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GERTRUDE M. JACKSON ET AL., APPELLEES, V. MINNIE JACKSON O'RORKE ET AL., APPELLEES, IMPLEADED WITH JOHN HARER ET AL., APPELLANTS.

FILED MARCH 17, 1904. No. 13,472.

1. **Administrator:** LEASE. An administrator has no authority to lease the lands of his intestate after the payment of the debts and final settlement of the estate.
2. **Guardian:** LEASE. A guardian may lease the ward's lands for the term of his guardianship, but any excess in such lease beyond such term will be void at the election of the ward on attaining his majority.
3. **Tenant in Common:** LEASE. A lease by one tenant in common of an entire estate is void as to the interest of his cotenants.
4. **Dower.** An unassigned dower interest in land is not the subject of a leasehold contract conveying any interest in the lands.

APPEAL from the district court for Gage county: CHARLES B. LETTON, JUDGE. *Reversed with directions.*

E. O. Kretsinger, for appellants.

R. W. Sabin, contra.

OLDHAM, C.

On the 6th day of February, 1893, George W. Jackson died intestate, seized in fee of 200 acres of land situated in Gage county, Nebraska. He left surviving him his wife, Minnie Jackson, now Minnie Jackson O'Rorke, and three minor children, Gertrude M., Edna L. and Leonard D. Jackson. His widow was appointed and duly qualified as administratrix of the estate, and also as guardian of each of the minor heirs. In 1894 the widow, as administratrix, made final settlement and distribution of the personal effects of the intestate, but was not formally discharged by the county court as administratrix. It appears that from the time of the death of the intestate, the widow, as guardian and administratrix, had leased the real estate from year to year until the year 1900, at

which time she executed a lease to John Harer and Elize Harer, defendants in the case at bar, for a period of 5 years beginning March 1, 1901, and ending March 1, 1906. The lease was signed by Mrs. O'Rorke in her individual name. At the time this lease was executed, Gertrude M. Jackson had attained her majority, being then 20 years of age; and shortly after the execution of the lease and before the institution of the instant suit, Edna L. Jackson attained her majority. Thereupon, Edna L. and Gertrude M. Jackson begun an action for partition of the real estate, making Minnie Jackson O'Rorke and Leonard D. Jackson, who is still a minor, and John Harer and Elize Harer parties defendant. The petition for partition alleged, in substance, that the plaintiffs and defendant, Leonard D. Jackson, were each entitled to a one-third interest in the real estate of the ancestor, subject to the dower interest of Minnie Jackson O'Rorke. Minnie Jackson O'Rorke answered admitting the allegations of plaintiffs' petition; Leonard D. Jackson, by his guardian *ad litem,* also filed an answer setting up the allegations of the petition and joining in the prayer for partition. The tenants, Harer and Harer, filed answer admitting the allegations of the petition as to the respective interests of the widow and heirs in the estate, but set up their rights as tenants to the occupancy of the premises during the term of the lease, and asked that when partition be made, it be made subject to their leasehold interest in the entire estate. On the issues thus joined, the court decreed a partition of the estate as prayed for by plaintiffs and the answering defendants, Minnie Jackson O'Rorke and Leonard D. Jackson, and appointed commissioners to partition the estate according to the decree, and continued the hearing on the answer and cross-petition of the lessees until a succeeding term of the court. The commissioners appointed reported that the estate was not susceptible of division in kind, and found that the interest of all the partitioners would be best subserved by a sale of the property. Issues were

then joined on supplemental pleadings between the partitioners and the lessees on the question of the validity of the lease. On the hearing of the cause, the court made certain findings of fact which are fully supported by the record, and which we adopt as our own independent findings for the purpose of the disposition of this case. The first of these findings is that the administratrix of the estate had made final settlement of the estate in 1894, or 6 years before the execution of the lease to defendants Harer and Harer, but that she had never been formally discharged as administratrix until after the institution of the present suit. Second, that in the execution of the lease, Minnie J. O'Rorke, the administratrix and guardian, had intended to convey both her personal and representative interest in the estate to the lessees for a period of 5 years. Third, that at the time of the execution of this lease, Gertrude M. Jackson was of full age, and never consented to the lease; that after the execution of the lease and before the institution of this suit, Edna L. Jackson arrived at her majority; that Leonard D. Jackson was, and still is, and will remain a minor during the full term of the leasehold estate; and that Minnie Jackson O'Rorke was possessed of a consummate right of dower in the lands, which had not been admeasured at the time the lease was executed.

The court found, as conclusions of law from these facts, that the lease was null and void as to the interest of the plaintiff, Gertrude M. Jackson, and that it was terminated, so far as the interest of Edna L. Jackson was concerned, at the date of the bringing of this suit, but that the lease was still in full force and of binding effect so far as it concerned the undivided interest of defendant Leonard D. Jackson and the dower interest of defendant Minnie O'Rorke. The decree closed with an equitable distribution of costs which we think should not be disturbed.

From this decree an appeal was taken by defendants Harer and Harer, and the case is now here for trial *de novo* on the issues involved in their answer and cross-petition.

The first contention of appellants is based on what we regard as a very restricted view of the holding of this court in *Lewon v. Heath,* 53 Neb. 707, to the effect that an heir may bring a suit for the possession of the land of his ancestor against any and all persons, except the administrator of the estate and such as have a right thereto from the administrator. From this excerpt from the second paragraph of the syllabus of that case, appellants contend that the heirs can not maintain this action against the lessees of the administratrix. It will be remembered that the administratrix joined with the heirs in the petition for a partition and does not assert this assumed exemption; and an examination of the full text of the decision in *Lewon v. Heath, supra,* shows that the court hold that lands of an intestate descend to his heirs, and that the title vests in them subject only to the debts of the ancestor; and that under section 202 of the decedent's act, chapter 23, Compiled Statutes (Annotated Statutes, 5067), the administrator of the estate has a right to possession of the real estate of which his intestate died seized, and may collect the rents thereof until the debts are paid and the estate is finally settled, but the decision goes no further than this.

Now, it appears from the facts in the case at bar that all the debts of the estate had been paid, and distribution of the personal assets had been made by the administratrix nearly 6 years before the lease in dispute had been executed. We think, then, that under the doctrine set forth in *Lewon v. Heath, supra,* the right of the heirs to maintain an action for the possession of the real estate accrued on the payment of the debts and the final settlement of the administratrix, and that thereafter the administratrix, as such, was invested with no authority to further lease the real estate of her intestate. While it is true that an heir can not maintain an action against the administrator while rightfully in possession of the property of his intestate, or against one holding under him while in such rightful possession, yet, when the authority of the ad-

ministrator to lease the estate has ceased by reason of his final settlement and payment of the debts, if he, or anyone under him, attempt to wrongfully hold possession, they may be proceeded against by the heirs as any other trespasser.

The next question arising is, what, if any, right Minnie Jackson O'Rorke had to lease the lands of her intestate as guardian of the minor heirs. With reference to this right, it is well established that a guardian may lease the ward's lands during the term of his guardianship, but that any excess in such a lease beyond such term will be void at the election of the ward on coming of age. 2 Kent, Commentaries, 228; *Emerson v. Spicer,* 46 N. Y. 594; *Richardson v. Richardson,* 49 Mo. 29. Now, applying this doctrine to the facts at issue, it follows that Mrs. O'Rorke was without any authority whatever to execute the lease as guardian of the interest of Gertrude M. Jackson, and that, by the institution of this suit, Edna L. Jackson elected, as she had a right to do, to determine the lease so far as her interest in the property was concerned.

Then the question remains as to the effect of the lease on the interest of Leonard D. Jackson, who was a minor and will remain so during the term of the lease. For the purpose of executing this lease, Mrs. O'Rorke in her representative capacity stood in the position of one tenant in common attempting to lease the entire estate, without the consent of the other cotenants. While such a lease as this may be upheld under certain conditions in a contest between the lessor and the lessee, yet, it is universally held that such a lease may be avoided by any of the tenants in common who did not execute it or subsequently ratify its execution. And, where a lease is executed by one tenant in common of the entire estate for a term of years, and such lease is repudiated by the cotenants, the lessee in the lease is held to be not a trespasser but a tenant by sufferance of the estate occupied under such lease. *Rising v. Stannard,* 17 Mass. 282; *Tainter v. Cole,* 120 Mass. 162; Gear, Landlord and Tenant, sec. 49. In other

words, the lessee of one tenant in common stands in the shoes of his lessor, and has no other or greater rights in the common property than that attaching to his lessor. It would be paradoxical to say that a tenant in common in possession of the estate might contract with himself to occupy the estate for a period of years, and defeat the right of partition of the estate by his cotenants by such an act.

We therefore conclude that, if the guardian was authorized to lease these premises so far as the interest of her ward is concerned, she could only do so in such a manner as would work no injury to the other cotenants. And as the report of the commissioners in the case at bar shows that the property is not susceptible of division in kind, and as a sale of the premises will be necessary to subserve the best interests of the partitioners, we think the land should be sold, entirely unincumbered by her lease as guardian of Leonard D. Jackson.

The only other question to be considered is, what, if any, right Mrs. O'Rorke had to convey by lease her unassigned dower interest in the premises. The rule seems to be that the right of a dower unassigned is not the subject of a lease containing covenants which run with the land. It is true that a doweress, whose right has not been admeasured, may contract with one in possession of the land to forbear an assertion of her interest in the rents and profits of the land for a period of years, and such contract will be upheld as a personal obligation between the parties; but even though it be drawn in the form of a lease, it is not a contract that runs with the land. *Croade v. Ingraham,* 13 Pick. (Mass.) 33; Gear, Landlord and Tenant, sec. 3.

We therefore recommend that the judgment of the district court, so far as it decrees the lease of the defendants Harer to be in full force and effect for its full term as to the undivided interest of Leonard D. Jackson, and the unassigned dower interest of the defendant Minnie Jackson O'Rorke, be reversed, and that the cause be remanded, with directions to the district court to enter a judgment

directing a sale of the premises unincumbered by such lease, and decreeing the surrender and possession of the premises in question to the purchaser at such sale, when such sale shall have been duly confirmed by the said district court.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court, so far as it decrees the lease of the defendants Harer to be in full force and effect for its full term as to the undivided interest of Leonard D. Jackson, and the unassigned dower interest of the defendant Minnie Jackson O'Rorke, be reversed, and that the cause be remanded, with directions to the district court to enter a judgment directing a sale of the premises unincumbered by such lease, and decreeing the surrender and possession of the premises in question to the purchaser at such sale, when such sale shall have been duly confirmed by the said district court.

JUDGMENT ACCORDINGLY.

GEORGE F. DICKSON ET AL. V. ROBERT STEWART.

FILED MARCH 17, 1904. No. 13,438.

1. **Trusts: STATUTE OF FRAUDS.** One who, by agreement, purchases land at a foreclosure sale for the benefit of the owner of the equity of redemption, at a price greatly below its value, can not set up the statute of frauds against the party for whom he purchased; the law will hold him to be a trustee *ex maleficio;* a court of equity will not permit the statute of frauds to be made an instrument of fraud. *Ryan v. Dox*, 34 N. Y. 307, and cases there cited.

2. **Deed as Mortgage: PAROL EVIDENCE.** Where a party acquires the legal title by purchase of land at a sheriff's sale, in pursuance of a parol agreement with a judgment debtor that he is to hold the title thus obtained as a security for the loan of the money paid to relieve the land from the judgment lien, and that he will reconvey

when the money is refunded, the case is not distinguishable from any other, where the deed though absolute in terms was designed simply as security for a loan; and parol evidence is admissible to show the transaction to be of that character. *Reigard v. McNeil*, 38 Ill. 400.

3. Contract: MUTUALITY. Want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms. *Bigler v. Baker*, 40 Neb. 325.

4. Action to Redeem: LIMITATIONS. The right to foreclose and the right to redeem are reciprocal; and an action to redeem may be brought at any time before the statutory bar of ten years is complete. *Morrow v. Jones*, 41 Neb. 867.

5. Interest. The rule is well established that interest on a debt is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, such surplus is applied to sink the principal, and so *toties quoties* taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest. *Mills v. Saunders*, 4 Neb. 190, followed and approved.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Reversed with directions.*

J. L. Epperson & Sons, for plaintiffs in error.

George H. Hastings and *L. B. Stiner, contra.*

FAWCETT, C.

On the 29th day of March, 1893, defendant in error, hereinafter styled plaintiff, was the owner and in possession of a farm of 160 acres of land in Clay county. A mortgage which he had given some years prior thereto had been foreclosed, and, on the day named, the farm was about to be sold by the sheriff under the decree of foreclosure in that case. Plaintiff alleges that, just before the opening of the sale, he called upon plaintiff in error, hereinafter styled defendant, and entered into a agreement with defendant whereby it was agreed and understood between them that defendant should bid in the land for plaintiff, pay for the same and take the title thereto in his own

name as security for the money so paid, and convey the same to plaintiff at any time that plaintiff should demand such conveyance, upon payment to him by plaintiff of any balance that might then be due and unpaid. That defendant, in accordance with this agreement, bid in the land for $1,960. That it was further agreed that defendant should place a mortgage on the land for $1,600, and a second mortgage for $120. That as additional security for his advances, defendant was to have the rents, issues and profits of the premises until he should be fully reimbursed; that when so reimbursed defendant and his wife were to make the plaintiff a good and sufficient deed to said premises, free and clear of all incumbrances excepting the two mortgages above described. That it was further agreed that the rents and profits arising from the premises should be applied: First, to the payment of taxes; second, to the payment of interest on said two mortgages; and, third, to the payment of the moneys advanced by defendant. That defendant has taken all of the rents and used the same, and refuses to render any account thereof, and refuses to convey said land to plaintiff, notwithstanding the fact that plaintiff stands ready and willing to make an accounting with defendant, and to pay any sum that may be due defendant. That plaintiff has many times during the past two years demanded a deed and accounting, which have been wholly refused. Wherefore, he prays that an accounting may be had; that defendant may be decreed to hold the title to said premises as trustee for plaintiff; that defendants be decreed to convey said premises to plaintiff in accordance with the terms of the agreement; that on failure to so convey, the decree stand as such conveyance; and for such other, further and additional relief as in equity and good conscience plaintiff ought to have. For answer defendants demur generally to the 4th paragraph of plaintiff's petition; deny all of the other allegations therein, and then allege that the defendants, nor either of them, nor any person authorized by them, or either of them, ever made or signed any mem-

orandum or note thereof, or any contract in writing for the sale of said land, or in any manner relating thereto, or for the transfer, granting, assignment or surrender of any interest therein to the plaintiff or to any other person; that neither of the defendants, nor any person authorized by them, or either of them, ever made or signed any note or memorandum in writing agreeing to make a conveyance or transfer of said land, or any interest therein to the plaintiff or any other person, and said alleged agreement was not, by its terms, to be performed within one year from the making thereof. Wherefore, they pray that plaintiff's petition be dismissed. Plaintiff's reply was a general denial.

The court below found generally for plaintiff, that the title to the land in question was taken by defendant as security for money advanced by him, with the express understanding that the same was to be reconveyed to plaintiff on the payment of the amount due, and that there is still due defendant from plaintiff $399.17, which is a lien on the premises in controversy; and, after stating the amount by items, the court adjudged that defendant have a lien upon the premises in controversy for the said sum of $399.17; that plaintiff pay said sum into court for the use of defendant, and that the defendants make to the plaintiff a good and sufficient deed to the premises within 30 days from the date of the decree, and, in the event of their failure so to do, that the decree should in all things operate, and be taken and construed as such deed of conveyance, and that plaintiff pay the costs of the action.

Counsel on both sides devote a great deal of space in their briefs to the discussion of express, constructive and resulting trusts—a very interesting field of discussion and one in which the writer would gladly accompany them if time would permit; but, as the only question to be determined in this case is the correctness of the holding of the district court that the deed in question was a mortgage, we feel constrained to confine this opinion to a discussion of that question alone.

There is no conflict in the evidence as to the making of the contract. Plaintiff testifies that on the day the sheriff was going to sell the property, and just prior to the opening of the sale, he called upon the defendant and said: "Now, Frank, I did a favor for you once and I want you to help me now. I want you to buy this place for me, and when I get the money I will redeem it. So Dickson bought the property. * * * Dickson was to buy the place for me, and when I got the money I was to give it to him; then he was to deed it back to me." The defendant himself testifies: "Well, at the time that this land was for sale, Mr. Stewart came to my office, and he told me that he wanted to buy this land at the sheriff's sale, but that he didn't have any money, or not enough money, to buy it; and that the sheriff said he would not take him, and that he advised him to come and get me to buy the land for him, and then Stewart said to me that he wanted me to go up and buy the land for him, as Davis, the sheriff, would take me, and that he, Stewart, wanted some one to buy the land that he could depend on." The court asked defendant the following questions:

Q. Now, was it your understanding, at the time that you bought this farm, that you were to buy it and hold it until Mr. Stewart could redeem it and pay you back the amount that you had paid out? Was that your understanding and intention?

A. Yes, sir, I was to buy it, to buy land for him.

Q. And hold it until he paid you back?

A. Yes, sir.

By General Hastings:

Q. You were to hold the land until it was redeemed, for your security?

A. Well, I think so, but I didn't think that it would run ten years.

In the light of this testimony we do not see how the trial court could have done otherwise than to find that the deed from the sheriff to the defendant, although absolute in its terms, was in fact a mortgage from the plaintiff

to the defendant as security for the money advanced by defendant.

Defendant contends that the rule so frequently announced by this and other courts that a deed, though absolute upon its face, if intended as security, will be held to be a mortgage, does not apply in a case where the maker of the deed is a third party. In other words, that to have entitled plaintiff to rely upon this rule, he must himself have been the grantor in the deed, when, as a matter of fact, the grantor was the sheriff. We do not think the contention is sound. While the sheriff is the nominal grantor in the deed, yet, the interest which he conveyed thereby was the interest of the plaintiff. The plaintiff at that time was the owner of the fee and in possession of the premises, and the deed by the sheriff conveyed that ownership and right of possession to the defendant, so that, in effect, it was a deed from the plaintiff to defendant. It is further contended by defendant, that the contract was void because the relation of creditor and debtor was not created by the contract; that, if plaintiff failed to repay the money to defendant, defendant would have had no action against him for the recovery of the money. In other words, that the contract was void for want of mutuality. We are unable to agree with this contention, for two reasons: First, the relation of debtor and creditor was created. Under the same evidence which we have quoted from the record, defendant could at any time, after a reasonable time had elapsed, have demanded payment from the plaintiff, and, in the event of plaintiff's failure to pay, could have proceeded to foreclose his deed as a mortgage, with all the rights of any ordinary mortgagee. Second, this court has held in *Bigler v. Baker,* 40 Neb. 325, that "want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract, and brought himself clearly within its terms." In this case plaintiff had complied with his part of the contract. After entering into this agreement with defendant, he made no effort

to obtain the money elsewhere to redeem the property from defendant's bid, but allowed the sale to defendant for $1,960, of property which the undisputed evidence shows to have been worth from $3,200 to $3,500, to be confirmed, and a deed to be issued to defendant thereunder, and immediately delivered possession of the premises to defendant, relying upon the fact, as stated by defendant in his testimony, that defendant was a man "that he could depend on." Plaintiff had "performed all of the conditions imposed upon him, and brought himself clearly within the terms of the agreement." Hence, under the decision of this court in *Bigler v. Baker, supra,* if a want of mutuality had existed in this case, it would not be a valid objection to plaintiff's right to recover. While we concede that there is some conflict in the authorities upon this point, that conflict was considered by this court in *Bigler v. Baker,* and the rule above announced adopted as the true rule.

The next contention of defendant is that section 3, chapter 32 of the Compiled Statutes (Annotated Statutes, 5952), is a complete barrier to plaintiff's right to recover. Defendant must also fail in this contention. If defendant did in fact bid in the land for plaintiff under the agreement set out, he held it in trust for him, and had no other interest in it than that of a mortgagee to secure the repayment of the purchase money and other advances made by him. But if he had no intention of keeping his part of the agreement, and did not in fact intend to hold the property in trust for plaintiff, he was guilty of a fraud which the court will relieve against. The court has power to relieve against such fraud, and the means to be employed is to convert the person who has gained an advantage by means of his fraudulent act into a trustee for those who have been injured thereby. *Ryan v. Dox,* 34 N. Y. 307. Defendant relies upon section 3, chapter 32, Compiled Statutes, but he overlooks section 6 of the same chapter (Annotated Statutes, 5955), which reads as follows: "Nothing in this chapter contained shall be con-

strued to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance." And he also overlooks another very important proposition: That a court of equity will never permit a party to shield himself behind a statute of frauds in order to perpetrate a fraud. In the case of *Sanford v. Norris,* 4 Abb. Ct. App. (N. Y.) 144, the court say:

"The circumstances attending his purchase are not obscured in the least by any doubts, either as regards the facts or their moral bearing; nor is any excuse or apology offered for his violated faith; and the simple question presented to this court is, whether the fruits of his perfidy are secured to him by a law having for its object the prevention of frauds. It stands indisputably proved that the defendant obtained this title on the pretense that he was purchasing for Mrs. Sandford, as a friendly act to her, and under agreement with her that he would take and hold the title for her benefit. Having thus obtained the title himself, he claims and insists that he is under no legal obligation to carry out the arrangement, because it is not evidenced by a writing, and that he may violate the trust and confidence reposed in him with impunity. But the law will not give its aid in support of a wrong and fraud so flagrant. If the question could ever have been considered open for discussion, it must now be deemed settled by the recent decision of this court in *Ryan v. Dox,* 34 N. Y. 307, wherein the equitable principle is recognized as the established law of this state, that 'equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds.'"

The case of *Ryan v. Dox, supra,* considers this proposition at great length and quotes from a large number of cases, both in this country and England, all to the effect that a court of equity will never permit the statute of frauds to be used as a shield for the perpetration of a fraud.

Another contention of defendant is that, if plaintiff had a right of redemption, it should have been exercised within

a reasonable time; that so long a time has elapsed since the making of the agreement that plaintiff ought not now to be permitted to exercise the right of redemption. That matter has also been settled adversely to defendant, by this court, in *Morrow v. Jones,* 41 Neb. 867, in which it is held that the right to foreclose and the right to redeem are reciprocal, and that an action to redeem may be brought at any time before the statutory bar of ten years is complete. Citing *Seawright v. Parmer,* 7 So. (Ala.) 201; *Green v. Capps,* 142 Ill. 286; *Rogers v. Benton,* 39 Minn. 39, and cases there cited. It follows therefore that plaintiff was not precluded from maintaining this action by lapse of time.

Defendant relies with great confidence on *Walter v. Klock,* 55 Ill. 362, but, even if the supreme court of Illinois had not subsequently passed upon the same matters involved in that case, it would easily be distinguishable from the case at bar. As a matter of fact the supreme court of Illinois, in *Reigard v. McNeil,* 38 Ill. 400, has held:

"It has been held repeatedly that deeds, in form absolute, may be shown to be mortgages in fact. Courts are not estopped from looking into the facts and circumstances of such a deed, to ascertain whether it was not intended as a mere security for the loan of money. And parol evidence is admissible to show the transaction to be of that character. And where a party acquires the legal title by purchase at a sheriff's sale of land under execution, in pursuance of a parol agreement with a judgment debtor that he is to hold the title thus obtained as a security for a loan of the money paid to relieve the land from the judgment lien, and that he will reconvey when the money is refunded, the case is not distinguishable from any other where the deed, though absolute in terms, was designed simply as security for a loan."

And in *Walter v. Klock, supra,* that court say that the case they were then considering had no application to the facts in the case of *Reigard v. McNeil.* And, later, in *Klock v. Walter,* 70 Ill. 416, the court say:

"At the September term, 1870, this case was before this court, and is reported in 55 Ill. 362. * * * The evidence establishes beyond doubt that the whole transaction was for the benefit of complainant, and that she was to refund the money, with interest. It operated as a loan to her, and, under the terms of the arrangement, the purchase at the sale, by McCullom, operated as a mortgage. He was simply to hold the land until complainant could sell it, and pay the money, with interest. By the arrangement he took the legal title, but in equity a trust resulted to her." Citing *Reigard v. McNeil, supra,* and *Smith v. Doyle,* 46 Ill. 451, each being a case where a sheriff's deed was held on parol proof to be a mortgage. It will thus appear that the supreme court of Illinois, instead of favoring defendant's contention, is clearly in line with our holding in this case.

Defendant assigns five errors in the court's computation, all of which we have carefully considered. The court charged defendant with $30 for rent of pasture for the year 1894. This was error, as no rent was paid for the pasture that year. Defendant is charged with $146.71 and interest, for sand in 1897. This is not quite correct. The total amount is $146.30, and interest should only be charged on $140.20 from December 12, 1902. The court charged defendant with 400 bushels of corn in 1893, $80. The amount was only 300 bushels, $60, an error of $20. The court charged defendant with corn rental in 1896, $30. The evidence shows, and the parties agree, that there was a total failure of the crop for 1896 so that no rent was received for that year. We observe also that the court charged defendant with only $90 for 600 bushels of corn in 1895, instead of $120, an error of $30 the other way. The decree should be amended so as to correct these errors. Defendant also claims that the court erred in charging defendant with 500 bushels of corn for 1902, claiming that 500 bushels was the total crop and not the rent portion thereof; but by reference to question 12, record p. 97, it will be found that the 500 bushels of corn referred to was

the rent portion of the crop; hence the finding of the court on that point is correct.

The court followed an erroneous rule in computing interest on the debits and credits. The rule is well established that "Interest on a judgment or debt due is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, such surplus is applied to sink the principal, and so *toties quoties*—taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest." *Mills v. Saunders*, 4 Neb. 190, and *Davis v. Neligh*, 7 Neb. 78. This method the court did not adopt.

The decree fails to do complete justice to the defendant in another particular, namely: Before plaintiff would be entitled to a deed from defendant for the lands in controversy, he should not only pay the amount found due under the accounting of the court, as corrected by this opinion, but he should also relieve defendant from his liability on the $1,600 note and mortgage.

The case should be reversed and remanded to the district court, with directions to make another computation in harmony herewith, and to modify the decree so as to require plaintiff to pay the corrected amount and relieve defendant of his liability on the $1,600 note and mortgage, within a reasonable time to be fixed by the court; and that, upon such being done, defendant be required to reconvey; and we so recommend.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to that court to correct its computation and modify its decree to conform to the views expressed in said opinion.

JUDGMENT ACCORDINGLY.

WILMER W. WILSON V. OTOE COUNTY.

FILED MARCH 17, 1904. No. 13,333.

1. **County Officers:** CONTRACTS. Section 51, article I, chapter 18, Compiled Statutes, which prohibits county officers from being pecuniarily interested in or receiving the benefit of any contract executed by the county for the furnishing of supplies or any other purpose, is general in its nature, and applies to all county officers and to every class of contracts.

2. ———: ACTION. A contract between a county and one of its officers, whereby such officer undertakes to perform extra-official services, for which the county undertakes to pay him compensation in addition to the fees or salary allowed by law, is in violation of said section and will not support an action for such extra compensation. *Shepard v. Easterling*, 61 Neb. 882, *contra*, overruled.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

W. W. Wilson and *L. F. Jackson*, for plaintiff in error.

A. A. Bischof, contra.

ALBERT, C.

The parties to the record in this court stand in the same order they stood below. The plaintiff was county attorney of the defendant county. While holding that office, and at the instance and request of the defendant, he followed certain litigation from the district court for his county to this court, where he appeared and represented the county; he also prepared and filed a petition for the defendant in an action which it brought in another county, but did not conduct the litigation which followed. This action was brought to recover the reasonable value of the services of the plaintiff in the matters just mentioned. The district court sustained a demurrer to the petition and gave judgment for the defendant, and the only question presented to this court is that raised by the demurrer.

The only statutory provision touching the compensation of a county attorney is section 19, chapter 7, Compiled Statutes (Annotated Statutes, 9143). It fixes the annual salary of such officer, and provides for the payment of his traveling and hotel expenses, where engaged in actions in which the state or county is a party interested, *"which have been transferred by change of venue from his county to any other county in the state."* That the compensation thus fixed is in full of all services rendered by county attorneys in the discharge of their official duties, is conceded. It follows, then, and the petition is framed on the theory that, if the plaintiff is entitled to recover, it is by virtue of a contract between himself and the defendant county, whereby he was employed to render services which in their nature were extra-official.

This brings us at once to what we regard as the vital question in this case, namely, can a county officer make a valid contract with the county for compensation for extra-official services? In *Shepard v. Easterling*, 61 Neb. 882, this court answered this question in the affirmative. But it is clear that the question was not necessarily involved in that case. It is not discussed, and is adverted to only in that portion of the opinion devoted to the discussion of a proposition which the opinion itself shows was not urged. Throughout the entire opinion there is no mention or reference to the statute, which in express terms forbids contracts between a county and any of its officers. For these reasons, and because of the importance of the question involved, we do not feel bound, so far as that question is concerned, by the view expressed in that case, and shall consider the question accordingly.

Section 51, article I, chapter 18, Compiled Statutes (Annotated Statutes, 4469), provides: "No county officer shall in any manner, directly or indirectly, be pecuniarily interested in or receive the benefit of any contracts executed by the county for the furnishing of supplies, or any other purpose." A violation of that provision is denounced as a felony in the section immediately following it. The temp-

tation of public officers to vicarious generosity is well known. It assails them with greater force when the object of such generosity is one of their own number, and in a position to reciprocate, or to further or thwart the purposes of his fellows. The object of the provision just quoted is to remove that temptation so far as possible, and to render innocuous that spirit of amity and reciprocity which is apt to prevail among public officers. In view of the mischief aimed at by such provision, and its comprehensive language, there can be no doubt that it was intended to include every species of contract in which an officer of the county may have a pecuniary interest, whether it be for furnishing supplies or services. It is true such provision was enacted long before the office of county attorney was created, but that may be said of the statute relating to embezzlement by a public officer, and other statutes, which unquestionably apply to a county attorney. The provision is general, and there is nothing in its object, or in the nature of the office of county attorney, from which it may be fairly inferred that such officer is exempt from its operation. He is the legal adviser of the officers who are authorized to act on behalf of the county in making contracts, and who must eventually pass on claims based on such contracts; his influence with such officers is generally commensurate with his fitness for his office, and it is not difficult to see that there would be a strong temptation to turn that influence to his own advantage, were he permitted to contract with the county.

In this view of the case we are nót called upon to determine whether it was the official duty of the county attorney to represent the county in the matters for which he seeks to recover. If it were such duty, then his compensation therefor is covered by the salary fixed by law; if, as is claimed, such services were rendered in pursuance of a contract with the county, then, as we have seen, the contract is in violation of a positive statute, and there can be no recovery thereon.

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

GLANVILLE, C., concurs.

FAWCETT, C., not sitting.

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

AFFIRMED.

MARY ELLA TYSON V. AMASA F. TYSON ET AL.

FILED MARCH 17, 1904. No. 13,343.

1. **Dower and Homestead:** COUNTY COURT: JURISDICTION. When a widow is entitled to dower and homestead in lands of which her husband died seized, and the facts upon which her right of homestead and dower depend are not in dispute, the county court of the county in which the estate of the husband is settled has jurisdiction to assign such dower and homestead.
2. ———. In order to oust the county court of such jurisdiction, the right of the widow must be disputed by presenting an issue of fact, which if established by proof would defeat her claim of dower or homestead, and such issue must be one which the county court by its organization is unable to try. Following *Guthman v. Guthman*, 18 Neb. 98; *Serry v. Curry*, 26 Neb. 353.
3. **Extent of Homestead.** In a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and $2,000 in value.

ERROR to the district court for Washington county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

Brome & Burnett, for plaintiff in error.

Frank Dolezal and *E. C. Jackson, contra.*

ALBERT, C.

Peter Tyson died intestate in Washington county; the plaintiff in error is his widow; the defendant in error, Amasa F. Tyson, is his only child, and had attained his

majority at the time of his father's death. The other defendant in error is administrator of the estate. On the 15th day of January, 1903, the defendant in error, Tyson, filed a petition in the county court which, so far as is material at present, is as follows:

"The said decedent (referring to the intestate) died seized of the following described lands situated in said Washington county, to wit: The north half of the southwest quarter, N. W. ¼ of S. E. ¼, and lot 1 of section 9 in township 17 north, range 10 east, and containing about 156 and ¾ acres of land, and all of which is a farm highly improved and the reasonable value of the use of the cultivated lands of said farm a year, being the rent thereof, is reasonably worth the sum of $350 a year and was worth said rental during the year 1902. That said Mary Ella Tyson claims a homestead interest in said premises, and occupies the dwelling house and buildings under her claim that the same was the homestead of said decedent and of herself during the lifetime of said decedent and at the time of his death, and your petitioner alleges that the said homestead consisting of the said dwelling house and outhouses and the land upon which the same are situated to the extent in value of $2,000 is a homestead, and that the said Mary Ella Tyson is entitled to use and occupy said dwelling house and outhouses with so much land upon which the same is situated as taken together with said buildings, shall equal in value the sum of $2,000, and no more, as a homestead. That in addition to said homestead, the said Mary Ella Tyson is entitled to dower interest in said land to the extent of one-third thereof, and is entitled to have the same set aside, and that your petitioner is entitled to the remainder of said premises, and that the said Mary Ella Tyson under the said claim of homestead and dower wrongfully excludes your petitioner therefrom, and wrongfully claims the whole of said real estate as homestead and dower, and refuses to account for the rent of that portion thereof not included in the homestead interest to which she is entitled; that said real estate is of the value

of $11,750, and exceeds the homestead in value by $9,750, and the said Mary Ella Tyson also claims the right to receive from said estate the said sum of $35 a month as support, as specified in said order of this court, and is drawing the same."

The prayer is for the appointment of three persons to set off the homestead and dower of the plaintiff by metes and bounds, the former not to exceed $2,000 in value.

The answer, among other allegations, contains the following:

"That said Mary Ella Tyson is receiving $35 a month for her support, and is occupying and using the land described in said petition and claims the exclusive right so to do. Further answering, said Mary Ella Tyson alleges that the land described in said petition consists of 156¾ acres of land, being the land upon which the dwelling house of said deceased is situated, and not in any incorporated city or village; that said land and all of it was the homestead of said Peter Tyson and Mary Ella Tyson, his wife, upon which they resided at the time of the death of said Peter Tyson, and that said homestead and all of it at the death of said Peter Tyson vested in his surviving wife, Mary Ella Tyson, during her life, and said petitioner, Amasa F. Tyson, has no right to or interest in said land during the life of said Mary Ella Tyson. Said Mary Ella Tyson further shows to the court that said petitioner has no present interest in said land; that the county court of said Washington county has no right or power to try or in any manner adjudicate the claim and title of said Mary Ella Tyson to said land and all thereof, or by its judgments or decrees in any manner inquire respecting same, determine or interfere with her right to the use and possession thereof, or to set off a homestead or assign dower therefrom, and the said Mary Ella Tyson hereby objects to the exercise of any power or jurisdiction of said county court in that behalf."

A hearing was had, and the county court found that the plaintiff in error had a homestead in the premises, or in so

much thereof as should not exceed in value $2,000, and was entitled to dower therein, and appointed three persons to assign her dower and homestead by metes and bounds. From that decree the plaintiff in error prosecuted error to the district court, where the decree of the county court was affirmed. The case is brought here by petition in error.

The plaintiff contends that the county court was without jurisdiction over the subject matter. This contention is based on section 16, article VI of the constitution, which gives county courts original jurisdiction in all matters of probate, settlements of the estates of deceased persons, the appointment of guardians and the settlement of their accounts, and such other jurisdiction as may be given by general law, but which also provides that they shall not have jurisdiction "in actions in which title to real estate is sought to be recovered, or may be drawn in question."

Guthman v. Guthman, 18 Neb. 98, involved a construction of the constitutional provision just quoted. In that case, the widow made application in the county court for an assignment of dower, and inferentially homestead, in certain lands of which her husband died seized. Her right of dower and homestead in the lands was admitted, but the jurisdiction of the county court to grant the relief sought was challenged on the same ground that the jurisdiction of such court is questioned in this case. The holding of the court in that case is reflected by the headnotes, which are as follows:

"1. When a widow is entitled to dower in the lands of which her husband died seized, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever county the lands may lie, by the county court of the county in which the estate of the husband is settled, upon the application of the widow.

"2. In order to oust the county court of such jurisdiction, the right of the applicant to such dower must be disputed by presenting an issue of fact which, if established by proof, would defeat her claim of dower, and such

issue must be one which the county court by its organization is unable to try.

"3. A county court has jurisdiction to set aside a homestead to a widow by virtue of its general jurisdiction in matters of probate and the settlement of estates."

In *Serry v. Curry*, 26 Neb. 353, this court, after quoting the second headnote in *Guthman v. Guthman, supra*, say: "This, we think, is a correct statement of the law, and will be adhered to." The jurisdiction of the county court in such matters is also recognized in *Brandhoefer v. Bain*, 45 Neb. 781, and *Clemons v. Heelan*, 52 Neb. 287. The plaintiff has not overlooked the rule announced in *Guthman v. Guthman, supra*, but attempts to distinguish between that case and the one at bar. The distinction as stated in the language of her brief is as follows:

"In the *Guthman* case, the widow filed her petition claiming dower. The heir at law by his answer admitted that she was entitled 'to have and receive her dower right in the estate.' Under these circumstances, the court might very well say, as it did, 'that the petitioner's right of dower was not disputed in the manner contemplated by the statute so as to oust the county court of jurisdiction.' In the case at bar, the petition of Amasa F. Tyson in the county court recited the fact that plaintiff in error claimed all of the premises as a homestead, and alleged that she wrongfully excluded the petitioner from the entire premises on account of such claim. It appeared upon the face of the petition that the precise and only question the petitioner sought to have determined was the validity of the claim of plaintiff in error to a life estate in the whole 156¾ acres."

The language thus quoted obviously shows some points of difference between the two cases, but they are not, we think, such as would remove the case at bar from the operation of the rule announced in the other. It is conceded by counsel that the pleadings in this case presented no question of fact, but merely a question of law. That was precisely the condition of the pleading in *Guthman v.*

Guthman, supra, and this court held, as we have seen, that, in order to oust the jurisdiction of the county court, the right of the applicant must be disputed by presenting an *issue of fact* which, if established by proof, would defeat her claim, and such issue must be one which the county court by its organization is unable to try. As no such issue was presented in this case, on the authority of the cases just cited, it seems too clear to admit of argument that the county court had jurisdiction in the premises.

Another contention of the plaintiff is that she is entitled to hold and occupy the entire tract of land as a homestead, regardless of its value, and this contention is supported by a more plausible argument than we should have thought possible in view of the plain provisions of the homestead act. A homestead within the meaning of that act, chapter 36, Compiled Statutes (Annotated Statutes, 6200), is defined and limited by the first section thereof, which is as follows:

"A homestead not exceeding in value $2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

The first limitation imposed is that the homestead shall not exceed $2,000 in value; the next, that it shall not exceed 160 acres of land not in any incorporated city or village, or, in lieu thereof, not exceeding two lots within such city or village. The head of a family might actually occupy more than 160 acres of land, not in an incorporated city or village, or more than two lots in such city or village, as a family homestead. But it will not be claimed that, in a case of that kind, the surviving spouse would take a life estate in the excess by virtue of the homestead

act. The limitation as to value is as certainly and positively fixed by statute as the limitation as to quantity. Neither are we able to see that the surviving spouse has any greater rights when the claimant of the excess is an heir of the deceased instead of a creditor. The homestead, which vests in such survivor for life, is the identical homestead in quantity and value defined in section 1 of the act. The statute recognizes none other.

It is also contended that the county court erred in not taking into acount the rights of the plaintiff under the provisions of section 22, chapter 23, Compiled Statutes (Annotated Statutes, 4922), to the effect that a widow who, at the time of her husband's death, shall be living therewith, and not owning in her own right a residence suitable to her condition in life, may remain in the dwelling house of her husband after his death, so long as she remains a widow, without being chargeable with rent. This contention is supported by no argument, and it will suffice to dispose of it to say that it is not presented by the pleadings.

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

GLANVILLE, C., concurs.

FAWCETT, C., not sitting.

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

AFFIRMED.

GEORGE GARTNER V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED MARCH 17, 1904. No. 13,430.

1. **Lands:** ACTION FOR DAMAGES. One in possession of real estate, under a contract with the owner for the purchase thereof, has sufficient title to maintain an action for damage to the land.

2. ———: ———. In such case, it is not necessary for the plaintiff to show the precise nature of his contract, so long as it sufficiently appears that, at the time the damage accrued, he was in possession under a contract of that character.

3. Error: REVIEW. Where the evidence on a vital proposition is erroneously excluded, it is not necessary for the party offering it to proceed to establish other propositions in his case in order to predicate error on such ruling.

4. Successive Actions. Where an obstruction causing the overflow of water and consequent damage to adjacent lands is of such a character that, unless interfered with by the hand of man, it will continue indefinitely, the damages, past and prospective, are recoverable in one action, and successive actions therefor can not be maintained.

ERROR to the district court for Pawnee county: JOHN S. STULL, JUDGE. *Reversed.*

Storey & Storey, for plaintiff in error.

Hazlett & Jack, contra.

ALBERT, C.

The petition states two cause of action: The first, so far as is material at present, is substantially as follows:

That in 1896, under and by virtue of a contract of purchase with the owner thereof, the plaintiff entered upon and took possession of certain real estate, and continued to keep possession thereof under said contract of purchase until 1898, when he paid the full amount of the purchase price, and the title in fee was conveyed to him by the owner; that the defendant's road extends through and across the above premises, and on the 11th day of March, 1897, the defendant negligently and carelessly caused a fire to be set out by one of its engines, whereby a certain orchard on said premises was wholly destroyed and the plaintiff damaged in the sum of $355. The second cause of action is for damage for the negligent construction and maintenance of a roadbed or embankment across a ravine, whereby the surface water is accumulated and thrown back upon the plaintiff's land.

As to the first cause of action, so far as the questions raised in this court are concerned, the answer may be said to be a general denial. As to the second cause of action, the defendant entered a general denial, except as to some formal matters, and a plea of a former adjudication. The reply amounts to a general denial.

At the close of the testimony the court directed a verdict for the defendant, and the plaintiff brings error.

As to the first cause of action, the principal complaint of the plaintiff is based on the rejection of certain evidence offered by him to show sufficient title to enable him to maintain the action. The pleading and the proof show that he was not the holder of the legal title to the premises at the time the alleged loss occurred. Hence the case does not fall within the general rule stated in 13 Ency. Law (2d ed.), 432, to the effect that, in an action for damages for injuries to real estate, actual exclusive possession is sufficient evidence of title, unless the defendant shows an outstanding adverse title of higher dignity than a mere possessory one. In other words the plaintiff having shown an outstanding title in fee simple at the time the loss occurred, bare proof that he was in possession of the premises at the time would not make a *prima facie* case as to his right to maintain the action. He took the stand in his own behalf and testified that in 1894, and while his brother was the owner of the premises, he went into possession thereof—under what arrangement does not appear—and continued in possession until after the loss occurred, which was on the 11th day of March, 1897; that on the 24th day of December, 1896, and while he was thus in possession of the premises, he entered into a contract with his brother for the purchase thereof. He produced a letter which he testified to having received from his brother, which is as follows:

"BELOIT, WIS., Dec. 4, '96.

"DEAR BROTHER GEORGE: I received your letter of the 2, it found me well and I hope these few lines will find

you all the same. I will take $30 an acre, you will have to measure the land. I think there must be 107 acres they have no right to tax a man for land if he has not got it you send me $200 so I get it next week and the rest as you say in your letters. How many bushels of rye was there and what is it worth and how many bushels of corn is there and what is it worth. Is Kretzer there or have they moved away. I will close for this time. By by with love to all from your brother. HENRY J. GARTNER."

He testified that this letter was in reference to the premises in question, that he and his brother had previous correspondence with reference thereto, and that he bought the premises on the strength of that letter which he called his contract; that he made his first payment on the land December 24, 1896, and completed his payments thereon in 1898, and thereafter received a deed of conveyance therefor from his brother. Two other letters from his brother were produced and identified, which the plaintiff offered to show were in regard to the same transaction. They are as follows:

"BELOIT, WIS., Feb. 6, '96.

"DEAR BROTHER GEORGE: I received your letter of 2, it found us all well and I hope these few lines will reach you all the same. I am positive that I have made a deed to you for the land before we moved here on the north side of the R. R. You look up the reckords and see if not you will have to measure the land on the north side so I will now about how many acres there is so I can make the deed. You must have forgot tht I was to have intrist at seven per cent. for $1,000 from Dec. 1, 1896, till it is paid; you have only sent me $200 on the $1,000 in Dec. so it will be more than $870 till you get it paid. I will not be able to handle any corn for it is only fetching 25c a bu. here will you tell Lewis send me the receipt to make the salve that he makes I have lost the one he gave me. I do not know what the Pentacosts are doing with Bain I think C. F. Nigh the Co. Tr. at Pawnee City is appointed ad-

ministrator over the property there so I think he will see about Bain. Has Bain any winter grain on Pentacosts land. By by your brother with love to all.

"HENRY J. GARTNER.

"If I remember correctly I mad a deed to you that you was to pay $700 of the $1,700."

"BELOIT, WIS., Oct. 25, '98.

"DEAR BROTHER GEORGE. I received your letter and draft it found us all well as usual and I hope these few lines will reach you all the same enclosed you will find the deed. Mr. Livermore said it will be just as good as to make a new deed and save the expense and time of riting a new deed and as for you to sending the tax receipts they are of no use to me since you have bought the place. I wish you would go to Pawnee City and pay the taxes on my lot 4 and part lot 3 you no which are my lots and see if there are any back taxes and straighten them up and send the tax receipts and I will pay you and se if the little three corner on the north side of the R. R. right away and on the south side of the S. E. corner block of the village of Gartner is taxes separate and are paid and about the land at Amboy Ill. I am not able to say anything unless I would go there; it will cost me about $6 car fare to go thair besides my time it will take perhaps about 2 days; I had a man tell me that it must be the worst kind of marsh land for you can not get good land at any such figers. If you want me to look at that land I will tell you just what it is but you will have to give me the exact description of the land and I will look it up. So by by from your brother with best regards to all. HENRY J. GARTNER."

The deed was also produced. It appears to have been acknowledged on the 2d day of February, 1896, and to have been originally made to another party, whose name is erased and that of the plaintiff substituted. These several letters and the deed were offered in evidence and excluded; the offer of the plaintiff to show that the second and third

letters referred to the land in question was also rejected. The exclusion of this evidence is now assigned as error.

The objections to the introduction of this evidence are couched in the most general language, and seem to have been made and sustained on the theory that the evidence offered was insufficient to show a complete contract of purchase between the plaintiff and his brother. Had it been necessary for the plaintiff to show the precise terms and conditions of such contract, this evidence doubtless would have been insufficient. But such was not the case. The question before the court at that time was not the precise nature of the plaintiff's contract with his brother, but whether plaintiff's title to the land at the time the loss occurred was sufficient to enable him to maintain the action. In his petition he alleged an equitable title, based on his possession of the premises under the contract for the purchase thereof, which would be sufficient title to enable him to maintain the action. *Omaha & R. V. R. Co. v. Brown,* 29 Neb. 492. The first letter contains an offer from the owner of the land of the terms upon which he would sell. The second is dated February 6, 1896, but from its contents it is clear that the date is a mistake and should be 1897. This letter shows that the owner of the land was preparing to execute a deed for the land to the plaintiff, and reminds him of the terms upon which payment is to be made. The third refers to an enclosed deed, and acknowledges receipt of a draft. Taking the letters and the deed, in connection with the plaintiff's evidence that he entered into possession on the strength of the first letter, and had fully paid for the land before he received the deed, and with his offer to show that the letters all refer to the land in question, it seems to us the evidence excluded would have strongly tended to show, to say the least, that the plaintiff at the time the loss occurred was in the possession of the premises under the contract with the owner for the purchase thereof, and should have been received. So far as the deed itself is concerned, the last letter shows that it was originally

made to another party, and that the grantor, in order to save expense, erased the name of such third party and inserted that of the plaintiff. Whether such change was made before or after the formal execution of the deed is not entirely clear, nor is it material for present purposes to inquire, because if ineffective as a conveyance of the legal title, there can be no doubt of its evidential value, taken in connection with the other evidence on the question whether the plaintiff was in possession under a contract of purchase. It is contended that the exclusion of this evidence was error without prejudice, because the plaintiff failed in his proof on other features of the case. This contention, we think, is without merit. One of the propositions which the plaintiff was required to establish, in order to recover on his first cause of action, was that he had sufficient title to the premises when the loss occurred to enable him to maintain the action. When his proof on that proposition was rejected, erroneously, we think, he was doomed to defeat, whatever proof might be forthcoming on other branches of the case. The law does not require vain things, and does not, therefore, require a litigant to furnish proof which could in no manner affect the result of the trial. This of course applies only to the cause of action in support of which the evidence was offered.

As to the second cause of action, it is pleaded as a defense, and conclusively shown in evidence, that soon after the construction of the roadbed or embankment, alleged to have caused the overflow of plaintiff's lands and consequent damage thereto, the then owner of the lands from whom plaintiff's title to such lands is derived brought an action against the defendant and another, asking judgment on these causes of action, one of which was for damage for injury to a part of said lands by reason of the negligent construction of such roadbed or embankement, whereby surface water was thrown back and over the lands. In that action, judgment was given generally for the plaintiff, which was subsequently paid.

The general rule is that, where the obstruction causing

the overflow of water and consequent damage to the land is of such a character that, unless interfered with by the hand of man, it will continue indefinitely, the damages, past and prospective, are recoverable in one action, and successive actions therefor can not be maintained. *Hodge v. Shaw,* 85 Ia. 137; *McGillis v. Willis,* 39 Ill. App. 311; *Pierro v. St. Paul & N. P. R. Co.,* 39 Minn. 451. The cause of action is single and indivisible, and when it passes into judgment, such judgment is a bar, not only to a subsequent action for the damages to the land actually litigated, but to a subsequent action for any such damage thereto as might have been litigated in the former suit. *Perry v. Dickerson,* 85 N. Y. 345; *Baird v. United States,* 96 U. S. 430; *DeWeese v. Smith,* 97 Fed. 309; *Bartels v. Schell,* 16 Fed. 341; *Beronio v. Southern P. R. Co.,* 86 Cal. 415; *Broxton v. Nelson,* 103 Ga. 327, 68 Am. St. Rep. 97. That such judgment is binding not only on the parties but their privies is elementary.

The obstruction complained of in this case is the same one that was alleged to have caused the damage in the former suit; it is of a permanent character, and one which will continue indefinitely unless interfered with by the hand of man. It follows, then, from what has been said, that the entire damage to the land, past and prospective, was recoverable in the former suit, and that the judgment rendered therein is a bar to the plaintiff's second cause of action.

There is one point of difference in the petition in the former case and that in the present which requires notice. In the former, a total lack of provision for carrying off the water is averred; in the present, it is alleged in effect that no such provision had been made save a certain ditch, which, it is alleged, was of insufficient capacity and fall to carry off the water, and which the defendant had permitted to become and remain obstructed. The ditch was constructed before the former suit was brought, and any faults in its original construction were part of the plaintiff's case at that time. Hence, not only the negligent construction

of the road itself, but also of the ditch which was a part of the same project, is eliminated from the present case by the former adjudication. If, then, the plaintiff has a cause of action for the overflow of his land, it must be for such overflow as was occasioned by the obstruction of the ditch, as that is the only act or omission approaching negligence averred which is not included in the former adjudication. But there is a total failure to show what portion, or that any portion, of the alleged damage was occasioned by the omission to keep and maintain the ditch free from obstructions. It follows, then, that the defendant was entitled to the direction of a verdict so far as the second cause of action is concerned. But as the judgment and verdict are general, for the erroneous exclusion of the evidence offered by the plaintiff in support of his first cause of action, the judgment should be reversed and the cause remanded for further proceedings acording to law.

FAWCETT and GLANVILLE, 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 according to law.

REVERSED.

ROBERT JOHNSON, TRUSTEE, APPELLEE, V. SHERMAN COUNTY IRRIGATION, WATER POWER AND IMPROVEMENT COMPANY, APPELLANT.

FILED MARCH 17, 1904. No. 13,453.

1. **Appeal:** REVERSAL. Where, upon appeal of a suit in equity, the decree of the trial court in favor of the plaintiff is reversed and the cause remanded for further proceedings upon amended pleadings, nothing has become *res judicata*, or the "law of the case" binding on the trial court, except that the pleadings and evidence on the first appeal did not authorize the decree.
2. **Appurtenances.** The ruling made on the former appeal, that, "Where a mill is erected and a water-power obtained by the aid and cooperation of adjoining landowners, any right of flowage

over their premises of water for the mill arranged for and contemplated by the owners, as subscribers toward its construction, becomes appurtenant to the mill," reannounced.

3. **Easement:** PAROL AGREEMENT. If one owning land traversed by a stream sells a portion thereof to another, and at the same time gives such other person by parol the right to overflow the remainder of the land by erecting a dam on the land so conveyed, and the purchaser, relying on such parol agreement, erects such dam and a mill operated by water, and maintains the same, the parol agreement becomes enforceable. If viewed as a license, the acts of the purchaser render the license irrevocable. If viewed as an easement, they take the grant out of the statute of frauds. *Newcomb v. Royce*, 42 Neb. 323, followed.

4. **Conveyance:** CONSIDERATION. The above rule applies as well where the mill site is conveyed in consideration of the erection of the mill, as where other consideration is paid therefor, and where the privileges given consist of other beneficial rights necessary to the use of the mill.

5. **Mortgage Foreclosure:** SHERIFF'S DEED: EASEMENTS. Where a sheriff's deed, made as the result of foreclosure of a mortgage, properly conveys realty consisting of mill property together with the appurtenances thereto belonging, the easements appurtenant to the mill property and necessary to its use and enjoyment, owned and used by the mortgagor in connection therewith at the time of the foreclosure, pass as appurtenances to the mill property.

6. **Lease:** STATUTE OF LIMITATIONS. Where, after conveyance of such property by sheriff's deed, the premises are leased by the purchaser to the mortgagor, possession of any portion of the property or its appurtenances, derived by third persons from the tenant, will not stop the running of the statute of limitations in favor of the lessor's title.

7. **Review:** DECREE. Record examined, and *held* to authorize the decree except as modified herein.

8. **Easement:** RIGHTS OF OWNER. An easement consisting of the right to maintain a mill-pond upon the land of another, does not deprive the owner of the land of any use thereof which does not interfere with the enjoyment of the easement.

