *State v. Moores,* in the more recent case of *Redell v. Moores, supra,* the *Moores* case was overruled and the act held to be within the constitutional powers of the legislature. It would be altogether profitless for us now to enter into a further discussion of the much mooted legal propositions involved, nor do we understand counsel to urge it in more than a perfunctory manner. The *Redell-Moores* case should be accepted as the deliberate expression of the court on this branch of the litigation, and we adhere to the conclusions announced and the principles of law as expressed therein. On this subject the views of a majority of the court as at present constituted are also manifested in the opinion formulated by the present chief justice in the case of *State v. Kennedy, supra.*

Chief reliance for a judgment in favor of the relators in the case at bar is based on the proposition that the judgments rendered and the matters litigated in the two cases, *State v. Moores,* and *State v. Kennedy, supra,* are *res judicata* as to all the parties to this action, and because thereof, irrespective of the question of the constitution-

ality of the act under which the governor appointed the respondents, they are concluded thereby and cannot be heard to assert a right to the office they are now incumbents of by virtue of such appointments. It is to this latter question that counsel have devoted most of their briefs and their oral arguments at the time of submission, and to which we will confine ourselves in the further discussion of the case. It is insisted, if we understand counsel aright, that the judgment in the *Moores* case operates as a bar to the assertion by the respondents of a right to the office they are now holding, and that, because of the adjudication of certain facts therein, they are estopped from contending to the contrary and that this action is by or against the same parties or their privies that were litigants in the two cases mentioned. It is said by counsel for relators that, while it may be true in the *Moores* case that as between the appointees of the mayor and the governor the thing in litigation was the office itself and the title thereto, yet nevertheless the right to the office was not the only point of issue presented or determined; that the question was also determined as to whether the mayor or governor had the right and power to appoint members of the board of fire and police commissioners; also that the act relating to cities of the metropolitan class, authorizing the governor to appoint, was adjudged to be unconstitutional; and further that the ordinance under which the appointment was made by the mayor was a valid ordinance; that all these questions were put in issue by the pleadings in that case, were litigated and determined, and, therefore, have become *res judicata,* binding alike on all parties thereto and their privies.

The pleadings in the several cases are too voluminous to be set forth herein, and we can not give an abstract of them without taking unnecessary time and space. We must content ourselves by stating what we conceive to be the essential features of the pleadings on which the judgment in the action was grounded. In the *Moores* case the action was by *quo warranto* begun by the attorney general

against the mayor and city council, and the board of fire and police commissioners appointed by the governor. The action was brought for the purpose of determining who were lawfully entitled to hold the office and exercise its functions. The mayor and city council, proceeding upon the theory that the act authorizing the appointment of members of the board by the governor was unconstitutional and void, had passed an ordinance providing for the appointment of such officers by the mayor, with the approval of the city council. The mayor having appointed certain parties to fill the office in pursuance of the provisions of the ordinance passed for that purpose, who claimed the right to the office, a conflict of authority between the two contending boards was imminent; and, to have a judicial determination as to which of the contending parties was the lawfully constituted board of fire and police commissioners, the action was instituted.

It is not entirely clear to us why the mayor and the council were made respondents in that action, or what precise legal interest they had in the subject matter of litigation; but however this may be, the appointees of the mayor intervened in the action and by proper pleadings set forth their claim and title to the office, as did also the board appointed by the governor. The facts pleaded show conclusively that the appointees of the governor based their rights on such appointments and such further necessary steps as would qualify them for the office; that the mayor's appointees claimed by virtue of the appointment made by the mayor and the necessary succeeding steps to qualify them for the office. It was also averred on behalf of the mayor and city council and their appointees that the act authorizing the appointment of members of the board by the governor was unconstitutional and void. Demurrers were interposed to these several pleadings by the adverse parties, which raised solely questions of law to be determined by the court, on which the decision was grounded. The court held in the *Moores* case that the legislature had exceeded its constitu-

tional powers in conferring upon the governor authority to appoint such officers, and the judgment entered went in favor of the appointees of the mayor, the respondents; the appointees of the governor being ousted from the office. The subject matter of the litigation, the claims and demands of the parties, was with respect to the title of the respective claimants to the office as members of the board of fire and police commissioners. It is true the court, in a sense, determined that the act of the legislature authorizing the governor to appoint was void; that the ordinance passed by the mayor and city council was valid; and that the mayor could rightfully fill the office by appointment. In a legal sense, however, in our view the *res,* the thing actually decided, was that the mayor's appointees were entitled to hold the office and perform its functions for the term for which they were appointed and that adjudication was binding on the parties to the action and their privies. These other questions, especially the one with reference to the validity of the statute, unquestionably influenced the court in pronouncing the judgment rendered, yet, in our opinion, they were not the things adjudicated within the meaning of the rule which is invoked as conclusive of the rights of the governor's appointees in the case at bar. The validity of the ordinance and the right of the mayor to appoint thereunder were dependent upon the alleged unconstitutionality of the act giving the governor power to appoint. The holding of the court on and its determination of these subordinate questions was the natural, logical and legal sequence of its holding on the main legal proposition involved, that is, the power of the legislature to authorize the governor to fill the office by appointment. This latter was the principal and pivotal legal point on which the decision of the controversy hinged. The mayor and the city council, and the appointees of the mayor, could not present under the issues as an abstract proposition the question of whether the city ordinance was valid and the mayor had authority to appoint thereunder. These would

be but moot questions on which the court could only express an opinion and not adjudicate. There must be a *res* in dispute, a subject matter for controversy, and parties to the litigation whose rights the court is called upon to adjudicate, which rights, when once determined, become *res judicata* as between the parties thereto and their privies. It may be, and probably is, true that in a proper proceeding the subject matter of the controversy could be the validity of the ordinance or the right of the mayor to appoint thereunder, which, when determined, would be binding on the parties and their privies under the doctrine of *res judicata;* but such action contemplates that there shall be parties to an action who are claiming and demanding the adjudication of their rights, in the determination of which the validity of the ordinance and its effect on the rights of such parties thus put in issue becomes essentially and actually the *res* in controversy. To illustrate: An injunction might be begun to restrain the enactment or enforcement of an ordinance and thereby determine the rights of a litigant. In such case an adjudication as to the validity of such ordinance would doubtless, as between the parties and their privies, be conclusive in future litigation with reference to the same subject matter. In the case at bar, however, the subject matter of litigation was not the validity of the ordinance, or the right of the mayor to appoint members of the board of fire and police commissioners. What the parties claimed and demanded the judgment of the court on, was the right and title to the office in controversy for the term for which they were appointed, and as a reason for such a demand they invoked of the court the application of certain principles of law, from which the deduction was made that the act authorizing the governor to appoint was unconstitutional, and the citizens of Omaha, as a muncipality of the state, had the undeniable right to select their own officers. The holding of the court on these several questions thus presented was but the expression of an opinion regarding legal principles of an abstract character, to be followed

or departed from in future litigation by the application of the rule of *stare decisis.* Certainly, if its holding that the legislative act was unconstitutional would not in subsequent litigation regarding a different subject matter be controlled by the doctrine of *res judicata,* then the subordinate legal questions involved dependent upon this main one, could not operate in a different manner or their scope and effect be extended beyond that of the main question. If counsel's contention is correct as to the scope and extent of the adjudication in the *Moores* case, then why may it not be said that the case of *State v. Seavey, supra,* has become *res judicata* of the question therein determined, binding upon the parties not only in that action, but upon those in the case of *State v. Moores,* where the identical question was determined. In the *Seavey* case it was decided by a unanimous court that the legislature was empowered to authorize the governor to appoint members of the fire and police board of cities of the metropolitan class. The principal question for the consideration of the court in that case was the constitutionality of such a law, and this was the identical question determined in the *Moores* case, the judgment in which it is now urged is an estoppel against those claiming the office by virtue of appointments made by the governor. It may be that the two cases and the questions decided are not analogous in all respects, and yet the principle contended for by relators, if sound, might with equal propriety have been urged when it was sought to overrule the *Seavey* case, as was done in the case of *State v. Moores, supra.* The suggestion is made more for the purpose of calling attention to what seems to us as the extraordinary extent to which we are asked to carry the doctrine of *res judicata* in the case at bar.

If it be conceded, as contended for by counsel for relators, that in the *Moores* case it was determined and adjudicated that the ordinance under which the mayor acted was valid and he might rightfully appoint the members of the board of fire and police commissioners, and

that such determination should be controlled by the doctrine of *res judicata,* yet, in our opinion, such disposition of these questions would not be conclusive of the rights of the parties to this suit, for the reason that the former controversy was in respect of a different subject matter, a different term of office, than the one now in controversy, and between parties other than those now litigating, and who do not stand in relation to them as privies in estate or in law. The two actions are entirely disconnected, both as to parties and subject matter. It is doubtless true that the judgment in the *Moores* case was and is an effectual bar against further litigation between the same parties or their privies as to the claims and demands therein adjudicated, to wit, the right to the office for which the parties were contending for the term then in dispute, and that question was, by the judgment rendered, forever settled in favor of the appointees of the mayor; but the judgment could not, we think, have the effect, either as a bar or by estoppel by adjudication, to conclude the same or different parties claiming under a different title and for a different term, nor would other appointees, whether of the governor or the mayor, be deemed in privity with those preceding them, who claimed or held the office for another and different term. Our views regarding this particular phase of the controversy will possibly be made clearer by what is hereinafter said.

The diligence of counsel for relators has resulted in the citation of a multitude of decisions on the subject, yet we find none going to the extent contended for, nor any that would warrant us in holding that the parties to the present action are concluded by the judgment in the *Moores* case or the one following, where the doctrine of *res judicata* was applied and held to be controlling in the decision there rendered. *State v. Kennedy, supra.*

The supreme court of the United States, in discussing the doctrine, say:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and

directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of the rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them." *Southern P. R. Co. v. United States,* 168 U. S. 1, 48.

In an early case, which is frequently quoted by the courts with approval (*Outram v. Morewood,* 3 East (Eng.) 346), it is said in relation to the subject by Lord Ellinborough:

"It is not the recovery but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

It is true that an estoppel by adjudication may arise from a decision of the law as to the legal rights of the parties to the litigation, where the decision is predicated upon a fact or state of facts common to both suits. This principle may perhaps be best illustrated by a citation of

authorities. In *Southern M. R. E. Co. v. St. Paul & S. C. R. Co.*, 55 Fed. 690, it is held that:

"The estoppel arising from a finding in a previous suit between the same parties, is not confined to matters purely of fact, or of mixed fact and law, but extends to a decision of the legal rights of the parties on a state of facts common to both suits, although the causes of action are different."

In the opinion it is said (p. 695):

"The authorities furthermore show, that the estoppel arising from a finding in previous suit between the same parties, is not confined to a finding upon a question purely of fact, or upon a mixed question of law and fact, but that it extends as well to a decision construing an agreement between the parties, and to a decision which determines the legal rights of the parties on a state of facts common to both suits, although the causes of action are different."

The controversy in the case from which we have quoted arose between two railway companies over lands granted by congress in aid of the construction of railways. Each company claimed the right to certain lands by virtue of these land grant acts, and certain steps taken by each of them, respectively, in compliance with the law and for the purpose of earning title to the land. In a prior suit, in which title to the same lands was in controversy, in determining the respective rights of the contesting parties, the decision went in favor of one of the litigants upon a construction of the laws granting the lands and upon certain facts there in litigation with respect to the location of the proposed lines of railway, the filing of a survey thereof, the construction of certain portions of the roads, and the selection of lands claimed under the grant. The second suit, although on a different cause of action, required an adjudication of title to the same lands as in the first suit, and the doctrine of *res judicata* was invoked and held applicable in the second litigation. It is to be noted that in both actions the subject matter of the controversy was the title and ownership of certain lands, and the

decision of the court as to the ownership upon the facts developed in the first suit was an adjudication of the title, whether as a question of law or of fact or both, which was binding on the parties in the subsequent litigation. In the case of *Baldwin v. Maryland,* 179 U. S. 220, 21 Sup. Ct. Rep. 105, cited by counsel for relator, it was decided that a judgment establishing the liability of the estate of a ward for taxes in a suit by the guardian to restrain their collection is *res judicata* as to that question in a subsequent action by the state against the sureties on the guardian's bond to collect the unpaid taxes. It was also held that the judgment establishing a liability to pay taxes for certain years is *res judicata* as to the liability for the taxes of a succeeding year when the facts affecting the liability are identical in the two cases. Other authorities making similar application of the doctrine of *res judicata* are cited, none of which we think go to the extent contended for by relator in the case at bar.

It must at once, we think, suggest itself to the legal mind that the "right, question or fact," in the legal acceptation of the terms, which, when put in issue and determined, thereby becomes subject to the rule, is necessarily distinguishable from the holdings and expressions of the court with reference to principles of law which, when applied to the facts or thing in litigation, must control in the final disposition of the action and determine the judgment rendered therein. The thing in dispute in the case of *State v. Moores* was the right of the contending parties to the office as members of the board of fire and police commissioners, and it was with reference to this right that the parties demanded the judgment of the court. The mayor's appointees were decided to have a valid title thereto, because the court found and held, as a matter of law, that the act authorizing appointments by the governor was unconstitutional and void, as being in excess of legislative power. This holding, however, and the fact that it controlled in the rendition of the judgment entered in that case, would not be an adjudication

of any "right, question or fact" in issue, such as would bring the holding within the operation of the rule of *res judicata* by estoppel; nor, for the same reason, could it be said, because the issues were found in favor of the mayor and the judgment rendered proceeded on the theory that the ordinance under which the appointments were made was valid, that such decision would have any greater effect than the holding of the court on the principal controverted proposition of law which was involved. In *State v. Savage,* 64 Neb. 702, 705, this court has said:

"Abstract questions of law can not be made the subject of litigation. There must be real parties, and a *res* in dispute that will become *res judicata* when the litigation is ended. * * * In the determination of a case legal principles are invoked, and the conclusion of the court thereon announced. Whether such conclusion shall be followed, without further investigation in subsequent litigation, frequently depends upon principles of *stare decisis.* * * * The thing determined by the litigation becomes *res judicata,* and can not be afterwards questioned between the parties, although the rule of law by which the decision was controlled is afterwards found to have been incorrectly applied, and such application is no longer binding upon the court."

In the case of *State v. Kennedy, supra,* the action was by *quo warranto,* and again presented to the court for its consideration the constitutionality of the act passed on in the *Moores* case, and there was also presented by the issue made up in that case the question of whether the judgment in the *Moores* case and the matters therein adjudicated were not, as to the parties then contending for the office, *res judicata.* Without making any authoritative announcement with reference to the first question presented, the court decided the *Kennedy* case in favor of the respondents, who were holding the office by appointment from the mayor, on the plea of a former adjudication presented by their answer to the information filed by the attorney general. The principal question in that action

discussed in the arguments of counsel and considered by the court was with reference to the right of the state, after it had invoked the jurisdiction of the court in the *Moores* case by an action in *quo warranto,* to again be heard to question the title of the respondents to the office adjudged in their favor in the first action. Counsel for relators and those claiming by appointment of the governor contended quite earnestly that, because the state was acting in its sovereign capacity in respect of the appointments made by the governor, the right adjudicated in the *Moores* case against it was not binding in subsequent litigation, and that the doctrine of *res judicata* was not, therefore, applicable, and could not be invoked as in the case of ordinary suitors. In the opinion it was held, and to our minds correctly, that the state was bound as any other litigant by such decision, whether it be favorable or adverse to it. The question was also discussed in regard to the privity existing between public officers holding by the same title, and it was held that one deriving his authority from the same source as his predecessor is in privity with him, and that a judgment against a public officer in regard to a public right would bind his successor in office. The correctness of the statements contained in these propositions can not, we think, be seriously questioned. It was not, however, absolutely essential to the decision rendered in that case to determine whether one holding a public office by appointment was in privity with his predecessor, deriving title from the same authority; the question of the right to the office being the only thing determined by the prior litigation. At the time of the institution of the suit and the rendition of the judgment in the *Kennedy* case, those made respondents, or a majority of them, were holding the office for the same term and by the same appointments, the right to which was adjudged in their favor in the prior case of *State v. Moores, supra.* The identical title and right to the office the court was asked to determine in the latter suit had been adjudicated in favor of respondents in the former. The term of office

of members of the board of fire and police commissioners is by statute limited to four years, the term of one member expiring each year. Notwithstanding the fact that the terms of the different members expire at different periods, during the whole course of the litigation over the subject of appointments and the right to the office, all have been treated and regarded not only as holding by the same authority, but for terms of the same duration and expiration of time. The respective claimants and contestants have joined together in a common cause of action or a common defense; and in the oral arguments we were asked to dispose of the case at bar in this same way. It is conceded by all parties in interest that the terms of office of each member, the title to which was under consideration in both the *Moores* and the *Kennedy* cases, have now expired, and that all save one had expired at the time of the commencement of the present action. Assuming, then, that the relators' claim of right to the office by virtue of appointments made by the mayor is for a different term from the one in controversy and adjudicated in the two prior actions, will those judgments operate as a bar or an estoppel against the respondents who claim by virtue of appointments made by the governor? Do the present appointees of the mayor claim under the same title as that adjudicated in the prior actions, and are they, in a legal sense, as respects such title, in privity with their predecessors in office? It can not, we think, be said that the respondents in the present action claim under the same right and title as their predecessors. It is true they both derive their authority and right to the office from the same source, but there has been no transfer of the title held by their predecessors to them. Each claims by an independent title derived from one and the same authority for a different term of office. The adjudication as to the the rights of the parties for the terms for which they were appointed, whether right or wrong, became final and operated as a complete bar against the other contending parties ever afterwards from asserting title to

such office for the term then in controversy, but the rule of *res judicata* can not, we think, without going to an unwarranted length, be extended any further. It can not be said that because of such decision the court is irrevocably bound for all time to construe the statute unconstitutional, as held in the *Moores* case, nor that the appointees of the mayor under the ordinance enacted by the city council who are holding under a different tenure, merely because they are successors of the parties to the original litigation, can invoke the doctrine against the appointees of the governor, who are likewise holding for a different term from that involved in the prior litigation. To sum up, we are of the opinion that the thing adjudicated in the *Moores* case and which was held to as an adjudication in the *Kennedy* case was the right and title of the mayor's appointees to the office for and during the term for which appointed, and that when such terms have expired and other appointments are made by both the governor and the mayor, the court is at liberty to determine the respective rights of the contesting parties according to their lawful rights, not by the application of the doctrine of *res judicata,* but on principle and authority.

It is to be observed that both the judgments relied on as concluding the governor's appointees in the present litigation were rendered in actions or proceedings in *quo warranto,* the objects and purposes of which were to try the title and determine the rights of the contending parties to the office as members of the board of fire and police commissioners for a particular and specified term. The adversary parties in those actions were litigating as individuals and not as officials. The actions were not by or against officers in an official capacity for the purpose of establishing some official power, right, duty or obligation attaching to a public office, or pertaining to the duties of a public official as such. The litigation was for the purpose of determining who were entitled to hold the several offices and discharge their functions for the term involved, and in no manner affected the manner or method of discharging offi-

cial functions, or established any duty or responsibility resting on the incumbent of the office by reason of his official character. Both contending parties asseverated that their opponents were not officers and were not entitled to the office. As stated by a text writer in discussing the nature of the proceedings and of the writ of *quo warranto:*

"Nor does it [the writ] command the performance of his official functions by any officer to whom it may run, since it is not directed to the officer as such, but always to the person holding the office or exercising the franchise, and then not for the purpose of dictating or prescribing his official duties, but only to ascertain whether he is rightfully entitled to exercise the functions claimed." High, Extraordinary Legal Remedies (3d ed.), sec. 604.

The supreme court of Wisconsin, speaking of a *quo warranto* proceeding, say:

"It is foreign to the objects and functions of the writ of *quo warranto* to direct any officer what to do. It is never directed to an officer as such, but always to the person—not to dictate to him what he shall do in his office, but to ascertain whether he is constitutionally and legally authorized to perform any act in, or exercise any functions of the office to which he lays claim." *Attorney General v. Barstow,* 4 Wis. 567, 803.

This distinction is material, and should be borne in mind, in order that the case at bar may not be confused with those cases which rightly hold that a judgment against a public officer in regard to a public right binds his successor in office, and that such officers are regarded as being in privity with their predecessors when they derive their authority from the same source. In *State v. Smyth, supra,* in announcing this rule of law, the court cited with approval the case of *Holsworth v. O'Chander,* 49 Neb. 42. In that case the controversy was with respect to the rights, duties and powers of a road overseer whose predecessor, in his official capacity had been, in a proper action, restrained from interfering with an alleged high-

way. It was held that a judgment upon the merits against the overseer was a bar to a subsequent proceeding by a successor in office of the former overseer, where the rights of the parties depended upon the facts put in issue in the first suit. Other authorities, in abundance, of like tenor, might be cited, but the one mentioned is deemed sufficient. The present action, in its relation to the two former judgments which are pleaded in bar or as an estoppel, and the matters therein litigated, does not fall within the rule laid down in the *O'Chander* case and other like authorities. We are in the present action to determine the rights of the parties herein uncontrolled by the judgments in the *Moores* and *Kennedy* cases, because the subject matter is not the same and because the parties are not the same; nor are they, in respect of the matter therein litigated, in privity with their predecessors who held under a different appointment and for a different term.

Entertaining, as we do, the opinion that the case of *Redell v. Moores, supra,* is a correct exposition of the law in respect of the validity of the act authorizing the governor to appoint, and that the judgments in the *Moores* and *Kennedy* cases are not conclusive as to the rights of the governor's appointees as against the relators and the interveners, the mayor and the city council, it follows that the respondents, who claim by virtue of appointments made by the governor, are lawfully entitled to the office, and should have judgment in their favor; and that the action begun by the relators and the petition of the interveners, the mayor and city council, should be dismissed. The interveners Peabody and O'Connor, who were appointed by the governor as members of the board prior to the judgment in the *Kennedy* case, and who were parties to that action, claim title to the office by virtue of such appointment. The judgment in the *Kennedy* case went against them, and that judgment has become final. That judgment was adverse to them as to their right to the office for the identical term they are now contending for. Furthermore, the term of office to which they assert

title has expired, and consequently no judgment in any event could be entered in their favor. Their petition of intervention is therefore dismissed. Judgment will be entered in this court in conformity with the views hereinbefore expressed.

JUDGMENT FOR RESPONDENTS.

SEDGWICK, J.

If the constitutionality of the statute making it the duty of the governor to appoint a board of fire and police commissioners for the city of Omaha is conceded, the conclusion that these relators are not entitled to the writ asked for seems to follow. The majority of the court adheres to the ruling in *Redell v. Moores,* 63 Neb. 219, upholding the validity of the statute.

It is suggested in relators' briefs that each member of the court ought to "carefully consider this question and review the authorities bearing upon it." This duty is fully appreciated, but other and more pressing duties are allowed to supersede it for the present, not because the importance of the question in the jurisprudence of the state is disregarded, but, rather, because its immediate discussion could not be productive of any practical results, and therefore it ought not to be allowed to interfere with other duties that can not be postponed.

JACOB A. GANOW ET AL. V. WILLIAM A. DENNY.

FILED APRIL 30, 1903. No. 12,515.

1. **Injunction:** TRESPASS. Ordinarily, an action in equity will not lie to restrain a solvent party from trespassing upon personal property, or from the mere oral assertion of title thereto.

2. **Judgment:** FINDING. A finding by a trial court "that there are no equities with the defendants and that all the equities are with the plaintiffs," is not a finding of fact, but a conclusion of law, and standing alone it is insufficient to support a judgment.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, DISTRICT JUDGE. *Reversed.*

Michael F. Harrington, F. M. Walcott and *Henry H. Wilson,* for plaintiffs in error.

Allen G. Fisher, contra.

AMES, C.

The record in this case is unaccompanied with a bill of exceptions. The petition alleges that the plaintiff below, William A. Denny, is the owner of a certain fence extending along described lands, but not constituting an enclosure, and that the defendants have "trumped up a sort of claim thereto, for the purpose of clouding the title of this plaintiff thereto, and of preventing his use, ownership and disposal thereof," and "have taken portions of said fence and changed it from said line," and erected it around premises in their exclusive possession, and that such conduct "has the operation and effect of interfering with, and preventing to plaintiff of the full enjoyment by this plaintiff thereto." The answer is a general denial, qualified by an assertion of title and right of possession of the fence in the defendants. The petition prays for a decree establishing the title and right of possession of the fence in the plaintiff and perpetually restraining the defendants and every of them from meddling or interfering with the plaintiff's peaceful use and enjoyment thereof.

There was a trial to the court without a jury, and the court found "that the plaintiff is and was at all the dates mentioned in the pleading the owner of the fence described in the plaintiff's petition, and situated entirely on government land, * * * and the court finds further that there are no equities with the defendants and that all the equities are with the plaintiffs," and thereupon rendered a decree in conformity with the prayer of the petition.

The defendants prosecute a petition in error, alleging, in substance, that the judgment is unwarranted by the petition and the findings of fact.

There is but one finding of fact in the record, namely, that the plaintiff is and has been the owner of the fence in question, situated on government land. The finding that the equities are with the plaintiff and not with the defendants, is purely a conclusion of law, and standing alone would not support a judgment. It is, in effect, no more than saying the court finds that the plaintiff is entitled to recover. It is not equivalent to a finding that the defendants "have trumped up some sort of a claim," whatever that may mean, or that they have interfered with his possession or attempted so to do, or that they have taken or removed any part of the fence. The fence being admittedly an unauthorized erection on government land, belongs either to the United States as a permanent fixture to the soil, in which view the plaintiff has no right to maintain it, or else it is to be regarded as a detached movable chattel, precisely like fencing material lying on the surface of the ground. In the latter view, which seems to be that taken by counsel for both parties, there appears no ground for the interposition of the equity powers of the court. There is no finding that the defendants are insolvent, nor does it appear from the record that they have actually interfered with the plaintiff's property, or done anything more to his disadvantage than merely to assert their ownership of it. Counsel cite us to one authority holding that when one person has an apparent lien by public record, as for instance, a mortgage, upon the chattels of another, which interferes with or prevents the enjoyment or disposition of the same, but which is in fact invalid, equity will intervene to remove the cloud. *Sherman v. Fitch,* 98 Mass. 59. We think this decision is exceptional, but we are not called upon to express an opinion as to whether it is sound. It manifestly has no application to a case in which the party sought to be enjoined pretends to have no public documentary evidence

in support of his mere oral assertion of title or interest, and is charged with nothing beyond a single act of trespass and conversion of personal property. Counsel also cites Jones, Chattel Mortgages, sec. 348; *Voss v. Murray,* 50 Ohio St. 19; *Becker v. Anderson,* 6 Neb. 499, and *Hagan v. Walker,* 14 How. (U. S.) 28, but these, being actions by creditors to remove fraudulent conveyances and incumbrances by their debtors, do not involve the principle contended for in the case at bar. So far as appears from the record, the plaintiff, if his rights have been invaded, which the court does not find to have been done, has a plain, adequate and speedy remedy by the ordinary course of the common law.

It is recommended that the judgment of the district court be reversed, and the case remanded for further proceedings.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and the case remanded for further proceedings.

REVERSED AND REMANDED.

FRED STORY V. MAUD M. GAMMELL ET AL.

FILED APRIL 30, 1903. No. 12,801.

1. **Reformation of Contract.** A written contract which, by mistake of the scrivener, fails to conform to the oral agreement made by the parties, will be reformed if the evidence clearly shows what the agreement was. *Silbar v. Ryder,* 63 Wis. 106.
2. **Contract: FRAUD: MISTAKE.** The rule, that the carelessness or negligence of a person in signing a written contract estops him from afterwards asserting that the writing does not truly express the agreement of the parties, does not apply in an action for relief on the ground that the contract was obtained by fraud or entered into by mutual mistake.
3. **Conversion.** If a person tortiously or fraudulently converts a chose

in action belonging to another, he may be compelled to respond for its value in a common law action for damages.

ERROR to the district court for Burt county: CHARLES T. DICKINSON, DISTRICT JUDGE. *Reversed.*

Willis G. Sears, for plaintiff in error.

H. Wade Gillis and *Harrison Bowes, contra.*

AMES, C.

The petition alleges, in substance, that the plaintiff purchased a tract of land of the defendants, paying a part of the price therefor in cash, and for the residue thereof agreeing to execute to the defendant Maud M. Gammell his three negotiable promissory notes for $600 each, payable, respectively, in one, two and three years, and bearing interest at the rate of six per cent. per annum, and secured by a mortgage on the lands, and that the parties jointly made known to one Charles W. Conkling the terms of the agreement, and employed him to prepare the notes and conveyances for execution; that pursuant to such employment the said Conkling did prepare the papers for execution, but in so doing, by mistake or inadvertence unknown both to himself and all the parties, the obligations were made to bear interest at the rate of ten per cent. per annum, and were executed by the plaintiff and delivered to and accepted by the defendants in good faith and without fraud, and in ignorance by all the parties of the mistake, and in the belief that they expressed the real agreement between them; that shortly afterwards, and before the notes, or any of them, or any instalment of interest on them, became due, the defendants discovered the mistake, but fraudulently concealed the same from the plaintiff, and sold and indorsed the notes to an innocent purchaser of them for value; that plaintiff did not discover or learn of the mistake until after the transfer had been made, and the first instalment of interest had become due, which he was called upon to

pay and did pay to the indorsee; that by reason of these transactions, and of the facts that the land is of more than sufficient value to discharge the mortgaged debt and that the plaintiff is otherwise of sufficient pecuniary responsibility to pay the same, he has been damaged in a sum equal to the difference, in aggregate amount, between the interest accrued and to accrue upon the notes as stipulated therein and the interest that he would have been obligated to pay had the mistake not occurred; for which amount he prays judgment. To this petition the district court sustained a demurrer *ore tenus,* and dismissed the action. The plaintiff prosecutes error.

That the facts thus admitted disclose that the plaintiff has been greviously wronged can not be disputed, and that he is without remedy, unless it be that sought in this action, is equally clear.

In support of the judgment it is urged that the petition discloses that the parties executed the contracts without reading them, and it is contended that there is no right of recovery because of the general rule that a party will not be relieved from the consequences of his own negligence. We think, however, that this principle is not applicable to circumstances like those set forth in the petition, but rather to those cases in which the party not charged with the negligence was not misled as to the contents of the contract, and was innocent of fraud, so that to deprive him of his rights under the agreement would be, in effect, to punish him, not for any fault of his own, but because of the inattention or incompetence of the party with whom he had dealt. *Woodbridge v. DeWitt,* 51 Neb. 98.

The principle announced in *Ward v. Spelts & Klosterman,* 39 Neb. 809, that negligence in signing a contract without reading it will not deprive the injured party of redress if the person with whom he contracted was guilty of fraud in procuring the signature, and the rights of innocent persons have not intervened, is equally applicable to cases of mutual mistake. In either case one is

not permitted to enforce an obligation which he knew, at the time, that the party making it did not intend to enter into; or, in other words, is not allowed to use the writing as evidence of consent to a contract which he knows was in fact never given. It is equally as fraudulent to attempt to enforce a writing executed by mutual mistake in such manner as not to express the real agreement between the parties as it is to procure such a writing by deceit or circumvention. *Cole & Hart v. Williams,* 12 Neb. 440; *Aultman & Taylor Co. v. Finck,* 36 Neb. 680.

An objection that the plaintiff can not have relief because he can not prove the allegations without varying the terms of a written contract by parol is scarcely deserving of mention. It is obvious that if this rule was applicable to cases like the one at bar the jurisdiction of the courts to reform instruments because of fraud or mutual mistake would be entirely defeated. The one purpose of such actions is to contradict or vary the terms of a written agreement, and the evidence, in most cases, is mainly or wholly oral. One of the most frequent occasions for the exercise of this jurisdiction is the mistake of a scrivener in reducing the contract to writing, and the inadvertent signing of it by the parties. In order to prove the mistake it is indispensable to show by parol in what particulars the writing differs from the oral agreement. *Silbar v. Ryder,* 63 Wis. 106; *Green Bay & Mississippi Canal Co. v. Hewitt,* 62 Wis. 316; *Hartford & Salisbury Ore Co. v. Miller,* 41 Conn. 112; *Linton v. Unexcelled Fireworks Co.,* 128 N. Y. 672; *Nowlin v. Pyne,* 47 Ia. 293.

But finally it is said that suits for the reformation of contracts on account of fraud or mistake are of equitable cognizance only, and that the court is incompetent to deal with them in an action at the common law. Under the code this objection would be devoid of force in any event. The plaintiff, in his petition, has stated the facts entitling him to relief, and the court may refer the suit to whichever branch of its powers may be the more properly

adapted to deal with it. But it is said that a suit for reformation will not lie because the instruments have passed out of the hands of the payee into those of an innocent purchaser for value. To allow this objection would be to permit the defendants to gain an advantage by their own wrong, a thing which the courts never intentionally do. A court of equity, in such circumstances, would doubtless have power to decree compensation, but we think that if the defendants have fraudulently or tortiously deprived the plaintiff of a valid cause of action, they are liable to respond for its value in an action for damages at law. In such case they are guilty of the wrongful conversion of a chose in action.

It is recommended that the judgment of the district court be reversed, and a new trial granted.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

FARMERS & MERCHANTS NATIONAL BANK OF GALVA, ILLINOIS, APPELLANT, V. CHARLES W. MOSHER ET AL., APPELLEES, IMPLEADED WITH DIXON NATIONAL BANK OF DIXON, ILLINOIS, ET AL., APPELLANTS.*

FILED APRIL 30, 1903. No. 9,891.

1. **Insolvent Debtor: TRANSFER OF PROPERTY.** Where property in large amount, without fraudulent intent, has been turned over by an insolvent debtor to his attorneys in consideration of past and future services and a general retainer for himself and wife, any creditor desiring to attack such transfer should do so before services to the full value of the property are rendered.

2. **Former Decision.** Former conclusion as to defendants Whedon and Magoon, so far as relates to such property, adhered to.

*Rehearing allowed. See opinion, p. 724, *post.*

3. **Garnishment:** WAIVER. Taking a general money judgment and issuing execution, which is returned wholly unsatisfied, is not a waiver of attachment lien by garnishment.

4. ———: ———. Taking no order against a garnishee who denies holding property, not a waiver of garnishment liens.

5. **Garnishment Lien:** BILL IN EQUITY. Garnishment lien may be enforced by bill in equity, in proper case.

6. ———: ———. By promptly resorting to equity after judgment in principal action, a garnishment lien is extended through the equity action.

7. **Liability of Garnishee.** Garnishee turning over money on order of principal debtor pending such action is liable to the creditor therefor.

8. **Former Conclusion Adhered to.** Former conclusion adhered to, as to property conveyed to D. E. Thompson.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, DISTRICT JUDGE. *Decree entered modifying decree of district court.*

Arnott C. Ricketts, Henry H. Wilson, Lionel C. Burr, Stephen B. Pound, Roscoe Pound, Amasa Cobb, Andrew E. Harvey, John H. Ames, Edward F. Pettis and *Nathan S. Harwood,* for appellants.

Charles O. Whedon, Charles E. Magoon, Genio M. Lambertson and *Frank M. Hall, contra.*

HASTINGS, C.

This is a rehearing of the case which appears in 63 Neb. 130. In that opinion the nature of the case and the fact that it is here on appeal by the plaintiff and two defendants, the Dixon National Bank, and the People's National Bank of Rock Island, Illinois, sufficiently appear. As stated in that opinion, the appellants claim three funds out of which they are entitled to have their judgments against Mosher and Outcalt satisfied. The first, 200 shares of stock in the Lincoln Gas Company, transferred by C. W. Mosher January 23, 1893, to Chas. O. Whedon, and 150

shares transferred on the same day to C. E. Magoon. This transfer they claim to have been without lawful consideration, and the property, it is asserted, was at the commencement of this action applicable to the payment of the debts of C. W. Mosher and R. C. Outcalt. The second claim is, that the appellants are entitled to have applied in satisfaction of their several judgments against Mosher and Outcalt, certain shares of stock and dividends in the Lincoln Gas Company, as a result of garnishment proceedings against that company and its president, D. E. Thompson. It is also claimed, as stated in the former opinion, that certain lands and personal property transferred to D. E. Thompson by Mosher in December, 1892, or January, 1893, were fraudulently conveyed for the purpose of placing it beyond the reach of the grantor's creditors.

At the former hearing a conclusion adverse to the appellants was reached upon all three of these contentions. A rehearing was allowed on appellants' contention that their position had been misunderstood with reference to the first fund; that the facts relating to the second fund were not fully discussed nor quite accurately stated in the former opinion; and that the conclusion with reference to the third fund is contrary to the evidence.

A somewhat careful re-examination has been made of the entire testimony in this case and of the several rehearing briefs which have been filed. As to the first contention, that the stock transferred to Whedon and Magoon was without lawful consideration, and remains in their hands as a fund out of which Mosher's and Outcalt's creditors are at liberty to seek satisfaction for their claims, we can see no sufficient grounds for changing the conclusion reached before.

It does not seem necessary to discuss this part of the case at any length. The former opinion states that it was "practically conceded" that there was no actual fraud in the transfer, and holds that under our statute there is no constructive fraud. Counsel for the appellants now say that it was not "practically" but "fully" conceded that

there was no actual fraud in the transaction by which this stock was transferred to Whedon and Magoon. They say they were not attacking that transfer on the ground of any actual fraud, but that their claim was wholly based on section 7 of the statute of frauds, Compiled Statutes, ch. 32, sec. 7 (Annotated Statutes, 5956):

"All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person."

They say that under the evidence in the case the contract of employment as attorneys, which the defendants Whedon and Magoon claimed was the consideration of the transfer, was an indefinite one; that it imposed a general care of the interest not only of Mosher but of his wife also; that under the testimony given by the grantees, they agreed to take no retainers against and to guard for all time the interests of Mosher and his wife; that such a contract is so indefinite in its character and is so completely in the nature of a trust for the grantor's benefit, that property conveyed in pursuance of it must be held to have been transferred without any lawful consideration. It is urged that only a small portion of the services which constitute the consideration for this stock had been rendered at the time the transfer was made.

It was conceded at the hearing that the value of the services rendered pursuant to this agreement was at least as great as that of the stock. It is conceded, as above stated, that the arrangement was made in good faith about January 23, 1893. This action was commenced in June, 1894. It does not appear from the evidence how much of these services had been rendered at the time this action was commenced. It is clear, however, that a very large proportion of them had by that time been performed.

It must be remembered that counsel are claiming that this action is to reach a fund held without fraud in trust for the debtor, Mosher. It is evident that it can be main-

tained as against Whedon and Magoon only so long as they are holders of such fund. It would seem to be entirely clear that where they have received property in good faith and without any intention to defraud, having performed services in consideration for it, they were liable to Mr. Mosher's creditors for only so much of it as they had not earned before the conveyance was attacked. There is no evidence in this record which would justify us in saying that at the commencement of this action Messrs. Whedon and Magoon had not earned all and more than the value of the stock they got. As there is no impeachment of their good faith, it would seem that this disposes of their part of the case in accordance with the former holding, so far as these 350 shares of stock are concerned.

Counsel, in claiming that only the services already rendered at the time the stock was transferred can be taken into account, are seeking to apply a rule which obtains only when there has been a fraudulent intent. Of course, where such an intent is present, the fact of the payment of a consideration will not sustain the transfer and the fraudulent grantee will be postponed in favor of an honest creditor; but where no bad faith is claimed, and no fraud is alleged nor attempted to be proved, counsel must take the situation as they find it at the filing of their petition. *Curtis v. Leavitt,* 15 N. Y. 9, 114-125. On that basis, there is nothing in this record to show that Mosher had at that time any interest in these funds whatever or that he had not received more than the stock was worth.

The claim of indefinitness in the contract certainly can have no weight. When performed, it would become definite by reason of such performance. So far as it was performed in good faith before the commencement of the action, the grantees would be entitled to be protected. On this record we can see no ground for changing the former conclusion in reference to these 350 shares of stock.

It seems entirely superfluous and unnecessary to follow the somewhat heated discussion by counsel of the cases cited and doctrines stated in the former opinion. That

opinion assumes, as here stated, that to overturn transactions where the consideration has been received, there must be established some actual fraud. This is conceded not to exist, and it nowhere appears in this record that the services actually performed by Whedon and Magoon in consideration of the receipt of this stock had not amounted to more than its value when plaintiff commenced this action.

Another question arises as to the stock of the Lincoln Gas Company and the dividends paid upon it. It seems clear that at the time the attachment proceedings by the three appellants began, Mosher had some interest in the Lincoln Gas Company stock. There seems no reason to change the conclusion reached at the former hearing that by the garnishment of the corporation, any interest then actually held by a debtor in its stock can be reached. On January 27, 1893, the plaintiff caused notices of garnishment to be served upon the gas company, through its president, D. E. Thompson. Mr. Thompson was also personally garnished. On June 25, 1894, a general judgment in favor of the plaintiff and against Mosher and Outcalt for $5,430.50 was rendered but no mention made of the attachment. In the meanwhile attachment had been issued to York and Hamilton counties and levied upon real estate, and on March 4, 1893, D. E. Thompson, as president of the gas company, answered that the books of the company showed at that time in Outcalt's name 945 shares and in Mosher's 2,580 shares. He also stated that dividends on these shares were payable to the parties in whose name the stock stood on the company's books, unless a written order to pay elsewhere was received. He also stated that various parties were claiming rights under portions of this stock. No order was entered against the garnishee, either personally or as president, nor was he discharged. On the rendition of judgment in 1894, as above stated, only a general judgment was entered. A motion had been made by the defendants to dissolve the attachment, which was on January 30, 1894, overruled. The same time with his answer

as president of the gas company Mr. Thompson also answered his own personal garnishment in the same action, denying that he had in his hands any property of Mosher.

As before stated, no order against the garnishees was ever taken, but immediately after the rendition of the judgment the present action was begun, asserting a liability on the part of both the gas company and Mr. Thompson, as garnishees; alleging that at the time of the garnishment Mosher and Outcalt were the owners of a large amount of stock in the gas company, which at that time stood in their names on the books of the company, and of which Mosher and Outcalt were still the owners, and asking that the gas company be required to disclose fully and account for all of such stock, as well as asking for general relief.

The evidence discloses clearly that dividends on a large portion of this stock accrued and were credited to C. W. Mosher and to R. C. Outcalt after service of garnishment. It shows that $1,079 were paid by the gas company to C. O. Whedon in 1895, upon an order from R. C. Outcalt, out of such dividends. It shows that there were paid in 1894, 1895 and 1896, to D. E. Thompson, on the order from C. W. Mosher, by the gas company, $8,327.66. It is contended on behalf of the appellants that this money came out of the funds which the gas company should account for; that these moneys should have been held for Mosher's creditors, and that the right of the plaintiff, by reason of the garnishment, to the funds, was not lost by reason of the failure to have an order entered against the garnishees, or by the failure to take more than a general money judgment, or by the issuance of an execution on that judgment and its return just prior to the inception of this action. The claim of the plaintiff is that it is entitled by means of this equitable proceeding to enforce its right gained by the garnishment.

It is urged on the other hand, that the attachment was waived by the rendition of the general money judgment and the issuance of an execution upon it, and that garnish-

ment was waived by the failure to procure any order from the court.

We are led to conclude that the weight of authority does not sustain the defendants' contention. It is true that in Indiana it is held that taking a general judgment and issuing an execution upon it waives an attachment lien, and the cases from that state are cited by the defendants. We do not think, however, that such is the general holding, nor that it is in accordance with justice. In this instance the moneys were paid out long after the institution of this action. The answers of the garnishees had not expressly admitted any liability. Mr. Thompson in his testimony expressly says that the money was subject to garnishment as that of Mosher and that plaintiff's counsel, if they had known, would have obtained it.

The use of an equitable remedy to enforce payment from garnishees is expressly upheld in this state. *Hargreaves v. Tennis,* 63 Neb. 356.

We conclude that the gas company is liable for these moneys paid on the orders of Mosher and Outcalt during the pendency of this action, on account of dividends upon its own stock. We are not satisfied from this record that appellants are entitled to anything more.