APPEAL from the district court for Valley county: JOHN R. THOMPSON, JUDGE. *Reversed with directions.*

R. J. Nightingale, for appellant.

O. A. Abbott, contra.

GLANVILLE, C.

This case is before the court a second time on appeal by the defendants, having been once reversed by an opinion

found in 63 Neb. 510, wherein it was remanded for further proceedings. A general statement of the matters in dispute is found in that opinion, to which we refer, mentioning herein only such other matters as are now involved. A new trial was had upon new pleadings, and new findings and decree were made in plaintiff's favor, different in some regards from the original decree. It is herein contended by defendants that certain matters retried by the district court had become *res judicata* by our former decision, and we take up this contention first. The question involved in this case is, what rights passed to the plaintiff by a judicial sale of the mill property involved, as appurtenances thereto? To be more specific, the rights in dispute are the rights, claimed by the plaintiff to have so passed, to flow land north of the mill site as a part of the mill-pond, the fee to which land was purchased by the mortgagor after the date of the mortgage which is the basis of the plaintiff's title, but which land was then so flowed; also the right to use a portion of the mill-race as then actually constructed, not upon land to which the mortgagor ever acquired the fee, together with a right to take water from the river in connection therewith. We think the scope and extent to which our opinion on the former appeal goes, as adjudicating the rights of the parties herein, is fairly shown by the following excerpts therefrom. "Plaintiff alleges an agreement, oral or in writing, between the various owners of the property affected and Schaupp, in the spring of 1887, to make to Schaupp an absolute title to the strip of land constituting the present race-way in consideration that Schaupp should erect the mill." "As before suggested, the question raised is as to the existence of title in the plaintiff to the strip of land claimed for a head-race in the north half of the section, and also as to the extent and character of the water right possessed by plaintiff." "It seems clear that the decree as it stands can not be sustained. It gives a degree of control to the mill-race as it now exists which only belongs to one who holds in fee. As above stated, the evidence is very far

from disclosing any such title in any portion of the north half of the section on the part of plaintiff." "The state of facts in this case warrants no finding of an absolute and exclusive right in plaintiff to the dam and to the race-way, with its tow-head and sluice in the north half of the section." "It seems, however, clear that there was during all the time from 1887 until the irrigation company's purchase, with only temporary interruptions, some use of water privileges by the mill." "It would seem that plaintiff's rights in the premises depend upon something neither alleged nor shown by the evidence with any definiteness, viz., the rights held by John G. Schaupp in this mill-race and water-power on November 21, 1887, at the time the deed was made to Charles Moore and August Schaupp for his benefit, and the mortgage executed by them." "Some prior right to draw water from the river over the original race-way, as contemplated at the time of the subscription agreement, and as conveyed by Wall, with a right to condemn for additional race-way and mill-pond, and, when that is done, to have so much use of the water, seems to be the extent of plaintiff's rights. To vindicate them will evidently require an amended petition and a new trial. It is therefore recommended that the decree of the district court be reversed and set aside, the injunction dissolved, and the cause remanded for further proceedings. By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and set aside, the injunction dissolved, and the cause remanded for further proceedings. Reversed and remanded."

We are persuaded, and so hold, that plaintiff had, when the cause was thus remanded, a right to amend his pleadings by alleging any facts that would show any lawful right he claimed touching the things in controversy, and to introduce any competent evidence to establish those facts; that he was neither confined to, nor precluded from using the allegations in the former pleadings, nor the evidence produced on the former trial; that he might in the new trial prove any fact material to his rights,

whether he had pleaded and failed to prove them before, or only failed to plead them. What was decided on the former appeal is, that the case made by the pleadings and evidence did not warrant the decree. If the pleadings and evidence now show that any of the rights in dispute belong to the plaintiff, he is entitled to have them awarded by the new decree.

The findings and decree now before us are specific and somewhat lengthy, covering 16 type-written pages. No good purpose would be subserved by copying the same or making any very close analysis thereof. The findings of fact justify the conclusions of law, so far as they are favorable to the plaintiff, under the rule announced in our former opinion: "Where a mill is erected and a water-power obtained by the aid and cooperation of adjoining landowners, and right of flowage over their premises of water for the mill arranged for and contemplated by the owners, as subscribers toward its construction, becomes appurtenant to the mill." And in *Newcomb v. Royce,* 42 Neb. 323: "If one owning land traversed by a stream sells a portion thereof to another, and at the same time gives such other person by parol the right to overflow the remainder of the land by erecting a dam on the land so conveyed, and the purchaser, relying on such parol agreement, erects such dam and a mill operated by water, and maintains the same, the parol agreement becomes enforceable. If viewed as a license, the acts of the purchaser render the license irrevocable. If viewed as an easement, they take the grant out of the statute of frauds." There can be no question but that the mill-race as now located is throughout nearly its entire length precisely where all the parties originally understood and agreed that it should be. It follows a natural channel that was the cause of the selection of the locality for a water-power. The contention that it was intended to tap the river further south is based upon the calls in a deed made after the channel was excavated. Such route was never surveyed or worked. There appears to have been a mis-

take or misunderstanding in regard to these calls because they are made with reference to some wrong variation from the magnetic pole, but the only right of way given and used, or surveyed, is where the race is located. That is the route intended by the deed from Wall, and is where the new decree fixes the right of way. The mill-race across the land known as lot 2 in the section in question, or the Fries tract, is where it originally was, except that a sharp bend made on land so low that the banks would not always hold the water, was avoided by cutting across the bend on a little higher ground. This land was owned by John Wall when the agreement was made to furnish such right of way, to secure the location and erection of the mill. Schaupp's proposition was to build the mill for a donation of money, a mill site and "sixty feet for the head-race *to the mouth of the channel.*" It appears from the findings of the court, which are supported by sufficient evidence, that Fries purchased this property from John Wall after the agreement with Schaupp to give the right of way for the mill-race; that Fries knew of the agreement and purchased the land without asking for its repudiation, allowed the mill-race to be dug in accordance with such agreement without objection, and the reason that no reservation of the right of way for the mill-race was placed in the deed from Wall to Fries, was not because of any mistake as to the location of the mill-race, for it was known that it would follow a well defined channel to the river, but because of a belief by both Wall and Fries that the land sold did not cover any part of that channel. Fries bought with knowledge of Schaupp's right in the premises under the contract with Wall, allowed valuable improvements to be made, based upon those contract rights, without objection, and is, we think, estopped to deny Schaupp's right to the mill-race. Perhaps he should even be held trustee of the legal title for Schaupp, or be required to specifically perform Wall's contract. Wall, under the evidence and findings, and the rules announced by this court above referred to, was

bound by his contract. Fries bought with a knowledge of all the facts, and therefore subject to the contract. The fact that when he bought he did not suppose his tract extended over any of the channel in question is immaterial, he knew of Schaupp's right to that channel.

The mill-race proper enters the land of Fries about 220 feet west of its southeast corner, runs nearly west-northwest some 600 feet, and connects with a natural channel of the Loup river which extends about northwest between the main land and an island, up beyond the Fries tract, and across the southwest corner of a tract then belonging to one Rounds, to the head of the island. The use of this channel was a necessary part of the proposed water-power scheme, and had been promised by the owners of the property throughout its entire length to Schaupp, in consideration of his locating and erecting the mill. At the time the mortgage herein referred to was taken, Rounds told the agent of the creditor who took the security "that he had agreed that Mr. Schaupp might use that water through there." That carries the right to the use of that channel down to where the channel entered the land of Wall, who was one of the active parties in securing the location of the mill, and had promised the use of the water in the channel, and the right of way from it for the mill-race.

There is another reason why the defendants can not prevail as to the right of way across the Fries tract. By Fries' testimony, Schaupp excavated the channel across his land in June, 1887. Schaupp remained in undisputed possession, and used the channel as an appurtenance to the mill, down to the time of the foreclosure sale, and whatever interest he had was appurtenant to the mill and passed by the sheriff's deed. Schaupp leased the property from the plaintiff, and was in possession of the entire plant under the lease. Whatever possession, if any, the defendants had in the ditch during the continuance of such lease, they acquired from Schaupp by contract, knowing him to be in possession as plaintiff's tenant.

They could not hold possession so acquired adversely to plaintiff, especially without notice to him. Schaupp's possession under the lease continued until in July, 1897. Prior to that time, defendants holding their possession under plaintiff's lessee, were holding under plaintiff, and were estopped to claim adversely to the plaintiff, until they had surrendered the possession. At the time Schaupp surrendered his lease, the ten years' statute of limitations had fully run, and plaintiff's title to an easement of right of way for the mill-race had ripened under the statute. All of the rights which the new decree gives the plaintiff in the mill-race and works above the mill and mill-pond were, we think, clearly appurtenant to the mill at the time of the foreclosure sale, and passed as against the defendants by the sheriff's deed.

Turning now to the question of the rights of the parties as to the land north of the mill site flowed by the mill-pond within the high banks of Hawthorne creek, we find that the race discharges the water into the pond. That the mill wheel is fed from the pond is shown by the maps and diagrams of both parties. To fill the pond is impossible without flooding the land, and to use the power for the mill is impossible except the pond be filled. When Schaupp created the pond for the use of the mill, partly on the mill site and partly above it, the pond became an appurtenance to the mill, necessary and appropriate for use in connection therewith. If he had obtained title to the easement by donation toward the enterprise, it would have gone with the mill as an appurtenance. Having created the pond for use of the mill and then purchased the land it covers, while the fee in the land would not pass by sale of the mill and site, yet the easement of right of flowage, we think, would pass as an appurtenance to the mill property. The fact that Schaupp perfected his right to flow the land after the giving of the mortgage would not prevent it from so passing, the same as other betterments to the land in the form of buildings and machinery afterwards added to the premises, would so pass. Its use in connec-

tion with the mill was open and visible. It was an *apparent* easement as that term is used in law. If Schaupp had owned and sold the mill at the date of the sheriff's deed, the easement would have passed by an implied grant. The owners of the fee continued to have the right to make use of the land in any way that did not lessen the enjoyment of such easement, but the mill property is the dominant estate. The decree gives plaintiff only such an easement. We are satisfied with the holdings of this court above referred to, and are content to follow them without further argument, and, applied to the facts in this case, we think they support the findings and decree of the lower court.

The trial court limited the rights of the plaintiff in the disputed property to such use as will yield for the mill 15 horse-power through the water power plant, upon the theory, as we understand, that our former decision prevented its giving to plaintiff a right to any greater flow than had been obtained at the date of the foreclosed mortgage. We do not so understand the matter. The donations of the rights acquired by Schaupp were for the mill he proposed to build. Though he had not at the date of the mortgage acquired sufficient flow to give him power to run the mill to its full capacity, if he had done so afterwards under the subscription agreement, we think he could not deprive the mortgagee of the power acquired and used in operating the mill, after sale of the mill and appurtenances under foreclosure. Mr. Schaupp, as a witness for the defendants, testified that soon after he turned the water to the wheel he could grind at "half capacity," and that the capacity of his mill required 40 horse-power. While he also testified that his first wheel would develop but 15 horse-power under a three foot fall, he also testified that he in some manner increased the fall and the power obtained. We think it well established from the evidence that the fall obtained is greater than three feet, and do not think the limitation of plaintiff to the use of 15 horse-power is just, under the evidence,

neither do we think the plaintiff has well established his right to the use of more water than is sufficient to develop 20 horse-power under the fall obtained.

The decree rendered preserves the rights of the parties in a joint use of the property, and water, and water right to the extent that such joint use is proper and right under the evidence, and should, we think, be affirmed except in the following particular. A joint use of the mill-pond as a reservoir seems necessary to the enjoyment of the several rights of each party, and is, we think, intended to be given by the decree. The plaintiff has only an easement to maintain the pond at its accustomed height; the enjoyment of such easement would not be disturbed by the defendants' use of the property, in which they own the fee, for the purpose of allowing water to flow in and out, provided they do not interfere with plaintiff's maintaining the pond at such height as to give him the power he is found to be entitled to. By the decree, before the defendants can so use the mill-pond, they will be compelled to make a canal on their own premises, diverging from the present canal and mill-race at the point where the present race enters the south half of the section, and a device to measure the water to which plaintiff is entitled is required to be placed at this point of divergence, to be maintained at the equal and joint cost of plaintiff and defendants. Plaintiff's mill-race discharges into the pond; if defendants' canal shall also discharge into the pond, it would be useless to measure the water which flows through plaintiff's separate mill-race. It must be true that the plaintiff, by knowing the capacity of his water wheel, may also know the height to which the water must be maintained in his flume to give him the specific power to which he has been found to be entitled. Instead of providing a measuring device, we think the decree should be modified so as to allow the plaintiff to use the quantity of water necessary to furnish such power, and to restrain him from using water in excess of such amount.

The decree should be so modified as to allow the plain-

tiff the use of sufficient water to develop 20 horse-power instead of 15, also, so as to require the plaintiff to pay two-fifths instead of one-third of the cost of keeping up the plant, as provided by the decree; and further, by striking out the provision for maintaining a measure device, and, instead thereof, entering an order restraining the plaintiff from using more than the quantity of water required to produce 20 horse-power under the fall obtained by maintaining the pond at its accustomed height, this restriction, however, to take effect only after the defendants shall become entitled to the use of the pond by making their own canal leading thereto as provided by the decree. In all other respects, the decree should be affirmed.

We therefore recommend that the cause be remanded, with direction to the district court to modify its decree in the above particulars only, the decree to stand as entered in all other respects.

FAWCETT and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that this cause be remanded, with directions to the district court to modify its decree so as to allow the plaintiff the use of sufficient water to develop 20 horse-power instead of 15, also, so as to require the plaintiff to pay two-fifths instead of one-third of the cost of keeping up the plant, as provided by the decree; and further, by striking out the provision for maintaining a measuring device, and, instead thereof, entering an order restraining the plaintiff from using more than the quantity of water required to produce 20 horse-power under the fall obtained by maintaining the pond at its accustomed height; such restriction to take effect only after the defendants shall have become entitled to the use of the pond by making their own canal leading thereto in accordance with the decree; and in all other respects, that the decree stand affirmed.

JUDGMENT ACCORDINGLY.

THOMAS BONACUM, BISHOP, APPELLANT, V. WILLIAM MURPHY, APPELLEE.*

FILED MARCH 17, 1904. No. 13,390.

1. **Ecclesiastical Tribunals:** CIVIL COURTS: REVIEW. The courts will not review the judgments or acts of the governing authorities of a religious organization with reference to its internal affairs, for the purpose of ascertaining their regularity or accordance with the discipline and usages of such organization, but they will inquire and determine whether or not a church tribunal, which undertakes to expel a member, has been organized in conformity with the constitution of the church, and whether a member of such tribunal is disqualified under the rules and canons of the church from sitting as a judge in the case. These questions are not ecclesiastical and within the exclusive jurisdiction of the ecclesiastical tribunal, although the decisions of such tribunal, if properly and legally constituted, would be binding on the civil courts on all matters properly before it for trial.
2. ———: APPEAL: ENFORCING SENTENCE: INJUNCTION. Where a church tribunal of original jurisdiction proceeds to try and discipline or expel a member of the society, and the member proceeded against claims that the presiding judge is disqualified from acting on account of a challenge interposed before the commencement of the trial, and where such challenge has been disregarded and an appeal has been taken by the accused to an appellate church tribunal, the civil courts have jurisdiction to enjoin the enforcement of a sentence pronounced against the accused until the appellate ecclesiastical tribunal has disposed of the appeal.
3. **Appeal:** INJUNCTION. Where the district court has enjoined the enforcement of a decree of an ecclesiastical court or the prosecution of any civil action against the accused, until an appeal taken by him has been determined by the appellate ecclesiastical court, it is immaterial whether such appeal is suspensive or devolutive, as the injunction must be observed and obeyed until the appeal has been disposed of.
4. **Evidence:** REVIEW. Evidence examined, and *held* to warrant the finding of the trial court that an appeal taken by the defendant had not been determined or disposed of.

APPEAL from the district court for Seward county: SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

* Rehearing allowed. See opinion, p. 487, *post.*

C. E. Holland and *Roscoe Pound,* for appellant.

M. D. Carey and *Norval Brothers, contra.*

DUFFIE, C.

The appellant, as bishop of the Roman Catholic church in the diocese of Lincoln, brought this action against the appellee, a priest of the mission of Seward in said diocese, to enforce the decretal order of the curia, the ecclesiastical court of the diocese, against the appellee for alleged wilful and continued disregard and violation of the canons, rules, regulations and discipline of said church, and for wilful disobedience to his superiors. For convenience the parties will be designated as in the court below, plaintiff and defendant.

The plaintiff's petition is in two counts, and sets out his cause of complaint in detail and at great length. The material allegations are, however, the following: After alleging that he is bishop of the diocese of Lincoln, which comprises that part of the state of Nebraska south of the Platte river, it is stated that the mission of Seward comprises certain real estate upon which is located a church and parsonage and also certain real estate and the church building thereon at Ulysses. In 1897 the defendant was appointed to this mission and took up his abode in the parsonage at Seward; that by virtue of the laws, canons, statutes, discipline, rules and regulations of the Roman Catholic church, the plaintiff is invested with the power and authority to transfer at his pleasure any priest, pastor or rector from any parish or mission within the diocese of Lincoln as an administrative act, and also, if required by the nature of the case, by a judicial act; that in the exercise of his prerogative he suspended and transferred the defendant from the mission of Seward on May 5, 1900, and thereafter appointed as rector or priest of said mission the Reverend John A. Hays; and that on April 5, 1900, in the exercise of his authority he trans-

ferred the defendant from the mission of Seward to that of Red Cloud, in Webster county, Nebraska; that it was the duty of the defendant under the rules and regulations of the church to immediately comply with such sentence of transfer upon the same being known to him, but that he failed and refused, and still refuses, to vacate and surrender to the plaintiff possession of the church and church furniture and fixtures, sacred vessels, vestments, and other church property belonging to the church in said mission of Seward. It is further alleged that on July 14, 1900, the plaintiff commenced an action in the district court for Seward county, reciting in his petition the foregoing facts and asking, among other things, that the defendant be restrained and enjoined from entering into either of said church edifices in said mission of Seward, and from exercising any of the rights of a priest or rector in said mission, and from collecting the revenues of said church in said mission and from hindering or in any manner interfering or preventing the Reverend John A. Hays from performing his duties as a priest or rector in said mission; that after a partial hearing in said cause and before the case was submitted to the court, the plaintiff dismissed that action without prejudice, but that, notwithstanding said dismissal, the court proceeded, wholly without jurisdiction, to render judgment in said cause; and it appearing to the satisfaction of the court that the defendant had appealed from the sentence and order of transfer and suspension made by the plaintiff on the 5th of April, 1900, and that no final decision had been made, or at least had not been promulgated on said appeal, the court, on the 6th day of January, 1902, acting wholly without jurisdiction, ordered and decreed that the plaintiff be enjoined from further proceeding in the civil courts until the defendant's appeal had been heard and determined by an ecclesiastical court having power and jurisdiction to hear and determine the same; and it is alleged that said appeal had been heard and determined by the sacred congregation of propaganda at Rome, the highest

court of the Roman Catholic church and the tribunal having power and appellate jurisdiction to determine the matter. The second count of the petition alleges that on January 23, 1901, the plaintiff, in the further exercise of his prerogative, excommunicated the defendant and expelled him from the jurisdiction of the diocese of Lincoln for misdemeanors committed and gross insubordination, which acts and misdemeanors are in violation of the laws, canons, statutes, discipline and regulations of the church; that notice thereof had been communicated to the defendant, and since that time defendant has had no right or authority to act or officiate as a priest or rector of the mission of Seward in any capacity whatever, or to hold possession of the church edifices, the sacred vessels, vestments, furniture and fixtures belonging thereto; that, notwithstanding this, the defendant, in defiance of the laws, canons and discipline of the church, has usurped the rights of said mission and of the priest and rector thereof, and forcibly intruded into each of the church edifices belonging to the mission, and assumed to exercise all the functions of a priest, and forcibly and wrongfully excluded from said churches and rectory the Reverend John A. Hays, and prevented him from officiating as priest of said mission; that he is collecting the revenues of said church; that plaintiff has exhausted all the resources known to the ecclesiastical law and is powerless to prevent the further unlawful acts of the defendant save in a court of equity; and he therefore prays that the defendant be restrained and enjoined by an order of the court from entering into any of the said church edifices or the rectory in said mission, or from exercising any of the rights and privileges of a priest therein, and from officiating or assuming to act as a priest or rector of the church in said mission of Seward, and from hindering or interfering with or in any manner preventing the Reverend John A. Hays from performing his duties as priest or rector of said churches in said mission.

The defendant in his answer admits that plaintiff is

bishop of the diocese of Lincoln; that the mission of Seward is in said diocese and comprises the parsonage and churches in Seward and Ulysses; that defendant took possession of the mission in 1897, and has ever since and does now reside in the parsonage at Seward; that since his appointment he has held possession of the mission and performed the duties of minister therein; he denies that the laws of the church have clothed a bishop with power at all times to remove a pastor from one mission to another in his diocese, and avers that under the laws of the church a pastor can not be removed against his will, except by a fair and impartial trial; he alleges that the plaintiff gave him notice to appear at Lincoln, Nebraska, on the 20th of March, 1900, to answer to charges preferred against him; that he appeared on that date and, before issues were joined, objected and challenged the right of the bishop to sit in judgment in the case, for the reason, among others, that the bishop was his enemy and prejudiced against him, and that within ten days thereafter he sent his objection, challenge and appeal to the highest church court, and that said objection, challenge and appeal have never been adjudicated by that court; he admits that again in October, 1900, he was summoned before the bishop in the second case, but he repeated the same objection, challenge and appeal, and immediately sent the same to the highest court of the church, and that the same has never been adjudicated by that court. In a supplemental answer filed by the defendant it is alleged that on January 6, 1902, the district court for Seward county rendered a judgment against the plaintiff in an action between plaintiff and defendant, which action was founded on the first ecclesiastical judgment mentioned and described in the petition in this action; that the judgment, among other things, enjoins plaintiff from commencing any other civil action involving the same controversy, until the defendant's appeal taken from the bishop's judgment has been determined by the highest ecclesiastical tribunal of the Roman Catholic church having power and jurisdic-

tion to hear and determine the matter complained of, and until the same is determined by the highest judicature of the Roman Catholic church. The defendant's answer is made a cross-bill, and affirmative relief is sought by way of an injunctional order against the plaintiff from in any manner or way interfering or intermeddling with the defendant as priest or rector of the church in the mission of Seward, until the challenges, protests and appeals of the defendant now pending and undetermined in the highest church court of the Roman Catholic church are finally heard and settled by said court.

The plaintiff's reply alleges that the decree and judgment of January 6, 1902, is null and void, for the reason that, before said cause was submitted to the district court, the plaintiff had dismissed his action and the court had no jurisdiction to proceed and enter judgment against the plaintiff. It is alleged that the defendant did not in that action file any cross-petition or set up any counter-claim or set-off that would entitle him to affirmative relief or give the court jurisdiction to proceed after the dismissal of plaintiff's case, and that said order was not made to enforce any ecclesiastical decision; it is further averred that the district court for Seward county had no jurisdiction to restrain the plaintiff as bishop from exercising his ecclesiastical rights in the government of his diocese in relation to the discipline of priests therein or the discharge of their ecclesiastical duties in the several parishes of that diocese; it is further alleged that the defendant has been lawfully convicted and sentenced to removal, suspension, excommunication and expulsion from the Roman Catholic church by an ecclesiastical tribunal of that church having power and jurisdiction to hear and determine the matter, and that such conviction and sentence, and each of them, have been finally determined by the highest judicial judicature of the church. On the final hearing, the court found all the issues against the plaintiff and in favor of the defendant, and entered a decree dismissing the plaintiff's petition.

The decree of January 6, 1902, entered in the prior action between these same parties, contains the following provision:

"It is further considered and decreed by the court that the plaintiff be and he hereby is enjoined and restrained from in any way or manner whatsoever interfering with or meddling with the defendant William Murphy as priest or rector of the Roman Catholic church within the plaintiff's Nebraska mission comprising the parishes of Seward, Nebraska, and Uylsses, Nebraska, and the said plaintiff is further enjoined and restrained from in any way or manner whatsoever commencing or prosecuting any suit or other proceeding in the civil courts on the matters complained of in his petition, until the defendant shall have been duly and lawfully convicted and sentenced by an ecclesiastical tribunal of said Roman Catholic church having power and jurisdiction to hear and determine the matters complained of, and until the same is determined by the highest judicial judicature of said Roman Catholic church."

It is claimed that the decree entered in that case, in so far as it afforded the defendant affirmative relief, is void, because of want of jurisdiction in the court to enter it. We have carefully examined the defendant's answer in that case and, while there is nothing therein denominated a "cross-bill," there are many allegations upon which affirmative relief to the defendant could properly be founded, and the defendant's prayer, based upon these allegations, asked the relief granted by the decree. That the court ought not to interfere with the regular exercise of his ecclesiastical duties by the bishop is too well established to need discussion, and if the decree be construed to enjoin the bishop from proceeding against the defendant in matters of church discipline, and in accord with the rules of the church, then, while we can not say that it would be absolutely void in that respect, it would be so irregular that effect ought not to be given it, unless its terms are so plain as to avoid any other construction. But that the

court had ample jurisdiction, under the circumstances, to enjoin the bishop from instituting and prosecuting further civil actions until defendant's appeal had been determined can not be doubted; and whether the decree was warranted by the evidence, or is one which should not have been made, is not a question now open to argument.

A somewhat analogous question was before the court in *State v. Baldwin,* 57 Ia. 266, and it was said:

"If these articles of discipline in any way qualify the right of the trustees to control the use of the house they should have been presented to the court in the injunction proceeding, and insisted upon as a reason why the order entered in that proceeding should not have been made. If they were called to the attention of the court in that proceeding, and notwithstanding the court erroneously ordered the trustees to do what is beyond their power, the order may, upon proper proceedings, be reversed. But the order of the court, even if erroneous, was not void. The court had jurisdiction of the parties and of the subject-matter and its adjudication can not be disregarded with impunity. So long as it remains unreversed it must be obeyed. There would be an end of all subordination and social order, if parties could disregard judicial orders, and when proceeded against for contempt, call in question the correctness of the order itself."

In our opinion the decree, in so far as it restrained the bishop from commencing an action in the civil courts until the defendant's appeal had been determined, was not beyond the power of the court to make, and that order should be enforced.

The two questions of paramount importance are, first, did the ecclesiastical court convened by the plaintiff at Lincoln have, under the circumstances, power or authority to proceed to judgment against the defendant; and, second, if so, have the appeals taken by the defendant been determined by the appellate ecclesiastical court? The law is well settled in this state that civil courts will not review or revise the proceedings or judgment of church

tribunals, constituted by the organic laws of the church organization, where they involve solely questions of church discipline or infractions of the laws and ordinances enacted by its ruling body for the government of its officers and members. *Pounder v. Ashe,* 44 Neb. 672; *Bonacum v. Harrington,* 65 Neb. 831.

In *Pounder v. Ashe,* the rule announced in *Watson v. Jones,* 13 Wall. (U. S.) 679, relating to the power of the civil courts to inquire into the authority of an ecclesiastical tribunal, was followed and adopted. It was there said:

"It may be said here also that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted, and in a sense often used in the courts; all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become in almost every case the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, * * * and would in effect transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions."

This doctrine was reaffirmed in *Bonacum v. Harrington, supra,* and is now too well settled in this state to be questioned or doubted. Relying on this rule, the plaintiff insists that he being the governing authority of the diocese of Lincoln, his action in relation to the trial of priests and the enforcement of the rules and regulations of the church can not be questioned by the civil courts; that he has exclusive original jurisdiction in such matters, and that relief can be obtained only by an appeal to a higher

ecclesiastical body. When Father Murphy was called to answer before the curia or church court at Lincoln, he interposed a challenge to the plaintiff as the judge of said court, upon the ground, among others, that he was prejudiced against him and a bitter personal enemy. Defendant asserts that, when a challenge of this character is interposed, the matter of the qualification of the judge objected to must be submitted to arbiters, one to be chosen by the judge, one by the defendant, and, if they can not agree, a third is to be selected by them. In support of this contention he introduced a translation from the decretals of Pope Gregory IX, Book 2, title 28, chapter 31, as follows:

"Challenged judge must appoint arbiters upon whose determination of sufficiency depends whether he can act. You ask to be instructed, when one refuses a judge as suspected, whether he must allege the cause for suspicion, and whether he is bound to prove it unless it is manifest. Also whether the judge can proceed in the business, if he who made the objection of suspicion does not wish or can not prove cause in court. To your consultation we answer that, when anyone proposes that he has a judge who is suspected he allege the cause of suspicion before the same judge; but the parties should be compelled by the judge to agree on some persons not very distant; before whom if the case of suspicion is not proved within a suitable time, and not till then, shall the judge make use of his authority. But if the cause of suspicion is sustained by them, the judge objected to is bound to refrain from taking cognizance of the cause."

Defendant also introduced in evidence the decretals of Pope Gregory IX, Book 2, title 28, chapter 61, as follows:

"Challenged Judge,—continued: Because by a special care has it been provided for that no one may presume to promulgate against anyone a sentence of excommunication, unless a suitable admonition be previously given; wishing also to so provide that the party thus admonished may not under the pretext of a frustrating appeal be able

to evade the trial of him who gave the admonition: We enact that if he alleges that he has a judge who is suspected he shall assign in the presence of the same the cause of suspicion; and he together with his adversary (or if it happens that he have no adversary), then with the judge, shall together elect arbiters; or if they can not come to an agreement without malice, this shall elect one, and that the other, to take cognizance of the reason for suspicion; and if they can not come to an understanding they shall call in a third, in order that what two of them shall decree may have the strength of durability; and let them understand that they are bound to adhere faithfully to it by an order from us in virtue of obedience under a severe command. If the legitimate reason for the suspicion is not proved before them within suitable period of time, the judge may use his jurisdiction. But if it is legitimately proved, with the consent of him who alleged the reason of suspicion, the judge who is objected to must commit the affair to a suitable person or transfer it to a superior, in order that proceedings should go on in the manner prescribed."

This challenge interposed by the defendant raised not simply a question of the jurisdiction of the court to try the case, but of the disqualification of the judge presiding in the court. A court may have ample or even exclusive jurisdiction to try a case, and yet the judge presiding may, on account of bias or partiality or interest in the case or of his kinship to one of the parties, be disqualified to sit in the case. Such is the case in our probate courts. They have exclusive jurisdiction in probate matters, and yet the probate judge can not act in those cases where the statute disqualifies him. The question here for our determination is not whether the curia at Lincoln had jurisdiction, but whether the judge presiding therein was disqualified from trying this particular case. For the plaintiff it is contended that the decretal orders above quoted are not in force in the United States and are not applicable to the particular proceeding had against the defendant. A re-

view of the several authorities, church rules and decretal orders offered in evidence would unduly extend this opinion. It is sufficient to say that we are not satisfied that plaintiff's contention is upheld by the evidence and are entirely satisfied with the holding of the district court, the more so from the fact that the first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality, and it would be a reflection upon the church to which both parties owe their allegiance, if it could be asserted and maintained that one put upon trial could not show the disqualification of the judge before whom he was cited to appear, but was compelled to submit his case to an interested party, or one so embittered against him that a fair trial could not be hoped for or expected. It is the rule of the civil courts that a judgment entered by a judge disqualified to act in the case is absolutely void. *Walters v. Wiley,* 1 Neb. (Unof.) 235, and cases cited. And if the canons of the church are to be regarded as the rules or statutes controlling the proceedings of the ecclesiastical courts, then, on principle, the same rule should apply to a sentence pronounced by an ecclesiastical judge disqualified from sitting in the case.

If we properly understand the record before us, it is claimed by the plaintiff that, in the proceedings, or at least one of the proceedings, had against Father Murphy, he was acting as a "judge delegate," and that a challenge or objection to a judge delegate does not oust him of authority to try the case. Referring to this phase of the case, we have to say that there is no allegation in the petition that in either of the proceedings brought against Father Murphy in the church curia at Lincoln the bishop was acting as a judge delegate, and a careful examination of the evidence fails to disclose any license or commission from any of his superiors vesting him with that authority. Both of the decrees made by the curia at Lincoln against the defendant are signed "Thomas Bonacum, Bishop of Lincoln, Judge Ordinary," and as we read the record of the proceedings had in those cases it was not claimed that

the plaintiff was acting as a judge delegate in either case. Indeed the record in the second proceeding seems to contradict that claim, as the following quotation taken therefrom will show:

"Before rendering a decision in the case of the *Diocese of Lincoln v. Rev. William Murphy* now before this curia, we deem it proper first of all to pass upon the exceptions and the alleged appeals which the Rev. Murphy claims to have made, and by which he pretends that this curia is deprived of all jurisdiction over him. (See Exhibits F and K.) In his answer to the citation of December 10, 1900, he says: 'I beg to inform you again that in all the matters referred to, you have lost all jurisdiction by my appeal and challenge of March 20 (1900) and by my appeal of October 1, 1900.' As regards the alleged challenge of March 20, 1900, we have to say—as the record of the curia will also show—that no challenge was made on March 20, 1900. If any challenges have been made since that time they are to be regarded as irregular and invalid, inasmuch as they set forth no reasons why the challenge is made. Where a judge *delegate* is challenged it is not necessary to give any reasons for the challenge; but where a judge *ordinary* is challenged it is necessary to set forth the reasons in writing, otherwise the challenge may be disregarded with impunity. (See De Angelis De Recusationibus, L. II, Tit. XXVIII; Smith's Elements II, No. 1038.)"

A consideration of these matters makes it apparent to us that the bishop in the proceedings referred to was acting as judge ordinary and not as judge delegate, and has so represented and designated himself by the record of his own court.

The court did not intend by the language used in *Watson v. Jones, supra,* to establish a rule depriving a member of a church society of a right to resort to the courts in cases where those pretending to act for the society have absolutely no right, authority or power. This is well illustrated by the holding in a later case, *Bouldin v. Alexander,* 15 Wall. (U. S.) 131. It is there said:

"This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. We have only to do with rights of property. As was said in *Shannon v. Frost,* 3 B. Mon. (Ky.) 253, we can not decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. We must take the fact of excommunication as conclusive proof that the persons exscinded are not members. But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church, and who consequently had no right to excommunicate others. And, thus inquiring, we hold that the action of the small minority, on the 7th and 10th of June, 1867, by which the old trustees were attempted to be removed, and by which a large number of the church members were attempted to be exscinded, was not the action of the church, and that it was wholly inoperative. In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church. An expulsion of the majority by a minority is a void act."

Hatfield v. De Long. 15 Ind. 207, 51 L. R. A. 751, is a good illustration of the rule that the civil courts will interfere to prevent a trial by an ecclesiastical court, the members of which are disqualified to sit in the case. The petition in that case alleged the following facts: The appellant was, on a trial had, expelled from the society. He took an appeal to the quarterly conference. The organic law of the society authorizes an appeal to the quarterly conference but no higher. It provides that on appeal the trial shall be had before a tribunal of five, two to be chosen by the accused, two by the quarterly conference, and a fifth by the four: That no person shall sit as a member of the appellate tribunal who sat in judgment at the original trial: That a decision of a majority of the appellate tribunal shall be final, and that any member who refuses to abide by such decision shall be expelled without

further trial. Appellees constitute the quarterly conference. Appellant chose two competent persons to act as members of the appellate tribunal. Appellees, with the fraudulent purpose of depriving appellant of the benefits of his appeal, selected two of their number to act as members of the appellate tribunal who had sat in judgment at the original trial. These two refused to consider the selection of anyone as the fifth member of the appellate tribunal except a certain person who is in the conspiracy to deprive appellant of the benefits of an appeal, and whose purpose is to join the other two in denying appellant a fair hearing. A demurrer to this petition was sustained by the trial court, but this holding was reversed on appeal; the court, after stating and recognizing the general doctrine that the civil courts will not interfere to review the decision of an ecclesiastical court, gave the following reasons for reversing the trial court:

"The foregoing considerations, however, do not dispose of this appeal. The cases that have been spoken of presupposed the existence of an ecclesiastical judicatory in accordance with the organic law of the church. The member, by joining, agrees that the church shall be the exclusive judge of his right to continue. For the purpose of trying a member on charges of having violated the rules of the church or the laws of God, the church is the tribunal created by the organic law. The member has consented that, for all spiritual offenses, he will abide the judgment of the highest tribunal organized under the constitution of the church. But he has not consented to submit to usurpation. As Mr. Justice McCabe said in *Smith v. Pedigo,* 145 Ind. 361, 407, 32 L. R. A. 838, 843: 'It must be the act of the church, and not the act of persons who are not the church.' In this case, it is disclosed that appellant has proceeded as far as he can within the church. He was compelled either to submit his appeal to a tribunal organized in defiance of the constitution of the church, or to appeal

to the secular courts. If the secular courts are without jurisdiction to grant relief, it is apparent that, on the facts alleged in the complaint, the question of appellant's guilt or innocence of a spiritual offense will be determined by an unconstitutional tribunal. This court will have nothing to do with the charge of a spiritual offense. That is an ecclesiastical question purely. But the inquiry, whether or not the tribunal has been organized in conformity with the constitution of the church, is not ecclesiastical. It is the same question, and that only, that may arise with respect to any voluntary association such as fraternal orders and social clubs. The assertion of jurisdiction in such a case is not an interference with the control of the society over its own members; but, on the contrary, it assumes that the constitution was intended to be mutually binding upon all, and it protects the society in fact by recalling it to a recognition of its own organic law."

In the celebrated case of *Chase v. Cheney*, 58 Ill. 509, some question was made as to the constitution of the court by which the appellant was tried. In the opinion delivered by Mr. Justice Thornton, language was used indicating that the civil courts would not inquire into the legality of the organization of the ecclesiastical court. Chief Justice Lawrence and Mr. Justice Sheldon, while fully concurring in the conclusion reached, filed a separate opinion, giving their views upon that question. They say:

"We understand the opinion as implying, that in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary, as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws or canons of the religious association to which it belongs, and its decision of that question is binding upon secular courts. This is a principle of so grave a character, that, believing it to be erroneous, we are constrained to express our dissent upon

the record. We concede, that when a spiritual court has once been organized, in conformity with the rules of the denomination of which it forms a part, and when it has jurisdiction of the parties and the subject matter, its subsequent action in the administration of spiritual discipline will not be revised by the secular courts. The simple reason is, that the association is purely voluntary, and when a person joins it he consents, that for all spiritual offenses, he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized, and when a clergyman is in danger of being degraded from his office, and losing his salary and means of livelihood by the action of a spiritual court, unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself, and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We consider this position clearly sustainable, upon principle and authority."

On the first hearing in *Pounder v. Ashe,* 36 Neb. 564, it was held that this court would inquire whether or not the organic rules and forms of proceeding prescribed by the ecclesiastical body have been followed. In other words, whether a court properly constituted and having jurisdiction of the matter before it had proceeded in a regular manner with the trial. On the rehearing it was held that, after the highest ecclesiastical court had determined that the court of original jurisdiction had proceeded regularly and had affirmed its finding, this court would not review such holding. It will be noticed however that in that case the highest court known to the church society to which Ashe belonged had affirmed the proceedings of the trial court, while in the case at bar

the appeal taken by Father Murphy from the judgment of the curia at Lincoln had not been determined at the time the injunction was issued, and that decree only attempted to stay the hand of the bishop until the appellate ecclesiastical court had passed upon the question.

In *Watson v. Jones, supra*, and in the cases heretofore coming before this court, the opinions have proceeded upon the theory, either that the highest court of the church had settled the question of jurisdiction, or that the court whose judgment it was sought to review had been properly and legally constituted, and that no appeal had been taken from its decision. The rules governing Catholic church trials are much more liberal in behalf of the accused than are those prevailing in the civil courts, it being laid down that the omission of a substantial formality vitiates and annuls the judgment pronounced. In Smith's New Procedure, which both parties cited as authority in Catholic church trials, it is said in article 43, section 2:

"The rule of law is '*quæ contra jus fiunt debent utique pro infectis haberi,*' hence all canonists teach that the omission of a *substantial formality* during the trial vitiates and annuls the entire proceeding. * * * When the trial is null by defect in the proceedings, the sentence passed after such trial will also be null and void and have no effect whatever. For the law prescribes indeed that the guilty shall be punished, but it prescribes also that they shall be punished by the forms of law. These forms are considered by the law the essential means of finding out the truth."

In *Pounder v. Ashe, supra*, this court has adopted the rule that, where the construction of a canon or rule of the church is in controversy, it will accept the construction put thereon by the highest church authority, and that, where the regularity of the proceedings of an inferior ecclesiastical court are passed on by the highest governing authority of the church and the regularity of the proceedings sustained, this court will accept such decision as final and conclusive. And in *Bonacum v. Harrington, supra,* it was

held that the decree of the highest church power in the state when not appealed from, would also be accepted by the court as a correct exposition of the question in controversy; but we have never gone so far as to say that we would enforce the orders of an ecclesiastical court, the members of which are disqualified from acting, or that we would accept as conclusive the construction put upon the canons and rules of the church by an inferior ecclesiastical tribunal, when that construction was a matter of controversy, and an appeal had been taken therefrom to a higher ecclesiastical body, and was still a matter for the decision of the highest governing authorities of the church. The parties have devoted considerable time to the question whether, under the rules governing church trials, an appeal taken from the decrees of the curia at Lincoln would have the effect of staying the execution of such decrees. A review of the evidence offered by the parties is rendered unnecessary for the reason that, by the injunctional order of January 6, 1902, the plaintiff was prohibited from bringing a civil action against the defendant until the appeal then taken had been determined by the highest church authority, and this injunction had never in any manner been set aside or modified.

Before proceeding to examine the evidence relating to the decision of the appeal taken by Father Murphy from the order or decree of the bishop, we might premise by saying that it is the plaintiff's contention that no challenge was interposed by the defendant to the qualification of the bishop to sit as a judge in that case, and it is said that Father Murphy, at the time and before pleading to the charge against him, desired to read a "statement," and that he at no time interposed or offered to read a "challenge." The record shows that when called upon to plead, Father Murphy asked to read a statement, but this privilege was denied him, and he was told that he would have opportunity after entering his plea to the charge to make such statement as he desired. He then attempted to read his statement, but was interrupted and great confusion

prevailed; he then attempted to file the statement with the secretary of the court, but this was refused under the direction of the plaintiff. This statement, or a copy thereof, is in the record before us, and it plainly contains a challenge setting forth numerous reasons why the plaintiff should not sit in the trial of the case. When the plaintiff says that Father Murphy did not interpose a challenge, that he merely offered a statement, he is making a play upon words, it being evident that it was known that this statement was in reality a challenge which, according to the forms of procedure formulated by the Roman Catholic church for the trial of cases, had to be interposed before the defendant entered a plea to the charges against him.

In Droste-Messmer, Canonical Procedure, chapter 3, article 2, it is said: "Recusation is only a dilatory not a peremptory exception, and must be made in writing to the judge himself before the public pleading begins. After that time the recusant can enter this plea only upon making an affidavit that he had no knowledge of the reasons for the challenge before, or in case the grounds of the challenge arose, only afterwards." In a note to this article it is said: "It is the nature of a recusation that it must be made before the person thus challenged begins to exercise his jurisdiction. To let him do this would be to admit his authority."

The argument, therefore, that there was no challenge, or that it was not offered at the proper time, is wholly without foundation and needs no further discussion. What is claimed to be an order of the sacred congregation of the propaganda fide disposing of Father Murphy's appeal, is contained in a letter addressed to the bishop of date April 13, 1901, and signed by Cardinal Ledochowski and Aloysius Veccia, which is as follows:

"SACRED CONGREGATION OF THE PROPAGANDA OF THE FAITH.

"Protocol No. 43771. ROME, April 13, 1901.

"Concerning the appeal of Rev. William Murphy.

"RT. REV. AND DEAR SIR: In reply to your letter of the

18th of March last, in which you make inquiry as to whether Rev. William Murphy, a priest of the Diocese of Lincoln, had appealed to this Sacred Congregation of Propaganda against a sentence of your Diocesan Curia, I have to inform you that the aforementioned priest did on the 20th of March, 1900, forward an appeal, but it was rejected; and that again on the 1st day of October, 1900, he made another appeal against a mandate which you had issued to him in your letter of the 29th of September of the same year, but that appeal was likewise rejected.

"Praying Almighty God to keep you in his holy keeping,

"I am, Rt. Rev. and dear Sir,

"Your most devoted Servant,

"M. CARDINAL LEDOCHOWSKI,

"ALOYSIUS VECCIA, *Secretary.*"

It is claimed that this is the original order disposing of Father Murphy's appeal, and in support of this theory the deposition of Francis Merchetti, auditor of the apostolic delegation to the United States and acting apostolic delegate for the church in the United States, was taken. He testifies that Cardinal Ledochowski was, at the date of the letter, prefect of the sacred congregation of propaganda fide and that Aloysius Veccia was secretary thereof. He states (and this is conceded by the parties) that the sacred congregation of the propaganda fide at Rome is the supreme tribunal for the determination of all questions relating to the spiritual and temporal affairs of the Roman Catholic church in the United States; that the officers of said tribunal are the prefect and secretary; that the decisions of the propaganda being determined, it is reduced to writing signed by the prefect and secretary and the original document is forwarded to one of the parties interested. He further states that the letter above set out is not a copy, but the original decree or decision entered in the case. This evidence is all objected to as incompetent, and we incline to the belief that the objection was well taken. We know of no court which is not required to keep some

record of its proceedings. In the trial had in the curia at Lincoln a very complete and minute record was made of all the proceedings in the case, and if there is a court ecclesiastical or of other kind which fails to make a record of its orders and decisions, then certainly the best evidence of what such unrecorded orders and decisions may be is the evidence of a member of the court. If the rules of the court require its decisions to be recorded, then a copy of the record properly identified is the best evidence of the decision: But if the rules do not require such a record to be made, we are unable to see how anyone except some member of the court participating in the decision is qualified to say what that decision is or was. The letter on its face shows that it was written in reply to an inquiry made by the plaintiff herein, and does not purport to be a decision of the appeal, but speaks of that decision as a past event, something that had taken place prior to the writing of the letter. The language is: "I have to inform you that the aforementioned priest did on the 20th of March, 1900, forward an appeal, but it was rejected, and that again on the 1st day of October, 1900, he made another appeal against a mandate which you had issued to him in your letter of the 29th of September of the same year, but that appeal was likewise rejected." The letter clearly speaks of the decision on these appeals as having been made at some time prior to the writing of the letter, and can not, as we see, be construed as an order then made rejecting these appeals or affirming the orders appealed from. Other letters from Rome were also offered touching this appeal, as well also as a document certified by a notary whose certificate was further attested to be in due form by officers of the government of Italy, in which he states that, at the request of Monsignor Veccia, secretary of the sacred congregation of the propaganda fide, he went to the secretary's office and was there shown a letter by the custodian of the archives addressed to Bishop Bonacum, a copy of which shows it to be the same letter above copied. This evidence was clearly incompetent, as we

know of no statute or rule of the common law which admits a certificate of a notary, however solemnly attested by other officials, to be received as evidence of matters of this character or of any matter except acts of their own committed to them by the laws of the state or country where they reside. In this connection it might be mentioned that a commission was taken out of the district court by the defendant, directed to Hector de Castro, our consul general at Rome, to take the deposition of Cardinal Gotti who, it appears, succeeded Cardinal Ledochowski as prefect of the sacred congregation of the propaganda fide, and of Monsignor Veccia and Monsignor Onronini, one of the objects being, as shown by the interrogatories propounded, to ascertain what disposition had been made by the sacred congregation of the propaganda fide of the appeals of Father Murphy, and this commission was returned by the consul general, with a statement that "he had personally interviewed each of the witnesses, who declined to answer their respective interrogatories, availing themselves, in their official position, of the rights conferred on them by the Laws of Guarantee of the Kingdom of Italy." It would appear from this return that these witnesses are not compelled to give evidence in this manner by the laws of the country where they reside. It may be that the plaintiff knew of the exemption extended to the officials composing the sacred congregation of the propaganda fide by the laws of Italy, and on that account made no effort to secure their evidence, and relied, and was compelled to rely, on the evidence contained in the bill of exceptions in his attempt to show that the defendant's appeal had been disposed of. If this be the case, he can not probably be charged with negligence in failing to obtain competent evidence to show what, if any, disposition has been made of that appeal; still, so long as he has not obtained and offered legal evidence determining the question, he is in the same position as any other litigant upon whom is cast the burden of proof upon a material issue of fact, and who is unable to sustain that burden because of the death of

the only witness who knew the fact, or the refusal of the witness to testify where the court has no means of compelling him to do so. In other words, where a party upon whom is cast the burden of proof is unable to furnish competent evidence, the court can not treat such inability to produce the evidence as an equivalent of the evidence itself.

It will be noticed, also, that the decree in the previous case, enjoining the plaintiff from commencing this action until the disposition by the appellate ecclesiastical tribunal of defendant's appeal, was entered on the 6th of January, 1902. The letter of Cardinal Ledochowski is dated April 13, 1901. If the defendant's appeal had been disposed of in the manner indicated by that letter, such disposition, being prior to the decree of January 6, 1902, should have been interposed as a defense to defendant's prayer for affirmative relief in that action. That decree, so long as it remains undisturbed, is an adjudication that on January 6, 1902, defendant's appeal from the judgment of the ecclesiastical tribunal at Lincoln had not been disposed of, and by that decree the fact that defendant's appeal was still pending on January 6, 1902, was *res judicata* for the purposes of this case. It was still open to the plaintiff to show that the appeal was disposed of subsequently to January 6, 1902, but he was precluded by the decree of that date from showing that it had been disposed of as early as April 13, 1901.

Because, as we think, the decree sought to be enforced was one entered by a judge disqualified to act, and further, because by the terms of the injunction of January 6, 1902, the plaintiff was enjoined from bringing this action until the appeal taken by Father Murphy had been determined, and the evidence failing to show that the appellate court has passed upon that question, we recommend that the judgment of the district court be in all things affirmed.

FAWCETT, GLANVILLE and ALBERT, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed June 22, 1905. *Former judgment vacated and action dismissed:*

1. Courts: TRIAL OF TITLE TO PROPERTY: PARTIES. The courts will not entertain a controversy concerning the title or right of possession of real or personal property, except at the instance of some person or persons having or claiming a right thereto derived from, or recognized by, the laws of this state or of the United States.

2. Ecclesiastical Trials: REVIEW. The courts of this state will not review the process or proceedings of church tribunals for the purpose of deciding whether they are regular or within their ecclesiastical jurisdiction, nor will they attempt to decide upon the membership or spiritual *status* of persons belonging or claiming to belong to religious societies.

AMES, C.

With an exception disclosed by the following discussion, the former opinion, *ante,* p. 463, contains a sufficiently accurate and ample exposition of the record in this case, and its reproduction here is not requisite. The authorities cited in that opinion seem to us also to suffice for the disposition of the action, although the conclusion we draw from them is the exact opposite of that there reached. The plaintiff styles himself in the title to his petition, and elsewhere in that document, "as bishop of the Roman Catholic church of the diocese of Lincoln," and seeks to recover in that capacity and not otherwise. The substance of the petition is that the defendant is, or was, a priest of the church and subject to the episcopal jurisdiction of the plaintiff, and that the plaintiff acting in his official capacity ordered the transfer of the defendant from Seward, Nebraska, where he had formerly been ministering, to Red Cloud, Nebraska, for like service, and that the defendant persistently refusing to obey the order, the plaintiff first suspended him from his priestly func-

tions, and afterwards pronounced against him the so-called greater excommunication which, it is said, assumes to interdict him from all Christian fellowship both in this life and in the life to come. It is further alleged that the defendant still remains contumacious and refuses to desist from his ministrations at the so-called "mission" of Seward, which includes a parish church building and parsonage at Seward, in Seward county, and a parish church at Ulysses, in Butler county. The prayer is, in brief, that the defendant may be enjoined from a continuance of the conduct complained of, and, incidentally, that he be required to turn over and deliver to the plaintiff the real estate mentioned and certain chattels, and that the title thereto *as against the defendant* may be quieted in the plaintiff.

Where the title of the property, or any of it, now is, or what lawful authority the plaintiff has over or concerning it, the petition does not aver. It is asserted by his counsel that he is a legal or equitable trustee of it, but the petition does not set forth any declaration of trust nor any facts or circumstances from which the law raises a constructive or resulting trust, so that the sole issue tendered by the petition is as to the spiritual or ecclesiastical *status* of the defendant as determined by the "laws, canons, statutes, discipline, rules, regulations and customs of the Roman Catholic church."

In the attitude of the pleader the matter of transference, or attempted transference, from one mission to another, has long ceased to be of importance, and it is manifest that if his contention is upheld, the defendant is not less disqualified from exercising the priestly office elsewhere than he is so at Seward and Ulysses. And it is solely because of his excommunication from the church that he is disqualified from exercising it there. So that the sole question which the court is asked to decide is, whether the defendant is catholic or recusant. All other relief sought by the petition is incidental to the determination of that controversy. Now the authorities cited in the

former opinion are unanimous to the effect that this is a question with which the lay courts in this country will have nothing to do. The only discordant note is the dissenting opinion of Judges Lawrence and Sheldon in *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95; but whoever will read the majority opinion in that case will be convinced, we think, that the position of the remaining five judges, among whom were Judges Breese and McAllister, is invulnerable. The case did not differ essentially from that before us. An ecclesiastical court was proceeding, it was alleged irregularly and illegally, as regarded by church laws, to try and depose the plaintiff from the ministry so as to deprive him of the right to officiate or receive a salary as a clergyman of that denomination, and it was held that, inasmuch as the substantive question at issue was his *status* in the society, the courts would not interfere, although his salary and livelihood were dependent upon the decision of the church authorities.

The answer in this case begins by protesting that the petition does not state facts constituting a cause of action, and then proceeds by way of cross-petition to allege that the defendant, according to the laws, canons, statutes, rules, etc., of the Roman Catholic church has not been deprived of his *status* of a priest of that church, because his alleged excommunication, on account of the prejudice and disqualification of the bishop who pronounced the sentence, is void, and because it has been temporarily taken off or suspended by an appeal to a church court at Rome. "And that the said control, custody or administration of various properties of said Roman Catholic church, remaining always one and the same, is vested directly or indirectly, proximately or remotely, particularly or generally in all of the three following ecclesiastical persons in various degrees and at the same time, namely, in the pope, in the bishop, in the pastor, priest or rector of the said Roman Catholic church according to the laws, canons, statutes," etc., of that church, and that he is, and

has been, the pastor or rector of the mission of Seward according to the laws, canons, rules, etc., of said church, and therefore one of the persons entitled to the control thereof.