It seems clear that in commencing this action plaintiff assumed the burden of establishing Outcalt's and Mosher's ownership of this stock, or the failure of any third party to claim it before the garnishees' liability for the stock itself would attach. It is contended that the record shows that 100 shares of it have never been demanded by anybody. The record shows in various places statements by the officers of the company that all of this stock is claimed by other parties. It seems probable that there is a portion as to which the record does not disclose that any specific person is claiming it. We are not able to conclude from this fact alone, however, that the trial court was wrong in finding that the stock itself had all been transferred. But these unclaimed dividends that were paid on the debtor's order pending this action could and should have

been applied to their debts, if either this action or the garnishment proceeding gave any lien.

There remains still to be considered, with reference to this stock and dividends, the situation of the appealing defendants. The Dixon National Bank had garnished the gas company on the same day as plaintiff, but at an earlier hour as shown by the sheriff's return. The same is also true as to the People's National Bank. The answers of the garnishees were to be taken as applying to each of the three cases. Motion was made to dissolve the attachment and to quash the garnishment service in each of these cases, which was overruled. In June, 1894, judgment was rendered for each of the appealing defendants, and an order entered that the attached property, including 2,580 shares in the capital stock of the gas company issued to C. W. Mosher, should be sold. Order of sale was issued on this stock, and the sheriff sold it to one W. Q. Bell in August, 1894. W. Q. Bell was the agent of D. E. Thompson in the purchase. Thompson borrowed the $2,000 for which it was sold, and gave his note. This note was renewed several times and was finally paid by Mosher's instructions, from dividends which the gas company had passed to his credit.

At the former hearing it was thought that this transaction being an absolute sale to W. Q. Bell and being made under garnishments prior in time to that of plaintiff, appellants could none of them claim any right or interest in this gas stock. We are obliged now to conclude that this is not true. Doubtless the defendants who procured this sale are bound by it. We do not see how they can claim by virtue of their garnishment any interest which did not pass by this sale. As to the plaintiff, no connection with the sale appears, and its rights as garnishing creditor are not affected except to the extent that the money applied by means of that sale to the doing away with the prior liens of the appealing defendants must be credited to the purchaser. The $2,000 were paid out in satisfaction of the two liens upon the Mosher stock and dividends. The fund has been diminished to that extent,

and the gas company should receive credit for that much and should account to the plaintiff for only the remainder. So far as the garnishment proceedings are concerned, the appealing defendants have no rights as against this stock whose sale they procured. But having joined in this proceeding we think that, after the satisfaction of plaintiff's judgment, they would be entitled to have the remainder of these dividends applied on their judgment. These dividends were paid out pending this action brought to charge the gas company as trustee for Outcalt's and Mosher's creditors.

The conclusion reached at the former hearing as to the transfers of real estate and personal property by Mosher and Outcalt to D. E. Thompson in December, 1892, and January, 1893, is assailed on the ground that the deeds, while absolute on their face, were given as security for the payment of a note and that the note was without consideration; also that the grantee in these deeds immediately set about disposing of the lands. This is claimed to be sufficient in connection with the other transactions between the parties to conclusively establish the fraudulent character of these conveyances. This would have to be granted if the want of consideration were established. It appears that the consideration was a note given in November, 1891, for shares in the Capital National Bank. The claim of no consideration rests upon the proposition that the shares in the Capital National Bank were worthless in 1891, and that all the parties to the transaction knew it. This, in turn, rests upon the statement of Kent K. Hayden, receiver of the Capital National Bank, that he had examined the books and assets of the bank, and in his opinion it was insolvent at that time; that is, that in November, 1891, the whole value of the bank's assets was not equal to the amount of its liabilities. This in the light of subsequent events is no doubt true, but it appears that at that time the stock was at twenty-five per cent. premium on the street. The note was for stock at that price and was secured, when given, by a deposit of stock in the Lin-

coln Gas Company. Some holdings to the effect that directors are presumed to know the condition of their bank are cited, and the fact appears that both Mosher and Thompson were directors of the bank in November, 1891.

No doubt, as against one who has a right to rely upon his official statement, a director is presumed to know the condition of his bank and the falsity of his statement if it is false. The official knowledge which a director may be presumed to have should be taken into consideration in a case like the present one. It doubtless was. Otherwise, the trial court would not have allowed the fact in evidence. But in this case it is not conclusive. Mr. Thompson says that he retired from the bank owing to a disagreement with Outcalt, and that the note was taken for the market price of his stock. The fact that he had collateral security consisting of $40,000 worth of gas stock, a fact attested by his own oath and those of Mr. Mullen and C. W. Mosher, is not denied.

It is true that the taking of security by means of a deed absolute on its face is a badge of fraud, especially if the security is excessive. In this case there is no claim of the latter, except as it is claimed that the indebtedness was fictitious; and the fact that the deeds are in terms absolute is, like the knowledge of a bank director, a circumstance to be considered. The court, in our opinion, was warranted in believing that the sale of the bank stock took place as claimed in 1891; that its price was secured by collateral which was given up in exchange for real estate and personal property just before the failure. The consideration is sufficient to support the transaction if the latter was made in good faith. We are by no means clear that the trial court was wrong in finding the exchange was made in good faith, and we adhere to the conclusion formerly reached, that this part of the decree is sustained by the evidence.

As only these three parts of the case are touched upon in the rehearing application, it is not necessary to discuss the remainder of the decree.

It is recommended that so much of the trial court's findings and decree as relate to the ownership of the dividends on stock in the Lincoln Gas Company paid to Charles O. Whedon and D. E. Thompson, on orders of Outcalt and Mosher, be reversed, and that said gas company and D. E. Thompson be required to account for and pay over the same, except the sum of $2,000 paid on the Bell purchase of said stock, said Thompson and said company to be both liable jointly for such sums of said dividends as Thompson received, and said Charles O. Whedon to be jointly liable with said company for the dividends received by him on Outcalt's order; that decree be entered in this court in favor of said plaintiff against said Lincoln Gas Company, defendant, and D. E. Thompson, for the sum of $6,327.26 paid to D. E. Thompson, of dividends credited to C. W. Mosher and subsequently paid over by Thompson on Mosher's order, and against said Lincoln Gas Company and Charles O. Whedon for the further sum of $1,079 paid out on the order of R. C. Outcalt, with interest at seven per cent. per annum from the date of the decree of the district court herein, and that the proceeds of such payment be applied, first, in payment of costs incurred by plaintiff herein; and, second, to the satisfaction of plaintiff's judgment and interest, and the surplus, if any, *pro rata* upon the judgments of the two appealing defendants.

KIRKPATRICK, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, it is ordered by the court that a judgment be entered in this court in conformity to the foregoing opinion, and special recommendations therein contained.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed June 9, 1904. *Judgment below affirmed:*

1. **Corporation: GARNISHMENT.** A stockholder's interest in a corpora-

tion, and in all of its property and rights, is represented by his stock. A levy upon the stock of a debtor by garnishment of the corporation pursuant to the statute will impound dividends upon the stock declared while the proceedings are pending.

2. ———: ———: BONA FIDE PURCHASER. If the debtor has sold or pledged the stock in good faith before the levy, the right of such *bona fide* purchasers will not be affected by the levy, even though, by the books of the corporation, the stock appears to be the property of the debtor and is so regarded by the corporation.

3. Appeal: ERRORS NOT CONSIDERED. In appeals to this court in equity cases, the findings of the trial court must stand or fall upon the pleadings and evidence contained in the record. Errors of the trial court in receiving or rejecting evidence, or upon questions arising upon the pleadings, can not be corrected upon such appeal.

SEDGWICK, J.

At the first hearing in this case, upon the opinion of Mr. Commissioner DAY, the decree of the district court was affirmed. 63 Neb. 130. At the second hearing, and upon the opinion of Mr. Commissioner HASTINGS, the decree of the district court was modified, and a decree entered in this court against two of the defendants. *Ante*, p. 713. Upon the motion of these defendants for rehearing further argument was had before the court. The issues are somewhat complicated and the evidence is very voluminous. Upon an examination of this record, we find no cause to doubt the correctness of the conclusions reached upon the several hearings, unless it be upon the matters suggested in the seventh paragraph of the syllabus of the opinion upon the second hearing. The trial court found: "That prior to the commencement of such proceedings at law by the plaintiff, and the several cross-petitioners herein, wherein garnishment proceedings were had, the said Charles W. Mosher and R. C. Outcalt had transferred, assigned and delivered all of the stock appearing by the books of the said several companies as belonging to them, either by actual sale as collateral security or in manner as is herein found, and were not the owners of any stock in the said several companies at the time of the institution of the proceedings at law by the plaintiff and the several

cross-petitioners, as alleged in their several petitions." It is said in the opinion that this finding of the trial court is supported by the evidence. It is also said that, the evidence discloses clearly that dividends on the stock accrued after the garnishment, and were credited to Mosher and Outcalt, and that $1,079 of this fund were paid to Whedon on the order of Outcalt, and $8,327.66 were paid to Thompson upon the order of Mosher out of this fund. It appears that these dividends had been credited by the corporation upon its books to Mosher and Outcalt, and that the corporation had retained the dividends during the pendency of the litigation; and it was thought that such part of these dividends as had not been claimed by other parties during the pendency of the legal proceedings, and had been paid out upon the orders of Mosher and Outcalt, should have been applied upon their debts. It was accordingly recommended that judgment be entered in this court against the parties who received this money upon these orders. Is this conclusion correct?

It is insisted in the briefs that dividends declared upon the stock after the attachment and garnishment proceedings would not be bound thereby. Very many authorities are cited upon the proposition that "the validity of an attachment depends upon the state of facts existing at the time when levied. It can not reach any liability of the garnishee accruing after the service of process upon him." These authorities are not in point upon the question presented.

A stockholder's interest in a corporation and in all of its property and rights is represented by his stock. There can be no question that the levy upon the stock by the garnishment of the corporation pursuant to the statute will impound the whole interest of the stockholder in the property and rights of the corporation, and that the right to receive dividends goes with the stock. We are satisfied with the discussion of this question by Mr. Commissioner DAY in the first opinion herein. We think he has correctly construed the statutes quoted and properly applied

the principles announced in the authorities cited by him. His conclusion, that the interest of Mosher in the stock, whatever it might be, was transferred to Bell under the foreclosure sale, does not affect the result, because, as was shown in the opinion upon the second hearing, this purchase was made at a nominal price, when compared with the face value of the stock purchased, and was made from dividends which had been declared upon the stock itself while these proceedings were pending. Such purchase would not change the rights of the parties in the stock as already fixed by the garnishment proceedings, or by *bona fide* transfers of the stock by Mosher and Outcalt before the proceedings were begun. We have no doubt that the garnished corporation from the time of service of the notice upon it became liable to account to the attaching creditors for the stock then actually owned by Mosher and Outcalt and its proceeds. *National Bank of New London v. Lake S. & M. S. R. Co.*, 21 Ohio St. 221. It is equally true that parties to whom the stock had been sold or pledged in good faith as collateral security prior to the garnishment proceedings would be entitled to the stock and the proceeds thereof as against the attaching creditors. The question is whether the stock of the Lincoln Gas Company that stood in the name of Mosher and Outcalt upon the company's books at the time of the commencement of the garnishment proceedings had been before that time sold or pledged in good faith to other parties. As before stated, the trial court found that it had been. Is this finding sufficiently supported by the evidence? If it is, it follows from the foregoing suggestions that the judgment of the district court is correct. If not, then such part of the stock as actually belonged to Mosher or Outcalt at the commencement of the proceedings should be applied upon the claims of these creditors, including the dividends since declared upon the stock.

It was sought in the petition to charge the gas company as trustee of the stock belonging to Mosher and Outcalt. It was alleged that other parties were claiming the stock;

that their claims were fictitious and fraudulent; and that the claims were really made in the interest of Mosher to enable him to obtain the value of the stock for his own use. The plaintiff asked that the gas company be required to show who the parties were making these claims, and what their interests, if any, really were in the stock. This feature of the petition does not seem to have been afterwards insisted upon. The gas company's answer to these allegations was a general denial. No attempt was made by the gas company in its pleadings to show who were, in fact, the owners of the stock except through sale to Mr. Bell. It was claimed in the answer that this sale to Mr. Bell transferred all of the interest of Mosher and Outcalt in the stock. The issues being in this condition, it was no doubt competent for the plaintiff to examine the officers of the gas company and other witnesses fully in regard to the ownership of the stock. This the plaintiff sought to do, but objection was made and sustained by the court. The result is that the evidence upon this point is very incomplete and unsatisfactory. This error of the court may have resulted in great injury to these plaintiffs, but it can not now be corrected upon this appeal.

Under our practice, established by a long line of decisions, upon appeals in equity the findings of the trial court must stand or fall upon the pleadings and evidence contained in the record. The party complaining of the decree of the trial court must choose his remedy, whether by appeal or by proceedings in error. An error of the trial court in receiving or in refusing evidence can only be corrected upon proceedings in error. If this rule of practice leads to injustice in many cases, it remains to the legislature alone to supply the remedy.

Undoubtedly, the general rule is, as stated in the last opinion, that "in commencing this action, plaintiff assumed the burden of establishing Outcalt's and Mosher's ownership of this stock." The plaintiff insists that the burden of rebutting that presumption is cast upon the defendant. Several cases are cited upon this point, one

being *Turnbull v. Payson,* 95 U. S. 418, from which the following quotation is made in the brief: "Where the name of an individual appears on the stock book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant." This rule obtains in an action where the claimant of the stock is a party to the suit. No doubt upon a direct issue between two parties, both claiming to own the stock, the *prima facie* presumption is that the stock stands upon the company's books in the name of the real owner; but when that presumption is overcome, the burden of proof would still be upon the plaintiff to show his ownership in the stock.

In *Barker v. Osborne,* 71 Me. 69, it was said: "Where, by the disclosures of an alleged trustee, it appears, that at one time prior to the service of the writ upon him, he held funds of the principal defendant, which would be attachable in that suit, the burden is upon the trustee to show, that, prior to the service, he had expended such funds for the defendant's benefit, and this can not be done by doubtful, indefinite, and sweeping statements, with an omission of details and particulars." In that case the trustee relied upon his own act to relieve him of liability. He was therefore in position to know and, if true, to sustain his allegation. When the corporation is garnished, the plaintiff claiming that it holds the stock for the debtor, it is sufficient answer for the garnishee to show that there is reasonable ground to believe that some third party, who is not a party to the litigation, is the owner of the stock, and that the corporation will be liable to such owner thereon. In an action in equity to determine the question of the ownership of the stock, and to appropriate it in satisfaction of plaintiff's claim, all persons claiming the stock should be made parties. If the claimants are unknown, or the corporation as garnishee attempts to disguise the facts and

avoid plaintiff's lien, as is alleged in this case, the court would, no doubt, when the facts were discovered, allow new parties to be brought in and determine that question after full investigation. We are not satisfied that the evidence in this record fails to support the finding of the trial court. There are many circumstances disclosed in the evidence bearing more or less directly upon the question involved. The fact that the dividends were credited to the accounts of Mosher and Outcalt upon the company's books while these proceedings were pending, is entitled to but little weight. The ownership of the stock being in litigation, and the record of the stock being kept in the names of Mosher and Outcalt, and it being the duty of the company to hold the dividends until the ownership of the stock was determined, the fact of entering the dividends in the same account with the stock itself, would not be conclusive that the corporation, at the time, considered that the stock belonged to Mosher and Outcalt; nor would their conclusion in regard to the matter be binding upon the owners of the stock, and so protect the corporation as garnishee.

Time and space will not admit a complete review of the facts disclosed by this record bearing more or less directly upon this point. It must be conceded that the record is unsatisfactory. It may be that the plaintiff, by erroneous rulings upon the trial, has been deprived of an opportunity to frame the pleadings and furnish the evidence necessary to sustain the burden which the law casts upon him. These errors can not now be corrected in this form of procedure, for the reasons above indicated.

The findings of the trial court being supported upon the pleadings and the evidence preserved in the record, the decree properly entered thereon must be sustained. The judgment entered in this court is vacated, and the decree of the district court

AFFIRMED.

BANK OF MILLER ET AL. V. JAMES E. RICHMON.

FILED APRIL 30, 1903. No. 10,303.

1. **Malicious Prosecution:** PROBABLE CAUSE: QUESTION OF LAW: WAIVER. Whether or not a given state of facts constitutes probable cause for procuring plaintiff's arrest is ordinarily a question of law. Where, however, defendants have requested special findings substantially embracing this question, they can not afterwards complain of an instruction submitting its decision to the jury.
2. **Evidence:** SPECIAL FINDINGS. Evidence *held* to support the special findings in this case if the jury accepted plaintiff's testimony, as they had a right to do.
3. **Malicious Prosecution:** EVIDENCE. Defendants having procured plaintiff's arrest on the ground that there was danger that he would leave the state to avoid an examination in proceedings in aid of execution, the county judge's finding that the evidence did not disclose such intention is admissible in evidence at the trial of plaintiff's action for malicious prosecution based on such arrest and proceedings, especially where the termination of such proceedings is disputed.
4. **Evidence of Intention:** ERROR. Evidence of plaintiff as to his intentions with regard to leaving the state, and as to his arrangements, about the time of his arrest, to remain, defendants not being chargeable with knowledge of either, and such proof merely tending to show plaintiff's innocence of the charge made by defendants, is immaterial in an action of malicious prosecution, and, where it may have created some sympathy for plaintiff, its admission is prejudicial error.
5. **Instruction:** PROCEEDINGS IN AID OF EXECUTION: ARREST. It is not error to refuse, in an action for maliciously procuring plaintiff's arrest in proceedings in aid of execution, an instruction that makes an intention on the part of plaintiff to leave the state a sufficient ground for arresting him. The statute only permits arrest where there is danger defendant will not obey a citation to appear.

ERROR to the district court for Buffalo county. HOMER M. SULLIVAN, DISTRICT JUDGE. *Judgment of reversal adhered to.*

Willis L. Hand, for plaintiffs in error.

Willis D. Oldham, Norris Brown, and *H. M. Sinclair, contra.*

HASTINGS, C.

The judgment for plaintiff below in this case was reversed. 64 Neb. 111. The case has been reexamined principally upon the fifth ground urged, namely, the claim that the question of probable cause was submitted to the jury by the plaintiffs in error in asking for special findings, and that consequently defendants are in no position to claim error because instruction 7 submitted this question of law to the jury. We will examine, seriatim, the five grounds for rehearing.

The first is that the legal effect of the portion of instruction 7, which was excepted to by plaintiffs in error, was misapprehended. An examination of the record discloses that only so much of this instruction as is embraced in the first three sentences down to the word "circumstances" is excepted to and is complained of in the petition in error. We still think, however, that the second sentence in the instruction contains the vice which the former opinion found in it. That sentence is as follows:

"It is for you to determine whether or not such information, if he had the same, was sufficient to justify him in instituting the proceedings against the plaintiff."

It seems clear that this sentence submitted to the jury in express terms the question of whether the facts alleged, if found to be true by the jury, were sufficient to constitute probable cause which would justify the defendants' action. The first ground for rehearing, then, was not well taken.

The second ground is like unto it, and should be disregarded for the same reason. It is a complaint that the entire instruction was inadvertently considered as having been excepted to, and that the vice is not in the portion which was excepted to. It is sufficient as to this to repeat that the sentence above is in the portion of the instruction excepted to.

The third ground of rehearing is that the commission was misled to believe that the facts were undisputed when

they were not so. No portion of the opinion is cited which indicates such an impression and an examination of it reveals nothing which indicates that the former opinion was written under any impression that the facts claimed by way of defense were not disputed, and we see no ground for reexamining the case for this reason.

The fourth ground of rehearing is that the objection to instruction 7, for which the case is reversed, was not raised by plaintiffs in error and therefore should be deemed waived. The first two paragraphs of instruction 7 were expressly excepted to on the records, and error in them expressely complained of in the petition in error. The brief of plaintiffs in error complains expressly of the first and second paragraphs of this instruction, and on page 21 of that brief counsel expressly complain that it was a question of law for the court as to whether or not the facts known to Maddox, in connection with the advice he received from counsel, constituted probable cause and a justification of the arrest. This, surely, is an objection to the jury's passing on that question of whether or not these facts were a justification. In our opinion, counsel are right in claiming that whether or not these facts, if found, would constitute a justification, was a question of law, and, so far as that question is concerned, the former opinion should be adhered to, unless the error is to be deemed waived because of the special findings on pages 9 and 10 of the record.

These special findings were requested by the defendants. The first is to the effect that defendants did not fully and truthfully state the facts to their attorney, and did not use reasonable diligence to ascertain them. The second answers "No" to a question as to whether the attorney advised the arrest, and whether defendants acted entirely on the advice. The third says that defendants had no reasonable cause to believe there was danger that plaintiff was about to leave the state to avoid examination.

Did these findings, and especially the third one, submit to the jury the whole question as to probable cause for

making the arrest? Is "reasonable cause" to believe there was danger that Richmon would leave the state to avoid an examination, the same thing as "probable cause" to procure his arrest on that ground? It is hard to distinguish them. We think the asking of these findings left the defendants no room to complain of the submission of the whole question of probable cause to the jury. The complaint made of this instruction was chiefly because it separated the defense of advice of counsel from that of the existence of probable cause, and almost eliminated the whole matter of counsel's advice. If the first finding, however, is sustained by the evidence, there is no room for protection on that ground. The first finding expressly says that a true statement to counsel was not made, nor reasonable diligence used to ascertain the facts. If this finding is upheld, there is no longer any question of advice of counsel in the case. If the findings are correct, and the evidence sustains them, of course the general verdict becomes unimportant, except as to the amount of damages.

These special findings and their significance seem to have been overlooked at the former hearing. It is conceded that plaintiff's arrest was procured. The jury has here found that the defendants did not make a full statement to the attorney, and did not have reasonable cause to believe in the truth of the accusation, and did not make reasonable investigation as to the facts, and did not act solely upon the attorney's advice. No complaint is made as to the assessment of damages, and there seems no question that, if these special findings are upheld, and there was no error in reaching them, the judgment should be affirmed.

Defendants insist that these special findings asked by them do not have the effect to submit to the jury the whole question of probable cause, and, still more earnestly, that the findings as to the disclosure to the attorney are not sustained by the evidence, and that, in any event, the facts shown in the record abundantly establish probable cause for defendants' action in causing plaintiff's arrest.

As we have concluded that the error in the seventh instruction must be deemed waived by the submission of the special findings, it becomes necessary to examine the evidence to see if those findings are supported, and whether it shows probable cause for defendants' action; that is, taking the most favorable reasonable construction for plaintiff, and giving him the benefit of all disputed matters in the evidence, does this evidence still show a full disclosure to the attorney and action on his advice in good faith, and does the record show probable cause for believing that there was danger plaintiff would depart the state?

We have gone somewhat carefully over the evidence, and we find that the vice-president of the bank, Mr. Maddox, testifies to two conversations with plaintiff, both of which are denied by the latter in the terms stated by Maddox. In the first Maddox claims to have been told by Richmon that the latter would never pay his debt to the bank. This is wholly denied. At a subsequent conversation Maddox claimed to have been told by Richmon that the latter did not care for the judgment, but was going to leave the state as soon as the replevin suit between his brother and the bank over some horses seized on this claim was settled. This, too, is denied. Both of these conversations were among the facts stated to counsel in getting his advice as to the institution of proceedings for the arrest. The witness Cross also denies the statement attributed to him by Maddox that plaintiff was arranging to leave the state by a three o'clock train the next morning. Counsel is not justified on this record in saying there is no discrepancy in the facts as stated by the witnesses. If these facts are taken out, as they must be after the special finding, there is hardly enough to warrant a holding that what is left shows a reasonable ground for the arrest. Malice might be presumed from the want of reasonable cause, and also from the misstating of the facts which the jury found had taken place. We are not prepared to say that these findings are unsupported by the evidence. While it was undoubtedly erroneous for the court to submit to the jury the

question whether the facts found constituted probable cause, defendants, having asked such a finding, can not complain.

Defendants insist upon five points, which they say were not passed upon at the former hearing. The first is that not only the plaintiff's discharge, but the findings of fact made by the county judge, were permitted to go to the jury in the present case, and particularly his finding as to plaintiff's non-intention to leave the state. The county judge made a finding that the allegations of defendants' affidavit, that plaintiff was about to leave the state, were not sustained by sufficient evidence. This finding was objected to as not proper for the jury to consider, incompetent, immaterial and irrelevant. The objection was overruled, and the record of the finding admitted "for the purpose of showing that the plaintiff was acquitted of the charge that he was about to leave the state to defraud creditors."

Defendants cite *Obernalte v. Johnson,* 36 Neb. 772, as showing that this was error. The precedent is rather the other way. In *Obernalte v. Johnson* the verdict of acquittal is held admissible, but an added finding that the complaint was without probable cause inadmissible. Following that precedent, the finding as to plaintiff's intention to leave the state to defraud his creditors would be admissible. It would seem that it was admissible to show the final termination of the proceedings in aid of execution, if not as *prima facie* proof of want of probable cause. *Secor v. Babcock,* 2 Johns. (N. Y.) 203; *Smith v. Ege,* 52 Pa. St. 419.

A second claim of error not passed upon in the former opinion is the admission of proof of statements and conduct of plaintiff which were not shown to have been brought to defendants' knowledge till the trial, and tended to indicate that plaintiff on the night of his arrest was not intending to leave the state. Plaintiff at the trial was asked if on the day of his arrest, or for thirty days prior thereto, he had any intention to leave the state to

avoid an examination as to his property. This was objected to as incompetent, irrelevant and immaterial, and after the answer was taken a motion was made and overruled to strike it out for the same reason. In *Turner v. O'Brien,* 11 Neb. 108, testimony of plaintiff, that he acted in good faith in threshing and selling the wheat for the larceny of which defendant had procured his arrest, was excluded, and this court say (p. 112):

"The question of Turner's good faith in threshing the grain was not before the jury. That he was not guilty of larceny, the crime for which he was prosecuted, was established by his discharge by order of the court of Washington county upon the failure of the grand jury to indict him, and no further inquiry on that point was necessary or proper. His method of threshing and hauling the grain, whether done in an open and public manner, as tending to show the want of good faith on the part of O'Brien in charging him with having stolen it, was pertinent and proper to be proved, but the secret intent of Turner in threshing and removing the grain is irrelevant in this case."

If this is the accepted view of the law in this state, then there was manifest error in admitting this testimony, as well as that of plaintiff and other witnesses as to his arrangement to return to Miller the next day. It is not claimed that defendants had any knowledge of these arrangements.

The cases bearing on this question, as to the right of plaintiff in a malicious prosecution case to show innocence of the charge brought against him by defendant, are collected in Century Digest, vol. 33, col. 1965. Many of them seem to be cases like that of *Casebeer v. Rice,* 18 Neb. 203, in which the defendant was chargeable with knowledge of the facts. *Turner v. O'Brien, supra,* cites no authority, but seems to be supported by *Brennan v. Tracy,* 2 Mo. App. 540; *Fenstermaker v. Page,* 20 Nev. 290, 21 Pac. 322; *King v. Colvin,* 11 R. I. 582; and apparently by *Thompson v. Beacon Valley Rubber Co.,* 56

Conn. 493. It is opposed to *Patterson v. Garlock,* 39 Mich. 447, a case which cites no authority, and to *Winemiller v. Thrash,* 125 Ind. 353, and *Long v. Rogers,* 17 Ala. 540.

The reasoning in *Turner v. O'Brien* seems sound. The general rule seems to be that defendant can only justify on the facts known to him when he institutes the prosecution. Cooley, Torts (1st ed.), *183, and cases. It would seem, as long as this is true, and it is admitted even in the cases holding evidence of innocence admissible, that it is not necessary, and, as it plainly tends to obscure the real issue of malice and want of probable cause, that the rule of *Turner v. O'Brien* should be adhered to, and that the admission of this evidence in this case was error.

It is complained that evidence was refused which tended to show that plaintiff was well able to pay this debt. We are not cited to any place in the record where such evidence was refused. In connection with his alleged refusal to pay in 1897, proof of his ability to do so would be material, but ability to do so during the previous years would hardly seem to furnish any inference as to his intention to leave the state in January, 1898.

It is urged that there was error in refusing the thirteenth instruction asked by defendants. The instruction seems to have been properly rejected. It told the jury that if the circumstances were such as to indicate to a discreet and prudent person that plaintiff was about to depart from the state, defendants had a right to detain him. Of course, the real question was not whether plaintiff had an intention to leave the state, but whether there was danger that he would carry out such intention, regardless of citation to appear for examination as to his property. The right to arrest is merely ancillary to that of bringing the execution defendant before the examining court. If there was danger that this could not be done without his arrest, then his arrest was authorized.

For error in admitting the evidence indicated it is recommended that the former judgment of reversal be

adhered to, and the cause remanded for further proceedings.

KIRKPATRICK, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of reversal is adhered to and the cause remanded for further proceedings.

JUDGMENT OF REVERSAL ADHERED TO.

ALTON D. WHITE ET AL. V. BESSIE WHITNEY.

FILED APRIL 30, 1903. No. 12,791.

1. **Ejectment:** SET-OFF. In an action of ejectment an offset for board and maintenance of the plaintiff by the defendants can not properly be introduced; it being pleaded merely as an account and not shown to have any direct connection with plaintiff's cause of action for possession of land and for rents and profits.
2. **Motion to Strike:** DEMURRER. Where a motion to strike out such matter on the part of the plaintiff has been overruled by the court and exceptions taken to such action, the subsequent sustaining of a demurrer to the same matter on the ground that it does not constitute a defense, is not prejudicial error.
3. **Cross-Demand:** DEMURRER: REMITTITUR. Error in sustaining a demurrer to an allegation of taxes paid, made by way of cross-demand, is without prejudice where plaintiff subsequently remits from the amount of her recovery the full alleged amount of such taxes.
4. **Demurrer:** ERROR WITHOUT PREJUDICE. Error in sustaining a demurrer to a counter-claim for improvements in an action for rents and profits as well as for possession of land, is without prejudice where it appears from the record that all such improvements were permitted to be shown to the jury under the name of necessary repairs, and the jury were instructed to allow a reduction of damages in the amount of all necessary repairs.
5. **Instruction:** PLEADING. The fact that the jury were told that an "equitable right" would be no defense against a "legal right" of the plaintiff, if it was found that she had one, is not prejudicial error where no equitable right to the premises is either pleaded or offered to be proved.

6. ———: ———. An instruction which tells the jury that they shall allow "rental value" of the premises as "damages for withholding possession" is not prejudicial error, although the petition of plaintiff makes no claim for any damage aside from rents, issues and profits.

ERROR to the district court for Boone county: JAMES N. PAUL, DISTRICT JUDGE. *Affirmed.*

James W. Hamilton and *Henry E. Maxwell,* for plaintiffs in error.

I. J. Dunn and *H. C. Vail, contra.*

HASTINGS, C.

This is an action in ejectment. Each defendant below brings error in eighty-one assignments. Fortunately it is not necessary to consider each of these separately. The first two briefs filed on behalf of the defendants complain only of error in sustaining demurrers to the second, third and fourth paragraphs of the answer, and of error in giving the tenth instruction, to the effect that if the jury should find the plaintiff was entitled to the premises she would be entitled also to damages for their withholding from the death of her mother, and that the measure of such damages would be the rental value of the premises, less whatever was actually necessary to keep the premises in a good and habitable condition; that any amount necessarily paid for repairs should be deducted, and also any money shown to have been paid to the plaintiff during her minority, if it had been assented to and allowed by her since she became of age, and also such sums as had been paid to her since she became of age on account of the property.

In a third and supplemental brief error is claimed also in instruction numbered 4, to the effect that this action in ejectment related only to legal and not equitable rights, and, if plaintiff had a legal right, no equitable right in the defendant would bar her recovery. It is claimed that this instruction, together with instruction numbered 10, pre-

cluded the jury from making any allowance in their verdict as to damages for the fact that plaintiff resided with the defendants on this property from February, 1892, until September, 1895. It is contended that the instruction must have operated to the prejudice of defendants.

It is conceded by the defendants that so far as concerns the possession of the property, the verdict is right; that it was plaintiff's land and that she was entitled to recover it. In her petition she had asked, not only for the land, but for rents and profits from February 8, 1892, to the commencement of the action, in the sum of $1,150. The petition was filed January 6, 1900. The claim was for the use of these premises from the death of plaintiff's mother. It is not denied that plaintiff did reside with the defendants upon this property from February, 1892, until some time in September, 1895. The property seems to have been the homestead of plaintiff's mother. Defendants are, the half sister of plaintiff, and the sister's husband. They were apparently living with the mother upon the property at the time of the mother's death, and continued to live there with the plaintiff for something over three years.

The answer of the defendants denied all of the plaintiff's allegations, and set out as a "cross-demand," that on or about February 8, 1892, they were left in possession of the premises described in the petition, by the death of plaintiff's mother, who had up to that time occupied it as a homestead; that the defendants from that time forward controlled and used the property; that plaintiff was her father's only child, and at that time was between 13 and 14 years of age; that she continued to reside with the defendants, and was supported and maintained by them until March, 1898; that during that time the defendants furnished plaintiff maintenance, care and support of the value of $1,825, which she promised to repay them, but no part of which has been paid. This was the second paragraph, and to which a demurrer was filed and

sustained. The third paragraph alleges the payment of all the taxes and assessments levied and assessed against the property from 1892, to the amount of $110, and that no part has been repaid. The demurrer was sustained to this paragraph also. The fourth paragraph alleges that they kept the property in repair and made such improvements thereon as were necessary, and in making such repairs and improvements had expended $625, and that they were of the reasonable value of $625, and no part thereof had been paid. A demurrer to this was also sustained. The plaintiff moved to strike out paragraphs 2, 3 and 4 from the answer, on the ground that they presented questions which could not properly be tried in connection with plaintiff's right of possession. Before the motion was ruled upon, an amended answer was filed, not, however, differing very materially from the former one, but merely adding some allegations that the improvements placed upon the property were placed there in the belief of the ownership of an interest in it by Viola White, defendant. The same day the motion was overruled, the demurrers were filed to these paragraphs 2, 3 and 4, which were sustained, as above stated. The jury returned a verdict in favor of the plaintiff for the possession of the premises and for $900 damages. Motion for new trial was filed on the ground that the verdict was not sustained by the evidence; was contrary to law; damages were excessive; error in the instructions by the court; error in refusing instructions; and error in sustaining the demurrers to paragraphs 2, 3 and 4 of the answer. One hundred and ten dollars of the damages were remitted because of the alleged payments of taxes and assessments, and judgment entered for the recovery of the premises and the $790.

The question is, substantially, as to the right to present the defense of the furnishing of care, support and maintenance of the plaintiff during the years from 1892 to 1898 as an offset or counter-claim to plaintiff's demand for rents.

The matter of taxes seems sufficiently covered by the remittitur. The question as to permanent improvements can be settled in a subsequent proceeding, and the costs of necessary repairs the jury were instructed to deduct in determining the rents and profits.

Counsel for defendants are not contending that they are entitled to a recovery in this action, but they do claim that defendants are entitled to set off against plaintiff's claim for rents and profits, contract indebtedness which they held, as they allege, against the plaintiff. They urge in the first place that this question as to the right to offset could not be raised by demurrer, and that it not being otherwise raised was waived. We are not able to take this position. The plaintiff promptly raised the question of the propriety of trying defendants' claim for support and maintenance in this action by moving to strike it from the answer. This motion, as we have seen, was overruled. To that overruling the plaintiff excepted, and the question was raised again by demurrer, and in that form was sustained by the court. If one who is sued in ejectment may not set up a contract claim by way of set-off against the plaintiff's claim for rents and profits, this action of the trial court, while perhaps irregular, must be held to be error without prejudice. The plaintiff had raised the question and was not assenting to any waiver of her rights in this respect.

The defendants contend, citing the case of *Seibert v. Baxter,* 36 Kan. 189, 12 Pac. 934, that the claim for rents and profits in an action of ejectment must be held to be an action sounding in contract and not in tort. As the Kansas court say (p. 191): "We think the action for rents and profits must be treated as one based upon an implied contract." It therefore applies the three years' statute of limitations, whereas, if it were a proceeding in trespass, the limitation would be two years. They also cite *Holmes v. Davis,* 19 N. Y. 488, 495, saying that the measure of damages in this class of cases is the same as would prevail in assumpsit for use and occupation. They

also cite Sedgwick & Wait, Trial of Title to Land (2d ed.), sec. 649, as saying that this action, recovery of mesne profits in ejectment, has been divested of many of the peculiarities of an action of trespass; that it has acquired the characteristics of an action *ex contractu;* and also Newell, Ejectment, page 609, as saying: "The action (for mesne profits) is no longer treated as sounding in tort, but rather as one founded upon an implied contract." We suppose, however, that it is an established doctrine in this as in most of the other states, that assumpsit for use and occupation of land only arises where the relation of landlord and tenant has been created either expressly or by implication. *Skinner v. Skinner,* 38 Neb. 756.

In *Janouch v. Pence,* 3 Neb. (Unof.) 867, the second point in the syllabus is as follows: "Assumpsit for use and occupation is founded upon a contract creating a tenancy, and will only lie where the relation of landlord and tenant exists."

As the relation of landlord and tenant is expressly negatived in the action of ejectment, and it is a wrongful withholding which is recovered for, it would seem impossible to hold that the claim for mesne profits in such an action sounds in contract. It does not seem to us desirable that the action for the recovery of real estate should be complicated with a general settlement of accounts between the parties. The question of the right of possession of real estate is, under our law, treated as so peculiarly and solely for a jury, that the statute has provided that each case may be twice submitted to that tribunal. That alone would seem to be sufficient to raise a somewhat broad distinction between actions of ejectment and ordinary actions on contract. The fact that the question of mesne profits may be joined, and for its joinder an express provision is made, would seem impliedly to exclude from this action any contest over general matters such as may be raised by claims of set-off. The whole question of set-off and counter-claim is one of statute, and regulated by

statute. *Davis v. Morton, Galt & Co.*, 4 Bush (Ky.) 442, 96 Am. Dec. 309.

We do not think that section 104 of the Code of Civil Procedure, in providing that set-off should only be pleaded in an action founded on contract, meant to include the claim for mesne profits in ejectment among the actions on contract. Counsel's citations from text writers and opinions as to the extent to which it is simulated to a claim *ex contractu* only serve to emphasize to our minds the fact that it is in truth an action of another kind. Counsel urge, however, that in any event this defense must be entertained as a counter-claim. In their brief counsel support this only by general expressions taken from cases relating to widely different matters, such as a counter-claim for waste against a mortgagee in possession. An examination of the answer reveals merely that the claim is set up, together with the fact of possession of the premises after the mother's death. That the maintenance and support of plaintiff was in any way connected with the possession of the property is not pleaded. From the answer itself it could not be learned even that the parties at any time after the mother's death resided on the land. It merely appears that defendants were residing there at the mother's death, and that plaintiff resided with them and was supported by them till 1898. From the evidence it appears that she was on the premises till 1895. It seems clear, however, that there is nothing in this answer which shows this claim for $1,825 for support to arise out of the holding possession of this land, or to be connected with it, except as it was held by the same parties. We think, therefore, that the trial court was right in refusing to consider this claim for maintenance, and if it did so somewhat irregularly, by sustaining a demurrer to it as a defense, its action should be still upheld, as well as its refusing to admit evidence relating to this claim. That the allegations as to taxes paid were a good defense, *pro tanto*, to the claim for rents and profits, there is no doubt. As before stated, the plaintiff

finally admitted them by remitting the full amount of them as alleged from her recovery of damages. The error in sustaining the demurrer seems to have been cured by such action.

The fourth answer and cross-demand was as follows:

"That for further answer and by way of cross-demand against the plaintiff the defendants allege that during the time they supported, maintained, educated and cared for the plaintiff in their home and up to the present time, and during the time said Viola White has owned said undivided interest in said property as aforesaid, while they have controlled and used said property, as alleged in paragraph 2 hereof, they have kept said property in repair, and made such improvements thereon as were necessary for the enjoyment and use of the property, and in making such necessary repairs and improvements they have expended on the property the sum of six hundred twenty-five ($625) dollars, and the same were and are of the reasonable value of that sum, and were made in good faith, and in reliance on such ownership of said defendant Viola White, and no part thereof has been repaid to the defendants."

The evidence discloses that no permanent improvements, aside from what are by defendants described as reasonable repairs, were made after the mother's death. The evidence as to these repairs seems to have been fully taken, presumably, under the denial of rents and profits, and as going to reduce their amount. Probably defendants would be entitled to counter-claim for improvements as against plaintiff's claim for rents and profits. Plaintiff claims that the relief given under the occupying claimant's act (Compiled Statutes, ch. 63, Annotated Statutes, 10259-10269) is exclusive. No authority is cited as to this point by either party, and in such investigation as we have been able to give it, we do not find a decision directly in point. The weight of modern authority, however, seems to be in favor of the allowance of a counter-claim for improvements in actions for mesne profits at common law. 17

Century Digest, col. 2600. It seems pretty clear that the right to offset improvements against rents and profits exists independently of statute. *Porter v. Doe,* 10 Ark. 186. The occupying claimant's law is not in terms exclusive. As to any pre-existing right, it should be held cumulative, unless a contrary intention is apparent. *Keith v. Tilford,* 12 Neb. 271. We think, therefore, that the trial court was in error in sustaining the demurrer to this part of the answer. It does not seem, however, that the judgment should be reversed on this ground. The trial court seems to have admitted all the evidence as to the changes and improvements made during the plaintiff's ownership as being necessary repairs, and so going to reduce the net rents. The defendants, therefore, got the benefit of them in proof. They would be still entitled to set them up under the occupying claimant's act, if they can show they fairly come within it, and were not to be considered simply as repairs. The record seems to establish that the error in refusing them to be pleaded and proved as a formal counter-claim was not prejudicial to defendant. They are all alleged as necessary to the use of the premises, and the jury were told to allow all such in reduction of damages. Defendant White swears to about $300 or $400 worth of such repairs, including fences and outbuildings.

It remains to consider the alleged errors as to the two instructions. The fourth one, which is complained of in the supplemental brief of defendants, is as follows:

"The jury are instructed that in an action of ejectment, it is only the legal rights of the parties, as distinguished from their equitable rights, that the jury have a right to consider. In this case, if the plaintiff shows a legal title to the premises in controversy, as explained in the following instructions, then no equitable rights of defendants will bar the plaintiff's right of recovery."

In our opinion the abstract error in this instruction, of saying that an equitable right would be no defense to the action, can not have produced harm, because no equitable defense existed. Some attempt was made to prove an

adoption of Viola White by plaintiff's father, and so to show a right of defendant. It did appear that Mrs. White was brought up in Dr. Whitney's family, and passed as his daughter and under his name, and was considered and treated in the family as a full sister, but no legal adoption was shown, and plaintiff's right to the land is now conceded.

It is insisted that because the court did not define an "equitable right," we are at liberty to presume that the jury assumed that it meant such reduction of damages as would result from the fact that plaintiff lived and was supported in defendant's family on these premises from February, 1892, to September, 1895. But we have concluded that the boarding and maintenance of plaintiff by defendants in the manner alleged can not properly come into this action. There is neither allegation nor proof of any joint possession. The premises were occupied by defendants and their family, of whom plaintiff, then a child not quite 14, was one. Defendant Alton D. White testifies fully to his own entire control of the premises during the whole time. It seems hardly possibly that any harm was done by telling the jury that an "equitable right" would be no defense where none is claimed to exist.

The remaining error of which complaint is made is the giving of instruction numbered 10, as follows:

"You are also instructed that if you find from the evidence in this case that the said Bessie Whitney was the owner of the premises described in said plaintiff's petition, and that she was entitled to the possession of the same, and that said premises have been wrongfully detained from her, then the said Bessie Whitney would be entitled to recover damages for the wrongful withholding of said premises from her possession from the date of the death of her mother, provided you find from the evidence that said property had been wrongfully kept from her possession by the defendants, and that the measure of such damages would be the fair rental value of said premises less whatever was actually necessary in the way of expenses

to keep said property in good habitable condition; and if you should find from the evidence that there had been expenditures by the defendants in this case, for the keeping of said premises in repair, then you would deduct that amount from the amount of damages, you would also deduct from the amount of her damages such amount of money, if any has been shown to have been paid to the plaintiff during her minority, if the same has been assented to and been allowed by her since she has become of age, and also such sums as have been paid her since she has become of age, if you should find from the evidence that any such have been paid her, for the damages of the alleged wrongful withholding of said property."