Whether or not these averments mean anything to a churchman we confess ourselves unable to say, but they are certainly without meaning to the courts of the state. Like the bishop, the defendant omits to say where the title to the property is, or to set forth any declaration of trust, or any facts or circumstances raising one by implication of law. But it is alleged that, in a prior suit, the defendant obtained from the district court a perpetual injunction restraining the bishop from again litigating any of the matters referred to, in the state courts, until the alleged appeal should be finally disposed of in the tribunal to which it was made.

This injunction strikes us as not the least remarkable of the proceedings under review. Let it be supposed to be valid, as it was held to be by the former opinion, and let it be supposed, also, that it shall finally be determined upon its merits and the decision made of record and exemplified in a satisfactory manner; and one of two consequences will be inevitable: either the courts of this state will sit in review of it as upon appeal, or, more properly, *certiorari*, a thing which reason and the authorities are unanimous in saying they can not do, or else they will humbly and unhesitatingly register and enforce the decree or sentence of an independent and alien power, having its seat of spiritual and temporal sovereignty in the ancient city of Rome; a proceeding for which there is no precedent in the United States, nor, it is believed, in any court whose records are written in the English language. But if neither of these consequences is admitted, then the injunction has no practical end or aim, and deals with no controversy of which the courts of this state can rightfully take cognizance, and is wholly void. And so we esteem it to be.

The second opinion in *Pounder v. Ashe*, 44 Neb. 672, a

leading case on the subject in this state, and which cites the principal leading cases thereon in other jurisdictions, so far from sustaining the former decision, is in direct conflict therewith. That case, as we gather from the somewhat meager statement of facts in the earlier decision in 36 Neb. 564, was begun by the trustees of a local protestant church society incorporated under the laws of this state. Their complaint was that no one could, according to the constitution and laws of their society, which derived their force and obligation from the statutes of the state, rightfully be employed or officiate, as pastor, in the property under their charge, unless he should be a member in good standing of their society and have the sanction and authority of a representative body, called in the opinion a conference. And it was alleged that Ashe had been expelled by the conference, but still persisted in officiating in the church buildings against the wishes and protest of the plaintiffs, who were unable to prevent him so doing without the aid of the court. The defendant contended that the proceedings of the conference, at the time of his removal from the ministry, were upon charges not constituting an offense against the discipline of the society, and that the proceedings were so irregular and informal that the body trying him did not acquire jurisdiction of the subject matter. With this defense, this court, in an opinion by the then Chief Justice HARRISON, expressly declined to have anything to do, quoting with approval the following from *German Reformed Church v. Seibert*, 3 Pa. St. 282:

"The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals."

The court considered that it sufficed for the disposition of the case that the body, whose authority the trustees of the title were bound to respect, and who were empowered by the constitution of the society to decide upon the qualifications of the defendant, had condemned him. Whether the condemnation was regular or irregular, or with or without jurisdiction, or just or unjust, the court refused to inquire; it was enough to know that the sentence was pronounced by a body to whom authority was committed by the society for pronouncing a like sentence in any case. The court, having before it the persons recognized by law as having or representing the legal title to the property in dispute, contented itself with protecting such persons in its peaceable possession and enjoyment for the uses to which it had been devoted, and under the direction of the authorities designated by the articles of the association or discipline for its government. Such, we think, is the consensus of judicial opinion in this country.

The only recent case that has been brought to our attention that lends color or countenance to the former decision is that of *Bonacum v. Harrington*, 65 Neb. 831. The opinion in that case is seemingly somewhat self-contradictory. After having at considerable length and with great vigor, clearness and learning expounded the doctrine that the civil courts will not review the proceedings of church tribunals, nor concern themselves with the discipline, modes of procedure or jurisdiction of such bodies, or attempt to decide upon the spiritual or ecclesiastical *status* of members, or alleged members, of religious societies, the opinion denied intervention to a local incorporation, or its legal representatives, being, seemingly, the only body having, under the laws of the state, the title or right of possession of the property in dispute, and proceeded to dispose of the case with sole reference to the ecclesiastical *status* of the defendant. According to our view, and to the nearly unanimous voice of the authorities, the persons denied intervention were not only proper and necessary, but the only indispensable parties plaintiff to the action.

The opinion does indeed say that the property had, in that instance, been conveyed to the bishop, who was plaintiff, but the remark seems to have been casually made, and is not stated to have been founded upon the pleadings or evidence, and the fact was, apparently, regarded as of no importance or significance in the case.

It is assumed in the briefs and argument on both sides, and perhaps also in a vague way and extremely qualified sense, in the pleadings, that the title to the Seward and Ulysses property is in the Roman Catholic church. To our minds this is an inconceivable assumption. That church is not, in contemplation of the laws of this state, a corporation, or a partnership, or a legal entity of any sort, and does not claim so to be. It is a hierarchy composed of a series of clerical dignitaries of various ranks and degrees, scattered over the whole world, and deriving their power and importance from the papal court at Rome, to whom they owe allegiance, and from whom they are liable at any time to suffer degradation. That court claims to be an independent sovereign power, a political as well as an ecclesiastical state having universal dominion, superior to all other principalities and powers of whatever description and wherever situated. As such it can acquire territorial rights in Nebraska, if at all, only with the consent of its legislature, by treaty with the government at Washington. The parties evidently regard the title to the property in dispute to be in the church, in the sense that it is subject to church jurisdiction and government, in much the same way as the ultimate title and eminent domain of all property within the territorial boundaries of the commonwealth are said to be in the state. The pleadings of both parties in this case proceed upon the assumption that the church tribunals, both local and foreign, have a jurisdiction of their own over church property, or property devoted to church uses, and over members of the catholic priesthood, concurrent with, but superior to, that of the courts of the state, and that the whole duty of the latter, with respect to such matters, is to lend their aid for

the carrying into execution the judgments and sentences of the former. In former days, and in the mother country, such a pretense would have incurred the penalties of *præmunire,* and the application for the injunction, instead of having been granted, would have been visited with swift and severe punishment for contempt of the court to whom it should have been presented. In these days, such measures are not necessary or desirable, but the civil courts ought, nevertheless, jealously to guard their own dignity and prerogatives, lest precedent followed by precedent shall gradually encroach upon the domain of the civil law and revive the abuses of a bygone age.

It is recommended that the former decision of this court and the judgment of the district court be wholly reversed, vacated and set aside, and the cause remanded with directions that the action, both upon the petition and upon the cross-petition, be dismissed, each party to pay his own costs, but without prejudice to the future litigation of the rights of either party, if either has any, under the laws of this state, to the property in dispute.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court and the judgment of the district court be wholly reversed, vacated and set aside, and the cause remanded, with directions that the action, both upon the petition and upon the cross-petition, be dismissed, each party to pay his own costs, but without prejudice to the future litigation of the rights of either party, if either has any, under the laws of this state, to the property in dispute.

JUDGMENT ACCORDINGLY.

JOSEPH COULSON, APPELLEE, V. HANNAH SALTSMAN ET AL., APPELLANTS.

FILED MARCH 17, 1904. No. 12,899.

1. **Attachment Lien:** CREDITORS' SUIT. The lien acquired by attachment or garnishment is not lost by taking a general money judgment against the defendant without an order for the sale of the attached property, where the creditor has used due diligence in the prosecution of a creditor's bill.
2. ———: ———: EXECUTION. A creditor by the levy of attachment upon land acquires a specific lien sufficient to support a suit in the nature of a creditor's bill to remove obstructions from the title calculated to make a sale unprofitable, and in such case the issuance of an execution and return *nulla bona* is not a preliminary prerequisite.
3. ———: ———: DORMANT JUDGMENT. Where a creditor has acquired a specific lien by the levy of an attachment, he is entitled to maintain a creditor's bill to remove obstructions to a sale of the premises, without reference to whether the judgment at law has, during the pendency of such creditor's suit, become dormant.
4. **Action Against Heirs:** PARTIES. Under the decedent law of this state, a nonresident who claims a life interest in lands located in this state, by virtue of a will which has never been probated in the courts of this state, is not a necessary party to a suit against the heirs at law of the decedent to subject the land to payment of the claims of creditors.
5. **Evidence.** Evidence examined, and found sufficient to sustain the finding and decree of the trial court.

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

H. H. Wilson and *Ricketts & Ricketts,* for appellants.

E. F. Pettis, contra.

KIRKPATRICK, C.

This is a suit in the nature of a creditor's bill by Joseph Coulson, appellee, against Hanna Saltsman and others, appellants. It appears that on March 19, 1879, John Clark, Sr., who at that time and ever since has resided in

the state of Ohio, gave his note to appellee for $225 due January 21, 1880, with interest at 8 per cent. Some time about September 19, 1885, Clark became the owner of the land in controversy, being 80 acres situated in Lancaster county. On October 1, 1893, an action was commenced in the district court for Lancaster county by appellee upon the note. Appellee filed the necessary affidavit and procured the issuance of an order of attachment, which was levied upon the land in controversy on October 12, 1893. Such proceedings were had in the action that on March 12, 1895, appellee recovered a judgment against John Clark, Sr., for $486 and costs. On November 12, 1899, John Clark, Sr., executed a deed conveying the land to his wife, Martha J. Clark, which was recorded November 18, 1899. On July 12, 1886, John Clark, Sr., executed and delivered to his son, Sherman Clark, one of the appellees herein, a mortgage upon the above mentioned land in the sum of $1,000. Subsequently a second mortgage seems to have been executed to appellee, Sherman Clark, in the sum of $2,200. On August 5, 1895, Martha J. Clark, at that time the record owner of the land, died, leaving 9 children as her heirs at law, who are appellees herein. On January 29, 1896, appellee Coulson began this suit, pleading in his petition the execution and delivery of the note hereinbefore mentioned; the issuance and levy of the order of attachment upon the premises; the recovery of the judgment in said proceedings; that the sum due was wholly unsatisfied; that John Clark, Sr., was wholly insolvent; that the conveyance made by John Clark, Sr., to his wife, Martha J. Clark, was without consideration, and made with intent to defraud creditors; that the mortgages of John Clark, Sr., to his son Sherman Clark, were without consideration, and made with intent to defraud plaintiff and other creditors; that the deed to Martha J. Clark and the mortgages to Sherman Clark were clouds upon the title to the premises attached; that the premises were reasonably worth the sum of $2,000, but that they could not be sold because of the clouds cast thereon by the

deed and mortgages mentioned, and that plaintiff had only recently discovered that John Clark, Sr., was the owner thereof. The petition concluded with a prayer that the deed and mortgages be decreed fraudulent; be set aside and held for naught, and for the sale of the premises for the satisfaction of the judgment. Subsequently an amended petition was filed by appellee which set out the same matters, and, in addition, pleaded that an order had been made by the trial court for the sale of the premises under the attachment. To the amended petition, Sherman Clark filed a separate answer, alleging that the deed from his father to his mother was made in good faith, for a valuable consideration, and without any intent to defraud, hinder or delay creditors; that the mortgages executed to himself were for a valuable consideration, were made in good faith, and without intent to defraud, hinder or delay creditors, and denying generally all the other allegations of the petition. The remaining appellees joined in an answer admitting that they and Sherman Clark were the sole heirs of Martha J. Clark, deceased; that they were the owners in fee of the land in controversy; that the conveyance from John Clark, Sr., to their mother was made in good faith and for a valuable consideration, and without intent to defraud; and denying generally. To these answers was filed for reply a denial of new matter, and an allegation that the levy of plaintiff's attachment was long prior to the execution of the mortgages from Clark, Sr., to his son Sherman. The trial resulted in a finding and judgment canceling the deed and mortgage and directing the sale of the premises as prayed by appellee.

Appellants herein allege error in the judgment of the trial court: (1) That appellee had taken personal judgment against Clark, Sr., in the action upon the note, and had not obtained an order for the sale of the attached property, thereby waiving his attachment lien upon the premises; (2) that no execution had been issued and returned *nulla bona* upon the judgment, and therefore appellee, not having exhausted his remedy at law, could not

have the aid of this proceeding; (3) that appellee's judgment, at the time of the trial of this cause, had become dormant, and was not a lien upon the premises, and therefore he could not recover in this case; (4) that there was a defect of parties in the action for the reason that Martha J. Clark, who died testate, provided in her will that John Clark, Sr., should have a life estate in the premises, and that he should have been made a party to the creditors' suit. The questions presented will be considered in the order named.

It is first contended that appellee, having in his suit at law taken a personal judgment without procuring an order for the sale of the attached property, waived his lien. We are unable to discover any merit in this contention. Cases are cited from the supreme court of the state of Indiana which seem to sustain the view contended for by appellants, but an examination of the statutes of that state discloses provisions that differ in essential particulars from our own and prevent the cases cited from being authority in the case at bar. Appellee having acquired a specific lien upon the property by the levy of his attachment could only lose his lien by an order discharging his attachment. *Herman Bros. v. Hayes & Jones,* 58 Neb. 54. In the case at bar it will not be contended that appellee could have proceeded to sell without the aid of a court of equity to remove the cloud on the title created by the fraudulent conveyances, even if he had procured an order for the sale of the attached property, and the law will not require him to do a foolish or unnecessary thing. Appellee made seasonable application to a court of equity for relief, and this is all he could be required to do; and it would not be in accord with the principles of equity to hold that by failure to procure an order for the sale of the attached property, which would have been unavailing, he lost his lien.

The statute of Illinois is very similar to that of our own state in the matter of attachment, and in *Yarnell v. Brown,* 170 Ill. 362, the supreme court of that state said:

"The appearance of Wooley was entered in the attachment suit and a general judgment was rendered against him, and it is argued on behalf of appellee that the attachment was thereby abandoned and the lien of the attachment released, so that the lien of the judgment became a general one. We do not think that such is the effect of the judgment. It is true that execution might issue thereon, not only against the property attached but the other property of Wooley, and yet the lien as to the particular tract of land levied upon was preserved, and appellant was not put in a worse position by the appearance and general judgment than she would have been if Wooley had not appeared."

We are convinced of the soundness of the view expressed in the language quoted. The same view has been expressed by other courts. *Waynant v. Dodson,* 12 Ia. 22. It follows that the first contention of appellants can not be sustained.

The second and third contentions may conveniently be considered together. It is said that no execution having been issued upon the judgment at law at the time of the trial of this suit in the district court, and more than 5 years having elapsed after the entry of the judgment, the judgment was barred, and could not be made the basis of an equitable proceeding such as this. This point is not well taken. As we have seen, appellee, by the levy of his attachment upon the land, had acquired a specific lien, which was sufficient to entitle him to invoke the aid of a court of equity to remove an obstruction that might exist preventing the sale upon execution. This court has repeatedly held that in such cases the issuance of an execution and its return *nulla bona* are unnecessary. *Kennard, Daniel & Co. v. Hollenbeck,* 17 Neb. 362; *Merchants Nat. Bank v. McDonald,* 63 Neb. 363.

Again, it is urged that the judgment having become dormant, appellee had lost his lien upon the premises, and therefore at the time of the trial the evidence did not show that appellee was entitled to a decree. This position,

like the other, can not be sustained. Appellee having recovered a judgment in his action at law, in which the land had been attached, was entitled to a sale of the premises for the satisfaction of his judgment. As we have seen, by the levy of the attachment a specific lien was acquired upon the property, for the satisfaction of which he was entitled to a sale of the premises. It was disclosed that this sale could not be made until by the aid of a court of equity, certain fraudulent conveyances were vacated. A decree having been entered by the trial court in this proceeding vacating those conveyances, the right of appellee to the satisfaction of his judgment, in our opinion, did not at all depend upon whether the lien established had become dormant as a judgment lien or not. He was clearly entitled under the decree in this case to enforce his specific lien. *First Nat. Bank v. Gibson,* 60 Neb. 767. It is finally contended that John Clark, Sr., was a necessary party to a correct determination of this suit, and that, because of the failure to join him as a defendant, there is a defect of parties, which renders the judgment erroneous. We are unable to discover merit in this contention. It is disclosed by the record that appellants claimed title, not only by descent from the mother but by will duly executed by the mother. It is disclosed that the will mentioned contains a provision demising to John Clark, Sr., a life estate in the land in controversy. It is claimed that this will was duly probated in the courts of Ohio, but it is not contended that the will had ever been presented for probate or probated in the courts of this state. All of the appellants, as well as John Clark, Sr., are nonresidents of this state, and under our decedent law it would appear that appellants, who are the children of Mrs. Clark, would, if the mother was the owner of the premises, acquire the title in fee simple on the death of the mother; and that John Clark, Sr., not having a homestead interest in the land, and not having resided in this state, would have no interest therein. It follows that he was not a necessary party to this proceeding. *Barney v. Bal-*

timore City, 73 U. S. 280; *Potter v. Phillips,* 44 Ia. 353; *Coffey v. Norwood,* 81 Ala. 512.

It is suggested in the reply briefs of appellants filed herein that the decree of the trial court is not sustained by sufficient competent evidence. We have carefully examined the evidence and are of opinion that no other judgment could have been entered by the trial court than that entered. The evidence establishes beyond question that the conveyances, that by deed and those by mortgage, were without consideration and in fraud of creditors.

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

HASTINGS, C., concurs.

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

AFFIRMED.

SAMUEL ZEIGLER ET AL. V. M. G. SONNER ET AL.

FILED MARCH 17, 1904. No. 13,311.

1. **Jurisdiction:** AFFIDAVITS: BILL OF EXCEPTIONS. The affidavits upon which a justice of the peace decides an objection to his jurisdiction over the person of the defendant can not, on error to the district court, be reviewed, unless incorporated in a bill of exceptions duly settled, signed and allowed by the justice, in conformity with the provisions of section 311 of the code, as amended by chapter 72, laws 1895.

2. **Review:** AFFIRMANCE. Upon error from a judgment of a justice of the peace to the district court, if error does not affirmatively appear in the proceedings had before the justice, the judgment of the justice should be affirmed.

ERROR to the district court for Dodge county: JAMES A. GRIMISON, JUDGE. *Judgment of district court reversed. Judgment of justice court affirmed.*

C. E. Abbott, for plaintiffs in error.

McNish & Graham and *J. H. Brown, contra.*

KIRKPATRICK, C.

This action was commenced by Samuel Zeigler and George Zeigler, partners doing business as the Forest City Nursery Company, in a justice court of the county of Dodge, against M. G. Sonner and William L. E. Green, asking judgment in the sum of $180 for damages for the breach of a contract for the purchase of nursery stock. Service was had upon Green in Dodge county, and an alias summons issued to the sheriff of Wayne county, who made return that he had served the writ upon Sonner in that county. Sonner appeared and objected specially to the jurisdiction of the justice over his person on the ground that Green was only a nominal defendant, having no real interest adverse to that of plaintiffs. He supported his objection by an affidavit setting up that Green was the agent of plaintiffs in the sale of their stock, that Green had procured Sonner to enter into the alleged contract for the purchase of the nursery stock, and that he was interested in the contract to the extent of his agent's commission, and that if Green was a signer upon the contract sued on as surety, he was made such without the knowledge or consent of affiant. Counter affidavits by plaintiffs and Green were made denying these alleged facts. Upon the issue thus joined the justice found that Green was a *bona fide* defendant, and that, accordingly, he had jurisdiction over the person of defendant Sonner.

Thereupon Sonner filed an answer, pleading the facts already set out in his affidavit, alleging that he did not waive the question of the jurisdiction of the justice over his person, denying generally all the allegations in plaintiffs' petition, alleging that the contract sued on was without consideration, and denied that he executed the contract sued on for nursery stock in the sum of $180, and that if plaintiff held such contract, it had been forged or altered by persons unknown to him. Plaintiffs filed a reply denying generally.

It appears that the trial was had on the date of filing

the answer and reply, the justice docket reciting that Sonner elected not to appear further. After hearing testimony, the justice entered judgment against Sonner as principal and Green as surety in the sum prayed for.

After the entry of this judgment, Sonner prosecuted error to the district court, alleging first, that the justice erred in overruling Sonner's special appearance; second, that the justice erred in assuming jurisdiction of the person of Sonner; third, that he erred in taking the cause under advisement from the 7th day of May until the 20th day of May, 1902; and fourth, that the justice erred in rendering judgment for plaintiffs and against Sonner. Upon a hearing in the district court the judgment of the justice was reversed, costs of error proceedings were taxed against plaintiffs, defendants in error therein, and the cause retained for trial and final judgment in the district court. From this judgment this proceeding in error is prosecuted by the Zeiglers, who complain of this judgment of reversal, contending that the judgment of the district court should have been one of affirmance.

It is not very clear upon what ground the district court reversed the judgment of the justice of the peace, but it is quite likely that it was because the court believed the special appearance of Sonner should have been sustained, as it is clear that there was no other ground upon which error could have been predicated. It is obvious that the district court could not pass upon the question of fact raised by the special appearance of Sonner, as that question was decided by the justice upon affidavits which had not been incorporated in a bill of exceptions and taken to the district court. Prior to 1895, bills of exceptions from the justice court to the district court in cases not tried to a jury were not provided for in the code. This omission in the statute was recognized by this court. *Moline, Milburn & Stoddard Co. v. Curtis,* 38 Neb. 520; *Meyer & Brothers v. Hibler,* 52 Neb. 823. By amendment to section 311 of the code, laws of 1895, chapter 72, the following provision was added to that section:

"That any person or officer, or the presiding officer of any board or tribunal before whom any proceeding may be had, shall, on request of any party thereto, settle, sign, and allow a bill of exceptions of all the evidence offered or given on the hearing of such proceeding."

There can be no doubt that the intent of the legislature in the enactment of the amendment just quoted was to supply a deficiency in the statute, and to provide for the preservation by bills of exceptions of the evidence heard by tribunals inferior to the district court in all cases whether tried before a jury or not. This court is equally powerless to review the evidence upon which the justice determined that he had jurisdiction of the person of the defendant Sonner, and it must now be assumed that that question was correctly determined by the justice in the first instance.

After the filing of his answer, it appears from the transcript of the docket of the justice that Sonner elected not to appear further, and a hearing was had, evidence adduced, and a judgment rendered in favor of plaintiffs. It can not be said that in this there is affirmative error warranting a judgment of reversal.

From the transcript it further appears that there was a hearing on the special appearance entered by Sonner May 7, 1902, and "by consent of parties case continued to May 20, 1902, 9 o'clock A. M." On May 20 Sonner's objections were overruled, and on the same day Sonner filed his answer and plaintiffs their reply, and judgment was entered. We mention this only in connection with the assignment in error to the district court, which, however, is not urged in briefs, "that the justice erred in taking the case under advisement on May 7, and not rendering judgment thereon within 4 days thereafter." It is manifest that this assignment under the record was not sustained.

Our examination of the record has failed to reveal, and counsel do not point out, error in the proceedings had before the justice. It follows that the judgment of reversal entered by the district court is erroneous; and it is there-

fore recommended that the same be reversed and the judgment of the justice affirmed.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of reversal of the district court is reversed, and the judgment of the justice is affirmed.

JUDGMENT ACCORDINGLY.

JOHN MCCORMICK V. STATE OF NEBRASKA.

FILED APRIL 7, 1904. No. 13,346.

1. **Criminal Law:** ERRONEOUS SENTENCE: DUTY OF APPELLATE COURT. Where a prisoner has been found guilty on a criminal charge, and the only error that appears on the record is the failure of the court to pronounce a legal judgment against him, it is the proper practice, and this court has the power, after setting aside the void or erroneous judgment, to remand the case and the accused, if sentence has not been suspended, to the district court, with instructions to render judgment on the verdict in the manner provided by law.

2. **Erroneous Sentence:** CONSTITUTIONAL LAW. Confinement in the penitentiary under a void or erroneous sentence, because of the failure of the accused to obtain a suspension of his sentence during the pendency of his proceedings in error, is in no sense a part execution of a legal sentence; and by the rendition and execution of a legal judgment, the accused is not twice punished for the same offense.

3. ———: POWERS OF COURTS. An ineffectual attempt of the district court to render a judgment on a verdict according to the provisions of the law, does not deprive that court of the power to pronounce a valid judgment against the accused.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

Charles O. Whedon, John C. Watson and *Robert Ryan,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

BARNES, J.

In March, 1902, John McCormick, the plaintiff in error, was duly tried and convicted of the crime of murder in the second degree, in the district court for Otoe county. He was sentenced to serve a term of 20 years in the state penitentiary, and from that judgment he prosecuted error to this court. A hearing here resulted in a judgment affirming his conviction, and it was found that there was no error in the record up to and including the verdict. It was disclosed, however, that the trial judge had failed to inform him of the verdict of the jury, and to ask him if he had anything to say why judgment should not be pronounced against him; for that reason the judgment was held to be invalid, and was reversed. *McCormick v. State*, 66 Neb. 337. Thereupon, a mandate was issued directing the trial court to render a valid sentence and judgment on the verdict. It appears that during the pendency of the proceedings in error the plaintiff, having been unable to furnish bail and obtain a suspension of the sentence complained of, was confined in the state penitentiary. On the 4th day of February, 1903, he was again brought into the district court for Otoe county, and was informed by the court of the verdict of the jury, and asked if he had anything to say why judgment should not be pronounced against him. He thereupon objected to the jurisdiction of the court to pass sentence upon him, and contended that by so doing the court would violate his constitutional rights. His objections were overruled, and no other reason having been shown why the court should not render judgment on the verdict, he was sentenced to confinement in the state penitentiary for 19 years. This is a proceeding in error to reverse said judgment.

The plaintiff contends that the judgment herein complained of calls for the infliction of a second punishment for the same offense, and cites in support of his contention, *Ex parte Lange*, 18 Wall. (U. S.) 163. In that case the accused was tried in the circuit court of the United States

for the southern district of New York, for the crime of stealing mail bags of less value than $25. The punishment provided by law for that offense was imprisonment for not more than one year, *or* a fine of not less than $10, nor more than $200. He was found guilty, and was sentenced by the court to one year's imprisonment *and* to pay a fine of $200. He was thereupon committed to jail, and on the following day paid his fine, which was in turn paid into the treasury of the United States. Thereupon the prisoner was brought before the court on a writ of habeas corpus, the same judge presiding, and an order was entered vacating the former judgment, and he was again sentenced to one year's imprisonment from that date. Thereafter he was brought before the supreme court of the United States on a writ of habeas corpus, and the return of the marshal showed the foregoing facts. In granting him his discharge, the court held that the first sentence and judgment was valid in so far as it imposed the fine of $200, but that the accused could not be punished by both fine and imprisonment; that having accepted as valid that portion of the first sentence, which imposed the fine, and having paid, and the government having accepted such payment and turned it into the treasury, from whence it could not be withdrawn, that the second judgment by which the accused was sentenced to imprisonment for one year, if carried out, would amount to his being twice punished for the same offense. Plaintiff also cites *Brown v. Rice,* 57 Me. 55. In that case the prisoner was legally sentenced, and duly committed to imprisonment in the county jail. Several days afterwards he was recalled into court and sentenced on the same indictment and conviction to be imprisoned in the state penitentiary for the term of 3 years. On these facts the court said:

"In this case the warrant had issued, had been executed, the prisoner had been under sentence, and in prison, under the warrant, and had suffered 19 days of confinement. This was a legal sentence, and was in the process of execution, when, for some reason, doubtlessly one that the

judge deemed sufficient, he was brought from the jail, and the former sentence was recalled and revoked and the new one imposed."

The second sentence was illegal because the first one having been a legal sentence, and having been at least partly executed, the trial court had no power to recall the prisoner, set aside its former judgment and resentence him to a term in the state penitentiary.

We have carefully examined each of the other cases cited by the plaintiff in support of his position. Comment upon them singly is neither profitable nor necessary, and can not be indulged in for want of time and space, but we may say that in each and all of them the first sentence imposed by the court was either legal in whole or in part, and hence it was held that the court had no power to set aside the sentence which had been partly or completely executed, and pronounce another and different one. We are in full accord with the doctrine laid down in these cases. But it will be observed that in the case at bar we held that the first sentence imposed upon the plaintiff was void, for the reason that the court in pronouncing it had not proceeded in the manner provided by statute. In this case the trial court did not set aside a former legal sentence and judgment, but this court set aside the sentence because it was null and void. Upon remanding the case to the district court, it stood there on the verdict of conviction, and upon which the trial court was required by law, and the order of this court, to pronounce a valid sentence and judgment. The difference between the cases cited by the plaintiff in support of his contention and the one at bar is a radical one. If the sentence and judgment of the trial court in the first instance had been legal in whole or in part, and if any portion of the same had been executed, it would seem that the plaintiff should be discharged. But such is not the case. The plaintiff prosecuted error because, as he claimed, the sentence and judgment was illegal and void, and his contention was sustained. He was therefore granted the right to have a

valid and legal sentence pronounced against him. This was one of the things that he contended for, and his confinement in the pentitentiary, for want of a suspension of this void sentence during the pendency of his error proceedings, was no part of the execution of a valid sentence, and the judgment complained of does not amount to a second punishment for the same offense.

It is further contended that the order of this court directing the entry of a valid judgment on the verdict, and the sentence pronounced thereunder, was without warrant, and thereby the plaintiff was denied justice according to due process of law. To support this contention it is claimed that our criminal code contains no provisions defining or regulating the procedure in a case like the one at bar, and for that reason this court had no power to direct the district court for Otoe county to pronounce the sentence and judgment complained of. This is not a new question; and the procedure complained of has been many times upheld and sanctioned by this court. The question first arose in the case of *Dodge v. The People*, 4 Neb. 220. The plaintiff in error therein was indicted at the March term, A. D. 1875, of the district court for Otoe county, for the murder of one James McGuire. Upon the trial a verdict of guilty was returned by the jury, and he was sentenced to be executed on the 14th day of January, 1876. A writ of error was allowed to this court, and execution of the sentence was suspended until its determination. It appeared that there was no error in the record up to and including the return of the verdict of guilty against the accused. It also appeared that the court had failed to inform the accused of the verdict of the jury, and ask him whether he had anything to say why judgment should not be pronounced against him, and it was insisted that for that reason the sentence and judgment of the court was void; that this court had no authority to either pass sentence or remand the cause to the district court, with instructions to pronounce sentence in conformity with law, and that therefore the prisoner must

be discharged. The court in answer to this contention made use of the following language:

"We are aware that cases can be found holding, under a statute similar to ours, that there is no authority in this court either to resentence the prisoner, or remand the case to the court below for that purpose. We may correct errors in any other respect, review the proceedings of the district court, see that the accused has had a fair trial, and that his rights have been properly guarded and secured, but the moment it appears that the court has not fully complied with the law in pronouncing sentence, it is at once ousted of jurisdiction, and the accused must go acquit. This doctrine, originating in England at a time when the courts of that country held that they had no authority to revise proceedings and judgments in cases of felony, and grant new trials, partakes of the reasoning of that period, that the judgment in a criminal case was absolute, unless a pardon was granted, that if the judgment did not conform to the law there was no power of revision or amendment, and as the prisoner could not be held on an invalid judgment he must therefore be discharged. This doctrine was expressly overruled in *King v. Kenworthy,* 1 Barn. & Cr. (Eng.) *711; and in *Regina v. Holloway,* 5 Eng. Law & Eq. 310, and the English courts now hold that they have full authority in such cases to impose the sentence required by law. In the case of *Beale v. Commonwealth,* 25 Pa. St. 11, 22, the court held: 'The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine, that a prisoner whose guilt is established by a regular verdict is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established. Our duty is to correct errors, and to "minister justice;" but such a course would perpetuate error, and produce the most intolerable injustice.' And so it was held that the judgment should be reversed and the cause remanded to the district court, with instruc-

tions to pronounce judgment on the verdict in the manner prescribed by statute. This decision has been followed and affirmed in *Tracey v. State,* 46 Neb. 361; *Griffen v. State,* 46 Neb. 282; *Barker v. State,* 54 Neb. 53, 58, and in our former judgment in this case reported in 66 Neb. 337. The foregoing decisions are based on, and follow the rule announced in, the cases cited in the quotation from *Dodge v. The People, supra,* together with *Benedict v. State,* 12 Wis. 313; *Williams v. State,* 18 Ohio St. 46; *Picket v. State,* 22 Ohio St. 405. We are satisfied with the reasoning of these cases, and have no disposition to set aside so salutary a rule of law, and this rule should no longer be the subject of discussion in this jurisdiction.

Again, if this were a new question, there appears to be no substantial reason why we should not adopt the present rule. Ours is not a court of general original jurisdiction, but in most matters is only a court of review, and yet it must be conceded that when we have passed on a matter brought before us, for that purpose, we have the inherent power to make such orders and such disposition of the case as will render our judgment effective and the mere fact that the legislature has not seen fit to point out by statute each successive step proper and necessary for us to take does not render us powerless to "minister justice." In the absence of express statutory enactment, reason and authority accord to the courts the inherent power to make such orders and adopt such methods of procedure, not inconsistent with law, as will enable them to properly exercise their jurisdictional powers, and render their judgments and decrees effective. So it was the proper procedure, when it was found that no error was committed by the district court until after the verdict, to remand the cause back to the court, which has express power to render judgment, with directions to perform that duty by pronouncing a valid judgment on the verdict. Indeed the law expressly provides that in criminal cases, where a verdict of guilty has been rendered by a jury, the district court "shall proceed to pronounce judgment as provided by

law." When the former sentence was set aside by this court, and the cause was remanded, the matter then stood before the district court precisely as though no judgment or sentence had ever been pronounced. It was then the duty of that court, irrespective of any order of ours, to pronounce a legal judgment on the verdict. The district court is one of general and original jurisdiction. It had the power to try the plaintiff on the charge preferred against him, and pass such sentence upon him, on the verdict of guilty, as was provided by law; and we are not prepared to hold that by its abortive attempt to render a judgment against the plaintiff, its power to pronounce a legal judgment was lost. It seems clear that the power of the court could only be lost or exhausted by pronouncing a valid judgment. For these reasons we are fully satisfied with our former decisions on this question, and therefore adhere to them.

Plaintiff also insists that notwithstanding the former judgment and sentence of the district court were erroneous and void, yet he had served a portion of his time thereunder; or, in other words, the sentence had been partly executed, and therefore he is entitled to his discharge. To this we can not give our assent. It is true that the plaintiff, during the pendency of his first proceeding in error, was confined in the penitentiary, but section 518 of the criminal code provides that "Every person sentenced to the penitentiary shall, within thirty days and as early as practicable after his sentence, unless the execution thereof be suspended, be conveyed to the penitentiary of this state, by the sheriff of the county in which the conviction took place, and shall there be delivered into the custody of the warden of said penitentiary, together with a copy of the sentence of the court ordering such imprisonment." The failure of the plaintiff to procure a suspension of the erroneous sentence rendered it necessary to confine him in the penitentiary of the state during the pendency of his proceedings in error. And, as before stated, such confinement was no part of the execution of a legal sentence. If

he had obtained a suspension of the sentence, this question would not have arisen, and it would be absurd for us to hold that, by failing or neglecting to obtain such suspension, he could render the courts powerless to punish him for his offense. There can be no doubt but that this court had the implied or inherent power to order the plaintiff to be conveyed from the penitentiary to the district court for Otoe county, for the purpose of enabling that court to pronounce judgment against him on the verdict, as provided by law. To hold otherwise would deprive the courts of this state of the power to punish persons duly convicted of crime, and they would thus not only fail to "minister justice," but would become convenient instruments for the perpetration of injustice.

For the foregoing reasons, we hold that the judgment of the district court was valid, and it is therefore

AFFIRMED.

EDWARD F. PETTIS V. GREEN RIVER ASPHALT COMPANY.*

FILED APRIL 7, 1904. NO. 13,215.

1. **Contract:** INSTRUCTION: ERROR. Where plaintiff's claim is for services under an alleged contract of a certain date, and the evidence tends to show an offer to engage services at a fixed price at that time on defendant's part, and immediately afterwards a beginning of such services on plaintiff's part, with defendant's knowledge and with no retraction of the proposition, it is error to instruct the jury, in substance, that there can be no recovery unless an express agreement on both sides was reached at the time alleged.
2. **Evidence:** CONVERSATIONS. Section 339 of the code only requires that the entire conversation on "the same subject" may be inquired into, or one necessary to make the other fully understood. If the conversation relates to different subjects, introducing one of them in proof does not entitle the other party to inquire as to the entire conversation on other subjects, except so far as is necessary to make the part already in fully understood.

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

* Motion to retax costs denied. See opinion, p. 519, *post.*

Edward F. Pettis and *Field & Andrews,* for plaintiff in error.

J. W. Deweese and *Frank E. Bishop, contra.*

HASTINGS, C.

Plaintiff filed petition in the district court for Lancaster county, alleging that the defendant is a corporation of the state of Missouri; that about June 1, 1902, defendant employed plaintiff to perform services in and about the conducting of business as paving contractors in the city of Lincoln, and agreed to pay for such services so contracted for 10 cents a square yard, amounting to $1,876; that plaintiff fully performed all of the services as by said contract he agreed to perform, and thereby defendant became indebted to him in the sum of $1,876, none of which has been paid. The defendant answered, saying that, still relying upon its objection to the jurisdiction for lack of legal service of summons, it admitted its incorporation in the state of Missouri, and denied plaintiff's other allegations. A reply was filed asserting jurisdiction, and that such jurisdiction had been found by the trial court, and that its conclusion on that subject was final. Trial was had to a jury, and a verdict returned for the defendant. The plaintiff brings error, and complains of the fifth instruction given by the court, which is as follows:

"The jury are instructed that, in order to establish the contract sued on, it is necessary for the plaintiff to show that the minds of the plaintiff and defendant, through its vice-president, Mr. R. W. Speir, met, and that the contracting parties mutually agreed to the terms of the contract substantially as set out in plaintiff's petition. The fact, if you find such to be true, that plaintiff performed services for the defendant under some other contract, expressed or implied, with the defendant, would not be sufficient to establish plaintiff's allegations in this case, nor should the proposition of compromise or settlement shown in evidence

be considered by you in determining what is due the plaintiff on the contract sued on, in the event that you find from the evidence and under these instructions that anything is due him."

It is urged that this instruction unduly narrowed the issues in the case and the application of the evidence. Of course, under the pleadings it was necessary for the plaintiff to establish his contract. This instruction told the jury that it was necessary for the establishment of that contract to prove that the minds of the plaintiff and defendant, through its vice-president, met, and that they mutually agreed to the terms of the contract substantially as set out in plaintiff's petition. The jury were also told that the fact that plaintiff performed services under some other contract, expressed or implied, would not be sufficient to establish plaintiff's allegations in this case. The two clauses taken together could have been interpreted to mean nothing else than that the only way by which plaintiff could establish his alleged contract with defendant, was by showing an express agreement on each side between the plaintiff and defendant's vice-president, on the one part, to perform these services and, on the other, to pay for them the stipulated price. Of course, if this was all the case which the plaintiff was tendering evidence to establish, the instruction would be correct. It is ordinarily necessary in order to establish a contract that the minds of the parties meet. It is so in this case. There must have been an intention on the part of each of them to contract; but it is not necessary that they mutually agreed, at the only interview which ever took place between plaintiff and defendant's vice-president, to the "terms of the contract substantially as set out in plaintiff's petition." It would be entirely sufficient to establish the contract set out in plaintiff's petition, that a proposition to procure certain services from the plaintiff at the alleged rate, was made to the plaintiff by defendant's vice-president at the interview, which took place in Sioux City, and that on his return

home and his investigating the circumstances, the plaintiff engaged in the performance of the services and, with the defendant's knowledge and without any withdrawal of the proposition, performed them. While it is necessary that the minds of the parties meet, it is not necessary that they meet at any specific time or place, and if by words or action, or by both, the plaintiff, within a reasonable time and before it was withdrawn, accepted a distinct proposition made at the date alleged in Sioux City, and performed the several things contemplated in that proposition, he would be entitled to claim the contract as of the date of the proposition. Plaintiff claims that such is the real state of affairs, which his evidence tends to establish, and that, consequently, the instruction confining him strictly to proof of mutual agreements entered into at the time of his interview with defendant's vice-president in Sioux City, was erroneous and prejudicial.

An examination of the evidence, as well as the discussion of it in the briefs of the parties, seems to show that, while there is really no claim that any agreement was reached in Sioux City, there is evidence tending to establish a proposition there made for such contract, and plaintiff's subsequent acceptance by going ahead, with the defendant's full knowledge and under frequent communication between the parties, to perform services, which are claimed to have been such as the offer contemplated, and to have been so accepted by the defendant. To be sure, the making of the proposition even is denied by the defendant, and it is also denied that services of the plaintiff, some of which are admitted to have been rendered, were in their nature and value such as were contemplated in the conversation in Sioux City. But these are both questions for the jury, under the evidence as it stands in this case, and were not submitted to them.

It is urged in defense of this instruction, that it submits to the jury the only case presented by plaintiff's pleadings. There seems no question but that the instruction requires an absolute mutual agreement. The petition merely

alleges a contract. There seems no reason to cite authorities to the proposition that the contract might be established by a proposition on the one side and action upon it by the other party with the proposer's knowledge and consent. In *Emery v. Cobbey,* 27 Neb. 621, after an offer had been expressly refused by one of the parties, his subsequent acting under it, with knowledge of the other party, is held to establish a contract. There was in this case, to be sure, an effort to show services which were not referred to in definite terms in the proposition, even on plaintiff's interpretation of his talk with defendant's vice-president, and there was ground for a caution to the jury not to allow plaintiff to recover on this contract merely because he had rendered some service; but it is clear that the plaintiff was not seeking to support his case on the ground of mutual agreement to render services on his part and to be paid a certain price for them on defendant's, but was basing it rather upon what was done by both parties in pursuance to an understanding had at Sioux City, and which seems to have been, on plaintiff's showing, indefinite as to everything except price. It seems clear that the trial court, in giving this instruction 5, unduly narrowed the issues to the plaintiff's prejudice, and that error is not corrected by any other instruction given. Indeed, it could hardly be. It is expressed in too stringent terms, and would be merely contrary to, and contradictory of, an instruction which would have permitted the establishment of the contract by the subsequent acts of the parties after the proposition, if one were made at Sioux City.

The complaint of errors in the refusal of instructions seems hardly well taken. Both of the instructions refused seem to be open to the criticism that there is no restriction of the services under consideration to such as the jury should find had been contemplated in the talk at Sioux City. Of course, other and different services from those contemplated in the proposition would be immaterial for the purpose of showing an acceptance or of entitling plaintiff to compensation under it.

It seems hardly necessary to discuss the complaints as to the admission and rejection of evidence. For the most part they seem to be based upon the view which the court took of the necessity, under the pleadings, to establish an express agreement at Sioux City between the parties.

At the argument the only complaint which was dwelt upon was the alleged violation of section 339 of the code, in refusing to permit R. W. Speir to answer question 840 in the bill of exceptions, and in rejecting the tender of proof made in support of it. The question was as follows: "You may state all that was said by Mr. Pettis at that meeting, as near as you are able, beginning at the beginning, touching and concerning the matter in dispute." The witness had stated that in a conversation held by him in New York, after these alleged services, with plaintiff, the latter had stated that he knew there was no contract. Plaintiff had testified previously that the entire New York conversation was an attempt to settle. It is now claimed that there was a right to go into the whole conversation and the cross-examining question calls for it. The question, however, seems too broad. All the conversation on "the same subject," that is, the fact of whether there was a contract or not, was what plaintiff was entitled to call for; not all the conversation as to plaintiff's claim. Anything in the conversation necessary to make this statement as to the contract understood was admissible, or that related distinctly to that contract. The talk simply in regard to a settlement was not needed for this purpose, and was rightly rejected. Only so much of the conversation as related to the subject of the existence of a contract was in question. The question was much broader than that.

For the error in unduly restricting plaintiff's right of recovery to one on an express agreement on each side, made in a conference of the parties, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES 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 remanded for further proceedings according to law.

REVERSED.

The following opinion on motion to retax costs was filed November 2, 1904. *Motion denied:*

Costs: BILL OF EXCEPTIONS. The necessary expense of settling a bill of exceptions upon the determination of a cause in the district court is taxable as costs incurred in that court to be adjudged against the unsuccessful party in the final determination of the litigation.

SEDGWICK, J.

The plaintiff in error in this case, having been successful in this court, and being entitled to recover his costs incurred in this court, insists that the expense of obtaining the transcript of the evidence in the court below for the purpose of settling a bill of exceptions is a part of the costs in this court and should be taxed as such. The appellant or plaintiff in error, upon obtaining judgment in this court reversing the decree or judgment of the lower court, is entitled to recover his costs in this court without regard to the further proceedings after the case is remanded to the district court, and notwithstanding that he may be ultimately defeated in the litigation. The costs, however, in the district court, whether before or after the appeal or proceedings in error in this court, are to abide the final result of the suit and to be taxed against the unsuccessful party. If the expense of settling the bill of exceptions is to be considered, under such circumstances, as costs in this court, this motion should be sustained; but if such expense is cost incurred in the district court, the motion must be overruled. *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437.

Our code provides that a party objecting to the decision of a court must except at the time the decision is made,

and time may be given to reduce the same to writing. Sec. 308. The exception must be stated with so much of the evidence as is necessary to explain it. Sec. 309. If the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts. Sec. 310. If the decision is not entered on the record or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within a limited time after the adjournment of the term (sec. 311), and must submit the same to the adverse party for examination. If objections are made, and the judge has determined and approved a correct statement of exceptions, it is allowed by the judge and is made a part of the record of the case. For this purpose, it is filed by the clerk and preserved by him as the other records in the case. It seems to be admitted that the bill of exceptions then becomes a record of the district court. It never becomes a permanent record of the supreme court.

The code provides that the plaintiff in error shall file with his petition in error in this court a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified (sec. 586), and also that the clerk of the district court shall upon request, and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings to either of the parties to the same or to any person interested in procuring such transcript. Sec. 587. This, of course, involves making a copy of the whole record, which would include the bill of exceptions as a part of the records of the district court. By section 1, chapter 28, laws 1881, it was provided that, instead of copying the bill of exceptions into this transcript, the original bill of exceptions itself shall, on the request of any party desiring to prosecute proceedings in the supreme court, be attached to the transcript or record, and be certified by the clerk of the district court to be the original bill of exceptions.

After the case is disposed of in the supreme court, the bill of exceptions is to be returned to the district court upon the request of any party interested. Code, sec. 587*c*. If the appellant should take a transcript of the entire record of the district court, including the bill of exceptions, instead of having the original bill of exceptions attached to his transcript, his right to have the expense of such transcript taxed as costs in this court might, perhaps, be questioned on the ground that such expense was unnecessary; but there could be no doubt of his right to proceed in such manner or of the efficacy of such transcript. It is suggested that, in practice, bills of exceptions are usually procured to be allowed with the view of taking the case to this court upon appeal or proceedings in error, and that therefore it ought to be considered that the expense of settling such bills is a necessary cost of this court. While it is true that bills are generally procured to be allowed with such purpose in view, yet it is not always the case. It sometimes happens that it is necessary that the records of the district court should be made thus complete for use in that court. This seems to be contemplated by the statute which requires them to be settled in that court and makes them a part of the record there. By the practice in some of the districts of this state, the clerk has entered the expense of the bill of exceptions as costs in the case, when the bill of exceptions is filed with him as a part of the records of his office. This appears to be the correct practice. 11 Cyc. 232*d*; *Pinney's Will*, 27 Minn. 280.

In *Palmer v. Palmer*, 97 Ia. 454, the court appears to take a different view. It would seem from the opinion that the practice there is quite similar to our own, and that when the bill of exceptions is settled, it is made a part of the record of the district court and, as such, filed in said court; and yet the court say: "It is to be remembered that the costs of the transcript follow the costs in this court because made upon appeal." There is no explanation of the sense in which it may be said that these costs are made upon appeal. Possibly, the view above suggested

was taken that, since bills of exceptions are usually settled with a view of prosecuting proceedings in the supreme court, the costs of the same should be considered as costs of the reviewing court; but, as before stated, it seems to us that the rule to be derived from our statute and practice is otherwise. The view of the Minnesota court, as expressed in the case above cited, is in harmony with the provisions of our statute above quoted. We have noticed several decisions of other courts more or less directly bearing upon the question here presented, but none of them sufficiently discuss the statutes and rules of practice from which they are derived to make them available as authorities in this state. Among them may be noted the following: *Hayes v. Livingston*, 35 Mich. 371; *Roby Lumber Co. v. Gray*, 73 Mich. 356; *Novotny v. Danforth*, 9 S. D. 412; *First Nat. Bank v. North*, 6 Dak. 136; *Brown v. Winchill*, 4 Wash. 98; *Turner v. Muskegon Machine & Foundry Co.*, 97 Mich. 166.

We think that costs of settling the bill of exceptions are costs made in the district court, and should be taxed as such against the unsuccessful party in the final determina- of the litigation.

MOTION OVERRULED.

FRANK E. MOORES, MAYOR, ET AL. V. STATE OF NEBRASKA, EX REL. I. J. DUNN ET AL.

FILED APRIL 7, 1904. No. 13,567.

1. **Mandamus:** DISCRETION OF COURT. While the courts, in the exercise of a sound discretion, will not issue the writ of mandamus, even to vindicate a technical right, where more harm than good will result through its interference with municipal administration, such considerations are addressed to the trial court. Only in a clear case of abuse of discretion would the granting of a mandamus be reversed for such a cause.

2. ———: GAMBLING. Where a number of prosecutions have failed to bring about the closing of a public gambling house, the exist-

ence of the remedy by complaint and arrest on warrant of the offenders will not prevent a writ of mandamus to require the mayor and chief of police of a metropolitan city to use their summary powers to prevent such open violation of law.

3. Cities: DUTIES OF MAYOR AND CHIEF OF POLICE. The statutes of this state require the mayor and chief of police of such city to actively interfere to prevent or stop open violations of law.

4. Mandamus: MOTIVES OF RELATOR. That one of two relators, asking a mandamus, admits that his leading motive in assailing a "pool room," whose closing was the object sought, was the belief that a certain citizen, who had actively assisted its operation, was interested in its profits, is no ground for reversing a judgment in favor of the relators.

5. Evidence: POOL ROOM. Evidence *held* to sustain the district court's conclusion that the "pool room" in question was a "room to be used or occupied for gambling within the statutes of the state of Nebraska."

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

W. J. Connell, for plaintiffs in error.

Lysle I. Abbott and *I. J. Dunn, contra.*

HASTINGS, C.

This is an error case brought to reverse the granting of a peremptory writ of mandamus by the Douglas county district court. The action was brought by I. J. Dunn and L. I. Abbott not only against Frank E. Moores, mayor, and John J. Donahue, chief of police in the city of Omaha, who are plaintiffs in error, but also against the members of the board of fire and police commissioners and P. J. Mostyn, acting chief of police. A demurrer on behalf of the board to the petition was sustained. The acting chief of police, Mostyn, had ceased to exercise such functions before the hearing and was dismissed. A peremptory writ was awarded against the chief of police, commanding him to forthwith arrest or cause to be arrested all persons found violating the laws of the state or the ordinances of the city relating to gambling, or operating or maintaining

a gambling room for the purpose of unlawful gaming at number 1313 Douglas street, known as "The Diamond Pool Room," and directing him to at once take action to detect all persons there engaged in such violation of the laws of the state and of the city ordinances. A peremptory writ was also awarded against the mayor, commanding him to cause this to be done by the chief of police, and to order the chief of police and, through him, the officers of the police department to detect and arrest all persons engaged in the violation of the laws of the state at the place designated. The costs of the action were taxed against the respondents, Moores and Donahue.

The mayor and chief of police filed a motion for a new trial, on the grounds that the decision was not sustained by the evidence and was contrary to law; that the findings that relator, Abbott, was acting in good faith and that there was no conspiracy between the relators were contrary to the evidence and not sustained by it; that the peremptory writ does not conform to the alternative one; that the writ requires acts in excess of respondents' duties; that upon the finding that Dunn was not acting in good faith the action should have been dismissed; that under the findings of law made by the court the action should have been dismissed, and that the judgment for costs was unlawful and unjust. From the overruling of this motion the respondents, Moores and Donahue, having filed a supersedeas bond, bring error.

The sole action which the mayor and chief of police are required by the peremptory writ to take is to proceed to use the powers and resources of the police department of the city of Omaha to suppress open violations of the statutes of Nebraska, and of the ordinances of the city of Omaha, in the matter of gambling and conducting a room for the purpose of unlawful gaming at number 1313 Douglas street in that city. The trial court thought that, under the evidence produced in this case, the mayor and chief of police should be required to do this. They say not, and they give four reasons why this court should reverse

the action of the district court and vacate the judgment: "1st. That the wrong complained of is not of so grave a character as to warrant interference by mandamus, and to so interfere would be for the court to assume the administrative functions of the municipal government. 2d. Other adequate and appropriate remedies exist. 3d. It is not the duty of the mayor or chief of police to do the things required. 4th. The action was not instituted or prosecuted by the relators in good faith."

The facts seem to be, that at number 1313 Douglas street in the city of Omaha, in the back part of a room, whose front is occupied by what is known as the "Diamond Saloon," under license for the sale of intoxicating liquors, and is used for that purpose, is openly and publicly carried on what is called a "pool room." The dates of races in different parts of the country and the names of the horses entered are posted upon a blackboard and, opposite the name of the horse, is posted the odds against his winning in that particular race; any customer, who desires to bet upon any horse, pays in his money and receives a ticket entitling him, in the event of that horse's winning, to the odds posted opposite the horse's name on the board.

The trial court found that the business of selling pools on horse races had been carried on there since some time in January, 1903, up to the trial of the action, which was finished November 30, 1903. The selling and buying of pools on horse racing was found to be betting on the same; the fixtures used in this pool room, a blackboard and a telegraph instrument, chairs, counters, drawers, books, pencils, tickets, pen, ink and sheets on which memoranda are kept of tickets and pools sold, were found not to be gambling devices within the meaning of the statute. Both the mayor and chief of police were found to have had notice before the bringing of this action that such pool room was conducted at the place designated, but not actual knowledge of the fact.