It is objected to this instruction that whereas the statute allows the joinder by plaintiff in this action of a claim for "damages for withholding the same and the rents and profits of the same," that no "damages for withholding" were claimed, but only rents and profits; that in submitting the question of "damages" at all, the trial court was in error. It is conceded that it gives as the measure of such damages the rental value, but the fact that it is denominated "damages for withholding" is urged as prejudicial. Counsel do not explain, and we are unable to see, how it affected the amount of the verdict that the trial court used one name instead of another, if it gave the true rule. No proof had been attempted as to any damages, except "rental value," and the jury were told to allow nothing more.

The other objection is more serious. It is that the instruction should have permitted the jury to deduct the value of improvements, as well as needed repairs. As we have before indicated, in passing on the action of the court in sustaining the demurrer, we think this claim is sound. We repeat, however, that all the evidence was submitted as showing "necessary repairs"; that the occupying claimant's act is still available to defendants, if they have any permanent improvements to their credit. We have not reached this conclusion without a good deal of hesitation,

as, in our opinion, the defendants should have been permitted to prove their repairs and improvements as a counter-claim, if they so desired, and it was error to refuse to let them do so. They did, however, finally introduce their proof in reduction of rents, and we think the record shows they were not prejudiced by the ruling. There is no claim that the verdict is not within the evidence.

It is recommended that the judgment of the district court be affirmed.

KIRKPATRICK and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BEE PUBLISHING COMPANY ET AL. V. GEORGE W. SHIELDS.*

FILED APRIL 30, 1903. No. 12,502.

1. **Libel:** LIBERTY OF PRESS. The liberty of the press is no more sacred than the liberty of speech; what a man may write with impunity he may speak with impunity.
2. **Privilege.** An occasion of privilege will not justify false and groundless imputations of wicked motives or of crime against public officials in the performance of their duty.
3. **Liberty of Press:** LIMITATION. While the conduct of such officials is open to criticism, a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives or of criminal offenses to officials.
4. **Malice:** EVIDENCE. In an action for libel, evidence of other publications in the same paper containing substantially the same imputation as that sued upon, whether made before or after the latter, or even after suit brought, may be admitted in evidence for the purpose of proving malice in the publication sued on.
5. **Damage:** EVIDENCE. Evidence of the extensive circulation of a paper, in which an alleged libel is published, may be admitted for the purpose of showing the extent of the injury.
6. **Exclusion of Evidence.** Action of the trial court in excluding evidence examined, and approved.

* Rehearing denied. See opinion, p. 759, *post*.

7. Construction of Language of Article: QUESTION FOR JURY. *Held*, Proper to submit to the jury whether or not the language contained in the article sued upon, when fairly construed, amounted to a charge of bribery and malfeasance in office against the plaintiff.

8. Instructions: Instructions examined, and *held* favorable to the plaintiff in error.

9. Damages: Amount of damages awarded *held* not excessive.

ERROR to the district court for Douglas county: WILLIAM W. KEYSOR, DISTRICT JUDGE. *Affirmed.*

Edward W. Simeral and *W. J. Connell,* for plaintiffs in error.

William F. Gurley and *Ed P. Smith, contra.*

OLDHAM, C.

On the 7th day of April, 1899, there appeared as an editorial in the *Omaha Evening Bee,* the following article:

"It is announced by the official organ of the gamblers' gang that County Attorney Shields has complaints supported by irrefutable evidence that would convict some sixty owners of gambling devices who have been operating in South Omaha, but that he will not prosecute the criminals on condition that they offend no more. Is this not a beautiful state of affairs for a reform county attorney? It is reliably stated that the evidence has been at hand for weeks, that protected gambling was going on unmolested in South Omaha, but the county attorney would not interfere until after election, out of apprehension that he might injure the chance of popocratic candidates. Now he openly proposes to pigeonhole the complaints and the evidence in deference to the interests of the gang. If, as is commonly reported, the South Omaha gamblers had to put up liberally for protection to run, how much have they had to put up to secure immunity from prosecution by Mr. Shields?"

The same article reappeared in both the morning and evening editions of the *Bee* of April 8. Shortly thereafter

a suit for libel was commenced by the plaintiff in the lower court against the Bee Publishing Company, and Edward Rosewater and Victor Rosewater, editors of the *Bee,* on account of the publication of this article. An answer was filed to plaintiff's petition by the several defendants, in which they admitted the publication of the article, but alleged, in substance, that it was a privileged communication, published in good faith and without malice. The answer failed to allege that the charges contained in the publication were true. After the evidence had been taken in the case, the suit was dismissed as to Edward Rosewater, and a verdict was returned by the jury in favor of plaintiff and against the other defendants in the sum of $2,500. There was judgment on the verdict, and defendants bring error to this court.

The first question with which we are confronted is as to the character of the article sued on; whether it is a strictly privileged communication, a communication of qualified privilege, or whether it is libelous *per se.* The court below treated the article as a publication of qualified privilege, and cast the burden upon the plaintiff of showing express malice; and for this purpose admitted in evidence subsequent publications contained in the same paper, referring back to the article in issue for the purpose of showing malice in the original publication. To this ruling complaint is made in the brief of plaintiffs in error; their contention being that the article is one of absolute privilege, and that the subsequent articles referring back to it were likewise privileged and, consequently, not admissible in evidence for the purpose of showing malice.

In the law of libel and slander there is clearly recognized two classes of privileged communications. One class is absolutely privileged and can not be made the foundation of an action for libel or slander. Of this class is a communication between attorney and client, husband and wife, parent and child, physician and patient, priest and confessor, and those necessarily occupying such a confidential relation to each other that public policy demands that the

communications between them, while such relation exists, be held absolutely sacred. This privilege is protected, not on account of the contents of the communication, but on account of the relation existing between the parties between whom the communications pass. *Vogel v. Gruaz*, 110 U. S. 311. We think it is apparent that no such confidential relationship exists between the publishers of a newspaper and its numerous readers as to grant absolute immunity for anything that may be published in its columns. In fact counsel for plaintiffs in error do not rest their contention on the ground of a confidential relationship existing between the publishers of the paper and the reading public in general, but rather on the ground that the editorial complained of was a legitimate criticism of the conduct of a public officer in the discharge of his duties, and as such it was a proper exercise of the liberty of the press.

It is declared in section 5, article 1, constitution of Nebraska:

"Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficent defense."

It is well to notice that the liberty of speech and press are guaranteed alike in this section of the bill of rights; that which a man may write with impunity, he may speak with impunity; what may be published in the columns of a newspaper may be proclaimed from the hustings, the pulpit, or the lecture platform; that the liberty of the press is and should be no more sacred than the liberty of speech. While the liberty of each is a sacred right dear to the hearts of an entire Anglo-Saxon civilization, yet the lawmakers and the framers of constitutions have all realized that liberty in the exercise of any natural right when unrestrained by law leads to licentiousness, and have therefore wisely provided that any one exercising the liberty of speech or of the press within this state shall be held re-

sponsible for an abuse of such privilege. It is unquestionably the right of the press to freely discuss, criticise or comment fairly upon the acts or omissions of a public officer of the county, state or nation; but it is not permitted, under the guise of criticising official acts, to maliciously defame the character of an official. The rule with reference to this right is well defined by the supreme court of Pennsylvania, in the case of *Neeb v. Hope,* 111 Pa. St. 145, when it says:

"An occasion of privilege will not justify false and groundless imputations of wicked motives or of crime. The conduct of public officers is open to criticism, and it is for the interest of society that their acts may be freely published with fitting comments and strictures. But a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives, or of criminal offenses, where such motives or offences can not be justly and reasonably inferred from the the conduct."

If, then, we treat the article in controversy as one of special privilege, because of the fact that it was a comment upon the acts of a public official, it was still actionable, unless true and published with good motives and for justifiable ends. As before stated, the court below was of the opinion that the article was privileged to such an extent as to require the plaintiff to show malice in its publication, and for this purpose admitted subsequent articles immediately following the publication sued upon and referring back to, and, in fact, reiterating the charges contained in the original article. This evidence was all confined by instructions merely to the purpose of showing malice in the original publication. In *Gribble v. Pioneer Press Co.,* 34 Minn. 342, the rule is announced:

"In an action for publishing a libel upon a plaintiff, evidence of other publications by defendant containing substantially the same imputation as sued upon, whether made before or after the latter, or even after suit brought upon it, may be admitted in evidence for the purpose of proving actual malice in the publication prosecuted for."

This rule is supported by the holdings in *Commonwealth v. Damon,* 136 Mass. 441; *Chamberlin v. Vance,* 51 Cal. 75; *Symonds v. Carter,* 32 N. H. 458; *McCleneghan v. Reid,* 34 Neb. 472; and is also laid down in Starkie, Slander and Libel, secs. 587-589.

The next complaint urged is as to the action of the trial court in admitting evidence as to the extensive circulation of the paper in which the alleged libel was published in this and other states. Testimony of this kind, however, has universally been held to be proper, at least for the purpose of tending to show the injury that may follow from the extent of the publication. For this purpose it was held proper by this court in the case of *Rosewater v. Hoffman,* 24 Neb. 222, 230. It has also been held proper in other states for the purpose of taking away the alleged privilege of criticising a public official within his jurisdiction to show that the circulation of the paper extended beyond the territory in which the official act is committed. *Buckstaff v. Hicks,* 94 Wis. 34; *State v. Haskins,* 109 Ia. 656, 47 L. R. A. 223.

Complaint is next made of the action of the trial court in excluding a communication written by plaintiff in answer to the charges made against him in the article in controversy, and published in the *World-Herald* on May 12, 1899, more than a month after the alleged libel was printed, and after suit had been instituted in this case. The authorship of the letter was proved in the cross-examination of plaintiff, and it was offered for the alleged purpose of showing plaintiff's feeling toward the editors of the *Omaha Bee.* We think the court was right in excluding it. When asked the question as to his feelings toward one of the editors, the witness answered that his feelings were very hostile; the cause was dismissed as to the other editor, so that the question of his feelings toward the latter are immaterial even if this was a proper method of proving such fact.

It is complained by plaintiffs in error that the instructions as a whole were unfavorable in spirit and contents

to them, and special criticisms are directed against certain paragraphs thereof. As before stated, the instructions were all based on the theory that the editorial in controversy was a communication of qualified privilege; and after stating the issues arising on the pleadings, the court told the jury, in substance, that the burden was upon the plaintiff to show that the publication was made maliciously. The court then defines libel in a manner approved by the authorities and not complained of by plaintiffs in error, and tells the jury that a publication is privileged when the author is so situated that it is his duty to the interests of society, morality or good government to communicate the matters contained, and when he does "so in good faith without actual malice." The court then says that one must not take advantage of a privileged occasion to exhibit malice toward and to unlawfully and wrongfully injure another by publishing false and defamatory matter concerning him, and that if he does so he forfeits the privileged occasion and becomes a libeler subject to the ordinary rules of law relating thereto. In the following paragraph of the instructions the court said:

"The publication of the article set forth in the petition is admitted, and, if the matters therein contained were true, the public had an interest in knowing them, and it was the duty of the defendant to publish them. The occasion of the publication of the article set out in the plaintiff's petition was therefore a privileged one, and the article aforesaid was so far a privileged communication that, in order to recover in this action, the plaintiff must prove by a preponderance of the evidence that the defendants made said publication with actual malice toward him."

This paragraph is criticised by counsel, because they say it seems to insinuate that it would be necessary for them to show that the article was true in order to justify its publication. This is not a legitimate inference from the instruction, because it closes by telling the jury that the plaintiff must prove by a preponderance of the evidence that the defendant had made such publication with actual

malice toward him. This instruction was certainly exceedingly favorable to defendants, and it is not reproduced here for the purpose of commending it as properly declaring the law in cases of this nature, but merely for the purpose of showing that plaintiffs in error are not the party to this controversy that should complain of it.

The next paragraph is criticised because it told the jury that:

"* * * in determining whether or not the defendants were moved by actual malice in making the publication complained of, the jury should examine the original and subsequent publications received in evidence, consider the nature of the charges, the extent of the publicity given them, their truth or falsity, whether or not the defendants had reasonable grounds for believing and did believe them to be true, and any and all other facts and circumstances proven on the trial which show or tend to show the attitude of the minds of the defendants toward the plaintiff in making the publication in controversy."

The criticism rests on the theory that subsequent publications should not have been admitted in evidence; a question which has already been fully disposed of in this opinion.

Complaint is also made because the trial court permitted the jury to determine whether or not the article sued on, when fairly construed in its ordinary meaning, charged the plaintiff with the crime of bribery and malfeasance in office. Each of the offenses were properly defined by the court, and we see no error in permitting the jury to find from the testimony whether a fair and reasonable construction of the language in the article contained a charge of either or both of these offenses against the plaintiff.

It will be noticed that the language of the article is not, as contended by counsel for plaintiffs in error, a mere expression of an opinion as to the disposition of a public officer toward the matter concerning which he is criticised. The article says that it is reliably stated that "protected gambling was going on unmolested in South Omaha, but

the county attorney would not interfere until after election, out of apprehension that he might injure the chance of popocratic candidates." To repeat or publish a slanderous or libelous communication is to indorse it as genuine, so that when this alleged "reliable" statement was published in defendants' paper, the names of the defendants were in law written across the back of the publication as an indorsement of the truth of the charge contained therein.

It will be noticed that the editorial also contained this statement:

"If, as is commonly reported, the South Omaha gamblers had to put up liberally for protection to run, how much have they had to put up to secure immunity from prosecution by Mr. Shields?"

This is not an expression of an opinion that at some future time the gamblers might contemplate paying money to the county attorney for the privilege of protection, but the language can, by reasonable innuendo, be construed to charge that the gamblers had already paid money to the county attorney for protection against prosecution, and if it does so it certainly amounted to a charge of bribery, as defined by our Criminal Code.

It is finally contended that the verdict in the case is excessive; that, at most, plaintiff should only have been awarded nominal damages for the publication complained of.

It was said by this court in the recent case of *Williams v. Fuller, ante,* p. 354, that:

"Where the publication is libelous *per se,* the plaintiff is not required to introduce evidence of actual damage to entitle him to substantial damages."

The jury was properly instructed against allowing anything by way of vindictive or punitive damages. This case has been tried twice to a jury; the first time a larger *quantum* of damages was awarded, so that we do not feel that we would be justified in saying that the amount of the verdict was necessarily the result of prejudice and passion.

It is, therefore, recommended that the judgment of the district court be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed May 18, 1904. *Rehearing denied:*

POUND, C.

This is a case to which we gave a great deal of time and attention. We thought at the time and still think that the questions upon which counsel for plaintiffs in error strenuously endeavor to procure a ruling are many of them entirely outside of the case. It is stated in the opening of the brief that this case involves:

"Some of the most important legal questions that can be submitted to a judicial tribunal, viz.: The right of the press to discuss and criticise the action of a public officer, and upon the part of that officer his right to refrain from the performance of those duties imposed on him by law."

The newspaper article complained of, by reason of which counsel thinks the power of a newspaper to criticise a public officer is involved, charges the defendant in error with two crimes, namely, bribery and malfeasance in office. That this is so two extracts from the article will readily demonstrate. The concluding words are as follows: "How much have they had to put up to secure immunity from prosecution by Mr. Shields?" In another place in the article is the following statement:

"It is reliably stated that the evidence has been on hand for weeks that protected gambling was going on unmolested in South Omaha, but the county attorney would not interfere until after election out of apprehension that he might injure the chances of popocratic candidates."

Obviously this is not criticism but on the contrary is a libelous charge of bribery and malfeasance in office. It does not say that the county attorney has not prosecuted certain gamblers when he ought to do so, but it says that he has failed to do so for political reasons and because money has been "put up to secure immunity from prosecution."

The distinction between criticism of the acts of a public officer and false and ungrounded charges of criminality is well established. Criticism is always proper, whether by individuals or by newspapers. Newspapers have no monopoly of the right of criticism; nor are their rights in this respect any broader than those of the community in general. *Negley v. Farrow,* 60 Md. 158. In Townshend, Slander and Libel, sec. 254, the learned author, after stating that official acts of public functionaries may be freely criticised, adds that the occasion "will not excuse an aspersive attack upon the character and motive of the officer. To excuse such attack, the truth of the utterances must be shown." In support of this doctrine he cites *Hamilton v. Eno,* 81 N. Y. 116. Indeed the reports are full of this distinction. In addition to this case I may call attention to *Hallam v. Post Publishing Co.,* 59 Fed. 530, affirming 55 Fed. 456; *Owen v. Dewey,* 107 Mich. 67, 65 N. W. 8; *Hay v. Reid,* 85 Mich. 296, 48 N. W. 507; *Cotulla v. Kerr,* 74 Tex. 89, 11 S. W. 1058; *Rowand v. De Camp,* 96 Pa. St. 493. In *Hallam v. Post Publishing Co.* the court say that a defense of privilege is confined to comment and criticism, and does not extend to false assertions of fact. It will not do to say that the article in question does not come within this rule because it sets forth that the facts charged are reliably stated. A repetition of rumors in such cases, without investigation of their truth, is not privileged. *Burke v. Mascarich,* 81 Cal. 302, 22 Pac. 673; *Upton v. Hume,* 24 Ore. 420, 33 Pac. 810.

The first ground upon which a rehearing is asked is the refusal of the trial court to give an instruction requested by the plaintiffs in error with respect to the extent of the

circulation of the newspaper. Counsel's argument upon this point is based upon a misapprehension of what the trial court charged the jury. The jury were instructed that in passing upon the question of malice they might consider "the extent of publicity" given to the libel. The article in question was published three times successively —in an evening edition and in the morning and evening editions of the next day. This carrying over of the article from the evening edition of one day to the evening edition of the next has much appearance of being a malicious repetition in order to give greater publicity to the article, and it was to this that the trial court properly directed the attention of the jury. The question of the circulation of the paper bore only upon the amount of damage. No one claimed that extra copies of the paper had been circulated, but only that the libelous article had been given undue repetition. In addition to these three publications, for a considerable time thereafter the paper continued to call attention to the article from day to day by various references and short paragraphs.

It is next claimed that we erred in holding that these subsequent publications were receivable for the purpose of proving malice, for the reason that they were not libelous *per se*. The cases cited by counsel on this point are not applicable since they present quite a different state of facts. In this case the subsequent publications referred to the charge already made, were plainly intended to have the effect of repetition, and must have had that effect upon all who read them. The third objection is that the eighth instruction of the trial court was erroneous, first, in that it did not instruct the jury that the county attorney had no right to refuse to prosecute upon the advice of the police officers of South Omaha, and, second, because the article in question was wrongfully assumed to charge malfeasance in office. The trial court told the jury expressly that the county attorney had no right or discretion "to refuse to prosecute criminal offenders in deference to the interest of candidates for office in an election campaign,

or in deference to the interests of any kind of a gang, be it political or for the protection of gambling." Shields claimed that he consulted the municipal police officers and upon their advice made up his mind that the best method of suppressing gambling was to take another course and hence did not file the complaints he had drawn up. The county attorney, under the present practice, has at least some part of the discretion which formerly resided in the grand jury. If the municipal authorities advise him not to put the county to the expense of prosecution in a particular case and he finds in good faith that the criminal practices in question have ceased and can be prevented by the action of the municipal authorities in the future, in our opinion he exercises his discretion properly by acting on such advice. Hence we do not think that the plaintiff in error was entitled to an instruction beyond what was given by the court. Moreover, the charge in the article in question was that he refused to prosecute for political reasons and in the interests of candidates for offices, and not that he unwisely exercised a discretion not reposed in him by the law. As to the second objection to the instruction, we need only quote the language of the article itself: "Now he openly proposes to pigeonhole the complaints and the evidence *in deference to the interests of the gang.*" The latter portion of this statement is clearly not criticism but a charge of misuse of his official position for political purposes. It is not an opinion. The article does not say that the author believes such is his reason, nor does he say that the circumstances are such as would create a just suspicion that the reason given may be his real motive. He states emphatically as a matter of fact that such is the reason and motive of the officer's action.

Finally, it is claimed that the verdict is excessive. Two juries under careful instructions have awarded large sums in this case. We have no doubt that another jury would bring in an equally large verdict. The evidence shows that Mr. Shields had for many years enjoyed the confidence and respect of the community, had been elected to office several

times and was a member of a profession in which a reputation for honesty and integrity is essential. In view of the character of the charges made against him, the great publicity given to them, and the well known influence of the paper which made them, we are unable to think any case is presented for a reduction of the damages given by the jury.

We therefore recommend that the motion for rehearing be overruled.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the motion for rehearing is overruled.

REHEARING DENIED.

SEDGWICK, J., dissenting.

Upon the trial, evidence was admitted as to the extent of the circulation of the *Bee* and the number of its subscribers, not only in Nebraska, but in other states, for the purpose of proving actual malice on the part of the defendant; and in the instructions the court told the jury that in determining whether or not the defendant was moved by actual malice the jury should consider "the extent of the publicity given." The defendant requested the following instruction:

"You are instructed that the fact that the *Bee* circulated outside of Douglas county and state of Nebraska would not deprive the article sued upon of its privileged character unless you further find from the evidence that the defendants maliciously and unnecessarily gave said article a wide circulation for the purpose of injuring the plaintiff. But the usual and ordinary circulation of the *Bee* to its regular subscribers outside of this county and state in the ordinary course of business would not be evidence of express malice toward the plaintiff."

This request was refused. I think the court should

have given this instruction. It is suggested that there was evidence that the articles in question were published in several editions of the *Bee,* and were also commented upon in subsequent editorials, and that it was to the publicity so given that the instruction given by the court was directed. It seems quite probable from the condition of the record that this was the view taken by the trial court. The jury, however, was nowhere told that this was the meaning of the court, and in the condition of the evidence the instruction given by the court might as readily be applied to the circulation of the paper in other states as to the successive publications, so that there was danger that the jury might understand that in determining the question of malice they might take into consideration the fact that the paper in its regular circulation was sent into other states. This, of course, is not the law, and the defendant was entitled upon request to have the jury plainly instructed upon this question. The instruction requested seems to be a proper one and should have been given to the jury.

It is not necessary to call attention to other matters in this record. The whole case has been exhaustively considered by the court, and as the majority are entirely satisfied that no different result would be reached if a rehearing was granted, I do not deem it advisable to insist upon such rehearing.

M. J. CLARK V. COMMERCIAL NATIONAL BANK OF COLUMBUS, NEBRASKA, ET AL.

FILED APRIL 30, 1903. No. 12,815.

Revivor of Judgment: JOINT DEBTORS. Where a judgment against joint debtors is sought to be revived, all those jointly liable should be made parties to the action. But where all are made parties and a summons is issued against all, the fact that one or more of the parties can not be found will not abate the action against those found and properly served. *Fox v. Abbott,* 12 Neb. 328, distinguished.

ERROR to the district court for Platte county: CONRAD HOLLENBECK, DISTRICT JUDGE. *Affirmed.*

Whitmoyer & Gondring, for plaintiff in error.

McAllister & Cornelius, contra.

OLDHAM, C.

This was an action to revive a judgment entered by a justice of the peace of Platte county, Nebraska, on a joint note executed by Henry McCabe, M. J. Clark and Martin Maher. A transcript of the judgment was filed in the office of the clerk of the district court, and an affidavit for revivor in statutory form was filed by plaintiff's attorney. Summons was issued against all the defendants. The return of the summons showed service on defendant Clark, and that defendants Maher and McCabe could not be found in the county. A judgment of revivor was entered by the district court, and defendant Clark brings error to this court.

Two objections are urged against the order of revivor in the brief of plaintiff in error. The first is that the original judgment of the justice of the peace was void, because no hour was named in the summons and on the docket of the justice at which defendants were to appear, and consequently that no valid judgment could be entered against them by default. It is also urged in this connection that the judgment of the justice of the peace does not show the appearance of plaintiff on the day of the trial. These contentions are all based on a misconstruction of the record of the proceedings before the magistrate. The record shows that summons was issued August 23, 1887, returnable August 29, 1887, at 9 o'clock A. M. The return shows that the summons was served personally on each of the defendants on August 25, 1887—four days before the time set for trial. The judgment of the justice of the peace shows that the defendants failed to appear at the hour of 9 A. M. on the day set for the trial, and for one hour there-

after, "but has made default, and this cause coming on for hearing upon the plaintiff's bill of particulars and the evidence, I find in favor of the plaintiff"; and the judgment then follows. We think that sufficient appears from this docket entry to show that the plaintiff was present introduring testimony at the time the trial was had before the magistrate, and that the judgment of the justice was valid.

The next contention is that as it appears by stipulation in the bill of exceptions that defendant McCabe had departed this life in the territory of Oklahoma, before this action was instituted, the action could not proceed against other of the joint debtors until his executor or administrator had been made a party. The case of *Fox v. Abbott,* 12 Neb. 328, is cited in support of this contention. The doctrine announced in this case as we understand it is, that where an action is brought to revive a judgment against joint debtors, all the joint contractors must be made parties to the action; in other words, a judgment creditor can not single out one of two joint debtors and proceed to revive against them alone. But we do not understand that where some of the joint debtors have removed from the state so that process can not be served upon them, this fact will abate the action against those found and properly served. *Fox v. Abbott, supra,* follows the construction of section 77 of the Ohio code, which corresponds to section 84 of our code, made by the supreme court of Ohio in *Bazell v. Belcher,* 31 Ohio St. 572. In this case the Ohio court say:

"Section 77 of the code authorizes a judgment against such joint contractors as have been 'served' with summons in the action, in those cases only, where the action was commenced by the filing of a petition and the issuing of a summons against all of the joint contractors."

That is just what was done in the instant case. The action was commenced against all; summons was issued against all; and all who could be found in Platte county were served. This was not done in *Fox v. Abbott, supra.* Hence, MAXWELL, J., says in that opinion (p. 331):

"To authorize the judgment as rendered, summons

should not only have been issued against the other joint contractors, but should also have been returned not found."

We are, therefore, of the opinion that the judgment of the district court is right, and should be affirmed.

BARNES and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

G. GUTTERSON, ADMINISTRATOR OF THE ESTATE OF A. W. PETTERSON, DECEASED, ET AL. V. CHARLES MEYER ET AL.

FILED APRIL 30, 1903. No. 12,845.

1. **Void Judgments:** VACATING. The provisions of section 602, Code of Civil Procedure, apply to voidable, but not to void, judgments.
2. **Attachment:** NON-RESIDENT. The filing of a bond is not jurisdictional to the right to have an attachment issued against a non-resident defendant for a debt not due.
3. **Bill of Exceptions:** AFFIDAVITS. Affidavits filed in support of motions in the district court will not be examined by this court, unless properly incorporated in a bill of exceptions.
4. **Judgment:** FRAUD: REMEDY. Where a judgment is obtained by a fraudulent misrepresentation that induces the party to remain away from court to his injury, the remedy for vacating such judgment is not by a motion filed under subdivision 3 of section 602, Code of Civil Procedure, but by petition and summons under subdivision 4 of said section.

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

Gamble, Tripp & Holman, for plaintiffs in error.

John Bridenbaugh and *Lohr, Gardiner & Lohr, contra.*

OLDHAM, C.

On November 22, 1899, plaintiffs in the court below filed their petition in the district court for Cedar county,

Nebraska, asking for a judgment against defendant A. W. Petterson, for goods sold and delivered, in the sum of $1,095.70. At the same time an affidavit was filed by plaintiffs' attorney alleging the statutory grounds for an attachment for a debt not due, and also alleging that the defendant was a non-resident of the state of Nebraska. The application for an attachment was presented to the judge of the district court, and an order was made by the court granting the attachment, without bond, because the defendant was a non-resident of the state. A writ of attachment was accordingly issued and levied November 23 upon certain lands owned by defendant Petterson in Cedar County. December 23, 1899, Petterson died intestate. December 5, 1900, plaintiffs' attorney filed an application, duly verified, in the district court, suggesting the death of defendant A. W. Petterson; that said Petterson was a resident of South Dakota; that he had died intestate, leaving surviving him a widow, Louisa Petterson, and four minor heirs, naming them; that one Gutterson was the duly appointed and acting administrator of the estate of the deceased; and praying that each of these parties be made defendants, and that service might be had upon them by publication. The application was granted and service was accordingly procured against these defendants by publication. The widow and the administrator filed special appearances on February 25, 1901, objecting to the jurisdiction of the court. Before these objections were disposed of they also filed a motion to dissolve the attachment, supported by affidavits, alleging among other things that no bond had been given by the plaintiffs, and that the statement of facts in plaintiffs' affidavit was untrue. May 8, 1901, a guardian *ad litem* was appointed for the minor heirs of the deceased. An answer was filed for the minors, denying each of the allegations in plaintiffs' petition, and a motion was filed on this answer to discharge the attachment, for the same reasons as alleged by the widow and administrator. June 18, 1901, the motions to dissolve the attachment were overruled and the attachment sustained. On the following day

the court finally adjourned. Another regular term of the district court was held and finally adjourned in November, 1901. At the March term, 1902, of the district court, defendants filed a motion to set aside the judgment rendered on June 18, 1901, on the ground that the judgment and proceedings were taken against each of said defendants by default and also by mistake and irregularity. An answer for the widow and administrator was tendered with this motion. Affidavits were filed tending to support the claim that the widow and the administrator did not appear at the hearing of the motions on June 18, 1901, because they had relied on an agreement with plaintiffs' counsel that no action would be taken on the motions until after a sale of the property had been had to satisfy a first mortgage lien thereon. This motion was overruled by the court, and from this action defendants bring error to this court.

The foregoing statement of the proceedings, orders and judgments presented to us for review have been gleaned from a confused and unsatisfactory record, certified to by the clerk of the district court, from which, however, it is apparent that the plaintiffs in error are attempting to have a judgment reversed, after the term at which it was entered, under subdivision 3, of section 602, of the Code of Civil Procedure.

The first question urged by counsel for plaintiffs in error is, that the order of the district court granting an attachment, without bond, for a debt not due, was a void order, and that the court was, therefore, without jurisdiction of the subject matter of the controversy. If this contention were well founded, it would still leave the plaintiffs in error without any right to the relief sought by the motion before us for review, because the provisions of section 602, Code of Civil Procedure, were not enacted to relieve parties from the cloud of a void judgment, but were only intended to relieve from irregular and voidable judgments. *Kaufmann v. Drexel,* 56 Neb. 229; *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44.

While it is true that an allegation that defendant is a

non-resident of the state is not alone sufficient to authorize an attachment for a debt not due, yet where, as in the case at bar, this allegation is coupled with other allegations which do warrant an attachment for a debt not due, and where the order is granted by a proper court or judge thereof, as provided by section 238, Code of Civil Procedure, the right to proceed with or without bond is governed by the provisions of section 200, Code of Civil Procedure, and even if the court had misconstrued this section in holding that the allegation of non-residence of the defendant authorized the issuance of an attachment without a bond, such judgment would have been at most erroneous and not void. *O'Farrell v. Stockman,* 19 Ohio St. 296; *Simon v. Stetter,* 25 Kan. 155.

It is next claimed that the judgment was irregularly entered, because of the fact that plaintiff was permitted to amend his statement of account at the time the judgment was finally rendered, and in the absence of defendants. The amendment complained of was permitted to correspond to the proof offered; no new cause of action was incorporated in the affidavit for attachment, nor was there any amendment of such affidavit. The only amendment made was in the statement of plaintiffs' account for goods sold and delivered to the deceased defendant, and this merely to show when the different items actually became due; the amount of the claim was not increased or diminished by the amendment. We think the amendment was unobjectionable and is far short of such an irregularity as should vacate the judgment.

It is urged strongly that the plaintiffs in error were deceived by an understanding that no order would be made in the case at the June sitting of the court in 1901. Affidavits and counter-affidavits were filed on this allegation. None of these affidavits have been preserved in a bill of exceptions, but are strewn promiscuously through the transcript. If plaintiffs in error desired us to examine this testimony, they should have gathered these scattered affidavits, even as a hen gathers her chickens under her wings,

and incorporated them into a bill of exceptions properly authenticated; but this they have failed to do, and, under a well established rule of this court, we can take no notice of them. Again, if the judgment in this case was rendered at the June sitting of the court, in the face of an agreement that the case should be continued, then, as was said by this court in *Estate of McKenna v. McCormick*, 60 Neb. 595, 599, "the judgment was rendered 'before the action regularly stood for trial,' and a motion to vacate must be made in the first three days of the succeeding term. Code of Civil Procedure, section 604." But this, as appears from the statement, was not done; the succeeding term was permitted to open and close, and no motion was filed until the second term of court after the judgment had been rendered. If plaintiffs in error were induced by the fraudulent misrepresentations of adverse counsel to remain away from court, to their injury, at the time the judgment was rendered, then their remedy would have been, as was said by HOLCOMB, J., in *Estate of McKenna v. McCormick, supra*, "by filing a petition, duly verified, and having summons issued thereon, such action to be begun within two years from the date of the judgment sought to be vacated. A motion to vacate the judgment under subdivision 3 would not lie."

We are, therefore, of the opinion that the judgment of the district court in overruling the motion to vacate the judgment rendered on June 18, 1901, was right, and should be affirmed.

HASTINGS and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NEBRASKA TELEPHONE COMPANY, APPELLANT, V. WESTERN INDEPENDENT LONG DISTANCE TELEPHONE COMPANY ET AL., APPELLEES.

FILED APRIL 30, 1903. No. 12,744.

1. **Telephone and Telegraph Companies: USE OF STREETS: NUISANCE.** The term "public roads," in section 14, chapter 89*a*, Compiled Statutes, giving telegraph and telephone companies a right of way along the public roads of the state, does not include the streets and alleys of a municipal corporation, and the unauthorized use of such thoroughfares for such purpose constitutes a public nuisance.

2. **Equity.** A court of equity will not lend its aid to protect a suitor in maintaining a public nuisance, nor in the doing of an act punishable under the laws of the state.

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

W. W. Morsman and *Matthew Gering,* for appellant.

Byron Clark and *C. A. Rawls, contra.*

ALBERT, C.

This is an action for relief by injunction. The petition, so far as is necessary to show the ground upon which the action is based, is as follows:

"For more than fifteen years last passed, this plaintiff has been and now is engaged in the prosecution of the telephone business in the state of Nebraska, operating exchanges and long distance lines, and during the said period has, at all times, been, and is now, in the actual possession and enjoyment, under the laws of the state of Nebraska, of a right of way upon one of the public roads of the state, upon and along which it maintains its poles, with cross-arms extending two and one-half feet on each side of the centre of said pole, and which said cross-arms support plaintiff's wires, all for the transmission of communications by telephone between plaintiff's patrons, and which

said public road passes through and constitutes the main public road or street, and is commonly known as Main street, in the village of Louisville, in the county of Cass, in the state of Nebraska.

"2. The plaintiff's said poles are all set out on the same side of the said public road, where the same passes through the village aforesaid, and plaintiff's said poles and cross-arms support four wires used for long distance telephony. Plaintiff's poles are twenty-five feet high, and set at distances from each other of about 125 feet, and the wires thereon are carried upon insulators fixed to cross-arms aforesaid, separating the said wires by spaces of twelve inches.

"3. The defendants are also engaged in the telephone business in the state of Nebraska, but have not heretofore occupied the public road aforesaid at the point where the same passes through the village of Louisville as aforesaid, but are now proposing to occupy the same by the erection of poles equipped with cross-arms, and by the stringing of wires thereon for long distance and exchange service. The said defendants give out that they will, and threaten to and are now in the act of setting the said poles along the said public road, at the place where the same passes through the said village, in the line of plaintiff's poles and right of way, and threaten and are about to so set and erect their said poles so that they will extend above and through plaintiff's lead of wires, strung as aforesaid, and so that the said defendants' poles will be projected into and through the central 12-inch space between the wires of plaintiff's said lead. The defendants intend and threaten to place their wires on the poles of the said defendants, above plaintiff's lead of wires and in line therewith, and to so maintain them upon cross-arms fixed to the defendants' said poles, extending at right angles with and across plaintiff's lead of wires.

"4. Plaintiff has never given its consent to the erection of the poles, cross-arms and wires of the defendants, or any of them, in, upon or over the right of way aforesaid

of plaintiff, or in the line of plaintiff's poles, or within two and one-half feet from the said line on either side, or through or over plaintiff's lead of wires, but has expressly objected thereto; but the defendants, disregarding the plaintiff's objections and prior rights, are now proceeding to erect their poles, cross-arms and wires in the manner hereinbefore set forth, with the intent and for the purpose of injuring plaintiff, and interfering with its business and its prior rights.

"5. If the defendants erect and maintain their poles and wires as hereinbefore set forth, such erection and maintenance will immediately and greatly interfere with and injure plaintiff's business and the business of the plaintiff's patrons over said wires. The defendants' poles and plaintiff's wires will come into electrical contact, so that plaintiff's wires will be grounded, and thereby conversation over plaintiff's said wires will be interrupted and prevented, and defendants' wires will also, when loose or down, come into electrical contact with plaintiff's said wires, producing a like result, to great injury of the plaintiff, and for which injury plaintiff has no adequate remedy at law."

An answer was filed by the defendant the Western Independent Long Distance Telephone Company and its officers, admitting that their intention and purpose was to do the acts sought to be restrained; denying that it was done with the intent and for the purpose of injuring the plaintiff, and, in effect, that such acts would not interfere with the plaintiff's business. The answer also put in issue the right of the plaintiff to occupy the street referred to in the petition. The other defendants failed to answer, and, from the evidence, it would appear that they were in no way concerned in the acts sought to be restrained. The court found for the defendants and dismissed the complaint. The plaintiff brings the case here on appeal. In the further consideration of the case we shall refer to the parties by the title in the district court.

The first question that concerns us in this case is whether

the plaintiff rightfully occupied the streets in question with its poles and wires. In the consideration of this question, the court will take judicial notice that the village of Louisville is and for many years past has been a body politic, organized under the general laws of the state. The plaintiff does not base its claim to a right of way on the streets on any grant from the village, but solely on section 14 of chapter 89*a*, Compiled Statutes (Annotated Statutes 11463), which is as follows: "That any telegraph or telephone company incorporated or doing business in this state shall be and is hereby granted the right of way along any of the public roads of the state for the erection of poles and wires; *Provided,* That poles shall be set at least six feet within the boundary line of said roadway and not placed so as [to] interfere with road crossings; and *Provided,* That said wires shall be placed at the height of not less than twenty feet above all road crossings" (Session Laws, 1887, ch. 87).

It is insisted on behalf of the plaintiff that the term "public roads," in the section just quoted, includes the streets and alleys of a municipal corporation. A statute of the state of Minnesota (Laws Minn. 1860, ch. 12, sec. 1), worded very much like the one under consideration, was construed in *Abbott v. City of Duluth,* 104 Fed. 833, and the terms "public roads and highways" were held to include the streets and alleys of cities and villages, as well as rural highways. This construction was followed by the supreme court of that state, in *Northwestern Telephone Exchange Co. v. City of Minneapolis,* 81 Minn. 140, 86 N. W. 69, Start, C. J., dissenting, and *City of Duluth v. Duluth Telephone Co.,* 84 Minn. 486, 87 N. W. 1127. A similar statute was construed by the supreme court of Iowa (Code, 1873, sec. 1324) in *Chamberlain v. Iowa Telephone Co.,* 119 Ia. 619, 93 N. W. 596, in which it was held that the term "public highways" includes the streets of a city.

The cases just cited strongly support the theory of the plaintiff, but, after all, with this court, as with those whose opinions have been cited, the question is one of

legislative intent; that is, did the legislature use the term "public roads" in the most comprehensive sense, intending thereby to include the streets and alleys of municipal corporations, or did it use it in the more restricted sense, intending to include only rural highways?

Ordinarily, in construing a statute, words should be given their usual and recognized meaning. *State v. Byrum,* 60 Neb. 384; *State v. Weston,* 4 Neb. 216. It is only where such construction would be obviously repugnant to the intention of the lawmakers that a different construction is allowable.

Whatever may be the usage in other jurisdictions, we think it safe to say that in this state the term "public roads" is commonly understood and recognized to apply exclusively to rural highways. It is thus understood and used by the people of the state generally, and it is doubtful whether, in the ordinary affairs of life and common conversation, it is ever used or understood to convey the idea of a street or alley of a city or village. This is a matter of common knowledge, and of which this court must take judicial notice. There is nothing in the act itself, nor in the legislative history of the state, that suggests that the legislature used the term in any other sense than that in which it is commonly used by the people of the state. The statutes of the state were before the legislature when the act was passed. In those relating to cities and villages the term "public roads" never occurs, while in those relating to rural highways it is invariably used, save in some cases where the term "highway" is used as its equivalent. The statutes in force at that time vested county boards with the general supervision over "public roads" (Compiled Statutes, 1885, ch. 78, sec. 1), and municipal authorities with the control of their streets and alleys (Compiled Statutes, 1885, ch. 13, sec. 15, subdivision 24, and ch. 14, sec. 77). At that time cities, as an additional remedy against encroachments on their streets and alleys, had express authority to enact ordinances to prevent the use of such streets and alleys for telegraph and telephone poles

and wires (Compiled Statutes, 1885, ch. 13, sec. 15, subdivision 8, and ch. 14, sec. 39, subdivision 21). At the same session at which the act in question was passed, an act was passed for the incorporation of cities of the metropolitan class, and another for the incorporation of cities of the first class, conferring upon such cities the power to enact such ordinances (Session Laws, 1887, ch. 10, sec. 50, and ch. 11, sec. 68, subdivision 14), while the authority of cities of the second class in that behalf was left untouched. It seems to us that but one reasonable inference is to be drawn from the foregoing, and that is that the legislature had in mind the popular distinction between "public roads" and "streets and alleys," and used the former term in the act under consideration in the sense in which it is generally used and understood by the people of this state, and not in its generic sense as including the streets and alleys of municipal corporations; because it dealt with the latter in such a manner as to clearly indicate that it regarded them as something separate and distinct from the public roads of the state. Had it regarded a right of way for telegraph and telephone poles on the streets and alleys of municipal corporations of such transcendent importance to the public as to justify direct legislative action and to make it the subject of a legislative grant, it is not probable it would at the same time have clothed such municipalities with express authority to defeat the grant. It follows, therefore, that the plaintiff's occupancy of the street in question was without lawful authority.

But the plaintiff contends that the state, or the village, alone can successfully assail its right to the use of the street as a right of way. In support of this contention we are cited to *Williams v. Citizens R. Co.*, 130 Ind. 71, 29 N. E. 408. We do not consider that case in point. There the plaintiff was a street railway company and had organized for the purpose of constructing and operating an electric street railway, under a statute providing for the organization of street railway companies, and author-

izing them to employ any kind of motive power in common use, except steam. The question raised by the defendant was that by the use of electricity as a motive power the plaintiff was acting without the scope of its charter. Passing on the question thus raised, the court applied the rule that where there is an assumption of corporate rights and functions and an exercise thereof under color of law, only the state can question the validity of the assumption and the exercise of such functions and rights. That is only another way of stating the elementary rule, applicable to corporations generally, that where an association of persons is found in the exercise of corporate franchises, under color of legal organization, its existence as a corporation can not be inquired into in a collateral proceeding, and generally it can be inquired into only by the state whose sovereign powers have been usurped. That is not the question before us. The unauthorized obstruction of a public thoroughfare was a nuisance at common law, and is punishable as such under our statutes. Criminal Code, sec. 232. The case, then, is one in which the plaintiff invokes the extraordinary powers of a court of equity to protect it in maintaining a public nuisance, and in the doing of an act punishable under the laws of the state. We know of no instance wherein a court of equity has lent its aid to such ends. To do so would be contrary to those principles which have always guided such courts in the exercise of their powers.

It follows that the complaint was properly dismissed, and we therefore recommend that the decree of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

E. N. BAILEY, GUARDIAN OF CLAUDE W. MASON, ET AL. V. THOMAS B. GARRISON, GUARDIAN OF CLAUDE W. MASON.

FILED APRIL 30, 1903. No. 12,754.

1. Guardian: FINAL SETTLEMENT: ATTORNEY'S FEE. In the final settlement of the accounts of a guardian, that he has not paid certain attorney's fees charged therein, is not of itself a valid objection to the allowance of such item, where it appears that there is a *bona fide* arrangement between himself and the attorney that the amount allowed by the court therefor shall be paid to the latter.

2. ———: ATTORNEY'S FEE. A guardian has authority to bind the estate of his ward by a contract, reasonable in its terms, for services reasonably necessary to the preservation and management of such estate.

3. ———: ———. Where a part of such services were rendered as guardian *ad litem*, in proceedings had in the same court as that in which the general guardian's accounts are adjusted, and no specific fee has been allowed the guardian *ad litem* in such proceedings, the county court may include such fee in the total allowance for attorney's fees for the entire services rendered.

4. Fees of Guardian Ad Litem. The fees of a guardian *ad litem* are not in all cases and under all circumstances taxable in whole or in part to the adverse parties.

ERROR to the district court for Valley county: JAMES N. PAUL, DISTRICT JUDGE. *Affirmed.*

A. M. Robbins, for plaintiffs in error.

A. Norman, H. Westover, Hall & Johnson, Edwin M. Coffin and *E. J. Clements, contra.*

ALBERT, C.

The parents of Claude W. Mason separated shortly after his birth, which was on September 20, 1881, and he was left in the custody of his mother, who appears to have taken up her residence in the state of Iowa. The father moved to Valley county, in this state, and resided there until his death, which occurred previous to the death of his parents, hereinafter mentioned.

About the time the parents of the minor separated, his paternal grandparents also settled in Valley county, where they remained until 1889, when they returned to the state of Massachusetts, their old home, when the grandfather died, leaving his entire estate, a part of which at least was in Valley county, to his wife. Administration was granted on his estate in Valley county in 1899, and while the same was there pending his wife died intestate. Whereupon, in the same year, administration was also granted on her estate in that county.

At this time it would appear that the paternal relatives of Claude W. Mason had lost trace of him, and that it was their purpose to ignore him in the settlement of the estate of his grandparents. At this stage of the proceedings Mr. A. Norman, an attorney at law, interested himself in behalf of the boy, and finally located him at Sac City, Iowa, and thereupon entered into a contract in writing with the boy and his mother to protect the interest of the former in the estate of his grandmother, for which he was to receive a fee equal to twenty per cent. of the value of the boy's interest in the estate. A guardian was then appointed for the boy by the county court of Valley county, who, after his appointment, adopted and ratified the contract hereinbefore mentioned, and proceeded thereunder as though the same had been made by himself as such guardian. In pursuance of that contract, and the guardian's adoption and ratification of it, Mr. Norman appeared for the boy in the proceedings for the administration of his grandmother's estate, protected his interest therein and established his claim as one of the heirs at law of the intestate, and as such his right to about $2,500 of the assets of the estate, consisting of real and personal property. From the record of the proceedings for the administration of that estate it appears that Mr. Norman acted both as attorney and guardian *ad litem* for the boy. Afterwards, and after Mr. Norman had performed his part of the contract hereinbefore mentioned, the guardian filed his final report, wherein he asked a credit for $500 as fees paid to

Mr. Norman for his said services in behalf of the ward. E. N. Bailey, who had been appointed guardian for the boy in the state of Iowa, appeared and objected to the allowance of that item. The issues were made up and submitted to the county court, which entered an order allowing the credit. The Iowa guardian then appealed to the district court, where, after a hearing on the merits, the order of the county court was affirmed. The Iowa guardian and the ward join in a petition in error to this court, asking a reversal of the judgment of the district court.

It is first insisted that the amount had not been paid Mr. Norman by the guardian, and therefore the latter was not entitled to a credit for the amount. The evidence shows that only a small portion of the amount was paid, but it further shows that the guardian and Mr. Norman expected the charge to be contested, and, in order that the guardian might take no risk, it was arranged between them that Mr. Norman should receipt for the full amount, which he did, and look to the guardian personally for payment, in case the credit was allowed by the court. There is no suspicion that it was any part of their purpose that any portion of the amount allowed should be retained by the guardian, or that he should profit in any way at the expense of the ward. The whole transaction was laid before the court, and, it seems to us, the legal effect was substantially the same as though the guardian had stated the claim to the court, represented that it had not been paid, and asked for an order for its allowance. Such a course would have been unobjectionable, and, the course adopted being substantially the same in legal effect, it seems to us to be equally so.

It is next urged that the contract of the minor was not binding upon him, and that its subsequent adoption and ratification by his guardian did not make it binding on the estate. We do not deem it necessary to go into the question of the effect of the contract made by the minor. The evidence is conclusive that the guardian, in effect, entered into precisely the same contract with Mr. Norman. Such

a contract, if reasonable, in our opinion, is binding on the estate of the minor. *McCoy v. Lane,* 66 Neb. 847; *Taylor v. Bemiss,* 110 U. S. 42. In this case it was, in effect, for twenty per cent. of the amount recovered for the ward, and was wholly contingent. The court under which the guardian held his appointment went into the reasonableness of the contract and the reasonable value of the services rendered on the trial of this case, and found them reasonable. Those matters were also in issue in the district court, where the finding of the county court thereon was sustained. The evidence is before us and it sustains the finding of the district court. Hence the reasonableness of the contract, and the reasonableness of the amount allowed for the services rendered, are no longer open questions in the case. We think, so far as the objection under consideration is concerned, there was no error in the order allowing the claim.

A part of the services performed by Mr. Norman, for which the allowance is asked, was performed as guardian *ad litem* in the settlement of the estate of his grandmother. It is now insisted that for the services rendered in such proceedings he is entitled only to such fee as has been allowed him therein by the court, and in this behalf we are cited to *Englebert v. Troxell,* 40 Neb. 195. In that case the minor and his father had been made parties to a foreclosure suit in the district court. They entered into a contract with the attorney to appear for them and defend their interest, agreeing to pay him a contingent fee. He appeared for them in the case, and was appointed guardian *ad litem* for the minor. In another action, wherein the validity of the contract for such services, so far as the minor was concerned, was called in question, this court, speaking through RAGAN, C., said (p. 210):

"For performing the duties of a guardian *ad litem* an attorney must look, and look only, for the amount of his compensation to the court, and the compensation allowed the guardian should be taxed as costs in the proceedings and as such collected. Perhaps it might be filed as a claim

against the minor's estate, but no other different or greater amount can be collected than that allowed by the court."

But we do not think that case is exactly parallel with the present. In the present case the services of the attorney, both as guardian *ad litem* and otherwise, were rendered in the same court, and in the court to which the application for an allowance for fees was made in this case. We do not think the fees of a guardian *ad litem,* in all cases and under all circumstances, are to be taxed in whole or in part against the adverse party or parties. There can be no doubt that under some circumstances such costs should be borne exclusively by the minor. In most cases we think the matter is, to some extent at least, within the discretion of the court. In this case the minor and those adversely interested were represented by different attorneys. Under such circumstances it would be no abuse of discretion for the court to tax the fees of the guardian *ad litem* to the minor, to be deducted exclusively from his share of the estate. That being true, it seems to us that the county court had jurisdiction to thus allow such fees, so long as it had jurisdiction over the parties and control of the fund against which they were chargeable. As we have already seen, the county court in this case not only went into the contract, but into the question of services rendered and the value of such services. It had jurisdiction of the parties and of the fund against which the fees of the guardian *ad litem* were chargeable. It does not appear that there was at any time any specific allowance for the fees of the guardian *ad litem.* Under such circumstances, we think it is a fair presumption that the county court included those fees in the aggregate amount allowed in this case for the services rendered for the minor by Mr. Norman. That court has jurisdiction in such matters and is charged with the duty of protecting the interests of its wards. Its jurisdiction and orders are attended by all the presumptions that attend those of other courts of record. Indulging those presumptions, we think the

judgment of the district court was right, and we recommend that it be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ELIZABETH HELLER SCHICK, APPELLEE, V. EDWARD WHITCOMB ET AL., APPELLANTS.

FILED APRIL 30, 1903. No. 12,797.

Partition: JOINT DEVISE: SETTLEMENT OF ESTATE. Where lands are devised to two or more jointly, one of the devisees may maintain an action for the partition thereof against the executor and the other devisees, at any time after the expiration of the time for filing claims against the estate, although the estate has not been settled and there has been no decree of distribution, provided the personal assets, in the hands of the executor, are sufficient to discharge the debts of the estate and the charges enumerated in section 289, chapter 23, Compiled Statutes (Annotated Statutes 5154).

2. ———: EQUITIES. In such action, the district court has jurisdiction to determine every question necessarily involved in a just and equitable decree of partition, and where the devisees, or any of them, have received advancements, which have not been adjusted by the county court, they may be adjusted in such action. For the purposes of such adjustment, such advancements are to be regarded as a part of the assets of the estate.

3. ———: DEVISE TO EXECUTOR IN TRUST. Where, by the terms of the will, a part of the devisees take only the use of a certain portion of the estate for life, remainder over to their children, etc., and the executor is authorized to make division thereof or to invest the proceeds, the legal title to such shares vests in the executor in trust, for the uses and purposes mentioned in the will, and imposes upon him a charge, requiring the exercise of his discretion, in regard to the care and management of that portion of the estate, and the provisions of the will in respect thereto should be carried out in the decree of partition.

4. **Devise:** DOWER. The wife of a devisee has an inchoate right of dower in his share of the lands devised, and a decree in partition,

which bars her of any right, title or interest in such lands, is erroneous.

5. Referees in Partition: INCUMBRANCES. The referees in partition are not required to procure certificates of incumbrances, and have the lands appraised, as in case of a sale by the sheriff on execution; nor is it essential to the validity of such sale that the report of the clerk, as to incumbrances required by section 819, Code of Civil Procedure, or the order therefor, should be made before sale.

6. Jurisdiction. Our statutory proceedings for the partition of real estate are essentially *in rem*, and the district court has no jurisdiction in such proceedings to partition real property in another state.

APPEAL from the district court for Seward county: SAMUEL H. SORNBORGER, DISTRICT JUDGE. *Reversed in part.*

Robert Ryan and *M. D. Carey*, for appellants.

Harry D. Landis and *R. R. Schick, Jr.*, *contra.*

ALBERT, C.

On the 16th day of May, 1900, one Anderson Dana Whitcomb died seized in fee of the lands in controversy in this action, and possessed of considerable personal property, leaving a will of which the following is a copy:

"Know all men by these presents, that I, Anderson Dana Whitcomb, fully realizing the uncertainties of life, and being in usual health and of sound mind, do make and publish this my last will and testament.

"1st. It is my desire that my funeral expenses and just debts be paid.

"2d. That after the payment of my funeral expenses and just debts, the residue of my estate shall be equally divided between my children, Edward Whitcomb, William Ahira Whitcomb, Walter Olen Whitcomb, Dana Simpson Whitcomb and Elizabeth Heller Schick, heirs of my body, excepting as hereinafter provided. I hold notes against,

and have bills which I have paid for Walter Olen Whitcomb, William Ahira Whitcomb and Dana Simpson Whitcomb, and I direct that the several amounts be deducted from the amounts of their share to be given them or which they are to have the use of as hereinafter provided. I direct that the shares of my estate that would otherwise be divided between William Ahira and Walter Olen Whitcomb, shall not be given them absolutely, but that they shall have the use of the same during their natural lives, and at their death or as either of them depart this life, the share which would otherwise have fallen to each one be equally divided between their children then living and heirs of their several bodies.

"4th. I hereby appoint my son Edward Whitcomb my sole executor of this my last will and testament, and who shall have full power and authority to make a division of my estate or to invest the amounts set aside for their use as above provided and directed.

"5th. I hereby renounce all former wills or bequests made by me.

"Witness my hand and seal this 8th day of March, 1900, at Lacyville, Pa."

On the 11th day of June, 1900, the will was duly admitted to probate by the county court of Saline county, whereupon the executor therein named qualified and entered upon the discharge of his duties as executor of the will. By order of the county court, creditors of the estate were allowed six months, from the 16th day of June, 1900, to file their claims against the estate. The time was not extended and, at its expiration, all claims not filed within that time were barred. The regularity of the proceedings in the county court are not questioned.

On the 2d day of July, 1901, and while the administration of the estate was still pending in the county court, Elizabeth Heller Schick, one of the devisees named in the will, brought this action against the other devisees, including the children of William Ahira and Dana Simp-

son Whitcomb, the executor, and Hannah, Alice, Caroline and Eva Whitcomb, the wives of the devisees Edward, William Ahira, Walter Olen and Dana Simpson Whitcomb, respectively, for a partition of the lands in controversy.

The petition, in addition to the usual allegations, contains the following:

"The said plaintiff further avers that the estate of the said Anderson Dana Whitcomb, deceased, is solvent, and that there is sufficient personal assets in the hands of said Edward Whitcomb, executor of the estate of the said Anderson Dana Whitcomb, deceased, belonging to said estate with which to pay all debts owing by said estate and the cost and expense of administering the same.

* * * * * * * * * *

"The said plaintiff further alleges that the said William Ahira Whitcomb, Walter Olen Whitcomb and Dana Simpson Whitcomb, have been advanced the following sums by notes and money, from the aforesaid Anderson Dana Whitcomb, deceased, during the lifetime of the aforesaid Anderson Dana Whitcomb, to wit: William Ahira Whitcomb, eight hundred fifty-eight and 4-100 dollars ($858.04); Walter Olen Whitcomb, one thousand six hundred thirty-one and 57-100 dollars ($1,631.57); Dana Simpson Whitcomb, one thousand eight hundred thirty-four and 73-100 dollars ($1,834.73); which sums, by the desire and will of the said Anderson Dana Whitcomb, deceased, were to be deducted from the respective shares of the aforesaid William Ahira Whitcomb, Walter Olen Whitcomb and Dana Simpson Whitcomb.

"The said plaintiff further alleges that the defendants, Hannah Whitcomb, wife of Edward Whitcomb, Alice Whitcomb, wife of William Ahira Whitcomb, Caroline Whitcomb, wife of Walter Olen Whitcomb, and Eva Whitcomb, wife of Dana Simpson Whitcomb, each claim to have some interest in or right and title to said premises or some portion thereof, the said Hannah Whitcomb claiming an interest in or title to said premises by reason of being the

wife of the defendant Edward Whitcomb, the said Alice Whitcomb claiming an interest in or some title to said premises by reason of being the wife of the defendant William Ahira Whitcomb, the said Caroline Whitcomb claiming an interest or some title to said premises by reason of being the wife of the defendant Walter Olen Whitcomb, the said Eva Whitcomb claiming an interest in or some title to said premises by reason of being the wife of the defendant Dana Simpson Whitcomb, but plaintiff alleges that neither they nor either of them have any right, title, interest, lien, or claim whatsoever, either at law or in equity in or to said premises, or any part thereof, and plaintiff avers that their pretended claim or title, or interest in said premises, is a cloud upon the title of plaintiff and the owners of said premises, and that said cloud should be forever removed, set aside and held for naught, and plaintiff asks that they and each of them be required to set up in writing by way of answer in the time and manner required by law whatever interest they or either of them have or claim to have in said premises, and in default thereof that they, and all persons claiming by, through or under them or either of them be forever barred and cut off from ever asserting the same.

"The plaintiff further alleges that the said defendant Edward Whitcomb, as the executor of said estate, also claims to have some interest in or right to said premises aforesaid by reason of his being the executor of the estate of the said Anderson Dana Whitcomb, deceased, but the said plaintiff avers that he, as the executor of said estate, has no right, title, interest or claim whatsoever in and to said premises or any part thereof."

The issues were made up and a trial had which resulted in the following findings and decree:

"And now on the 8th day of January, 1902, at 9 o'clock A. M., this cause came on for further hearing on the pleadings and evidence and was duly submitted to the court, on consideration thereof the court finds, that:

"Due and legal service of summons and notice of the

pendency of this action has been made upon all the defendants in this cause in the time and manner provided by law and that a guardian *ad litem* was duly appointed to protect the interests of the minor defendants.

"On the 16th day of May, 1900, one Anderson Dana Whitcomb died, testate, seized in fee of the following described real estate, situated in Nebraska, to wit: Northeast one-fourth, section twelve (12), town eight (8), range one (1) east, situate in Saline county; all of section thirty-three (33), town fourteen (14), range nine (9) west, situate in Howard county; northwest one-fourth section twenty (20), town twelve (12), range four (4) east, situate in Seward county; east one-half southwest one-fourth, section thirty (30), town eleven (11), range seven (7) west, situate in Hamilton county; lot six (6), original town of Friend, situate in Saline county.

"Said Anderson Dana Whitcomb, deceased, left as his devisees and heirs at law the following persons, viz.: Edward Whitcomb, Walter Olen Whitcomb, William Ahira Whitcomb, Dana Simpson Whitcomb, Elizabeth Heller Schick, Arthur Whitcomb, Dana Whitcomb, Clarence Whitcomb, Floyd Whitcomb, Chester Whitcomb, Nelle Whitcomb, Herbert Whitcomb, Lila Whitcomb, Pauline Whitcomb, —— Whitcomb and —— Whitcomb, christian names unknown.

"That the will of Anderson Dana Whitcomb, deceased, was duly probated in the county court of Saline county, Nebraska, and that Edward Whitcomb is now the duly qualified and acting executor of said estate.

"That the estate of Anderson Dana Whitcomb, deceased, is solvent and that there is sufficient personal assets in the hands of the said Edward Whitcomb, executor of the estate of Anderson Dana Whitcomb, deceased, belonging to said estate with which to pay all debts owing by said estate and the costs and expense of administering the same.

"That the following sums and amounts, to wit, $1,834.73, $1,631.57 and $858.04, are to be deducted from the shares of Dana Simpson Whitcomb, Walter Olen Whitcomb and

William Ahira Whitcomb, as follows: $1,834.73 from the share of Dana Simpson Whitcomb, $1,631.57 from the share of Walter Olen Whitcomb and $858.04 from the share of William Ahira Whitcomb, as advancements according to the last will and testament of Anderson Dana Whitcomb, deceased.

"That Anderson Dana Whitcomb died leaving no minor children or widow.

"That the executor, Edward Whitcomb, as such has no right, title interest or claim whatsoever in and to said advancements and premises or any part thereof.

"Hannah Whitcomb, Alice Whitcomb, Caroline Whitcomb and Eva Whitcomb have no interest, right or title in the above described lands.

"Said plaintiff, as an heir and devisee of the said Anderson Dana Whitcomb, deceased, has an undivided one-fifth interest in said lands and each of the following defendants has a similar estate of an undivided one-fifth interest therein, viz.: Edward Whitcomb, an undivided one-fifth interest; Dana Simpson Whitcomb, an undivided one-fifth interest, subject to a lien hereinafter mentioned; William Ahira Whitcomb, an undivided one-fifth interest, subject to a lien hereinafter mentioned; and Walter Olen Whitcomb, an undivided one-fifth interest, subject to a lien hereinafter mentioned, except that William Ahira Whitcomb and Walter Olen Whitcomb have a life estate only in their respective shares, with remainder over, in equal shares to the children of the said William Ahira Whitcomb and with remainder over, in equal shares to the children of the said Walter Olen Whitcomb.

"The court further finds that the plaintiff is entitled to a partition of said premises as prayed in her petition.

"It is therefore decreed that the sums and amounts, to wit, $1,467.784, $1,305.256 and $686.432, be declared liens against the shares of Dana Simpson Whitcomb, Walter Olen Whitcomb and William Ahira Whitcomb in said land, in favor of Edward Whitcomb, Elizabeth Heller Schick, Dana Simpson Whitcomb, Walter Olen Whitcomb and

William Ahira Whitcomb as follows: the sum of $1,467.784 be declared a lien against the share of Dana Simpson Whitcomb in favor of Edward Whitcomb, Elizabeth Heller Schick, Walter Olen Whitcomb and William Ahira Whitcomb; the sum of $1,305.256 be declared a lien against the share of Walter Olen Whitcomb in favor of Edward Whitcomb, Elizabeth Heller Schick, Dana Simpson Whitcomb and William Ahira Whitcomb, and the sum of $686.432 be declared a lien against the share of William Ahira Whitcomb in favor of Edward Whitcomb, Elizabeth Heller Schick, Dana Simpson Whitcomb and Walter Olen Whitcomb.

"It is further ordered that Edward Whitcomb, Elizabeth Heller Schick, Dana Simpson Whitcomb, Walter Olen Whitcomb and William Ahira Whitcomb each have an undivided one-fifth interest in the above mentioned advancements, viz., $1,834.73, $1,631.57, and $858.04, according to the last will and testament of Anderson Dana Whitcomb, deceased.

"It is therefore considered, ordered, adjudged and decreed by the court that the shares of the said parties and their interests in said lands and advancements be and the same hereby are confirmed, and that partition be made accordingly. It is further ordered that R. E. Dunphy, James Ruby and Charles Adams be and they are hereby appointed referees to examine said lands and report as to the manner of partition."

The referees duly reported to the court that the lands could not be equitably divided, and recommended a sale thereof. The court, on the 13th day of February, 1902, approved the report and ordered the lands sold as upon execution. Afterward, in pursuance of such order and after due notice, the referees sold the lands, and reported the sales to the court. The defendants then lodged objections against the confirmation of the sales, some of which are based on alleged errors in the decree and need not be noticed at this time; the others are as follows:

"The report does not show that any purchaser has paid

the purchase price of any of the lands of which there has been reported sale.

* * * * * * * * *

"The will vested in William Ahira Whitcomb and Walter Olen Whitcomb a life estate each in one of the shares into which the testator directed by his will that his property should be divided and this court after making the order of sale herein failed to direct the clerk to report whether there were any incumbrances upon any part of the property to be sold.

"The court can not make an order as to the life estate of William Ahira Whitcomb and Walter Olen Whitcomb for the reason that no attempt has been made to come to an agreement with either of the said parties as to the same in gross to be considered an equivalent for each of said life estates.

"The sales by the referees were not conducted in the manner as sales by sheriffs on execution are by the statute and the order of the court required to be conducted, for the reason that there were no liens or incumbrances ascertained and no appraisement was made."

The objections were overruled and the sales confirmed; the court at the same time ordered the referees to file a supplemental report, showing who of the purchasers had paid or tendered the full amount of their bids before confirmation, and who, of such purchasers, had tendered security for one year's deferred payment according to the terms of the sale. The court further ordered the referees to retain the money and securities, received from the sale of the lands, until the further order of the court.

The defendants appeal to this court from the decree and order of confirmation.

The defendants contend that the executor is entitled to the possession of the real estate, until such possession is terminated by a decree of the county court, and, as his possession had not been thus terminated when this action was brought, the decree ordering partition is erroneous. Compiled Statutes, chapter 23, section 202 (Annotated Stat-

utes, 5067), is the basis of the right of an executor to the possession of the real estate of his testator, and is as follows:

"The executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents, issues and profits of the real estate, until the estate shall have been settled, or until delivered over, by order of the probate court, to the heirs or devisees, and shall keep in good, tenantable repair, all houses, buildings and fences thereon which are under his control."

If that section stood alone, it would, perhaps, be sufficient to establish the defendants' contention. But in the same chapter are the following:

"Sec. 288. Before any partition or division of any estate among the heirs, devisees or legatees, as provided in this subdivision, the probate court shall make an allowance for the necessary expenses of the support of any children of the deceased under seven years of age; and it shall be the duty of the executor or administrator to retain in his hands sufficient estate for the purpose, except when some provision is made by will for their support.

"Sec. 289. After the payment of the debts, funeral charges, and the expenses of administration, and after the allowances made for the expense of the maintenance of the family of the deceased, and for the support of the children under seven years of age, and after the assignment to the widow of her dower, and of her share in the personal estate, or when sufficient assets shall be reserved in the hands of the executor or administrator for the above purposes, the county court shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are by law entitled to the same.

"Sec. 290. In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same.

"Sec. 291. Such decree may be made on the application of the executor or administrator or of any person interested; but no heir, devisee or legatee shall be entitled to a decree for his share until payment of the debts and allowances and expenses mentioned in the preceding section shall have been made or provided for, unless he shall give a bond to the county judge, with such surety or sureties as he may direct, to secure the payment of the just proportion of such heir, devisee or legatee of such debts and expenses, or such part thereof as shall remain unprovided for, and to indemnify the executor or administrator against the same.

"Sec. 292. When such estate shall consist in part of real estate, and shall descend to two or more heirs, devisees or legatees, and the respective shares shall not be separate and distinguished, partition thereof may be made as provided by law."

As to the time when a devisee is entitled to a decree for a division or partition of the estate, the foregoing sections make no distinction between real and personal property. In either case an heir or devisee is entitled to a division or partition, (1) When the charges therein enumerated have been paid; (2) When the executor or administrator reserves sufficient assets in his hands to pay such charges; (3) Upon giving the bond provided for in section 291. Section 289 provides for a decree of distribution by the county court. Section 292 provides for partition, "as provided by law," where the property to be divided is real estate, and the respective shares are not to be separate and distinguished. The phrase, "according to law" can have but one meaning and that is, by an action in partition in the district court, the only court having original jurisdiction in cases of that character. The sections quoted, then, fairly construed, provide that where real estate descends to two or more heirs or devisees jointly, an action for the partition thereof may be maintained in the district court, after the charges enumerated in section 289 have been paid, or, when the executor reserves in his hands sufficient to pay them.

Applying the foregoing to the case at bar, the contention under consideration can not be sustained. The time for filing claims against the estate had expired when this action was commenced; but one claim, amounting to some $70, was filed against the estate; the deceased left neither widow nor minor children; the evidence shows personal assets of the estate, in the hands of the executor, amounting to more than $11,000, of which more than $800 is in money; by the terms of the will the land in controversy descended to the heirs jointly. It seems to us that these facts bring the case within the provisions of the sections just quoted, and that the right of the plaintiff to a partition of the real estate had fully matured when this action was brought. This appears to be the construction placed on like statutory provisions by the supreme court of Wisconsin. *Volk v. Stowell,* 98 Wis. 385, 74 N. W. 118; *McManany v. Sheridan,* 81 Wis. 538, 51 N. W. 1011.

The defendants rely on *Alexander v. Alexander,* 26 Neb. 68, wherein this court held, that an action of this character could not be maintained by an heir, "until the debts, allowances and expenses against said estate have been paid or provided for, unless he give a bond with approved sureties to pay the same." There is nothing in that case inconsistent with the views hereinbefore expressed, but we do not consider it directly in point on the precise question under discussion. There the petition contained no allegation whatever in regard to the solvency of the estate, or of the sufficiency of the personal assets to meet the charges which the statute requires to be paid or provided for before a division or partition of the estate can be had. The court merely paraphrased section 291, in order to show the insufficiency of the petition. But in this case the solvency of the estate, as well as the sufficiency of the personal assets to pay the debts against it, are alleged in the petition and conclusively established by the evidence. The distinction between the two cases, to our minds, is clear. The defendants also rely on *Security Investment Co. v. Lottridge,* 2 Neb. (Unof.) 489. So far as that case touches

the present it simply holds, in effect, that where lands descend to two or more jointly, an order of the county court assigning the lands, or a portion thereof, to one of the heirs was unauthorized, because, in such case, the heirs would have to make voluntary partition or resort to the district court. The precise question now before us was not involved.

The defendants contend that the decree of the district court is erroneous in that it adjusts the advancements made to three of the devisees, whereas the county court has exclusive original jurisdiction in that behalf. In support of this contention we are cited to numerous authorities showing the exclusive jurisdiction of the county court in matters of probate. A review of the authorities on that point may be found in *Williams v. Miles*, 63 Neb. 859. But, as we have seen from the sections of the statute hereinbefore quoted, the right of a devisee to a partition of the real estate depends upon precisely the same conditions as his right to a division of the personal estate; in neither case is he obliged, under all circumstances, to wait until a final settlement of the estate. Where the real estate descends to two or more jointly, an action in partition will lie. Sec. 292, *supra*. Of such actions the county court has no jurisdiction (Compiled Statutes, ch. 20, sec. 2, Annotated Statutes, 4786); resort, therefore, must be had to the district court. The jurisdiction to partition or divide a portion of the estate among the devisees, of necessity, carries with it the power to determine such incidental questions as are necessarily involved in a just and equitable decree of partition. Where one or more of the devisees have had advancements which, as in this case, have not been adjusted, justice to the other devisees requires a proper adjustment of such advancements by the court decreeing partition. In this case, such adjustment involves no controversy as to the amount of the advancements, because the amount of each, as well as the shares of the devisees, is specified in the will, and conclusively established by the decree of the county court admitting it to

probate. Under such circumstances, it seems to us, there can be no doubt that the district court has jurisdiction to enter a decree whereby the respective interests of those receiving advancements are duly charged therewith; in no other way could the rights of all parties be fully protected against all contingencies.

But the defendants complain of the manner in which the district court adjusted the advancements. We discover no just ground for complaint in this respect. There were five devisees and, according to the terms of the will as well as the findings of the district court, three of them were respectively chargeable with the following advancements: $1,834.73, $1,631.57 and $858.04. Such advancements, for the purpose of computing the shares of the respective beneficiaries under the will, are to be considered as a part of the estate to be distributed. That is to say, they are not to be charged against those receiving them and credited to the other devisees, but the account is between the former and the estate in which they, as well as the latter, have a one-fifth interest each. That being true, each devisee who had received an advancement, as between him and the estate, is chargeable with the full amount, but, as between him and the other devisees, he is chargeable with but four-fifths of it. By its decree, the district court made four-fifths of each advancement a lien against the interest in the land, of the party receiving it, and in favor of the other devisees. That was proper. The decree further provides that each devisee has an undivided one-fifth interest in the whole amount of the advancements. As before stated, the account is primarily between those receiving the advancements and the estate, and as they have a one-fifth interest in the estate, that part of the decree gives them nothing more than the law itself gives them, and can not, therefore, be erroneous. Whether it is essential to the decree is another question.

The decree is assailed on another ground, namely, that it ignores that provision of the will giving two of the devisees only a life estate in an undivided one-fifth each in the

estate of the testator, and the power vested in the executor in respect thereto. This complaint, we think, is well founded. By the terms of the will, it is expressly provided that the shares of such devisees "shall not be given to them absolutely, but that they shall have the use thereof during their natural lives, and at their death or as either of them depart this life, the share which would otherwise have fallen to each one be equally divided between their children then living and heirs of their several bodies." The last paragraph of the will authorizes the executor to make division and invest the amounts set aside for the use of such devisees. The district court found that the executor, as such (he is also a devisee), had no interest whatever in the lands, and decreed accordingly, allowing him only the one-fifth devised to him personally by the testator. This is erroneous. The provisions of the will just referred to cast upon the executor a personal trust in addition to that which is inseparably connected with the office of executor; namely, the power to invest the shares of two of the devisees, with such other powers as are necessarily incident thereto at least. Such was clearly the intention of the testator. It is well settled that in the construction of a will the intention of the testator must be carried into effect, provided in so doing no rule of law or sound policy is violated. *McCulloch v. Valentine,* 24 Neb. 215; *St. James Orphan Asylum v. Shelby,* 60 Neb. 796. It is equally well settled, we think, that a court will not annul a trust, created by will, which charges a trustee with the care and supervision of real estate and requires the exercise of his discretion. *Outcalt v. Appleby,* 9 Stew. Eq. (N. J.) 73; *Ex Parte Cubbage v. Franklin,* 62 Mo. 364; *Naglee's Estate,* 52 Pa. St. 154; *Gregory v. Gates,* 30 Gratt. (Va.) 83. It follows, therefore, that the decree should have protected the interest of the executor, as trustee, in the shares of the two devisees who, by the terms of the will, take only a life estate, and to the extent that it ignores such interest it can not be sustained.

There is another respect in which we think the decree

of the district court is erroneous, and that is in regard to the defendants, Hannah Whitcomb and Eva Whitcomb, the wives of the defendants Edward and Dana Simpson Whitcomb, respectively. The court found that they had no right, title or interest in the lands. Their husbands were seized of an estate of inheritance in the land, consequently they each had an inchoate right of dower therein. Ordinarily, such inchoate right, once vested in the wife, can be devested only by her voluntary act. *Motley v. Motley,* 53 Neb. 375; *Nicoll v. Ogden,* 29 Ill. 323, 81 Am. Dec. 311. This rule, however, does not prevent a partition of lands in case it is incumbered by the inchoate right of dower of the wife of one of the joint tenants. In such case, the right of dower follows and attaches to the allotment of the husband, or to its equivalent in case of sale where division in kind can not be made. Section 831, Code of Civil Procedure, appears to have been expressly devised to meet contingencies of that character and is as follows:

"If the owner of any share thus sold has a husband or wife living, and if such husband and wife do not agree as to the disposition that shall be made of the proceeds of such sale, the court must direct it to be invested in real estate under the supervision of such person as it may appoint, taking the title in the name of the owner of the shares sold as aforesaid."

We think it follows that the findings and decree of the district court, as to the two defendants having an inchoate right of dower in the lands, is erroneous.

We come now to the objections to the confirmation of the sales. The first is that the lands were not sold "as upon execution" as provided by the decree, in that it was not appraised. The statute does not provide in express terms that a sale of lands under a decree in partition shall be "as upon execution," but that "the same notice of sale shall be given as when lands are sold on execution by the sheriff, and the sale shall be conducted in like manner." Code of Civil Procedure, sec. 817. In providing for the notice of such sales, the lawmakers indicated clearly that

they did not intend to include all the preliminary steps leading up to a sale by a sheriff in the clause "and the sale shall be conducted in like manner," but merely the manner of conducting the sale itself at the time and place fixed by the notice. Hence we do not think the statute contemplates an appraisement of the land in partition sales. That being true, the decree of the district court directing a sale as upon execution should be held to be no more than a direction that the land be sold according to law, that is in accordance with the provisions of section 817, *supra,* and not as imposing additional restrictions on such sale.

Another objection urged against the confirmation of the sales is, that the report of the referees fails to show that the purchase price, in each instance, had been paid or secured in accordance with the order of sale. The referees are under bonds for the faithful discharge of their duties; the court fixed the terms upon which they were authorized to sell, and they are responsible for the proceeds; the law provides that, upon confirmation of such sales, the court shall enter an order directing the referees, or any two of them, to execute conveyances in pursuance of such sales, but that no conveyances shall be made until the purchase money is paid or secured. Code of Civil Procedure, sec. 829. It is fair to presume that the referees will observe the law. If they do not, they are in no degree absolved from liability by the order of confirmation. This objection does not appear to us to be well founded.

It is next insisted that the order of confirmation is erroneous, because there was no report of incumbrances by the clerk, as required by section 819, Code of Civil Procedure. Subsequent sections relate to the procedure in case of incumbrances, and section 827 expressly provides that "the proceedings in relation to the incumbrances shall not delay the distribution of the proceeds of other shares in respect to which no difficulties exist." This clearly shows that it was not the intention of the lawmakers that a compliance with section 827 should necessarily precede

a valid sale. The record shows that after the sales, and before confirmation, the court directed the clerk to report as required by section 819. The funds are still within the control of the court, and a report by the clerk as to the incumbrances will serve all the purposes for which it is required, if filed at any time before a distribution of the funds and a final disposition of the case.

The defendants further contend that the proceedings are erroneous throughout, because certain lands in the state of Pennsylvania, of which the testator died seized, should have been included in the action and disposed of by the decree. They concede that the courts of this state have no jurisdiction of lands in another state, but insist that a personal adjudication would bind the parties, as in the case of a decree for specific performance for the conveyance of land in another state, enforceable by injunction, attachment or like process against the person, or which would be available in an action between the same parties in such other state, concerning the title to the lands lying there. The argument in this behalf is based on the assumption that the maxim, that equity operates *in personam* and not *in rem,* applies to cases of this character. But such is not the case. The statutory proceedings pursued in this case involve a division of the lands by referees appointed by the court, and, under certain circumstances, a sale thereof by such referees. Such proceedings, therefore, are essentially *in rem,* and the elementary rule that the courts of one state have no jurisdiction of lands lying in another applies with full force. Besides, we know of no rule that would compel the plaintiff to include all lands, subject to partition as between him and the defendants, in one action.

For the reasons hereinbefore stated, the decree of the district court, so far as it relates to the executor's share, as such, and to the defendants Hannah and Eva Whitcomb, the wives of defendants Edward and Dana Simpson Whitcomb respectively, should be reversed with directions to enter a decree in favor of the executor, as such, for one-

fifth of the land in trust, for the use of William Ahira Whitcomb, and one-fifth in trust for the use of Walter Olen Whitcomb, for the term of their respective natural lives, and upon the death of either of them, the share held to his use to be divided between his children then living and the heirs of their several bodies. As to the defendants Hannah and Eva Whitcomb, the decree should give each of them an inchoate right of dower in the share allotted to her husband, which should be protected before final disposition of the proceeds in the manner provided by section 831, *supra*. This would involve corresponding modifications of the decree as to William Ahira Whitcomb and Walter Olen Whitcomb and their children, as to the terms of the trust, and as to Edward Whitcomb and Dana Simpson Whitcomb to the extent of the dower interests of their wives. Such modifications of the decree will not affect that portion of the proceedings by which the referees were authorized to make partition and sale; the sale appears to have been fairly conducted, and no complaint is made, not hereinbefore considered, that the order directing the sale was not proper, or that the lands were not sold for their fair value; as before stated, the funds are still under the control of the court, consequently the interests of the several parties may be fully protected by proper orders of the district court. We are of the opinion, therefore, that the ends of justice will be fully served by a modification of the decree, in the manner hereinbefore indicated, leaving the subsequent proceedings undisturbed.

It is therefore recommended that the decree of the district court, as to the executor as such, and as to the defendants Hannah and Eva Whitcomb, be reversed and the cause remanded with directions to enter a decree in their favor in accordance with this opinion; and, that the decree in all other respects, and the order of confirmation, be affirmed.

DUFFIE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court, as to the executor as such, and as to the defendants Hannah and Eva Whitcomb, is reversed and the cause remanded with directions to enter a decree in their favor in accordance with this opinion; and that the decree in all other respects, and the order of confirmation is affirmed.

REVERSED IN PART.

HENRY G. LEISENRING V. CHARLES H. LA CROIX.

FILED APRIL 30, 1903. No. 12,806.

1. **Malpractice:** EVIDENCE. In an action against a physician and surgeon for alleged negligent treatment of a compound fracture of the bone, it is permissible to show by another surgeon what would be the proper treatment for a simple fracture, and that the treatment for a compound fracture would not be materially different.
2. **Evidence:** DAMAGES. In such an action it is proper to submit evidence relating to the condition of the patient's health at the time the treatment began, and also to the length of time he was treated by others after defendant ceased to attend him, the jury being cautioned "to compensate plaintiff only for such injury and damage as may have been caused by reason of the negligence of defendant."
3. **Evidence:** NEGLIGENCE: QUESTION FOR JURY. Where there is evidence that under proper treatment the fractured bone should have united within six weeks, and that plaintiff was confined under defendant's treatment for a period of fourteen weeks, most of the time in great pain, it is proper to submit to the jury the question whether the pain and suffering were caused by defendant's negligence, and to authorize a recovery therefor.
4. **Verdict:** REMITTITUR. A verdict in such case for $1,140 upheld, when corrected by a remittitur of an item of interest erroneously allowed between the date of the injury and that of the judgment.

ERROR to the district court for Wayne county: JAMES F. BOYD, DISTRICT JUDGE. *Affirmed on condition that defendant file a remittitur in the sum of $109.20.*

Guy R. Wilbur and *F. A. Berry,* for plaintiff in error.

H. C. Brome and *A. H. Burnett, contra.*

LOBINGIER, C.

This is an action for malpractice. Plaintiff below was injured by a fall from a horse, resulting in a compound fracture of the tibia and fibula of his right leg about three inches above the ankle; and defendant below, a practicing physician and surgeon, was called to attend plaintiff at his home, where the accident occurred, about four miles from Wayne. The petition alleged that it was defendant's duty to place the fractured portions of the bone in apposition, and by the use of suitable splints and bandages retain and secure them so that they might adhere naturally; that defendant failed to do this, and negligently permitted the bones to overlap; that this negligent treatment was continued for a period of fourteen weeks, during which time plaintiff suffered great pain, and that he was finally compelled to seek other surgical aid, cause himself to be removed to a hospital in Sioux City, and there subject himself to painful and dangerous operations to avoid the effects of defendant's negligence. He further alleged that his injury was permanent, and asked for damages in the sum of $12,500.

The answer admitted the accident and the employment of defendant, but alleged:

"That he gave to the said plaintiff's injury proper, careful and skillful treatment and such treatment as the condition of the injury and the plaintiff would permit him to give. That the operation complained of and the bad results therefrom, were caused by plaintiff's own actions and commands; and not by want of any skill or suitable care on the part of the defendant."

On the trial defendant testified that he "couldn't get the bones in perfect apposition," and informed plaintiff that the bone was not "all right" and would not be un-

less an operation was performed, and that plaintiff said he would not permit an operation. Elsewhere defendant testified that he told plaintiff that "the bone might unite without an operation." Plaintiff, on the other hand, denies this, and testifies that his first knowledge that the bones were not in apposition was obtained after his removal to the hospital in Sioux City. He also relates a colloquy between himself and the defendant as follows: "I said, 'Doctor, I can see that bone move,' and he says: 'Your eyes are fooling you, there is good bony union there.'" Plaintiff is corroborated in his testimony by his mother, who was present when the defendant came to attend her son, and who also denies that defendant stated that the bones were not in perfect apposition, and says that she heard nothing of this until her son was taken to Sioux City. Evidence of competent surgeons was introduced to the effect that the proper permanent dressing for a fracture of this kind would be a plaster of Paris cast to hold the fractured parts in place and secure adhesion. Plaintiff's mother testified that defendant first applied a muslin bandage with a splint whittled out of a piece of board, and that later this was removed and the limb left without a bandage for several days, when a starch bandage was put on.

Certain special findings were submitted by the court. Those relating to the branch of the case just discussed being as follows:

"Did the defendant, at the time he first visited the plaintiff and treated him for the fracture of his leg, inform the plaintiff that he could not put the broken bones in perfect apposition and properly reduce the fracture without an operation to lay bare the bones at the point of the fracture? Answer Yes or No.

"Answer. No.

"Did the plaintiff oppose such an operation to such an extent that it was not performed? Answer Yes or No.

"Answer. No.

"Did the defendant from time to time as he visited the

plaintiff tell him that it might still be necessary to resort to such an operation before a bone union could be obtained and the fracture be properly cured? Answer Yes or No.

"Answer. No.

"Was the treatment of the plaintiff's injury the best that could have been given him with the facilities at hand, and that the plaintiff would allow and consent to at the time such treatment was given by the defendant? Answer Yes or No.

"Answer. No."

The jury also returned a general verdict for plaintiff in the sum of $1,140.

Plaintiff in error complains of the court's refusal to direct a verdict in his favor. But in view of the testimony just reviewed this was clearly not error. The finding of the jury as to the interrogatories quoted above is not only supported by evidence, but is in accord with what appears to be the weight of the evidence.

It is claimed that the court erred in admitting the deposition of Dr. Reder, a surgeon of St. Louis, who was one of those testifying that, in a case of this kind, "the dressing known as the plaster of Paris dressing is the most preferable one."

It is complained that the evidence of this witness was based on hypothetical questions relating to a simple fracture, and not to a compound fracture such as this is shown to be. It is true that in the first part of his testimony the witness is discussing simple fractures, but when he is asked what the treatment would be in the case of a compound fracture, he says: "It would differ in some respects, but not materially." He later proceeds to explain the treatment of a compound fracture such as has been described in this case. Moreover, we are unable to see that the evidence could have been prejudicial had the witness been speaking of a simple fracture all the time. His evidence was introduced for the purpose of showing that plaintiff in error's treatment was not adequate for an injury of so serious a character, and it could hardly have

prejudiced plaintiff in error had he confined his testimony to injuries less serious and requiring treatment less skillful.