The court found, as matters of law, that selling pools upon horse racing is gambling within the meaning of the

Nebraska statute; that the keeping and maintaining of a room, where the public is invited to come for such purpose, constitute the offense of keeping a room for gambling purposes within the statutes of Nebraska. It found that it is the duty of the mayor of the city of Omaha to see that the criminal laws of the state and the city ordinances are enforced; that it is his duty, through the chief of police and the police force of the city, to ascertain, where he has reason to suppose such to be the facts, whether or not the laws are being violated, and, if such is the case, he should see that a proper information is filed, and that the persons violating the laws are arrested by the police and prosecuted; and that, in case the chief of police or the police force neglect such duty, it is the mayor's province to order them to do it; that it is the duty of the chief of police of his own volition, if he has cause to believe that the criminal laws are being violated, to make an investigation, and arrest persons found breaking the law, and hold them until a complaint is filed and a warrant issued, and to use all lawful means to bring such parties to trial; that, when a complaint is filed, and a warrant issued, it is his duty to arrest the person charged in the complaint, and investigate and ascertain, as far as he can, whether the offense has been committed; after so doing, he should submit his proofs to the officer having charge of the prosecution.

Upon these findings the peremptory writ of mandamus against the mayor and chief of police was allowed, and the costs of the action adjudged against them; and, to obtain a reversal of such order, they now urge, as above stated, that there is nothing to warrant the court's interfering with the administrative functions of the municipal government; that other and better remedies exist; that the mayor and chief of police are under no duty to perform the acts required, and that relators are not acting in good faith.

A moving picture was drawn at the argument of the condition of matters in the city of Omaha, if this court were to interfere by mandamus to control the action of the city's police officers in reference to every trifling offense

against state laws or city ordinances which may take place there. It seems sufficient to say that the upholding of the mandamus issued by the district court in this case does not commit this court to such a position. This objection merely raises an appeal to the sound discretion of the trial court, and not a bar to the action. No claim is made, or can be made, that these officers have a discretion which the courts may not interfere with, as to whether or not they shall discharge their duties under the law. It is quite true, as stated in *People v. Listman,* 40 Misc. (N. Y.) 372, 82 N. Y. Supp. 263:

"The existence, therefore, of the numerous methods described above by which the relator can obtain his object without application to the supreme court, is, in itself, no sufficient answer to such an application. But after all the writ of mandamus is an extraordinary remedy, and whether it shall or shall not be granted in a specified case rests largely in the sound discretion of the court. There is no doubt that there are circumstances where such a power may be wisely exercised. It might well be that cases might arise where the neglect of the municipal officer is so flagrant, where the wrong is of so grave a character and where the public interests involved are so important that the court will not hesitate to resort to this remedy. But it should be used with caution. Ordinarily it is far better that the usual course should be pursued."

The case last cited is reprinted in full in the respondents' brief. In it the New York supreme court, at a special term in Onondaga county, refused a mandamus against a commissioner of public safety of the city of Syracuse, requiring him to enforce general laws prohibiting labor on Sunday, and public dramatic performances on that day. On a complaint made to the commissioner of the character of the performances, he caused two officers to attend one of the performances, which were styled by those conducting them "Sacred Concerts"; on the report of the two officers, the matter was presented to the police justice of the city of Syracuse, who refused to issue a

warrant, on the ground that the concerts were not a violation of law. The commissioner declined to do anything further. An application was made for a mandamus to compel him to attend personally, or cause his officers to attend, the concerts, and to arrest, or cause to be arrested, without a warrant, the persons holding them, if they were found to be an offense against the laws of the city. The supreme court in that case adjudges it better that the performances be proceeded against in the ordinary manner because, if the police judge refused to issue a warrant, recourse might be had to any one of the several other magistrates, and the police judge, if necessary, removed.

The case of *Alger v. Seaver,* 138 Mass. 331, is also cited as refusing a mandamus against a municipal officer. The court say:

"As applications for the writ of mandamus are addressed to the sound judicial discretion of the court, the circumstances of each case must be considered in determining whether the writ shall issue."

The circumstances of this present case have been considered, and the district court, in its discretion, decided that as against the mayor and chief of police the writ shall issue. There certainly does not seem to have been any such abuse of discretion as to call for a reversal of the cause merely because of it. If the duty rested upon the officers to do the things required of them and they were failing in that duty, and the relators are entitled to insist upon its performance, unless there is other clear and adequate remedy, the order allowing the writ should be affirmed.

The second objection is, that there is a clear, adequate and more appropriate remedy existing. To this it seems sufficient to say that the evidence indicates that a number of complaints—one witness for respondents says "eight or ten"—of the violation of law by the conducting of this pool room have been filed; that arrests have been made, followed by the prompt release upon bail of the parties charged, and an immediate resumption of the pool room's

business. If the continuance of that pool room is an open, public violation of the law, the citizens of Omaha, who maintain the police to patrol its streets and prevent such violation, are entitled to have that force used in promptly suppressing such an element of disorder, especially after it appears that ordinary prosecutions do not deter the parties. As Lord Mansfield said of the writ of mandamus: "It was introduced, to prevent disorder from a failure of justice, and defect of police." *Rex v. Barker,* 3 Burr. (Eng.) 1266, 1268.

The third objection is, that it is not the duty of the mayor and chief of police to do the acts required. Section 71, chapter 12*a* of the Compiled Statutes, provides as to the mayor of cities of metropolitan class: "The mayor shall be the chief executive officer and conservator of the peace throughout the city, and shall have power, by and with the concurrence of the board of fire and police commissioners, to appoint any number of special policemen which he may deem necessary to preserve the peace of the city, and to dismiss the same at pleasure." Section 73 makes it his duty to see that the provisions of the law and the city ordinances are enforced. Section 171 of the same chapter provides as to the chief of police: "The chief of police shall be the principal ministerial officer of the corporation; he shall, by himself or by deputy, execute all writs and process issued by the police judge; he, or one of his deputies, shall attend on the sitting of the police court and preserve order therein; and his jurisdiction and that of his deputies in the service of process in all criminal cases, and in cases of the violation of city ordinances shall be coextensive with the county." Section 172: "He shall be subject to the orders of the mayor in the suppression of riots and tumultuous disturbances and breaches of the peace; he may pursue and arrest any person fleeing from justice in any part of the state." Section 173: "He shall have, in the discharge of his proper duties, like powers and be subject to like responsibilities, as sheriffs in similar cases." Among the duties of the sheriff as defined in sec-

tion 119, article I, chapter 18, Compiled Statutes, are: "The sheriff and his deputies are conservators of the peace, and to keep the same, to prevent crime, to arrest any person liable thereto, or to execute process of law, may call any person to their aid; and, when necessary, the sheriff may summon the power of the county." And section 283 of the criminal code provides: "Every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained."

It seems clear that it is the duty of both the chief of police and the mayor to interfere for the prevention of the public violation of the laws, and that seems to be all which is required of the officers by this mandamus; they are to see that the police officers under their charge investigate the alleged open violation of the law at a given place, and arrest such parties as are found in the act of violating it, and are to take measures for their prosecution. If it be granted, as the trial court found, that an open and public violation of the law is going on there, it would seem that it is clearly within the prescribed duties of these officers to take such steps.

The fourth objection raised is, that the action was not instituted or prosecuted by the relators in good faith. This rests upon the trial court's finding that one of the relators, I. J. Dunn, was influenced in his action more by the desire to "affect" one Thomas Dennison than by a desire to enforce the laws of this state. It was, however, found that, so far as the other relator was concerned, the proceedings were in entire good faith. The soundness of this conclusion is not disputed. The relator, Dunn, owned to having taken, as assistant county attorney, various steps toward the prosecution of Dennison on various actions, and declared that a large share of his desire to suppress the pool room was from his belief that Dennison shared in its profits. This, no doubt, together with a mass

of evidence as to Dunn's action as assistant county attorney, the relevancy of which is not perceived, was the basis of the finding, which was in the following terms: "The court further finds, as a matter of fact, that the relator, I. J. Dunn, is not acting in good faith in bringing and prosecuting this action, in this, that he brings and prosecutes this action primarily for the purpose of affecting one Thomas Dennison, and his desire for enforcing the law is a secondary consideration." The court, however, found that the action was not brought nor prosecuted in pursuance of any wrongful conspiracy or combination. The action of the relators seems to have been at the request of a number of prominent and respectable citizens of the city, and there seems no reason, in the fact that Mr. Dunn was actuated by a conviction that Dennison had an interest in the pool room and a desire to drive him out of that business, to dismiss the proceedings. It appears from the evidence of Dennison himself that he has no such interest at the present time, and he declares that such action as he has taken in regard to the pool room was solely on account of friendship for its proprietor, Chucovich. There seems no reason to reverse the action of the district court because of Mr. Dunn's appearance as one of the relators.

The real turning point in the case seems to be the question, whether or not the keeping of a pool room, such as the evidence discloses, is a violation of the law, the prevention of which the courts will enforce by a writ of mandamus. The officers seem to have regarded it, in the words of police commissioner Broatch, as "no more a violation of law than is the grain bucket shop." There seems to have been something like an understanding that the city authorities would not, of their own volition, interfere with its operation, if they were conducted without disorderly accompaniments. No attempt, however, is made at the present hearing to defend the lawfulness of this business. No complaint is made as to the correctness of the district judge's findings, that pool selling is gambling, and that the maintaining of a place where the public are invited to

come and buy pools upon races is the maintaining of a gaming house, under the laws of this state.

All laws for the suppression of vice are subject to evasion. Doubtless gambling is a vice and so distinguishable from crime. Like all other vices, the most that can be done toward its suppression is to prevent its open and public indulgence to the demoralization of society. So long as the laws of the state of Nebraska make the public maintaining of gambling places unlawful, so long it would seem to be the right of citizens, who believe that openly and publicly advertising them and their business is dangerous and demoralizing to the community, to insist that public officers, selected for that purpose, should carry into execution the laws dealing with such places. It seems sufficiently to appear, in the present case, that ordinary remedies had been tried and found powerless to answer the purpose of the statute in question, the closing up of an open and public gaming house.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

EDA MEINHARDT, APPELLANT, V. LEWIS A. NEWMAN ET AL., APPELLEES.

FILED APRIL 7, 1904. No. 13,536.

1. **Agency**: DEATH OF PRINCIPAL. It is not a hard and fast rule, that an agency shall be deemed to have been revoked for all purposes by the death of the principal, as against those dealing in good faith with such agent, without knowledge of revocation, and within the scope of his actual and ostensible authority.

2. **Evidence.** Evidence examined, and *held* sufficient to sustain the judgment of the trial court.

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

C. L. Richards, for appellant.

Kelligar & Ferneau and *T. C. Marshall, contra.*

OLDHAM, C.

This is an action for the foreclosure of a real estate mortgage on certain lands situated in Thayer county, Nebraska. Defendants answered admitting the execution of the mortgage, and pleading payment to the duly authorized agent of the payee. There was a judgment for the defendants in the court below, and plaintiff appeals.

The facts clearly established by the testimony contained in the bill of exceptions are: In 1881, J. W. Lewis, of Suffolk, Massachusetts, the payee named in the note in controversy, constituted M. H. Weiss of Hebron, Nebraska, his agent for the purpose of loaning, collecting and reinvesting money on farm securities in Thayer county, Nebraska. Mr. Weiss continued to act as his agent up to and during the year 1885, when the Blue Valley Bank at Hebron, Nebraska, was organized and Mr. Weiss became its cashier. On the organization of the bank, Mr. Weiss transferred the account of J. W. Lewis to the bank, and credited the bank with profits on the loans and collections made for Mr. Lewis, and an account was opened at the bank with him, more, however, for the convenience of the bank in transacting the business than for the benefit of Mr. Lewis. A large number of loans were negotiated by the bank, and these notes were all made payable to J. W. Lewis, at the Blue Valley Bank. Among others, the loan in controversy was made by the bank to one William T. Jackson for $700, secured by real estate mortgage. The mortgage provided, among other things, that payments in multiples of $100 might be made on the principal debt, at any interest payment. Jackson conveyed the lands

covered by the mortgage to the defendant Lewis A. Newman, in the year 1891, who assumed and agreed to pay the mortgage. J. W. Lewis, the payee of the note, died, in 1891, intestate, and Sherman T. Lewis was duly appointed as one of the administrators of his estate. In 1892, defendant Newman paid the interest on the loan, and $100 on the principal, through his agent, to the Blue Valley Bank; received a receipt from the bank for such payment, and this money was properly transmitted to the administrators of the payee of the note; and the interest coupon and receipt for part payment of the principal were transmitted to the bank and, by the bank, to the defendant Newman. On August 16, 1893, defendant paid in the same manner to the bank, $48, interest, and $225 of the principal of the loan, and took its receipt therefor. The bank transmitted the interest of $48, but credited the payment of $225 on the principal of the indebtedness to the account of J. W. Lewis at the bank, and did not transmit this to the legal representatives of the payee. In 1894, another payment was made in the same manner, which was duly transmitted, accepted and receipted for. In September, 1895, the Blue Valley Bank suspended, and a receiver was appointed to take charge of its affairs; and in the same year, the administrator of the estate of J. W. Lewis, deceased, assigned the mortgage and note to plaintiff, Eda Meinhardt, in the following manner: "For value received, I, Sherman T. Lewis, administrator of the estate of J. W. Lewis, deceased, hereby assign and fully transfer to Eda Meinhardt, heirs and assigns forever, one certain mortgage executed by William T. Jackson and Annie M. Jackson, his wife, to J.W. Lewis, bearing date August 18, 1890, and recorded, etc., * * * also the promissory note accompanying said mortgage and mentioned therein, and for the security of which said mortgage was given." This transfer was duly acknowledged before a notary public. In 1896, a similar assignment of the mortgage and note was executed by each of the heirs of J. W. Lewis, deceased, and these assignments were recorded in the office of the

register of deeds in Thayer county, in 1896. The assignment of the heirs was taken after the maturity of the note, and was recorded nearly 3 years after the payment in dispute had been made.

The only question at issue on the trial of the case in the court below was as to the credit of the $225 payment on the principal sum of the indebtedness made as above stated. All the remainder of the indebtedness, if this credit is allowed, has been duly paid. There is no contention that plaintiff is an innocent purchaser of this note by indorsement under the law merchant; and plaintiff virtually concedes that the evidence is sufficient to establish an agency in the Blue Valley Bank for the collection of the interest and principal by its dealings with J. W. Lewis, deceased, but it is strongly contended that this agency was terminated by the death of J. W. Lewis, and that thereafter defendant dealt with the bank at his peril.

It is not, however, as contended by plaintiff, a hard and fast rule that, under all circumstances and in the face of intervening equities, the death of a principal absolutely nullifies and renders of no effect the acts of an agent, dealt with in good faith and in view of his apparent authority, by one who does so, without notice of the revocation of his authority. This view is well illustrated by the holding of this court in *Deweese v. Muff*, 57 Neb. 17, in which NORVAL, J., after a careful review of the authorities, quotes with approval the following language from the opinion in *Ish v. Crane*, 8 Ohio St. 520, 540:

"Now upon what principle does the obligation, imposed by the acts of the agent after his authority has terminated, really rest? It seems to me the true answer is, public policy. The great and practical purposes and interests of trade and commerce, and the imperious necessity of confidence in the social and commercial relations of men, require that an agency, when constituted, should continue to be duly accredited. To secure this confidence, and consequent facility and aid to the purposes and interests of commerce, it is admitted that an agency, in cases of actual

revocation, is still to be regarded as continuing, in such cases as the present, toward third persons, until actual or implied notice of the revocation. And I admit, that I can perceive no reason why the rule should be held differently in cases of revocation by mere operation of law."

Now, it will be remembered that each of the payments made by the defendant on this mortgage indebtedness had been made after the death of the payee, and all, except the $225 in dispute, had been transmitted by the bank to the representatives of the deceased and had been properly accounted for. It is also in evidence and undisputed, that a large number of other collections, some of interest and some of principal, had been made by the bank for one of the administrators after his appointment and qualification as such. That after his qualification, he sent to the bank for a statement of its dealings with the intestate, and for a list of mortgages negotiated by it, and that such was duly furnished by the bank. That when the bank failed and passed into the hands of a receiver, the $225 paid by defendant was found credited to the J. W. Lewis account kept at the bank.

Now we think it could not be disputed that had J. W. Lewis, in his lifetime, revoked the agency of M. H. Weiss, and the Blue Valley Bank, to collect his loans and reinvest his money, and had he failed to notify those doing business with that institution under its real and apparent authority as agent, he would not in conscience have been heard to say, as against those honestly dealing with the institution, that its agency had been revoked. And if, as set forth in *Dewcese v. Muff, supra,* the same rule should apply on revocation by death, then we think that the conduct of the administrator in his dealings with the bank with reference to loans and collections made for his intestate, should now estop the representatives and heirs of the deceased from asserting the revocation of this agency by the death of the principal. That the note and mortgage were a part of the same transaction is alleged in the petition and admitted in the arguments; that the privilege of

paying $100, or any multiple thereof, on the principal debt at any interest payment, was brought home to the plaintiff by the possession of the mortgage, is not disputed, as was also notice of the fact that part of the principal had been paid under this option before she took the assignment.

There is another question urged by appellees that would probably be fatal to a reversal of this case, and that is, that there was no evidence of any kind in the record tending to show that no action at law had been had on the note before foreclosure proceedings were instituted. This allegation was contained in the petition and denied by the answer. But as we deem the evidence sufficient to sustain the judgment of the trial court on the merits of the controversy, we refrain from saying just what judgment we should have rendered in this trial *de novo* for want of this technical proof, had no other substantial defense been interposed.

We conclude, however, that the evidence is sufficient to sustain the judgment of the trial court on the merits of the controversy, and we recommend that it be affirmed.

AMES and HASTINGS, CC., concur.

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

AFFIRMED.

DANIEL ISAACS, APPELLEE, v. RACHEL DAVIS ISAACS, APPELLANT.

FILED APRIL 7, 1904. No. 13,426.

1. **Antenuptial Agreements.** While antenuptial agreements may essentially alter the interest which either the husband or wife takes in the property of the other, they can not vary the terms of the conjugal relation itself; they can not add to or take away the personal rights and duties of husband and wife.

2. ———. An antenuptial agreement by a man about to be married,

that, after marriage, he will reside in a particular state, can not be enforced.

3. **Domicile.** The general rule is that the domicile of the husband is the domicile of the wife.

4. ———. The wife is bound to follow her husband when he changes residence, if such change is made in good faith.

5. **Husband and Wife: SUPPORT.** When a wife, without just cause, refuses to live with her husband, he is not required to contribute to her support.

6. **Divorce and Alimony.** When a wife, without cause, refuses to live with her husband, and the evidence shows that she did not assist in or contribute to the accumulation of any of his property, but that it was all accumulated by him prior to their marriage, the husband, on obtaining a divorce on the ground of desertion, will not be required to pay alimony.

7. **Evidence.** Evidence examined, and *held* to fully sustain the findings and judgment of the trial court.

APPEAL from the district court for Wayne county: JAMES F. BOYD, JUDGE. *Affirmed.*

Wilbur & Berry, for appellant.

A. A. Welsh, contra.

FAWCETT, C.

This is a suit by plaintiff for a divorce on the ground of desertion, with a petition in the usual form. Defendant, answering, admits the marriage and denies all the other allegations of plaintiff's petition, and, for cross-petition, asks for a divorce on the grounds: First, of desertion; and, second, failure to support. She bases her claim of desertion on the allegations that, prior to her marriage with the plaintiff, he agreed with her that he would make his home, after their marriage, in the state of Ohio; that without this promise she would not have married him; that on or about the first day of November, 1900, being the same year in which they were married, plaintiff left the defendant in Cincinnati, stating that he was going to Ironton, Ohio; and that instead of going to Ironton he

came to Wayne county, Nebraska, without the consent or knowledge of the defendant. For reply, plaintiff says that, prior to his marriage with defendant, he expected to make his home, after their marriage, in the state of Ohio; that, after their marriage, he made numerous efforts to get into business or to obtain employment in that state, but was unable to do so, whereupon he repeatedly solicited the defendant to come to Wayne county, Nebraska, to make their home, but that defendant refused and has ever since refused; and in November, 1900, plaintiff, being unable to find a place in Ohio suitable and satisfactory, came to Wayne county, Nebraska, where he had resided prior to their marriage, and where he owned a well improved farm of 320 acres of land; that since coming to Wayne county he has repeatedly requested defendant to come and live with him, and, upon her refusal so to do, has offered to return to Ohio and make his home there, if defendant would live with him, but that defendant refused to live with him either in Nebraska or Ohio; that he is now ready and willing to provide a home and live with the defendant either in the state of Nebraska or the state of Ohio, and offers to return to Ohio and live with the defendant; alleges that for a long time prior to his marriage with defendant, he had resided in Wayne county, Nebraska, with his family, consisting of 5 children by a former wife, then deceased; that defendant has never contributed in any manner to the accumulation of any of the property of plaintiff or assisted in the care thereof; that defendant is possessed of a one-fifth interest in a house and lot in Norwood, Ohio, where she resides with her sisters, as the co-owners thereof; that he has always been ready and willing to contribute to the support of defendant, and has sent her money, which defendant has refused to receive.

The evidence shows that the parties were married in April, 1900; that defendant had a decided aversion to coming to Nebraska, preferring to live in Ohio, where she had lived all her life, and where plaintiff had spent the early years of his life; that, after the marriage, they came

to Nebraska and spent a couple of months together on plaintiff's farm in Wayne county, defendant returning to Ohio during the summer, and plaintiff agreeing to follow her in September. In September, plaintiff returned to Ohio in accordance with this arrangement, and began his efforts to get into a business of some kind which he would be able to manage, or, failing in that, to obtain some suitable employment. He seems to have been quite persistent in his efforts in this direction. The evidence satisfies us, as it doubtless did the trial court, that those efforts were made in good faith, and that he did everything in his power to gratify the wish of his wife. On the evening of November 4, 1900, he returned to the defendant's old home, where she was living with her sisters while he was making the efforts to secure a business, above referred to, feeling rather discouraged at another failure of his plans. Defendant seems to have been angry at him on account of this failure, and told him he could not stay there that night. After some talk between them, she partially relented and permitted him to remain in the house that night, but refused to occupy the same room with him, telling him that he would have to occupy another room, which he did. The next morning he left her with the understanding that he would make another trip to Ironton, and try and make some kind of an arrangement by which they could move there. After leaving the house, under the effects of the chilly reception which he had received the evening before, he said he was feeling homesick, and concluded that he would take a trip to Nebraska; so, instead of going to Ironton he took the train for Omaha. The first thing he did after arriving in Omaha was to write to his wife, telling her what he had done, and expressing sincere regret that he had left her and come to Nebraska without telling her that he was going to do so, and asked her forgiveness for having done so. He waited some time, and, receiving no answer, he again wrote her from his farm in Wayne county. Receiving no answer to that, he wrote a third letter. To this he received this answer:

"NORWOOD, OHIO, December 16, 1900.

"*Mr. Isaacs*—Sir: You deserted me once for all. I will have nothing more to do with you. You have made many good promises to me but kept none of them. I do not want you to come back to Ohio, as you left me without a cause. Hoping this will be satisfactory, I remain,

"RACHEL DAVIS ISAACS."

Notwithstanding this letter plaintiff kept writing to his wife, urging her to reconsider the matter, calling her attention to the fact that he had been unable to get into business in Ohio, that he had a good home in Nebraska and could support her in proper manner here. Finding that she would not yield, he then wrote her that he would return to Ohio and secure a home for them there. Receiving no word from her, in the fall of 1901 he returned to Ohio, learned where she was stopping, and went to the house between 7 and 8 o'clock in the evening, to see her. In answer to his rap at the door she appeared and, on observing who it was, slammed the screen door shut and retired to another room in the rear of the house. He went around to the window and importuned her to talk the matter over with him. She finally told him to go around to the door, where she met him, but she kept the screen door closed and would not permit him to enter. He reasoned with her there, and offered to return to Ohio, but she was obdurate, claiming that he had blasted her life and that she would not have anything more to do with him. He tried to have an interview with her the next day, which she refused to grant, claiming that she had a prior engagement. After remaining in Ohio a while he returned to Nebraska; but, before leaving, left a letter with her sister, to be forwarded to her. She answered this letter November 3, 1901, saying:

"*Mr. Isaacs:* Your letter received about a week ago, in which you make some very good promises if I would live with you. I trusted you once on your good promises until you failed to keep one of them, and asked me to work for

my board, which was more than I could endure. I was not conscious at the time that you had any intention of leaving me to fight my way through the world as your wife, which has caused me many a heart ache and blighted my life forever. You wished me to write you this one letter, which I will do, as I promised. I always thought you would support me until I gave you the opportunity, then I found I was very much mistaken. You said as I had an interest in our home I could live there, which is very true; I could; at the same time I could not eat the house nor dress with it. On the other hand it takes money to keep the house in repair and I must do my part as I have no one to do for me since my married life has been a failure. Hoping you will always be happy with your family, will close. From RACHEL DAVIS ISAACS."

To this plaintiff replied, saying, among other things:

"Now, my dear wife, I hope you will not be offended by my writing you this time; you know we are tied together for life and there is not a day but I think of it a thousand times and am willing to do anything I can in order that we can live together. * * * I will send you money as soon as you send me your address, and I am going to ask you won't you please promise to live with me so I can close the deal on the home I have in view in Jackson county, Ohio, and I will promise that I will try to do all I can to make our home happy, and I will do as I say. As soon as I close the deal I will send the papers to you to hold, and I can not tell you how glad my children would be if we were living together. If you get this letter please write so I can close the deal if you will consent. This from your loving husband, DANIEL ISAACS."

He wrote her again on December 16, in which, among other things, he says:

"Now, Rachel, it was a mistake on my part. I hope you will forgive me. I am going to ask you to write yourself and if you will state any terms that I can comply with

I will be glad to do it for I think we could live happy if we only get started. I can rent or sell my farm to good advantage, and I can go back east to live. * * * Now, my dear wife, if you will forgive me the past I will be glad to send money to support you until we can get to living together, and I hope I will get to hear from you soon. This from your loving husband, DANIEL ISAACS."

In this letter he enclosed a draft for $25 as a Christmas gift. The letter, envelope and draft were all returned to him by the defendant, with this endorsement on the letter: "December 31, 1901. Opened, read and returned by Rachel Davis Isaacs."

The above are only brief extracts from the many kind and affectionate letters written by plaintiff to the defendant, urging her to forgive him for the one slight error of coming to Nebraska in November, 1900, without previously informing her of his intention so to do. This act of his she construes into a great wrong: One which, she says, blasted her life, and which she was never willing to forgive. We are absolutely unable to conceive how dedefendant could have become imbued with such a silly idea. The alleged antenuptial agreement, that he would always live in Ohio, was void. As stated by counsel for appellee, "Valid antenuptial contracts can only be made with reference to the property of one another and their rights thereto. They change and control the general rule of the marriage state in reference to property only." And, as stated in Schouler, Domestic Relations (3d ed.), sec. 171: "They can not vary the terms of the conjugal relation itself; they can not add to or take away from the personal rights and duties of husband and wife; but they may essentially alter the interest which each takes in the property of the other." The general rule is that the domicile of the wife follows that of the husband and that he has the right to fix their domicile; the wife is bound to follow the husband when he changes his residence, if such change is made in good faith. The authorities in support

of this principle are so numerous and uniform that it is unnecessary to cite them. But, conceding that plaintiff had agreed, prior to the marriage, that he would always live in Ohio; if, after the marriage, he, in good faith, tried to secure employment or a business of some kind there and was unable to do so, and had a good home of 320 acres of land in Wayne county, Nebraska, at his disposal, he had a perfect right to return to that home and to insist that his wife should go there with him, and her refusal so to do would constitute desertion on her part. He was under no obligation to surrender his home that he had worked years to establish, and return to Ohio and engage in a business enterprise, without experience, and possibly, nay, probably, lose the earnings of years in that enterprise; and if the defendant had even the faintest conception of her marital duties, she would not have required him to continue tramping around through the state of Ohio seeking employment or business, but would have promptly and cheerfully accompanied him to the good home which he had already established in Nebraska.

A sufficient answer to defendant's plea of nonsupport is that a man is not required to support his wife when she, without just cause, refuses to live with him.

From the questions asked by defendant's counsel on the trial of the case, it is apparent that defendant cares nothing about the marriage relation or as to who succeeds in obtaining the decree of divorce, provided she is given a goodly portion of the property, which she never assisted the plaintiff to accumulate. If the trial court had awarded her even a very small amount of alimony, we are satisfied that this court never would have been troubled with an appeal in this case. On the trial the court awarded her $100 for expense money in defending the suit, but, after hearing the case, refused to allow her any alimony, and ordered that each party pay their own costs. This is the part of the decree that was grievous to defendant; but we think the court did right. When a wife, absolutely without cause, deliberately refuses to live with

her husband, and has not helped to accumulate any of his estate, we know of no law which entitles her to alimony.

We have read the record very carefully, and are unable to discover any error therein. The judgment of the district court is right in all respects and should be affirmed; and we so recommend.

ALBERT and GLANVILLE, CC., concur.

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

AFFIRMED.

CITY OF SOUTH OMAHA V. JOHN RUTHJEN.

FILED APRIL 7, 1904. No. 13,545.

1. Instructions. Instructions given and refused examined, and *held* to be without prejudice.
2. Witnesses: VALUES. Persons who have resided for several years and own property in the immediate neighborhood of property alleged to have been damaged by grading a street in front of such property, and who seem, upon examination, to be well informed of its situation, condition and value, are competent witnesses on the question of its value.
3. Interest. Where the plaintiff in an action does not pray for interest, none can be recovered.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed upon condition.*

Murdock & Cohn and *E. R. Leigh,* for plaintiff in error. *W. R. Patrick, contra.*

FAWCETT, C.

This action was commenced by defendant in error, hereinafter styled plaintiff, against the plaintiff in error, hereinafter styled defendant, to recover $200 damages, which plaintiff claims to have sustained by reason of the grading of a portion of 12th street in South Omaha in

front of his premises. He alleges that the defendant cut the street down in front of his premises to a depth of about 6 feet without first establishing a grade upon said street, and without providing for the payment of damages occasioned thereby; that on October 7, 1901, he gave defendant written notice of his claim for such damages. The prayer of his petition is "for the sum of $200, together with costs of this cause." For answer the defendant admits that certain grading was done in front of plaintiff's premises; denies that it was done by or under the direction or authority of the city; denies that defendant had authority under its charter to do the work in the manner alleged; alleges that the work was done by parties desiring an opening through from 13th street easterly to the river; alleges that the work was done in accordance with the specific permission of the plaintiff and at his request and sanction; denies that plaintiff has been damaged, but alleges that by reason of the grading the property of the plaintiff has been benefited and its value greatly increased. The reply is a general denial. There was a trial to the court and a jury, resulting in a verdict in favor of the plaintiff for $220.71. Judgment was entered upon this verdict, motion for new trial overruled, and the case is now here on error.

Defendant claims that it is entitled to a reversal of this case for the following reasons: "(1) The trial court erred in giving instruction numbered 2 of the instructions given on its own motion. (2) The trial court erred in giving instruction numbered 4 of the instructions given on its own motion. (3) The trial court erred in refusing to give instruction numbered 3 of the instructions requested by the defendant. (4) The trial court erred in permitting the witnesses Ma Dru and B. Tangeman to testify, over the objection of defendant, to the value of plaintiff's property." These are the only assignments argued in defendant's brief, and under the well established rule in this court they are the only ones that will be considered.

Instruction numbered 2 complained of is as follows:

"The burden of proof is upon the plaintiff to establish by a preponderance of the evidence each of the material allegations of his petition not admitted by the answer; and the burden of proof is upon the defendant to establish each of the affirmative allegations of his answer."

It is evident that counsel does not object to this instruction in and of itself, but complains that the court nowhere else in its instructions tells the jury what the material allegations are in either the petition or answer. If either the petition or answer contained immaterial matter, the position taken by defendant would be sound, but we think the case comes clearly within the rule laid down by this court in *Murray v. Burd*, 65 Neb. 427. Neither the petition nor answer contains any immaterial matter. Both pleadings are more than ordinarily brief and explicit in cases of this kind, and we think that instruction numbered 2, taken in connection with the statement of the issues contained in instruction numbered 1, preclude the idea that the jury could in any manner have been misled by being left in doubt as to what matters were for their consideration.

Instruction numbered 4 is as follows:

"If you find from the preponderance of the evidence that the grading in front of the plaintiff's premises was done, either by virtue of the resolution of the city council introduced in evidence, or by the employees of the defendant city, under the instruction of its officers or any of them, and any damage was occasioned to the plaintiff's property thereby, your verdict should be for the plaintiff."

It is argued by defendant that under this instruction the jury would have been warranted in holding the defendant liable if the work had been done under the instruction of a single councilman or any other officer of the city. As an abstract proposition counsel is right, and the instruction is wrong; but, in the light of the evidence in this case, we do not see how the jury could possibly have been misled by it. There is no conflict in the evidence as to the fact that the work was done by the city's grading

gang, under the supervision of a city street boss, and, in fact, we think the evidence fairly shows that it was done under the supervision of the city engineer himself. Be that as it may, there is absolutely no claim that any officer unauthorized to act in a case of this kind assumed to act. If such had been the case, the instruction might have been prejudicial; but in this case, we can conceive of no possible manner in which the defendant could have been prejudiced by the giving of it.

Instruction numbered 3 requested by the defendant and refused by the court is as follows:

"You are instructed that in determining the amount of damages resulting to plaintiff, if any, by reason of the excavations aforesaid, you shall take into consideration the benefits accruing to plaintiff's property, if any, by reason of the grading aforesaid."

We do not think any discussion is necessary to demonstrate the correctness of the court's action in refusing this instruction. Under it, the jury would have been warranted in taking into consideration general benefits, which can not be done.

We have examined the testimony of the witnesses Ma Dru and Tangeman very carefully, and are unable to agree with counsel for defendant that the court erred in permitting these witnesses to testify as to the value of plaintiff's property. On their direct examinations they were asked if they knew the value of this property, and they answered, "Yes." Counsel for defendant did not then question them upon this point, but simply rested upon his objection that sufficient foundation had not been laid. This objection was not well taken. Subsequently, on cross-examination, he sought to show that they had not sufficient knowledge to entitle them to testify; but in this we think he failed. While their cross-examinations show that they are not what would be termed experts, yet it does fairly show that they were well acquainted with the property; that they had considerable knowledge of the values of adjoining property; that they owned property

themselves within a block or two of the property in controversy; and, in fact, they showed as much knowledge as is usually shown on the part of witnesses classed as non-expert witnesses.

The verdict was for $220.71, when the prayer of the petition was for $200 and costs. The court in its instruction authorized the jury to add interest to whatever amount it might find due to plaintiff as damages. This should not have been done, as the plaintiff does not pray for interest, but simply prays a judgment for $200 and costs. Plaintiff should therefore enter a remittitur for $20.71.

While the instructions given by the court are not as full and explicit as instructions in such case should be, yet an examination of the entire record satisfies us that the court has not committed any prejudicial error.

We recommend that if plaintiff shall within 20 days from the filing of this opinion enter a remittitur for $20.71, the judgment be affirmed; otherwise, that it be reversed.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that if plaintiff shall within 20 days from the filing of this opinion enter a remittitur for $20.71, the judgment of the trial court shall stand affirmed; otherwise, that the same be reversed and remanded for a new trial.

JUDGMENT ACCORDINGLY.

ADAMS COUNTY ET AL. V. KANSAS CITY & OMAHA RAILWAY COMPANY.

FILED APRIL 7, 1904. No. 13,185.

1. **Statute**: ELEVATORS. An elevator is a storehouse within the meaning of section 39, article I, chapter 77, Compiled Statutes, 1899.
2. ———: CONSTRUCTION. The phrase "outside of said right of way,"

etc., in the proviso to said section qualifies only the word "property" immediately preceding it, and not the specific terms used in the enumeration of other classes of property therein.

3. **Elevators: ASSESSMENT.** By virtue of such proviso, elevators situate on the right of way of a railroad are subject to assessment by the local authorities, and not by the state board; and that they may be necessary for the successful operation of the road is immaterial.

4. ———: ———. The owner of such elevators can not escape local assessment thereon, and taxes levied in pursuance thereof, by voluntarily listing and returning them for taxation to the auditor of public accounts, and the payment of the taxes levied by the state board.

ERROR to the district court for Adams county: ED L. ADAMS, JUDGE. *Reversed and dismissed.*

Snider & Logan, for plaintiffs in error.

C. F. Manderson, M. A. Hartigan, R. G. Brown, M. A. Reed, J. W. Deweese and *F. E. Bishop, contra.*

ALBERT, C.

This action originated in the presentation of a claim for the repayment of taxes paid under protest for the year 1900, to the county board of Adams county, which was rejected. Appeal was taken to the district court and submitted on an agreed statement of facts, which, so far as is material at present, is as follows: 1. It is admitted that the Kansas City & Omaha Railway Company is a corporation, created and existing under the laws of the state of Nebraska. 2. That its line of railway passes through the southern portion of Adams county, from east to west, and that there is situate on said railway the village of Le Roy and the village of Pauline in Adams county, Nebraska. 3. It is further admitted that the Kansas City & Omaha Railway Company is owner in fee of its right of way in Adams county, Nebraska, through and over which it passes. 4. It is further admitted that the Kansas City & Omaha Railway Company has erected at the villages of Le Roy and Pauline, as aforesaid, elevators, which

elevators are erected and built upon piers of stone, brick and wood, and that the same are used by lessees in a general grain elevator business in buying and shipping grain to be transported over said railway company's line of road. And there is contained in said elevators, machinery, boilers, engines and other agencies for the handling, unloading and loading of grain received for shipment. And that said elevators are situate within and upon the right of way of said railway company. 5. It is further admitted that said railway company, for the year 1900, listed with the auditor of public accounts for the state of Nebraska, among other items of property, said elevators situate at Le Roy and Pauline, Adams county, Nebraska, and that said railway company has paid taxes levied against it by the state board of equalization. 6. That said elevators, with the machinery therein contained, were by the local authorities of Adams county, duly assessed as personal property, for the year 1900, in the precincts respectively of their location in the said Adams county, Nebraska, and that the taxes so levied and assessed were, by the said railway company, paid under protest, and this action brought to recover the money so paid. 7. It is further admitted that the populations of the village of Le Roy and of the village of Pauline do not exceed 200 in each instance; that in the village of Pauline there is located a grain elevator other than the one taxed to said railway company, and the same is operated by parties who buy, sell and ship grain, doing a general elevator business. 8. It is further stipulated and agreed that both the elevator at Le Roy and the elevator at Pauline were, during the year 1900, and prior and subsequently thereto, leased by said railway company, for value, to parties operating the same as general grain elevators, buying, selling grain and shipping the same over the line of said railway company. 9. That said railway company is not engaged in the purchase and selling or the receiving for storage of grain, but operates said line as a common carrier, transporting freight and passengers for hire. That there are numerous

grain elevators along said railway company's line of road, and other lines of railroad in Adams county, Nebraska, owned and operated by private parties.

The county claims that the judgment of the district court is not sustained by the evidence, and is contrary to law. On the stipulated facts, the court found for the plaintiff, and entered a decree accordingly. The defendants bring error.

The principal question in the case is, whether the elevators were subject to assessment by the local authorities. The question should be answered in the affirmative, unless the property is exempt from such assessment by the provisions of section 39, article I, chapter 77, Compiled Statutes of 1899, in force when the taxes in question were levied. By the provisions of that section, railroad and telegraph companies were required to return to the auditor of public accounts for taxation by the state board of equalization the number of miles of such railroad and telegraph lines in each organized county in the state, and the total number of miles in the state, including the railroad bed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs or successful operation of such railroad and telegraph lines. Then follows this proviso:

"*Provided, however,* That all machine and repair shops, general office buildings, storehouses and also all real and personal property outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where said real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

The plaintiff contends that each of the terms used in the proviso, to designate the different classes of property,

is qualified by the phrase, "outside of said right of way," etc.; and, consequently, that the location of the property, and not its character or use, is the test whereby to determine whether it should be assessed by the state board, or by the local authorities. We do not think the proviso will admit of that construction. As was said by POST, J., in *Chicago, B. & Q. R. Co. v. Hitchcock County,* 40 Neb. 781:

"The provision under consideration is not found in the revenue law of 1879, but was adopted as an amendment thereto in 1881. By the original act railroad companies were required to return to the auditor of public accounts for taxation, not only the number of miles of track, rolling stock, depot grounds, repair shops, furniture and fixtures, but all other personal property belonging to the corporation. The declared purpose of the amendment is to except from the operation of the above general provision the property enumerated therein, including all real and personal property outside of the company's right of way and depot grounds."

To read the proviso as the plaintiff contends it should be read, it would mean no more than that the real and personal property outside the right of way and depot grounds, were thereby excepted from the general provisions of the section. Had the legislature thus intended, it is not likely they would have followed a specific enumeration by general terms sufficiently comprehensive to include all the preceding terms, and it is still less likely that the learned judge, who prepared the opinion in the case referred to, would have fallen into the same error of composition, had he thus understood the proviso. Besides, from the word "also," following the conjunctive, and the repetition of the collective "all," it is clear, we think, that the phrase, "outside of said right of way," etc., was intended to qualify only the word "property" immediately preceding it.

It is true, in *Chicago, B. & Q. R. Co. v. Hitchcock County, supra,* there is one sentence which, taken by itself, would indicate that the court there held that the location

of property was the arbitrary test whereby to determine what property came within the exceptions of the proviso. But the property, which gave rise to the controversy in that case, consisted of rails, ties and other material for the construction of a railroad, and was outside the right of way. The court held that the location was the test. The language of the opinion must be read and understood in the light of the facts then before the court. That the court, in applying the test in that case, had reference exclusively to personal property, and had no intention to commit itself further than was necessary to a decision in the case before it, is clear. In the present case, the property consists of elevators, located on the plaintiff's right of way, and the question now arises, whether they fall within any of the exceptions of the proviso. The only term in the proviso, which could include elevators on the right of way, is the term "storehouses." A storehouse is "a building for keeping goods of any kind, especially provisions; a magazine * * * a warehouse." Webster. A warehouse is "a house in which wares or goods are kept; a storehouse." Century Dictionary. In *County of Erie v. Erie & Western Transportation Co.*, 87 Pa. St. 434, the court defines elevators as "warehouses for the storage and ready shipment of grain." Throughout that opinion the court uses the term elevators, warehouses and storehouses interchangeably. In *Metz v. State*, 46 Neb. 547, this court held, that a corn crib is a storehouse, within the meaning of the statute defining burglary. From the foregoing definitions, we are thoroughly satisfied that elevators are included within the term storehouses and are among the exceptions contained in the proviso in question.

The foregoing disposes in part, at least, of another contention of the plaintiff's, namely, that the elevators are exempt from local assessment, because they are "necessary for the successful operation" of the road. It is a familiar rule of construction that specific provisions control those which are general. By the general provisions of section 39, the right of way and superstructures thereon,

are exempt from local assessment. But the proviso specifically excepts storehouses, which, as we have seen, include elevators, from the operation of the general provisions preceding it. The specific provisions of the proviso, therefore, must be held to control the general provisions of the section, and to except elevators from the operation thereof.

It is next urged that the elevators, having been assessed by the state board, and the taxes levied thereon having been paid, the plaintiff, if defeated in this action, will be required to pay double taxes on the same property. This, under ordinary circumstances, would constitute a strong appeal, but it loses much of its force in view of the facts in this case. The plaintiff voluntarily listed and returned the elevators, with its other property, to the state board for taxation. A belief that they were assessable by the state board, and not by the local authorities, could arise only from, what appears to us, a most extraordinary and forced interpretation of the language of the legislature. To relieve the plaintiff from the taxes levied by the local authorities, under such circumstances, would be to permit it, by its own act, to divest the local authorities of their legal power to assess the property. The suggestion is not to be tolerated. The taxes levied by the local authorities are lawful, and no escape from their payment suggests itself. As to the taxes levied by the state board, they were not levied on the elevators specifically; the value of the elevators was simply taken into account in fixing the value per mile of the railroad; and every county through which the line passes, shares in whatever increase of taxes resulted from listing the elevators with the state board for taxation. It is obvious, therefore, that in this action the court is powerless to relieve against the taxes assessed by the state board.

It is therefore recommended that the decree of the district court be reversed and the cause remanded, with directions to enter a decree dismissing plaintiff's cause of action.

GLANVILLE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to enter a decree dismissing plaintiff's cause of action.

REVERSED AND DISMISSED.

BARNES, J., dissenting.

I am unable to concur in the majority opinion for the following reasons: It was conceded on the trial that the elevators in question are situated upon the depot grounds and right of way proper of the railroad company; that is to say, within its 100 feet of right of way, and on its depot grounds. It was further conceded that the railroad company was not engaged in buying and selling grain, and did not use the elevators for that purpose; that the structures were built by the company for the accommodation of the public, and were leased to local grain dealers, who purchased and stored grain therein to be transported to market by the railroad company as a common carrier; that it received for the use of the elevators the nominal sum of 50 cents a month; that it had properly returned them along with its other taxable property to the auditor of public accounts for valuation and assessment by the state board of equalization; that they had been so assessed, and that the company had paid its taxes thereon for the year in question; that, notwithstanding this fact, the local authorities had again taxed the property and the company had paid the taxes, amounting to about $20, under protest, and that this action was brought for the purpose of recovering the same.

Section 39, article I, chapter 77 of the old revenue law (Compiled Statutes, 1899), under which the assessment in question was made, reads as follows:

"The president, secretary, superintendent or other principal accounting officers within this state of every railroad or telegraph company, whether incorporated by any law

of this state or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list and return to the auditor of public acounts for assessment and taxation, verified by the oath or affirmation of the person so listing, all of the following described property belonging to such corporation on the first day of April of the year in which the assessment is made within this state, viz.: The number of miles of such railroad and telegraph line in each organized county in this state and the total number of miles in the state, including the road-bed, right of way, and superstructures thereon, main and side tracks, depot buildings, and depot grounds, section and tool houses, rolling stock, and personal property necessary for the construction, repairs or successful operation of such railroad and telegraph lines; *Provided, however,* That all machine and repair shops, general office buildings, storehouses, and also all real and personal property, outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

Section 40 provides, in substance, that as soon as practicable after the auditor has received the returns mentioned in the preceding section, or procured the information necessary therefor, a meeting of the state board of equalization shall be held for the purpose of assessing the property so returned; that after such assessment is made by the said board, the auditor shall certify to the county clerks of the several counties in which the property returned is situated, the assessment per mile, and the amount in each of said counties, and that "All such property shall, for the purpose of taxation, be deemed 'personal property,' and be placed on the tax list as hereinafter provided." Construing this law in the case of *Chicago,*

B. & Q. R. Co. v. Hitchcock County, 40 Neb. 781, we used the following language:

"It is contended by the plaintiff that the character of the property and use for which it is designed, and not its precise location, is the test which should be applied in determining whether it is taxable by the state board or the local authorities, but we can not so construe the section mentioned without ignoring the plain language of the proviso. It would seem that the intention of the legislature was rather to provide a fixed and arbitrary rule for the taxation by the state board of the property of railroad and telegraph companies within their right of way and depot grounds, and all other property by the local authorities."

The facts in this case bring it clearly within the rule above stated. The decision quoted from is supported by *Red Willow County v. Chicago, B. & Q. R. Co.*, 26 Neb. 660; *Burlington & M. R. R. Co. v. Lancaster County*, 15 Neb. 251; *Burlington & M. R. R. Co. v. Lancaster County*, 7 Neb. 33, and in the opinion of the writer we should not overrule these decisions, and at this time adopt a new construction of the statutes.

Again, it clearly appears from the record that these elevators were built by the railroad company, and leased for merely a nominal sum for the purpose of enabling the lessees to collect and store grain therein to be shipped over its lines for gain or hire; and they may be fairly said to be structures proper and necessary for the successful operation of the road, and especially is this true where, as in this case, there are no grain elevators at the stations in question owned by private persons or individuals which can be used for that purpose. They are, for that reason, exempt under the statute quoted, from taxation by the local authorities. *Herter v. Chicago, M. & St. P. R. Co.*, 114 Ia. 330; *Chicago, M. & St. P. R. Co. v. Board of Supervisors*, 48 Wis. 666; *Milwaukee & St. P. R. Co. v. City of Milwaukee*, 34 Wis. 271, and *Red Willow County v. Chicago, B. & Q. R. Co., supra.*

For the foregoing reasons, together with the fact that

the majority opinion herein results in subjecting the railroad company to double taxation, a thing which we should not sanction, the judgment of the district court should be affirmed.

MARY A. TOPPING, APPELLEE, V. JACOB COHN, APPELLANT.

FILED APRIL 7, 1904. No. 13,484.

1. **Accretions.** Where the water of a river gradually recedes, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor.
2. ———. Where, at the time of a grant from the United States, the bank of a river formed a part of the boundary of the grant, subsequent accretions formed by the gradual recession of such bank attached to and became a part of the grant.
3. ———: SUBSEQUENT CONVEYANCES. A subsequent conveyance by such grantee, without describing such lands by metes and bounds, but by the number or numbers by which the same are designated in the government survey, passes the title, not only to the land originally constituting the grant from the United States, but to the accretions thereto.
4. **Adverse Possession.** No title by adverse possession can be acquired against the state or general government, nor is land the subject of adverse possession while the title is in the state.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Reversed.*

John C. Watson and *John V. Morgan,* for appellant.

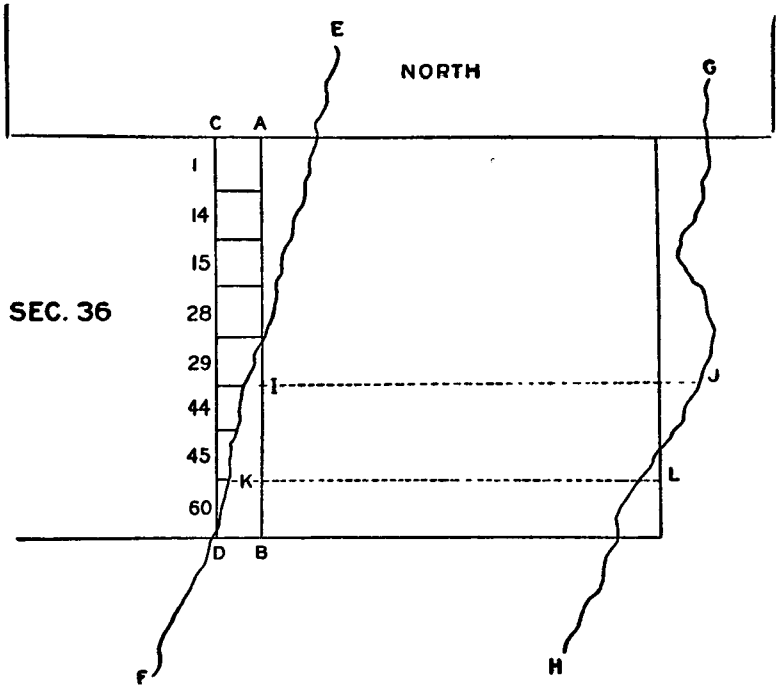
W. F. Moran, contra.

ALBERT, C.

This is a suit in equity, brought to quiet the title to certain real estate. On page 560 is a plat which will, perhaps, assist to a proper understanding of the case.

The line AB represents the eastern boundary of section 36, town 8, range 14 east of the 6th P. M.; the line CD, the

western boundary of certain lots in said section, which are numbered 1, 14, etc.; the irregular line EF, the right bank of the Missouri river, as it was at the time of the government survey and at the time of the grant to the state hereinafter mentioned. The river gradually receded to the east until some time before 1901, and the right bank is now located as indicated by the irregular line GH. The land in dispute is bounded on the west by the east line of



lots 44 and 45; on the north, by the dotted line IJ; on the east by the right bank of the Missouri river, as now located; on the south, by the dotted line KL. The triangular tract of land lying between the former right bank of the Missouri river and the north half of section 36, and marked M, is what is referred to in the record as lot 1 of section 31, town 8, range 15 east of the 6th P. M. Section 36 was a part of the grant of the United States to the state of

Nebraska, and the state, on the 23d day of September, 1901, sold and conveyed lots 44 and 45 to the defendant. The lots are not described by metes and bounds in such conveyance, but by the respective numbers by which they are designated in the government survey. The plaintiff asserts title, not only to the land in dispute, but to the entire tract lying between the line AB and the present right bank of the river. While she introduced deeds from different parties, purporting to convey to her different portions of this tract, it does not seem that she traces her title to any portion of it to a grant from the United States, but claims exclusively by adverse possession. On the other hand, the defendant contends that the land in dispute is the proportionate share of the accretion resulting from the recession of the river, which belongs to 44 and 45, conveyed to him by the state, and that the title to such share of the accretion passed to him by such conveyance. The trial court found for the plaintiff and entered a decree accordingly. The defendant appeals.

It would appear from the record that the former right bank of the river was in fact the eastern boundary of the south half of section 36, and consequently of lots 44 and 45 of that section, according to the government survey, and at the time of the grant of said section to the state. The state, therefore, became the riparian proprietor to the extent of such boundary. It is well settled that where, as in this case, the water of a river recedes gradually, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor. *Gill v. Lydick,* 40 Neb. 508; *Wiggenhorn v. Kountz,* 23 Neb. 690; *Lammers v. Nissen,* 4 Neb. 245.

As before intimated, lots 44 and 45 are not described by metes and bounds in the conveyance from the state to the defendant, but by the numbers by which such lots are described in the government field notes. Under such conveyance, the title to such portion of the accretion as attached to those lots passed to the defendant. *Rex v. Yar-*

borough, 3 Barn. & Cr. (Eng.) *91; *County of St. Clair v. Lovingston*, 23 Wall. (U. S.) 46; *Chicago Dock & Canal Co. v. Kinzie,* 93 Ill. 415; *Camden & Atlanta Land Co. v. Lippincott,* 45 N. J. Law, 405; *Lammers v. Nissen,* 4 Neb. 245, 154 U. S. 650.

It may be conceded that the possession of the plaintiff of the land in dispute has been of such a character and for such a period as to have ripened into a title in fee before the commencement of this action, had she been holding adverse to the defendant, or any other person against whom the statute would run during that time. But, so far as appears from the record, the United States and the state of Nebraska were the exclusive owners of the adjacent lands until 1901, when the state conveyed lots 44 and 45 to the defendant. That no title by adverse possession can be acquired against the state or general government is elementary. Land can not be the subject of adverse possession while the title is in the state. *Bagley v. Wallace,* 16 S. & R. (Pa.) 245; *Hall v. Gittings,* 2 Harr. & J. (Md.) 112; *Armstrong v. Morrill,* 14 Wall. (U. S.) 120. It follows, then, that the statute did not begin to run in favor of the plaintiff as to any portion of the accretion until 1901, when the title to lots 44 and 45 passed from the state to the defendant, and then began to run only as to that portion of the accretion attaching to said lots.

The record does not afford sufficient data nor do we deem it necessary to determine what portion of the accretion thus passed to the defendant. That it includes at least a considerable portion of the land in dispute is obvious, under the familiar rules for the apportionment of accretions. The plaintiff has not shown title of any kind to any portion of the land, and therefore the decree quieting her title in the whole is obviously erroneous in any proper view of the case.

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

FAWCETT and GLANVILLE, 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 cause remanded for further proceedings according to law.

REVERSED.

SECOND UNITED PRESBYTERIAN CHURCH, PAWNEE CITY, NEBRASKA, APPELLANT, V. FIRST UNITED PRESBYTERIAN CHURCH, PAWNEE CITY, NEBRASKA, ET AL., APPELLEES.

FILED APRIL 7, 1904. No. 13,534.

1. **Wills:** CONSTRUCTION. The mere misnomer of a legatee or devisee does not render the gift void, if, from the context of the will or proof *dehors* the instrument, it can be ascertained who was actually intended.
2. ———: MISNOMER. Where one claiming as devisee under a will is not designated therein by his proper name, he may show that he is also known by the name used in the will to designate the devisee, although the name of another claimant exactly corresponds to the name thus used.
3. ———: AMBIGUITY. In such case there arises a latent ambiguity, which may be removed by evidence of circumstances tending to show which of the two claimants the testator intended as the object of his bounty.
4. **Evidence.** Evidence examined, and *held* sufficient to sustain the decree of the district court.

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

J. W. Deweese, F. E. Bishop, George W. Scott and *S. J. Graham,* for appellant.

Lindsay & Raper and *James R. Hanna, contra.*

ALBERT, C.

In 1870, a religious body was organized in Pawnee City, under the corporate name of the United Presbyterian

Church of Pawnee City, Nebraska. It is claimed on the one hand, and denied on the other, that the corporate name was changed, in 1881, to the First United Presbyterian Church, etc. In 1887, another religious body was organized in the same city, under the corporate name of the Second Presbyterian Church of Pawnee City, Nebraska. Ecclesiastically, as well as legally, the two organizations were entirely independent of each other, save that they were within the jurisdiction of the same presbytery and synod of the denomination known as the United Presbyterian Church of North America to which they belonged. They will be referred to hereafter as the first and second church, respectively.

David Remick resided in that city from 1870 to 1880, and retained business interests therein and made frequent visits thereto until his death. He died testate in 1901, in the state of California, and his will was duly probated. The devise which gave rise to the present litigation is as follows:

"I will to the United Presbyterian Church of Pawnee City, Nebraska, the following described land in Greeley county, Nebraska, to be managed and expended in a way the trustees of said church may deem best for the welfare of said church." (Here follows a description of the land.)

After the probate of the will, the trustees of the first church conveyed the land in question to the Pawnee City Academy, which is an educational institution of the same denomination. Afterwards, the second church began this action against the Pawnee City Academy and others in the district court for Greeley county, claiming that under said devise it took title to one-half the land mentioned therein, and asked to have its title thereto confirmed. The first church intervened, was made a party defendant, and filed its answer asserting ownership of the land under the will. The court found against the plaintiff and in favor of the intervener. The plaintiff brings the case here on appeal. The controversy here is exclusively between the first and second churches.

It is claimed on behalf of the second church, that the first church, having changed its name before the will was made, from the United Presbyterian Church to the First United Presbyterian Church, does not bear the name used in the will to designate the devisee, but that the two churches, taken together, constitute a corporate ecclesiastical entity, which corresponds to the name used by the testator to designate the devisee, and that the devise, therefore, goes to such entity, to be apportioned between two congregations constituting the first and second churches.

There is considerable doubt arising from the evidence, whether a change in the corporate name of the first church was legally effected, but it does not appear to be necessary to go into that question; because, whatever steps may have been taken to that end, it is clear that, after such steps were taken, and down to the time of the trial of this case in the district court, the first church continued to be known by the name of the United Presbyterian Church of Pawnee City, Nebraska, under which it was organized, although it was also known by the other name. In 1883, it erected a large church edifice, which was paid for, in part at least, by subscriptions from its members and the public generally. A number of these subscriptions were reduced to notes as late as 1884 and 1885. One of the subscription papers and a number of the notes are in evidence, and in each instance the church is designated by its original name. In 1884, a contract was made for furniture for the new church edifice, and a mortgage for $5,000 given on the church property. In both of these instruments, as well as in the note for the security of which the mortgage was given, the church is described as the United Presbyterian church. The same is true of a policy of insurance on the church property, issued in 1889. As late as 1887, it appears to have been referred to by one of the newspapers of Pawnee City by its old name. Another significant fact bearing on this point is that, from 1870 down to the present time, the accounts of the church of

its different funds, in the several banks of Pawnee City, were kept in the name of the United Presbyterian Church of Pawnee City, Nebraska. The testator was president of one of these banks for a number of years immediately preceding his death. It will not be claimed, we think, that it is necessary, in order to sustain a devise to the first church, that it should be designated in the will by the precise name it had adopted.

The rule is thus stated in Schouler, Wills (3d ed.), sec. 583:

"The mere misnomer of a legatee or devisee does not render the gift void, if from the context of the will or proof of the admissible sort *dehors* the instrument it can be ascertained who was actually intended. Persons designated by their nicknames, too, or by words of misdescription originating in some nickname, or by their popular names, or by some familiar term of endearment, may also be identified. So, too, may a name assumed or gained by reputation, though not strictly appropriate, amount to a sufficient description of the person intended. Nor need a legatee be expressly named at all if oral proof of identity serves to connect him with the gift which the will expresses."

The doctrine of the text is familiar, and is supported by a long list of authorities. Assuming, as claimed on behalf of the second church, that the two churches taken together constitute a corporate ecclesiastical entity, corresponding to the name used in the devise and capable of taking thereunder, the most favorable view that can be taken, with respect to the claim of the second church, is that there are two bodies answering to the name used by the testator to designate the object of his bounty, namely, the first church and the "corporate ecclesiastical entity" consisting of the first and second churches. This gives rise to a latent ambiguity. It is elementary that an ambiguity of this character may be removed by any evidence, either of circumstances or declarations of the testator, tending to show which of the two persons answering to the description the testator had in mind when the will was made. Schouler,

Wills (3d ed.), sec. 573. The rule is illustrated and applied in numerous cases collected in 2 Am. & Eng. Ency. Law (2d ed.), 298.

The only question then is, whether the testator, by the use of the name, the United Presbyterian Church of Pawnee City, Nebraska, intended the first church, or had in mind a body consisting of both the first and second churches. The evidence on this point is quite voluminous, and we shall notice only what seems to us to bear most strongly on the question. It sufficiently appears that, during the residence of the testator in Pawnee City, four church organizations were maintained there: (1) The United Presbyterian Church; (2) the First Presbyterian Church; (3) the First Baptist Church, and (4) the First Methodist Church. He was not a member of any of them, but the evidence shows a decided preference on his part for the first. During his residence there, that church was presided over by the Rev. R. J. McCready, whose pastorate continued up to the trial of this case. The testator appears to have held him in high esteem; and between the two men there existed a strong bond of friendship, which was broken only by the death of the former. During his residence in Pawnee City, the testator usually attended the first church, and his daughter was a teacher in its Sunday school. After his removal, on each subsequent return, he visited the Rev. McCready, or the latter, alone or with his family, visited him. The last of these visits appears to have been in 1898 or 1899, and on this occasion the testator made inquiries of the pastor in regard to the church over which he presided, as well as in regard to the other organizations which were in existence during his residence in that place. It does not appear that he made any inquiry in regard to any other church organization, although there were three others at that time. It also sufficiently appears that, after his removal from Pawnee City, he expressed an intention to help the Rev. McCready's church or congregation. In addition to the devise hereinbefore mentioned, the testator made provision by will for

the First Presbyterian Church, the First Baptist Church and the First Methodist Church, all of Pawnee City. The evidence tends to show grounds for a special interest in each of the three churches just mentioned. They were in existence during his residence in that city. His first wife was a member of one of them; his second wife of another, and a nephew, in whom he took unusual interest and to whom he left a considerable portion of his property, was a member of the third. It was these three churches, and the one presided over by the Rev. McCready, of which he made special inquiry on the occasion of his last visit to Pawnee City, and the names by which these four churches were known and designated during his residence there correspond exactly with the names used in the will to designate the objects of his bounty. Three other churches were organized after his removal from Pawnee City, one of which is what we have heretofore referred to as the second church and the plaintiff in this case. None of them are specifically mentioned in the will, nor any of them referred to in any way, unless it should be held that the second church is included in the devise under consideration. It also appears in evidence that the second church was organized as a result of some difference between the members of the first church, the dissatisfied members withdrawing and organizing the second church. The evidence shows that the testator was aware of this division, and disapproved of the organization of the second church. There is nothing in the record to show that he ever expressed any intention to assist it, or that he took any special interest in it, save that on one occasion he attended one of its services. Taking into account all the circumstances—the interest the testator manifested in the first church, the strong friendship that existed between him and the reverend gentleman who was its pastor for so many years, that the first church and the three other churches in Pawnee City mentioned in the will were associated in his mind with his life and business career in Pawnee City—the evidence seems amply sufficient, if not

conclusive, that the testator, in the use of the name, the United Presbyterian Church of Pawnee City, Nebraska, had in mind the first church and no other.

Our attention is called to another provision of the will, whereby certain property was left "to the trustees of the United Presbyterian Church of Hepburn, Page county, Iowa, for the benefit of such church (said church now being presided over by Rev. D. Dodds) and to the trustees of the United Presbyterian Church, in Page county, Iowa, to be disposed of as the trustees of said church think best for the benefit of said church." The evidence shows that the United Presbyterian denomination had six or seven congregations or churches in Page county, Iowa, at the time the will was made, one of which was presided over by Rev. D. Dodds. It is argued that as the testator was so specific in his description of the church in Hepburn, going to the extent of naming its pastor, he would have been equally specific in designating the first church in the devise under consideration, had he intended it as the devisee. That simply goes to the sufficiency of the evidence to sustain a finding that the first church was the object the testator had in mind when he used the name, the United Presbyterian Church, etc.; and, to our minds, it is wholly insufficient to rebut the inference to be drawn from the facts hereinbefore stated. It is not unusual for a person to exercise the greatest precaution, or to express himself with the highest degree of accuracy up to a certain point, and then relax his vigilance. It is not always easy for the person himself to explain how this happens. In the present instance, it is probable that, when the testator called to mind the intended objects of his bounty, the names by which he had known the churches in Pawnee City during his residence there came to him with all the strength of early impressions, leaving no room for doubt, in his mind, as to the exact names by which they should be designated in the will.

We are thoroughly satisfied that the decree of the district court is in accordance with the intention of the tes-

tator, which, after all, is the chief thing to be considered in determining the construction to be put on a will. It is therefore recommended that the decree of the district court be affirmed.

FAWCETT and GLANVILLE, CC., concur.

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

AFFIRMED.

WILLIAM A. GORDON V. CITY OF OMAHA.

FILED APRIL 7, 1904. No. 13,387.

1. **Cities:** ACTION. A public officer who has by mandamus compelled the payment of the principal of his salary, can not afterwards maintain an action at law against the municipality out of whose funds such salary is payable to recover interest thereon.

2. ———: DAMAGES. Damages are not recoverable against a metropolitan city of Nebraska because of delay or neglect of its mayor and council in the performance of a ministerial duty.

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

J. W. Eller, for plaintiff in error.

C. C. Wright and *W. H. Herdman, contra.*

GLANVILLE, C.

This case was tried in district court upon appeal from the action of the city council of the city of Omaha in disallowing a claim filed by the plaintiff in error, as assignee of Samuel I. Gordon, against such city for certain amounts of interest claimed to be due because of delay in the payment of the salary of his assignor as police judge of that city. Payment of the principal of such salary was secured by plaintiff's assignor by means of writs of mandamus

issued to the mayor and council of said city, in which they were required as ministerial officers to perform the acts necessary to the payment of such salary. The writs were sought and issued requiring the payment of a specific amount, being the principal only of such salary, and no mention of interest thereon was made in those actions. We are fully satisfied that the plaintiff's assignor could not split his cause of action and secure the payment of the principal in one form of action, and afterwards, by himself or his assignee, resort to another form to secure the payment of interest. Again, we are satisfied that a municipal corporation is not responsible in damages to one injured by the failure of its officers to perform a ministerial duty expressly placed upon such officers by law. To allow the plaintiff's action for interest for the time of the delay in the payment of his salary, would be to give him damages against the city because of the failure of its public officers to perform an act enjoined by law upon them, stipulated in this case to have been a ministerial duty. Such damages, if recoverable at all, can only be recovered from such officers and their sureties upon their official bonds.

The judgment of the trial court upon the pleadings and stipulated facts, wherein it dismissed plaintiff's action, is right and should be affirmed. We therefore recommend that it be affirmed.

FAWCETT and ALBERT, CC., concur.

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

AFFIRMED.

WESTERN MATTRESS COMPANY V. JENS OSTERGAARD.*

FILED APRIL 7, 1904. No. 13,518.

1. **Action for Damages:** CONTRIBUTORY NEGLIGENCE. If a servant's injury is the direct result of his own disobedience of orders given by one in charge of the work in which he is engaged, he is guilty of contributory negligence and is not entitled to recover therefor.
2. **Trial:** QUESTION FOR JURY. When there is evidence tending to show that an employee disobeyed the orders of his superior, and that obedience to the order would have avoided the injury of which he complains, the question of whether the orders were given should be submitted to the jury.

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

T. J. Doyle and *Strode & Strode*, for plaintiff in error.

Frederick Shepherd, contra.

DUFFIE, C.

Plaintiff in error is engaged in the manufacture of iron bedsteads at the city of Lincoln. Ostergaard, an employee, was injured in the defendant's foundry by molten metal, which flew from a chill or mould and struck him in the left eye. It appears from the evidence that the foundry is provided with a number of benches, where the hands "assemble" or place the rods and other parts of the bed in a frame attached thereto in such manner as, when bound together, to make a completed head or foot piece of the bed. The frame is also supplied with moulds or chills at proper places, and into these, after the rods and parts have been assembled and the frame unlocked, one of the employees pours molten metal through spew holes opening thereon. By this means the rods or parts are molded and bound together and, after the molten metal has cooled, the workmen unlock the frame and take out the completed head or foot piece of the bed. There are two dangers accompanying this process. One from some of the molten

* Rehearing allowed. See opinion, p. 575, *post.*

metal dropping upon the ground and "popping" or throwing off minute particles of the metal. This popping from the ground does not usually arise higher than a man's knees or waist. The other danger arises from the rod upon which the molten metal is poured being damp or rusted, in which case the popping comes from the mould or chill, and the face and eyes of the workmen are endangered thereby. To guard against injury from the last mentioned cause, the company usually furnished each of its employees, upon their entering its service, with a notice reading as follows: "Notice to men entering the employ of the Western Mattress Company in the iron bed department: You are requested to bring a two pound blacksmith's hammer and a pair of glasses. These glasses are to protect your eyes from injury, and, while not compulsory on your part to wear them, still we advise you to take this precaution. The best pair of glasses can be made by buying what are commonly called 'goggles,' being composed of a light screen work of wire with glass in front; the glass should be removed and mica or, as it is often called, 'isinglass' substituted. This makes a pair of glasses that will not break and which, if struck by a hot iron, will not be destroyed or burned in any way. The gauze or iron part of these glasses extends away from the eye, giving ample ventilation, so there will be no difficulty from sweating around the eyes, as there would be from ordinary glasses." By some oversight the company neglected to give this notice to the defendant in error when he entered its employ. Within two or three days after commencing work he was engaged in filling the frame with the iron rods, and was standing near thereby when the "pourer" filled the moulds or chills with molten metal, and what is denominated a "pot" came from the chill, throwing a piece of the hot iron into his eye, from which he suffered great pain, and the sight, while not destroyed, is injured to a considerable extent. The negligence charged is the failure to provide him with goggles or to notify him of the danger attending his work. A trial resulted in a verdict

for the defendant in error and, judgment having been entered thereon, the case is brought here for review.

Many exceptions are taken to the instructions given by the court, and to the refusal of the court to give those asked by the plaintiff in error. We do not think that it is necessary to review all the questions made, as the case, in our opinion, will have to be reversed upon the refusal of the court to give the tenth instruction requested by plaintiff in error. This instruction is as follows:

"If the jury find from the evidence that defendant's foreman instructed the plaintiff to stand behind him (the foreman), and turn his face in the opposite direction from the chills into which molten metal was being poured at the time of the accident, and if the plaintiff did not obey such instructions, but stood with his face in the direction of the chills into which molten metal was being poured at the time of the accident, then he can not recover in this action."

Roy Redding was foreman of the company at the time the accident occurred, and the party who poured the molten metal into the moulds or chills. He testified that he directed Ostergaard to stand back behind him, and to turn his back to the mould or chill while the metal was being poured. The evidence is uncontradicted that Ostergaard stood facing the mould or chill at the time he received the injury. It is apparent that, if he had obeyed the instructions of the foreman and turned his back to the moulds, the injury to his eye would not have happened. Whether such instructions were given him or not was a question for the jury, and plaintiff in error had the right to have that question submitted to the jury, and to take their judgment upon any conflicting evidence relating to the giving of such instructions. The law is plain that, if the servant's injury is the direct result of his own disobedience of orders, he is guilty of contributory negligence and can not recover on that account. We have examined the instructions with care, and we find nothing in them that is the equivalent of the tenth instruction asked by the plaintiff in error, or

calls the attention of the jury to this theory of the case. We think there was error in the refusal of the court to give this instruction or one covering the point raised, and we therefore recommend a reversal of the judgment.

LETTON and KIRKPATRICK, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed November 16, 1904. *Judgment of reversal adhered to:*

1. **Trial:** INSTRUCTIONS. When a special request is made for an instruction which fairly reflects either a meritorious cause of action or ground of defense, the court should either give the instruction requested or substitute another in its stead which embodies the same principal.

2. **Negligence:** INSTRUCTION. When an allegation of negligence is unsupported by any competent testimony, it should not be given in an instruction to the jury.

OLDHAM, C.

The original opinion in this case was announced by DUFFIE, C., *ante,* p. 572. The issues are fully and fairly stated in the opinion and need not be again set out. A rehearing was granted for a further examination of the conclusion reached. It is held in the opinion that the judgment of the district court was erroneous, in refusing to submit to the jury the question as to whether plaintiff was injured while disobeying an instruction given him by the foreman of defendant, who, for that purpose, stood in the place of the master. One of the defenses relied upon and supported by the testimony of defendant's foreman was that, when plaintiff was employed, he was directed by the foreman to turn his back to the foreman when the moulds were being filled with molten metal. While this direction was denied by plaintiff, the testimony on this

issue raised a question of fact on a meritorious defense, which should have been submitted in a proper instruction. It is not necessary to determine whether the instruction requested was the best that could have been compiled; it is sufficient to say that it fairly called the attention of the trial court to one of the defenses relied upon, and that either the instruction requested, or a better one embodying the same principle, should have been given. In fact, it is probably the duty of the trial court, without a request, to embody in the instructions to the jury every meritorious cause of action or ground of defense raised by the pleadings and supported by competent evidence. But, in any event, when a special request is made for an instruction which fairly reflects either a meritorious cause of action or ground of defense, the court should either give the instruction requested or substitute another in its stead which embodies the same principle.

While, as above indicated, the defendant introduced testimony tending to show that the injury was occasioned by plaintiff disobeying the orders of his foreman in not turning his back when the chills were being filled, yet, even under defendant's testimony, there is a serious doubt as to whether plaintiff might not have been misled by another direction given him by the foreman, to the effect that, if he (the plaintiff) stood behind the foreman when the metal was poured into the chills, he could not be hurt. But, in any event, the question as to whether plaintiff was properly instructed in such a manner as to fully warn him of his danger and whether he obeyed or disobeyed the instruction so given, was a question raised by the pleadings on which there was conflicting evidence and, as a correct verdict depended on this issue, it should have been given in a proper instruction to the jury; and as, for this reason, a new trial will be necessary, we would suggest that the learned trial judge give a new set of instructions to the jury, confined strictly to the questions in issue, and not submitting any question unsupported by any testimony, as was done in the 5th and 6th paragraphs of instructions

given on its own motion at the former trial. These instructions submitted the alleged negligence of the defendant in not providing a shield or guard over the frame to prevent the heated metal from flying out. While negligence is alleged in the petition because of this failure, yet the testimony wholly fails to support this allegation of the petition, and, being wholly unsupported by competent evidence, it should not have been submitted to the consideration of the jury.

We therefore recommend that the former judgment of this court be adhered to.

AMES and LETTON, CC., concur.

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

REVERSED.

HENRY DU BOIS V. ANN MARTIN, APPELLEE, ET AL., IMPLEADED WITH SAMUEL C. COLT, APPELLANT.

FILED APRIL 7, 1904. No. 13,420.

Foreclosure: DOWER: STATUTE OF LIMITATIONS. A mortgagee obtained a decree of foreclosure in the year 1877, the proceeds of the sale being distributed among various lienholders according to their priority, leaving a balance insufficient to satisfy the lien of the mortgage. The question of the dower interest of the mortgagor's wife was presented in the foreclosure suit, but there was no adjudication thereof in the decree. She was made a party and served with summons, but made no appearance in the suit. In 1901, the mortgagee filed a supplemental cross-petition in the foreclosure suit, serving summons upon the mortgagor's wife, and asking that she be decreed to pay him the balance due on his mortgage, or be barred of her dower right. *Held*, That the attempted proceedings were barred by the statute of limitations.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

Ricketts & Ricketts, for appellant.

Strode & Strode and *Guy A. Anderson, contra.*

KIRKPATRICK, C.

It is disclosed by the record in this case that one O. J. Martin was the owner of certain land in Lancaster county, Nebraska; and of this land the S. ½ of the N. W. ¼ of section 28, township 12, range 6, involved in this controversy was a part. Ann Martin, appellee, was the wife of O. J. Martin. On April 15, 1874, one Seeley Y. Mason recovered a judgment against O. J. Martin for the sum of $450.88, and on November 2, 1874, Martin and his wife executed a mortgage upon the premises to appellant, Samuel C. Colt, for $1,272. Some time later O. J. Martin seems to have executed a second mortgage upon the premises to one Henry Du Bois; and on August 19, 1876, Du Bois brought a suit of foreclosure, and made Mason, the judgment creditor, and Samuel C. Colt, appellant, parties defendant. Colt filed an answer and cross-petition, making Ann Martin, appellee, a party defendant, and legal service of summons seems to have been made upon her. Seeley Y. Mason answered, setting up his judgment, which antedated all the mortgages, and alleged that he had levied upon the land in controversy in the case at bar under an execution issued upon his judgment, and had sold the land, bidding it in himself, prior to the commencement of the foreclosure proceedings. This cause was referred to a referee to return findings of fact and conclusions of law, which was done; and, subsequently, in 1877, a decree of foreclosure was entered on the report of the referee, fixing the amount of the liens, and determining the priorities of the various parties. Ann Martin, appellee, seems to have made default in the foreclosure proceedings, but the decree was silent as to her dower interest, and the land in controversy was omitted from the decree and order of sale. After satisfying the prior liens from the proceeds of

the sale, there remained to apply on the decree of appellant, Colt, the sum of $515.30, which would leave a balance due him of $756.68. No further payment seems ever to have been made by Martin upon this indebtedness. In 1893 O. J. Martin died, leaving surviving him appellee, his widow. On September 12, 1901, appellant Colt filed in the old case of *Du Bois v. Martin,* in which the proceedings hereinafter referred to were had, a pleading which he styled a supplemental cross-petition, in which he sets out the transactions substantially as hereinbefore narrated, and prayed for a decree, that, on the failure of Ann Martin to pay the balance due on his decree within a time to be fixed by the court, her dower interest in the premises might be sold for the satisfaction thereof. To this supplemental cross-petition, appellee answered, setting up the foreclosure of appellant's mortgage in the proceedings mentioned; that no mistake had been made in the entry of the decree; that no proceedings had ever been taken to correct, modify or appeal from it, and that it had become final; and that the mortgage was wholly barred by the statute. To this answer was filed, for reply, a general denial. Trial was had, which resulted in a finding that the mortgage of appellant was barred by the statute of limitations, and judgment dismissing the supplemental cross-petition. The correctness of this judgment, so entered, is presented in this appeal.

It is contended on behalf of appellant that, inasmuch as the pleadings in the first foreclosure case presented the question of the dower right of appellee in the real estate in controversy herein, and no action was taken by the court in that case upon this question, therefore, the effect was to leave the question of dower right an undetermined and pending question, and that, as such, it could be brought to the attention of the trial court at any time, and, it being a pending case, the statute of limitations would not run. We are not disposed to question the correctness of the decisions, cited by appellant, in cases where the facts were such as to warrant the application of the principle con-

tended for; but, in the view we take of the facts of this case, these decisions have no application. The answer and cross-petition of appellant Colt having presented an issue of the dower right of appellee, we are of opinion that it must be conclusively presumed to have been adjudicated. If appellant neglected to obtain all the relief to which he was entitled under his mortgage, it was due to his own neglect, and we are of opinion that he can not now be heard to complain.

A decree was entered in the case, a sale was had, and the proceeds were distributed, a portion of which was paid to appellant. The case was closed up, and we do not see upon what principle it could ever again be considered as a pending cause. The fact that appellant filed a supplemental cross-petition, and caused new service to be made upon appellee, would seem to indicate that appellant himself regarded his action as the commencement of a new proceeding. We are of opinion that appellant, having failed in the first proceeding to insist upon his lien upon all the land covered by his mortgage, is in the same position he would occupy had he made proof but for half the amount actually due him at the time. It would hardly be contended that he could now come in, at the end of nearly 25 years, and have a decree for the remainder. The only right of action appellant has must arise out of his mortgage, and all rights thereunder having become fully barred by the statute, there can be no recovery. The judgment of the trial court in dismissing the cross-petition of appellant seems to be right, and it is recommended that it be affirmed.

DUFFIE and LETTON, CC., concur.

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

AFFIRMED.

C. D. SMILEY ET AL., APPELLEES, V. SIOUX BEET SYRUP COMPANY ET AL., APPELLEES, ABEL ANDERSON, TRUSTEE, INTERVENER, APPELLANT.*

FILED APRIL 7, 1904. No. 13,564.

Corporation: RECEIVER: PARTIES: LIENS: PRIORITIES. A corporation issued bonds in the sum of $35,000, to secure which it executed a mortgage in the name of a trustee. Bonds to the extent of $17,000 were disposed of, the proceeds being applied to the satisfaction of the corporation's indebtedness. Subsequently, a stockholder on behalf of himself and all the other stockholders made application to the court for the appointment of a receiver, no notice of such application being served upon either the trustee or any of the bondholders, who were not made parties to the proceedings. *Held*, That the receiver's certificates issued for expenses incident to the receivership were not a lien superior to that of the mortgage.

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

A. L. Beardsley, for appellant.

Shull & Farnsworth and *R. E. Evans, contra.*

KIRKPATRICK, C.

This cause is brought to this court upon appeal from a judgment of the district court for Dakota county. In order to obtain a correct understanding of the questions presented, it will be necessary to state briefly the history of the proceedings leading up to the judgment presented for review. Prior to December 23, 1903, the Sioux Beet Syrup Company was a duly incorporated company, having its place of business in Dakota county. On that date, one C. D. Smiley, a stockholder of the corporation, on behalf of himself and all the other stockholders, filed a petition in the district court, asking the appointment of Andrew J. Cramper as receiver of the corporation. A waiver of notice of the application and a certified copy of

* Rehearing allowed. See opinion, p. 586, *post.*

the minutes of the stockholders' meeting held December 22, 1902, showing a request that a receiver be appointed, and that Andrew J. Cramper be named as such receiver, were filed by the corporation. Acting on this application and the consent of the corporation, a receiver was appointed on the 24th day of December, 1902. The receiver gave bond and took charge of the corporation. On December 4, 1902, about 20 days before the receiver was appointed, the corporation executed a mortgage upon all of its property to secure its bonds which were to be issued in the sum of $35,000. In the mortgage given to secure these bonds, Abel Anderson, appellant herein, was named as trustee. Of the $35,000 in bonds provided for, about $17,000 were issued and disposed of, and the proceeds realized therefrom applied upon the indebtedness of the corporation. None of the bondholders were made parties to the proceedings for the appointment of a receiver. On January 3, 1903, Smiley, plaintiff in the receivership proceedings, served notice on Anderson, trustee for the bondholders and appellant herein, that on January 12, 1903, he would apply to the district judge, at Pender, in Dakota county, for an order permitting the receiver to issue receiver's certificates, which should be a lien superior to the mortgage. Anderson, trustee, appeared specially and challeneged the jurisdiction of the court, and objected to the issuance of the receiver's certificates upon various grounds. On January 12, the day set for the hearing, these objections were overruled, and the receiver was authorized to issue certificates in the sum of $2,500 which should be a lien upon the property of the corporation, superior to the mortgage. No further steps seem ever to have been taken under the receivership as it then existed, but on February 17, 1903, Smiley, the plaintiff, served a second notice on the corporation that, on February 23, he would apply for the appointment of a receiver. He thereupon filed a motion based on the petition filed in the first instance, asking that a receiver be appointed, and on the day fixed for the hearing Andrew J. Cramper was appointed receiver. Neither

the trustee nor any other person representing the mortgage were made parties to this last proceeding, nor was any notice served upon the trustee or the bondholders. On July 1, 1903, the receiver filed his final report, showing his transactions, the sale and disposition of a large amount of the property of the corporation, and the incurring of a large amount of indebtedness for the protection of the corporation property, attorneys' fees, court costs, etc.; and showing that he had issued receiver's certificates in the sum of $2,307.31, which he asked to have made liens upon the property superior to the mortgage. Thereupon, appellant Anderson, by leave of court, filed a petition of intervention, setting up the mortgage; the amount of bonds which had been sold; that he had had no notice of the application for a receiver; that the petition upon which the receiver was appointed failed to state a cause of action, and that the receivership proceedings were void and of no effect as affecting the lien of the mortgage, for want of notice. No answer was filed to this petition of intervention. On the next day, July 2, a trial was had on the issues presented by the petition of intervention, resulting in a judgment approving the final report of the receiver, ordering his discharge, and adjudging that the receiver's certificates, amounting to $2,307.31, were valid liens upon the property of the corporation superior to the lien of the mortgage; and the correctness of this judgment of the trial court is presented for determination by this proceeding.

It is contended on the part of appellant: First, that the petition for the appointment of a receiver did not state facts authorizing the court to make such appointment and, therefore, the appointment was void; second, that the holders of the bonds of the corporation were not made parties to the proceedings, and had no notice of the application for the appointment of a receiver, and, therefore, their interests could not be affected by such proceedings; third, that in no event could the rights of the bondholders be made subject to the receiver's certificates, even though the receiver had been regularly and lawfully appointed. These

questions, so far as necessary, will be considered in the order stated.

Touching the first contention, the petition shows that plaintiff is a stockholder; that the manufacturing plant belonging to the corporation is worth $65,000; that there is on hand belonging to the corporation something like $10,000 worth of merchandise; that a mortgage for $35,000 had been executed, and $17,000 worth of the bonds had been disposed of; that the proceeds of the bonds sold had been applied to the satisfaction of the debts of the corporation; that the corporation was indebted to some further amount, the exact amount not being disclosed; that the plant was insured for $45,000, and that to keep the insurance valid, the plant must be either operated or cared for; that the corporation had under contract a large amount of beets, and a large amount of syrup on hand that would perish unless taken care of; that some of the officers had abandoned the corporation, and the stockholders did not seem to be able to get any one to conduct the business, and at the meeting of the stockholders it was determined to be for the best interest of the corporation to apply for a receiver. It clearly appeared that the corporation was not insolvent, and that there was no disagreement of any kind among the stockholders. About all that did appear from the face of the petition was an apparent want of capacity on the part of the stockholders and officers to manage the business of the corporation. This does not present such a condition of affairs as would authorize a court of equity to appoint a receiver. There were no adversary proceedings pending. The stockholders, at their meeting, seem to have unanimously agreed that it would be a good thing to appoint a receiver, and they selected appellee Smiley as a proper person to make the application. The courts of the state are not constituted and maintained at public expense for the purpose of conducting the business of private corporations, and mere incapacity of stockholders or officers of a corporation to manage its business in a successful manner is not enough to authorize the courts to take charge of such business.

In the case of *Jones v. Bank*, 10 Colo. 464, 17 Pac. 272, it was said: "To hold that courts of equity can entertain jurisdiction to appoint a receiver of property as the substantive ground and ultimate object and purpose of the suit, on the petition of the owner of the property to be controlled and protected, would be to make them the administrators of every estate where the owners thereof were incapable or unwilling to administer them themselves."

It is very clear, therefore, that the petition failed to state facts sufficient to entitle plaintiff to the appointment of a receiver. But that question is not presented for review in this case, and appellant was not a party to such proceedings. Whether the action of the court in the appointment of a receiver was absolutely void and subject to collateral attack, such as that made in this case, is altogether another question, and one which we think is not necessary to a correct determination of the question presented by the record.

The second contention is that the bondholders were not made parties to the proceedings for the appointment of a receiver, and that, for this reason, their rights can not be prejudiced by anything the receiver did. This proposition seems to be sustained upon authority. Section 273 of the code provides: "Every receiver shall be considered the receiver of any party to the suit, and no others." The bondholders represented by appellant in this case were not parties to this suit, and, clearly, under the statute quoted, the receiver appointed by the court was not their receiver. If he was not the receiver for the bondholders, it is difficult to see how their rights can be affected by what he did. They were in no way responsible for his appointment. They could not procure orders from the court directing the manner in which he should perform his duties, and it is clear their mortgage lien can not be made subject to his expenditures, not made at their instance and not incurred in any case in which they were parties. No notice was served upon them as required by the provisions of section 274 of the code, and we are of opinion that the order ap-

pointing the receiver and all proceedings had thereafter are void, as affecting the rights of appellant and the bondholders whom he represents.

Having reached a conclusion which disposes of the case, the question presented by the third contention of appellant need not be considered. It is therefore recommended that the judgment of the district court, allowing the report of the receiver and making his certificates a lien upon the property of the corporation superior to that of appellant as trustee of the bondholders, be reversed and set aside, and the cause remanded for further proceedings according to law.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court, allowing the report of the receiver and making his certificates liens superior to the mortgage, is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED.

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

1. **Petition:** SUFFICIENCY. The question of whether a petition states a cause of action may be raised at any stage of the proceedings, up to the submission of the cause in this court upon appeal.

2. **Receiver:** APPOINTMENT. 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.*, 68 Neb. 233, followed.

3. **Petition Insufficient.** Petition in case at bar examined, and *held* not to state facts sufficient to authorize the court to appoint a receiver to care for, preserve and manage the property of the defendant corporation.

LETTON, C.

The facts in this case are set forth in the former opinion by Mr. Commissioner KIRKPATRICK, *ante*, p. 581. The

principal point argued upon the rehearing was that the original petition in this action, asking for the appointment of a receiver, stated facts sufficient to justify the court in the appointment of the receiver. The substance of the petition is set forth in the former opinion, but, in the re-examination of this question, we believe it proper to set forth more fully the substance of the petition, with the view of ascertaining whether it sets forth sufficient facts to justify the appointment of the receiver. It is alleged that the defendant is a corporation, doing business in South Sioux City, Nebraska; that the plaintiffs, with many others, subscribed for stock in said corporation to the amount of $14,000; that Henry Haubens, William Peterson and Frank Burness became stockholders in said corporation and were instrumental in its organization, and did undertake to and did construct a building and machinery for said company that cost about $65,000; that the plant was placed in operation in the early fall of 1902 and operated until about the 14th day of December, 1902, when the same was closed; that it has on hand merchandise to the value of $3,000 or $4,000, and several thousand dollars' worth of beets, and, unless the beets are manufactured into syrup within the next 90 days, the same will be lost; that it has been demonstrated that the enterprise is a successful one and, if properly managed, the property is of great value, but, unless properly managed, all of the money expended by the plaintiffs will be lost and the property of the company be of no value.

Second. That the management of the company has been under the charge of Henry Haubens and William Peterson; that neither the plaintiff nor any of the stockholders have been able to obtain any correct statement of the affairs of the company from said managers; that, in December, 1902, a stockholders' meeting was held, and the officers of defendant were authorized to issue bonds to the amount of $35,000, for the purpose of paying off existing indebtedness and furnishing the company with sufficient capital to place its product upon the market; and it was

agreed by the stockholders and officers that, of the proceeds of the bonds, $12,000 were to be applied to the payment of the mortgage of $15,000 on the property, held by Abel Anderson or the Northwestern National Bank of Sioux City, Iowa; that open accounts to the amount of $8,000 were to be paid from the proceeds, and the balance was to be placed in the treasury for operating expenses; that the bonds and mortgage were executed and placed in the hands of Abel Anderson, who was made trustee in the trust deed, and who was also the treasurer of the defendant company; that one Bradshaw paid $5,000 to Abel Anderson and received 5 of the bonds; that, by agreement with Anderson, the $5,000 were to remain to the credit of the company for the purpose of paying laborers and other pressing demands; that, in violation of the agreement, Anderson applied the same to the satisfaction of balances due Anderson or the Northwestern National Bank of which he is president, and did thereby deprive the company of all its funds and ability to continue its business, and did so embarrass the company that it has been unable to make further sale of its bonds or, in any other way, raise sufficient funds to continue its business; and that, by reason thereof, the company and these plaintiffs, as stockholders, are threatened with the loss of all their merchandise, property and money, and that the machinery in said plant is threatened with destruction by freezing of pipes; and that the insurance requires the operation of the plant, to the extent of keeping fires in cold weather so the pipes may be filled with water at all times, and that, unless the company can purchase coal and keep the fires going, the insurance will be canceled.

Third. That, about the 17th day of December, 1902, Henry Haubens, as president of the defendant company, resigned, and that William Peterson, who has been in active management for defendant company, has abandoned said company and is giving the same no attention. That a large number of creditors are threatening to commence attachment proceedings and other litigation and, by rea-

son thereof, all the property of the company is threatened with destruction and loss, and, unless a receiver is appointed to take charge of said company, these plaintiffs and other stockholders will lose the said property.

Fourth. At a meeting held on December 22, 1902, by the stockholders, it was resolved that a receiver of defendant company should be applied for.

Prayer. Petitioners pray that Andrew J. Cramper be appointed receiver of defendant company and its property with authority, under direction of the court, to take charge of all said property; operate said plant, if deemed advisable and found possible so to do; to employ expert accountants for the purpose of ascertaining the financial condition of said company; to employ counsel to do each and every act necessary in the proper management and preservation of said defendant company's property and its affairs; and to have all the powers and authority usually vested in a receiver, and for such other and further relief as may be deemed equitable in the premises.

It was urged upon the argument that, where the directors of a corporation have been guilty of fraud and mismanagement, a court of equity had the power, at the instance of a stockholder, to appoint a receiver for the affairs of the corporation but this argument was entirely foreign to the case made by the petition. The petition charges no fraud or mismanagement on the part of any directors of the corporation. It states that the president has resigned; that the manager has abandoned the plant; and that the treasurer paid certain debts of the corporation to a banking institution of which he was president with part of the company's assets; but it nowhere charges or asserts that the governing body of the corporation is not in possession of the property nor able to carry on its business. It is true it alleges the corporation is short of funds, and perhaps the true reason why the plaintiff desired the appointment of a receiver is to be found in the allegation that a large number of creditors are threatening to commence attachment proceedings and other litigation, etc.; but this

is no ground for the appointment of a receiver. If the attorney for the plaintiff had been as prolific of charges of fraud and mismanagement by the officers of the company in his petition as he has been in his briefs, he would be in a better position to claim the relief he asks.

A court of equity has no power to appoint a receiver for a solvent concern, for the purpose of preventing its creditors from maintaining actions against it for the recovery of their debts; and, under the facts alleged as to assets, the value of the property largely exceeded the debts. Further than this, the petition seeks no relief beyond the mere appointment of a receiver to care for, manage and control the property and business of the company. Proceedings for the appointment of a receiver in a court of equity are usually ancillary in nature, and the appointment is only granted as an incident to the relief sought in the petition. It is analogous to an attachment proceeding in an action at law, in so far as being dependent upon the main action. In a recent case in this court, *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 233, this question has been fully discussed by HOLCOMB, J., and the principles fully and clearly stated. But in the petition it is not alleged that the directors of the corporation are not entirely able and willing to carry on its business, nor that any dissension or trouble exists among them. The relief sought amounts, practically, to a removal by the court of the officers of the corporation and the installation by the court itself of its officer, the receiver, as the manager of the corporate affairs. We know of no such power residing in the court under the facts recited in the petition.

A receiver was appointed under this petition and, on the 3d of January, 1903, Abel Anderson, trustee, was served with a notice that the receiver would apply to the district court for orders authorizing him to issue receiver's certificates, as first liens upon the property of the defendant company, for the necessary expenses of preserving the property and placing its product upon the market. Pursuant to this notice, Anderson appeared specially and ob-

jected to the granting of any order making any charges of the receivership a lien prior to the mortgage, among other matters alleging that the petition did not state facts sufficient to empower the court to appoint a receiver, and therefore the receivership is void. The cause was heard on the 12th of January, at chambers, and the objections overruled. On February 17 another summons was issued in the case and served upon Fred Miller, the president of the defendant company, together with a notice of application for the appointment of a receiver, but no new petition appears to have been filed. Following the service of these papers, on the 23d day of February, another order was made in the district court appointing Cramper receiver. If Cramper was already receiver, the object of this second order is not obvious. On the first day of July, 1903, a report of the receiver was filed, with exhibits showing the receipts and disbursements from December 24 to June 1; a list of receiver's certificates issued and accounts for services rendered by attorneys to the receiver; and, on the same day, there was filed by Abel Anderson, trustee, intervener, what he terms an intervention by leave of court, in which he alleges the execution of the mortgage, its recording, that $18,500 of the debt are due and unpaid, that he was not a party to the application for a receiver, and had no notice of the same; that the petition for such appointment does not state facts which entitle the plaintiff to the relief demanded; and asks that the receivership and the costs thereof be decreed to be junior and inferior to the plaintiff's rights. A hearing was had upon the intervention and objections, the objections were overruled, the report of the receiver confirmed and allowed, and the amount evidenced by the receiver's certificates decreed to be first liens upon the property of the corporation superior to the lien of the bonds and mortgage.

It is contended that Anderson appeared at the time that the order allowing the receiver to issue certificates was made; that he did not appeal from the same and, therefore, the order allowing them to be issued was final as to

him. It will be observed, however, that the order then made allowing the receiver to issue certificates was merely interlocutory in its nature, and was not a final order in the cause from which appeal or error might be taken.

It is further argued that the order appointing the receiver is not subject to collateral attack, but the attack made by Anderson in his intervention is not a collateral attack. He had an interest in the subject matter, and came into court as a party to the action when he intervened and filed his objections seeking to challenge the jurisdiction of the court. The rule is settled in this state that the question of the sufficiency of a petition and whether it states a cause of action may be raised at any step of the proceedings, hence, Anderson was not too late, the trial court was entitled to consider and pass upon the question of jurisdiction, and this court, also, is entitled to pass upon the same question upon appeal. The petition being clearly insufficient, the appointment of the receiver by the lower court was erroneous and, as against the intervener and the bondholders whom he represents, the charges of the receivership do not constitute prior liens upon the property of the defendant corporation.

For these reasons, the judgment heretofore rendered, reversing the action of the district court, should be adhered to.

AMES, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of reversal entered in this court is adhered to

REVERSED.

STATE OF NEBRASKA, EX REL. C. W. MCCOMB, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED APRIL 7, 1904. No. 13,478.

1. **Carriers:** DUTIES TO SHIPPERS. It is the duty of a railroad company to furnish the necessary cars to transport the goods which are offered to it for carriage, but, when the carrier has furnished itself with the appliances necessary to transport an amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily or at long intervals of time.
2. ———: ———. It is the duty of a railroad corporation, both under the common law, and by statute in this state, to supply cars to all persons or associations handling or shipping grain, without favoritism or discrimination in any respect whatever.
3. ———: ———: DISCRIMINATION. During a temporary scarcity of cars, a railroad company is entitled to consider, in apportioning cars among grain dealers, their relative volume of business and facilities for the loading of cars. Though there may be a difference in the number of cars furnished different grain dealers at the same railroad station, still, if no favoritism or discrimination is shown and the number of cars furnished each is in a fair proportion to his volume of business, facilities for loading and grain in sight, no shipper has a right to complain of this difference, though he may not obtain all the cars he deems necessary for his business.

ORIGINAL application for a writ of mandamus to compel respondent to furnish facilities for shipping grain. *Writ denied.*

Smyth & Smith, for relator.

J. W. Deweese and *Frank E. Bishop, contra.*

LETTON, C.

This is an original application for a writ of mandamus in this court. On the 22d day of August, 1903, C. W. McComb, a farmer, living about 4 miles from Wilsonville,

in Furnas county, Nebraska, began the business of buying and shipping grain at Wilsonville in competition with 2 elevators there situated, one owned by S. A. Austin and the other by the Central Granaries Company, a corporation. From the day he began business until about September 5, he obtained all the cars from the respondent necessary for the carrying on of his business. He alleges in his application that, on or about the 1st day of October, 1903, and on divers dates since then, he requested that the respondent furnish him all the cars he needed in his business or that, if it could not do that, it supply him with 2 cars for each 3 furnished each of the elevators. He alleges that the volume of his business is such that he requires 2 cars for each 3 used by each elevator. He says that it refused to furnish him cars as he required and that, during the 2 weeks ending October 18, 1903, it supplied him with only 2 cars, while it supplied the elevators with 23 cars. That he demanded of the respondent a just proportion of the empty grain cars available at Wilsonville, but that the company, through its agent, declared that the elevators should have the preference. He avers that such discrimination will ruin his business, and he prays for a peremptory writ of mandamus commanding the respondent to furnish him, whenever demanded, with 2 cars to each 3 furnished each of the elevators; that the respondent be commanded to afford him equal facilities in all respects with each elevator, and to cease all discrimination of any kind and character against him in favor of the elevators.

The answer of the respondent to the alternative writ alleges, in substance, that there are 2 large and well equipped grain elevators at Wilsonville; that the relator McComb has no elevator, shovel house or any convenience adjacent to the track for loading of grain into the cars; that, owing to the manner of his loading, he occupies a whole day for loading 1 car, while the elevators load cars at the rate of 1 car in 2 hours, and, consequently, the elevators need and can use many more cars than he could

handle. It further says that the demand for cars about the first day of September, 1903, was so great that it was, temporarily, impossible for the company to furnish sufficient cars; that it used every reasonable effort to procure cars and, since it could not obtain all that were demanded at Wilsonville, it adopted the plan of dividing the cars between the 2 elevators and the relator on an equitable and just basis, in accordance with the relative amount of grain handled by the elevators and the relator, and taking into consideration the facilities for handling of grain by each of said shippers. It denies that, during the 2 weeks ending October 18, 1903, the relator was supplied with but 2 cars, while the elevators had 23, but alleges that the relator had 5 cars during this period, while 1 elevator was furnished with 7 and the other with 8 cars. It denies any discrimination between the relator and the elevators, and alleges that, although at the time it was well equipped with the necessary cars for handling the ordinary business coming to the railroad, yet, at that time, the demand for cars in the shipment of grain was unusual, and that, temporarily, all the cars demanded could not be furnished.

It is the duty of a railroad company to provide itself with all the instrumentalities and facilities necessary to carry on the business for which it is organized. It must furnish the necessary cars to transport the goods which are offered to it for carriage, but to this rule there is an exception. When the carrier has furnished itself with the appliances necessary to transport an amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily or at long intervals of time.

In this connection, the testimony of Mr. Calvert, the superintendent of the lines of the respondent west of the

Missouri river, is that the railroad company is well supplied with cars. That at times the cars are so plentiful that they have difficulty in storing them, and that usually it has more cars than it needs in taking care of the business offered; that a scarcity of cars existed at the time the relator complains of, and that at the present time cars are comparatively plentiful. He testifies that frequently, by the manner of doing business by grain dealers, shipments are delayed until a certain time when the markets will justify a quick sale, and this causes a congestion of business on the railroad. That he has frequently known on the Burlington & M. R. R. Co. in Nebraska upwards of 2,000 box cars held for orders up to the 20th of the month, and by the 26th the railroad company would be probably that many cars short of being able to fill its orders. That at times there is a rush and at times there is a dearth of business, but that the railroad company has enough cars to take care of the business. These facts are not denied. Under this state of facts, the complaint of the relator that the respondent is not sufficiently provided with cars in order to transact the business of the public does not seem to be well founded.

Since there was a scarcity of cars during a part of the period Mr. McComb was in business, what was the duty of the respondent as to their distribution among those desiring to ship grain over its line of road?

Part of section 1, article V, chapter 72, Compiled Statutes 1903 (Annotated Statutes, 10007), is as follows: "Every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and shall supply side tracks and switch connections, and shall supply cars and all facilities for erecting elevators and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favorit-

ism or discrimination in any respect whatever." This provision, so far as it requires railroad companies to supply cars for shipping grain without discrimination, is merely declaratory of the common law. Under this provision, it was manifestly the duty of the respondent to refrain from discrimination between McComb and the 2 elevators in the furnishing of cars for use in the business of buying and shipping grain at the station at Wilsonville. Whether or not this has been done is a question of fact which must be determined from the evidence.

The evidence shows that the elevator and bins of the Central Granaries Company have a capacity of about 10,000 to 12,000 bushels of grain. That the elevator and bins of Mr. Austin have a capacity of about 8,500 bushels. That these elevators and bins are situated close to the railroad track; that the Central Granaries Company have facilities for and can load 8 cars of grain a day; that the Austin elevator can load 10 cars a day. That Mr. McComb has a bin at his residence, which is about 2 blocks from the railroad track, that holds 2,500 bushels, and that he has rented other bins in the town which in all have a storage capacity of about 7,500 bushels. Upon his farm, about 4 miles from town, he has about 4,500 bushels of grain which were raised on the farm, but this we think should not be taken into consideration upon the question of the volume of his business as a grain dealer. The only means of loading cars which he possesses is by hauling the grain in wagons and shoveling the same into cars. The evidence shows that he has usually loaded 1 car a day, although upon one occasion he loaded 2 cars in that length of time. It appears that both the elevators and Mr. McComb received all the cars they needed up to about the 5th day of September, but, afterwards, up to the time of the beginning of the suit, a scarcity of cars existed, in fact, to such an extent that each of the elevators and McComb, also, was compelled to turn away and refuse to buy large quantities of grain—one of the dealers stating that he had turned away 60,000

bushels and the other 50,000 bushels. The only question then necessary for us to decide is as to whether or not, taking into consideration the volume of Mr. McComb's business, his facilities for loading cars, and all the circumstances as compared with the volume of business and facilities of loading of each of the elevator owners, he has been unjustly discriminated against by the respondent, and whether it is the respondent's duty to furnish him with 2 cars for each 3 furnished to each of the elevators.

Mr. McComb began business on the 22d of August. Up to the 5th of September, he obtained all the cars that he could use, as did both of the elevators. The scarcity of cars appears to have begun at that time. The evidence shows that from August 22 to September 5, inclusive, Mr. McComb received 8 cars, Mr. Austin 17 and the Central Granaries Company 15. Mr. McComb therefore received one-fourth of the number of cars received by both elevators and, as this was all he wanted, it was presumably the measure of the volume of his business and of his ability to handle grain, with his inadequate facilities as compared with those possessed by the elevators. From the 22d of August to October 20, the day before this action was commenced, Mr. McComb had received 15 cars, Mr. Austin 41 and the Central Granaries Company 34. During the entire period from August 22 to October 20, therefore, Mr. McComb had received exactly one-fifth of the number of cars furnished to both elevators. If we compare the cars furnished during the entire period with that in which each party was supplied with all the cars that could be used in his business, it will appear that McComb received 3¾ cars less during the entire period than he would have been entitled to, if we take his needs during the time from August 22 to September 5 as a fair and just criterion. According to his testimony he could have used more cars than this, but so could each of the elevators. The question is not whether he received all the cars he wanted, but whether the cars on hand were

apportioned in fairness and without unjust discrimination among the 3 grain dealers.

It is clear that an individual loading grain into cars by shoveling the same from wagons, other things being equal, has not the ability to load as many cars in a day as a well equipped elevator, and the testimony in this case clearly shows that the volume of Mr. McComb's business is not such as to require him to be furnished with 4 cars to every 6 furnished to both of the elevators in Wilsonville. It further appears that the railroad company prefers to have the grain shipped from elevators, and that Mr. McComb received something less than his fair proportion of cars, but, under no view of the evidence that we have been able to take, can we say he was at the time this action was begun entitled to the number of cars that he asks. From a statement in the evidence furnished by the agent at Wilsonville, it appears that since the 23d of October inclusive to the 30th of November inclusive, Mr. McComb has been furnished with 23 cars, Austin 44 and the Central Granaries Company 48, which is the exact proportion furnished him before September 5, when he had all he wanted, and from Mr. Calvert's testimony it would seem that the scarcity of cars is now over.

The purpose of a writ of mandamus is to compel something to be done which ought to be done. "The question whether a mandamus should issue to protect the interest of the public does not depend upon a state of facts existing when the petition is filed, if that state of facts * * * has ceased to exist when the final judgment is rendered." *Northern P. R. Co. v. State,* 142 U. S. 492; *State v. Newman,* 25 Neb. 35. The respondent is not discriminating against the relator at this time, and the neglect of duty of which he complains does not now exist. The object of the writ of mandamus being only to compel action, the relator is not at this time entitled to the writ. Although he was not entitled to all he asked for in his application, yet he had cause to complain at the time his action was begun, and, for that reason, it is only just to him that he

should recover his costs herein expended. *State v. Newman,* 25 Neb. 35; *State v. Anderson,* 100 Wis. 523.

He is also entitled to the benefit of his action so far as may be. Since it is a continuing duty on the part of the respondent to furnish him cars without unjust discrimination, and in order to afford speedy relief if this duty is not performed in future, we recommend that the writ be refused at this time, with leave to respondent to apply for the issuance of the same in this case in the future if necessity arises, upon notice to the respondent, and that the costs of this proceeding be taxed to the respondent.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the writ of mandamus applied for is refused, with leave to respondent to apply for the issuance of the same in the future if the necessity arises, upon notice to the respondent. It is further ordered that the costs of this proceeding be taxed to the respondent.

WRIT DENIED.

CUDAHY PACKING COMPANY V. JAMES W. ROY.

FILED APRIL 7, 1904. No. 13,491.