Complaint is also made because the court admitted evidence as to the amount of defendant in error's hospital bill at Sioux City. It would be sufficient to say of this that it is not assigned in the petition in error. Moreover, this evidence was withdrawn from consideration, in determining the amount of damage, by the following instruction:

"If you find for the plaintiff in this case, you will, by your verdict, award plaintiff such damages as are claimed in the petition and you find have been proven by a preponderance of the evidence in this case; plaintiff is not entitled to recover the amount paid for the operation at Sioux City, or his hospital expenses at that place, or any other expense incurred by him, but this evidence and all other evidence relating to plaintiff's condition of health at the time defendant began to treat him, the length of time he was being treated by defendant or others, the pain and suffering, if any, the present condition of his limb; all are matters proper to be considered by you, and to be taken into account by you in making up your verdict in this case, bearing in mind, however, that you are to compensate plaintiff only for such injury and damage as may have been caused by reason of the negligence of defendant, and not charge defendant with any damage that may have been sustained by plaintiff had his injury been properly and skillfully treated."

It is urged, however, that this instruction is erroneous because it still permitted the jury to consider this evidence, though not to award damages thereon. But as we read the instruction it permits the jury to consider the evidence concerning the operation at Sioux City only so far as it relates to "plaintiff's condition of health at the time defendant began to treat him," and we see nothing prejudicial in this. The evidence discloses that defendant in error was in good health at the time the accident occurred and that later, in addition to his injury, he was

afflicted with pneumonia, and that he was treated for this also by plaintiff in error. The latter is certainly in no position to complain because the jurors were allowed to consider evidence which might have afforded a basis for the claim that the patient's removal to the hospital was due to other causes than the unskillful treatment of this injury. On the other hand, the jurors were cautioned against assuming any unproved connection between the injury and the general condition of the patient's health by the admonition to "compensate plaintiff only for such injury and damage as may have been caused by reason of the negligence of defendant." We do not think that this was open to the charge of assuming that negligence was established, especially in view of the fact that the court gave other instructions, at the request of plaintiff in error, that negligence must have been proven by the preponderance of the evidence. Nor do we think the instruction prejudicial because it permitted the jury to take into account the length of time that the patient was treated by others than plaintiff in error. The jury had a right to consider whether and what medical and surgical services on the part of others were made necessary in order to restore the patient to a sound physical condition after the alleged unskillful treatment by plaintiff in error.

Error is also assigned because of the following instruction:

"If you find, from a preponderance of the evidence and the instructions of the court, that the plaintiff is entitled to recover, then in fixing the amount of damages you should take into account the present and future loss of the plaintiff's leg, if any such loss has been proved, as well as compensation for the pain and suffering endured by the plaintiff in consequence of the want of skill, care, and diligence of the defendant, as shown by a preponderance of the evidence, and charged in the petition, if you find from a preponderance of the evidence such loss and suffering was caused by the negligence of the defendant in not properly caring for and treating such injury."

It is claimed that the record contains no evidence as to the "future loss" of defendant in error's limb. But he testified at the trial that his ankle was stiff and sore, and that he was even then unable to work. It is true that the jury afterward found, in response to a special interrogatory, that the stiffness of the ankle was not due to plaintiff in error's treatment. But when the court prepared its instructions it was proper to submit the question of future loss, safeguarded, as it was, by the phrase "if any such loss has been proven."

It is also urged that the instruction is faulty because no evidence was offered showing that the patient endured any special pain or suffering as a result of negligent treatment and beyond what would ordinarily follow from the injury. There was evidence, however, of extreme suffering on the part of defendant in error, and that the proper treatment was not employed. There was also evidence that the union of the fractured bones, where the subject is in previous good health, as defendant in error was shown to have been, should have taken place from the fourth to the sixth week, while here the patient was under plaintiff in error's treatment fourteen weeks, and testifies that he was in great pain until the time he was removed to the hospital. Such being the evidence, we think it was proper to submit to the jury, as was done by the instruction complained of, whether some, at least, of this pain and suffering was not the result of negligent and unskillful treatment, and we think the charge clearly confines the question to such consequent pain and suffering.

It is argued that the evidence discloses contributory negligence on the part of defendant in error in removing the starch bandage, and allowing himself to be carried a long distance to Sioux City in a wagon. This occurred, however, at the close of plaintiff in error's period of treatment, and was fully placed before the jury in an instruction which authorized a verdict for the physician, "unless you find from the evidence that prior to that time plaintiff had sustained injuries by reason of defendant's negligent

treatment of his injuries." As the question was thus fairly submitted, and the jury by its general verdict and the answer to the special interrogatory found that the treatment was negligent, we see no ground for reversal here.

It is finally contended that the verdict is excessive. It is less than one-tenth of the amount sued for, and while, as the jury elsewhere found that the stiffness of the patient's ankle was not caused by plaintiff in error's treatment, the verdict could not have been based on the idea of permanent injury, still, in view of the pain and suffering which defendant in error is shown to have endured and which the jury must have found resulted from negligent and unskillful treatment, we can not say that it is for an amount in excess of what it should have been. It is conceded, however, that the verdict includes an improper allowance of interest, awarded under an erroneous instruction. It is admitted by defendant in error that he is not entitled to interest from the date of injury, December 21, 1899. Interest should have been allowed only from the time when the amount due was fixed by litigation. *Wittenberg v. Mollyneaux*, 59 Neb. 203.

We do not think that this error calls for a reversal of the whole case, but recommend that it be corrected by ordering a remittitur of $109.20 (being the amount of the verdict less a sum which at seven per cent. from December 21, 1899, to May 17, 1901, would produce $1,140), and that as thus corrected the judgment stand affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, unless within thirty days plaintiff below file with the clerk of this court a remittitur of $109.20, in which case the judgment will be affirmed.

AFFIRMED ON CONDITION.

NELSON H. TUNNICLIFF, ADMINISTRATOR, ET AL. V. PHILIP FOX ET AL.

FILED APRIL 30, 1903. No. 12,482.

1. **Instruction:** "LEGAL SITUS" OF STOCK. An instruction will not be held erroneous on account of the use of a technical term therein without explanation, if the charge of the court, as a whole, sufficiently explains the sense in which such term is used and is to be understood by the jury.

2. **Foreign Executor:** DOMESTIC ANCILLARY ADMINISTRATOR: ACCOUNTING. An executor whose domicile is in Wisconsin, and who also qualifies as ancillary administrator in Nebraska, can not be charged as such ancillary administrator with property of the estate whose legal *situs* is in Wyoming, and for which he accounted to the court of Wisconsin.

3. **Instruction:** ASSUMPTION OF VITAL FACT IN ISSUE. The question whether the legal *situs* of certain personalty belonging to the estate was in Wyoming or in Nebraska having been, by proper instructions, submitted to the jury, another instruction which in substance charges that the executor, as ancillary executor in Nebraska, will not be liable to the estate for personal property whose legal *situs* is in Wyoming, will not be held bad on the ground that it assumes the existence of property in Wyoming.

4. **Trustee Appointed Executor:** ACCOUNTING AS ANCILLARY EXECUTOR. A Wisconsin executor, prior to the death of the testatrix, had been the latter's trustee, and afterwards became charged with certain personal property which he had managed as trustee. In filing his report as executor in the Wisconsin court, he included therein a schedule of property coming into his possession, and an account of his doings as such trustee. His report was approved, and he was duly discharged. Before such discharge, he qualified as ancillary executor in Nebraska, filing in the Nebraska court a copy of his report as executor theretofore filed in the Wisconsin court, which included his report as trustee. In a proceeding instituted in Nebraska, resisting the allowance of his final report as ancillary executor, *held*, that matters relative to the previous trusteeship of the executor were properly withdrawn from the jury, as having been adjudicated in the domiciliary court.

5. **Probate Court:** NOTICE: HEARING AT SUBSEQUENT TERM WITHOUT NOTICE. Where parties interested have been duly served with notice by a court having jurisdiction in a sister state to appear and show cause at a time stated why the final report of an executor should not be allowed and settled, such court having jurisdiction of person and subject matter, a properly authenticated

transcript of the proceedings had, will not be held inadmissible in the courts of this state because it shows that a hearing was had and a judgment rendered at a subsequent term of such court.

6. **Legacy to A if A Survives C; to B if C Survives A; B Not Entitled to Be Heard Upon Final Accounting of Executor.** Where, by the terms of a will, the minor son of the sole legatee thereunder would take the estate when he arrived at the age of twenty-five years, providing his father survived his mother, and it appears that at the time of the trial the parents of the minor were both living, *held*, that such minor child did not have such an interest in the estate as qualified him, under the provisions of section 283 of chapter 23, Compiled Statutes, to file objections to the allowance of the final report of the executor.

7. **Objections of B, a Minor, Stricken; A, Mother of B, Files Same Objections:** PARENT REPRESENTS MINOR: ERROR WITHOUT PREJUDICE. Where the objections of such minor are stricken, and the mother of the minor, who is the legatee, is permitted to and does file the same and other objections, upon which the cause is tried and determined, the decision being affirmed on error to this court, the rule of the trial court in striking such objections, if error, would be without prejudice.

8. **Executor:** INVENTORY: ACCOUNTING. An ancillary executor in Nebraska, at the instance of the probate judge, procured and filed with his report an inventory of certain household goods, which had been owned by the testatrix, but which had been given away by her before her death, and of which the executor never obtained possession; *held*, that the executor could not be charged with the value of such goods.

9. **Rent of Real Estate as a Charge Against Executor.** Under the law of this state, an executor can not be charged with the rent of real estate until it becomes necessary or proper to reduce such real estate to actual possession for the protection of the creditors of such estate, or until the executor is ordered so to do by the proper court.

10. **Instruction.** Instructions examined, and *held* properly given.

11. **Evidence.** Evidence examined, and *held* sufficient to sustain verdict and judgment.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, DISTRICT JUDGE. *Affirmed.*

George G. Bowman and *Brome & Burnett*, for plaintiffs in error.

William F. Vilas and *Montgomery & Hall, contra.*

KIRKPATRICK, C.

The questions requiring determination in this controversy arise from the following state of facts: Catherine M. Tusler died in Dane county, Wisconsin, March 22, 1894, leaving a last will and testament executed February 18, 1893. By the terms of this will Dr. Philip Fox was named as one of the executors, and he, on March 27, 1894, filed in the county court of Dane county a petition asking for the probate of this will. On May 1, 1894, acting on this petition, the county court of Dane county appointed Dr. Fox executor, issuing to him letters testamentary. At the time of her death, Mrs. Tusler possessed some real estate and personal property, the former consisting, among other properties, of a residence in Omaha, the latter consisting of a herd of horses and mules, and other personal effects connected with the management of the same, which some time prior to her death had been kept on a ranch in Cheyenne county, this state. Some time in 1892 Mrs. Tusler, then in Nebraska, seems to have had some difficulties in the management of her personal property, and she thereupon returned to Wisconsin, shortly afterwards entering into an agreement with Dr. Fox, whereby he became her trustee touching personal property then owned by her; Mrs. Tusler giving to Dr. Fox a bill of sale of such property, and a power of attorney authorizing its control and management. There is much evidence in the record touching upon what Dr. Fox did by virtue of this power of attorney and under his character as Mrs. Tusler's trustee during her lifetime; but in the view we take of the record and the law, it would serve no useful purpose to set out this evidence with any endeavor at detailed accuracy. On April 7, 1897, Dr. Fox filed in the county court of Dane county his first report as executor, giving therein a detailed account of his doings as executor, annexing a schedule showing property coming into his hands as executor and his manner of dealing therewith, the amounts received

therefor and disbursed therefrom. To this report was also appended an account of Dr. Fox's transactions in the capacity of Mrs. Tusler's trustee during her lifetime. In this report he accounts to the Dane county court for all property coming into his hands, or of which he had knowledge, whether in Wisconsin, Wyoming or Nebraska, evidently upon the assumption that the domiciliary court had jurisdiction of all property with which he, as Mrs. Tusler's executor, was charged. He filed subsequent reports to the same court on February 5, 1898, and July 8, 1898; his resignation as executor on July 8, 1898; and on December 22, 1898, a petition for settlement and allowance of his accounts and discharge as executor. On May 4, 1899, the county court of Dane county, after notice, approved the accounts of Dr. Fox, and discharged him as executor.

Dr. Fox, by proceedings instituted May 12, 1894, procured the issuance to him of ancillary letters of administration from the county court of Douglas county, to wit, on July 31, 1894. The real estate belonging to Mrs. Tusler's estate situated in Omaha, already referred to, consisted of a house and lot, in which Mrs. Tusler, prior to her death, had resided with her family. There is testimony to the effect that prior to her daughter's marriage, Mrs. Tusler made her daughter a present of the furniture in this residence. On January 23, 1895, the county court issued a warrant for an inventory and appraisement of the Omaha property. This was accordingly had, and gives in detail the articles of furniture and the value thereof, and a description of the premises on which the residence was located.

On May 20, 1895, Montgomery & Hall, a firm of attorneys, filed with the county court of Douglas county a claim against the estate for legal services rendered to Mrs. Tusler subsequent to October 23, 1892, amounting to $345.79. A claim for $2,595 was filed by G. D. Meiklejohn July 6, 1895. The allowance of these claims was resisted, but judgment was finally rendered by the county court, giving Mont-

gomery & Hall $345.79, and to Meiklejohn $2,000. On April 8, 1898, the executor's report theretofore filed in the Dane county court was by Dr. Fox filed in the Douglas county court, and on February 8, 1898, there was filed in the Douglas county court a subsequent report theretofore filed by Dr. Fox in Dane county.

An appeal had been prosecuted from the allowance of the Meiklejohn claim to the district court, but seems subsequently to have been dismissed, and it appears that Meiklejohn thereupon, and some time in April, 1899, becoming dissatisfied with the time consumed by the executor in making due payment of the sums owing to him, began to press the matter, filing a petition to require Dr. Fox to show cause why the claim should not be paid, and asking for the removal of Dr. Fox as executor, and for the appointment of an administrator *de bonis non*. On December 29, 1899, the county court, having under consideration the application of Paxton C. Stoddart, a minor, by his next friend, Bowman, to have the judgments theretofore rendered against the estate set aside, and also the petition of Meiklejohn for the removal of the executor, dismissed Paxton C. Stoddart's application, and found that there was sufficient property of the estate to pay the claim of Meiklejohn, and that the executor failed and refused to pay the same. It was adjudged that the resignation of Dr. Fox as executor, theretofore filed in the county court of Douglas county, be not accepted; that Fox be removed from his office, his letters revoked and twenty days be given him in which to file a full, complete and correct statement of his proceedings as executor of all property, wherever located; and that he and all other persons interested in the estate appear in the Douglas county court January 30, 1900, when an examination and settlement of the accounts of Dr. Fox would be had, and such further orders made as might appear proper. In the same judgment the county court of Douglas county adjudged, that letters of administration *de bonis non* with will annexed should be granted; Nelson H. Tunnicliff, plaintiff in error

herein, being appointed such administrator. He qualified, giving bond in the sum of $1,000, conditioned as required by law.

On January 16, 1900, Dr. Fox filed, in compliance with the order of the county court, a final report as executor, making reference to the reports theretofore filed by him in the Dane county court, and to his discharge as executor by that court, and in this report he claimed that the estate was indebted to him in the sum of about $800. To the allowance of this report objections were filed by Tunnicliff, administrator *de bonis non*, by Meiklejohn, Stella M. Stoddart and by Paxton C. Stoddart, a minor. On July 26, 1900, judgment was rendered by the county court in favor of the estate and against Dr. Fox for $39,881.47. Included in this judgment was an item of $2,600 for rent of Omaha real estate, and to that portion of the judgment Stella M. Stoddart and Paxton C. Stoddart each duly excepted. The cause was thereupon removed to the district court for Douglas county, and trial was had to the court and a jury, resulting in a verdict of $445.55, for Fox, and against Tunnicliff, administrator *de bonis non*. By order of court a remittitur of $445 was filed by Dr. Fox, and this proceeding is prosecuted from the judgment for 55 cents in favor of the former executor; Tunnicliff, Meiklejohn and Mrs. Stoddart being plaintiffs in error.

Many errors are assigned by each of plaintiffs in error, but all questions presented requiring consideration may be summarized under the following heads: (1) The court erred in giving instructions numbered 1, 4, 5 and 8. (2) The court erred in admitting in evidence the transcript of the judgment of the county court of Dane county, Wisconsin. (3) The court erred in striking from the files objections to the allowance of the report of executor Fox filed by Paxton C. Stoddart. (4) The verdict is contrary to and not sustained by the evidence.

The contention with respect to instruction No. 1 is that it is confusing and misleading, in that it does not define the meaning of the term "legal *situs*," used therein regard-

ing certain personal property with which Dr. Fox as executor was sought to be charged. In our view, it is not possible that the use of this term in the instruction, considering that instruction independently of others given, resulted in confusing or misleading the jury. The instruction is, however, preliminary in its nature, and must be considered in connection with those that follow. The term, "legal *situs*" occurs twice therein, and in the second instance in the following sentence, "whose *situs* was in Nebraska, and as herein instructed." The natural effect of this language was to direct attention to following instructions upon any question which might be left unexplained. Accordingly, by reference to instructions numbered 4, 5, 6 and 8, ample explanatory language of the term "legal *situs*" is found. We are of opinion that the first contention of plaintiffs in error must be overruled.

Instruction No. 4 is said to be objectionable because it charges, in substance, that Dr. Fox, as ancillary executor under appointment in Douglas county, was not chargeable with and was not required to answer to the Douglas county court for property which was not kept, and did not have its home for any length of time, in Nebraska, but which was kept in Wyoming, and was in Nebraska only temporarily, in transit, for sale or other purposes. The instruction seems to us applicable to the evidence in the case, and correctly to state the law. The theory of some of plaintiffs in error is that, because one C. C. Nelson, who was agent for Dr. Fox in the care of the horses, and who had charge of the horses and other ranch property in the state of Wyoming, resided for a portion of the time upon his homestead across the line within Nebraska, this would fix the *situs* of such property in Nebraska. We are not able to conceive how the fact of the agent's residence can be available in determining the legal *situs* of the personal property which was the subject of his agency. That Nelson was a citizen of Nebraska sheds little, if any, light upon the question whether the property of this estate was subject to the jurisdiction of our state courts. Nelson's testimony

is in the record, from which it appears that, during the entire period of Dr. Fox's Nebraska executorship, no part of the ranch property or stock was brought from Wyoming into Nebraska, except certain horses which were in transit, being *en route* to the St. Louis market. These horses were driven to the old ranch in Cheyenne county, this state, and from there to Sidney, where they were loaded on cars and shipped to the market. It was claimed that this was done because Sidney was a more desirable shipping place than any available point in Wyoming. A finding that these horses were in Nebraska only for purposes of transit is, we think, sufficiently sustained. The evidence discloses that the stock and ranch property were removed from Cheyenne county into Wyoming apparently for the reason that the herd laws of Nebraska were unfavorable to the care of a large number of horses and mules; that a substantial stock fence, not far from the Nebraska line, running north and south, had been constructed and maintained; and that horses and other stock grazing in Wyoming were thereby prevented from crossing the state line.

Mrs. Tusler resided in Dane county, Wisconsin, where also resided Dr. Fox, who seems to have been related to her as cousin. It was in the county court of this county that Dr. Fox qualified as executor under the terms of Mrs. Tusler's will. It was therefore proper for him to account to that court for property coming into his control or possession in Wyoming.

Under this state of the record, we can not see that the instruction under consideration was inapplicable to the issues, or incorrectly stated the law. Manifestly, Dr. Fox, as Nebraska executor, would not be chargeable with property whose legal *situs* was in Wyoming, and for which he had accounted to the court of his domiciliary executorship.

Instruction No. 5 is assailed on the ground that it assumes the existence of property having a legal *situs* in Wyoming. We are convinced that the instruction is not objectionable for this reason, if it is considered in con-

nection with others given, as it should be. The jury were by other instructions told to determine the question of the *situs* of the property. This instruction was supplementary, in that it laid down the rule as to property in Wyoming, and should be read as if it contained the words, "If you find that there was property in Wyoming." The rule that if instructions as a whole correctly submit the issues and state the law, error can not be predicated thereon, is in *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 13, said to be settled beyond the necessity of citing authority.

However, the record, in our view, contains testimony from which the inference is inevitable that some property did have its home in Wyoming. While the court in its charge ought not to assume the existence of a fact in issue, yet, if the evidence as to such fact is clear and decisive, an instruction assuming its existence will not warrant reversal. *Gran v. Houston,* 45 Neb. 813, 815.

The giving of instruction 8 is assigned as error on the ground that by it the report of Dr. Fox, as Mrs. Tusler's trustee, made to the Dane county court, was withdrawn from the jury. The record discloses that some years prior to Mrs. Tusler's death she gave to Dr. Fox a bill of sale of her personal property, together with a power of attorney, and that they executed an agreement by which Dr. Fox became her trustee in the management of her personal estate. Dr. Fox continued to act in this capacity until Mrs. Tusler's death. As already indicated, he thereupon qualified as executor, and in making his report as such to the county court of Dane county he included a report of his doings, and the property coming into his control and possession as trustee. This report, both as to his executorship and his trusteeship, was allowed and approved by the Dane county court. We do not think it can be seriously questioned that the Dane county court had exclusive jurisdiction of Dr. Fox as trustee, and that, as to matters adjudicated under the trusteeship, the Nebraska court would be without jurisdiction. It follows

that jurisdiction of the latter court would only attach to the Nebraska executorship of Dr. Fox.

Another assignment is that the court erred in admitting in evidence a transcript of the judgment of the Dane county court settling and allowing the reports of Dr. Fox as executor, and discharging him and his sureties from liability. The basis of this contention is that the order of the Dane county court fixes the time for the hearing of the application of the executor for a final settlement of his accounts and his discharge on the first Tuesday in February, 1899, or as soon thereafter as the matter could be heard, whereas the judgment approving his accounts and discharging him was not entered until the May, 1899, term of that court. It can hardly be said that the county court of Dane county, having jurisdiction of person and subject matter, and proper notice being given, lost jurisdiction by reason of the fact that the cause seems not to have been reached for trial and determination until some two months later than the time fixed in the notice. Parties interested, being served with notice to appear, would doubtless be required to take notice of any subsequent action of the court. There would be more point to this contention if it appeared that judgment was rendered prior to the date fixed by the notice for hearing.

It is not made to appear what the law of Wisconsin is relative to notice of the final settlement of accounts of an executor or administrator. The law in that regard ordinarily would be presumed to be the same as in our own state. But as a well defined exception to this general rule, it has been many times held that courts of sister states will be presumed to possess the powers which they appear to have exercised, unless the contrary is made to appear, and that the modes of procedure pursued by them, although differing from the practice established in this state, are authorized by the state in which they act. *Council Bluffs Savings Bank v. Griswold,* 50 Neb. 753.

It is contended that the trial court erred in striking from

the files certain objections filed by Paxton C. Stoddart, a minor, to the final report of the executor. Mrs. Tusler's will, among other things, provided that as soon as it could conveniently be done without unnecessary loss, her real and personal estate should be converted into money by her executors; that during the life of Stella M. Stoddart, her daughter, the latter should be paid semi-annually the sum of $900; that on the death of her daughter's husband the entire estate should vest in her absolutely; that if Stella M. Stoddart, having issue, should die before her husband, the proceeds of the estate should be devoted to the education of such issue, and upon their arrival at the age of twenty-five years, it should be divided equally among them; that if Mrs. Stoddart died without issue, the estate should be divided equally between testatrix's brothers and sisters. Paxton C. Stoddart is the minor son of Stella M. Stoddart, and at the time of the trial in the district court was about eight years of age. Section 285, chapter 23, Compiled Statutes (Annotated Statutes, 5150), provides that "every executor or administrator failing to render his account within one year, as required by section two hundred and eighty-two of this chapter, may be cited by such court to render such account upon the application, under oath, of any party interested in the estate." The question accordingly is whether Paxton C. Stoddart has such an interest in the estate as entitles him to be heard on objections to the settlement of the executor's accounts. It will be noticed from the provisions of the will referred to that the interest of Paxton C. Stoddart is, at most, a remote contingency. It is only in the event that the mother should die before her husband that any interest in his favor arises. The provision under which Paxton C. must claim, if at all, is in the language following:

"In case my beloved daughter shall die leaving issue before receiving my estate from said trustees, as hereinbefore for her provided, I will, devise and bequeath all of my said estate to my said executors, to have and to hold the

same in trust for such issue of my said daughter, to be divided between and among such issue share and share alike, the share of each child to be paid to such child when he or she shall arrive at the age of twenty-five years, and in the event of but one child then surviving, such child to have and receive of said trustees all of said estate upon arriving at the age of twenty-five years."

We are of opinion that under this will, Paxton C. Stoddart has not such an interest as is contemplated in the section of the statute cited. *Keene's Appeal,* 60 Pa. St. 504.

But if the law were otherwise, we think the action of the trial court in striking these objections would nevertheless be without prejudice. After this action was taken, the court permitted the mother of Paxton C., Stella M. Stoddart, the legatee under the will, to file objections. This was done, presenting to the court all of the objections of Paxton C. Stoddart, and in addition many others.

Again, section 285, chapter 23, Compiled Statutes (Annotated Statutes, 5150), provides:

"When a new administrator shall be appointed in the place of any former executor or administrator of the same estate, the probate court shall have power, upon the application of such new administrator, to cite such former executor or administrator to render an account of his administration, and such order and decree thereupon as may be proper shall be made by such court, requiring such former executor or administrator to turn over and deliver to such new administrator any estate or effects remaining in the hands of such former executor or administrator unadministered."

In the case at bar, Tunnicliff was appointed administrator *de bonis non,* with will annexed, before Dr. Fox filed his final report; and Tunnicliff duly filed objections to the allowance of such report. It will thus be seen that the identical objections of Paxton C. Stoddart, in addition to others, were presented for consideration and determination, being presented both by Mrs. Stoddart, the mother and natural guardian of the minor, and by the

newly appointed administrator as well. The trial resulted in a decision favorable to Dr. Fox as to the executorship in Nebraska. That decision being herein affirmed, it must be held that the ruling of the trial court striking the objections of Paxton C. Stoddart from the files was without prejudice.

The final contention is that the verdict and judgment are contrary to and not supported by the evidence. This contention is based upon the following grounds: (1) that Dr. Fox should have been charged with the rents of the Omaha real estate from the date of his appointment as executor rather than from the 20th day of May, 1895, when the first claim against the estate was filed; (2) that Dr. Fox should be charged with the value of the household goods in the residence at Omaha, which the testimony shows Mrs. Tusler, during her lifetime, gave to her daughter; and that he should be charged with these goods not because he ever took possession of them, the evidence showing without dispute that he never did, but because, at the request of the county court of Douglas county, he obtained an inventory of the goods and filed it with his report; (3) that Dr. Fox was credited with the payment of certain expenses on account of the ancillary administration, when such payments were in fact made from funds of the estate in his hands, and for the payment of which he had already received credit in the settlement had in the Dane county court.

As to the contention relative to the household goods, it is clearly established by the record that they were presented to Mrs. Stoddart by her mother before the latter's death, some time prior to the occasion of Mrs. Stoddart's marriage, when Mrs. Tusler was preparing to leave Omaha to make her home in Wisconsin. These household goods were never the property of the estate. We can not sanction the proposition that the executor should, under this state of facts, be charged with the value of these goods, solely on the ground that an inventory thereof was embraced in his report under the circumstances indicated.

The trial court instructed the jury that the executor should be charged with the rent of the property from May 20, 1895, the date of the filing of the first claim. Plaintiffs in error say that he should have been charged therewith from July 31, 1894, the date of his appointment as executor in Nebraska. Dr. Fox never obtained possession of this property, and never collected any rent therefrom. Mrs. Stoddart was living in this property when her mother died, and so far as this record discloses, has lived there continuously since, paying no rent. No serious contention is made in briefs that Dr. Fox should have been charged with rent prior to May 20, 1895. We think that if there was error in this instruction, it was favorable to plaintiffs in error. Under our law, the real estate of a decedent belongs to the heirs at law, subject to the claims of creditors of the estate. There is no legal obligation upon the executor to take possession of the real estate until such action may be necessary to protect creditors; at all events not until claims are filed, or until directed so to do by the probate court.

In *Lewon v. Heath,* 53 Neb. 707, 711, this court said:

"If the title passes to and vests in the heirs, as it most certainly does, then the possessory right goes with it, except to the extent it is placed by law in the administrator, which is not exclusively or absolutely, but optionally with him, and for the purposes indicated by statute, and for none other."

And further, in the same case, the court quoted with approval from *Jones v. Billstein,* 28 Wis. 221, 228, as follows:

"As we understand this statute, it gives the personal representative the power to reduce the real estate to his actual possession should he think proper, or should the probate court direct him so to do, but it does not imperatively require him to take possession thereof, and until he does so, the common law right of the heir to the possession remains unimpaired." *Dundas v. Carson,* 27 Neb. 634; *Cooley v. Jansen,* 54 Neb. 33.

The fact that Mrs. Tusler died testate, and that under the will the executor was directed, as soon as it could be done without loss, to sell the real estate and convert it into money and reinvest it, would not change the conclusion reached. Thus it appears that plaintiffs in error were not prejudiced by failure of the court to direct the jury to charge the executor with rents for a longer period than was actually done. A careful examination of the testimony under the instructions given has satisfied us that the jury would have been justified in returning a larger verdict in favor of the executor, charging him with rents as directed, and crediting him with such payments as the evidence authorized. It will serve no good purpose to set out the testimony upon this point.

Finally, as to the insufficiency of the evidence, it is claimed that a large part of the expenditures of the executor concerning his administration in Nebraska had been credited to him in his final settlement in Dane county, thus giving him double credit. This question seems not to have been presented in the court below. It will serve no good purpose to attempt to set out these accounts in detail, and it will not be done. From a careful examination of the evidence we are led to conclude that if the jury gave Dr. Fox credit for all the testimony showed he paid out in and about the ancillary administration, and charged him with only what he received on that account, a verdict would find support in an amount something more in favor of Dr. Fox than the amount for which judgment was entered after remittitur was filed. For the purpose of supporting the judgment, we are bound to assume that the jury allowed Dr. Fox all he was entitled to under the evidence, and viewed in this light, it is shown that the evidence supports the verdict.

It not having been made affirmatively to appear that there is error in the proceedings had, it is recommended that the judgment of the district court be affirmed.

HASTINGS and LOBINGIER, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. GEORGE HOLMES, JR., ADMINISTRATOR OF THE ESTATE OF JOHN E. OAKLEAF, DECEASED.

FILED APRIL 30, 1903. No. 12,352.

1. **Action Under Lord Campbell's Act:** EVIDENCE. In an action by an administrator for the benefit of the widow and children under section 2, chapter 21, Compiled Statutes, evidence as to the amount of property left by the deceased is inadmissible. *Chicago, R. I. & P. R. Co. v. Hambel*, 2 Neb. (Unof.) 607, followed.
2. **Evidence Admissible for One Purpose.** Where evidence admissible for the one purpose is not relevant as to other subjects or for other purposes, an instruction limiting its effect must be asked; but where evidence received is not admissible for any purpose, no such request is necessary.
3. **Expert Witness:** ULTIMATE FACT. It is error to permit an expert witness to give his opinion on the ultimate fact to be determined by the jury.
4. ———: ERROR WITHOUT PREJUDICE. Where the facts upon which such opinion is based are stated, and the conclusion is one which must necessarily be drawn from such facts, error in permitting an opinion upon the ultimate fact to be determined by the jury to be given in evidence is without prejudice.
5. **Witness:** CONCLUSION. But where the witness saw the occurrence with reference to which he testifies, and differences of opinion as to the conclusion to be drawn may reasonably arise, he should be required to state facts, rather than give his conclusion upon the ultimate issue.

ERROR to the district court for Douglas county: WILLIAM W. KEYSOR, DISTRICT JUDGE. *Reversed.*

M. A. Low, W. F. Evans, James M. Woolworth and *William D. McHugh*, for plaintiff in error.

George W. Cooper and *Martin Neilan, contra.*

POUND, C.

The accident out of which this case arises occurred upon a track in a portion of the yards of the Union Pacific Railroad Company in Omaha, used jointly for switching purposes by the Union Pacific Company and the Chicago, Rock Island & Pacific Railway Company, the defendant. The particular track is known as track No. 1, and is used for cars which are distributed to other tracks and made up into trains. Oakleaf, the deceased, whose administrator is plaintiff in this case, was a switchman employed by the Union Pacific Company. At the time of the accident he was assisting in making up a train upon the east end of said track No. 1. This track slopes from west to east to such an extent that a car can hardly stand without having the brakes set. The Union Pacific Company had twenty cars, nearly all of them loaded, at the east end of the track, and the brakes were set only upon one car, which was the extreme car at the east end. The switch engine was at the east end of this string of cars and was endeavoring to couple the last car of the twenty to the others and to take the cars east upon the track. It made several attempts to couple the one car to the other nineteen, but upon each occasion the coupling, which was automatic, failed to work. Oakleaf went in between the one car and the remaining nineteen, arranged the coupling, and signaled to the engineer to back up. As the coupler failed to work, he went in again, in the endeavor to repair or adjust the coupling, and, while there, the nineteen other cars moved down upon the sloping track and caught him between the couplers of the two cars, killing him immediately.

The theory of plaintiff is that these cars came down and caught Oakleaf between the couplings by reason of being struck or run into at the west end by a Rock Island train, which was engaged in switching at the west end of said track No. 1, and that there was negligence on the part of the Rock Island Company in not stationing some one so

as to warn the employees of the Union Pacific Company, and in not taking proper precautions to prevent their cars from pushing into those switching at the other end of the track.

The defendant's theory was that as the nineteen cars were standing on a sloping track, where a single car could scarcely stand without brakes being set, and as they were heavily loaded and the brakes were not set, the repeated jars, as the engine and single car pushed into them from the east in the endeavor to make a coupling, were sufficient to put them in motion down the incline and to account for the accident. The defendant contended also that the deceased was guilty of contributory negligence in getting between the iron drawheads, with his back to the nineteen cars standing without brakes set, upon the sloping track, in such a position that he could not see them as they came upon him, whereas, if he had stood upon the side of the drawhead in front of it, he need not have been injured. The jury rendered a verdict for the plaintiff, and the judgment rendered pursuant thereto is before us on petition in error.

The principal errors assigned are based upon rulings in the introduction of evidence. In order to pass upon these rulings intelligently, some further statement of the evidence is requisite. No one testifies directly that the Rock Island cars struck or came in contact with the nineteen cars of the Union Pacific Company, but several witnesses stated it as their opinion that such was the fact. One Potter, a switchman of the Union Pacific Company, introduced as a witness for the plaintiff, who saw more of the accident than any of the other witnesses, testifies that the nineteen cars came down gradually, with no jar and no noise, and moved so gradually and quietly that Oakleaf had no warning. It is manifest that this evidence is entirely compatible with the theory of the defendant that the nineteen cars were set in motion by the jars of repeated attempts at coupling and the fact that they were standing upon a steep incline with no brakes set. The other wit-

nesses who testified speak with reference to the jar produced by these cars coming down against the one car and the engine attached thereto. Their testimony is that there was a considerable jar and that it came from the west; but it is clear, in the light of Potter's testimony, that the defendant's theory affords a complete and adequate explanation of the occurrence, and that a verdict for the plaintiff must rest on inference and comparative probabilities only.

As has been stated, the action is brought by an administrator on behalf of the widow and children to recover damages for alleged negligence in causing the death of the intestate. The widow was asked this question: "What property, if any, did Mr. Oakleaf have at the time of his death?" Due objections were interposed, but the court overruled them and permitted the witness to answer, "Not any, at the time of his death." This ruling was excepted to and is assigned as error. We think the case in this respect is the converse of and is governed by *Chicago, R. I. & P. R. Co. v. Hambel,* 2 Neb. (Unof.) 607. In the *Hambel* case the defendant sought to prove that the deceased left a large and valuable estate. Here the plaintiff was allowed to show that he left none. As the court said, quoting an eminent authority, in the *Hambel* case:

"A dollar lost, whether by poor man or rich man, is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount, must, when lost, be compensated to the same extent, whether the loser be rich or poor."

The plaintiff showed in evidence how much the deceased earned, what portion of his earnings he devoted to his family, and his expectation of life. Also, his character and disposition as to industry and frugality were shown. These facts determined the damage which his wife and children had sustained. Whether he left them in wealth or in poverty had no bearing upon the case. Counsel argue that the evidence was admissible to show whether he was saving and frugal and had accumulated an estate. But it

does not go to that point. If he left property, it did not follow that he had earned or saved it. He might have derived it from gift or by inheritance. Moreover, the evident purpose was, not to ascertain whether he had accumulated property, but to show that his widow and children were left destitute. The testimony in question obviously might have been prejudicial. Having been shown in evidence, the destitution of the beneficiaries in the action was a matter to be urged by counsel in argument and considered by the jury. But there was no issue in the case upon which that fact was relevant, and it could not fail to excite sympathy and prevent a dispassionate review of the questions of fact, "uninfluenced by sentimental considerations." *Robertson v. Brown,* 56 Neb. 390, 391. We have seen that there was a very close and very grave question; whether the defendant was in any manner responsible for the death of plaintiff's intestate, and whether the deceased was not guilty of contributory negligence. In view of all the evidence and the doubts which it suggests as to the defendant's liability, we can not say that the error was without prejudice. Counsel suggests that an instruction should have been requested. Where evidence admissible for one purpose is not relevant as to other subjects or for other purposes, an instruction limiting its effect must be asked. *Carleton v. State,* 43 Neb. 373, 396, 404. Where it is not admissible for any purpose, no request is necessary.

Counsel for the plaintiff asked one of his witnesses, a switchman in the employ of the Union Pacific Company, who had seen the accident, this question: "When Mr. Oakleaf, in the performance of his duty, at that time and place, went in there to do this work, was it necessary for him to do what he did do?" Objection was made to this question; it was overruled; and the witness was permitted to answer in the affirmative. We think this ruling was erroneous. It is error to permit an expert to give his opinion on the ultimate fact to be determined by the jury. *Read v. Valley Land & Cattle Co.,* 66 Neb. 423. The very question which the jury were to decide was, whether it was necessary for

Oakleaf to stand in front of the drawhead, with his back to the nineteen cars, or, whether, as a prudent man, he should not have stood upon the side in such position that he would not be crushed between the drawheads in case the cars came together. The witness Potter testifies that in order to see what was the matter with the coupling, which was failing to work, it was not necessary for Oakleaf to get in front of the drawhead. Testimony to this effect was scarcely needed, because it must be apparent to any reasonable mind that the coupling could be examined as easily by standing at the side and looking at it, as by getting squarely in front of it, and between the projecting couplers of the cars. If the testimony in question is regarded as that of an expert, it is clearly incompetent, under the rule announced in *Read v. Valley Land & Cattle Co. supra.* Whether or not it is intended as expert evidence, it is open to the further objection that the witness in question saw the accident, or at least had personal knowledge of the circumstances under which it took place, and was able to state fully the situation and circumstances from which the jury could judge whether Oakleaf's course was necessary and prudent. He should have been required to state the facts from which his opinion was derived, so long as it was practicable to place those facts before the jury, and to state what would be a prudent and careful course in doing what Oakleaf had to do. The jurors would then have been left to form their own opinion from such facts and from the evidence as to what would be a proper way of doing the work. It is contended on behalf of the plaintiff that the error was not prejudicial, because the conclusion was one which the jurors must have drawn necessarily from the facts if the witness had not given his opinion. We can not agree. It seems evident to us that there was no necessity for the plaintiff to put himself in such situation as he did and, as has been seen, one of plaintiff's witnesses so testifies. Counsel urges further that the witness whose opinion was allowed to be given had previously stated all the circumstances upon which his opinion is based. Upon examina-

tion of his evidence, we find that he stated the general circumstances of the accident, but nowhere does he state the nature and construction of the coupling, or other facts connected with it indicating any necessity for the plaintiff to examine it as he did.

We therefore recommend that the judgment be reversed, and the cause remanded for a new trial.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

GEORGE GATZEMEYER V. DOVEY PETERSON.

FILED APRIL 30, 1903. No. 12,778.

1. **Statute Constitutional.** Chapter 37, Compiled Statutes, *held* constitutional and valid.

2. **Continuance.** If sufficient time is given from denial of a motion for a continuance, sought in order to obtain a deposition, to enable it to be taken under ordinary circumstances, and from the showing made upon the motion there is no ground to believe it can be procured in any reasonable time if not in that allowed, it is not error to deny the continuance.

3. **Cross-Examination:** DISCRETION OF THE COURT. The trial court has a certain discretion in determining the limits of cross-examination, and reasonable limitation with respect to matters not necessarily material, in the exercise of such discretion, is not erroneous.

4. **Bastardy:** ADMISSION. An offer by the defendant in bastardy proceedings to take the prosecutrix away to a physician for the purpose of getting rid of the child is not an offer of compromise, and may be shown as an admission.

5. **Instructions:** VERDICT. Errors in giving and refusing instructions are not prejudicial and need not be reviewed where the verdict rendered is required by the evidence.

6. ———: TESTIMONY OF PROSECUTRIX. An instruction that the unsupported testimony of the prosecutrix should be received with cau-

tion and weighed carefully, on the theory that she should be regarded as an accomplice, is properly refused; her interest in the event of the case may be considered, but the instruction should go no further.

7. **Amount of Award:** DISCRETION OF THE COURT. The amount which a defendant in bastardy proceedings shall be adjudged to pay is largely in the discretion of the district court, and its award will not be disturbed unless manifestly excessive.

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

Ira Thomas and *W. W. Sinclair,* for plaintiff in error.

O. C. Anderson and *Harry F. Keefe, contra.*

POUND, C.

Although the numerous points urged upon our attention present nothing which has not been passed upon in this court more than once in like cases, the diligence and ingenuity of counsel in endeavoring to give some of them new phases, or put them in new lights, require us to pass upon them in some detail. The points going to the merits relate to the constitutionality of the bastardy law, under which this proceeding is prosecuted, and the sufficiency of the evidence to support the verdict. Every possible objection to the constitutionality of the statute has been presented in prior cases. *Ex parte Donahoe,* 24 Neb. 66; *Stoppert v. Nierle,* 45 Neb. 105. See, also, *In re Walker,* 61 Neb. 803. Moreover, the construction of the statute upon which counsel base their argument in large part was rejected in *State v. McBride,* 64 Neb. 547. As to the sufficiency of the evidence, we need only say that to our minds the verdict is not only supported by the evidence, but is clearly right. Bearing in mind that the defendant did not see fit to testify, which is a matter proper to be considered in such cases (*Ingram v. State,* 24 Neb. 33), we do not see how any other conclusion could have been reached.

Most of the other errors assigned, have to do with mat-

ters of procedure and rulings at the trial. At the opening of the term of court the defendant moved for a continuance in order to enable him to procure the testimony of a witness. It appears that he had made an attempt to secure the deposition of this witness and had not succeeded, owing to failure of the witness to attend at a time and place agreed on for that purpose. Defendant testified that he was informed the witness had left for some temporary purpose, and that his exact whereabouts could not be learned. The motion was overruled on September 12, and the cause was thereupon passed to the foot of the docket, and not called for trial until September 24. If the absence was temporary only, this postponement ought to have enabled the defendant to locate the witness and take his deposition, since he was known to be somewhere in a particular portion of a neighboring state. If he could not be reached in that time, there was very little likelihood that his testimony could be had at all in any reasonable time, and the affidavit filed shows no reason for thinking the contrary. Under such circumstances, it was not error to deny the continuance. *McClelland v. Scroggin,* 48 Neb. 141.

Several rulings upon the admission of evidence are complained of. The prosecutrix testified, and it was not denied, that she and the defendant were engaged to be married. It appears from her testimony and that of other witnesses that, except while the defendant was away at school, he had been calling upon her, taking her out riding, and going with her to dances and other entertainments, with more or less regularity during two years. Her relations with him for some four months of this period are testified to positively, circumstantially and repeatedly by the prosecutrix, and not denied by the defendant. The latter, relying on the expert evidence of a physician as to the probable date of conception, attempted to show an alibi as to certain particular occasions, without taking the stand himself. It is admitted, substantially, that the statements of the prosecutrix are true, except as to these particular occasions. On cross-examination she was asked if she

was not "keeping company" with another man also at that time. We can not say that the court committed prejudicial error in excluding this and like questions. The defendant was allowed to show fully all the facts as to her conduct with other men, and seems to have established everything that was to be shown. So long as the existence of improper relations between the prosecutrix and defendant is clearly established, and the evidence as to her conduct with others goes no further than to suggest some possible grounds for suspicion, we do not think the case comes within the facts of *Burris v. Court,* 34 Neb. 187. There the trial court excluded evidence of other witnesses tending strongly to show improper relations with third parties. Here it went no further than to limit cross-examination as to a point not necessarily material. This was a proper exercise of the discretion which exists in such cases. *Missouri P. R. Co. v. Fox,* 60 Neb. 531; *Stough v. Ogden,* 49 Neb. 291.