1. **Master and Servant:** APPLIANCES. A master is bound to use such care as the circumstances reasonably demand to see that appliances furnished his servants for use in his business are reasonably safe. He is not liable for defects, of which he has no notice, unless the exercise of ordinary care would have resulted in notice.

2. **Error:** INSTRUCTIONS. Instructions examined, and *held,* under the facts in this case, to be erroneous and prejudicial to the defendant.

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

Greene, Breckenridge & Kinsler, for plaintiff in error.

A. C. Pancoast and *A. H. Murdock, contra.*

LETTON, C.

This action was brought by James W. Roy against the Cudahy Packing Company to recover damages for personal injuries sustained by him while in the employ of said company. It appears that Roy was employed in that part of the Cudahy Packing Company's works, in South Omaha, known as the press room; that it was his duty to open and close a gate or valve by which certain soft tankage, consisting of offal, etc., contained in a tank situated upon the second floor of the tank-house and projecting through the floor into a room upon the first floor, in which the plaintiff worked, was emptied into a truck for the purpose of being conveyed to a press, in the process of the manufacture of fertilizer. This gate was opened and closed by means of a cast iron lever about 4 feet long and between 1 and 2 inches in diameter. While the plaintiff was attempting to close this gate, the lever broke, causing the plaintiff to fall backwards, by which the injuries complained of resulted. In his petition the plaintiff alleges that the company negligently provided an inefficient and defective appliance, that the lever was too small for the pressure that was necessary to be placed upon it; that it was of brittle cast iron, that it was too short, that it broke at its weakest point where there was a flaw in the iron, which defect was unknown to the plaintiff and, owing to the height of the lever, the plaintiff could not have discovered it, but the defendant might have discovered it by the exercise of due care and diligence in the selection and inspection of the same. He further alleges that the floor was greasy and slippery, and that the company failed to furnish him a reasonably safe and secure platform upon which to stand. That he had informed the superintendent of the need of this platform, and said superintendent in-

structed him to continue to use it for a short time, when he would have the necessary improvements made.

The defense is substantially the assumption of risks incident to the employment by the plaintiff, contributory negligence, that the defect in the lever was latent and was not discoverable by inspection, and lack of negligence in that respect by defendant.

The evidence shows that, a short time before the accident happened, the Cudahy Packing Company fitted up what was called the new tank-room at their packing house in South Omaha. That the witness, A. W. Ruff, who was the purchasing agent of the company, bought the gate valves and levers in use in that tank-room. That, before purchasing these appliances, he went to Chicago and examined the tank valves in use in several packing houses there, and also the patterns used for the plant of the Armour Packing Company in Kansas City, and that valves and levers of this pattern were in use in a number of packing houses in Kansas City and Chicago. The plaintiff had been working for the company as a common laborer for a number of years prior to the accident, and had been employed in the tank-room for about 3 weeks prior to that time. It appears that the tank-room or press-room, as it has been variously termed by the witnesses, was not in a completed condition. That the carpenters were still at work there, and that the gate which the plaintiff was operating had only been in use a short time when the accident happened.

It was the plaintiff's duty to open the valve by which a portion of the contents of the tank on the second floor was permitted to descend into a truck upon the first floor, and to close the valve when the truck was full. On the day the accident happened, the tank was empty; the plaintiff had been on the second floor cleaning it out; when he returned, a young man who had been trying to shut the valve had failed to do so on account of it being stuck, when the plaintiff took hold of the lever by which the valve was pulled and, while pulling it in the attempt to shut the

valve, the lever suddenly snapped, allowing him to fall over backwards, whereby he was injured. The lever itself was introduced in evidence and showed clearly, at the point of breakage, a "blow-hole" or "sand-hole," as it has been variously termed by the witnesses, extending from a point at or near the surface of the lever for a distance of five-eighths of an inch toward the center of the same, the effect of which would necessarily be to weaken it at that point.

The defendant complains of the admission of evidence in regard to a promise to make more convenient the place where the plaintiff stood, while at his work, and the failure of the defendant to carry out such promise. There is no evidence in the record which shows that the defective condition of the place where the plaintiff stood was in any manner responsible for the injuries which he suffered. But this was an issue in the case made by the pleadings and, if the defendant desired to remove the consideration of the same from the jury, it should have requested the court to do so by tendering an appropriate instruction.

Complaint has been made by the defendant of the rulings of the trial court upon the admission or rejection of evidence, especially of the witnesses Brizendine and Bergquist; but an examination of the record shows that substantially the same questions which were excluded were, at another point in the examination of the witnesses, asked and answered without objection, and hence the defendant can not complain.

The vital point in this case, as we view it, is whether or not the defendant used ordinary and reasonable care to furnish the plaintiff with a lever which was reasonably safe for the purpose for which it was used. The rule is well settled in this state that it is the duty of a master to use ordinary and reasonable care to furnish appliances reasonably safe for the use of his servants in carrying on his business, and that a failure to exercise such reasonable and ordinary care upon his part renders him liable, if the servant suffers any injury by reason of his negligence in

that behalf. The master is not an insurer of the safety of the appliances which he furnishes. If he exercises the reasonable care which a prudent man would ordinarily take for his own safety, under like circumstances, in furnishing his servants with instruments reasonably safe for the particular purpose for which they are used, he has fulfilled his whole duty in that respect. It was the duty of the employer to use reasonable care in the furnishing of a lever of sufficient size, and to use reasonable care in the inspection of the lever at the time that the same was put in place, and if any defect had been visible or discoverable by the use of such care, by which a reasonable man might conclude that it was weakened or rendered unsafe for the purpose for which it was used, then the defendant would become liable for any damages which resulted in consequence thereof. The question as to whether or not the defect was obvious or was latent, so that an inspection of the lever would not have revealed it, is a matter for the jury to determine from all the evidence in the case, and it is for the jury to say whether or not the master used reasonable care in furnishing a lever which proved to be not sufficiently strong for the purpose, either by reason of its lack of size or by reason of a defect therein. It can not begin its inquiry with the assumption that it is the master's absolute duty to furnish a safe appliance, but rather its inquiry should be whether he used reasonable care to provide such an appliance.

In the sixth instruction to the jury, it is said by the court: "It is the duty of the master to his servant to provide his servant with reasonably safe machinery and appliances with which to work, and if the master fails in this regard and the servant is injured thereby, then the master is liable for such injury, unless the negligence or want of ordinary care of the servant contributed to his injury."

The tenth instruction was as follows: "If you believe from the evidence that plaintiff was injured substantially as al'.ged, and that such injury was caused by the negli-

gence of the defendant in providing the lever for use by plaintiff, and that plaintiff did not assume the risk of danger arising from its use, and that the plaintiff was not guilty of contributory negligence, then you should find for the plaintiff and assess his recovery as hereinafter stated; but if you do not so find, your verdict should be for the defendant."

By these instructions, the jury were told that it was the duty of the defendant to provide Roy with a reasonably safe lever, and if it failed in this duty and Roy sustained injury, it was liable. It is true that, by the twelfth instruction, the jury were told that if, by the exercise of reasonable care and prudence on the part of the defendant, the defect in the lever would not have been discovered before the time of the injury, then the defendant would not be negligent with reference thereto; but, taking the instructions as a whole, we are satisfied that, under the circumstances in this case, where the question of the master's liability to his servant rests upon the single question, whether or not the master used ordinary and reasonable care in furnishing and inspecting the lever whose breaking caused the accident, and where the master's liability may rest largely upon the question whether the defect in the lever was one which ordinary care could have discovered and guarded against or was latent, so that the exercise of reasonable care by the master could not have discovered it, the unqualified statement that it was the master's duty to his servant to furnish a reasonably safe appliance was erroneous. We do not think that the proper rule can be better stated than in the language of Commissioner IRVINE, in *Lincoln Street R. Co. v. Cox*, 48 Neb. 807:

"To a legal mind the word 'reasonably' might perhaps imply the element of care; but we must deal with the instructions in the sense in which they would be understood by the jury. Notwithstanding these qualifying words, we think it quite clear, as already stated, that the instructions made the case turn upon the fact of danger and not

the fact of negligence. A master does not insure his servants against defective appliances. He is not chargeable in all events because the appliances furnished his employees are defective. He is liable only when he has been negligent in the matter. The rule is that as to his servants he is bound to use such care as the circumstances reasonably demand, to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition. He is not liable for defects of which he has no notice, unless the exercise of ordinary care would have resulted in notice. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578; *Missouri P. R. Co. v. Lewis*, 24 Neb. 848; *Union P. R. Co. v. Broderick*, 30 Neb. 735, all recognize this rule." In *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, it is said by SULLIVAN, J.:

"The measure of defendant's duty to its servants was the care required by the usual and ordinary usage of the business. The standard of due care is the conduct of the average prudent man." See, also, *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1; *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748; *O'Neill v. Chicago, R. I. & P. R. Co.*, 66 Neb. 638. The principle stated in *Leigh v. Omaha Street R. Co.*, 36 Neb. 131, and in *Hammond v. Johnson*, 38 Neb. 244, has been modified by the later decisions of this court.

In this case, where the question of fact as to whether the master had been guilty of negligence or not is so narrow, the attention of the jury should have been clearly directed to the limit of the master's liability. We do not think that the giving of the twelfth instruction cured the prejudicial language of the charge in other respects.

For these reasons, we recommend that the judgment of the district court be reversed.

DUFFIE 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 for further proceedings.

REVERSED.

WILLIAM A. GOURLAY V. ADOLPH L. PROKOP ET AL.*

FILED APRIL 7, 1904. No. 13,510.

Pleadings: AMENDMENTS: STATUTE OF LIMITATIONS. Where the original petition, in an action for conversion against a bailee for sale, was defective for lack of the allegation that a reasonable time had elapsed within which he might sell the property, before demand for its return was made, the filing of an amended petition, by which such allegation was inserted, *held* not to be the commencement of a new action, so as to permit the statute of limitations to interpose as a bar between the filing of the original petition and the amendment.

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

F. I. Foss, B. V. Kohout and *R. D. Brown*, for plaintiff in error.

George H. Hastings and *W. S. McClintic, contra.*

LETTON, C.

On February 19, 1900, a bill of particulars was filed in justice court before E. D. Fay, a justice of the peace, in and for Saline county, Nebraska, as follows: "Now comes the plaintiff and says that, on or about May 16, 1898, he delivered to defendant, Adolph L. Prokop, one Crown organ, one organ stool, and one organ instruction book of the value of $68. 2. The plaintiff says that, on or about May 10, 1898, he agreed with defendant, Adolph L. Prokop, that he should sell said organ, stool and book, and any amount received over and above the amount of $68 should be retained by him as his commission for such sale.

* Rehearing allowed. See opinion, p. 612, *post.*

3. That some time between May 16, 1898, and March 10, 1899, Joseph Jiskra became a partner of defendant Adolph L. Prokop. 4. Plaintiff says that, on or about March 10, 1899, he made a demand for said organ, stool and book, and that defendant refused to deliver the above named articles to plaintiff, and that defendants have never paid for the same, though often requested so to do. Wherefore, plaintiff asks judgment against defendants for the sum of $68, with interest from the 10th day of March, 1899, and costs of suit." Issues were made up, a trial had, and an appeal taken from the judgment to the district court. On the 7th day of May, 1900, the following petition was filed in the district court: "1. The plaintiff complains of the defendants for that, on or about the 16th day of May, 1898, the defendant, Adolph L. Prokop, kept a store and warehouse at Wilber, Saline county, Nebraska; that soon after May 16, 1898, Joseph Jiskra became a partner with the said Adolph L. Prokop; that they kept in their store and warehouse a stock of furniture; that the plaintiff is engaged in and is a dealer in musical instruments; that the defendants desired to sell musical instruments on commission for the plaintiff, and desired to have a musical instrument sent to them that they might keep the same on exhibition and for the purpose of sale, and, in consideration of the plaintiff sending the musical instrument to the defendants that they might have it for the purpose of sale, the defendants agreed to safely stow and safely keep in said store the following goods which the plaintiff sent to them under the foregoing arrangements, to wit, 1 Crown organ, 1 organ stool, 1 organ instruction book, of the value of $68 which was the property of the plaintiff; and the defendants as storekeepers and warehousemen received said goods and agreed to keep the same safely. 2. At the time that the said goods were delivered to the defendants, the plaintiff informed them that it was necessary for their preservation that they should be safely kept and insured. 3. The defendants, while said goods were in said store and warehouse, neglected and did not insure the same, but per-

mitted said goods to be burned and destroyed, on or about the first day of May, 1899, whereby said goods were injured and wholly lost to the plaintiff to the damage of plaintiff in the sum of $68. 4. The plaintiff says that, on or about March 10, 1899, he made a demand for said organ, stool and instruction book of the defendants, and desired that said organ, stool and instruction book be returned from said defendants to the plaintiff, but said defendants refused to deliver the above named articles to the plaintiff, and the defendants have never paid for the same, though often requested so to do. 5. Wherefore, the plaintiff asks judgment against the defendants for the sum of $68, with interest from the 10th day of March, 1899, and costs of suit." Issues were made up, the cause tried to a jury and a judgment rendered in favor of the plaintiff and against the defendant. Upon proceedings in error in this court, the judgment was reversed and the cause remanded for further proceedings. *Prokop v. Gourlay,* 65 Neb. 504.

On the 23d day of March, 1903, an amended petition was filed in the district court as follows: "1. And now comes the plaintiff and says that, on or about May 16, 1898, he delivered to the defendant, Adolph L. Prokop, one Crown organ, one organ stool, and one instruction book of the value of $68. 2. The plaintiff says that, on or about May 16, 1898, he agreed with the defendant, Adolph Prokop, that he should sell said organ, stool and book, and that any amount received by him over and above the amount of $68 should be retained by him as commission for said sale. 3. That sometime between May 16, 1898, and March 10, 1899, Joseph Jiskra became a partner with Adolph L. Prokop and interested in said store, and, as partner, assumed the contract as above set forth with the said Adolph L. Prokop and this plaintiff. 4. Said parties had said organ, stool and book for a reasonable time and did not sell the same, and the plaintiff says that a reasonable time within which to sell said organ, stool and book would be from 6 to 8 months. 5. The defendants having had said organ, stool and book for a reasonable time and not having

sold the same, the plaintiff, on or about March 10, 1899, made demand for said organ, stool and book, and defendants refused to deliver the above named articles to plaintiff, but converted the same to their own use. 6. The plaintiff says that the reasonable value of said property was the sum of $68. Wherefore, plaintiff prays for a judgment against these defendants for the sum of $68, with interest at 7 per cent. from March 10, and costs of suit."

A motion was made by the defendants to strike the amended petition, for the reason that it was not an amendment but set up a new cause of action, and did not accrue within 4 years, and that, so far as amended, it was a departure from the original cause of action in the justice court. This motion was overruled. A demurrer was then filed to the petition and sustained, upon the ground that the amended petition set up a new cause of action, and was therefore barred by the statute of limitations, and the cause was thereupon dismissed. Exception was duly taken to the ruling of the district court, and the cause is here upon error.

Without considering whether the question proposed can be properly raised by demurrer, it will be seen that there is only one question presented and that is, whether or not the amendment to the petition was such as to set up a new cause of action, or whether the additional facts alleged were merely an amplification of the original. From the opinion of Commissioner ALBERT, it appears that the judgment based upon the first petition was reversed, for the reason that the petition, having failed to allege that a reasonable time had elapsed after the delivery of the organ to the bailee, was insufficient to state a cause of action in conversion. The only additional allegations in the amended petition to those in the bill of particulars upon which the action was begun are, that the defendants had the property for a reasonable time and did not sell the same; that a reasonable time within which to sell it would be from 6 to 8 months, and that the reasonable value of

the property was the sum of $68. It is obvious that the subject matter of the action is the same, that the cause of action is the same, and the relief sought is the same, in these several pleadings. The grounds of the action are the delivery of possession of the property to the defendants as bailees, the demand made upon them by the plaintiff for its return, the refusal and conversion to their own use. The only additional fact alleged being, that they had been in possession of the property a reasonable length of time within which to make the sale before the plaintiff made the demand. It is elementary that, where the identity of the cause of action and the relief demanded are the same, a change in the form of the allegations, or an additional allegation amplifying the original petition, does not set up a new cause of action. No new wrong is charged upon the part of the defendants by the amended petition; the action originally was for the wrongful conversion of the organ, though the cause was defectively stated, and the amended petition merely supplies a necessary allegation omitted in the former pleading.

This is allowed by section 144 of the code. The statute of limitations ceased to run upon the beginning of the action in the justice court; and the cause of action being the same, it is not now barred. The district court erred in sustaining the demurrer to the petition, and the cause should be reversed and remanded for further proceedings.

For these reasons, we recommend that the judgment of the district court be reversed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: The conclusions reached by the commissioners are approved; and it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

REVERSED.

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

Pleadings: CAUSE OF ACTION. Pleadings examined, and *held* that the amended petition does not state a new and different cause of action from that attempted to be stated in the bill of particulars and the original petition.

BARNES, J.

The defendants, in their brief and oral argument on the rehearing, strenuously contend that, by the amended petition, a new and different cause of action was stated from that set forth in the original petition; that, the new cause of action being barred by the statute of limitations, the trial court was right in sustaining the demurrer to the amended petition, and our opinion reversing the judgment of the district court should be set aside. The foregoing question is the only one fairly presented for our determination. This requires a careful examination of the pleadings, including the bill of particulars filed in the justice court where the action was originally commenced, and our former opinions herein. The bill of particulars, the original petition and the amended petition filed in the district court are set out in Commissioner LETTON'S opinion (*Gourlay v. Prokop, ante,* p. 607), and it is unnecessary for us to quote them herein. It appears, by referring to that opinion, if the words, "said parties had said organ, stool and book for a reasonable time and did not sell the same, and the plaintiff says that a reasonable time within which to sell said organ, stool and book would be from 6 to 8 months," were stricken from the amended petition, the remaining allegations would be identical with those contained in the bill of particulars on which the cause was tried in the justice court. If the amended petition states a cause of action for conversion, then the bill of particulars stated such a cause of action, if any. It seems from reading the opinion of Commission ALBERT (*Prokop v. Gourlay,* 65 Neb. 504), that the case was considered

and treated therein as an action for conversion, for the learned commissioner made use of the following language:

"It is not easy to determine, from an inspection of the petition, whether the plaintiff's action was brought to recover for damages sustained by reason of the negligence of his bailees, or for damages for the conversion of the property by such bailees. But, as the evidence is insufficient to justify a recovery on the ground of negligence, and the plaintiff presented his case on the other theory, the sufficiency of the petition to sustain the judgment should be tested by the rules of pleading applicable to actions for conversion. Tested by those rules, the petition is insufficient. No time was fixed for the termination of the contract under which the property was left with Prokop by the plaintiff. That being true, the law will imply a reasonable time. In other words, the plaintiff would have a right to a return of the property only after the bailee had had a reasonable time in which to make the sale contemplated by the contract, and a demand before the expiration of such time would be premature. It will be conceded that, had the time been expressly fixed by the contract, the plaintiff in an action of conversion would have been required to allege the expiration of the contract, or some violation of it, to state a cause of action. The only difference between a case of that kind and the present is that in this case, instead of the time the defendants might retain possession of the property being expressly fixed by the contract, it is implied. It is just as essential that the expiration of the time be alleged, where it is implied, as where it is expressly stated, and the omission of such allegation is fatal to the petition in this case."

It seems that, in response to the rule announced above, the averment first above quoted was inserted in the amended petition. Without doubt the bill of particulars filed in the justice court was somewhat defective, but it is clearly apparent that no attempt was made thereby to state a cause of action against the defendants for negligence as bailees. There was an attempt to state a cause of action

in conversion, and when the original petition was filed in the district court, a motion to strike out the new matter stating an agreement to safely store, keep and insure the property, if one had been filed, must have been sustained. Such allegations were insufficient to state a cause of action for negligence, were redundant and immaterial matter, and were very properly omitted from the amended petition. It seems clear that the action as commenced in the justice court was one for conversion. The original petition contained a statement of the same facts alleged in the bill of particulars; that petition was insufficient, as held in the opinion of Commissioner ALBERT, and such deficiency was supplied by the amended petition. The cause of action, although sometimes defectively stated, has remained the same from the filing of the bill of particulars to and including the amended petition in question herein. No new cause of action having been stated, and the commencement of the action before the justice having interrupted the running of the statute of limitations, the district court erred in sustaining the demurrer.

For the foregoing reasons, our former opinion is adhered to.

REVERSED.

WILLIAM B. SMITH ET AL. V. CLAY COUNTY.

FILED APRIL 21, 1904. No. 12,569.

Affirmed. On rehearing, the former judgment entered in this court is vacated, and the judgment rendered by the district court for Clay county is affirmed. *Mitchell v. Clay County*, 69 Neb. 779, followed.

PER CURIAM.

This case is submitted on rehearing. It is a companion case to *Mitchell v. Clay County*, 69 Neb. 779. In all essential features the two cases are similar. The questions herein presented for consideration and determination are

decided in the case cited. On the authority of that case, the former judgment entered in this court in this cause, 4 Neb. (Unof.) 872, is vacated, and the judgment rendered by the district court is

AFFIRMED.

J. L. CAMPBELL ET AL. V. JOHN MORAN ET AL.

FILED APRIL 21, 1904. No. 13,353.

Liquor License: PETITION: FREEHOLDER. A wife, living with her husband on land, the title to which is in the latter and which is occupied by them jointly as a family homestead, is not, by reason thereof, a freeholder within the meaning of section 25, chapter 50, Compiled Statutes, regulating the sale of intoxicating liquors. The same is true as to a husband, living with his wife on land, occupied by them jointly as a homestead, the legal title to which is in her.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Reversed.*

Kirkpatrick & Hager, for plaintiffs in error.

Leslie G. Hurd, Paul E. Boslaugh and *John A. Moore, contra.*

HOLCOMB, C. J.

The present controversy is with respect to an order of the authorities of the village of Clay Center granting a license to the defendants in error to sell intoxicating liquors. The district court having on appeal affirmed the order of the village board, the cause is brought here for review by proceedings in error. It is argued that the order granting the license is irregular and erroneous because no sufficient petition was presented to the village trustees as required by the law regulating the sale of intoxicating liquors. Among those who signed the petition are the names of several whose qualifications to sign a petition for a license are disputed. Whether such persons

are qualified petitioners depends upon their being freeholders within the meaning of the law. Their interests are limited to a mere homestead right or privilege in lands, occupied as a family homestead, the legal title to which they do not hold, but which is in the wife or husband of such petitioner. If a person having only such homestead right or interest in real estate is not a "resident freeholder" within the meaning of the statute, then the petition in the case at bar is insufficient, and the order thereon, granting a license by the board of trustees and by the district court on appeal, is erroneous, and the judgment will have to be reversed. Section 25, chapter 50, Compiled Statutes (Annotated Statutes, 7175), provides that village authorities may grant a license to sell intoxicating liquors, when a petition therefor shall be signed by 30 of the resident freeholders, or, if there be less than sixty, a majority of the freeholders of the ward or village where the sale of such liquors is to take place. Of course, the legislature, in fixing the qualifications of petitioners for a liquor license, used the term "resident freeholder" as it is ordinarily and commonly understood in legal terminology, where the words have a well recognized and generally accepted meaning. The fact that a qualified petitioner is required to be a resident freeholder is, of itself, evidence that, in the regulation of the traffic, the legislature intended those only should be permitted to act who had attained the status, standing and dignity attributable to those who are owners of property of the stable character of real estate. The test is not only a property qualification, but the person must have title to and interest in the particular kind of property designated. The phrase "resident freeholder" in this connection should be given neither a narrower nor a broader meaning than that which should be given wherever found in the statute, where such requirement is made the basis of the qualification of a person when acting in regard to any designated matter. If the husband who lives with his wife on a homestead, the legal title of which is in her, is a freeholder within the

meaning of the liquor law, then he is a freeholder for all other purposes, where the statute, in general terms, makes that a test of qualification.

In order to determine the question here presented, it is necessary to inquire, first, what is a freeholder; and, second, is the homestead right or interest of the spouse, not owning the legal title, a freehold estate within the meaning of the word as recognized and defined by the authorities? Blackstone defines a freeholder as one having such an estate in lands as is conveyed by livery of seizin, and may be in fee simple or conditional fee, and may be for life only. 2 Blackstone, Commentaries, 104. In Winfield, Adjudged Words and Phrases, 277, it is said: "A freeholder is one who holds lands in fee, or for life, or for some indeterminate period." It is also defined as "An estate of inheritance or for life in real property." 8 Am. & Eng. Ency. Law (1st ed.), 898. From the definitions given, it will readily be seen that, in order to be a freeholder, a person must have a property right in and title to real estate, amounting to an estate of inheritance, or for life, or for an indeterminate period. What is required is title to the property, and not simply a contingent or an expectant estate, nor a right of occupancy or a privilege, with power to prevent alienation or incumbrance by the holder of the legal title. While this court has, in construing the law relative to the right of homestead, in all instances, given a most liberal construction for the protection of the homestead claimants and the conservation of the homestead, it has never gone so far, in any of its decisions, as to say that the selection of the homestead by a husband and wife from the separate property of either effected a change of title, or created in the one not holding the legal title a new property interest in the land thus selected as a homestead. The homestead right or privilege granted by statute, before it has ripened into a life estate by the death of the spouse holding the legal title, is a quality of exemption and freedom of the property embraced in the homestead from execution and forced

sale, incumbrance or alienation, without the consent of both husband and wife. The right of homestead, this court has frequently said, is a personal privilege, which may be waived or lost, unless asserted in due time on all proper occasions. *Brownell & Co. v. Stoddard,* 42 Neb. 177; *Schields v. Horbach,* 49 Neb. 262, 271. In Waples, Homestead and Exemption, p. 121, it is said:

"The husband conveys no land to his wife by declaring homestead; he lets her in to equal control as to alienation, and equal right to enjoyment, and to that protection which the law gives to all homestead holders. But when the state's purpose, relative to homestead conservation, has been accomplished, the land title is as before." At page 103 it is said: "There is no conveyance of land or land title in the dedication, allotment or setting apart of the homestead." Again says the author, at page 102: "The state bestows no homestead property on anybody. It interferes with no man's title. It protects what he already owns, under conditions and with limitations. * * * The homestead right has been called an incumbrance upon land. * * * So it is held that, by the carving of the homestead out of land, the incumbrance is thus put upon it, but the title remains as before."

This view as to the effect of the dedication of land as a homestead must, we think, be the true one. There is nothing in the statute, providing for the selection and exemption of a homestead, that operates to transfer the title to all or any part of the real property. Its effect is to withdraw the land, thus selected, from forced sale, and prevent alienation without the consent of both spouses. The statute, as its title indicates, treats the subject as one of exemption, rather than the creation of any new estate in the property in the spouse not holding the legal title. It is true that section 17, chapter 36, Compiled Statutes (Annotated Statutes, 6216), provides that, upon the death of the holder of the legal title to the homestead, the surviving spouse shall be vested with a life estate therein, and this estate, when it becomes vested, doubtless makes

the surviving homestead claimant a freeholder within the ordinary meaning and acceptation of that term; but there is nothing in the section referred to inconsistent with the view, that the full legal title and estate in the homestead property are in the one who holds the fee, prior to death. The manifest purpose of the provisions of section 17, *supra*, is to preserve to both spouses the full benefit of the homestead right, during the whole of the lives of each of those for whose protection the statute was intended. The right or interest of the wife or husband, in the homestead, not holding legal title is quite analogous to the right of dower or the estate by curtesy, both of which are simply contingent and inchoate till, by the death of the owner of the fee, they become vested estates; and all current authority is to the effect that the estate by the curtesy initiate, or the inchoate right of dower, is not a freehold estate, nor have they any of the attributes of a freehold, nor do they become such till death of the husband or wife owning the fee. After the death of the owner of the fee, the estate by curtesy and the right of dower become vested and, as in the case of the death of the fee owner of the homestead, a freehold estate arises in favor of the survivor. In *Holbrook v. Wightman*, 31 Minn. 168, it is said by that court, in speaking of the homestead right:

"We think, therefore, that the plainer and less artificial construction of the language is that the survivor takes a life estate in the homestead premises analogous to that of dower, and we believe this to be the construction which is generally placed upon it by those charged with the duty of executing the law." Citing Potter's Dwarris, Statutes and Constitutions, 179, note; *Edward's Lessee v. Darby*, 12 Wheat. (U. S.) 206.

In *Johnston v. Bush*, 49 Cal. 198, it is held that the dedication of land as a homestead under the homestead laws of that state did not, in any wise, change the title of the property thus dedicated, and that title remained in either the husband or wife, or as the common property of both, as it was before its selection as such homestead.

To the same effect is *Gee v. Moore,* 14 Cal. 472. In *Brame v. Craig,* 12 Ky. 404, it is held that the homestead exemption is not an estate in the land, but only a privilege of occupying the same by a housekeeper with his family as against his creditors. This court has once said, in a cause here on appeal from a confirmation of sale in foreclosure proceedings, that a husband is a freeholder who lives with his wife upon land of which she has the title, when occupied as a homestead. *Salisbury v. Murphy,* 63 Neb. 415. This decision gives warrant for the contention of the defendants in error, to the effect that the petitioners in the case at bar, to whom objections are made, were qualified signers as resident freeholders. The court's utterance, in the case cited, is the only expression heretofore made, which seemingly recognizes a person so situated as being a freeholder within the meaning of that term. The opinion, on its face, discloses that the subject was not exhaustively argued nor thoroughly considered. The case was disposed of almost entirely by the application of the doctrine of *stare decisis.* The decision follows, or purports to follow, *Cummings v. Hyatt,* 54 Neb. 35, and *Hughes v. Milligan,* 42 Kan. 396, 22 Pac. 313. An examination of *Cummings v. Hyatt* discloses that this question was not decided in that case, and that the court, in specific terms, found it unnecessary, and declined to pass upon the point in that controversy. It is said in that opinion, at page 39:

"In relation to the signer of the petition, who was a minor at the time, and the one a man who was occupying property with his wife, which was owned by her and which was their homestead, we are not called upon to discuss or decide whether the trial court was correct or otherwise in its holding that the minor and the man referred to were freeholders within the meaning of the statute, for the reason that the record discloses that there were 2 of the signers of the petition as to whom the parties stipulated that they knew nothing in regard to whether they were freeholders or not. * * * The petitioner based his right to an injunction, in part, on the assertion that 50 freeholders

had not signed the petition, and it devolved on him to prove his assertions, and any of the signers as to whom there was no testimony offered must be presumed to have been freeholders; they being counted, gives the requisite number 50, without an examination of the question of the minor's qualification or that of the man who was occupying as a homestead land owned by his wife."

It is thus made clear that the court was in error in the *Salisbury* case, in saying that the question there for consideration had already been determined in the case of *Cummings v. Hyatt.* In the case of *Hughes v. Milligan, supra,* in which was raised the question of the qualification of signers to a road petition, it is said by the court:

"By the common law the estate of dower was a freehold estate; and also the estate by the curtesy; and although in the latter the title of the land was in the wife, yet upon the birth of a child the husband was called tenant by the curtsey initiate." Say that court, "The interest that the husband has in the homestead of the wife is a different estate from that by curtesy initiate, but in some respects at least it is analogous."

It is quite evident that, in speaking of the right of dower, and of the right of tenant by curtesy under the common law, as being a freehold estate, the court had reference, not to the inchoate right of dower, or the right as tenant by curtesy initiate, but to the estate which became vested upon the death of the owner of the fee. It is contrary to the trend of all the authorities to hold that, under the common law, the inchoate right of dower, or the right of tenant by curtesy, as existing during the life of the owner of the fee, rises to the dignity of a freehold estate, and this, certainly, has not been the view held to in this jurisdiction since the foundation of the state's jurisprudence. It would seem, therefore, that correct reasoning would lead to a contrary conclusion from that announced by the supreme court of Kansas in the case heretofore cited. If the analogy be proper, then it is obvious that the homestead right of the husband or of the wife to land occupied as a home-

stead, the legal title to which is held by the other spouse, can not be anything more than an inchoate right similar to that of dower or curtesy initiate, in so far as any title in the land is concerned, and that no vested title or freehold estate arises in favor of the survivor till the death of the owner of the fee. It must follow from what has been said that the homestead right or privilege of the husband or of the wife in land occupied as a homestead, the title to which is in the other, is not a "freehold estate" within the ordinary and generally accepted meaning of the word; and that the petition in the case at bar, for such reason, not having the signatures of the required number of resident freeholders, renders the granting of a license erroneous, and calls for a reversal of the judgment of the district court affirming the action of the village board of trustees granting such license. The judgment is reversed and the cause remanded.

REVERSED.

STATE OF NEBRASKA V. BANKERS UNION OF THE WORLD ET AL.

FILED APRIL 21, 1904. No. 13,595.

1. **Beneficial Associations: UNLAWFUL ACTS: INJUNCTION.** When a fraternal beneficial association refuses and neglects to report to the auditor as required by law, or shall exceed its powers, or conduct its business fraudulently, or fail to comply with any of the provisions of the statute, it is the duty of the auditor to notify the attorney general in writing, and the duty of the attorney general to immediately commence an action against such society to enjoin the same from carrying on any business.

2. **Suspension of Business.** When, in such action, it appears that any of said causes exist, the court must enjoin the defendant from transacting business until such report shall be made, or overt act or violation complained of shall have been corrected, and costs are paid by the defendant.

3. **Reinstatement.** When such report shall be made, or overt act or violation complained of shall have been corrected, and costs are

paid, it is the duty of the auditor to reinstate such defendant, and the society will then be authorized to continue its business.

4. **Government.** A fraternal beneficial association must have a representative form of government. This requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, shall be chosen by the members.

5. **Diverting Funds.** Diverting the funds of the society from the purposes for which they are contributed is a violation of the statute and will be enjoined.

6. **Annual Reports.** All claims for death losses must be included in the annual reports to the auditor. A failure to make such report as the statute requires is sufficient cause for enjoining the society from transacting business.

7. **Incorrect Records and Reports.** The books and records of such society must show the true condition of its business and finances, including its benefit assessments and its liabilities, and if they fail to do so, or if the society fails to report to the auditor the details of its business and financial affairs required by the statute, the society will be enjoined from doing business.

8. **Age Limit and Medical Examinations:** MERGER. Such societies are not allowed to take members who are above the age limit, nor without medical examination, and to do this indirectly by the purchase of the business and risks of another similar society, and consolidating such society with itself, is a violation of law.

9. **Assets:** SOLVENCY. The assets of such a society do not consist in cash, and tangible securities and property alone. If its plan of business is feasible and just, it may rely upon the good faith and solvency of its members. It can not be said to be insolvent when it is reasonably probable that, by its authorized assessments, it can provide sufficient funds to meet its just liabilities.

10. **Pleadings and Evidence:** RECEIVER: INJUNCTION. Under the pleadings and evidence in this case, it is *held* that it is not a case for the appointment of a receiver and winding up the affairs of the society; but, to secure a correction of abuses and irregularities, the defendant is enjoined, under section 16, chapter 47 of the laws of 1897, from transacting business until the law is complied with in the matters specified.

ORIGINAL action for an injunction to restrain defendant from further proceeding with its business. *Injunction allowed.*

Frank N. Prout, Attorney General, for the state.

Field & Andrews, contra.

SEDGWICK, J.

The defendant is a fraternal beneficial association organized under chapter 47, laws of 1897, "An act defining fraternal beneficiary societies, orders or associations, and regulating the same." Under section 16 of the act, it is the duty of the auditor to notify the attorney general, in writing, whenever any such society has refused or neglected to make the report provided for; or, if any such society shall exceed its powers, or conduct its business fraudulently, or fail to comply with any of the provisions of the act, and upon receiving such notice, it is made the duty of the attorney general to "immediately commence an action against such society to enjoin the same from carrying on any business." The attorney general having received such notice from the auditor, began this action in this court against the defendant in pursuance of the statutory requirements.

The Honorable Robert Ryan was appointed referee to take the evidence and report his findings of fact and conclusions of law. A large amount of evidence was taken by the referee, and he has made an exhaustive report, which concludes with the recommendation that this court, by its judgment, permit the defendant to continue in business under certain directions and restrictions. We do not think that this recommendation is within the purview and meaning of the statute. The requirement of the statute is that, if the court shall find that such society was in default, as charged, the defendant shall be enjoined, and shall not have authority to continue in business until such report shall be made, or overt act or violation complained of shall have been corrected, nor until the costs of such action be paid by it.

On the other hand, the attorney general insists that the court appoint a receiver to wind up the affairs of the

defendant and to "distribute the assets as equity would permit." This, the court can not do in these proceedings. There are, no doubt, some allegations in the petition which would be appropriate in an action in the nature of quo warranto to oust a defendant corporation of its franchise and wind up its affairs, and we do not decide that, under proper pleadings and evidence, such a proceeding might not be maintained. But these proceedings, by the express language of the petition, as well as by the character of the allegations, and the nature and force of the evidence brought to sustain them, must be considered to be under section 16 of the act referred to, and the meaning of that section is that, if the allegations are sustained by the evidence, the defendant shall not be allowed to do business until it has complied with the law.

It is the duty of the court to determine and point out the particulars in which the defendant has failed to comply with the law, and to enjoin the defendant from proceeding to carry on its business until these delinquencies in these respects have been corrected. When this shall have been done by the defendant, it will be the duty of the auditor to reinstate the defendant. The court has been greatly assisted by the work of the referee in his exhaustive and painstaking investigation of the evidence and conclusions of fact derived therefrom.

1. By the provisions of section 10 of the act these societies are required, on or before the first day of March of each year, to make and file with the auditor of public accounts a report for the year ending on the 31st day of December immediately preceding. These reports are to be upon "blank forms to be provided by said auditor," and are to be "verified under oath," and are to contain answers to questions specifically prescribed by the statute, among which are: (3) Number of losses or benefit liabilities incurred. (4) Number of losses or benefit liabilities paid. (7) Number and kind of claims for which assessments have been made. (8) Number and kind of claims compromised or resisted, and brief statement of reasons. It

appears from the findings of the referee, and is abundantly established by the evidence, that the defendant has failed to make the annual reports contemplated by the statute. It is plainly intended by the statute that the defendant shall report all claims against it on account of death losses. When the insured under one of the defendant's policies has died, and the defendant has notice that a claim is made against it on account thereof, there can be no doubt that such claims should be included in its report to the auditor. When the auditor finds that the defendant has not made the report required by the statute, but refuses so to do, it is his duty to notify the attorney general, who should take proceedings to prevent the defendant from further carrying on business until this error is corrected. The reports of the defendant for several years past were not in compliance with the statute in this respect, and the fact that the auditor has not heretofore enforced the law is not a defense in these proceedings in which he is trying so to do, and the defendant is enjoined from transacting business until such report is made.

2. The referee finds:

"It is provided by section A, division 3 of the constitution of the Bankers Union of the World, that the supreme officers of the supreme lodge shall be 9 in number. These, by section C, division 1 of said constitution, are required to be elected by supreme lodge delegates. It is further provided in said section A, as follows: 'There may also be not more than 8 directors elected by said supreme officers. The officials above designated shall together constitute a board of directors, and all the power and authority of the supreme lodge shall, when not in session, be vested in the board of directors, the same as though the said supreme lodge was regularly convened in open session.' It is provided in section B, division 3 of said constitution: 'All of said officers of the supreme lodge shall be elected for the term of 2 years and until their successors are elected and qualified.' The effect of the above provisions is to create a possible board of directors, 17 in

number, of which board 8 members are to be elected by the executive officers. These 8 directors are not to be chosen by the members of the Bankers Union of the World, nor by the representatives of the said members selected for that purpose."

These findings are abundantly supported by the evidence, and this provision in the organization of this company, is in conflict with section 1 of the act, which provides that "such society shall have a * * * representative form of government." These directors, who control the affairs of the company, must be chosen by the membership thereof, either directly or through representatives chosen by the membership for that purpose. No license to transact business should have been granted to this defendant until such a board of directors was provided for in its organization. The defendant is enjoined from doing business until this error is corrected.

3. It appears from the evidence that the management of the affairs of the society has been exclusively within the control of its supreme executive officers. These officers have not only had charge of the general affairs of the society, but in many instances have dealt with themselves in making contracts in their own personal interest, and, in some instances, in conflict with the interest of the society. In order that the society shall have a representative form of government as required by the statute, the general control of the affairs of the society must be in the hands of directors elected by the membership, as before pointed out. The defendant should not have been licensed to do business while this evil existed, and is therefore enjoined from transacting any further business until this error is corrected.

4. It appears from the findings of the referee, a contract with the president was made by those purporting to act for the defendant society, which was in violation of law, and was afterwards abrogated, and another contract made in January, 1902, giving the president a stated salary per month, and commissions upon policies that had

theretofore been taken as well as upon policies afterwards to be taken; and the referee concludes that the defendant had no right to give to its president a commission on membership already secured. In this, the referee is undoubtedly right. The salary of the president should have been fixed by its board of directors. It is inconsistent with the policy of the law, under which these societies are organized and authorized to do business, to allow commissions to its managing officers, which are uncertain in amount, and are to be determined by computations from data not within the knowledge of the membership, and to which the members have not ready access. The defendant is therefore enjoined from transacting business until it is made to appear to the satisfaction of the auditor, or by a showing in this case, that no such contracts are in existence, and that no such claims of emolument are made by the president.

5. It is charged in the petition: "By unlawful means, liabilities against said Bankers Union of the World were suddenly created and not shown on the books of said Bankers Union of the World, or in the statements filed by it in the office of the auditor of public accounts of the state of Nebraska, and this condition of affairs was first disclosed by an examination into the affairs of said Bankers Union of the World, made and conducted by the authority and under directions of the auditor of public accounts; such examination of the books and affairs of the defendant, Bankers Union of the World, disclosing the facts herein alleged; and the further fact that the president of the said defendant, Dr. E. C. Spinney, and the vice-president, J. C. Spinney, who is the wife of the said E. C. Spinney, drew from the treasury of said Bankers Union of the World, during the year 1903, the sum of $20,000 for their own use and benefit, and for their alleged services as president and vice-president of said Bankers Union of the World, in fraud of the rights of the members and certificate holders of said Bankers Union of the World, and while said association was then, and is now,

indebted to beneficiaries for death losses in the aggregate sum of $30,000, for the payment of which said association had on hand, at the time of the examination referred to, available assets in the sum of $2,437.65." Upon this allegation, the referee finds: "From the organization of the Bankers Union of the World, its president advanced various sums to it and for its use. There is in evidence no tabulated statement of the amounts drawn out by him. There is in evidence sufficient data to show that the amounts paid to him as salary, not including commissions, is $5,015.76. The Bankers Union began business November 14, 1898. The period above contemplated is, therefore, over 5 years. The net sum he has received as salary is at the rate of less than $1,000 a year during the existence of the Bankers Union of the World"; and, second, "There was paid the vice-president, the wife of the president of the Bankers Union, for services in 1903, $50 a month for a short period. She received for the remainder of that year, for editing the official paper of the Bankers Union, $150 a month. The salary of the president of the Bankers Union, for the year 1903, was $600 a month. The salaries just referred to I find are not exorbitant." This finding of the referee does not appear to us to fully reflect the evidence upon this allegation. We do not want to be understood as expressing an opinion whether the salary as allowed to the president would, or would not, be exorbitant, when allowed by a board of directors selected as the statute requires, and freely acting in the management of the general affairs of this society. The finding of the referee, "That there is in evidence no tabulated statement of the amounts drawn out by him," is, to our minds, more serious in its nature and consequences than would appear to be regarded by the referee. There should be no uncertainty in the accounts between a salaried officer and the society, and the auditor would undoubtedly be justified in refusing a license to a society in whose transactions such uncertainty existed.

The managing officers of these societies are trustees for

the members, and must transact the business that comes within their province for the interests of the members. If it appears from their plan of organization, and their manner of doing business, that the funds of the society are considered and used by them as their personal emolument, they are not to be allowed to transact business. The defendant is enjoined from doing business until it is made to appear to the satisfaction of the auditor, or by a showing in this case, that all claims of the president against the company are fully and finally adjusted; and no claims of the president for compensation for services rendered will be made or entertained, except the regular and reasonable salary as allowed and fixed by the board of directors.

6. The petition alleges that the society is insolvent and unable to meet its pending death claims. A large proportion of the evidence relates to this allegation. The referee finds that the allegation is not proved, and we are entirely satisfied with his finding in that regard. The conduct of the officers of the society in adjusting death claims has without doubt led to great confusion, and unnecessary delay; and merits criticism. Also does its apparent reluctance and neglect to disclose to the proper authorities the true state of affairs regarding these matters, and, possibly, also the provisions of its constitution and by-laws as to the extent of its liabilities upon death claims, and its manner of determining the same. The managing officers have failed to appreciate the fact that the supervising authority of the auditor is such as to require perfect frankness and a full disclosure of its affairs, whenever demanded. We have already indicated that these evils must be corrected before business is continued. But, the allegation that the society is insolvent is wholly unsupported. The plan of its organization, if carried out, will, apparently, furnish ample funds to meet all its just liabilities, and the managing officers have been active and vigilant in the prosecution of its business. It has, apparently, during the last year, paid from the assessments collected for death claims occurring during the year, more than the

total amount of losses for the same period. The assets of such societies do not consist of tangible property and cash in hand alone. Its members pay assessments when called upon to meet the loss occasioned by the death of one of their number. If its plan of operation is feasible, its ability to meet its liabilities depends upon the good faith and solvency of its members. It can not be said that it will not be able to meet its death losses as they occur.

7. It is charged that the defendant has diverted the funds of the society and paid out large sums for the alleged purchase of the business and membership of other purchased organizations, and that the membership of such other purchased organizations were admitted to the defendant association, without medical examination, at lower and less rates of charges and assessments than required from persons originally becoming members of the defendant society. Upon this allegation the referee finds: "While all the transfers of societies above noted, except the Red Cross of Waverly, Iowa, the Home Guardians of Sterling, Illinois, and the Pioneer Life Association of Luverne, Minnesota, were made under sanction of the insurance department of this state, the evils which inhere in such transfers without authority of law have fully justified the auditor's refusal to sanction such transfers. Of these evils, the following are the most conspicuous: There is a temptation to the officers of the absorbed lodges, who receive its fund for disbursement, to use such funds for their own individual advantage. There are of necessity members whose health has failed, or who have passed the age of 55, between the date of entry into the transferred order and its transfer to another order. These must either be ignored and their insurance thus destroyed without their consent, or a physical examination must be waived, contrary to the provisions of the statute of the state. Reserves accumulated must be diverted by the transferred society to an improper purpose, and thus there must be violated a sacred trust." It appears that the insurance department of the state at one

time approved of such methods, and recognized such action as legal. It also appears that, after a change had taken place in the personnel of the department, such action was not sanctioned but disapproved, and that the defendant society, nothwithstanding such disapproval, has persisted in the same course of conduct. The statute prescribes the qualifications of members that may be admitted; and to admit members above the age limit, or without medical examination, is clearly in violation of its provisions. What may not be done directly in that regard, can not be done by taking over the entire membership of another society, and the conduct of the defendant was a manifest violation of law. It seems to be the opinion of the referee that this practice had been discontinued before these proceedings were begun, and that no further action on the part of the court is necessary than to express its disapproval thereof. We are inclined to adopt this suggestion.

8. The defendant asks that the court will, in this action, enter an order upon the auditor to reinstate the defendant, but, as before pointed out, the court is not given authority to do so under section 16 of the act. It will be the duty of the auditor to reinstate the defendant when it has complied with the order of this court, and has corrected the errors herein indicated.

The suggestion that the auditor might, through prejudice or partiality, neglect to perform this duty is wholly unwarranted by the evidence. The evidence shows a desire and effort on the part of the auditor to perform the duties enjoined upon him by statute, and his action in commencing these proceedings was not only justified, but required, by the facts as disclosed in the evidence. If this judgment is complied with by defendant within 60 days, the injunction will be dissolved. In the meantime, the injunction is continued, and if further action herein becomes necessary to protect or enforce the rights of the parties, upon application of either party, such action can be taken.

JUDGMENT ACCORDINGLY.

HOLCOMB, C. J., dissenting.

I am unable to concur in all the conclusions announced in the majority opinion. I think the defendant society should be reinstated and permitted to continue its business as recommended by the referee, but enjoined from doing certain things which are violative of the law regulating the business of such societies. It seems to me that the construction placed on the section of the statute under consideration operates unnecessarily harshly on mutual fraternal beneficial organizations, and overlooks the interests of the individual members which the statute was designed to protect. The judgment to be entered enjoining the defendant society from doing business until, at a regular or specially called meeting of its membership in delegate convention, there shall be effected a reorganization of the society, and of the plan of conducting its business, so as to conform to the requirements laid down in the opinion, has the tendency, if not the result, of extinguishing life by the slow process of strangulation. The life of an organization like the defendant society depends upon the activity and energy exerted continuously and at all times by those charged with the duty of administering its affairs. The prolonged litigation in the case at bar can not but have a most depressing effect on the strength and vitality of the organization, and now to suspend its business by an injunction, until a reorganization can be effected, as it appears to me, can but result in seriously impairing, if not altogether destroying, the usefulness and beneficent purposes which, by the judgment, it is intended to preserve. The object and aim of the statute is to regulate the management of the affairs of the society and protect its membership, and not, by injunction, to drive it out of business, except in extreme cases.

Nor do I understand that it is the province of the court to prescribe a designated plan of organization, or reorganization, as a condition of reengaging in business. The

internal affairs of the society and the plan upon which it will conduct its business are matters of concern only for its membership. It can not do business in violation of law. The court can say "thou shalt not," but, however wise and advisable it may seem to the court, it can not very well say: Unless you do business according to certain prescribed methods, which are regarded as best calculated to subserve the interests of the membership, you can not do business at all. I do not understand that a board of directors is indispensable in the management of the affairs of such an organization. The members may, without violating the law, provide for the government of the affairs and the conduct of the business of the society through other agencies and instrumentalities. All the statutes enjoin is a representative form of government.

The majority opinion enjoins the defendant society from doing business until certain errors therein mentioned and found to exist are corrected to the satisfaction of the state auditor. The history of the present case does not, as it seems to me, make appropriate an order of this kind. The auditor is thereby clothed with greater authority than is contemplated by the enactment prescribing his powers and duties. The auditor is a real party in interest in this litigation. The suit was begun at his written request. He prosecutes in the name of the state. The litigation should be as binding on him as on the defendants. The judgment and decrees entered should operate against him as forcibly as against the other parties to the suit. The controversy having been submitted to the court for adjudication, its decrees should definitely fix and determine the responsibilities and duties imposed upon and due to each of the adversaries.

The society is enjoined from doing business until its president shall release all claims for compensation for his services under contracts made with the other executive officers of the organization. Of course, the legality of his demands against the society can not be litigated in this action. He may have just demands against the society.

He may choose to assert the legality of his claim, decline to renounce it, and thus the life of the society is made to depend upon his philanthropy or his avarice, and this, as it seems to me, is not a correct adjudication of the society's right to continue its business.

As expressive of my own views of the matters in litigation, I make the following opinion, prepared by me before this case was reargued, with a view to its adoption as the opinion of the court, a part of my dissenting opinion herein:

The legislature, in 1897, passed a law entitled "An act defining fraternal beneficiary societies, orders or associations, and regulating the same" and to repeal a prior law relating to the same subject. Laws, 1897, chapter 47 (Compiled Statutes, chapter 43, sections 91-112, Annotated Statutes, 6483-6504). Section 106 provides that, upon failure or refusal of any such association to make the report provided for by the act, the association shall be excluded from doing business in the state. It is also provided in the same section, in substance, that in case of the failure to make such report, or when any such society shall exceed its powers, or shall conduct its business fraudulently, or shall fail to comply with any of the provisions of the act, an action may be begun by the attorney general at the instance of the state auditor to enjoin the society from carrying on business; that, when so enjoined, such society shall have no authority to continue in business until such report shall be made, or overt act or violation complained of shall have been corrected, provided it is found by the court that the default charged exists, whereupon the auditor shall reinstate such association, and not until then shall such association be allowed to do business in this state. Acting under the provisions of the above mentioned section and in pursuance of the authority therein given, the attorney general prosecutes the present action in the name of the state, praying in the petition that the defendant society, its officers and agents may be enjoined from further pro-

ceeding with the business of the association; that a receiver may be appointed to take charge of its affairs, and that the same may be wound up according to law. The petition alleges, and it is admitted, that the defendant is a fraternal beneficial society organized under the laws of this state. As grounds for the relief sought, the substance of the allegations of the petition is to the effect: First, that the society has exceeded the powers granted it by its license issued by the state auditor, and that it has conducted its business fraudulently, and has not fully complied with the requirements of the laws of the state; second, that the society is insolvent; third, that it has diverted the funds of the association from the purposes for which contributed, and has paid out the same for the business and membership of other similar organizations; such membership being admitted to the defendant society without medical examination, and beyond the age limit prescribed by statute, and at less rates than charged to the membership of the society generally; fourth, that the law has been violated by withdrawing, without consideration, securities donated and belonging to the society, for the purposes of putting it upon a financial basis so as to continue business; fifth, that false and fraudulent statements of its financial condition for the purpose of deceiving the auditor have been made, and thereby the insurance department was induced to renew its authority to do business in the state; sixth, that the law is violated in that the society has no representative form of government in the management of its business, and that the affairs of the society are not managed by a board of directors but by employees in the interest of its president, who, by this means, controls its affairs; seventh, and lastly, that the society's liabilities have by unlawful means been suddenly and greatly increased and large amounts drawn from its treasury by its president and vice-president in fraud of the rights of its membership. The answer of the society and its officers amounts to a general denial of these several charges of irregularities and noncompliance

with the law. A reference was directed by the court, and the referee, after having taken all the evidence offered by the respective parties bearing on the issues raised by the pleadings, has filed an exhaustive report containing his findings of fact and conclusions of law. On the referee's report, the defendant society asks for judgment in its favor. The state has filed exceptions to certain of the findings of fact, and because other findings were not made, and also to some of the conclusions of law arrived at by the referee. The findings are too voluminous to be incorporated in this opinion, and we must content ourselves by referring only to some of the more important portions thereof with an expression of our own views regarding the particular question under consideration.

While the referee's findings are in the main on all salient points in favor of the society, yet there are several matters in respect of which it is found that the society has failed, in the conduct and management of its business, to comply with certain provisions of the law. Regarding these adverse findings, however, they are not deemed by him sufficient to justify a judgment precluding the society from continuing its business in this state. As a conclusion of law it is held that the several irregularities and illegal practices found to exist can be remedied by enjoining the society and its officers from further permitting or engaging in the same. In this connection it is proper to state here that, in our judgment, it is the policy of the law under which the state is proceeding in this case to regulate the business of fraternal beneficial societies and compel compliance with the law, by enjoining that which may be found to be irregular and illegal, rather than to close up the affairs of a society and drive it out of business. A perpetual injunction or the appointment of a receiver would effectually close up the business of a fraternal beneficial society and terminate its earthly career, and it is not believed that, because it is found there has been a failure in some respects to comply with the law or to conduct the business of the society in all respects in

the manner contemplated and provided by its articles of incorporation, such results should follow unless it is made manifest that, by reason of such irregularities, the society has rendered itself incapable of accomplishing the objects and purposes of its organization. It is, we think, made clear, by a reading of the entire act and especially the section under the provisions of which these proceedings are instituted, that what the legislature intended was that compliance with the law should be required and secured, and the interest and rights of the members and certificate holders protected and subserved. If, says the statute, it is found that there has been a default, that is, a failure to comply with some of the provisions of the statute, such society shall be enjoined until the overt act or violation complained of shall have been corrected, whereupon it shall be reinstated and be allowed to continue its business. We do not mean to be understood as saying that there may not be such violations of, and failure to comply with the law as to be incapable of correction and that, in such case, the society should at least be perpetually enjoined from doing business in the state and, in a proper case, its affairs wound up through the instrumentality of a receivership proceeding. What is said is that, where the errors and irregularities can be corrected and the membership protected, it is the policy of the law to permit the society to continue its business and thus carry out the aims and purposes of its organization. The courts, in such proceedings, will look to the interests of the society at large and to those who comprise its membership, rather than to the legal rights and liabilities of those responsible for the management of the society as they might be fixed and determined when no other rights and interests intervene. The referee has evidently accepted this construction as the proper view of the law and in this our judgment coincides with his.

With reference to the first ground of complaint relating to the alleged wrongdoing by the defendant society in exceeding its authority, conducting a fraudulent business

and in not complying with the law, it may be said that the allegations are of such general character as to be in effect only conclusions of the pleader and, regarding which, a cause of action is not stated. However, the different grounds of complaint are specifically enumerated in subsequent paragraphs of the petition, so that no further notice need be taken of the first ground mentioned.

It is next alleged that the society is insolvent and unable to meet its pending death claims. Around this point nearly all of the evidence centered, and a mass of figures are presented for consideration sufficient to daunt the strongest heart and clearest head. While the question of liabilities for death losses ought, it would seem, to be a simple one and easily ascertainable, as also the amount of the income from assessments from which these liabilities are to be met, yet the society's method of doing its business, and the provisions of its constitution and by-laws as to the extent of its liabilties by reason of death claims, and its apparent reluctance to disclose to the insurance department of the state auditor's office the true state of affairs regarding these matters, has led to unnecessary controversy. The managing officers of the society have, it is manifest, not complied with the reasonable requirements of the insurance department of the auditor's office, and have seemingly failed to appreciate the fact that the supervising authority of the auditor is such as to require perfect frankness and the fullest disclosures of its affairs whenever requested. The chief cause for the difference between the insurance department and the officers of the society has been with reference to the variable amounts for which the society is liable by reason of death claims arising under the provisions found in its constitution, which differ from the amounts called for by the face of the beneficial certificate, unless the insured member has lived the entire period of his life expectancy from the time of his having become a member. It is found by the referee that, by the constitution under which the society is now operating, "from each death benefit payable on account of death

before living out expectancy under American experience tables of mortality, a deduction is made of a sum equal to the amount of one annual premium for each year of the assured's life expectancy, with interest from the date of the policy to the date of death at two and one-half per cent. per annum, less the amounts paid each year into the mortuary fund by said member, together with accumulated interest on the same for the period of his membership at two and one-half per cent. per annum." It is readily seen that, in order to ascertain the amount due to the beneficiary of the certificate holder at the time of death, reference must be had to the state of his account with the society which will show his expectancy at the time of becoming a member, the annual dues or assessments paid, and those which would have become due, had he lived out his expectancy, and from this computation the amount actually due on the benefit certificate is ascertained. More or less litigation has grown out of the constitutional provision referred to regarding the legal effect thereof on certificates issued prior to its incorporation by amendment as a part of the constitution. We have assumed and, for the purposes of this case, shall assume that the society's liability for death losses is to be determined upon a basis of deductions from the face of the certificates according to the terms of such provision, without at all undertaking to prejudge or determine rights of beneficiaries in an action in which they are not parties. It would seem that, ordinarily, such provisions, when legally adopted by amendment as a part of the fundamental law of the society, become binding on all its members, and will govern in all cases in determining the society's liability for death claims accruing thereafter. *Hall v. Western Travelers Accident Ass'n*, 69 Neb. 601. The referee also finds that "The claims for losses reported and received, in 1903, amounted to $27,300. The amounts collected for deaths and disabilities, in 1903, were $56,117.81. There was therefore collected, in 1903, the sum of $28,817.71, for deaths and disabilities in that year, in

excess of what was necessary to pay losses of that character accruing within the same period. From these figures it does not appear that the Bankers Union of the World is in a condition in which it is unable to raise funds with which to meet its liabilities by the assessment of its members. As its revenues as a fraternal beneficial association are, in the nature of its business, to be obtained only from this source, I find that the allegation that this association is insolvent and unable to meet its pending death claims, is not sustained by the evidence." Our own examination of the evidence confirms the correctness of the finding, and from it the result necessarily follows that the charge of insolvency is not supported by the evidence. An examination of the liabilities of the society at the beginning of its business for the year 1903, as shown by its annual report introduced in evidence, and at the close of its business for that year, as shown by the evidence in the case at bar, discloses marked improvement, and the inference is fairly warrantable that, during its last year of business, it has paid considerable more from the assessments collected for death claims occurring during the year than the total amount of losses for the same period, and that with proper management it should be able from its assessments to meet all legitimate demands which have accrued or, in the ordinary course of events, will accrue by reason of death from among its membership. Its revenues are derived from its assessments made upon its members and, with the rate of death loss normally to be expected, it seems to us its receipts are sufficient to meet its liabilities by reason thereof as they mature. It has paid something over $6,000 during the first half of January of the current year and just before these proceedings were begun. It is true, it has been unfortunate in the number of claims presented and resisted which have been followed by litigation. The explanation of this state of affairs has been adverted to. It does not appear that the society has been unable to meet judgment liabilities when finally adjudicated. It is also obvious that, among the

claims made against the society by reason of death of its members, the aggregate amount of all of which is relied upon by the state to prove insolvency, many are found which are stale and unjust demands, and for the satisfaction of which, the society is not legally liable. It is impossible in this proceeding to distinguish with any degree of accuracy the just claims from the spurious demands. It would therefore be unjust and unfair to the society to say that all of the claims for death losses, which the evidence discloses in this case have been made on the society, are legal liabilities. Upon a consideration of the whole of the evidence relating to the question, we are constrained to say that the society's liabilities for death claims are much less in amount than as contended for by the state. The line of demarcation between solvency and insolvency, when applied to the affairs of a beneficial society such as the defendant in the case at bar, is a difficult question to determine. The assets of the society do not consist of cash in its treasury and property subject to its disposal. It may not have a dollar's worth of property or a cent in its treasury, and liabilities to meet, and yet be solvent. Its assets are in the pockets of its members, to be paid into the treasury by assessments, whenever required to pay liabilities and in accordance with the terms of the contracts under which the assessments are levied and collected. If its plan of operation be such as to warrant the conclusion that it will be able to meet liabilities for deaths as they may reasonably and, under normal conditions, be expected to occur, and to pay the expenses of the management of the business judiciously conducted, then the society may, it seems to us, be said to be solvent. In such case, it would seem that the society has the ability to pay debts as they fall due in the usual and ordinary course of the business in which it is engaged, in which event it would not, in our opinion, be subject to the charge of insolvency. It is observed by the common pleas court of Ohio on the question of the solvency or insolvency of a fraternal beneficial society:

"An ordinary business corporation is insolvent when it is unable to make payments as usual, or as they mature, or according to the undertaking, or in the ordinary course of business. *Stone v. Dodge,* 96 Mich. 514, 56 N. W. 75. A refusal to make payments does not necessarily mean an inability to pay. The fact that the liabilities of the defendant, at any given time, may exceed the funds then on hand which can be properly used to pay them, does not prove insolvency. The defendant is not required by law to keep enough money in the treasury to meet all the liabilities which may come upon it. It is not required by any by-law to collect the funds till after the liability is incurred. * * * The insolvency of such an association is, therefore, *sui generis.* It is not like that of an ordinary business corporation. It means a condition in which the association is unable to raise the funds, with which to meet the liabilities, by assessment of the members. It is assumed that some of the money to make that fund is either in the treasuries of the subordinate rulings, or in the pockets of the members. Hence, to prove insolvency, it must be proved that the money is neither in the treasuries of the subordinate rulings, nor in the pockets of the members, or, if there, that they refuse to pay it." *Baker v. Fraternal Mystic Circle,* 1 Ohio Dec. 579.

It would serve no useful purpose for us to burden this opinion with a mass of figures elucidating the conclusion we reach regarding the alleged insolvency of the defendant society. It is sufficient to say that, in our judgment, with proper management, and with the costs of conducting the business reduced to a minimum, and the maintenance of the rates as charged in the schedules of assessments, and with liabilities as fixed and determined by the present contracts of insurance, no reasonable ground exists for saying the society can not meet its liabilities in the ordinary and natural course of affairs as they mature, and that therefore insolvency is not proved. We must not be understood as expressing approval or disapproval of the plan adopted by the society in perfecting its organization and carrying

forward the purposes of its creation; nor do we hold that the management of its internal affairs is a subject of judicial control and regulation. We desire only to be understood as saying that, by the application of any accepted test for the determination of the question of the insolvency of a society doing business as a fraternal beneficial organization, it can not be said that the defendant society is insolvent and, for that reason, should be enjoined from further engaging in business, its affairs placed in the hands of a receiver and wound up.

As to the third ground of complaint mentioned in the petition, the evidence discloses, and the referee finds, that the officers of the defendant society, for the purpose of gaining accessions to its membership, have pursued a systematic course eventuating in the consolidation with the defendant society of numerous others organized for like purposes, and that, as a result of this plan of operation and in bringing about such consolidations, the laws governing and regulating the business of fraternal beneficial societies have been disregarded in more than one particular. By the methods adopted and practiced in consolidating different societies, the law requiring admission to membership into a fraternal society upon medical examination, by a competent physician, and also the provision of the statute fixing a limit as to the age of a person who may be admitted as a member, have been violated. It is also disclosed by the evidence, and found by the referee, that, in some instances, where such consolidation has been effectuated, trust funds of the absorbed society have been diverted from the use for which contributed, and used for the purposes of effectuating a consolidation of the absorbed society with the defendant. The referee upon this point finds: "While all the transfers of societies above noted, except the Red Cross of Waverly, Iowa; the Home Guardians of Sterling, Illinois, and the Pioneer Life Association of Luverne, Minnesota, were made under sanction of the insurance department of this state, the evils which inhere in such transfers without authority of law,

have fully justified the auditor's refusal to sanction such transfers. Of these evils, the following are the most conspicuous: There is a temptation to the officers of the absorbed lodges, who receive its funds for disbursement, to use such funds for their own individual advantage. There are, of necessity, members whose health has failed, or who have passed the age of 55, between the date of entry into the transferred order and its transfer to another order. These must either be ignored and their insurance thus destroyed without their consent, or a physical examination must be waived, contrary to the provisions of the statute of the state. Reserves accumulated must be diverted by the transferred society to an improper purpose and thus there must be violated a sacred trust." It is to be said, in this connection, that the insurance department at one time approved of such methods and gave official recognition to the legality of such action. It is also manifest that, as at present organized, the department refused to sanction such action, and that the defendant society, notwithstanding such disapproval, has persisted in conducting its business along these prohibited lines. In the absence of a statute making provisions for and authorizing the joinder or consolidation of different fraternal societies when desired by their membership, so that the two organizations may coalesce, it is evident under our present statute that such results, even though wise and beneficial, can be accomplished only by admitting to membership in the surviving society those alone who have complied with the express requirements of the statute with reference to medical examination, and the age limit, as therein found. It ought not to require discussion or argument as to the inviolability of trust funds held by a beneficial society and the duty of the courts to require their application to the uses and purposes for which contributed. We find no difficulty, however, in respect of the matters last discussed, in bringing our minds to the conclusion that these irregularities and illegal practices may be corrected, and that, by restraining the defendant from a further continuance

thereof, the purposes of the statute will be fully subserved and the rights of the individual membership of the society best protected.

As to the fourth ground of complaint, the referee finds, and the evidence fully supports the finding, that the president of the society, in withdrawing the securities complained of, at the same time paid into the society treasury the fair market value of such securities and that, in this regard, the complaint of the state is ill-founded.

Exception is taken by the state because, as contended, no finding was made by the referee as to the fifth ground of complaint. We are disposed to the view that the several findings of the referee fairly cover and include the issue presented by the paragraph of the petition referred to. In the sixth paragraph of the findings it is found that the reports of the financial condition of the society filed with the state auditor were not full, complete and accurate statements, such as are required by law. In regard to this complaint of the state, it is to be observed that a difference of opinion exists, having a reasonable foundation for its basis, as to the exact nature and scope of the information the financial reports to the state auditor should contain. The reports made to the auditor were not false and fraudulent in the sense that they were intended to deceive the insurance department, and thereby obtain a license and permission to continue a business which was being conducted in fraud of the rights of the members of the society. It is a fraud of this character, as we understand the statute, that is referred to in the section on which this action is grounded. The mere fact that the reports of the society to the auditor did not contain all the information they properly should, does not justify the inference that the society is conducting a fraudulent business, within the meaning of that section. The officers of the society have failed to include in their reports to the insurance department death claims, where the proofs had not been completed to their satisfaction or where, for any reason by them deemed sufficient, the claims were regarded as un-

just, and for the satisfaction of which no legal liability was deemed to exist against the society. It is not to be doubted that all reasonable requirements of the insurance department in regard to disclosures of liabilities, either contingent or fixed, actual or apparent, are to be complied with by every insurance society coming within its jurisdiction. But these requirements, whatever they may be, are of a uniform character, and a general rule in that regard bears upon each society doing a like business in the same way. The statute under consideration specifically requires that, in the annual report to the auditor, information shall be disclosed as to the number of losses or benefit liabilities incurred, and the number and kind of claims compromised or resisted, with a brief statement of the reasons therefor. (Compiled Statutes, ch. 43, sec. 100, Annotated Statutes, 6492.) It is clearly the duty of the proper officers of the defendant society to furnish, in their reports to the insurance department, the information above specified and this includes, of course, every claim for death benefits for which proofs have been furnished in accordance with the rules and requirements of the society, even though it is believed, or as a matter of fact, there do exist good and sufficient reasons for regarding the claim as unfounded, and for the satisfaction of which no liability exists against the society. The conclusion of the referee regarding this phase of the controversy is: "If permitted to do business the Bankers Union, as well as its officers who are defendants in this case and their successors, should be enjoined from withholding information from their reports, and from the auditor of public accounts of this state, of information of the nature indicated, and any other information, or means of deriving information, as to the business and business methods of such Bankers Union of the World, which said auditor may deem necessary." This conclusion is believed to be a correct construction of the law and is therefore confirmed.

As to the sixth ground of complaint, the referee finds as follows: "It is provided by section A, division 3 of the

constitution of the Bankers Union of the World, that the supreme officers of the supreme lodge shall be 9 in number. These, by section C, division 1 of said constitution, are required to be elected by supreme lodge delegates. It is further provided in said section A, as follows: 'There may also be not more than 8 directors elected by said supreme officers. The officials above designated shall together constitute a board of directors, and all the power and authority of the supreme lodge shall, when not in session, be vested in the board of directors, the same as though the said supreme lodge was regularly convened in open session.' It is provided in section B, division 3 of said constitution, that: 'All of said officers of the supreme lodge shall be elected for the term of 2 years, and until their successors are elected and qualified.' The effect of the above provisions is to create a possible board of directors 17 in number, of which board 8 members are to be elected by the executive officers. These 8 directors are not to be chosen by the members of the Bankers Union of the World, nor by the representatives of the said members selected for that purpose." The referee concludes: "The provisions for the appointment of 8 directors by executive officers is entirely nugatory, for the reason that this method of providing directors is in conflict with section 91, chapter 43, Compiled Statutes (Annotated Statutes, 6483), requiring that fraternal beneficial associations shall have 'a representative form of government.' If the Bankers Union is permitted to do business, there shall be an injunction against the appointment, or the recognition of any director appointed by supreme lodge officers." These findings and conclusions are confirmed, and the provisions for the selection of 8 directors by the executive officers is held to be a nullity, and of no force, because violative of the section mentioned, which declares that such societies shall have and maintain a representative form of government in the management of their affairs. While the internal affairs of the society are, except where conflicting with the law, matters of concern

only for the membership of the organization, and are not properly under the control or direction of the courts, it is quite patent to us that a large share of the difficulties which have been incurred by the defendant society arises by reason of its methods of government. It has no directory, in the proper sense of the word, to guide and direct the general management of its affairs. Its directory, as provided for, as has been noted, is clearly in violation of the statute; but even this provision for a directory has not been attempted to be put into practical operation by those purporting to have authority so to do. The management of the affairs of the society, by its membership and under its constitution and by-laws, has been left exclusively within the control of its supreme executive officers. These officers have not only had to do with the general affairs of the society, but, in a measure and in many instances, have dealt with themselves in making contracts in such a way that their personal interests and the interests of the society at large have come in direct conflict, and because thereof, the latter has been the greater sufferer. In this connection it is proper to note that, by the finding of the referee, it is made to appear that, soon after the organization of the society, a sweeping contract was made by those purporting to act in its behalf with its president, the nature of which need not here be discussed, which, because of its objectionable features, was later on abrogated, and in January, 1902, an arrangement was made whereby the president was to receive a stated salary a month, "and commissions at the rate of 5 cents a $1,000 for single life policies, and 7 and a half cents on joint policies, on all the policies shown by certain books of the Bankers Union designated as A, B and C." The receipt of these commissions ended in June, 1903, after something like $4,000 had been received under the contract. As a conclusion of law, the referee holds that because of the provisions of section 103, chapter 43, Compiled Statutes (Annotated Statutes, 6495), the Bankers Union of the World had no right to give to its president a commission on its membership al-

ready secured, and, consequently, if the society is permitted to do business, it should be enjoined from paying, and its president should be enjoined from receiving pay or credit for, commissions to any amount of that character. The conclusion reached by the referee is a correct interpretation of the law and is approved. With reference to the last ground of complaint, the referee finds upon the fullest investigation, and we are disposed to adopt his finding, that the charge made is not sustained by the evidence. The referee finds: First, "From the organization of the Bankers Union of the World, its president advanced various sums to it and for its use. There is in evidence no tabulated statement of the amounts drawn out by him. There is in evidence sufficient data to show that the amounts paid to him as salary, not including commissions, are $5,015.76. The Bankers Union began business November 14, 1898. The period above contemplated is therefore over 5 years. The net sum he has received as salary is at the rate of less than $1,000 per annum during the existence of the Bankers Union of the World." And, second, "There was paid the vice-president, the wife of the president of the Bankers Union, for services in 1903, $50 a month for a short period. She received for the remainder of the year, for editing the official paper of the Bankers Union, $150 a month. The salary of the president of the Bankers Union, for the year 1903, was $600 a month. The salaries just referred to I find are not exorbitant."

A consideration of the entire record leads to the conclusion that the defendant society should be reinstated and permitted to continue its business; that such an order will best subserve the interests of its certificate holders, whose rights, we are disposed to view, were the principal object of legislative solicitude in the enactment of the section of the law we have under consideration. In the further prosecution of the business affairs of the society, its executive officers who are made defendants in this action should be restrained from doing those things herein found to be irregular or not in compliance with the requirements

of the law, and from withholding from the state auditor any and all information pertaining to its affairs, showing its financial condition or relating to claims for death losses and disability benefits, whether the liability has been adjusted or in process of adjustment, or whether the claim has been compromised or is resisted, and all other needful and necessary information required by the rules of the insurance department, in the exercise of its supervisory authority over the affairs of insurance societies organized under the law under which defendant is operating.

The costs of the action should be taxed against the defendant society, as by section 106, chapter 43, Compiled Statutes (Annotated Statutes, 6498), is provided shall be done.

RICHARD GOULD V. STATE OF NEBRASKA.

FILED APRIL 21, 1904. No. 13,642.

1. **Trial: ERROR.** In order to predicate error on the fact that the father of a state's witness was permitted, while she was testifying, to sit near her in the court room, it must affirmatively appear that his presence caused her, in giving her evidence, to deviate from the truth, or color her statements to the prejudice of the accused.

2. **Secondary Evidence.** Where it is shown that a note and certain letters written by the accused to, and received by, a child alleged to have been enticed away from her parents by him, have been totally destroyed by her, at his request, and can not be restored or produced, and that she remembers their contents, she may be permitted to give oral evidence of what they contained.

3. **Instructions.** Instructions examined, and *held* to have been properly given.

4. **Evidence.** Record examined, and the evidence *held* sufficient to sustain the verdict.

5. **Sentence.** Where a man of mature years, who is married and has a family of 7 children, is guilty of enticing a girl of 15 years of age away from her parents for an unlawful purpose and in violation of the provisions of section 20 of the criminal code, he being a minister of the gospel and she a member of his church, a sentence of 6 years in the penitentiary is not an excessive punishment for his crime.

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

Patterson & Patterson, for plaintiff in error.

F. N. Prout, Attorney General, and *Norris Brown, contra.*

BARNES, J.

At the September, 1903, term of the district court for Merrick county, one Richard Gould was tried and convicted of the crime of child stealing. After his motion for a new trial was overruled, the court sentenced him to imprisonment in the penitentiary of this state for the period of 6 years. To reverse that sentence he prosecuted error to this court, and will hereafter be called the plaintiff.

In the first assignment of error the plaintiff complains because the father of Eva Flint, the child charged in the information to have been stolen or enticed away, was allowed to remain seated near her while she testified on the trial of the case. The plaintiff states no reasons in support of this assignment which in any way appeal to our consideration. The substance of all that is said by him is, that he thinks the father had manufactured testimony in the nature of a family record, which was introduced in evidence as exhibit "A"; and for that reason his being allowed to sit facing his daughter while she was testifying was prejudicial to the plaintiff's rights. A careful examination of the record fails to disclose any improper conduct on the part of the father, and it nowhere appears that the testimony of the daughter was in any way affected by the father's presence.

The plaintiff, by his second assignment, contends that the court erred in allowing the witness, Eva Flint, to give oral evidence of the contents of a note she had received from him the day before they left the state, and certain letters theretofore written by him and received by her.

The only argument made by counsel in support of this contention is, that no sufficient foundation was laid for the introduction of this class of testimony. It appears from the record that the note and the letters in question were written by the plaintiff, and received by the witness; that after she had read them, at his special request, they were totally destroyed by her; so that, as she testified, it was impossible to find or restore them. In addition to these facts, the witness stated that she could remember certain portions of what the note and letters contained. Thereupon she was permitted to state, in detail, such parts of them to the jury as she could remember. It thus appears that a sufficient foundation was laid for the introduction of this evidence, and plaintiff's contention is without merit.

The next assignment of error argued, in substance, is, that the court erred in permitting the witness, Eva Flint, to state that she would not have gone away but for the inducements of plaintiff. The facts constituting these matters of inducement had been properly put in evidence, and after the witness had testified to them in detail, she then stated that, but for them, she would not have left her home with the accused. It was proper for her to state these matters, to give the actions and statements of the accused, and state what effect they had on her. Therefore the court did not err in receiving this evidence.

It is further contended that the court erred in giving the jury his instruction numbered 1, on his own motion. We have examined this instruction, and find that it contains a fair and impartial statement of the charges contained in the several counts of the amended information on which the accused was tried, and informed the jury of the issues presented for their consideration. It is insisted, however, that, because the state elected to rely for a conviction on the third count of the information, it was error for the court to mention the other two counts. We are unable to agree with this contention. It was the duty of the court to advise the jury of the facts charged in the information,

which was fairly and impartially done. This was immediately followed by a direction to them, as follows: "The state having elected to rely upon the third count of the information, the first and second counts are therefore withdrawn from your consideration. Therefore the only questions for your consideration in this case are the allegations contained in the third count of the information."

It thus appears that the statements contained in the first and second counts of the information were entirely withdrawn from the consideration of the jury, and in such a manner that they could not have been misled to the prejudice of the plaintiff by this instruction.

Complaint is also made of the giving of instructions numbered one, two, three and four, asked for by the state. The best way to dispose of these assignments is to consider them separately and in connection with section 20 of the criminal code under which the prosecution took place, which provides as follows: "Any person who shall maliciously or forcibly or fraudulently lead, take, or carry away, or decoy, or entice away, any child under the age of eighteen years, with intent unlawfully to detain or conceal such child from its parent or parents, or guardian, or other person having the lawful charge of such child, shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

By the first of these instructions complained of the jury were told, in substance, that any solicitation, representation or suggestion made to Eva Flint by the accused for the purpose of influencing her to leave her father would, if it actually induced her to go away, be sufficient to make out a case of enticing.

By the second instruction the jury were informed that it was unnecessary for the state to establish beyond a reasonable doubt that it was the intention of the defendant in enticing Eva Flint away, if he did entice her away, to both detain and conceal her from her father; that it was sufficient for them to find from the evidence beyond a reasonable doubt that it was his intention to do either.

And, if they so found, it would be sufficient to make out a case of enticement, with intent, as charged in the information.

By the third instruction the jury were told that, while it was necessary for them to find and determine the intent of the accused, beyond a reasonable doubt, yet in so doing it would be immaterial for them to determine whether Eva Flint joined in said intent or not. In short, the substance of this instruction was, that the intent with which the accused performed the acts complained of, was what should be considered by them, and that the intent of Eva Flint in leaving her home with him was immaterial.

By the fourth paragraph of the instructions the jury were told, in substance, that in order to establish the intent of the accused it was not necessary for the state to show that it was his intent to detain or conceal Eva Flint from her father, against her will. No authorities are cited to prove that these instructions, or any of them, were erroneous. And we are satisfied that there is nothing contained in them which could in any manner prejudice plaintiff's legal rights. They seem to cover the propositions of law involved in the case, and to state fairly to the jury what it was necessary for the state to prove beyond a reasonable doubt, in order to warrant a conviction, under the section of the statutes above quoted.

The next assignment of error is, that the evidence is not sufficient to sustain the verdict. This question seems to be relied on to a greater extent than any of the others, and is argued at considerable length by counsel for the plaintiff in error. The gist of the argument seems to be that the plaintiff and his counsel appear to labor under the impression that because Eva Flint consented to go away with the plaintiff, that he is innocent of the charge of child stealing. To sustain this contention would practically set aside, and hold for naught, the statute under which this prosecution was conducted. It must be borne in mind that the offense of enticing a child away for unlawful purposes, without the use of violence, is entirely sepa-

rate and distinct from the one of forcible abduction. The fact that Eva Flint consented to leave her parents, with the accused, is immaterial. The offense is complete if the accused enticed her away with the unlawful intent, and by holding out hopes of some advantage to her, or by allurements persuaded her to go with him. The word "entice," as used in this statute, must be given its ordinary and usual meaning, which is: To draw on; to instigate by inciting hope or desire; to allure, especially in a bad sense; to lead astray, to tempt, to incite. Its synonyms are: To allure; to coax; to destroy; to seduce; to tempt; to inveigh; to persuade, and prevail on. That the accused, by his statements to Eva Flint, persuaded and induced her to leave her home and go with him for his unlawful purposes, is fully and completely established by the evidence contained in this record.

Lastly, the plaintiff contends that the court should reduce his sentence; that 6 years in the penitentiary is too long a term, and too severe a punishment for the offense committed by him. It appears from the record that the plaintiff is a man of mature years, having a wife and 7 children; that he was pastor of the church of which Eva Flint and her mother were members; that taking advantage of his confidential relations with them as their spiritual adviser, he frequented their home; that Eva Flint was a girl about 15 years old, perhaps a year older, but not exceeding that age; that shortly after the accused commenced his visits to her home he began his attempts to induce her to accompany him to some distant state, and participate with him in his unlawful purposes. It appears that she hesitated to leave her parents, but her hesitations were overcome by his blandishments and promises, together with his pretended solicitude for and care of her; that finally persuaded by his promises she yielded to him, and acompanied him from her home to Aurora in Hamilton county, from thence to Lincoln, from there to Omaha, to St. Paul, Minnesota, to Minot and finally to Williston, North Dakota, where she entered upon a course of illicit

relations with him, and where they were found living together as man and wife at the time of his arrest. On the trial he offered no explanation of his conduct, and there appears a letter in the record from him to the father of this child in which he acknowledges his guilt. The following is a part of the letter: "My plans were well laid, and I worked while others slept. Some day you will hear from us again. When you get this we will be hundreds of miles from here."

A careful examination of the record in this case satisfies us of the guilt of the accused. With this view of the case we are unable to say that his sentence is too severe. His conduct was so reprehensible that it would shock the sensibilities of the irreligious, even those who are "dead in trespasses and in sin." Such conduct on the part of a minister of the gospel can not be too severely censured. The accused made use of his confidential relation as spiritual adviser of the mother and daughter to frequently visit this family which he has disgraced, and entice from her home this child whose ruin he has accomplished; and in our judgment "the punishment fits the crime," and the judgment of the district court is

AFFIRMED.

HERMAN MENDEL V. JAMES E. BOYD.

FILED APRIL 21, 1904. NO. 13,487.

1. **Witness**: VOLUMINOUS ACCOUNTS. Where a book contains voluminous accounts or transactions, the examination of which could not conveniently take place in court, an accountant, who had made an examination of the book, may testify as to the result of his computation therefrom, but not as to mere inferences.

2. **Drafts**: EVIDENCE OF PAYMENT. Where the question was whether certain drafts had been paid for when issued, an accountant, who had examined the books of the bank, was permitted to testify as to what the books showed in regard to that question: *Held*, error.

3. ———: AUTHORITY OF CASHIER OF BANK. The general authority of a cashier of a bank does not authorize him to issue drafts of the bank for himself or for his private use.

4. ———: PROOF OF PAYMENT. When it appears that he has thus issued drafts, there is no presumption that they were paid for when issued, and the burden is on the party claiming they were thus paid for to prove it.

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

John P. Breen and *Frank H. Gaines,* for plaintiff in error.

S. R. Rush and *Howard B. Smith, contra.*

ALBERT, C.

One, since deceased, while cashier of a state bank in Iowa, embezzled $18,000 of the funds of the bank. Herman Mendel, the plaintiff in this action, and another were his bondsmen, and made good the shortage. A large portion of the funds thus embezzled were lost by the cashier in gambling on the board of trade, through the defendant who conducted a commission house. The plaintiff by assignment succeeded to the rights of his fellow bondsman in the premises, and brought this action against the defendant for the full amount of the cashier's shortage to the bank. The petition sets forth 19 drafts, aggregating $21,125, which, it is alleged, were received by the defendant from the cashier in the gaming transactions. Each draft represents a separate transaction, and each transaction is made the basis of a separate cause of action in the petition. The case is here for the second time. The former opinion is unofficially reported, under the present title in 3 Neb. (Unof.) 473, and contains a somewhat extended statement of the facts. The principal question of fact, on the first trial, appears to have been as to the amount which the cashier had received from the defendant in the transactions and returned to the bank. In the former opinion,

reversing the judgment of the district court, BARNES, C. (now judge), said:

"Therefore, in any event, the verdict in this case should have been for the plaintiff. We are satisfied that a verdict for $3,500 would not have been excessive. For this reason the judgment herein must be reversed."

The evidence on the second trial was the same as that on the first, save that the defendant undertook to show by an expert accountant, that 6 of the drafts had been paid for when issued. The trial resulted in a verdict for the defendant, and judgment was given accordingly. The plaintiff brings error.

As the plaintiff's right to recover on the evidence adduced on the first trial is established by the former opinion, for a justification of the present verdict we must look to the testimony of the expert accountant, which is the only additional evidence adduced on the second trial. One of the principal errors assigned is based on the reception of his evidence. After qualifying as an expert and showing that he had made an examination of the books of the bank, which were in court and identified, the witness was examined as follows:

Q. You may state whether you made an examination of the books of the State Bank of Neola, as to whether or not draft, Exhibit 16, No. 37,848, dated June 1, amounting to $1,500, was paid for when issued?

A. I have made such examination.

Q. You may state whether or not the entries upon the books of the state bank of Neola, or what they show with respect to the payment for draft Exhibit No. 16?

Objected to on the grounds that the book is the best evidence, and calling for a conclusion. Objection was overruled.

A. The books of the state bank of Neola show that Exhibit 16, draft No. 37,848, for $1,500, was paid for when issued.

Substantially the same record was made as to the other 5 drafts. It seems to us that this evidence was so clearly

incompetent as to leave little room for a difference of opinion. One of the elementary rules which governs in the production of evidence is that which requires the best evidence of which the case in its nature is susceptible. That a book itself, ordinarily, is the best evidence of its contents will be conceded. The foregoing rule has been relaxed where the book contains complicated or voluminous accounts or transactions, the examination of which could not conveniently take place in court. In such cases it is the practice to permit an accountant, who has made an examination of the book, to state the result of his computation therefrom. 1 Greenleaf, Evidence (13th ed.), sec. 93; 12 Am. & Eng. Ency. Law, sec. 2, p. 428. But, in the present case, the question was whether the 6 drafts, or any of them, had been paid for when issued. This involved only 6 transactions, simple in their nature. The entries, which the defendant relied upon as showing such payment, should have been pointed out, and the question of what they showed left to the jury. If the entries were made in technical language, or were ambiguous, there is no doubt they might have been explained by any witness having shown himself competent to make the explanation. But to permit a witness to examine such entries, and then give in evidence the inferences which he drew therefrom was clearly improper. Whether the book itself would be admissible in evidence to prove or disprove such payment, in an action between the present parties, is a question that is not necessarily presented by the record.

One paragraph of the charge to the jury, and which is the basis of another assignment of error, is as follows:

"1st. Whether or not the drafts, Exhibits 1, 2, 13, 14, 15 and 16, or any of them, of the Neola State Bank, were paid for on their issuance, and the burden is upon the plaintiff to establish by a preponderance of evidence that said drafts were not paid for."

The 6 drafts mentioned in the foregoing instruction are the drafts which the defendant undertook to show by the expert had been paid for when issued. Some of them were

signed by the cashier whose peculations gave rise to this action; the others, by the assistant cashier; all of them, however, were issued by the cashier himself. It is well settled, that the general authority of the cashier of a bank does not authorize him to issue drafts of the bank for himself, or for his private business. *Lee v. Smith*, 84 Mo. 304, 54 Am. Rep. 101; *Anderson v. Kissam*, 35 Fed. 699; *Lamson v. Beard*, 36 C. C. A. 56, 45 L. R. A. 822; *West St. Louis Savings Bank v. Shawnee County Bank*, 5 Otto (U. S.), 557. This rule is founded on the familiar rule of the law of agency, which forbids that an agent shall act for himself and for his principal in one and the same transaction. It is founded on sound considerations of public policy, and the recognized inability of any person to faithfully serve two masters at the same time. Consequently, when the cashier issued these drafts, he did so without authority, and his conduct is to be viewed in no more favorable light than that of any other person who, without authority, appropriates the property of another to his own use. Such appropriation is commonly called conversion, sometimes by a harsher term, and where it is shown, as in this case, there is no presumption that the wrong-doer has paid value or made restitution, the burden is upon those claiming that he did to prove it. There may be a question whether the plaintiff, by the evidence adduced in making his case, did not commit himself to the theory that the burden was on him to show that the drafts had not been paid for when issued. But as the case must be remanded for a new trial on other grounds, it was thought best to deal with the instruction as an abstract proposition, rather than as it stands related to the theory on which the case was tried.

For the errors pointed out, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

FAWCETT, C., concurs.

GLANVILLE, C.

I concur in the conclusion but not in the holding announced in paragraph 2 of syllabus.

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.

FRED KRUG BREWING COMPANY ET AL. V. PETER HEALEY.*

FILED APRIL 21, 1904. No. 13,317.

1. **Petition.** Petition examined, and *held* to state a cause of action.
2. **Conversion:** ATTACHMENT: JUDGMENT. In an action for conversion of property taken from the possession of plaintiff, where defendants justify under an order of sale of attached property upon judgment against plaintiff's vendor, defendants must, at all events, show a valid judgment in the attachment case before he can question plaintiff's title.
3. **Plea of Res Judicata.** In such action, a plea of *res judicata* against plaintiff's title is not sustained by proof that plaintiff, who was made defendant in the attachment case, but against whom no judgment was rendered therein, had moved to discharge the attachment and his motion had been overruled. *Kimbro v. Clark*, 17 Neb. 403.
4. **Evidence:** MOTION TO STRIKE. A motion to strike out certain evidence of proceedings in such attachment case, *held* properly sustained, when the evidence was closed without proof of the affidavit, writ, levy of the writ, or final judgment therein having been offered.
5. **Verdict:** NO ERROR. Where the verdict found is the only one proper under the pleadings and evidence, so that it should have been directed by the court upon the motion made, there is no prejudicial error in the manner in which the case was submitted to the jury.

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

* See opinion on motion for rehearing, p. 667, *post*.

Charles F. Tuttle and *Allen & Reed,* for plaintiffs in error.

P. M. Moodie, A. R. Olson and *A. G. Burke, contra.*

GLANVILLE, C.

The defendant in error commenced an action in the district court for Cuming county against the plaintiffs in error to recover for the conversion of a stock of saloon goods and some saloon fixtures, and had judgment. Three petitions in error are filed, containing 54 assignments each, but they are identical except that one is a joint petition by the plaintiffs in error and the others are their separate petitions. Under the pleadings and evidence, both, if either, are liable, and the case will be discussed upon this theory. In the condition of the record and the contentions of parties, it would be very difficult to make a full connected preliminary statement of the case without making it unreasonably long, and we prefer to make the necessary statement in connection with the contentions as we discuss them.

The first contention is that the petition does not state a cause of action, and the point, if good, is saved by the record. Much argument in the briefs is made on this point, but it is not worthy of extended discussion. The petition shows that the defendant in error was in possession of the property involved; that he had a special ownership therein by virtue of a bill of sale, a copy of which is set out; that the bill of sale was given to him as security for $180 lent to the owner of the property who gave the bill of sale, which was past due and unpaid, and also to indemnify him as surety for such owner upon notes amounting to $800 which he had been compelled to pay, and no part of which had been repaid to him. Copies of the notes are set out showing that they were past due. It alleges an unlawful and wrongful taking and conversion of the property by the plaintiffs in error. The petition is sufficient.

Plaintiffs in error answer jointly, and admit the existence of the bill of sale, but allege that the bill of sale was fraudulent and made for the purpose of defrauding the creditors of Fred Kruger; that it was made March 17, 1901, and not placed upon record until the 22d day of that month; that the defendant in error took possession of the saloon and fixtures on that day; "that becoming heavily indebted to various creditors, among others, the Fred Krug Brewing Company, the said Kruger" made the bill of sale in question, and that defendant in error placed it on record and took possession "for the purpose and with the intent of hindering, delaying and defrauding the said creditors." They then attempt to plead *res judicata*, and their plea may be summarized as follows: They allege that, in an action in the county court wherein the Fred Krug Brewing Company was plaintiff and Fred Kruger and the defendant in error were defendants, the defendants therein moved the court to dissolve an attachment; that upon the hearing of the motion, defendant in error appeared in person and by attorney; that evidence was taken upon the motion to discharge the attachment; and that the motion was overruled. As a further statement of such plea, we quote from the answer as follows:

"For further answer the defendants show to the court that, upon a final hearing in said cause, upon evidence and argument submitted to said court, all the issues now brought and sought to be made in this pretended present action were adjudicated, and it was ordered and adjudged by the county court that the said pretended bill of sale was fraudulent and void, and conveyed to the said Healey no right, title or interest, in or to the goods and chattels, herein described, and it was further ordered that said Felix Gallagher, as such sheriff, sell the said goods, as the goods of said Fred Kruger, to satisfy a debt therein adjudged to be due and owing the said Fred Krug Brewing Company." They then alleged that the property in question was sold by virtue of an order of sale issued in that action; that "the said Felix Gallagher justifies his acts in

that regard under a valid and sufficient proceeding of said court in said cause," and that no appeal or error was prosecuted from the county court. The reply is a general denial. No other or more specific allegation of any indebtedness or final judgment than those above quoted are found in the answer.

The record in this case is in a very unsatisfactory condition. A great mass of exhibits in the way of letters, telegrams, checks, notes, bills, receipts, affidavits and orders, some 75 in number, are found in the bill of exceptions, with no index to help in finding what is material for us to consider. We have examined the record in regard to each of the 54 assignments of error, and find no one of them sustained in the view we take of the case, and a discussion of them in detail would be of no value to the profession.

One of the main contentions is in regard to the plea and proof of *res judicata*. It is contended by the plaintiffs in error that the court erred in not submitting this question to the jury upon proper instructions. We think there was no error in this regard. The plea that the rights of the parties had become *res judicata* by the overruling of a motion to discharge an attachment is bad under the ruling in *Kimbro v. Clark*, 17 Neb. 403. In that case, a husband being sued in attachment, the wife intervened and claimed title to the attached property, and it was held that, upon creditors' bill against the wife to subject the property, a judgment against the husband and an order that the attached property be sold will not debar the wife from claiming title, notwithstanding such intervention. Moreover, the pleadings in this regard were not sufficiently shown, if such a plea were good. The original affidavit for an attachment was not offered, and therefore the grounds alleged for the attachment are unknown. The motion to discharge was made on the grounds: "1st. Because the facts stated in the affidavit are not sufficient to justify the issuing of the same. 2d. Because the statement of facts in said affidavit are untrue." The ruling upon the motion is:

"The court finds that defendant has not presented sufficient proof to sustain his motion to dissolve said attachment, and that motion should be overruled. Motion is overruled." The record is insufficient to show an adjudication of defendant in error's claim or title.

After spending much time in analyzing the record, we are confident that the only verdict that could properly be rendered upon the pleadings and evidence is the one found by the jury. The plaintiffs in error sought to justify under an attachment and order of sale. They have failed in their evidence in this regard, even if all that was offered were received. No affidavit for attachment was shown, no writ of attachment was offered, no levy was pleaded or proved; in fact, what was offered as a return to the writ is only an inventory and appraisement, and Gallagher's testimony shows that he broke into the building and took possession of the property by direction of the brewing company's agent, in the absence of the defendant in error, and it almost conclusively shows that no valid levy was made. Again, no final judgment in the attachment is pleaded, and no proof of any such judgment was offered, outside the recitals of the order of sale, and such recitals show that the action against defendant in error was dismissed. Such recitals are insufficient in such case to prove judgment, if one were well pleaded, which is doubtful. Section 127 of the code reads:

"In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall be sufficient to state that such judgment or determination was duly given or made. If such allegation be controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction."

Complaint is made because, after the evidence was closed, the court struck out all that had been introduced showing what had been done in the attachment case. This was proper when no proof of the affidavit, writ, levy of the writ, or final judgment had been offered. The court should have instructed a verdict for the defendant in error. The

jury having found such a verdict, the judgment thereon should be affirmed.

We therefore recommend that the judgment of the trial court be affirmed.

FAWCETT and ALBERT, 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 November 16, 1904. *Motion denied; and motion and brief stricken from files:*

1. **Conversion:** PETITION. One who has possession of personal property, claiming a lien thereon, may maintain an action for conversion against one who wrongfully attaches the property. It is not necessary, in such case, to set out in the petition the particulars of his lien.
2. **Chattel Mortgage:** FRAUD: PRESUMPTION. The presumption of fraud which the statute raises against a mortgagee who fails to take immediate possession of the things mortgaged, is not available to one who attaches the property after the mortgagee has taken it and while he has actual possession thereof under his mortgage.
3. **Attachment:** RES JUDICATA. A ruling made upon a motion to dissolve an attachment is not *res judicata* of the facts involved therein, as against one who, though a party to the proceedings at the time of the ruling, is dismissed therefrom by the final judgment entered in the action.
4. **Briefs.** The court will, on its own motion, strike from the records a motion and brief which contain personal criticisms of a commissioner of this court, and of his character and motives in the performance of his official duties.

BY THE COURT: Upon the motion for rehearing in this case it is contended:

1. That the petition was insufficient because it failed to allege the particulars in regard to the mortgage lien; but, in the argument upon this point, the plaintiffs in error have overlooked the fact that the petition alleges that the

plaintiff below had possession of the property at the time of the attachment, which constitutes the act of conversion complained of. One who is in possession of property claiming a lien thereon may maintain an action of conversion against one who wrongfully attaches the property.

2. It is contended that the commissioner has not recognized the statute which provides that a chattel mortgage shall be presumed to be fraudulent, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged. But here again the fact is overlooked that the petition alleges, and the preponderance of the evidence shows, that the mortgagee had taken actual possession of the property before the attachment complained of. Under such circumstances, there is no presumption of fraud against the mortgagee in favor of an attaching creditor. *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224.

3. It is also contended that the defense of *res judicata* was established upon the trial. This defense is predicated upon the ruling of the court in the attachment proceedings refusing to dissolve the attachment, but as the attachment proceedings were ancillary only to the main action, and the plaintiff Healey was dismissed from the action by the final judgment rendered therein, the ruling upon the motion to dissolve the attachment would not be *res judicata* as to him. Such ruling does not become *res judicata*, unless it is necessarily involved and confirmed in the final judgment in the case. It was therefore unnecessary to determine what effect it would have had upon the rights of the parties in the property if the defendant Healey had been a party to the final judgment.

4. It is asserted in the brief upon the motion for rehearing that the issues involved in the case are not correctly stated in the opinion, but there is no merit in this assertion.

5. There are in the brief unjust, querulous and unfounded criticisms of the reasoning and the motives of the commissioner who wrote the opinion. These criticisms are

of so personal and offensive a nature as to call for an expression of disapproval on the part of the court. The commissioners are officers of the court. They are called upon by the laws of the state to perform important and arduous duties in the transaction of the business of the court. They are entitled to the same confidence and respectful treatment that is accorded to the court itself. The brief itself is not fit to remain upon the records of the court. The counsel for the plaintiffs in error have gone so far as to insert offensive expressions in the motion itself. In addition to this, and as above pointed out, there is no merit in the motion. It is therefore ordered that the motion for rehearing and the brief filed thereon be stricken from the records of the court.

MOTION DENIED; AND MOTION AND BRIEF STRICKEN FROM FILES.

STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT, V. JOSEPH SAMS, VILLAGE CLERK.

FILED APRIL 21, 1904. No. 13,537.

1. **Act Constitutional.** The provisions of section 28, chapter 80, Compiled Statutes, are not in conflict with section 5, article 8 of our constitution. *Kas v. State*, 63 Neb. 581, followed.

2. **Title to Act:** REPEAL. Where the title to an act states a general subject, coupled with a proposed repeal of laws not within such general subject, the act will be held void as to such attempted repeal, when it is clear that the provisions for the repeal were not the inducement to the general provisions of the act. *State v. Lancaster County*, 17 Neb. 85.

3. ———: ———. The title of an act approved April 1, 1899, is "An act to provide for the registration, leasing, selling and general management of the educational lands of Nebraska, to provide for the collection of rental, interest and principal payments thereon, and for the distribution of the funds arising therefrom; and to repeal chapter 80, Compiled Statutes of 1897." The act, in terms, repeals the chapter referred to, but reenacts certain sections

thereof, the subjects of which are not within its title. *Held*, That such sections continue in force.

4. **Mandamus**: ANSWER: DEMURRER. A demurrer to the answer to a writ of mandamus will be overruled, if the writ fails to show refusal or neglect to perform an official duty, the act demanded not appearing either by the writ or answer to be a duty of the respondent.

5. **Dismissal.** In such case, it is not error for the trial court to dismiss the action and render judgment against relator for costs, upon overruling such demurrer, when no offer or request for leave to amend the writ is made.

ERROR to the district court for Saunders county: SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

J. L. Sundean, for plaintiff in error.

Simpson & Good, contra.

GLANVILLE, C.

The relator brought mandamus to compel respondent to pay over to it one-half of the sum of $1,000 for saloon licenses in the village of Colon in Saunders county. The territory included in the corporate limits of such village is comprised within two school districts, the relator and one other. The respondent's answer to the writ set up the defense that, by the last school census, the number of children of school age in the relator district is shown to be 23, and that of the other district 56, and that therefore, under the law, the relator was entitled to but $291.15 which the respondent was ready and willing to pay upon demand. The relator demurred to the answer and return. The district court overruled the demurrer and gave judgment dismissing the action at relator's cost. The relator brings the cause before us upon the following assignments:

"1. The court erred in overruling demurrer to the defendant's answer. 2. The court erred in rendering judgment for defendant, denying the writ of mandamus on the pleadings without testimony. 3. The judgment is not sustained by the evidence. 4. The judgment is contrary to

law. 5. The court erred in overruling plaintiff's motion for a new trial."

It is contended that the return is demurrable because section 28, chapter 80 of the Compiled Statutes of 1903, upon which the sufficiency of the answer depends, is not the law for two reasons: first, because it is directly contrary to certain provisions of the constitution; and, second, because this section having been a part of chapter 80 of the Compiled Statutes of 1897 at the time of the passage of the act of 1899, entitled "An act to provide for the registration, leasing, selling and general management of the educational lands of Nebraska, to provide for the collection of rental, interest and principal payments thereon, and for the distribution of the funds arising therefrom; and to repeal chapter 80 of the Compiled Statutes of 1897," was repealed by such act; and it is contended the reenactment of the section in question, as section 28 of the new act, was unconstitutional, the section not being germane to the subject, nor within the title of the new act. The section is as follows:

"In cities and villages whose corporate limits form, in whole or in part, more than one school district, all money derived from fines, penalties and licenses, shall be apportioned to the several districts in proportion to the number of persons of school age residing in each district, included in whole, or in part in said corporate limits, according to the school census taken last before any such apportionment." The first reason urged for holding it invalid is disposed of in the case of *Kas v. State,* 63 Neb. 581, where the identical question was raised. The decision in that case sustaining the statute is satisfactory, and we adhere to the ruling without further argument.

Chapter 80 of the Compiled Statutes of 1897 is divided into four articles, and is made up of chapter 71 of the session laws of 1897, the title being "An act to amend chapter 80, of the Compiled Statutes of 1895, relating to school lands and funds, to prevent the further sale of school lands, and to repeal said original chapter 80, Com-

piled Statutes of 1895." Article I contains provisions prohibiting the sale of school lands, providing for abstracts, appraisements, reappraisements, payment for and removal of improvements, payments of interest and principal on old contracts, and general provisions in regard to the leasing of school lands, collection of rentals, and the investment of the funds. Article II, entitled "School Funds," contains the provisions of an act of 1869, covering unclaimed fees and costs, and fines and penalties, into the school fund; an act passed in 1895 containing the section in controversy; an act contained in the general statute of 1873, providing for the payment of what is known as the 5 per cent. fund received from the United States into the school fund; an act of 1877, authorizing suits for the collection of securities held for investments belonging to the school fund; an act of 1879, providing for turning moneys collected upon judgment in favor of the state into the school fund; and an act of 1887, providing for stamping bonds belonging to the permanent school funds so as to show to what they belong. Article III contains the provisions of an act of 1879, providing for refunding taxes paid upon school land. Article IV contains laws enacted in 1875, 1877 and 1879 as amended in 1897, together with a clause repealing chapter 80 of the Compiled Statutes of 1895. The act of 1899 in its new provisions covers the entire subject contained in article I of the act of 1897; reenacts all the sections in article II; omits all of articles III and IV, and repeals chapter 80 of the Compiled Statutes of 1897, and all acts in conflict with the new act.

The theory upon which we are asked to hold the law invalid is that its subject is not included within the title; that the act of 1899 was not an amendment to chapter 80, but was the enactment of a new and independent statute covering a part only of the ground covered by the old chapter, and that all of the reenacted provisions that are not within the title are wiped out by the repeal, notwithstanding the attempted reenactment. We think there are at least two theories, either of which would sustain the

statute in question. One is that the importance of the laws that would be thus wiped out is so obvious and great as to indicate that their retention was a part of the inducement to the passage of the act as framed, and that, if they can not be sustained as a part thereof, the entire act must fall with them, and the law stand as theretofore. The second is, that if the subject matter of these sections is so foreign to the title of the act as to render their reenactment void for this reason, then the act is in part bad, because to repeal numerous acts of the legislature, the subjects of which are not germane to the main title of the act in question, makes the act cover more than one subject, that is, the object stated in the title, and the provision in the bill for the repeal of the entire chapter 80, covers a subject foreign to the main subject disclosed by the title. The result of this would be to allow the act, in so far as it enacted provisions covering the entire subject previously embraced in article I of chapter 80, to stand as a new, complete act, and, by implication, repeal the provisions of article I, in so far as they are in conflict therewith, and to hold the positive repealing clause of the entire chapter void, and yet not an inducement to the act, because the intention to preserve the provisions of article II by an attempted reenactment would show that their repeal was not an inducement to the other part of the act. Either of these theories, if adopted, defeats the contention of the relator, but they would have different effects upon other portions of the law. The adoption of the first theory would reinstate the provisions of article I, which were intended to be changed, and also the provisions of articles III and IV, which were intended to be wiped out by the act. The adoption of the second theory would substitute the new provisions for such article, continue article II, and reinstate articles III and IV. This second theory is practically the one adopted by this court in *State v. Lancaster County*, 17 Neb. 85, where it is held: "A provision in an amendatory act repealing an act not connected with the subject of the amendment is void." The case involved

chapter 80 of the Compiled Statutes as it then existed. The title of the act involved in that action showed that its subject was to amend article I, and to repeal article III of this chapter, and the repealing clause repealed articles I and III. After discussing the case and concluding that the act embraced more than one subject, it was found that the second subject, that is the repeal of article III, was not an inducement to the passage of the act, and that it is possible to determine which part of the act might stand. It is said in the opinion:

"That portion of the act, therefore, by which it was sought to repeal the act which took effect February 20, 1879, for the repayment of taxes levied on lands the legal title of which is in the state is not repealed. Except where a statute is amended, and the statute as it existed prior to the amendment repealed, a law not connected with the subject of the act amended can not be repealed by a provision in the nature of a rider upon an independent act. The attempted repeal is therefore a nullity."