Other assignments of error relate to the admission of evidence as to an alleged offer to compromise. If the circumstances testified to amounted fairly to an attempt at compromise, counsel's points might be well taken. But we think they must be considered as admissions on the part of the defendant, and were provable as such. In *Robb v. Hewitt,* 39 Neb. 217, this court held that "an offer made by the defendant to the father of the prosecutrix to contribute money for the purpose of 'sending the prosecutrix away' is not an offer to compromise, and is admissible in evidence." In the case at bar it is shown that the defendant, when the prosecutrix became pregnant, and he was asked to marry her, pursuant to his promise, offered to take her to a physician in Omaha for the purpose of "getting rid" of the child. The evidence was received properly.

A large number of errors are assigned upon the charge of the court and its rulings on requests for instruction. We are of opinion that we need not consider them in view of the conclusion we have reached upon the evidence. *Jeffres v. Cashman,* 42 Neb. 594. But we have examined the instructions given and refused, and think the objections

urged are hypercritical, and that nothing prejudicial has been shown. Among the requests refused was one based upon the theory that the prosecutrix was to be regarded as an accomplice in weighing her evidence, and that her statements were to be received with caution, and weighed carefully. We know of no warrant for such an instruction. Her unsupported evidence would have sustained a conviction. *Olson v. Peterson,* 33 Neb. 358, 360; *Robb v. Hewitt,* 39 Neb. 217. An instruction that her interest in the event of the case might be considered was all that the defendant was entitled to.

Finally, it is urged that the award made by the court is excessive. The amount of the judgment in such cases is largely in the discretion of the district court, and will not be reduced unless such discretion has been manifestly abused. *Clark v. Carey,* 41 Neb. 780; *Wurdeman v. Schultz,* 54 Neb. 404. That court has a clear advantage over this one in that it sees the parties, and is able to form a better opinion as to their circumstances, and the expense of suitably maintaining the child in view thereof. In the case at bar, we see no reason to think that any wrong has been done.

It is therefore recommended that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

INDEX.

Abatement. See CRIMINAL LAW AND PROCEDURE, 14-17.

Action. See BANKRUPTCY, 1-3. CONTRACTS, 4. EVIDENCE, 6. INJUNCTION. INSURANCE, 2, 3. JUDGMENT, 3. QUO WARRANTO. SHERIFFS.

1. Under the provisions of section 29 of the Code of Civil Procedure, a joint obligee in an appeal bond may maintain an action thereon in his own name without joining the other joint obligee, where he alleges and proves that he has purchased the interest of his joint obligee, is the owner of the bond, and the real party in interest therein. *Harker v. Burbank* 85
2. An action for money had and received will lie, where the defendant has obtained possession of money which in equity and good conscience he ought to refund. *McCormick Harvesting Machine Co. v. Stires* 432

Adverse Possession. See HUSBAND AND WIFE. TENANT IN COMMON, 3.

Affidavits. See APPEAL AND ERROR, 1. CONTINUANCE, 1. PROCESS.

Agency. See CONSTITUTIONAL LAW, 1, 2. EVIDENCE, 4. PRINCIPAL AND AGENT.

Appeal and Error. See CRIMINAL LAW AND PROCEDURE. EQUITY, 4. EVIDENCE. EXECUTORS AND ADMINISTRATORS, 1, 2, 5. FRAUDULENT CONVEYANCES, 4. INSTRUCTIONS. INSURANCE, 3, 4. INTOXICATING LIQUORS. JUDGMENT, 2. JURISDICTION. MALICIOUS PROSECUTION, 2, 3. NEW TRIAL, 3. PLEADING AND PRACTICE, 4. SET-OFF, 2. TRIAL.

Bill of Exceptions.

1. Affidavits filed in support of motions in the district court will not be examined by this court, unless properly incorporated in a bill of exceptions. *Gutterson v. Meyer* 767
2. Where error affirmatively appears on the face of the record proper, a bill of exceptions is unnecessary to obtain a review of such errors. *Herman v. Beck* 566

Findings.

3. Where there is a conflict of evidence on the material facts, and the finding of the trial court is sustained by sufficient evidence, such finding will not be set aside by a court of review. *Saxton v. Harrington* 446

Appeal and Error—*Continued.*

4. In passing on findings of fact upon appeal, the reviewing court should go over all the evidence and reach its own conclusion thereon, giving such weight to the determination of the trial court as to credibility of witnesses and its finding on conflicting evidence as, under all the circumstances of the case, the nature of the evidence before the trial court, and that court's special opportunities, if any, for reaching a correct solution, such finding may be entitled to. *Faulkner v. Simms*..... 299
5. In ordinary cases, where the evidence is entirely oral, and the trial court may be presumed to have had a general local knowledge of the parties, the witnesses and the subjects of controversy, the finding of the trial court is often entitled to almost decisive weight. *Faulkner v. Simms*..... 299
6. A finding on conflicting evidence in such cases will be adhered to unless clearly wrong; but, if clearly wrong, it will be set aside, notwithstanding there may be some competent evidence in support thereof. *Seymour v. Street*, 5 Neb. 85, approved. *Faulkner v. Simms*..... 299
7. *Dicta* in prior opinions of this court with respect to review of findings of fact explained and qualified. *Faulkner v. Simms* 299
8. The statements that the reviewing court will not "weigh conflicting evidence," that it "will not review findings on conflicting evidence," and that "findings on conflicting evidence are conclusive," as announced *obiter* in several prior decisions, disapproved. *Faulkner v. Simms*..... 299
9. Where a finding is based largely upon depositions or written testimony, as to which the trial judge has no special advantage over the reviewing court, the rule that his findings will be adhered to unless clearly wrong does not apply with the same force. *Faulkner v. Simms*..... 299
10. But in such case, if the oral testimony is evidently the basis of the finding, or the written testimony relates to matters as to which the trial judge is better able to reach a satisfactory conclusion than the reviewing court, the rule may be applied. *Male v. Dahlgrin*, 66 Neb. 524; *Waldron v. First Nat. Bank of Greenwood*, 60 Neb. 245. *Faulkner v. Simms*... 299
11. If the evidence before the trial court is entirely written and relates to matters as to which the trial judge is in no better position to reach a correct solution than this court, the rule has no application, and this court should be governed by its own conclusion as to the weight of the evidence. *Faulkner v. Simms*..... 299

Harmless Error.

12. Error in sustaining a demurrer to an allegation of taxes

Appeal and Error—*Continued.*

paid, made by way of cross-demand, is without prejudice where plaintiff subsequently remits from the amount of her recovery the full alleged amount of such taxes. *White v. Whitney* 739

13. Error in sustaining a demurrer to a counter-claim for improvements in an action for rents and profits as well as for possession of land, is without prejudice where it appears from the record that all such improvements were permitted to be shown to the jury under the name of necessary repairs, and the jury were instructed to allow a reduction of damages in the amount of all necessary repairs. *White v. Whitney* 739

14. The fact that the jury were told that an "equitable right" would be no defense against a "legal right" of the plaintiff, if it was found that she had one, is not prejudicial error where no equitable right to the premises is either pleaded or offered to be proved. *White v. Whitney*..... 739

Instructions.

15. A judgment will not be reversed on account of the number of instructions given to the jury by the trial court, unless it clearly appears that the party complaining is prejudiced thereby. *Omaha St. R. Co. v. Boesen*..... 437

16. The giving of an instruction which places the burden of proof to establish some of the facts put in issue by the pleadings on the wrong party, is reversible error. *Omaha St. R. Co. v. Boesen*..... 437

17. It is error to give the jury instructions which contain inconsistent and conflicting paragraphs relating to the burden of proof. *Farmers' Bank v. Harshman*, 33 Neb. 445, approved and followed. *Omaha St. R. Co. v. Boesen*..... 437

18. Errors in giving and refusing instructions are not prejudicial and need not be reviewed, where the verdict rendered is required by the evidence. *Gatzemeyer v. Peterson*..... 832

19. An instruction, that notice of facts sufficient to lead a prudent man to the conclusion that a debtor "could not meet his obligations as they matured in the ordinary course of business" is notice of the insolvency of such debtor, within the meaning of the bankruptcy act, is erroneous. *Hackney v. Raymond Bros. Clarke Co*..... 624

20. An instruction which tells the jury that they shall allow "rental value" of the premises as "damages for withholding possession" is not prejudicial error, although the petition of plaintiff makes no claim for any damage aside from rents, issues and profits. *White v. Whitney*..... 739

21. Instruction examined, and *held* not erroneous. *Modern Brotherhood of America v. Cummings*..... 256

Appeal and Error—*Continued.*

22. It is error to submit to the jury as an issue of fact a question material to the case, regarding which there is no evidence to support a finding. *Parker v. Wells*..... 647

Issues.

23. Where, in an appeal from the judgment of the county court, in a term case, the petition filed in the district court is assailed on the ground that it tenders other and different issues than those tendered in the court below, the question of fact, raised by such motion, is determinable solely by a comparison of the petition filed in the district court with that upon which the cause was submitted to the county court. *Coleman v. Spearman, Snodgrass & Co*..... 28

24. The rule requiring cases on appeal to be tried on the same issues as those upon which they were tried in the court below, does not require that the petition filed in the appellate court be in the precise language of that filed in the lower court, but is satisfied if the ultimate facts relied upon for a recovery are substantially the same, and provable by evidence of the same character. *Coleman v. Spearman, Snodgrass & Co*..... 28

Pleading and Practice.

25. In an equity cause brought to the supreme court on appeal, the ruling of the district court on a motion to strike an answer from the files can not be considered. *Frenzer v. Phillips*, 57 Neb. 229. *Danforth v. Fowler*..... 452

26. To authorize the supreme court to review the rulings of the trial court on motions and other matters of procedure, the party complaining must except to such rulings, file a motion for a new trial, and present the questions by a petition in error. *Danforth v. Fowler*..... 452

27. The ruling of the district court on a motion for a judgment on the pleadings, can not be reviewed on appeal if it appears that the judgment is sustained by and conforms to the pleadings. *Danforth v. Fowler*..... 452

28. Affidavits addressed to the trial court after judgment on a motion to amend the reporter's notes of the evidence can not be considered by the appellate court, in the absence of a ruling by the trial court on such motion. *Modern Brotherhood of America v. Cummings*..... 256

29. An assignment that "the court erred in excluding from the testimony proof as to the truth of the article and the charges made therein," is too general and indefinite to be entitled to consideration where a portion of the testimony offered upon the subjects mentioned was rightly excluded. *Williams v. Fuller*..... 362

Appeal and Error—*Continued.*

30. Where it is claimed that the court erred in permitting a pleading to be amended during trial, the alleged fact must be shown by the record; its existence will not be presumed. *Pratt v. Smith*..... 151

31. This court is not bound to examine questions not so raised in the briefs as to state specifically what is complained of, the reason and basis of the complaint, and the exact portions of the record material thereto. *Hackney v. Raymond Bros. Clarke Co*..... 624

32. Although a defense is pleaded in an answer with lack of technical precision, so as to be obnoxious to attack in the first instance, yet, if the plaintiff reply thereto without objection, and the matter is treated upon the trial both by counsel and by the court as properly in issue, the defect can not be taken advantage of for the first time in this court. *Standley v. Clay, Robinson & Co*..... 332

33. A judgment will not be reversed except for error, prejudicial to the party complaining, affirmatively appearing in the record. *Modern Brotherhood of America v. Cummings*..... 256

34. A motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on the hearing of an appeal taken from the order of a license board granting or refusing a license to sell intoxicating liquors. *Bennett v. Otto*..... 652

35. In appeals to this court in equity cases, the findings of the trial court must stand or fall upon the pleadings and evidence contained in the record. Errors of the trial court in receiving or rejecting evidence, or upon questions arising upon the pleadings, can not be corrected upon such appeal. *Farmers & Merchants Nat. Bank v. Mosher*..... 724

36. A supplemental petition was filed by the plaintiff and a copy thereof served on the attorney for the defendant some months prior to the trial of the case. The supplemental petition was stricken from the files for the reason that no notice thereof was given the defendant, and the same was filed without leave of court. Immediately thereafter the plaintiff was given leave to file her supplemental petition. *Held*, That this did not constitute reversible error. *Diedrichs v. Diedrichs*..... 534

37. A much stronger case is necessary to warrant this court in interfering with a second verdict and judgment on the merits by reason of alleged error in setting aside a prior verdict and granting a new trial, than where a motion for a new trial has been denied. *Hackney v. Raymond Bros. Clarke Co*..... 624

38. In furtherance of justice, where a finding is set aside on

Appeal and Error—*Concluded.*

appeal and the former trial was unsatisfactory, instead of entering or directing a new decree, this court will remand the cause for further proceedings. *Faulkner v. Simms*..... 299

39. Errors assigned examined, and found to furnish no sufficient basis for a reversal of the judgment. *Jahnke v. State*..... 154

40. Action of the trial court in excluding evidence in an action for libel, examined and approved. *Bee Publishing Co. v. Shields* 750

41. Where defendant is sued in the county court, appears, files an answer, and participates in the trial by cross-examining plaintiff's witnesses, he is entitled to an appeal from a judgment rendered against him. *Creighton v. Chicago, R. I. & P. R. Co*..... 456

Procedure.

42. A district court does not acquire jurisdiction of an appeal from an order in a probate proceeding unless within forty days from the date of the order a transcript thereof and of the proceedings relative to it is filed with the district court clerk, nor unless within thirty days from the date of such order the bond upon appeal, required by the statute, has been executed and filed. *Jones v. Piggott*..... 140

Transcript.

43. Although the filing of a duly authenticated transcript is required in order to perfect an appeal from the county court to the district court, and although the transcript filed for such purpose is not thus authenticated, yet, if the parties proceed in the district court on the theory that the appeal has been perfected, they will not be heard to question the sufficiency of such transcript in this court. *Coleman v. Spearman, Snodgrass & Co*..... 28

Assumpsit. See ACTION, 2.

Attachment. See CHATTEL MORTGAGES, 3.

1. Where a writ of attachment issues for the whole amount claimed in several causes of action included in the same petition, and afterward, and before trial, some of such causes of action are dismissed by the plaintiff, a motion to dissolve the attachment, based on such dismissal, should be sustained. *First Nat. Bank of Greenwood v. Van Doren*.... 142

2. The filing of a bond is not jurisdictional to the right to have an attachment issued against a nonresident defendant for a debt not due. *Gutterson v. Meyer*..... 767

Attorney and Client. See GUARDIAN AND WARD. WITNESSES, 12, 13.

1. An attorney at law having a lien on a judgment may intervene in proceedings to revive such judgment, and is en-

Attorney and Client—*Concluded.*

titled to a revivor thereof in his own name to the extent of his lien. *Greek v. McDaniel*..... 569

2. That the court, in such proceedings, renders a judgment in favor of the attorney and against the judgment debtor for the amount of the lien, instead of entering an order of revivor in the name of the attorney, to that extent is without prejudice to the judgment debtor. *Greek v. McDaniel*..... 569

3. The commencement of proceedings, of which the judgment debtor has notice, to enforce such lien, while a sufficient amount of the judgment remains unpaid to cover it, is sufficient notice of the lien to the judgment debtor. *Greek v. McDaniel* 569

Bankruptcy. See CHATTEL MORTGAGES, 4.

Action.

1. An action by a trustee in bankruptcy to recover a negotiable promissory note from one to whom it had been transferred by the bankrupt's wife pending bankruptcy proceedings, must develop either fraud or an intended preference to entitle plaintiff to recover. *Hackney v. First Nat. Bank of Lincoln*..... 588

2. Evidence *held* to support the trial court's finding that neither of the above grounds of recovery are shown in this case. *Hackney v. First Nat. Bank of Lincoln*..... 588

3. Where one creditor of a bankrupt has secured a preference in the payment of his claim, the trustee may recover the property, or its value, from such preferred creditor, but he can not pursue the property into the hands of a third party, who is a *bona fide* purchaser, or recover from such third party the value of the property. *Hackney v. First Nat. Bank of Lincoln*..... 594

Evidence.

4. A schedule of liabilities filed by the bankrupt in bankruptcy proceedings, is not competent evidence on an issue between the trustee and third persons as to the financial condition of the bankrupt three months before such proceedings were instituted. *Hackney v. Raymond Bros. Clarke Co*..... 624

Notice.

5. Whether a creditor had reasonable cause to believe his debtor insolvent within the purview of section 60 of the bankruptcy act is a question of fact. *Hackney v. Raymond Bros. Clarke Co*..... 624

6. In determining this question, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with re-

Bankruptcy—*Continued.*

spect to the debtor's condition which were brought home to him, might fairly be expected to disclose. *Hackney v. Raymond Bros. Clarke Co*..... 624

7. But a mere knowledge that the debtor has other liabilities, or of circumstances which could operate no further than to create a suspicion of possible insolvency, will not necessarily suffice. *Hackney v. Raymond Bros. Clarke Co*..... 624

8. If the creditor has reasonable ground to believe that the debtor is insolvent, and the obvious effect of receipt of the money under those circumstances is to give him an advantage over other creditors, he is chargeable with notice of intent to prefer. *Hackney v. Raymond Bros. Clarke Co*..... 624

Preferences.

9. A creditor of a bankrupt can not escape the consequences of the bankruptcy act regarding unlawful preferences by assigning his account to a purchaser of the property of the bankrupt under an arrangement whereby such purchaser offers to assume the liability, and satisfy such account contingent upon the purchase of the bankrupt's property, and where in the sale of such bankrupt's property, as a part of the consideration, such purchaser agrees to and assumes such liability, and reserves from the purchase price an amount sufficient to satisfy the same. *Hackney v. Raymond Bros. Clarke Co*..... 633

10. In such a case the legal effect of the transaction is to appropriate out of the assets of the bankrupt the amount required and used in the satisfaction of such claim by the purchaser assuming the liability, and other essential elements not being lacking, an unlawful preference in favor of such creditor results therefrom. *Hackney v. Raymond Bros. Clarke Co*..... 633

11. If a chattel mortgage is executed more than four months before bankruptcy, which creates no lien on specific chattels, and afterwards, within the four months, while the mortgagor is insolvent, he separates or identifies certain chattels and agrees that the mortgage shall apply to them, the lien is created then for the first time, and constitutes a preference within the meaning of section 60 of the bankruptcy act. *First Nat. Bank v. Johnson*..... 641

12. The trustee in bankruptcy may recover money paid by the bankrupt as a preference, only when the person receiving it had reasonable ground to believe that a preference was intended. *Hackney v. Raymond Bros. Clarke Co*..... 624

13. A creditor will not be permitted to obtain a preference indirectly by transfer of his account, procuring a third party to loan money to the debtor for payment of such

Bankruptcy—*Concluded.*

creditor, or other colorable device or transaction intended to evade the provisions of the bankruptcy act. *Hackney v. Raymond Bros. Clarke Co*..... 624

14. But an absolute transfer of an account against the insolvent debtor, in good faith, to one who afterwards buys the latter's stock of goods and obtains credit for such account on the purchase price, without any agreement or understanding that such use was to be made thereof, or that the purchaser of the account was to be protected by the creditor in any way, does not constitute a preference of the creditor to the extent of the money he received on sale of his claim. *Hackney v. Raymond Bros. Clarke Co*..... 624

15. In such case the remedy is against the purchaser of the stock, who received credit on the purchase price for the account so transferred, in case he had reasonable ground to believe that a preference was intended. *Hackney v. Raymond Bros. Clarke Co*..... 624

Banks and Banking.

Checks.

1. The payee of a check has a right of action against the drawee if the latter has funds to meet it when it is presented. *Falls City State Bank v. Wehrli*..... 75

2. Evidence *held* sufficient to sustain a finding that there was an agreement by the bank to honor checks to be given in payment for a car-load of horses by the drawers. *Falls City State Bank v. Wehrli*..... 75

3. An agreement to honor checks for a car-load of horses, the drawee bank to be secured by a draft and bill of lading on their shipment, *held* valid, and the bank liable for the payment of the checks, it having sufficient funds for such purpose derived from the draft. *Falls City State Bank v. Wehrli* 75

4. It is no objection to such an agreement that the drawers were already indebted to the bank on other transactions. *Falls City State Bank v. Wehrli*..... 75

Officer.

5. Where an officer of a bank gives a bond conditioned that he will "honestly, faithfully, and efficiently" perform his duties, he and his sureties are liable for loss resulting from his negligence, even though the directors may not have used due diligence. *Fiala v. Ainsworth*..... 308

Bastardy. See CONSTITUTIONAL LAW, 3. INSTRUCTIONS, 4.

The amount which a defendant in bastardy proceedings shall be adjudged to pay is largely in the discretion of the district court, and its award will not be disturbed unless manifestly excessive. *Gatzemeyer v. Peterson*..... 832

Beneficial Association. See INSURANCE.

Bill of Exceptions. See APPEAL AND ERROR, 1, 2. EQUITY, 3, 4.

Bona Fide Purchaser. See BANKRUPTCY, 3. FRAUDULENT CONVEYANCES, 2. JUDICIAL SALES, 1.

Bonds. See BANKS AND BANKING, 5. JUDGMENT, 3.

Burden of Proof. See APPEAL AND ERROR, 16. MASTER AND SERVANT, 1. TRIAL, 1.

Chattel Mortgages. See BANKRUPTCY, 11.

Remedy.

1. The words "feels unsafe and insecure," in a chattel mortgage do not mean that the mortgagee may exercise an arbitrary discretion in the premises, but the mortgagor must be about to do or must have done some act which tends to impair the security of the mortgagee in order that the latter's right to take possession may become operative. *Newlean v. Olson*, 22 Neb. 717. *Allen v. Cerny*..... 211

2. Where a mortgage by its terms provides for a seizure of the property if it or any part of it is disposed of or taken out of the county without the mortgagee's assent, a sale in the open market of a substantial part of the wheat covered by the mortgage, without the mortgagee's assent, and against his express prohibition, will entitle the mortgagee to recover possession of enough of the remainder to satisfy his claim. *Allen v. Cerny*..... 211

3. A mortgagee of chattels does not waive or lose his lien by causing an attachment to be levied upon the mortgaged property. *First Nat. Bank v. Johnson*..... 641

Validity.

4. A chattel mortgage executed and delivered more than four months prior to bankruptcy of the mortgagor, is not voidable because not recorded until a subsequent date within such period of four months. *First Nat. Bank v. Johnson*... 641

5. A chattel mortgage which would be invalid as against creditors and purchasers in good faith by reason of defective description of the property mortgaged, may be good as between mortgagor and mortgagee, where the property in fact mortgaged is identified. *First Nat. Bank v. Johnson*..... 641

6. Such a case differs from one where no specific chattels are mortgaged, but there is an attempt to mortgage a certain number out of a mass without separating or identifying them. *First Nat. Bank v. Johnson*..... 641

7. No lien upon specific chattels is created in a case of the latter sort until they are separated or identified and it is agreed that the mortgage shall apply to them. *First Nat. Bank v. Johnson*..... 641

Checks. See BANKS AND BANKING.

Common Law.

The term "common law of England," as used in chapter 15*a*, Compiled Statutes, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or Civil law system. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system. *Williams v. Miles* 463

Condemnation. See EMINENT DOMAIN.

Constitutional Law. See LIBEL AND SLANDER, 13, 14.

1. It is competent for the legislature to classify objects of legislation, and if the classification is reasonable, and not artificial or arbitrary, it will be upheld as a legitimate exercise of legislative power. *Baker v. Gillan* 368
2. The act of 1897 (Session Laws, 1897, ch. 57), entitled "An act to provide for the making of contracts in writing between owners of land and brokers or agents employed to sell lands," is not repugnant to the constitutional inhibition against special legislation; and every provision of said act is clearly expressed in its title. *Baker v. Gillan* 368
3. Chapter 37, Compiled Statutes, *held* constitutional and valid. *Gatzemeyer v. Peterson* 832

Continuance.

1. Where the affidavit in support of a motion for a continuance does not set out the facts and circumstances to which an absent witness will testify, and especially where it is not shown that there are no other available witnesses by whom the facts known to the absent witness can be proved, the continuance of the case should be denied. *Diedrichs v. Diedrichs* 534
2. If sufficient time is given from denial of a motion for a continuance, sought in order to obtain a deposition, to enable it to be taken under ordinary circumstances, and from the showing made upon the motion there is no ground to believe it can be procured in any reasonable time if not in that allowed, it is not error to deny the continuance. *Gatzemeyer v. Peterson* 832

Contracts. See MARRIAGE. MUNICIPAL CORPORATIONS, 2-6.

Acceptance and Waiver.

1. In an action upon a contract for the sale of chattels, evidence by the purchaser that after the delivery of the subject

Contracts—*Concluded.*

matter he inspected, retained and used it as a whole, shows both an acceptance and a waiver of any objection that the quality was not such as the contract required. *Hazen v. Wilhelmie* 79

Construction.

2. Where a written contract requires extrinsic evidence to explain its terms, the interpretation to be given in view of such evidence is a question of fact. *Haskell v. Read*..... 107
3. As a rule, courts will adopt the construction which the parties themselves have placed on a contract. *Williams v. Auten*..... 26
4. In an action for damages for a breach of contract between a school district, in a metropolitan city, and an architect, for his services for the period of one year, the contract will be construed according to the plain import of its language, viewed in the light of the circumstances and the apparent understanding of the parties at the time it was made. *School District of Omaha v. McDonald*..... 610

Damages.

5. Where the contract is entire, is one for personal services only and the breach of it is total, the measure of damages is what the plaintiff would have earned, less what it would have cost him to perform it according to its terms. *Brodie v. Watkins*, 33 Ark. 545; *Wirth v. Calhoun*, 64 Neb. 316. *School District of Omaha v. McDonald*..... 610

Public Policy.

6. An assignment of salary or fees of a public officer to be earned in the future is contrary to public policy and void. *First Nat. Bank of Columbus v. State*..... 482

Reformation.

7. A written contract which, by mistake of the scrivener, fails to conform to the oral agreement made by the parties, will be reformed if the evidence clearly shows what the agreement was. *Silbar v. Ryder*, 63 Wis. 106. *Story v. Gammell*, 709
8. The rule, that the carelessness or negligence of a person in signing a written contract estops him from afterwards asserting that the writing does not truly express the agreement of the parties, does not apply in an action for relief on the ground that the contract was obtained by fraud or entered into by mutual istake. *Story v. Gammell*..... 709

Conversion.

If a person tortiously or fraudulently converts a chose in action belonging to another, he may be compelled to respond for its value in a common law action foi damages. *Story v. Gammell*..... 709

Corporations. See EQUITY, 1, 2. GARNISHMENT.

Election of Officers.

1. As a general rule, the right to vote pledged shares of stock remains in the pledgor until foreclosure. *Haskell v. Read*.. 107
2. Whether less than a majority of the shares of stock in a corporation having a fixed capital stock, divided into a definite number of shares, may hold a valid meeting and bind the corporation, in the absence of any rule upon the subject, left undecided. *Haskell v. Read*..... 115
3. Whatever may be the rule in case of stated meetings, or those regularly called or convened, a minority of the shares, after failure of the stated meeting for election of officers, can not call a new meeting on their own authority and hold a valid election. *Haskell v. Read*..... 115
4. The officers of a corporation, in conducting an election, will not look behind the books of the corporation which show who are registered as stockholders; but a court of equity may do so, and may enjoin a pledgee from voting the shares pledged in prejudice of the rights of the pledgor. *Haskell v. Read*..... 107
5. A stockholder may maintain a suit to enjoin the holder of shares issued in excess of the amount authorized by the articles of incorporation, and without consideration, from voting such shares in prejudice of his rights, and to procure cancelation thereof. *Haskell v. Read*..... 107
6. Where a corporation has a fixed capital stock, divided into a definite number of shares, a majority of all the shares is necessary to a valid election in the absence of some rule to the contrary. *Haskell v. Read*..... 107
7. It is not necessary that a stockholder shall have paid for his stock in full to enable him to vote all his shares at an election. *Haskell v. Read*..... 107

Equity.

8. When an insolvent corporation transfers all of its assets to a creditor in settlement of a claim upon which the officers of the corporation are personally liable, and the transfer is for that reason held invalid, the transferee holds the property in trust for all creditors of the corporation, and is entitled to participate in the distribution of the assets. *National Wall Paper Co. v. Columbia Nat. Bank*..... 47
9. In an action in equity against such trustee the court will distribute the assets to all creditors, parties to the suit, in proportion to their respective claims. *Merchants' Nat. Bank of Omaha v. McDonald*, 63 Neb. 363, distinguished. *National Wall Paper Co. v. Columbia Nat. Bank*..... 47
10. In the absence of statutory authority, courts of equity do not

Corporations —*Concluded.*

possess jurisdiction over corporate bodies to the extent of, on the application of private parties, appointing a receiver, sequestrating the property and business and selling the same through the instrumentality of such receiver, and thereby wind up the affairs and terminate the business and indirectly dissolve the corporation. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co*..... 233

Estoppel.

11. Whatever might be the rule as to a *bona fide* purchaser of or subscriber for an overissue of shares, one who procures the overissue without consideration, by false representations, will not be heard to assert that a stockholder who voted therefor, relying on such representations, is estopped to question the validity of the shares. *Haskell v. Read*.... 107

Costs. See GUARDIAN AND WARD, 3.

Courts. See EQUITY, 7. JUDGMENT, 12. JURISDICTION. NEW TRIAL, 1.

Jurisdiction.

1. The county court has exclusive original jurisdiction of all probate matters, and where the relief sought by an action is such as the county court, in the exercise of its probate jurisdiction, might grant, the district court has no original jurisdiction. *Reischick v. Rieger*..... 348
2. On the facts stated, *held*, that the district court was without jurisdiction to construe a will and order distribution. *Reischick v. Rieger*..... 348

Supreme Court Commissioners.

3. Where opinions are prepared by commissioners, they must be permitted, necessarily, to state their reasons in their own way, without binding the court to all that is said *arguendo*, even though it concurs in the conclusions of law and express findings of fact. *Williams v. Miles*..... 479
Modern Woodmen of America v. Colman..... 665
4. Opinions expressed by the commissioners on matters not essential to the decision, while properly set forth to advise counsel that their arguments in briefs or at the hearing have been duly considered, do not become necessarily the law of the case, and will not preclude further investigation of such points, should they come before the court once more. *Williams v. Miles*..... 479

Creditors' Suit. See FRAUDULENT CONVEYANCES, 6.

There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an execution at law can not be levied; the other in aid of an execution at law, as to set aside an incumbrance or a transfer of property made to defraud creditors. In the first class of

Creditors' Suit —*Concluded.*

cases the creditor must allege and show that he has exhausted his remedy at law, while in the second it is sufficient to show that his claim has been reduced to judgment and docketed in the county where the land lies which he seeks to subject to the payment of his claim. The equity court in such case is merely lending its assistance to the legal tribunal to remove a fraudulent obstruction interposed to the execution of its writ. *State Bank of Ceresco v. Belk*.. 517

Criminal Law and Procedure. See INSTRUCTIONS, 8, 9.

Admissions.

1. The conduct of the sheriff, who, upon arresting one charged with crime, immediately furnishes him with intoxicating liquors and proceeds to question him for the purpose of obtaining evidence against him, is unjustifiable, and evidence of admissions made under such circumstances should be excluded. *McNutt v. State*..... 207
2. But the admission of such evidence will not be held prejudicial so as to require a reversal if there is uncontradicted evidence that the defendant afterwards, when free from the influence of liquor, and without any undue influence of any kind being brought to bear upon him, made the same admissions to various other persons. *McNutt v. State*..... 207

Arrest of Judgment.

3. A plea of guilty of the acts alleged in an information charging no offense is not a plea of guilt of the crime attempted to be charged, and the sufficiency of the information and the authority and jurisdiction of the court to pronounce sentence of imprisonment may properly be challenged by a motion in arrest of judgment. *Smith v. State*..... 204

Bowling Alley.

4. The running of a bowling alley in connection with a saloon or hotel, is in this state a criminal offense. *Koepke v. State* 152

Evidence.

5. It is competent, in the prosecution of a person for murder, for the state to prove prior attempts by the defendant to kill the deceased, as tending to establish an intent to kill, and plan and design adopted and resorted to in the commission of the crime. *Jahnke v. State*..... 154
6. If upon trial of a charge of murder evidence is introduced by the state tending to prove that the life of deceased was insured in favor of defendant as showing a motive for the alleged crime, it is error to exclude evidence tending to show that the policy of insurance was of very little, if any, value and that the defendant was aware of that fact. *Jahnke v. State* 181

Criminal Law and Procedure—*Continued.*

7. Evidence found sufficient to support the allegation of the ownership of the building burglarized and property stolen. *McNutt v. State*..... 207

Information.

8. In charging the statutory crime defined by section 49 of the Criminal Code, it is essential to aver in apt terms an attempt by the accused to commit one of the felonies enumerated by alleging the overt act or acts constituting such attempt, and in the absence of such allegations an information by which it is sought to charge an offense under said section is fatally defective, and will not support a sentence of imprisonment for a violation of the provisions thereof. *Smith v. State*..... 204

9. An allegation of an unlawful entering of a building with intent to commit one of the crimes enumerated in said section is not sufficient to charge a crime as therein defined. *Smith v. State*..... 204

10. In an information for burglary, a drug store is properly described as "a store house, commonly called a drug store." *McNutt v. State*..... 207

Jury.

11. Where, on a challenge of a proposed juror for cause on the ground that he has formed or expressed an opinion concerning the guilt or innocence of the defendant, it appears that such opinion is not unqualified and is formed from reading newspaper accounts of the transaction, or from common talk or rumor regarding the same, and that notwithstanding such opinion the juror is unbiased, and can impartially hear and consider the evidence and arrive at a verdict solely with reference thereto and the instructions of the court, uninfluenced by anything heard or read prior to the trial, the court may admit such person to sit in the trial of the case as a qualified juror. *Jahnke v. State*..... 154

12. An exception by the defendant to a ruling of the trial court on a challenge for cause in a felony case, is not properly presented for consideration on review, where the juror is afterwards excused, and the record does not show the exhaustion of all his peremptory challenges, and that the proposed juror to whom the exception relates was excused by him in the exercise of his right of peremptory challenges. *Jahnke v. State*..... 154

Preliminary Examination.

13. In a prosecution by information for a felony, in the absence of his waiver of a right to a preliminary examination, a defendant can not be put upon trial for the crime charged over his objections, until such preliminary hearing is ac-

Criminal Law and Procedure —*Continued.*
corded him, and he is held by the examining magistrate to await a trial in the district court. *Jahnke v. State*..... 154

14. By the interposition of a plea in abatement after the filing of an information against one accused of a felony the question may properly be determined as to whether a preliminary examination has been had or waived. *Jahnke v. State*..... 154

15. The statute providing for preliminary examinations contemplates that before a person can be proceeded against by information, he must be brought before an examining magistrate, charged with the commission of a crime, and that the magistrate shall proceed to hear the complaint, examine such witnesses as are produced in support thereof or to controvert the same, and then exercise judgment or discretion of a judicial character in determining from the evidence adduced whether the accused should be held to appear for trial in the district court, or should be discharged for want of probable cause, or because it is not made to appear that a crime has been committed. *Jahnke v. State*..... 154

16. When the quantity or sufficiency of the evidence to justify the holding of a person to answer for a crime in the district court is called in question by a plea in abatement, and it appears that there has been a preliminary hearing in form and substance, and that evidence has been introduced in support of the complaint such as to invoke an honest exercise of judgment or discretion in the weighing of such evidence and in reaching a conclusion as to the order or judgment to be entered, and from which a fair legal deduction may be reached that a crime has been committed, and there is testimony tending to show that the accused committed the offense and he is held to await trial in the district court, a preliminary examination has been had within the meaning of the statute and the plea in abatement would be unavailing. *Jahnke v. State*..... 154

17. *Held*, That a preliminary examination within the meaning of the statute had been accorded the defendant in the case at bar, and that the trial court properly sustained a demurrer to his plea in abatement alleging that no such examination had been had. *Jahnke v. State*..... 154

Principals.

18. Under the Criminal Code of this state the law does not distinguish between principals in the first and second degrees. *Jahnke v. State*..... 154

19. Where a person accused of the commission of a felonious homicide is present at the time, aiding, abetting, and assisting or counseling and procuring its commission, and a felony is committed, then he is guilty in the same degree and to

Criminal Law and Procedure —*Concluded.*
the same extent as though he had performed the act causing death. *Jahnke v. State*..... 154

Proof.

20. In a prosecution for burglary and larceny, the proof must agree with the allegations of the information in the description of the property, but when the property stolen is described in the information as "one Elgin gold watch" and thirty-two gold watch chains," the verdict will not be set aside as unsupported by the evidence because no witness testified that the articles were gold, if the articles are produced and offered in evidence at the trial, and there is nothing in the record to show that the jury could not determine the truth of the allegation from an inspection of the articles. *McNutt v. State*..... 207

Damages. See CONTRACTS, 5. EMINENT DOMAIN. LIBEL AND SLANDER, 2, 3. MALPRACTICE, 2, 4.

Where plaintiff, an electric lineman of 33 years of age, earning $65 monthly, has been injured in both feet and one ankle in such a manner as to compel amputation of the right foot almost eleven months later, with severe suffering, a verdict for $15,000 will not be reduced or set aside as excessive. *New Omaha Thompson-Houston Electric Light Co. v. Rombold* 54

Deeds. See EMINENT DOMAIN. ESTOPPEL, 5. EVIDENCE, 28. HOMESTEAD, 1. JUDICIAL SALES, 1. TENANT IN COMMON, 1.

A deed for the conveyance of land, if obtained by duress, may be avoided by the entry of the grantor or his heirs within the statutory period of limitation. *Hovorka v. Havlik*..... 14

Demurrer. See DIVORCE AND ALIMONY. PLEADING AND PRACTICE. TRIAL, 2.

Depositions.

Filing.

1. Where depositions are withdrawn from a case, to entitle them to be read on the trial they must be refiled in accordance with the provisions of section 387, Code of Civil Procedure. *Peycke v. Shinn*..... 343

Second Deposition.

2. In this state the taking of depositions is regulated by statute, and there is no provision which requires leave of court to entitle a party to take a second deposition of the same witness for use in the same case. *Peycke v. Shinn*.... 343

Suppression.

3. The plaintiff gave notice to the attorney of the defendant of the taking of depositions in the state of Ohio. The defendant at the time was confined in a jail in Ohio, and his attorney, immediately on receipt of the notice, sent the same

Depositions—*Concluded.*

to him through the mail. The notice never reached him, and he was unrepresented at the taking of the plaintiff's depositions, and her witnesses were not cross-examined in his interest. These depositions were taken three months or more before the trial of the case, and no effort was made to secure a cross-examination of the witnesses prior to the trial. *Held*, That the court properly refused to suppress the depositions. *Diedrichs v. Diedrichs*..... 534

Descent and Distribution. See EXECUTORS AND ADMINISTRATORS. INDIANS. TRIAL, 26, 27. WILLS. WITNESSES, 1-3.

1. Brothers, and children of deceased brothers and sisters, of an intestate are not *prima facie* heirs and distributees, and must allege and prove that there are no persons of the several classes which would take before them and exclude them, under the statute, before they can obtain an order for distribution of the estate. *Sorensen v. Sorensen*..... 483

2. In a contest between rival claimants seeking to establish heirship and have distribution of the estate of a decedent, the administrator of such estate has no official interest. As the representative of the deceased person he is not an adverse party to any of the claimants in the controversy. *Sorensen v. Sorensen*..... 500

3. A surety who pays a debt and wrongfully takes possession of the principal debtor's land can not require, as a condition precedent to yielding possession to the principal's heir, that the latter should reimburse him for such payment. *Mavity v. Stover*..... 602

Discretion of Court. See TRIAL, 7-13.

Divorce and Alimony.

In an action brought by the wife for a divorce on the ground of cruelty, a demurrer to the petition on the ground that it shows condonation of the offense charged will not be sustained unless the statements of the petition plainly show acts and conduct on the part of the wife amounting to condonation. Generally, the question of condonation in such cases should be tried on the evidence as an issue of fact. *Diedrichs v. Diedrichs*..... 534

Dower.

The wife of a devisee has an inchoate right of dower in his share of the lands devised, and a decree in partition, which bars her of any right, title or interest in such lands, is erroneous. *Schick v. Whitcomb*..... 784

Duress. See DEEDS.

Ejectment. See APPEAL AND ERROR, 13. SET-OFF.

Elections. See CORPORATIONS, 1-7.

Eminent Domain.

1. Ordinarily, when a railroad company enters upon land of another and constructs a road-bed and tracks thereon, and occupies the land for right of way purposes, and thereafter condemnation proceedings are had to appropriate the land on which the road-bed is constructed, under the law of eminent domain the landowner can not in such proceedings have the value of such improvements included in his award. *Omaha Bridge & Terminal R. Co. v. Whitney*..... 399

2. Where, however, such improvements are made on the land of another under a contract, arrangement or agreement with third parties, to be used for private purposes, the law relative to the seizure of property for a public use does not apply. *Omaha Bridge & Terminal R. Co v. Whitney*..... 399

3. The rights of parties in such a case are to be measured and determined by legal principles generally applicable to improvements in the nature of trade fixtures by a tenant or licensee in the possession and use of the real estate on which the improvements are made. *Omaha Bridge & Terminal R. Co. v. Whitney*..... 399

4. A road-bed or embankment built out of the soil, and with riprapping for its protection, on which ties and rails are laid for use as a railway track, is not an improvement placed upon land in the nature of a trade fixture, but is a part and parcel of the land itself, and where there are no exceptions or reservations will pass by a deed of conveyance as does the real estate on which constructed. *Omaha Bridge & Terminal R. Co. v. Whitney*..... 399

5. A railroad corporation, under an agreement with a land company to furnish the latter certain trackage facilities, entered upon land belonging to a third party and constructed a road-bed and railway-tracks thereon, and occupied and used the same as a licensee. Afterwards negotiations were entered into for the sale of the real estate, a part of which was thus occupied, by the owner to a purchasing syndicate. During the negotiations, a deed for the land on which the improvement was made was requested and obtained from the railroad company, which was executed and delivered so as to consummate the sale, and in pursuance of a prior agreement with the landowner, in settlement of existing controversies over land boundaries, and which conveyance contained no reservation or exception, and ran to the owner, who in turn conveyed to the purchasing syndicate. *Held*, (1) That in proceedings begun thereafter by those claiming under and through the railroad corporation to con-

Eminent Domain—*Concluded.*

demn a right of way along where such embankment was constructed, the title to the embankment or road-bed thus constructed had passed by such conveyances, and that the owners of the land were entitled to recover the value of the road-bed in such proceedings; (2) that the ties and rails constituting the railway-track had not, under the circumstances disclosed in the record, lost their character as personal property in the nature of removable trade fixtures, and remained the property of the railroad company and those claiming under it, the value of which should not be included in the award to the landowners in such condemnation proceedings. *Omaha Bridge & Terminal R. Co. v. Whitney* 399

6. Where a railway company, having no estate in land, places on it, with the knowledge and consent of the owner, an embankment, riprapping, ties and rails, and maintains and uses such track for its own purposes, without objection from the owner, such track remains the property of the railway company in the absence of any agreement to the contrary and of any intention on its part to make such track appurtenant to the real estate. Under such circumstances, an agreement by the licensor that the track shall remain the property of the railway company is implied. *Fischer v. Johnson*, 106 Ia. 181. *Omaha Bridge & Terminal R. Co. v. Whitney*..... 389

7. Where the railway company, before constructing its track, has settled a dispute as to the boundaries with the owner of the land, by the terms of which settlement deeds are to be made by each party to the other of their respective holdings, the fact that such deed is not made until after the construction of the track, and by its terms conveys the land "and all appurtenances thereto belonging," will not prevent the railway company or its grantees from showing, as against the owner and his grantees with notice, the true state of the title, when the track was built; nor will such deed carry the ownership of the tracks, they not being expressly mentioned, and not being legally appurtenant to the owner's estate. *Omaha Bridge & Terminal R. Co. v. Whitney* 389

8. In condemnation proceedings by the grantee railway company to obtain a right of way over the land, the value of the track should not be added to the owner's damages for the taking of the land, the railway company having remained continuously in possession, since the first construction of the track by itself and its grantor. *Omaha Bridge & Terminal R. Co. v. Whitney*..... 389

Equity. See CORPORATIONS, 4, 5, 8-10. CREDITORS' SUIT. GARNISHMENT, 3-5. INJUNCTION. MARSHALING ASSETS. SUBROGATION.

Corporation.

1. It seems that in this state a stockholder may maintain a suit in equity to try the validity of an election of officers and directors of a private corporation, and determine whether persons claiming to be such are entitled to act in that capacity. *Haskell v. Read*..... 107
2. In any event the court may inquire into the validity of the election and pass upon the title to corporate officers when necessary to do complete justice in a suit of which it has jurisdiction on other grounds. *Haskell v. Read*..... 107

New Trial.

3. A failure to return a bill of exceptions within the statutory time, or within time to commence error proceedings in the supreme court, is not sufficient ground to sustain a petition in equity for a new trial. *Saxton v. Harrington*..... 446
4. In such a case, proceedings in error may be commenced on the return of the bill of exceptions, and a motion to dismiss the case or quash the bill, made by the party whose fault or misconduct caused the delay, will be overruled. *Saxton v. Harrington* 446
5. The loss of the files, in a case where no effort is made to substitute them, and no order is obtained for that purpose, and the only diligence to obtain a transcript is repeated requests of the clerk for one, will not sustain a judgment granting a new trial in an equitable proceeding for that purpose. *Saxton v. Harrington*..... 446

Nuisance.

6. A court of equity will not lend its aid to protect a suitor in maintaining a public nuisance, nor in the doing of an act punishable under the laws of the state. *Nebraska Telephone Co. v. Western Independent Long Distance Telephone Co*... 772

Probate Court.

7. Applications for equitable relief on the probate side of the county court in matters within the exclusive jurisdiction of that court, are to be deemed suits in equity, and are governed by the general rules of pleading applicable to such suits in the district court. *Genau v. Abbott*..... 117

Error. See APPEAL AND ERROR.

Estoppel. See CORPORATIONS, 11. EMINENT DOMAIN, 7. MUNICIPAL CORPORATIONS, 6. PRINCIPAL AND AGENT, 2, 3.

Deceit.

1. One to whom a receipt in full settlement of all damages has been, in order to procure his signature, misread so as to cause him to think it a receipt and settlement of certain expenses only, is not estopped from disputing its validity

Estoppel—*Concluded.*

by the fact that, relying upon such information as to its contents, he signs without reading it. *New Omaha Thompson-Houston Electric Light Co. v. Rombold*..... 54

2. Where one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his own claim, he will not afterwards be permitted to exercise his legal right against such person. A willful design to mislead and deceive is not necessary in such a case. *Gillespie v. Sawyer*, 15 Neb. 536, approved and followed. *Lydick v. Gill*..... 273

3. Whatever a man's real intention may be, if he so conducts himself that a reasonable man would take the act or representation to be true, and believe that it was made to be acted on, and he did act upon it as true, the party making the representations will be precluded from contesting their truth. *Lydick v. Gill*..... 273

4. An estoppel may be binding and effectual, even though there was no intention to deceive, and it is not necessary for the holder of an adverse interest to deny his interest, or expressly declare his intention to abandon it. *Lydick v. Gill* 273

Deed.

5. Whatever be the form or nature of the conveyance of real property, if the grantor therein sets forth on the face of such instrument, by way of recital or averment, either in express terms or by necessary implication, that he is seized or possessed of a particular estate in the premises conveyed, then such grantor and all persons claiming under him are ever afterward estopped from denying that he was so seized and possessed at the time he made such conveyance. *Hagensick v. Castor*, 53 Neb. 495. *Omaha Bridge & Terminal R. Co. v. Whitney*..... 399

Evidence. See APPEAL AND ERROR, 4-11. BANKRUPTCY, 2, 4. CRIMINAL LAW AND PROCEDURE, 1, 2, 5-7, 20. DEPOSITIONS. INSURANCE, 3, 9. LIBEL AND SLANDER, 4-6. MALICIOUS PROSECUTION, 1, 2. MALPRACTICE. PRINCIPAL AND AGENT, 5. TRIAL. WILLS. WITNESSES.

Admissibility.

1. An offer by the defendant in bastardy proceedings to take the prosecutrix away to a physician for the purpose of getting rid of the child is not an offer of compromise, and may be shown as an admission. *Gatzmeyer v. Peterson*..... 832

2. Where it is sought to establish a contract by letters, there must be evidence tending to prove that they are in the handwriting of the defendant, or that they came from him

Evidence—*Continued.*

or his authorized agent, or were received in due course of mail, in answer to letters duly mailed to the address of the party sought to be bound. *Peycke v. Shinn*..... 343

3. Ordinarily, to justify the reception of a copy of a private writing in evidence, it must appear that it is a true copy of some writing, admissible in evidence, which has been lost or destroyed, or which is in the possession of the adverse party, who refuses to produce it on due notice. *Peycke v. Shinn*..... 343

4. If a message to be sent by telegraph is not reduced to writing by the sender, he makes the company his agent for that purpose, but he is not thereby estopped to deny that a paper offered in evidence was in fact reduced to writing by the telegraph company, or delivered as his message. *Peycke v. Shinn*..... 343

5. In a contest between a trustee in bankruptcy and one sought to be charged as a creditor having received an unlawful preference, the schedule of liabilities filed by the bankrupt in the bankruptcy proceedings is admissible in evidence on the issue of insolvency as tending to prove the insolvency charged. *Hackney v. Raymond Bros. Clarke Co*..... 633

6. In an action by an administrator for the benefit of the widow and children under section 2, chapter 21, Compiled Statutes, evidence as to the amount of property left by the deceased is inadmissible. *Chicago, R. I. & P. R. Co. v. Hambel*, 2 Neb. (Unof.) 607, followed. *Chicago, R. I. & P. R. Co. v. Holmes*..... 826

7. Where evidence admissible for the one purpose is not relevant as to other subjects or for other purposes, an instruction limiting its effect must be asked; but where evidence received is not admissible for any purpose, no such request is necessary. *Chicago, R. I. & P. R. Co. v. Holmes*..... 826

8. Where parties interested have been duly served with notice by a court having jurisdiction in a sister state to appear and show cause at a time stated why the final report of an executor should not be allowed and settled, such court having jurisdiction of person and subject matter, a properly authenticated transcript of the proceedings had, will not be held inadmissible in the courts of this state, because it shows that a hearing was had and a judgment rendered at a subsequent term of such court. *Tunnicliff v. Fox*..... 811

9. A judgment record can not be used in favor of a stranger to establish facts recited in the judgment unless such finding is based on an admission made by the party against whom it is sought to be used. *Sickler v. Mannix*..... 21

10. An amicable adjustment of a controversy between two

Evidence—*Continued.*

parties is not admissible for the purpose of showing any liability of either. *Creighton v. Chicago, R. I. & P. R. Co...* 456

11. Evidence of an estoppel *held* to have been properly admitted. *Lydick v. Gill*..... 273

Bond.

12. Production of an alleged official bond from the proper official custody, together with the record of its approval, are not sufficient evidence of its execution when the latter is denied. *Craw v. Abrams*..... 546

13. The introduction in evidence of a certified copy of what purports to be an official bond, without proof of its execution and delivery, is not sufficient to authorize the court to render a judgment against the sureties thereon where its execution and delivery are denied by them. *Craw v. Abrams*, 553

Competency.

14. The testimony of an attorney who prepared an answer is competent to show that by inadvertence and mistake he used the name of one party to the action while intending to name another party. *Ritchey v. Seeley*..... 120

Declarations.

15. Evidence as to declarations of the testator should be scrutinized carefully and weighed cautiously. *Williams v. Miles*, 463

Intention.

16. While a person's intention is to be determined primarily from his acts, where such acts are ambiguous and good faith is in issue, he may testify what his intention was. *Hackney v. Raymond Bros. Clarke Co*..... 624

Opinion.

17. It is error to permit an expert witness to give his opinion on the ultimate fact to be determined by the jury. *Chicago, R. I. & P. R. Co. v. Holmes*..... 826

18. Where the facts upon which such opinion is based are stated, and the conclusion is one which must necessarily be drawn from such facts, error in permitting an opinion upon the ultimate fact to be determined by the jury to be given in evidence is without prejudice. *Chicago, R. I. & P. R. Co. v. Holmes*..... 826

19. Where the witness saw the occurrence with reference to which he testifies, and differences of opinion as to the conclusion to be drawn may reasonably arise, he should be required to state facts, rather than give his conclusion upon the ultimate issue. *Chicago, R. I. & P. R. Co. v. Holmes*.... 826

Parol.

20. Parol evidence to show that a former will was revoked by implication by reason of a subsequent will, which can not be

Evidence—*Concluded.*

found, must be clear, unequivocal and convincing. *Williams v. Miles* 463

Petition.

21. It is not reversible error to refuse to allow a defendant to introduce in evidence plaintiff's original petiton where there is no substantial difference in the statement of the facts contained therein and in the one on which the suit is tried. *School District of Omaha v. McDonald* 610

Secondary.

22. When the loss or destruction of a written instrument is shown, secondary evidence of its contents is admissible. *Larson v. Cox* 44

Sufficiency.

23. Evidence in action for malicious prosecution, *held* to support special findings, if the jury accepted the plaintiff's testimony, as they had a right to do. *Bank of Miller v. Richmon* 731
24. Evidence found sufficient to support a verdict of guilty of murder in the first degree, as returned by the jury. *Jahnke v. State* 154
25. Evidence of sufficiency of petition for liquor license, *held* not to support the finding of the district court. *Bennett v. Otto* 652
26. Evidence as to liability of officer of a bank, *held* sufficient to support the verdict. *Fiala v. Ainsworth* 308
27. Evidence *held* not sufficient to establish a common law marriage. *Sorensen v. Sorensen* 500
28. Evidence found sufficient to sustain the conclusions of the trial court that the deed in question was a forgery. *Mavity v. Stover* 602
29. The findings of a referee as to the nonuser of a highway, *held* to be supported by the evidence. *Gehris v. Fuhrman* ... 325
30. Evidence of acts constituting notice, *held* sufficient to sustain the findings and judgment of the trial court. *Millard v. Wegner* 574
31. Evidence of void proceedings of county court, *held* insufficient to sustain the judgment. *McCormick Harvesting Machine Co. v. Stires* 432
32. Evidence of payment in money, *held* sufficient to sustain the judgment of the district court. *Breck v. Meeker* 99
33. Evidence *held* in part to support the decree. *Faulkner v. Simms* 295
34. Evidence *held* sufficient to sustain verdict and judgment. *Tunnicliff v. Fox* 811
35. Evidence found sufficient to sustain the verdict. *Larson v. Cox* 44

Executors and Administrators. See DESCENT AND DISTRIBUTION. PARTITION. WILLS.

1. Error will lie from an order of the county court, allowing a claim against the estate of a decedent, although no answer or objections were filed against the claim, and the order was made in the absence of the administrator. *Herman v. Beck*, 566

2. Error from such order may be prosecuted by the administrator alone. *Herman v. Beck*..... 566

Accounting.

3. An executor whose domicile is in Wisconsin, and who also qualifies as ancillary administrator in Nebraska, can not be charged as such ancillary administrator with property of the estate whose legal *situs* is in Wyoming, and for which he accounted to the court of Wisconsin. *Tunnicliff v. Fox*... 811

4. Where, by the terms of a will, the minor son of the sole legatee thereunder would take the estate when he arrived at the age of twenty-five years, providing his father survived his mother, and it appears that at the time of the trial the parents of the minor were both living, *held*, that such minor child did not have such an interest in the estate as qualified him, under the provisions of section 283 of chapter 23, Compiled Statutes, to file objections to the allowance of the final report of the executor. *Tunnicliff v. Fox*..... 811

5. Where the objections of such minor are stricken, and the mother of the minor, who is the legatee, is permitted to and does file the same and other objections, upon which the cause is tried and determined, the decision being affirmed on error to this court, the rule of the trial court in strikng such objections, if error, would be without prejudice. *Tunnicliff v. Fox*..... 811

6. An ancillary executor in Nebraska, at the instance of the probate judge, procured and filed with his report an inventory of certain household goods, which had been owned by the testatrix, but which had been given away by her before her death, and of which the executor never obtained possession; *held*, that the executor could not be charged with the value of such goods. *Tunnicliff v. Fox*..... 811

7. Under the law of this state, an executor can not be charged with the rent of real estate until it becomes necessary or proper to reduce such real estate to actual possession for the protection of the creditors of such estate, or until the executor is ordered so to do by the proper court. *Tunnicliff v. Fox*..... 811

Payment.

8. An account need not be presented to and allowed by the probate court in order to entitle the holder to plead it as payment upon a note made to a party since deceased, provided

Executors and Administrators—*Concluded.*

the deceased in his lifetime agreed that the account should be credited as a payment on the note. *Parker v. Wells*..... 647

Sale.

9. Under our probate system an administrator can not sell the interest of the estate in an executory contract for the purchase of lands except as real estate, and after a license obtained from the court therefor. *Hovorka v. Havlik*..... 14

10. Where an administrator becomes the purchaser at his own sale of the lands of his intestate, and applies the proceeds in payment of the debts of the estate, in an action by the heirs to set aside such sale they are not required to offer to reimburse him for the purchase price, where it appears that the rents and profits in his hands, accruing since the sale, exceed the amount of his disbursements on the venture. *Cole v. Boyd*..... 146

Exemptions. See INJUNCTION, 1, 2. SHERIFFS, 2.

Findings. See APPEAL AND ERROR, 3-11. EVIDENCE, 29. INSTRUCTIONS, 19. MASTER AND SERVANT, 2. TRIAL, 14.

Foreclosure. See MORTGAGES.

Fraud. See ESTOPPEL. JUDGMENT, 10. LIMITATION OF ACTIONS, 1.

Fraudulent Conveyances. See BANKRUPTCY. CREDITORS' SUIT.

Action.

1. Where property in large amount, without fraudulent intent, has been turned over by an insolvent debtor to his attorneys in consideration of past and future services and a general retainer for himself and wife, any creditor desiring to attack such transfer should do so before services to the full value of the property are rendered. *Farmers & Merchants Nat. Bank v. Mosher*..... 713

Bona Fide Purchaser.

2. Assuming that property was fraudulently conveyed by a husband to his wife, the same can not be recovered from a *bona fide* vendee of the wife. *Hackney v. First Nat. Bank of Lincoln* 594

Homestead.

3. The head of a family has a homestead right of the value of $2,000 in 160 acres of land, owned and occupied by him as a homestead, which is not the subject of a fraudulent alienation. *Brown v. Campbell*..... 103

4. It is error for a trial court to cancel a conveyance of such homestead right as having been made in fraud of creditors. *Brown v. Campbell*..... 103

5. If, above any valid incumbrances thereon, there be a surplus in excess of the sum of $2,000 within the homestead limits,

Fraudulent Conveyances—*Concluded.*

a conveyance of such surplus can be set aside when made in fraud of creditors. *Brown v. Campbell*..... 103

Judicial Sale.

6. The thing offered at an execution sale of real estate being the title which the judgment debtor had at the time the judgment became a lien, a subsequent fraudulent transfer of the property furnishes no ground for a creditors' bill. *Newman Grove State Bank v. Linderholm*..... 364

Trial.

7. R. testified, he understood that G. was alone liable for a mortgage debt. *Held*, That R.'s understanding was immaterial and incompetent, but that it would be competent and material to show that a solvent and responsible party had assumed the mortgage debt on which a deficiency judgment was entered, as bearing on the question of the character of a conveyance by R. to his son, and whether fraudulent or not, but that the offer did not go far enough, in not proposing to show that G. was solvent and able to meet any deficiency that might arise after exhausting the mortgage security. *Ritchey v. Seeley*..... 120

Garnishment. See INJUNCTION, 1, 2.

Corporate Stock.

1. A stockholder's interest in a corporation, and in all of its property and rights, is represented by his stock. A levy upon the stock of a debtor by garnishment of the corporation pursuant to the statute will impound dividends upon the stock declared while the proceedings are pending. *Farmers & Merchants Nat. Bank v. Mosher*..... 724

2. If the debtor has sold or pledged the stock in good faith before the levy, the right of such *bona fide* purchasers will not be affected by the levy, even though, by the books of the corporation, the stock appears to be the property of the debtor and is so regarded by the corporation. *Farmers & Merchants Nat. Bank v. Mosher*..... 724

Equity.

3. Garnishment lien may be enforced by bill in equity, in proper case. *Farmers & Merchants Nat. Bank v. Mosher*.... 713

4. By promptly resorting to equity after judgment in principal action, a garnishment lien is extended through the equity action. *Farmers & Merchants Nat. Bank v. Mosher*..... 713

5. Garnishee turning over money on order of principal debtor pending such action is liable to the creditor therefor. *Farmers & Merchants Nat. Bank v. Mosher*..... 713

Waiver.

6. Taking a general money judgment and issuing execution, which is returned wholly unsatisfied, is not a waiver of

Garnishment—*Concluded.*

attachment lien by garnishment. *Farmers & Merchants Nat. Bank v. Mosher* 713

7. Taking no order against a garnishee who denies holding property, is not a waiver of garnishment lien. *Farmers & Merchants Nat. Bank v. Mosher* 713

Guardian and Ward.

Attorney's Fees.

1. A guardian has authority to bind the estate of his ward by a contract, reasonable in its terms, for services reasonably necessary to the preservation and management of such estate. *Bailey v. Garrison* 779
2. Where a part of such services were rendered as guardian *ad litem*, in proceedings had in the same court as that in which the general guardian's accounts are adjusted, and no specific fee has been allowed the guardian *ad litem* in such proceedings, the county court may include such fee in the total allowance for attorney's fees for the entire services rendered. *Bailey v. Garrison* 779
3. The fees of a guardian *ad litem* are not in all cases and under all circumstances taxable in whole or in part to the adverse parties. *Bailey v. Garrison* 779

Final Account.

4. In the final settlement of the accounts of a guardian, that he has not paid certain attorney's fees charged therein, is not of itself a valid objection to the allowance of such item, where it appears that there is a *bona fide* arrangement between himself and the attorney that the amount allowed by the court therefor shall be paid to the latter. *Bailey v. Garrison* 779

Heirs. See DESCENT AND DISTRIBUTION.

Highways. See TELEGRAPHS AND TELEPHONES.

Prescription.

1. To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action for the recovery of the land. *Gehris v. Fuhrman* 325

Vacating.

2. A public road was surveyed and located in 1869, but there was never any public travel along or upon the line of the survey. *Held*, That the road was vacated by the provisions of section 3, chapter 78, of the Compiled Statutes. *Gehris v. Fuhrman* 325

Highways—*Concluded.*

3. The proviso in section 3, chapter 78, Compiled Statutes (Annotated Statutes, 6006), "that all roads that have not been used within five years shall be deemed vacated," was intended to apply exclusively to roads that had not been used within five years before the enactment of such section. *Williams v. Smith*..... 329

Homestead. See FRAUDULENT CONVEYANCES, 3-5.

Sheriff's Deed.

1. A sheriff's deed made in pursuance of a sale of a debtor's homestead, which at the time of the levy is occupied as such by the debtor and his family, the judgment running against the husband individually, will not devest the debtor of his title to the homestead, nor invest the purchaser with any title thereto. *Van Doren v. Wiedeman*..... 243

Waiver.

2. A homestead was levied upon and sold by the sheriff on an ordinary execution. After confirmation of the sale and application of the proceeds to the payment of the judgment and costs, a surplus amounting to the sum of $2,449.08 remained in the hands of the sheriff. The wife had not been a party to the proceedings, but subsequently, by application to the court, obtained an order for the payment of the surplus to her. The sheriff, acting in pursuance of this order, required that the husband join with the wife in signing the receipt for the money. *Held*, That a waiver of the homestead right by the husband could not be predicated solely upon the fact that he signed the receipt. Whether in any event a homestead right can be waived, *quære*. *Van Doren v. Wiedeman*..... 243

Husband and Wife. See FRAUDULENT CONVEYANCES, 2.

The husband, while living with his wife, can not gain title to her land by adverse possession. *Hovorka v. Havlik*..... 14

Indians.

1. Under an act of congress entitled "An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the state of Nebraska," etc., the widow of an allottee dying before the issuance of a final patent, and without issue, takes a life estate in the allotment to her husband, remainder over to his father. *McCauley v. Tyndall*..... 685

2. An allottee and patentee of lands in severalty pursuant to an act of congress entitled "An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the state of Nebraska, and for other purposes," approved August 7, 1882, is seized of an equitable estate in fee, which, upon his death before the issuance of a final patent therefor

Indians—*Concluded.*

by the United States, descends to his heir or heirs at law according to the laws of inheritance of this state. *Porter v. Parker*..... 338

Injunction. See CORPORATIONS, 4. 5.

Garnishment.

1. A suit in equity may be maintained to enjoin a judgment creditor from prosecuting a multiplicity of proceedings in garnishment to subject the wages of laborers, mechanics and clerks, which are absolutely exempt by law from attachment, execution, and garnishee process, to the payment of his judgment. *Seiver v. Union P. R. Co*..... 91

2. The employer from whom such wages are due and who has been served with garnishee process is a proper and necessary party to such suit, in order to authorize the court to make a decree which will afford plaintiff suitable, adequate and complete relief. *Seiver v. Union P. R. Co*..... 91

Summons.

3. Where the employer is thus made a party and the suit has been properly brought against him in any county, and service of summons therein has been made on him, a summons issued to the sheriff of another county, where the judgment creditor resides, which is properly served on him, gives the court jurisdiction of all the parties to the action, and full power to grant the proper relief therein. *Seiver v. Union P. R. Co*..... 91

4. In such cases it must appear that the defendant served in the county where the suit is brought has a substantial interest in the legal questions involved, and the relief prayed for in the action, and that he is a real and not a sham defendant. *Miller v. Meeker*, 54 Neb. 452, and *Stewart v. Rosengren*, 66 Neb. 445, distinguished and approved. *Seiver v. Union P. R. Co*..... 91

Trespass.

5. Ordinarily, a suit in equity will not lie to restrain a solvent party from trespassing upon personal property, or from the mere oral assertion of title thereto. *Ganow v. Denny*..... 706

Innuendo. See LIBEL AND SLANDER, 7.

Insolvency. See BANKRUPTCY.

Instructions. See APPEAL AND ERROR, 14-22. INSURANCE, 4, 5. MALICIOUS PROSECUTION, 3. MALPRACTICE, 3. STATUTE OF FRAUDS, 3. TRIAL.

Action for Damages.

1. Instructions in an action to recover damages for loss by fire from engine, *held* not prejudicial. *Creighton v. Chicago, R. I. & P. R. Co*..... 456

Instructions—*Continued.*

Assumption of Fact.

2. The question whether the legal *situs* of certain personalty belonging to the estate was in Wyoming or in Nebraska having been, by proper instructions, submitted to the jury, another instruction which in substance charges that the executor, as ancillary executor in Nebraska, will not be liable to the estate for personal property whose legal *situs* is in Wyoming, will not be held bad on the ground that it assumes the existence of property in Wyoming. *Tunnicliff v. Fox* 811
3. In instructing the jury, the court may and should assume as established all facts over which there is no controversy. *Strong v. Combs* 315

Bastardy.

4. An instruction that the unsupported testimony of the prosecutrix should be received with caution and weighed carefully, on the theory that she should be regarded as an accomplice, is properly refused; her interest in the event of the case may be considered, but the instruction should go no further. *Gatzemeyer v. Peterson* 832

Faulty.

5. While not to be commended, an instruction directing the jury to "do substantial justice" between the parties, is not prejudicial error where they are told to do so by finding a verdict "solely from the evidence in the case, applying the law as given in these instructions." *German Ins. Co. v. Shader* 1

Libel.

6. Instructions in an action for libel, *held* favorable to the plaintiff in error. *Bee Publishing Co. v. Shields* 750

Malpractice.

7. A charge in an action for malpractice, that defendants are not liable for the consequences of the operation if they acted "in a careful and skillful manner under the belief that it was proper," is too broad; the belief must have been one acquired in the exercise of due professional care and skill. *Johnson v. Winston* 425

Murder.

8. Where by the evidence it is conclusively shown that the defendant either committed the crime charged—that is, murder in the first degree—or is entirely innocent, noninstruction to the jury by the trial court with respect to the lesser degrees of homicide embraced in the charge alleged in the information is not erroneous. *Jahnke v. State* 154
9. Instructions given and refused, excepted to by the defendant, examined, and the ruling thereon *held* proper. *Jahnke v. State* 154

Instructions—*Continued.*

Negligence.

10. Unless the inference of negligence from the conduct of a party is so direct and immediate as to be within the common and universal experience of mankind, the court may not instruct the jury that he was negligent as a matter of law. *Hajsek v. Chicago, B. & Q. R. Co*..... 539
11. Where evidence tended to show that a lineman of an electric lighting company was injured by inadvertently passing between a pair of exposed splices situated within two feet of a post on wires carrying a strong current of electricity, and that the lack of insulation had continued during time of lineman's employment, *held*, not error to tell the jury that failure to make reasonable effort to provide a safe working place for the employee, and consequent negligence, might be inferred from the mere fact that the splices were not insulated, if the jury found that reasonable care would have required their insulation. *New Omaha Thompson-Houston Electric Light Co. v. Rombold*..... 54
12. *Held*, that whether or not due care on the lineman's part required that he see and avoid contact with the exposed splices was properly left to the jury. *New Omaha Thompson-Houston Electric Light Co. v. Rombold*..... 54

Peremptory.

13. An instruction which, in effect, directs a finding on an issue upon which the evidence is conflicting, is erroneous. *New Omaha Thompson-Houston Electric Light Co. v. Rombold* 71

Refused.

14. Where an instruction was requested that assumed the existence of a judgment unreversed and unmodified as a bar to a defense of adverse possession, and the evidence disclosed that such judgment had been annulled by a decree enjoining its enforcement and declaring it of no force and effect, such instruction was properly refused. *Lydick v. Gill*. 273
15. In an action where there are several defendants all defending on distinct and different grounds, an instruction in general terms which can apply to the defense made by only one of them, should be refused. *Lydick v. Gill*..... 273
16. The instruction tendered should have been specific in its terms, and limited in its application to the one defendant. *Lydick v. Gill*..... 273
17. Where one of several instructions asked by a party fails to correctly state the law, error can not be predicated upon an exception taken to the refusal of the court to give the instruction as a whole. *Strong v. Combs*..... 315
18. Instructions tendered by the defendant, to the effect that a

Instructions—*Concluded.*

statement made by the assured was a warranty and untrue, *held* to have been properly refused. *Ætna Life Ins. Co. v. Rehlaender*..... 284

Special Findings.

19. The refusal to give an instruction, proper in form, is not ground for reversal where such instruction is based on a fact the existence of which the jury negative by a special finding supported by the evidence. *New Omaha Thompson-Houston Electric Light Co. v. Dent*..... 668

Technical Term.

20. An instruction will not be held erroneous on account of the use of a technical term therein without explanation, if the charge of the court, as a whole, sufficiently explains the sense in which such term is used and is to be understood by the jury. *Tunnicliff v. Fox*..... 811

Theory of Case.

21. A party is entitled to have his theory of his case, as disclosed by the evidence, submitted to the jury, under proper instructions, and where such an instruction is tendered to the court, the refusal to give it is reversible error. *Omaha St. R. Co. v. Boesen*..... 437

Insurance.

Benevolent Association.

1. A benevolent association which issues benefit certificates to its members, payable from a fund maintained by assessments upon the certificate holders, is, in effect, a mutual life insurance company, and is governed by the general rules of law applicable to such companies. *Supreme Lodge Knights of Honor v. Davis*, 26 Colo. 252. *Modern Woodmen of America v. Colman*..... 660

Defense.

2. Where an insurance company denies all liability on a policy, basing its refusal on the ground that the loss or injury insured against has not occurred, the insured may bring an action thereon without waiting for the expiration of the period limiting the time within which an action may be brought. *Modern Brotherhood of America v. Cummings*.... 256

3. In an action on an accident insurance policy, plaintiff alleged the accidental breaking of his arm. The theory of the defense was that the arm had not been broken, and resistance of the claim was based upon this ground. *Held*, That it was not error to exclude evidence that the action was prematurely brought, under the terms of the policy. *Modern Brotherhood of America v. Cummings*..... 256

Instruction.

4. The evidence that proofs of loss or injury under an insur-

Insurance—*Continued.*

ance policy were duly furnished being undisputed—the defendant at no time urging the failure to furnish such proofs, litigating its case upon the merits—an instruction purporting to state the essential elements of plaintiff's proof will not be held erroneous for omitting to mention the necessity of filing proofs of loss. *Modern Brotherhod of America v. Cummings*..... 256

5. An accident insurance policy provided that in case of death resulting from an accident, the beneficiary would be entitled to the full sum of one regular assessment upon all members of the association in good standing, not to exceed $3,000, and in case of the accidental breaking of an arm or leg, the insured would be entitled to one-tenth of the sum which the beneficiary would have received in case of the death of the insured. In an action on the policy, alleging the accidental breaking of an arm, the plaintiff asked a witness if he knew how many members the defendant order had. Objection that the testimony was "immaterial and irrelevant" was sustained. The defense was based solely upon the ground that the accident as alleged had never occurred. An instruction authorized the jury, if they found for plaintiff, to assess his recovery at the full sum of $300. *Held*, That the absence of proof as to the membership of defendant would not warrant the setting aside of a verdict in that sum. *Modern Brotherhood of America v. Cummings*, 256

Principal and Agent.

6. Where an agent who has general power to receive and collect premiums accepts a premium after loss and the insurer desires to repudiate such act, it should return or tender the money to the insured; mere return to the agent with instructions which are not executed will not suffice. *German Ins. Co. v. Shader*..... 1

Representations.

7. A statement, signed at the request of the agent of a life-insurance company by the assured, to obtain a revival of his policy, where, by its terms, it should have been signed by the beneficiary, and in which the assured states that he is in good health and that there is nothing in his habits or condition which is likely to impair his health or shorten his life, is a representation and not a warranty. *Ætna Life Ins. Co. v. Rehlaender*..... 284

8. In order to defeat a recovery in such a case the company must prove that the representations are untrue, and were made by the assured knowingly with the fraudulent intent to mislead and deceive; that they were material to the risk, and were relied on by the defendant. *Ætna Life Ins. Co. v. Rehlaender*..... 284

Insurance—*Concluded.*

9. Where the insurance company treats the statement as a representation, pleads its falsity, alleges that the false statement was knowingly and intentionally made in order to deceive, and cause it to revive the policy, which it otherwise would not have done, and the cause is tried and the jury properly instructed on that issue, a verdict against the company will not be set aside if there is competent evidence to sustain it. *Ætna Life Ins. Co. v. Rehlaender*..... 284

Waiver.

10. A forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them without objection until after the death of the insured. *Modern Woodmen of America v. Colman*..... 660

11. Provisions in a policy of insurance that the risk shall not attach unless the premium has been actually paid, are waived in case the policy is delivered upon an agreement to extend credit, and the insurer does not take advantage of said provisions, but treats the policy as in force. *German Ins. Co. v. Shader*..... 1

12. Receiving the premium after destruction of all the insured property, so that nothing remains to which insurance might attach, waives a provision that the insurer shall not be liable for a loss occurring before payment of the premium. *German Ins. Co. v. Shader*..... 1

13. Former decisions of this court as to waiver of conditions in policies of insurance and the construction of such conditions adhered to. *German Ins. Co. v. Shader*..... 1

Intervention. See ATTORNEY AND CLIENT, 1.

Intoxicating Liquors.

On the hearing of an appeal from a license board the district judge should exercise his independent judgment, being governed by the evidence found in the record alone; his judgment should not be controlled or influenced by the finding made by the board from which the appeal is taken. *Bennett v. Otto*..... 652

Judgment. See EVIDENCE, 13. JURISDICTION. JUSTICE OF THE PEACE. PRIVITY.

Confession.

1. A written offer to allow judgment to be taken against a defendant for a sum specified, made under the provisions of section 565 of the Code of Civil Procedure, to be available for the purpose of the rendition of a judgment on such offer of compromise, must be accepted and notice thereof given to

Judgment—*Continued.*

the party making the offer within five days from the time of making the same. *Becker v. Breen*..... 379

2. In the case at bar, the trial court erred in overruling a motion to vacate a judgment rendered on an offer to compromise made in pursuance of the provisions of said section, it being disclosed by the record that there was no acceptance of such offer and no notice of acceptance given within the time and manner required by statute. *Becker v. Breen*..... 379

Petition.

3. An action by a subcontractor, brought on the bond of a contractor for the erection of a public building, demanded judgment for work and labor in said building furnished by said subcontractor. Judgment in his favor was entered for the sum of $127.70 for labor and material furnished. *Held*, That the judgment could not be supported by the allegations of the petition. *Fidelity & Deposit Co. v. Parkinson*, 319

Res Judicata.

4. A judgment, rendered by a court of competent jurisdiction, determining the rights of the litigants on a cause of action or defense, is an effectual bar against future litigation over the same right determined by such judgment, and is for all time, unless reversed or modified, binding on the parties and their privies in estate or in law. *State v. Broatch*..... 687

5. A "right, question or fact" distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies, and this even though the second suit is for a different cause of action. *State v. Broatch*..... 687

6. The right, question or fact which when put in issue and determined, to become the subject of the rule of *res judicata*, must be a question of fact as distinguished from an abstract proposition of law; and the determination must be with reference to such question or questions of fact, although the decision itself may be a question purely of fact or a mixed question of fact and law or a legal deduction arising from a state of facts common to both actions, as for example a decision construing, as a matter of law, an agreement is binding between the parties and their privies where the same instrument is urged as a ground of recovery or defense in a subsequent suit on a different cause of action. *State v. Broatch* 687

7. Abstract questions of law can not be made the subject of litigation. There must be real parties and a *res* in dispute that will become *res judicata* when the litigation is determined. *State v. Savage*, 64 Neb. 684. *State v. Broatch*... 687

Judgment—*Concluded.*

8. A judgment *in rem* is binding and conclusive on all persons as to every matter necessarily involved in an adjudication upon the status of the person or thing which is the subject matter of the proceeding; but as to matters involved in collateral litigation in such proceedings, between particular parties, and not necessarily involved in such adjudication, it is binding only upon those who actually litigated such matters, and their privies. *Sorensen v. Sorensen*..... 490

Revivor.

9. Where a judgment against joint debtors is sought to be revived, all those jointly liable should be made parties to the action. But where all are made parties and a summons is issued against all, the fact that one or more of the parties can not be found will not abate the action against those found and properly served. *Fox v. Abbott*, 12 Neb. 328, distinguished. *Clark v. Commercial Nat. Bank of Columbus*... 764

Vacating.

10. Where a judgment is obtained by a fraudulent misrepresentation that induces the party to remain away from court to his injury, the remedy for vacating such judgment is not by a motion filed under subdivision 3 of section 602, Code of Civil Procedure, but by petition and summons under subdivision 4 of said section. *Gutterson v. Meyer*..... 767

11. The provisions for vacating judgments, after term, under section 602, Code of Civil Procedure, apply to voidable, but not to void, judgments. *Gutterson v. Meyer*..... 767

12. Under the provisions of section 602 *et seq.* of the Code of Civil Procedure a county court has no power, after term, to vacate its own judgment on the ground that the same is void for want of jurisdiction over the person of the defendant. *McCormick Harvesting Machine Co. v. Stires*..... 432

Judicial Sales. See FRAUDULENT CONVEYANCES, 6.

Bona Fide Purchaser.

1. Where a sheriff's deed forms one of the links in a chain of title, the party claiming thereunder is charged with notice of any jurisdictional defect in the proceedings which the record in the case from which the deed emanated shows; and if the record discloses on its face that the court had no jurisdiction to enter the decree in the execution of which the deed was made, he can not claim to be a *bona fide* purchaser of the land. *Albers v. Kozeluh*..... 522

Proceeds.

2. The statute constitutes the sheriff making a judicial sale of real property the sole custodian of the fund derived from such sale, between the date thereof and the date of confirma-

Judicial Sales—*Concluded.*

tion, and, upon the happening of the latter event, makes it his duty to pay the money to the person or persons entitled thereto. *Craw v. Abrams*..... 546

3. The sheriff and the purchaser disobey this statute at their peril, but they can not by such disobedience, and the payment of the money to the clerk of the court, impose obligations upon him, as such clerk, foreign to the duties of his office. *Craw v. Abrams*..... 546

4. The sheriff making a judicial sale of real property under a decree of foreclosure, is the sole custodian of the fund derived from such sale between the date thereof and the confirmation of such sale, and upon such confirmation it is his duty to pay the money to the person or persons entitled thereto in conformity to the order of the court. *Craw v. Abrams* 553

5. Whether the payment of the money by the purchaser or by the sheriff to the clerk of the court in vacation, and before a confirmation of the sale, is payment into the court so as to charge the clerk and his sureties on his official bond with its repayment, is not determined. *Craw v. Abrams*..... 553

6. Where the sureties deny the execution and delivery of the official bond, and the clerk defends on the ground that he merely received the money as bailee, and not in his official capacity as clerk, a tender of part payment by him does not impair the defense of the sureties. *Craw v. Abrams*..... 553

Jurisdiction. See APPEAL AND ERROR, 42. ATTACHMENT, 2. CORPORATIONS, 10. COURTS, 1, 2. PARTITION, 5. RECEIVERS, 4, 6.

1. Seeley obtained a judgment in the district court, and after his death a petition in error making Seeley the sole party defendant was filed in this court, and attorneys of this court who were attorneys of record for Seeley in the district court, filed with said petition in error a written statement, signed by them, as attorneys for Seeley, purporting to waive the issuing of summons in error and to enter the voluntary appearance of Seeley in this court. *Held*, That this court acquired no jurisdiction. *Ritchey v. Seeley*..... 127

2. A formal judgment entered in this court upon such attempted voluntary appearance is void, and will be so declared, when, at the same term at which the judgment was entered, the facts are brought to the knowledge of the court. *Ritchey v. Seeley*..... 127

Jury. See CRIMINAL LAW AND PROCEDURE, 11, 12. TRIAL.

Justice of the Peace.

A justice's docket contained the following: "One hour after the time stated in the summons, this cause came on for

Justice of the Peace—*Concluded.*

hearing. Plaintiff in court. Defendant failed to appear one hour after the time stated in the summons, and the plaintiff filed his bill of particulars, and I find from the bill of particulars that there is due the plaintiff the sum of fifty-eight dollars and all costs taxed at $2.40 (two and forty cents)." On the margin was a taxation of costs, and a charge for the entry of judgment. *Held*, Sufficient to protect succeeding justice in the issuance of an execution, and a constable in levying that execution. *Fowler v. Thomsen*.. 578

Libel and Slander. See INSTRUCTIONS, 6.

Civil Liability.

1. The proprietor of a newspaper is civilly liable for a libelous article published therein, although such article be published without his knowledge. *Williams v. Fuller*..... 354

Damages.

2. In an action for libel in this state, the recovery is limited to compensatory damages, and the defendant is not permitted to show, in mitigation thereof, that the publication was without his knowledge. *Williams v. Fuller*..... 354
3. Damages awarded in the sum of $2,500, for libeling a county attorney, *held* not excessive. *Bee Publishing Co. v. Shields*, 750

Evidence.

4. Where the publication is libelous *per se*, the plaintiff is not required to introduce evidence of actual damage to entitle him to substantial damages. *Williams v. Fuller*..... 354
5. In an action for libel, evidence of other publications in the same paper containing substantially the same imputation as that sued upon, whether made before or after the latter, or even after suit brought, may be admitted in evidence for the purpose of proving malice in the publication sued on. *Bee Publishing Co. v. Shields*..... 750
6. Evidence of the extensive circulation of a paper, in which an alleged libel is published, may be admitted for the purpose of showing the extent of the injury. *Bee Publishing Co. v. Shields* 750

Innuendo.

7. The office of an innuendo in pleading is to point out the meaning of words which are vague or indefinite in meaning or application; but where the words have definite and certain meaning and application, and thus taken are libelous, explanatory words or phrases, or innuendoes are not required. *Williams v. Fuller*..... 354

Libel per se.

8. Any false and malicious writing published of another is libelous *per se*, when its tendency is to render him con-

Libel and Slander—*Concluded.*

temptible or ridiculous in public estimation, or expose him to public hatred or contempt, or deprive him of the companionship of respectable people. *Williams v. Fuller*..... 354

Liberty of Press.

9. The liberty of the press is no more sacred than the liberty of speech; what a man may write with impunity he may speak with impunity. *Bee Publishing Co. v. Shields*..... 750

10. An occasion of privilege will not justify false and groundless imputations of wicked motives or of crime against public officials in the performance of their duty. *Bee Publishing Co. v. Shields*..... 750

11. While the conduct of such officials is open to criticism, a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives or of criminal offenses to officials. *Bee Publishing Co. v. Shields*..... 750

Pleading.

12. The answer in an action for libel alleged, among other things, that the article complained of was not published of or concerning the plaintiff, and that it was true. *Held*, That these allegations must be construed so as to be consistent, and hence that evidence that the charges contained in such article were true of the plaintiff was properly excluded. *Williams v. Fuller*..... 362

13. Section 132, Code of Civil Procedure, in effect, declares that in an action for a libel or slander the truth of the defamatory matter is *per se* a complete defense. *Larson v. Cox*..... 44

14. Said section, so far at least as it relates to spoken defamation, is in harmony with the constitution and is valid. *Larson v. Cox*..... 44

15. In an action for slander, a plea of justification is good without alleging that the defamatory words were spoken with good motives or for justifiable ends. *Larson v. Cox*..... 44

Limitation of Actions. See DEEDS. TENANT IN COMMON, 1.

1. An action for relief on the ground of fraud, is barred in four years from the date of the discovery of such facts as would put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to such discovery. *Cole v. Boyd*..... 146

2. After eight years have elapsed, an attorney's claim for services is barred by the statute of limitations. *Greek v. McDaniel*..... 569

Malicious Prosecution. See EVIDENCE, 23.

1. Defendants having procured plaintiff's arrest on the ground that there was danger that he would leave the state to avoid an examination in proceedings in aid of execution, the county

Malicious Prosecution—*Concluded.*

judge's finding, that the evidence did not disclose such intention, is admissible in evidence at the trial of plaintiff's action for malicious prosecution based on such arrest and proceedings, especially where the termination of such proceedings is disputed. *Bank of Miller v. Richmon*..... 731

2. Evidence of plaintiff as to his intentions with regard to leaving the state, and as to his arrangements, about the time of his arrest, to remain, defendants not being chargeable with knowledge of either, and such proof merely tending to show plaintiff's innocence of the charge made by defendants, is immaterial in an action of malicious prosecution, and, where it may have created some sympathy for plaintiff, its admission is prejudicial error. *Bank of Miller v. Richmon*..... 731

3. It is not error to refuse, in an action for maliciously procuring plaintiff's arrest in proceedings in aid of execution, an instruction that makes an intention on the part of plaintiff to leave the state a sufficient ground for arresting him. The statute only permits arrest where there is danger defendant will not obey a citation to appear. *Bank of Miller v. Richmon* 731

Malpractice. See INSTRUCTIONS, 7. WITNESSES, 10, 11.

1. In an action against a physician and surgeon for alleged negligent treatment of a compound fracture of the bone, it is permissible to show by another surgeon what would be the proper treatment for a simple fracture, and that the treatment for a compound fracture would not be materially different. *Leisenring v. La Croix*..... 803

2. In such an action it is proper to submit evidence relating to the condition of the patient's health at the time the treatment began, and also to the length of time he was treated by others after defendant ceased to attend him, the jury being cautioned "to compensate plaintiff only for such injury and damage as may have been caused by reason of the negligence of defendant." *Leisenring v. La Croix*..... 803

3. Where there is evidence that under proper treatment the fractured bone should have united within six weeks, and that plaintiff was confined under defendant's treatment for a period of fourteen weeks, most of the time in great pain, it is proper to submit to the jury the question whether the pain and suffering were caused by defendant's negligence, and to authorize a recovery therefor. *Leisenring v. La Croix* 803

4. A verdict in such case for $1,140 upheld, when corrected by a remittitur of an item of interest erroneously allowed between the date of the injury and that of the judgment. *Leisenring v. La Croix*..... 803

Mandamus.

1. Mandamus will not lie to compel an inferior board or tribunal to do an act in the performance of which discretion or judgment is required to be exercised. *State v. City of Lincoln* 597

2. Under section 120, chapter 13, article 1, Compiled Statutes, 1901, mandamus will not lie to compel the city council to award the contract to supply coal for the city water department to a bidder on the ground that he is the lowest and best bidder, as, in passing upon the question who is the best and lowest bidder, the council exercises a discretion not controllable by mandamus. *State v. City of Lincoln*..... 597

Marriage. See EVIDENCE, 27.

1. There is a presumption of the existence of marriage which arises from cohabitation and holding each other out to the world as husband and wife, and public policy will not prevent a child born of such relations from availing himself of such presumption in a contest as to his legitimacy. *Sorensen v. Sorensen*..... 509

2. A contract for a marriage in the future can not of itself constitute marriage, and if its language imports that the marriage is to take place in the future, such contract will not constitute a marriage *de præsenti.* But two contracts, one constituting a present marriage and the other providing for a future public celebration thereof, are not inconsistent. *Sorensen v. Sorensen*..... 509

3. A contract between a man and woman, competent to marry, in which it is by them mutually agreed by that contract to then become husband and wife, constitutes a valid marriage; but when there has been no subsequent cohabitation, admissions of the parties, or other evidence, except the unsupported oath of one of the parties after the other party is deceased, there is a presumption against secret marriages which must be considered as evidence against the existence of the contract. Our marriage laws aim at publicity; secret marriages are not favored. *Sorensen v. Sorensen*..... 509

4. An existing agreement between a man and woman to marry at a future day conclusively negatives the claim of a marriage *per verba de præsenti* between the same parties. *Sorensen v. Sorensen*..... 500

5. Marriage *per verba de futuro cum copula* is not consummated unless the *copula* is had in fulfilment of the future agreement. *Sorensen v. Sorensen*..... 500

6. An agreement to live together as husband and wife, made with the intention of being carried into effect, is not sufficient to constitute a common law marriage, unless it is

Marriage—*Concluded.*
acted upon by the parties living together as husband and wife. *Sorensen v. Sorensen*..... 500

Marshaling Assets.
1. The rule as to marshaling assets has its proper exceptions and limitations, and where, by reason of the circumstances in a particular case, it would be inequitable and work an injustice to require one of two creditors having a lien on two securities to first resort to the one on which the other creditor has no lien, a court of equity will not enforce the rule. *Anthes v. Schroeder*..... 370
2. Ordinarily, where several creditors having a common debtor, who has several funds, all of which can be reached by one creditor and only a part of the funds by others, a court of equity will require that the former shall take payment out of the funds to which he can resort exclusively, so that all may receive payment. *Anthes v. Schroeder*..... 370
3. It is likewise a rule in equity, that if a prior creditor having security on two funds satisfies his demand out of the security or fund which alone is pledged to a junior creditor, and thereby exhausts that fund or security, the latter creditor will be subrogated to the former's lien upon that fund or security which is not exhausted. *Anthes v. Schroeder*... 370
4. The plaintiff is entitled to equitable subrogation to the lien of a prior creditor on other security, for any balance remaining due, after the application of the proceeds of the security on which both have liens to the payment in full of the prior incumbrance. *Anthes v. Schroeder*..... 370

Master and Servant. See CONTRACTS, 5. INSTRUCTIONS, 11. NEGLIGENCE.

Burden of Proof.
1. In an action for negligence, when contributory negligence is relied upon as a defense, the burden of proof is upon the defendant to establish such defense, unless contributory negligence is disclosed by the petition, or by the evidence introduced by the plaintiff in making his case. *New Omaha Thompson-Houston Electric Light Co. v. Dent*..... 668
2. Where the evidence on the question, either of negligence or contributory negligence, is of such a character that reasonable minds might honestly differ as to the inference to be drawn therefrom as to such questions, a finding either way thereon can not be said to be insufficiently supported by the evidence. *New Omaha Thompson-Houston Electric Light Co. v. Dent*..... 668
3. An employee has a right to assume that his employer has taken due precautions to insure his safety, and that the

Master and Servant—*Continued.*

tools, appliances and material furnished by the employer are reasonably safe. *Aliter*, where the employee has notice of the defective condition of such tools, appliances or material or of facts sufficient to put a man of ordinary prudence on inquiry. *New Omaha Thompson-Houston Electric Light Co. v. Dent*..... 668

Duty of Master.

4. Ordinarily, in providing his employees with a place to work, or tools and appliances with which to work, an employer is bound to exercise reasonable care to insure the safety of such employees. *New Omaha Thompson-Houston Electric Light Co. v. Rombold*..... 71

5. The foregoing duty is a continuing one, and the employer is also bound to keep such place, tools and appliances in a reasonably safe condition, and to make seasonable inspection with that end in view. *New Omaha Thompson-Houston Electric Light Co. v. Rombold*..... 71

Duty of Servant.

6. Where, from the nature of the work, the contract of employment, or other facts and circumstances, the duty to make inspection and discover defects devolves upon the employee, the employer is not liable for an injury resulting to such employee from a defect which the latter, by reasonable inspection, would have discovered. *New Omaha Thompson-Houston Electric Light Co. v. Rombold*..... 71

Negligence.

7. Whether plaintiff's intestate, an experienced lineman with telephone and telegraph wires, had such knowledge and experience respecting the handling of wires charged with heavy currents of electricity and used for lighting and power purposes, and of the character and pliability of the insulation thereon as to its being brittle and liable to break when twisted in fastening because of age and wear, and whether he acted without due care and caution under the circumstances and was chargeable with contributory negligence, *held*, not to be so conclusively proved as that there is no reasonable chance of different minds reaching different conclusions, and to have been properly submitted to the jury for its determination. *New Omaha Thompson-Houston Electric Light Co. v. Dent*..... 674

Risks—Assumption of.

8. An employee assumes only the risks arising from the appliances and materials to be used by him or from the manner in which the business in which he is to take part is conducted, when such risks are known to him or are apparent and obvious to persons of his experience and under-

Master and Servant—*Concluded.*
standing. *Union Stock Yards Co. v. Goodwin*, 57 Neb. 138. *New Omaha Thompson-Houston Electric Light Co. v. Dent*..... 674

9. Whether or not the employee exercised due care and caution in looking for breaks in the insulation on the wire he was working with and fastening, and whether he was guilty of contributory negligence in respect thereto, *held*, under the evidence, to have been properly submitted to the jury for its determination. *New Omaha Thompson-Houston Electric Light Co. v. Dent*..... 674

10. A break occurring in the insulation on the wire which was being handled and fastened around a glass insulator by the plaintiff's intestate is not an open and obvious defect, notice of which will be imputed to him where, under the evidence, there exists reasonable grounds for difference of opinion as to his being able to observe such break in the prosecution of the work in which engaged in the ordinary way and without making an extra effort specially for the purpose of ascertaining the condition of the insulation where the break occurred, after the wire was fastened. *New Omaha Thompson-Houston Electric Light Co. v. Dent*..... 674

11. The rule announced in *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, *ante*, p. 71, on the evidence in that case as to the duty of a lineman of an electric light company to inspect wires with which he was working to discover defects, *held*, not applicable to the case at bar and the case cited is therefore distinguished. *New Omaha Thompson-Houston Electric Light Co. v. Dent*..... 674

Mechanics' Liens. See STATUTES.

Mortgages. See CHATTEL MORTGAGES.

1. To entitle a mortgagee, who has taken a judgment, to foreclose, it is only necessary that the judgment and a return of execution as required by section 851, Code of Civil Procedure, be set out. It is not necessary in the petition to state the nonexistence of other proceedings to enforce the judgment. *Montpelier Savings Bank & Trust Co. v. Follett*..... 410

2. Where a judgment has been transcripted to another county, issuance and return of execution there will be a sufficient compliance with the requirements of section 851 of the Code of Civil Procedure, unless it affirmatively appears that the defendant did not reside there. *Montpelier Savings Bank & Trust Co. v. Follett*..... 410

3. Under provisions of section 848 of the Code of Civil Procedure, prior to its amendment in 1897, no action at law could be maintained to recover on a debt secured by a mort-

Mortgages—*Concluded.*

gage, after a petition to foreclose the mortgage had been filed, or after a decree had been rendered, without authority from the court having jurisdiction of the foreclosure proceedings. *Mann v. Burkland*..... 269

4. A petition in an action at law seeking to recover on an indebtedness secured by a mortgage, where foreclosure proceedings have been instituted under the mortgage, are pending, or have gone to decree, is subject to demurrer if it fail to allege authority from the court having jurisdiction of the foreclosure proceedings to maintain the action at law. *Mann v. Burkland*..... 269

5. Before a plaintiff in a foreclosure suit can recover the proceeds of a judicial sale on his decree, he must show his right thereto by proving the confirmation of the sale. *Craw v. Abrams* 553

Municipal Corporations. See MANDAMUS. TELEGRAPHS AND TELEPHONES.

Board of Fire and Police Commissioners.

1. The legislature may by statute confer upon the governor the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class. *Redell v. Moores*, 63 Neb. 219. *State v. Broatch*..... 687

Contracts.

2. A city or village can enter into a valid contract for the erection or construction of any work authorized by section 69, article 1, chapter 14, Compiled Statutes, only after it has advertised for bids as required by subdivision XV of such section, and then only with some person in accordance with a bid tendered by him in response to such advertisement. *Fairbanks, Morse & Co. v. City of North Bend*..... 560

3. The object of that subdivision is to invite competition and to prevent favoritism and fraud; to attain that object it is essential that the bidders, so far as possible, be placed on equal footing, and be permitted to bid on substantially the same proposition, and on the same terms. *Fairbanks, Morse & Co. v. City of North Bend*..... 560

4. Where a bid, filed within the time fixed by the advertisement for receiving bids, is substantially changed and modified after such time, it is to be regarded as a new bid, received after other competitors, by the terms of the notice, had a right to presume that the contest was closed; consequently, its acceptance would be in violation of the provisions of said subdivision, as above construed, and would impose no liability on either party. *Fairbanks, Morse & Co. v. City of North Bend*..... 560

Municipal Corporations—*Concluded.*

5. Where a bid, under the circumstances mentioned in the preceding paragraph, is accompanied by a deposit, as a guarantee that the bidder will enter into a contract in accordance with the terms of his bid if accepted; upon the refusal of the bidder, after his bid is accepted, to enter into such contract, he is entitled to a return of his deposit, because, under such circumstances, such bid and its acceptance can not be made the basis of a valid contract. *Fairbanks, Morse & Co. v. City of North Bend*..... 560

6. In an action to recover such deposit, the plaintiff is not estopped to deny the validity of the bid and its acceptance, nor does the maxim, *Potior est conditio possidentis*, apply in such a way as to defeat a recovery. *Fairbanks, Morse & Co. v. City of North Bend*..... 560

Negligence. See BANKS AND BANKING, 5. INSTRUCTIONS, 10-12. MASTER AND SERVANT.

1. Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state. *Hajsek v. Chicago, B. & Q. R. Co*..... 539

2. An employer's act of unbridling, in connection with the driver, a mare theretofore always gentle and tractable, and putting on her a halter, and then leaving her ordinary driver to lead her to a feed-box to eat, and doing this in front of a tent on the state-fair grounds without unhitching her from a wagon, to which she was attached, there being nothing in the surroundings aparently calculated to frighten the mare, *held*, not negligent nor creating any liability of the employer, although immediately after she became unmanageable, and ran over the driver and fatally injured him. *Fifer v. Burch*..... 217

Negotiable Instruments.

The maker of a note and mortgage not negotiable, without notice of an assignment thereof, may pay the same to the original payee in the mortgage. *Crewison v. Oelschlegal*... 573

New Trial. See APPEAL AND ERROR, 34. EQUITY, 3-5.

1. The rule acted upon by the supreme court that it will not interfere where the trial court has overruled a motion for a new trial grounded upon the insufficiency of conflicting testimony, does not apply to the district courts. These courts should independently exercise their power in this respect, without restraint from the rule which governs appellate tribunals, and, taking care not to invade the legitimate province of the jury, grant new trials whenever it appears that substantial justice has not been done between the parties. *Parker v. Wells*..... 647

New Trial.—*Concluded.*

2. Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants. *Lydick v. Gill*..... 273

3. Where a motion for a new trial is overruled under such circumstances, this court is only required to examine the record far enough to ascertain that fact. *Lydick v. Gill*..... 273

Notice. See ATTORNEY AND CLIENT, 3. BANKRUPTCY, 5-8. DEPOSITIONS, 3. JUDICIAL SALES, 1. PRINCIPAL AND AGENT, 4.

Inclosing an eighty-acre tract with other land, with a post and wire fence, and using the same for pasturing cattle, is sufficient notice of the rights of a purchaser who holds it by an unrecorded contract to put a subsequent incumbrancer on inquiry as to the purchaser's rights. *Millard v. Wegner*.. 574

Nuisance. See TELEGRAPHS AND TELEPHONES.

Officers. See BANKS AND BANKING, 5. CONTRACTS, 6. SHERIFFS.

Parties. See ACTION, 1. INJUNCTION, 2.

Partition. See DOWER.

1. Where lands are devised to two or more jointly, one of the devisees may maintain an action for the partition thereof against the executor and the other devisees, at any time after the expiration of the time for filing claims against the estate, although the estate has not been settled and there has been no decree of distribution, provided the personal assets, in the hands of the executor, are sufficient to discharge the debts of the estate and the charges enumerated in section 289, chapter 23, Compiled Statutes (Annotated Statutes, 5154). *Schick v. Whitcomb*..... 784

2. In such action, the district court has jurisdiction to determine every question necessarily involved in a just and equitable decree of partition, and where the devisees, or any of them, have received advancements, which have not been adjusted by the county court, they may be adjusted in such action. For the purposes of such adjustment, such advancements are to be regarded as a part of the assets of the estate. *Schick v. Whitcomb*..... 784

3. Where, by the terms of the will, a part of the devisees take only the use of a certain portion of the estate for life, remainder over to their children, etc., and the executor is authorized to make division thereof or to invest the proceeds, the legal title to such shares vests in the executor in trust, for the uses and purposes mentioned in the will, and im-

Partition—*Concluded.*

poses upon him a charge, requiring the exercise of his discretion, in regard to the care and management of that portion of the estate, and the provisions of the will in respect thereto should be carried out in the decree of partition. *Schick v. Whitcomb*..... 784

4. The referees in partition are not required to procure certificates of incumbrances, and have the lands appraised, as in case of a sale by the sheriff on execution; nor is it essential to the validity of such sale that the report of the clerk, as to incumbrances required by section 819, Code of Civil Procedure, or the order therefor, should be made before sale. *Schick v. Whitcomb*..... 784

5. Our statutory proceedings for the partition of real estate are essentially *in rem*, and the district court has no jurisdiction in such proceedings to partition real property in another state. *Schick v. Whitcomb*..... 784

Petition. See PLEADING AND PRACTICE.

Physicians and Surgeons. See MALPRACTICE.

Pleading and Practice. See ACTION, 1. APPEAL AND ERROR, 25-43. CREDITORS' SUIT. CRIMINAL LAW AND PROCEDURE. EQUITY, 7. INSURANCE. JUDGMENT, 10-12. LIBEL AND SLANDER, 7, 12-15. MORTGAGES. STATUTE OF FRAUDS, 2. TRIAL, 24-26.

1. The denial of an allegation that "Helena V. W. Knight, on and prior to the 25th day of April, 1898, was the owner in fee simple and entitled to the possession of" certain premises, in *ipsis verbis*, accompanied by a plea that prior to October 25, 1898, defendant had acquired title to the premises by adverse possession, and accompanied by a denial that the plaintiff, who was claiming as executor of Helena V. W. Knight, had title or right of possession, and accompanied by specific denials of plaintiff's alleged executorship, of the death of Helena V. W. Knight, and of plaintiff's right in the premises, does not deny the antecedent title of Helena V. W. Knight. *Knight v. Denman*..... 383

2. Former conclusion adhered to, both as to the negative pregnant in defendant's denial of Helena V. W. Knight's title, and as to error in the instructions by which the issue of defendant's adverse possession was submitted to the jury. *Knight v. Denman*..... 383

Petition.

3. A petition demanding relief on the ground of fraud, is demurrable if it shows that the action was not commenced within four years, and fails to show when the fraud was discovered. *Newman Grove State Bank v. Linderholm*..... 364

4. The question of whether a petition states a cause of action

Pleading and Practice—*Continued.*

or discloses grounds sufficient for the granting of equitable relief, may be raised at any stage of the proceedings in the appellate court, up to and including the filing of a motion for a rehearing. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co*..... 233

5. A prayer for general equitable relief, coupled with that of one for specific relief, can not be extended so as to warrant the granting of relief not embraced within and comprehended by the allegations of fact contained in the pleading. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co*..... 233

6. In pleading performance of conditions precedent under section 128, Code of Civil Procedure, a plaintiff may properly assume that conditions which have been waived will not be relied upon, and allegations of waiver to meet a defense based on such conditions are not inconsistent with the statutory allegation that all conditions on his part have been duly performed. *German Ins. Co. v. Shader*..... 1

7. Petition in the case at bar examined, construed, and *held* defective in substance, and insufficient to support the orders of the court appointing a receiver to take charge of and sequestrate the property and business of the defendant corporation, directing a sale thereof, and the confirmation of the sale made under such orders. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co*..... 233

8. A plaintiff does not change his cause of action by substituting allegations of waiver for a general denial with respect to a defense of breach of conditions precedent. *German Ins. Co. v. Shader*..... 1

9. Petition for alienating the affections of a husband *held* sufficient. *Sickler v. Mannix*..... 21

10. Petition filed in the county court examined, and *held* to state a cause of action. *Coleman v. Spearman, Snodgrass & Co*... 28

Practice.

11. It is not proper practice to strike from the files a duly verified petition by an heir at law of the testator seeking equitable relief against an order admitting a will to probate. Such a petition should be met by demurrer or answer. *Genau v. Abbott*..... 117

12. If the petition states a cause of action on its face, an order striking it from the files is not to be held error without prejudice because such petition is obnoxious to motion with respect to form, and the record in the probate proceedings discloses facts at variance with some of its allegations. *Genau v. Abbott*..... 117

13. A demurrer to the petition is not, by the provisions of our

Pleading and Practice—*Concluded.*

code of practice, a proper part of the answer filed in a case, and should be disregarded. *Fidelity & Deposit Co. v. Parkinson* 319

14. Where issue is joined and a trial had without objection to the sufficiency of the petition, that pleading will be construed liberally, and if the essential elements of plaintiff's case may be implied from its terms by reasonable intendment, they will be regarded as alleged sufficiently. *Sorensen v. Sorensen*..... 483

Reply.

15. The reply of plaintiff setting out certain proceedings of the county court, examined, and *held* not to state a defense to the answer of defendant. *McCormick Harvesting Machine Co. v. Stires*..... 432

Pledges. See CORPORATIONS, 1, 4.

Preferences. See BANKRUPTCY.

Principal and Agent. See CONSTITUTIONAL LAW, 1, 2. INSURANCE, 6.

Authority.

1. If a principal constitutes an agent to do a business which obviously and from its very nature can not be done by the agent otherwise than through a substitute, or if there exists in relation to the business a known established usage of substitution, in either case the principal would be held to have expected and authorized such substitution. *Breck v. Meeker*..... 99

Estoppel.

2. Where a principal has by its voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. *Holt v. Schneider*, 57 Neb. 523, followed. *Faulkner v. Simms*..... 295

3. Ostensible authority to act as agent may be inferred if the party to be charged as principal affirmatively, or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency. *Thomson v. Shelton*, 49 Neb. 644, and *Phœnix Ins. Co. v. Walter*, 51 Neb. 182, followed. *Faulkner v. Simms*..... 295

Notice.

4. It is the duty of an agent to make known to his principal all facts concerning the service in which he is engaged that

Principal and Agent—*Concluded.*

come to his knowledge in course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed. This is the foundation of the rule, necessary to the public safety, that notice to an agent in the course of his employment is notice to his principal. *Modern Woodmen of America v. Colman*..... 660

Proof.

5. The existence of an agency, and the nature and scope of its powers, may be proved by the course of dealing between the persons alleged to sustain the relation of principal and agent, and between the latter, with the consent of the former and third persons. *Standley v. Clay, Robinson & Co*..... 332

Principal and Surety. See DESCENT AND DISTRIBUTION, 3. EVIDENCE, 13. JUDICIAL SALES, 6.

Privity. See QUO WARRANTO, 3.

Privity, so far as concerns the effect of a judgment on property rights, does not arise from mere relationship by blood or affinity, nor because two parties may have an interest in the same subject matter of litigation; it implies a relationship by succession or representation, between a party to the first action and a party to a subsequent action, in respect to a matter adjudicated in the first. *Sorensen v. Sorensen*..... 490

Process.

An affidavit which contains no venue and which also fails to disclose the county of which the officer before whom it was taken is an official, is so fatally defective as to be worthless as a basis for the publication of a summons on a nonresident defendant. *Albers v. Kozeluh*..... 522

Proof. See BURDEN OF PROOF. TRIAL, 1.

Public Policy. See CONTRACTS, 6.

Publication of Summons. See PROCESS.

Quo Warranto.

1. In an action by proceedings in *quo warranto* to try title to an office, the claim or demand on which the judgment of the court is asked, the subject matter of the controversy, is the right to the office for the term in controversy, and the action is personal as to the parties claiming the office. *State v. Broatch*..... 687
2. In such action there is no adjudication or determination of official rights, duties and powers of the person adjudged to be entitled to the office, but solely an adjudication of his right to hold the office for the term in controversy and perform its functions. *State v. Broatch*..... 687

Quo Warranto—*Concluded.*

Judgment.

3. Such an adjudication determining the right of a claimant to an office for a specified term does not determine the right of a successor to the office, holding by appointment from the same authority for a different term; nor is the successor, with respect to the right to the office adjudicated in a prior suit for a different term, deemed in privity with his predecessor; nor is the subject matter the same in the two suits. *State v. Broatch*..... 687
4. Interveners *held* to have no valid claim to the office as members of the board of fire and police commissioners for the terms which are in controversy in the present action. *State v. Broatch*..... 687
5. *Held*, That the respondents, appointees of the governor, are the lawfully constituted board of fire and police commissioners of the city of Omaha. *State v. Broatch*..... 687

Railroads. See EMINENT DOMAIN.

Real Estate Agents. See CONSTITUTIONAL LAW, 1, 2.

Receivers. See CORPORATIONS, 10.

1. A receivership is a purely ancillary remedy and can not be maintained in a proceeding instituted solely for that purpose. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.* 222
2. Unless expressly authorized by statute, a court has no jurisdiction to appoint a receiver of corporate property upon grounds which would not be sufficient were the owner a natural person. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co*..... 222
3. A receiver can not be appointed at the instance of a mere mortgagee for property not covered by the mortgage. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co*..... 222
4. Jurisdiction to appoint a receiver of corporate property, can not be conferred by the mere consent of the corporation where neither equitable nor statutory grounds exist and where other parties whose rights are affected have not been notified; nor is a stockholder concluded by such an order. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co*.. 222
5. The appointment of a receiver in an equitable action is ordinarily an ancillary remedy, provisional in character, and incidental to the main object or purpose of the suit. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co*..... 233
6. Save in certain classes of suits in equity which constitute well-recognized exceptions, the jurisdiction of courts of equity does not warrant the appointment of a receiver to take charge of and administer the property and business of

Receivers—*Concluded.*

a corporation in an independent action, where that is the main object and purpose of the suit and the sole and only relief asked for. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.* 233

Rehearing.

If a correct conclusion has been reached, even by a wrong course of reasoning, the unsuccessful party is not entitled to a rehearing. *School District of Omaha v. McDonald*..... .. 623

Res Judicata. See JUDGMENT, 4-8.

Revivor. See ATTORNEY AND CLIENT, 2. JUDGMENT, 9.

Roads. See HIGHWAYS.

Sales. See CONTRACTS, 1. EXECUTORS AND ADMINISTRATORS, 9, 10.

Set-Off.

1. In an action of ejectment an offset for board and maintenance of the plaintiff by the defendants can not properly be introduced; it being pleaded merely as an account and not shown to have any direct connection with plaintiff's cause of action for possession of land and for rents and profits. *White v. Whitney*..... 739
2. Where a motion to strike out such matter on the part of the plaintiff has been overruled by the court and exceptions taken to such action, the subsequent sustaining of a demurrer to the same matter on the ground that it does not constitute a defense, is not prejudicial error. *White v. Whitney* 739

Sheriffs. See CRIMINAL LAW AND PROCEDURE, 1, 2. JUDICIAL SALES.

1. An action against a sheriff to recover damages for the seizure and sale of exempt property under an execution, is not a suit for misconduct in office within the meaning of section 907, Code of Civil Procedure; following *Neihardt v. Kilmer*, 12 Neb. 35. *Strong v. Combs*..... 315
2. Where the sheriff fails to inform the appraisers, called by him to appraise personal property seized on execution, of a mortgage lien existing thereon, which lien is set forth in the claim made by the defendant in execution that the property is exempt from seizure and sale under the execution, and the appraisement is made without knowledge of such lien on the part of the appraisers and without any allowance being made therefor, the sheriff can not interpose the appraisement so made as a defense to an action brought against him for damages for selling the property, when the amount of the lien, if deducted from the appraisement as made, would reduce the defendant's interest in the property to less than $500. *Strong v. Combs*..... 315

Statute of Frauds.

1. An oral agreement between the owner of the fee and a mortgagee of real estate that the latter shall accept a deed from the former of the property in full satisfaction of the indebtedness secured by the mortgage, is within the statute of frauds, and, in the absence of facts to take it out of the statute, is not enforceable. *Montpelier Savings Bank & Trust Co. v. Follett*..... 416

2. The objection that a contract sued upon is void under the statute of frauds because not in writing, may be availed of by a general denial in the answer. *Riiff v. Riibe*..... 543

3. In an action to recover for personal services under a contract void because not in writing and not to be performed within one year, it is error to instruct the jury that the wage agreed upon by the void contract may be regarded as establishing the rate of the plaintiff's compensation. *Riiff v. Riibe*..... 543

Statute of Limitations. See LIMITATION OF ACTIONS. TENANT IN COMMON, 1.

Statutes. See CONSTITUTIONAL LAW, 2, 3. EVIDENCE, 6. EXECUTORS AND ADMINISTRATORS, 4. HIGHWAYS, 2, 3. JUDGMENT, 1. MANDAMUS, 2. MUNICIPAL CORPORATIONS, 2, 3. STATUTES AND CONSTITUTIONAL PROVISIONS CITED, *ante*, p. xxxv. TELEGRAPHS AND TELEPHONES.

The object of the statute, section 4, article 2, chapter 54 of the Compiled Statutes of 1901 (Annotated Statutes, 7117), was to secure to mechanics and laborers the amount due them for work and labor performed in the erection of a public building on which no lien is allowed for such work and labor. While the mechanic and laborer doing work on such building may resort to the bond required of the contractor, it is doubtful if the subcontractor who furnishes work and material in the construction of such building is within the terms of the statute, even though he has paid the mechanics and laborers doing the work contracted for by him. *McCluskey v. Cromwell*, 11 N. Y. 593. *Fidelity & Deposit Co. v. Parkinson*..... 319

Stocks and Stockholders. See CORPORATIONS.

Subrogation.

One who pays a mortgage covering land in which he has no legal interest, and who is in no way liable for the mortgage, is not entitled to be subrogated to the rights of the mortgagee; but if the former is in possession he may be allowed a credit for such payments as against an action by the mortgagor for an accounting for rents and profits. *Mavity v. Stover*..... 602

Summons. See INJUNCTION, 3, 4. PROCESS.

Telegraphs and Telephones. See EQUITY, 6.

The term "public roads," in section 14, chapter 89*a*, Compiled Statutes, giving telegraph and telephone companies a right of way along the public roads of the state, does not include the streets and alleys of a municipal corporation, and the unauthorized use of such thoroughfares for such purpose constitutes a public nuisance. *Nebraska Telephone Co. v. Western Independent Long Distance Telephone Co*..... 772

Tenant in Common.

1. A tax deed does not convey the title to real estate, but it is a sufficient color of title when coupled with possession to put the statute of limitations in operation against the rights of all cotenants in the land. *Craven v. Craven*..... 459
2. The right of joint tenants to participate in the benefit of a superior claim purchased by one of them in possession, is dependent on a timely offer to contribute their rightful proportion of the money expended by the tenant in possession in procuring such superior claim. *Craven v. Craven*..... 459
3. Where one tenant in common openly denies the title of his cotenants and is in possession of and claims the entire property himself by deed, such holding is adverse. *Craven v. Craven*..... 459

Tender.

A tender in an answer or during the progress of the trial, does not necessarily admit the validity of the plaintiff's cause of action. *Craw v. Abrams*..... 546

Trespass. See INJUNCTION, 5.

Trial. See APPEAL AND ERROR. BANKRUPTCY, 5. BASTARDY. CONTINUANCE. CONTRACTS, 2. CRIMINAL LAW AND PROCEDURE. EVIDENCE. FRAUDULENT CONVEYANCES, 7. INSTRUCTIONS. MASTER AND SERVANT, 7, 9. PLEADING AND PRACTICE. WITNESSES.

Burden of Proof.

1. The burden of proof is upon the husband or those claiming under him to show that a gratuitous transfer to him from his wife was made freely and deliberately, and that the transaction was fair and proper. *Hovorka v. Havlik*..... 14

Demurrer to Evidence.

2. A jury impaneled to try issues of fact is practically eliminated by a decision sustaining a demurrer to evidence. Such a decision is essentially a denial of the litigant's claim that he is entitled to a jury trial. *Bee Building Co. v. Dalton*.... 38
3. When a court has sustained a demurrer to evidence, the

Trial.—*Continued.*

direction, reception and recording of a verdict are mere ceremonial acts. The verdict in such a case has no legal significance; it does not furnish the basis of the judgment nor serve any other useful purpose. *Bee Building Co. v. Dalton* 38

Directing Verdict.

4. Where no evidence is introduced in support of the only defense properly pleaded, it is the duty of the court to construe the contract, and determine the measure of damages, and direct the jury to return a verdict accordingly. *School District of Omaha v. McDonald*..... 610

5. Plaintiff having introduced his evidence without proving all material allegations, it is not error for the court to direct a verdict for defendants. *Harker v. Burbank*..... 85

6. It is error to instruct a jury to return a verdict for defendant where there is any competent evidence adduced which, if believed by the jury, would suport a verdict for plaintiff. *Habig v. Layne*, 38 Neb. 743. *Allen v. Cerny*..... 211

Discretion of Court.

7. The propriety of allowing the plaintiff to withdraw a juror and continue the case in order to obtain further testimony, is a matter resting in the sound discretion of the court. *Violet v. Rose*, 39 Neb. 660. *Harker v. Burbank*..... 85

8. The record of the trial court examined, and *held* that the court was not guilty of an abuse of discretion in refusing such a request. *Harker v. Burbank*..... 85

Dismissal.

9. A plaintiff can not dismiss his action without prejudice, after there has been a final submission of it either to the court or jury. *Bee Building Co. v. Dalton*..... 38

10. The "submission of a case to a jury," contemplated by section 430, Code of Civil Procedure, is the submission of an issue of fact which the jury is at liberty to decide in favor of either party. *Bee Building Co. v. Dalton*..... 38

11. When a case has been submitted upon a demurrer to the evidence, plaintiff's absolute right to dismiss without prejudice is lost. *Bee Building Co. v. Dalton*..... 38

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

13. But where the discretionary power of the court is not invoked and the application to dismiss after final submission is made and allowed as a demandable right, the order of dis-

Trial—*Continued.*

missal will not be upheld unless a denial of the application would amount to an abuse of discretion. *Bee Building Co. v. Dalton*..... 38

Finding.

14. A finding by a trial court "that there are no equities with the defendants and that all the equities are with the plaintiffs," is not a finding of fact, but a conclusion of law, and standing alone it is insufficient to support a judgment. *Ganow v. Denny*..... 706

Motion to Direct Verdict.

15. When in a jury trial a party moves the court to instruct a verdict in his favor, which is overruled and he is compelled to submit the matter to the jury, he may assist the court in a proper submission of the matter without thereby estopping himself to afterwards contend that a verdict against him is not supported by the evidence. In such case the rule of *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, does not apply. *Sorensen v. Sorensen*..... 509

Offer of Proof.

16. An offer of proof in support of a preliminary question, need not be confined to the same limits as the answer, but may extend farther *in medias res*, provided both relate to the same subject matter. *Johnson v. Winston*..... 425

17. No formal offer to prove is required, to obtain a review of a ruling of the trial court excluding the answer of a witness to a question, where the question itself clearly indicates what the party expected to prove by the witness. *Williams v. Fuller*..... 354

Proof.

18. Where a material allegation in the petition is denied by the answer, the plaintiff must prove the facts alleged, by some competent evidence, and, failing to do so, he can not maintain the action. *Harker v. Burbank*..... 85

Question for Jury.

19. The evidence showing that no inspectors were employed, and that lineman was instructed to repair or report defects of insulation observed by him, the question as to whether or not he had assumed the risk from this defect of insulation was properly left to the jury. *New Omaha Thompson-Houston Electric Light Co. v. Rombold*..... 54

20. It is proper to submit to the jury whether or not the language contained in an article sued upon, when fairly construed, amounted to a charge of bribery and malfeasance in office against the plaintiff. *Bee Publishing Co. v. Shields*, 750

21. Evidence *held* to present a question for the jury whether

Trial—*Continued.*

the specific chattels in controversy were mortgaged in the first instance, or were afterwards agreed upon as the mortgaged property. *First Nat. Bank v. Johnson*..... 641

22. Whether or not a given state of facts constitutes probable cause for procuring plaintiff's arrest is ordinarily a question of law. Where, however, defendants have requested special findings substantially embracing this question, they can not afterwards complain of an instruction submitting its decision to the jury. *Bank of Miller v. Richmon*..... 731

23. A Wisconsin executor, prior to the death of the testatrix, had been the latter's trustee, and afterwards became charged with certain personal property which he had managed as trustee. In filing his report as executor in the Wisconsin court, he included therein a schedule of property coming into his possession, and an account of his doings as such trustee. His report was approved, and he was duly discharged. Before such discharge, he qualified as ancillary executor in Nebraska, filing in the Nebraska court a copy of his report as executor theretofore filed in the Wisconsin court, which included his report as trustee. In a proceeding instituted in Nebraska, resisting the allowance of his final report as ancillary executor, *held*, that matters relative to the previous trusteeship of the executor were properly withdrawn from the jury, as having been adjudicated in the domiciliary court. *Tunnicliff v. Fox*..... 811

Right to Open and Close.

24. If any of the material facts of a petition are not admitted, but are denied, either directly or argumentatively, the right to open and close is in the plaintiff. *Sorensen v. Sorensen*.. 483

25. A party can not acquire the right to open and close by pleading a denial in affirmative form. If his denial is sufficient to prevent his adversary from obtaining judgment on the pleadings, it is sufficient to put the burden of proof upon the latter. Nor can he acquire a right to open and close, to which he is not entitled on his pleadings, by filing an "admission" in which he assumes the burden of proving affirmatively matter amounting to a denial of plaintiff's case, and admits that plaintiff may recover, unless an essential averment of his petition is negatived in a particular way. *Sorensen v. Sorensen*..... 483

26. An admission that the petitioners for distribution are brothers, and nephews and nieces of the intestate, and are heirs and distributees unless a person named is proved to be the son of the intestate, in conection with a general denial and an allegation that such person is the son of the intestate and

Trial—*Concluded.*

is sole heir and distributee, does not relieve the petitioners of the necessity of making a *prima facie* case. *Sorensen v. Sorensen*..... 483

27. In a proceeding for the distribution of the estate of an intestate, in a contest between parties, each claiming as next of kin and heir at law, to the exclusion of the other and all other persons, the right to open and close rests in the discretion of the court, disaffirming the rule announced on former hearing. *Sorensen v. Sorensen*..... 490

Ruling.

28. The decision of the trial court upon conflicting evidence as to misconduct of counsel will not be disturbed. *German Ins. Co. v. Shader*..... 1

Verdict.

29. The time which jurors shall be kept together before they are finally discharged because of their inability to agree on a verdict rests largely in the discretion of the trial court, but this is a legal discretion, and if legal rules and principles governing are transgressed, the action can not be upheld. *Jahnke v. State*..... 154

30. Where the jury, after being kept together for an unusual length of time, have returned a verdict of guilty and there is nothing in the record inconsistent with the view that it was agreed to voluntarily by all the jurors solely from a consideration of the evidence and the instructions of the court unaffected by anything in the nature of coercion, the verdict will not be disturbed. *Jahnke v. State*..... 154

31. Where it appears, by an undisputed showing in an action for damages for the change of a street grade, that one of the jurors had prior knowledge of the premises involved in the controversy, that he based his own conclusion partly thereon and used it to influence his fellow jurors in arriving at their verdict, the latter must be set aside. *Falls City v. Sperry*..... 420

Witness.

32. How far, if at all, a party shall be permitted to cross-examine, or put leading questions to his own witnesses, where they appear to be hostile or unwilling, is in the discretion of the trial court, and its rulings in such matters will not be disturbed except for manifest abuse of discretion. *Hackney v. Raymond Bros. Clarke Co*..... 624

Trover. See CONVERSION.

Venue. See INJUNCTION, 3, 4.

1. An application for a change of venue is addressed to the

Venue—*Concluded.*

sound discretion of the trial court, and its ruling thereon will not be held erroneous, unless an abuse of discretion is shown. *Jahnke v. State*..... 154

2. If, upon the showing made in support of and against an application for a change of venue, it does not appear that there exists reasonable grounds on which to found a belief that the defendant can not have a just trial in the county by a fair, unbiased and impartial jury, the trial court may properly overrule the application. *Jahnke v. State*..... 154

Verdict. See APPEAL AND ERROR, 18. CRIMINAL LAW AND PROCEDURE, 20. INSURANCE, 9. TRIAL, 4-6, 15, 29-31.

Waiver. See APPEAL AND ERROR, 32. CONTRACTS, 1. GARNISHMENT, 6, 7. HOMESTEAD. INSURANCE, 10-13.

Wills. See EVIDENCE, 15, 20. EXECUTORS AND ADMINISTRATORS.

Lost.

1. Declarations of the testator are competent evidence on an issue whether a will was made, but will not suffice, of themselves, to prove its contents. *Williams v. Miles*..... 479
2. Although the contents of a lost will can not be proved solely by the declarations of the testator, such declarations are admissible to prove the existence of the will. *Williams v. Miles* 463
3. If the instrument is in fact signed, attested and subscribed as required by the statute, a formal attestation clause is not necessary. *Williams v. Miles*..... 463
4. Hence the subscribing witnesses to a lost will may testify that the testator signed and they witnessed and subscribed in the required manner, without proving that there was an attestation clause, or establishing the contents thereof. *Williams v. Miles*..... 463

Revocation.

5. Where a will is shown to have been made and left in the custody of the testator, if it can not be found after his death the presumption is that the testator destroyed it *animo revocandi*. *Williams v. Miles*..... 463
6. But this is a presumption of fact only. It may be overcome by evidence, circumstantial or otherwise, to the contrary; and declarations of the testator may be shown for this purpose. *Williams v. Miles*..... 463
7. If the testator destroys a subsequent will revoking a former one by implication, such act, of itself, will not operate to revive the former will. *Williams v. Miles*..... 463
8. Whether the former will is revived in such a case depends

Wills—*Concluded.*

upon the intention of the testator, which is to be deduced from all the circumstances. *Williams v. Miles*..... 463

9. A subsequent will which has the effect of revoking a prior will may be shown for the purpose of defeating probate of such prior will, although by reason of its loss or destruction the exact dispositions made therein can not be shown and are incapable of execution. The revocation will be effectual, even though in other respects the will can not be carried out. *Williams v. Miles*..... 463

10. A subsequent will may have the effect of revoking a prior will, either by reason of an express clause of revocation, or of an inconsistent disposition of the testator's property. *Williams v. Miles*..... 463

11. Unless the subsequent will expressly revokes the former one, such former will is only revoked so far as it is inconsistent with the later; a complete revocation will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together. *Williams v. Miles*..... 463

12. Courts do not favor revocation by implication, and incline to such a construction as will give effect to both instruments. *Williams v. Miles*..... 463

13. The fact that a subsequent will was made is not sufficient, of itself, and without some proof of its actual contents, to show revocation of a former will. *Williams v. Miles*..... 463

Witnesses. See DEPOSITIONS. DESCENT AND DISTRIBUTION, 2. EVIDENCE. TRIAL, 32. WILLS, 4.

Competency.

1. In a proceeding for the distribution of the estate of an intestate, the administrator is an adverse party, and where one of the issues between rival claimants is a marriage of the intestate with a third party, the testimony of such third party is inadmissible on such issue, under the provisions of section 329, Code of Civil Procedure. *Sorensen v. Sorensen*..... 490

2. The heir is not, in all litigation concerning the estate, the representative of the deceased. To represent the deceased, within the meaning of section 329 of the Code of Civil Procedure, the heir must stand in his place so as to uphold a right which the deceased had at the time of his death. *Sorensen v. Sorensen*..... 509

3. Persons who would take as heirs or next of kin in case of intestacy are not disqualified, under section 329, Code of

Witnesses—*Continued.*

Civil Procedure, from testifying as to transactions and conversations with the deceased in a contest over an alleged will. *McCoy v. Conrad*, 64 Neb. 150, followed. *Williams v. Miles* 463

4. The evidence of an accomplice should be closely scrutinized. If it appears that such witness has willfully sworn falsely in regard to a material matter upon the trial, his evidence can not be sufficient, if uncorroborated, to support a verdict of guilty. *Jahnke v. State* 181

5. A wife may testify in favor of her husband in relation to conversations and transactions had with a person since deceased in all cases except where the result of the suit, if favorable to the husband, would invest her with some direct legal interest in the subject of the controversy. *Parker v. Wells* 647

Cross-Examination.

6. When a party to the suit testifies as a witness, it is competent to ask him on cross-examination if he has not on a specified previous occasion made a particular contradictory statement or admission against his own interest. *Palmer v. Burleigh* 24

7. The trial court has a certain discretion in determining the limits of cross-examination, and reasonable limitation with respect to matters not necessarily material, in the exercise of such discretion, is not erroneous. *Gatzemeyer v. Peterson*, 832

8. A witness can not be interrogated on his cross-examination as to the length of time it took him to perform another contract, different from and independent of the one which is the basis of the action. *School District of Omaha v. McDonald* 610

Impeachment.

9. It is competent as preliminary to impeachment to ask a witness, on cross-examination, if he has not on a previous trial of the same case made a particular statement as a witness contradictory to his present testimony. *Palmer v. Burleigh*, 24

Preliminary Question.

10. In an action for malpractice in amputating part of plaintiff's hand and removing the metacarpal bone, it is proper to ask a professional witness for plaintiff, as a preliminary question, whether there is any method of cure without removing the bone. *Johnson v. Winston* 425

11. In such action, a surgeon of thirty-five years' experience, who has inspected the amputated bone, may be asked to examine plaintiff's hands and state what ligaments would need to be

Witnesses—*Concluded.*

severed in the operation, without a preliminary showing that the question can be answered from such inspection. *Johnson v. Winston*..... 425

Privileged Communication.

12. Statements made by one to an attorney in the capacity of a client communicating with his counsel, is a privileged communication, which can not lawfully be divulged by counsel, nor drawn from the witness on cross-examination without his consent. *Jahnke v. State*..... 154

13. *Held*, That the relation of attorney and client exists, and that the testimony sought to be elicted on cross-examination was properly excluded by the court. *Jahnke v. State*..... 154