Whether or not it is possible to adopt a theory which will hold in force the reenacted provisions which were contained in article II of the chapter in question, and at the same time sustain the repeal of articles III and IV of the chapter, is not raised in this case. The effect of the act of 1899 upon articles III and IV will be determined when a case arises calling for such determination.

We now turn to the other contention, that the court erred in giving judgment against relator upon overruling its demurrer to the return. It is well established that a demurrer to a pleading searches the entire record, and that judgment should go according to the case made by such record. In section 493 of High, Extraordinary Legal Remedies (3d ed.), it is said:

"The familiar rule of pleading, that a demurrer reaches back to the first fault committed by either party, applies with especial force in cases of mandamus. On demurrer to the return, it is therefore competent for the respondent to avail himself of any material defect in the alternative

writ, * * * the demurrer being carried back to the first defective pleading." *People v. Ransom,* 2 N. Y. 490; *Commercial Bank v. Canal Commissioners,* 10 Wend. (N. Y.) 25, and *State v. McArthur,* 23 Wis. 427, are referred to as sustaining the text.

In *Commercial Bank v. Canal Commissioners, supra,* it is said:

"Upon referring to the mandamus, as set out in the record, it shows no right in the relators whatever to the money which the writ commands these defendants to pay. Perhaps it was sufficient in this case, in the writ, to refer to the order and assignment annexed to the affidavits on file, to ascertain *what* the defendants were required to pay; but the facts showing *why* they ought to pay that sum, should appear in the writ, clearly and distinctly; so that the facts there alleged might be admitted, or traversed. *Peat's Case,* 6 Mod. Rep. (Eng.) 310; *Rex v. College of Physicians,* 5 Burr. (Eng.) 2742. It may sometimes be allowable to refer to extrinsic facts to ascertain precisely what is claimed in a suit; but the reasons why it is claimed must always appear upon the record, to enable the court to judge of their validity. As the mandamus was defective in substance, I am satisfied that judgment was properly given for the defendants on the demurrer to the return."

In section 493 above referred to it is said:

"So when the alternative writ is defective in not showing that the act which it is sought to coerce is the specific duty of the officer at whose hands its performance is required, a demurrer to the return will be sustained as a demurrer to the writ itself."

This rule is sustained in *State v. McArthur, supra.* In the case before us, the writ is defective in that it recites a demand for one-half of the fund in question, without pleading facts which under the law show that it is entitled to one-half, or to any other specific or particular portion thereof. Before a relator is entitled to a writ against a public officer to compel the performance of some

duty, he must show a duty neglected or refused under circumstances requiring its performance. The only demand and refusal pleaded in this instance is a demand for one-half of the sum, and a refusal to comply with this specific demand. No writ should be awarded to compel the respondent to pay any other sum simply because in his return he admits that he has such sum and is ready to pay it over when called for, no demand and refusal in respect to such sum being pleaded in the writ. The case is made clearly and only for the purpose of determining, whether or not the relator is entitled to one-half of the fund, under its contention as to the law governing the question involved. We hold against such contention, and relator has failed to plead facts which, under the law as we find it to be, show it to be entitled to the sum demanded. The record brought up by the respondent fails to show that it sought, or asked leave, to amend the writ under the provisions of section 653 of the code; neither is there anything to indicate that it desired or offered to introduce evidence to disprove any of the allegations of the return. The question which the case was brought to determine was rightly decided against the relator.

We recommend that the judgment of the trial court be in all things affirmed.

FAWCETT and ALBERT, CC., concur.

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

AFFIRMED.

MICHAEL G. KIME ET AL. V. CASS COUNTY ET AL.*

FILED APRIL 21, 1904. No. 13,454.

Roads: INJUNCTION. The owner of land attempted to be taken for a public road may enjoin the use of the same for such purpose until his damages for the taking have been ascertained and paid, or provision made for their payment, provided such injunction is sought before the public have acquired a prescriptive right to the land taken.

ERROR to the district court for Cass county: PAUL JESSEN, JUDGE. *Reversed.*

H. D. Travis and *W. Deles Dernier,* for plaintiffs in error.

Jesse L. Root, contra.

DUFFIE, C.

This action was brought by the heirs of Alfred Kime for the purpose of ousting the county of Cass and the road overseer of road district No. 58 in said county from the possession of a strip of land 4 rods in width and 100 rods in length claimed as part of the highways of said county. An injunction and other equitable relief was asked. The answer was a general denial and the claim that the premises in controversy were part of the highway known as road No. 111, which it is alleged was regularly established by the board of county commissioners in the year 1872. The district court dismissed the plaintiffs' petition, and they have taken an appeal to this court.

The record discloses that at the regular meeting of the county commissioners of Cass county, held on June 4, 1872, a petition was presented for the appointment of a commissioner to examine and locate a county road, commencing at the southwest corner of section 30, town 10 north of range 13 east, and terminating at the road leading from Pollard & Sheldon's mill to Nebraska City: That a

* Rehearing allowed. See opinion, p. 680, *post.*

commissioner to view and, if in his opinion the public good required, to locate said road, was appointed at said session, and "the county clerk directed to issue a commission to him requiring him to examine the route, after giving public notice of the date when he will make said examination, and to report his action to the county clerk within 20 days after the plan of survey." July 1, 1872, the commissioner made his report to the effect that, after a view of the proposed road, being of the opinion that the public good required its establishment, he proceeded to lay out, mark and plat the same according to law. A plat and field notes of his survey are attached to this report. We do not find in the record any order of the board establishing the road as recommended by the commissioner, but the road appears to have been opened some time in the year 1872 and used more or less from that date down to 1879 or 1880. The road, as recommended by the commissioner, includes the tract of land involved in this controversy, which is a strip 4 rods wide running east from the section line between sections 29 and 30 to intersect with what is known as the Nehawka road. Some time about 1879, Alfred Kime, who then owned and was living upon the premises, gave a right of way at some distance south of the disputed premises, connecting the Nehawka road with the section line road between sections 29 and 30, and this south or "old road," as it is called in the record, was used by the public from 1879 up to 1896, when Michael G. Kime, who was then occupying the premises, fenced this right of way and attempted to prevent further public travel thereon. The old road was closed for about 2 weeks, when it was reopened and the public used the same until April, 1900, when Kime again closed it, whereupon the board of supervisors ordered the road as originally surveyed and located opened. A resurvey was made, the road opened to public travel, and the injunction is sought against what is claimed to be a continuing trespass. From 1879 up to April, 1900, the strip in dispute was not used or traveled as a public highway, and was enclosed and cultivated by the appellees and

their ancestors. We do not think it necessary to discuss the numerous questions raised by the parties in their briefs. The district court found that no damages were awarded to Kime for the land taken for this road, and we think the evidence amply sustains that finding. There is no record of the appointment of any appraisers to assess the damages, and no record of damages having been paid. In fact, no evidence of any kind appears relating to the appraisement or payment of damages. If this road had been opened and used by the public as a highway for 10 years or more, then the regularity and validity of the proceedings in establishing the same would not be examined. *Lydick v. State,* 61 Neb. 309. The public, however, ceased to use the premises as a road not later than 1879, and from that time up to April, 1900, the owner of the land has been in the exclusive possession. In this state, the county can not take posession and use land as a highway without assessing and paying or providing for the payment of damages to the land owner. This has been established by a long course of decisions. *Livingston v. Board of County Commissioners of Johnson County,* 42 Neb. 277; *Hodges v. Board of Supervisors of Seward County,* 49 Neb. 666; *Propst v. Cass County,* 51 Neb. 736; *Lewis v. City of Lincoln,* 55 Neb. 1.

It is urged by the appellees that the elder Kime dedicated the land in controversy as a public highway. The only evidence of such dedication is contained in the testimony of one Griffith who petitioned for the road in controversy. He says that he had a talk with Kime about the time of circulating the petition for the road, and that Kime told him that he desired the road to run along the section line between 29 and 30 until it reached the bluff, and there turned and run east until it intersected the Nehawka road, and that following this direction the petition was prepared as requested by Kime. There is nothing in this to indicate that Kime intended to give away his land or to waive damages for its taking. The fact that he desired the road to run across his land at the foot of the

bluff, instead of a point lower down, is no argument in favor of the theory that he intended to make a donation of the land necessary for the road. Because the county has not had the damages appraised and made provision for its payment, and because the evidence fails to establish the use of the highway in question for a sufficient length of time to give the county a prescriptive right thereto, we recommend that the decree of the district court be reversed.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

The following opinion on rehearing was filed October 20, 1904. *Judgment of reversal adhered to:*

Eminent Domain: WAIVER. Under the constitution of 1866, as well as that of 1875, mere passive acquiescence by a land owner in the taking of his property for a public use, unaccompanied by any conduct indicative of an affirmative assent thereto, and not continued for the statutory period of limitations, is not a waiver of his right to compensation therefor and can not be made so by statute.

AMES, C.

This case is before us upon a rehearing from a former decision prepared by Mr. Commissioner DUFFIE and concurred in by Messrs. Commissioners KIRKPATRICK and LETTON. Upon a reexamination of the record, we do not find that in the preparation of the former opinion anything of importance was overlooked, or that the commissioners or court fell into any error. We do not think it incumbent upon us to repeat the recital of facts contained in the former opinion. There are two vital matters disclosed thereby upon which the conclusion is based, both of which, we think, are justified by the record. The first is that no

damages were appraised, or provision made for their payment, before or at the time of the attempted establishment of the alleged public road in controversy. Under the constitution of 1866 (article I, section 13), as well as under that of 1875 (article I, section 21), such omission defeated the alleged right to appropriate the land to a public use. If, as counsel for appellees contend, the statute of 1866, under which the proceedings were had, contemplated that the right of the landowner should be treated as waived, by failure to demand compensation before or at the time of the taking, we are of opinion that to that extent the enactment was void. If the legislature could rightly require of the landowner one affirmative and initiatory act, as a condition precedent to obtaining damages, they might require of him any other, or a series of acts which might be difficult or onerous or, in some circumstances, impossible of performance, and so the constitutional guaranty might thus be seriously impaired or wholly frittered away. We are of opinion that the spirit, if not the letter, of the constitution requires that the public seeking to appropriate private property to its use should, unless damages have been waived by some affirmative and unequivocal act, take steps of its own motion to ascertain their amount and secure their payment, and that mere passive acquiescence by an individual in the appropriation of property, unaccompanied by any conduct indicative of affirmative assent thereto, should not, unless continued for the statutory period of limitations, be regarded as a waiver of his rights. The second matter determined by the opinion, and about which the record leaves no room for doubt, is that the public have not occupied the lands in suit, continuously, for so long a time as is required by the statute to acquire, by that means, a prescriptive title to the alleged easement.

In view of these two findings, the conclusion at which the commission and the court arrived appears to us unavoidable, and we recommend that the former decision be adhered to.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision be adhered to.

JUDGMENT OF REVERSAL ADHERED TO.

JOHNSON COUNTY V. M. H. CARMEN, ADMINISTRATOR.

FILED APRIL 21, 1904. No. 13,488.

1. **Petition**: MOTION. In a suit against a county for damages on account of the death of a party caused by the giving way of a county bridge, the petition contained a general statement that the bridge was "out of repair and unsafe." *Held*, That a motion for a more specific statement should be sustained.

2. **Counties**: DEATH: DAMAGES: INSTRUCTIONS. In such action, the jury, in assessing damages, are limited to giving pecuniary compensation for injuries resulting to the next of kin on account of the death of the deceased. No damages can be given on account of the bereavement, mental suffering or as a solace on account of such death. An instruction relating to the measure of damages, which does not limit the assessment to the pecuniary injury sustained, is erroneous.

3. ———: LIABILITY. The county can not be held as an insurer of those who have occasion to use a county bridge. If the defect in a bridge, from which injury and damages occur to the person using it, is a latent defect, not discernible from the ordinary tests and examinations usually made to ascertain its condition, and if those charged with such examination have not been negligent in their duty in that regard, the county can not be held liable for damages caused by such latent and undiscovered defects.

ERROR to the district court for Pawnee county: JOHN S. STULL, JUDGE. *Reversed.*

Jay C. Moore, Wilson & Brown and *Hugh La Master*, for plaintiff in error.

George A. Adams and *S. P. Davidson, contra.*

DUFFIE, C.

July 25, 1901, Joseph B. Gooch was killed, while attempting to cross a bridge with his traction engine. The bridge gave way and, in the fall, the deceased was caught between the engine and the tender. M. H. Carmen, administrator of his estate, brought this action to recover for his death, alleging that the county authorities were negligent in allowing the bridge to become out of repair and unsafe. The answer denies negligence on the part of the county, and alleges that the condition of the bridge was unknown to the county officials although all due care and diligence had been exercised by them; that the defect was of such a nature that it could not be ascertained by the exercise of care and diligence; that deceased was negligent in going upon the bridge with such an extraordinary load, and in failing to take proper precautions by planking the bridge and detaching the tender, and by running the engine across the bridge by its own power instead of using horses to pull it across. The reply was a general denial. The petition does not point out any particular defect in the bridge, but alleges that it was "out of repair and unsafe." Error is alleged in the refusal of the court to require a more specific statement in the petition, pointing out wherein the county and its officers were negligent, and wherein the bridge was out of repair and unsafe. In so far as the motion required the plaintiff below to show in his petition in what particular the bridge was out of repair and unsafe, we think it should have been sustained. Under our system of pleading, the facts are to be stated, in order that the party proceeded against may know what facts his adversary relies on and against which he must defend. *Board of Commissioners v. Coffman*, 60 Ohio St. 527, 48 L. R. A. 455; *Tolles v. Meyers*, 65 Neb. 704. If the bridge was out of repair and unsafe, and the county commissioners had knowledge of this fact, or such condition of the bridge was discernible, or could have been ascertained, by reasonable care and inspection, and so continued for such

a length of time as to raise a presumption of knowledge, these facts show negligence upon their part in not repairing it, and the petition, so far as charging negligence, would be sufficient.

It is next urged that the court erred in not sustaining the objection to two of the jurors called in the case. We have read their examination with care, and we can not say that there was prejudicial error in retaining them upon the panel. They are apparently men of intelligence and candor, who stated that they would follow the direction of the court as to the law of the case, and, while they expressed some feeling and sympathy for the plaintiff, it is not unnatural, indeed it is human nature, that disinterested men should sympathize with the wife and children of a deceased husband and be inclined to lean to their support, rather than to that of a county by whose negligence it is charged the death of the husband and father was occasioned; at the same time, when an apparently candid juror states that he will observe the instructions of the court and be governed in his verdict by the law and the evidence, and that he has no preconceived opinion of the case which would prevent his doing so, no prejudicial error can be predicated upon the refusal of the court to sustain an objection to his serving as a juror in the case.

It is further urged that there could be no liability on the part of the county until notified of the defective condition of the bridge. This question has been settled by the former decisions of this court. *Hollingsworth v. Saunders County,* 36 Neb. 141; *Raasch v. Dodge County,* 43 Neb. 508.

The eighth instruction given is the only one in which the measure of damages was referred to by the court. In that instruction the jury were told that, if they found for the plaintiff, "then and in that case you will assess the amount of the recovery herein at such sum as you think from the evidence would be right and just." It will be noticed that this instruction does not confine the jury to any particular element of damage. The statute under

which the action was brought restricts the damages to the pecuniary injury resulting from the death, not to exceed the sum of $5,000. In this class of actions the jury, in assessing the damages, are limited to giving pecuniary compensation resulting to the next of kin on account of the death of the deceased. No damages can be given on account of the bereavement, mental suffering, or as a solace on account of such death. *Steele v. Kurtz*, 28 Ohio St. 191; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95. We think that a serious error was made in not confining the jury to the one element of damage allowed by the statute. As is well said in plaintiff's brief: "To the average layman the greatest loss to the widow and orphan would be the deprivation of the society and companionship of the husband and father. No element of damage would in the mind of the average juryman be at all comparable to this in such a case. * * * Another element of injury that would appeal strongly to the average jury is the grief and mental anguish caused to the widow and orphan by the untimely death of the husband and father." Yet under the instructions of the court all of these matters could be, and probably were, considered by the jury in arriving at their verdict.

Instructions 8 and 9 are objected to by plaintiff in error for the reason that the jury are told that, if the defect in the bridge had remained for a long time prior to the accident, then the county would be liable. If the defect was an open one, which could be observed on reasonable inspection and examination, no fault could be found with this charge; but it was the contention of the county, and there was evidence in support of the theory, that the defect was latent and not observable by any ordinary inspection, or test, or examination that might be made. While the statute makes the county liable for damages resulting from the defective condition of the bridge, the same rules of law applicable in other cases must be applied. Latent defects in the timbers of a bridge, which can not be discovered by the ordinary means usually adopted for testing the sound-

ness of timber and the safety of the structure, would relieve the county from the charge of negligence, and be a defense to a claim for damages arising from the latent defect. These instructions were improper in not recognizing this rule. Other errors complained of need not be discussed as they will not probably occur upon another trial.

For the errors above pointed out, we recommend a reversal of the judgment and that the cause be remanded for another trial.

LETTON 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 for another trial.

REVERSED.

WESTERN WHEELED SCRAPER COMPANY V. J. M. MCMILLEN ET AL.

FILED APRIL 21, 1904. No. 13,497.

1. **Promissory Note:** EXECUTION BY AGENT. The court is fully committed to the doctrine that, in order to exempt an agent from liability upon a negotiable note executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal though done by the hand of the agent.

2. ———: REFORMATION: PAROL EVIDENCE. Though the language of a note executed by directors of a corporation imports a personal obligation, it may be shown by parol evidence, on an issue of reformation, that the intention of both the makers and the payee was to execute an instrument binding the corporation only, and that, though the language was that which they intended, it did not express their true purpose.

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

C. H. Holcomb, for plaintiff in error.

H. M. Sullivan, contra.

DUFFIE, C.

Plaintiff in error brought suit against the defendants in error upon three promissory notes, all in the following form:

"$84. THEDFORD, NEBRASKA, NOVEMBER 20, 1893.

"One year after date we promise to pay to the Western Wheeled Scraper Company, or order, at Thedford Bank of Thedford, Nebraska, eighty-four and no-100 dollars, with interest at seven per cent. per annum, payable annually, for value received, and if action is commenced hereon, attorney's fees for collection. (Sign officially.)

"J. M. MCMILLEN,
"G W. MILLER,
"G. L. MATTHEWS,
"Directors of Thedford Irrigation & Power Co.
"(limited)."

McMillen and Matthews alone answered. Their answer consists, first, of a general denial. Second, they allege that the notes sued on were executed and delivered to the plaintiff by, for and on behalf of the Thedford Irrigation & Power Company (limited), a corporation organized under the laws of Nebraska, by their then duly qualified and acting board of directors, of whom the defendants were at that time members, and were signed by them in their official capacity, and for the purchase of a grading machine bought of the plaintiff for the use and benefit of the Thedford Irrigation & Power Company (limited); that the defendants never had or claimed any interest in said machine except as members and stockholders of said irrigation company, and that the consideration for said notes moved from said Western Wheeled Scraper Company to the said Thedford Irrigation & Power Company (limited), and that the plaintiff had always so considered and treated said notes; that defendants never received any value for said notes except as members of said corporation, and have

never assumed or agreed to assume any personal liability on said notes. To this answer there was a reply which is, in effect, a general denial of the allegations of the answer. The evidence tended to show that the defendants were members of the board of directors of the Thedford Irrigation & Power Company (limited) at the time of the execution of said notes; that, prior to the making of the notes, defendants negotiated with an agent of the plaintiff for the purchase, for the use of the irrigation company, of a wheeled scraper to be used in the construction of its ditch; that it was finally agreed a scraper should be sent for and tested, and, if it worked as represented by the agent, the irrigation company would purchase the same, giving notes of the company therefor; that the test proved satisfactory to the directors, who purchased the machine for the company, and executed the notes in suit in the form above set out, supposing that they were binding the company and with no intent to make themselves individually responsible for their payment, and that the agent of the plaintiff taking said notes so understood.

The court, in its seventh instruction, told the jury:

"You are further instructed that if you should believe from a preponderance of all the evidence in this case that the three notes set out in plaintiff's petition were made and executed by the Thedford Irrigation & Power Company (limited), and if said notes were signed by said defendants with the intention and understanding to bind the Thedford Irrigation & Power Company (limited), and not the signers of said notes as individuals, and if you should find from a preponderance of all the evidence that it was so understood by and between the agent of plaintiff and these defendants, at the time said notes were executed and delivered, then your verdict should be for the defendants, 'No cause of action.'"

The jury returned a verdict for the defendants, and the plaintiff has brought the record to this court for review.

The petition in error, among other matters, alleges "that the court erred in permitting the defendants to in-

troduce oral testimony tending to prove a different contract than that set out in the written contract, namely, the notes sued upon," and in giving the instruction above quoted and other instructions which it is unnecessary to discuss. The general rule undoubtedly is that, on account of the qualities which the law annexes to negotiable instruments, none are bound except those who appear on the face of the instrument as bound, and, accordingly, extrinsic evidence can not be admitted to charge parties whose names do not appear on the face of the instrument. In 4 Thompson, Corporations, sec. 5141, it is said:

"The modern doctrine seems to be that, where individuals subscribe their proper names to a promissory note, they become *prima facie* liable personally upon the same, although they add a description of the character in which the note is given; but such presumption of liability may be rebutted by proof that the note was in fact given by the makers as agents of a corporation, for a debt of the corporation, due to the payee, and that they were lawfully authorized to make such note as agents of the corporation; and such facts may be pleaded in bar of the action against the makers personally, averring knowledge on the part of the payee." He states further: "It is no objection to such a defense that the name of the corporation is not correctly stated in the description attached to the signature; it is enough if it appear that the makers did not intend to be personally bound. But it should be shown that the payee of the note had knowledge, or at least the full means of knowledge, that the makers of the note were promising as agents, duly authorized, of the corporation; for 'it is well settled that a man, contracting with another, can not shield himself as agent, unless he give notice at the time that he is so, or it be known in some other way to the person with whom he deals.'"

It is undoubtedly true that the modern cases are more liberal than was formerly the case in allowing one who signs a negotiable instrument, designating himself as agent or trustee, to show by parol evidence that he was acting

for another, who received all the benefits of the consideration for which the note was given. *Keidan v. Winegar,* 95 Mich. 430, 20 L. R. A. 705, is a case in point; and other cases referred to in the notes of the editor will furnish examples of the relaxation of the rule adopted by the courts at an earlier date upon this question. If this court had not put itself on record, we should be disposed to follow the modern decisions, but as early as 1886, in *Webster v. Wray,* 19 Neb. 558, the court, after a full review of the authorities, held that "no party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed," and it was further held in that case that parol evidence was not admissible to show that one who appeared upon the face of the notes to be the maker was in fact acting as agent for another, or as the officer of some corporation which had received the benefit of the consideration. This case was followed by *Andres v. Kridler,* 47 Neb. 585, where suit was brought upon a note made and signed substantially in the manner of those in suit, and it was held that, "where the pleadings disclose a cause of action against a defendant personally, superadded words, such as 'agent,' 'executor,' or 'director' should be rejected as *descriptio personæ.*"

We think this court is now fully committed to the doctrine that in order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound and the agent is not; but a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or to exempt the agent from personal liability. There was evidence which would fully support a finding that, in executing these notes, the defendants did not intend to bind themselves

personally, and that the plaintiff's agent was not only fully aware of that fact and understood that he was taking the notes of the corporation, but assisted and advised as to the form in which the notes should be drawn in order to make them the obligation of the corporation. This being the case, the defendants, upon a proper plea, would be entitled to have the notes reformed to express the real intention of the parties. *Western Wheeled Scraper Company v. Stickleman,* 122 Ia. 396, and authorities there cited.

We recommend, therefore, that the case be reversed and remanded to the district court, with directions to allow the defendants to amend their answer if they so elect, otherwise to enter judgment for the plaintiff for the amount due upon the notes.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded to the district court, with directions to allow the defendants to amend their answer if they so elect, otherwise to enter judgment for the plaintiff for the amount due upon the notes.

REVERSED.

MARY L. HENRY V. ANDREW DUSSELL.

FILED APRIL 21, 1904. No. 13,301.

1. **Contract:** CONSIDERATION. The consideration sufficient to support a promise may be a detriment suffered by the promisee in reliance upon the promise, as well as a benefit accruing to the promisor.

2. **Directing Verdict.** Where, in an action on a contract, the defendant pleads illegality of consideration and duress, upon a return of a finding as to the two defenses pleaded adverse to the defendant, it is proper for the court to instruct the jury to find for the plaintiff, if, under the pleadings and the evidence, facts sufficient to show that the contract is upon a valid consideration appear uncontradicted.

3. **Instructions:** ERROR WITHOUT PREJUDICE. In such case, if the issue of illegality of consideration and that of duress are properly submitted to the jury, upon which their verdict is adverse to defendant, it is not error prejudicial to defendant that the court, instead of directing the jury to find for the plaintiff upon the issue of consideration, instructs the jury incorrectly as to what constitutes a valid consideration for the contract.

4. ———: ———. An instruction which contains an inaccurate statement of the law will not work a reversal of the judgment, if it is manifest that the instruction could not have confused or misled the jury, and where it appears that the verdict must have been the same, if the instruction had been technically correct.

5. **Trial:** ARGUMENTS. Whether or not, after argument by counsel for plaintiff to the jury, the defense can cut off further argument by waiving argument on his own behalf is a matter within the sound discretion of the trial court regulating the procedure of the trial.

6. **Rulings:** DISCRETION OF COURT. Under the facts stated in the opinion, *held*, that the ruling of the trial court was not an abuse of discretion.

7. **Instructions.** Instructions requested, given and refused, examined, and *held*, that the rulings of the court thereon were not prejudicially erroneous.

8. **Rulings.** Rulings of the trial court on the admission and exclusion of testimony, examined, and *held* not erroneous.

9. **Evidence.** Evidence examined, and *held* that the verdict and judgment are sustained by the evidence.

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

Allen & Reed and *W. N. Hensley*, for plaintiff in error.

Reeder & Hobart and *McAllister & Cornelius*, *contra.*

KIRKPATRICK, C.

Mary L. Henry prosecutes this proceeding from a judgment of the district court for Platte county rendered in an action brought by Andrew Dussell against Mary L. Henry to recover upon a contract for the payment of money. This contract is in the following language:

"This agreement, made and entered into this 24th day of March, 1902, by and between Mary L. Henry of Columbus, Nebraska, and Andrew Dussell of the same place, witnesseth as follows: Whereas the said Mary L. Henry is the mother of Robert H. Henry, an infant between 18 and 19 years of age, and the said Andrew Dussell is the father of one Jessie G. Dussell, of the age of 17 years, and, whereas the said Robert H. Henry and the said Jessie G. Dussell, with the consent of their parents, the parties to this contract, are about to be married, which said marriage is believed by all parties to be for the best interests of all persons concerned, and, whereas the said Robert H. Henry has not possession or control of any means or property wherewith to support the said Jessie G. Dussell, and defray the expenses of her expected sickness, and, whereas the said Mary L. Henry has possession and control of property and means to which the said Robert H. Henry will be entitled on reaching his majority: It is therefore agreed by the said Mary L. Henry that she will pay to the said Andrew Dussell, the first party hereto, within 10 days, the sum of five hundred dollars ($500), of which sum three hundred dollars ($300) shall be applied to defray the expenses of the said Andrew and the said Jessie G. up to the present time, the remaining two hundred dollars ($200) shall be applied to the future maintenance and support of the said Jessie G.; and the first party further agrees, at such time and times as may be necessary, to pay such other and further sums to the said Andrew Dussell for the support and maintenance of the said Jessie G. as may be necessary, so long as she remains the wife of the said Robert H. Henry; and the said Andrew Dussell agrees, on his part, to see that the said Jessie G. is provided with a suitable room, shelter, clothing and medical attendance from the proceeds of said money, and to apply the said money, and also such other sums as may be paid to him, to the support of the said Jessie G. as may in his judgment seem meet and proper, rendering an account thereof to the said first party. Wit-

ness our hands this 24th day of March, 1902, in duplicate.

"In presence of

"J. G. REEDER.

"MARY L. HENRY,
"ANDREW DUSSELL,
"By ERNEST P. DUSSELL."

In the petition this contract is set out *in hæc verba*, and it is alleged that Robery H. Henry and Jessie G. Dussell were united in marriage in Denver, Colorado, March 24, 1902; that the plaintiff, pursuant to said contract, provided the said Jessie G. Dussell with suitable room, shelter, clothing, nursing and medical attendance, and that a child has been born to Jessie; that the plaintiff has kept and performed all the conditions of the contract on his part to be performed, and that the defendant, Mary L. Henry, has failed and refused to pay the sums of money provided by the contract by her to be paid, and judgment in the sum of $500 is prayed. The answer pleaded that the contract declared upon was without any consideration, that the real consideration was an unlawful one, namely, the abandonment of a prosecution against Robert H. Henry for rape pending before a justice in Platte county, and that the signing of the contract on the part of the defendant was brought about by duress consisting of threats that, unless it was signed, Robert H. Henry would be incarcerated in the Nebraska penitentiary, which threats deprived defendant of her free volition. Plaintiff's reply was a general denial. A trial to a jury resulted in a verdict and judgment for plaintiff for the full sum prayed for.

There are many assignments of error, and we will consider and pass upon those which are deemed of importance in a correct disposition of the controversy. Preliminary to a discussion of the legal questions involved, a statement of the principal facts will be given. The parties to this suit, as well as the daughter of the plaintiff and the son of the defendant, lived in the city of Columbus, this state. Defendant is a widow, and some time prior to the execu-

tion of the contract in suit had gone with her son to the state of Colorado, apparently upon medical counsel that a change of climate was necessary on account of the health of her son. It appears, however, that, prior to the departure of defendant and her son for Colorado, Robert H. Henry and Jessie G. Dussell had sustained relations resulting in the pregnancy of Jessie. This fact coming to the knowledge of plaintiff, proceedings were commenced for the arrest and extradition of Robert, that he might be made to answer to the charge of rape upon the person of Jessie. Requisition papers were issued by the governor of the state of Nebraska, which were taken by one Byrnes, sheriff of Platte county, together with one Reeder who accompanied him, to Colorado, and there presented to the governor of that state, who, upon the showing made, issued a governor's warrant for the arrest of Robert. Defendant contended at the trial that she knew nothing of the relations sustained by her son toward Jessie Dussell until waited upon and informed of the charge pending against him by Byrnes and Reeder. Be that as it may, it appears that defendant, when apprised of the situation, asked if anything could be done to settle the matter, and was told that the marriage of her son with Jessie would be satisfactory, and would be regarded as a reparation. The contract in suit was thereupon drawn up, signed and delivered.

It appears from the evidence that the father of Jessie, plaintiff, was a man of ordinary means, and that Jessie, his minor daughter, was his housekeeper, her mother being dead. It is also made apparent that the Henrys were in more than comfortable circumstances. We mention these two facts at this time because they, in a measure, throw light upon the situation which resulted in the execution of the writing which forms the basis of this action. It is also convenient at this time to advert to the defense of duress, hereinafter more particularly considered. It was contended by defendant that the contract was obtained by intimidation and threats. This contention may

be regarded as eliminated from the case by the verdict of the jury. We believe that their special finding in regard thereto is amply supported.

Robert and Jessie were married, as alleged in the petition, and, subsequently, Jessie gave birth to a child. Medical attendance and nursing were provided by plaintiff. There is no question to be made, under this record, as to the paternity of the child; it is that of Robert H. Henry. He appears from the evidence to have been quite willing to marry Jessie.

The first question for determination is, whether the petition states a good cause of action. It was not attacked by demurrer at the trial, but objection was raised for the first time after issues were joined and the trial commenced. It is therefore entitled to a more liberal construction than it would otherwise be. Defendant invokes the familiar rule that, where the declaration is upon a simple contract, the petition must plead the consideration, unless the consideration is recited in the contract and that is set out *in hæc verba*. As no particular allegation in the petition purports to set forth the consideration, our inquiry will be confined to the contract, which appears in the petition in its entirety. The question is, whether it shows a consideration sufficient to bind defendant to her promise. It is not material that it recites facts which, standing alone, would not constitute a legal consideration. It appears that one of the parties to the contract was the father of a minor daughter; the other the mother of a minor son; also, that the intercourse of the minors had resulted in the pregnancy of the daughter. The minority of these children, and the pregnancy of Jessie by Robert, constituted the conditions confronting the parties to this contract and with which they sought to deal. Much of the argument of counsel for defendant is directed to the inquiry, whether this contract shows that anything of value, a benefit of any kind sufficient to constitute a consideration, passed to Mary L. Henry; or whether, by making the promise, she escaped any burden for which otherwise she would be

legally liable. It is asked, whether the immoral relations of Robert and Jessie imposed on defendant an obligation to pay either to Jessie or her father a sum of money. We think it may be answered that the relations of Robert and Jessie, resulting in the latter's pregnancy, did not impose any legal obligation on defendant. But it is not necessary, in our view, to point out any specific benefit that accrued to Mary L. Henry by reason of her promise. The agreement is not a *nude pact,* even though it is manifest that defendant received no benefit at all. *Shaffer v. Ryan,* 84 Ind. 140; *Rucker v. Bolles,* 80 Fed. 504; *Dorwin v. Smith,* 35 Vt. 69; *Dyer v. McPhee,* 6 Colo. 174. It seems that a benefit to the promisor is not an essential to consideration, but that consideration may be a detriment to the promisee or a benefit to a third person. It is the view of some of the courts that this is the only true and invariable test of consideration. Does it appear from this contract that plaintiff in reliance upon the promise of defendant suffered a detriment? Not as a result of a breach of the agreement, but as a result of entering into it and acting in reliance on it? If this question can be answered in the affirmative, the contract is not unsupported by a valid consideration.

Now, to us it appears perfectly plain that the making of this contract depended upon the consent of the plaintiff to the marriage of his daughter to the son of defendant. He was not under any obligation to consent to this marriage. She was a minor at the time of the making of this contract. It is not necessary to decide whether he had a right of action against the seducer of his daughter, and whether by this contract and his consent to her marriage he waived such right of action. It is clear that he was entitled to her services until her majority, which, except for this marriage, would not have occurred for some time thereafter. Under the facts shown in evidence, those services were more than ordinarily valuable to him, but the mere quantum of their value is not material. To our mind, the contract may be read as if thereby the defendant said,

"If you will consent to your daughter's marriage to my son, thereby surrendering your claim upon her services during her minority, I will," etc. The legal effect of plaintiff's consent to his daughter's marriage was a surrender of his right to her services during minority, and it is equally clear that there could have been no contract without this consent. If, therefore, plaintiff's reliance on defendant's promise resulted in a detriment to him, it is immaterial whether the making of that promise secured a benefit to defendant. Under this state of facts, we would certainly hesitate to declare this contract wholly void, and conclude that, as declared upon in the petition, it sufficiently shows a valid consideration.

Among the remaining contentions of defendant, several require but little consideration, inasmuch as they are dependent upon questions of fact, which were resolved by the verdict of the jury adversely to defendant. The first of these was the defense that the real consideration was the abandonment of the proceedings pending against Robert in Platte county. This question was submitted to the jury for a special finding, and they say this was not the real consideration. We believe, after an examination of the evidence, that this verdict is right.

We have already adverted to the defense of duress. Under this plea it was sought to be shown that defendant signed the contract because of the threat that, if she did not, her son would be prosecuted and imprisoned, and the promise that, if she did, he would be permitted to go free; and that, confronted with this alternative, she was deprived of her free volition. Our examination of the testimony, and particularly of that of defendant, upon this question has convinced us that the jury were amply justified in finding against defendant upon this contention. It is true, she says she signed the contract to save her boy from prison, but her own narrative of the events immediately preceding the execution of the contract is not calculated to corroborate this statement. This interview, looked at even through the medium of this narrative, seems

to have been one especially free from conduct and influences calculated to deprive defendant of her free will. It was characterized by an evident desire, not only on the part of those representing plaintiff, but defendant also, to do the thing that would be right and proper. Defendant was no doubt disappointed upon learning of her son's intimacy with a young woman, who, perhaps, would not have been selected by Robert's mother to be Robert's wife, but we believe the record shows that she took a philosophic view of a bad situation. It is to be remarked that the son was not averse to the union, and this woman appears to have entered into this contract freely and voluntarily.

The court upon its own motion gave the two following instructions to the jury:

"5. You are instructed that if you believe from the evidence that the defendant Mary L. Henry voluntarily entered into said contract, that said contract was founded upon consideration of the marriage of Jessie G. Dussell, daughter of plaintiff, to Robert H. Henry, son of defendant, and that said marriage was the cause actuating defendant in executing and delivering said contract to said plaintiff, then said contract is a valid and binding contract.

"6. If you find from the evidence that the consideration of the contract sued upon was the abandoning or agreement to abandon the criminal proceeding against Robert H. Henry, son of defendant, then such consideration is not a legal consideration, and your verdict should be for the defendant."

This instruction is not a correct statement of the law. If the plaintiff in the making of this contract had acted as the agent of his daughter, making the contract for her and on her behalf, she would doubtless be in a position to enforce it. In such event her marriage would have been a consideration. But this contract is a sole and independent one between the parties to this suit. The consideration of the promise must move from the plaintiff.

But while this instruction is not correct, we are of opin-

ion that the giving of it was not such error as requires the reversal of the judgment. In our consideration of the sufficiency of the petition, we concluded that a consideration sufficient to support the contract was therein shown, namely, the surrender by the plaintiff, in reliance upon the promise, of his right to the services of his daughter. This was a detriment suffered by him, and followed as a legal consequence upon his consent to the marriage. The answer pleaded illegality of consideration and duress. Upon these two issues defendant was entitled to have the jury properly instructed. The execution of the contract being admitted, it followed from an adverse verdict upon the two defenses pleaded that the contract was valid and binding, and plaintiff, as a matter of law, was entitled to recover. It is apparent, then, that the giving of instruction numbered 5 was not prejudicial to defendant. It had no tendency to confuse or mislead the jury in the consideration of the two issues properly submitted to them. The trial court might well have instructed the jury that, if they found against defendant on both the defenses pleaded, their verdict should be for plaintiff. The giving of a wrong instruction, which could not possibly have prejudiced the defendant, will not justify the reversal of the judgment.

The complaint directed against instruction numbered 6 is that it is confined to the defense of illegal consideration, and makes no mention of the defense of duress. But the latter defense was properly treated in subsequent instructions.

The defendant asked the court to instruct the jury that the doctrine of marriage settlement had no application to this case, and in this instruction matters in explanation of what constituted a marriage settlement were incorporated. There was nothing in the evidence or in the issues joined by the pleadings suggestive of a marriage settlement, and we fail to understand upon what principle a negation of this kind was necessary to go to the jury.

The defendant asked the court to instruct the jury that the marriage of the minor children of plaintiff and defend-

ant was not a consideration for the contract in suit, and that, unless they found that there was another and different consideration, they must find for defendant. In view of what has just been said with reference to instruction numbered 5 given by the court, the refusal of this request was not error prejudicial to the rights of defendant.

The defendant requested an instruction to the effect that, under the law of this state, plaintiff had no right of action against the seducer of his minor daughter, which was refused. This request was based upon evidence to the effect that those representing plaintiff at the interview, which resulted in the execution of the contract in suit, stated to defendant that plaintiff had such right of action. Defendant asked to have the jury instructed as indicated, and that, if defendant's belief in this representation was an inducing cause to the execution of the contract, that fact, together with other facts, might be considered in connection with the defense of duress. The court instructed the jury, and we think properly, that if they found that defendant entered into the contract freely and voluntarily, and not because of fear or duress, the statements made by Reeder and Byrnes were immaterial. The issue of duress having been submitted to the jury, the refusal of the requested instruction just referred to was not error.

The court instructed the jury at the request of plaintiff that, if they found that at the time of the execution of the contract there was no agreement or promise on the part of plaintiff to abandon the prosecution of Robert, then the defense of compounding a felony was not sustained, and upon that issue they should find for the plaintiff. It is said that this instruction states but half the truth. If we do not misapprehend counsel, it is sufficient to say that the other half is embraced in instruction numbered 6, heretofore quoted.

The criticism directed toward other instructions which were given are with reference to the court's statements as to what did constitute a sufficient consideration. We do

not believe, in view of views already expressed, that the jury were misled as to the issues properly before them, and defendant suffered no prejudice by reason of the instructions complained of. The same may be said with reference to the instruction that, under the law, if a female between the ages of 16 and 18 marries, her minority ends. This instruction was unnecessary but can not have been prejudicial.

There is an extended discussion in brief of counsel for defendant with reference to the alleged errors of the trial court in the admission and exclusion of testimony. The errors assigned are several hundred in number, and of necessity the space devoted by counsel in the discussion of each error is limited. Some of the rulings complained of excluded testimony of defendant, or struck out answers as not responsive. Some of the evidence excluded was afterwards admitted. In other cases the rulings do not seem to have been erroneous in view of the issues being tried. We have carefully read the evidence, together with the rulings made by the court, bringing to bear on our inquiry all the light which counsel have shed by means of brief and oral argument, and we are satisfied that there was no prejudicial error committed by the court. It would make this opinion unwarrantably long to discuss each assignment in detail. The record is voluminous, but our examination has convinced us that the trial was had with circumspection and care, and the rulings of the court were fair and reasonable.

It is contended that there was error in denying to counsel for defendant the right to argue the case before the jury. It apears that by agreement each side was to have two hours for argument, the defendant to open and close, and not to use more than half the time allotted in the closing argument. Pursuant to this agreement counsel for defendant occupied a little over an hour in the opening argument, whereupon counsel for plaintiff announced that the plaintiff waived argument. Further argument on behalf of defendant was not permitted by the court, the argument

being held to be at an end. It is quite possible that, under some circumstances, to put it in the power of the defense to close the argument in this manner would result in a hardship, but we are inclined to adopt the views expressed by the supreme court of Michigan in *Barden v. Briscoe*, 36 Mich. 254, that matters of this kind rest in that large discretion of the trial court by which the general course of procedure is regulated, and that an appellate court would not be justified in making the ruling a ground for reversal unless it was manifest that the discretion was abused. That there was an abuse in this case, we are certainly not prepared to say, and this ruling will not be held to be erroneous.

Complaint is lodged against the order of the trial court in taxing costs against the defendant, the contention being that the amount involved in the case brought it within the jurisdiction of the county court, and the case not having been brought there, costs were not under the ruling of this court recoverable in the district court. Several cases from this court are cited which, however, do not sustain the point. We do not know of any rule which prevents a plaintiff from recovering his costs in a case brought in the district court in the first instance, unless it be in the case of an action whereof it appears a justice of the peace had jurisdiction. Section 621 of the code. Such is certainly not this case.

We have gone over this record, and the extended and exhaustive argument in support of the errors assigned, and have failed to see wherein it appears that the trial court erred to the prejudice of defendant. It is therefore recommended that the judgment of the district court be affirmed.

DUFFIE and LETTON, CC. concur.

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

AFFIRMED.

IN THE MATTER OF THE APPLICATION OF GEORGE W. TIERNEY FOR A LICENSE TO SELL MALT, SPIRITUOUS AND VINOUS LIQUORS.

FILED APRIL 21, 1904. No. 13,432.

Liquor License. Under the provisions of section 1, chapter 50, Compiled Statutes, the licensing board, upon the hearing of an application to grant a liquor license, must pass upon the character and standing of the applicant and his citizenship, and the board is without authority to delegate these functions to another person or corporation by issuing the license in the name of one shown to be not the real party in interest, upon the understanding that such person or corporation will select a person to conduct the business under the license.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Cooper & Dunn, for plaintiff in error.

Charles Ogden and *Hamilton & Maxwell, contra.*

KIRKPATRICK, C.

This case is an application for a liquor license presented by George W. Tierney to the board of fire and police commissioners of the city of Omaha. A remonstrance to the granting of the license was filed by I. J. Dunn, a resident taxpayer. The remonstrance was overruled by the board, and the license granted. An appeal from the action of the board was taken by Dunn to the district court, where trial resulted in a judgment sustaining the action of the board. From the judgment so entered the cause is brought to this court on error.

The remonstrance filed by Dunn with the board, omitting formal and certain immaterial portions, is in the language following:

"3d. That said party is not entitled to a license for the reason that he is not the real party in interest, but is securing said license to be used and controlled, not for himself,

but by the real party in interest, who is in fact securing, and who will control the said license if granted, to wit, the Storz Brewing Association."

At the hearing before the board, in lieu of all other evidence, an agreed statement of facts was presented, upon which the cause was submitted. This agreed statement of facts is in the language following:

"It is hereby stipulated by the said applicant and remonstrator that this application is made in the interest of and for the Storz Brewing Company, a corporation, of which said applicant is collector, said corporation being engaged in the brewing business; that the Storz Brewing Company has paid the license fee of $1,000 herein, and asks that the license be granted in the name of George W. Tierney, as a matter of convenience; that after the license is granted on this application, the Storz Brewing Company intends to place some proper person in charge of said saloon to operate the same under a business arrangement with the Storz Brewing Company, and who will run said saloon as his own business venture so far as the profits and losses of said business are concerned; that the Storz Brewing Company will not be interested in the profits, nor responsible for the losses of said business; said party will be placed in charge of said saloon to run it under the license of said applicant, and will be required to pay the Storz Brewing Company the license money by said Storz Brewing Company paid, and will be required to sell the beer of the said Storz Brewing Company, and to pay the rent of the building on such terms as may be agreed upon between said parties. It is understood that the party placed in charge of said saloon under the arrangement referred to will take out a government license in his own name to sell liquor at said place."

But a slight examination of the agreed statement of facts quoted is sufficient to show that the license in question ought not to have been granted. Section 1, chapter 50, Compiled Statutes (Annotated Statutes, 7150), being a part of the statute governing the granting of liquor

licenses, provides that, before a license shall be granted to any person to sell liquor, a petition shall be presented to the licensing board, setting forth that the applicant is a man of respectable character and standing, and a resident of the state. The licensing board has no right to grant a license until it is made satisfactorily to appear that the person to whom the license is to be granted, and who is to run the saloon, is a man of respectable character and standing, and that he is a resident of the state. It is disclosed by the agreed statement of facts that the man Tierney, in whose name the license is to be issued as a matter of convenience, has no interest in the matter, but "that, if the license is granted on this application, the Storz Brewing Company intends to place some proper person in charge of said saloon to operate the same under a business arrangement with the Storz Brewing Company." It is proposed to permit the brewing company to select the man who is to conduct the saloon. The arrangement contemplates investing the brewing company with the function and responsibility of passing judgment upon the character and standing of the man who is to conduct the business. The selection is to be made entirely by the brewing company. It is not only to determine his standing in the neighborhood wherein he resides, but is also to pass upon the question of his citizenship. We have experienced no difficulty in coming to the conclusion that such an arrangement would be an apparent evasion of the statute. It amounts to an abdication by the board of its functions and legal powers, which are to become the regal garments of another institution not recognized in the statute. It is not for us to deny that the brewing company is better qualified to decide whether an applicant has the character and standing contemplated by the law, as well as decide the question of his citizenship. But to us it seems quite plain that the legislature deemed it wiser to vest this power in a duly constituted and legal board, whose identity and personnel would be matters of public knowledge, whose duties would be to receive applications, hear and entertain remon-

strances, and bring to bear their own judgment and personal and official responsibility in deciding whether the applicant is shown to be qualified under the statute to be a licensee. A liquor license is in the nature of a personal privilege, and the petitioners must represent the applicant to be such a person as the law permits to receive a license. The effect of the scheme disclosed by the agreed facts is to issue a license in blank, to be hawked and sold by the brewing company, and to take from the board its power to determine the character and fitness of the applicant. This the law does not permit.

It is contended on behalf of the applicant that, inasmuch as Tierney is a man of respectable character, the presumption must obtain that the brewing company will consult with him in the selection of the man to run the saloon who will have a respectable character. It is suggested that this court has said that the saloon may be run by an agent of the licensee, and that the scheme disclosed by the record amounts simply to this. We do not see anything of merit in this suggestion. The parties have, as we have already seen, attempted to do something neither allowed nor contemplated by the statute. The action taken by the licensing board in overruling the remonstrance and granting the license, and the judgment of the district court upon the appeal are wrong and should be set aside. It is therefore recommended that the judgment of the district court and the board of fire and police commissioners be reversed and set aside, and the license canceled.

LETTON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court and the fire and police commissioners is reversed, and the license canceled.

REVERSED.

ZEBULINE H. SCHAFER, APPELLEE, V. PAUL J. SCHAFER, APPELLANT.

FILED APRIL 21, 1904. No. 13,526.

1. **Divorce:** VACATING DECREE. The provisions of sections 602 of the code apply to divorce proceedings as well as to other proceedings in which it is sought, upon the grounds therein mentioned, to vacate or modify a decree or judgment after the term.

2. **Statute:** CONSTRUCTION: REPEAL BY IMPLICATION. Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless such construction is made necessary by the evident intent of the legislature.

3. ———: ———. Sections 1 and 2, chapter 49, laws of 1885, *held* to apply to the commencement of proceedings in the supreme court, and not to repeal section 602 of the code in its application to proceedings commenced in the district court to vacate a decree of divorce.

4. **Petition:** SUFFICIENCY. Petition for new trial under the provisions of section 602 examined, and *held* to state a cause of action.

APPEAL from the district court for Douglas county: GUY R. C. READ, JUDGE. *Reversed.*

Burkett & Greenlee, for appellant.

Geo. A. Magney, contra.

KIRKPATRICK, C.

On October 22, 1902, appellee procured to be entered by the district court for Douglas county a decree of divorce in her favor, and against the appellant, awarding to her the custody of their three minor children, and enjoining appellant from in any way interfering with their custody and control. Appellant was a resident of the state of California, and made no appearance in the case until after the decree, service having been made upon him by publication. On the 18th day of August, 1903, appellant filed in the district court a petition asking a new trial under the provisions of section 602 of the code, and that he be allowed to

defend. The petition is of too great length to be copied herein, but it sets out facts which, if true, show that appellee was a nonresident of the state at the time she procured her divorce; that her allegation of residence was a fraud upon the court; and that the divorce was obtained upon unlawful, corrupt and perjured testimony of the extremest character, and that appellant had an absolute defense to the cause of action set out in her petition; that appellant had no knowledge of the pendency of the proceedings for nearly a year, and until after the adjournment of the term; that the notice was fraudulently published in an obscure weekly paper in Douglas county, for the purpose of preventing appellant from acquiring knowledge of its pendency; that the next day after the decree was entered, appellee crossed the river into Council Bluffs, Iowa, and there intermarried with one Beck, whose intimacy with appellee, it is alleged, was the cause of the separation of the parties, which occurred in California. Appellant, in his petition, brought himself fully and clearly within the provisions of section 602 of the code, authorizing the granting of new trials after the term at which the decree was rendered.

Appellee contends that, by the provisions of section 45 and 46, chapter 25, Compiled Statutes (Annotated Statutes, 5369, 5370), all divorce proceedings are taken out of the provisions of section 602, and that, in proceedings to vacate or modify a decree of divorce, or to obtain a new trial in a divorce case, except in so far as it affects alimony or the custody of children, they must be brought within 6 months; and that, conceding all that appellant alleges in his petition to be true, and that the divorce was obtained by perjury, and that the court had no jurisdiction, yet, the court is powerless to grant appellant any relief. The doctrine contended for strikes us as monstrous, and we are not inclined to accede to its correctness, unless the language of the statute is such as to make that construction imperative. The act relied upon by appellee in support of her contention was passed in

1885. (Laws, ch. 49.) It is composed of two sections, in the language following:

"Section 1. It shall be unlawful for any person who shall obtain a decree of divorce to marry again during the time allowed by law for commencing proceedings in error or by appeal for the reversal of such decree, and in case such proceedings shall be instituted it shall be unlawful for the defendant in error or appellee to marry again during the pendency of such proceedings, and a violation of this act shall subject the party violating it to all the penalties of other cases of bigamy.

"Section 2. No proceedings for reversing, vacating, or modifying any decree of divorce, except in so far as such proceedings shall affect only alimony, property rights, custody of children, and other matters not affecting the marital relations of the parties, shall be commenced unless within six months after the rendition of such decree, or in case the person entitled to such proceedings is an infant, a person of unsound mind, within six months, exclusive of the time of such disability."

From a careful reading of these sections, we are of opinion that they will not bear the construction sought to be placed upon them. Prior to the passage of this act, proceedings in error in all cases might be brought in the supreme court within one year. The legislature seems to have concluded that, so far as decrees of divorce were concerned, error proceedings, except as affecting children and property rights, should be commenced in the supreme court within six months, the time already limited for appeals, and to effectuate this purpose, enacted the sections quoted. It is apparent to us that the sections referred to will not bear the construction contended for. If any doubt existed as to the meaning of this enactment, we would be at liberty to look to the title of the act to aid the construction, which is in the following language:

"An act to prevent the marriage of divorced persons during the time allowed for proceedings to reverse the decree of divorce, and during the pendency of such pro-

ceedings, and to fix the time within which such proceedings may be commenced."

The language used in the title, even if the meaning of the sections themselves were not clear, shows, beyond question, that the act was only intended to apply to proceedings commenced in the supreme court.

Appellee contends that, because the act permits parties to marry after six months, if no proceedings to reverse have been commenced, therefore, it was intended to apply as well to proceedings commenced in the trial court; and that, being an act complete within itself, it repeals by implication the provisions of section 602. It is probably true that parties may marry again after six months from the date of the decree, if no error or appeal proceedings have been commenced; but there is no doubt that in so doing they must take their chances on having the decree vacated upon a proper application under the provisions of section 602, and, in such event, must bear the consequences that flow from a vacation of the decree, since all persons are charged with knowledge of the law. Repeals by implication are not favored, and a construction which results in an implied repeal of some other enactment should only be resorted to when made necessary by the evident intent of the legislature. In the case at bar there is no necessity to adopt such construction. The language of the sections quoted is plain, and we can not see that they deprive appellant of any rights granted by section 602.

It follows from what has been said that the trial court erred in sustaining the demurrer to the petition of appellant, and it is therefore recommended that the judgment be reversed.

DUFFIE and LETTON, 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.

REVERSED.

HARRY L. MCCONNELL V. P. E. MCKILLIP.

FILED APRIL 21, 1904. No. 13,308.

1. **Game Laws:** POLICE POWER. CONSTITUTIONAL LAW. Under the police power of the state, the legislature has power to declare property which may be used only for an unlawful purpose to be a public nuisance and authorize the same to be abated summarily by public officers, but, if property, of a nature innocent in itself and susceptible of a beneficial use, has been used for an unlawful purpose, a statutory provision subjecting it to summary forfeiture to the state as a penalty or punishment for the wrongful use, without affording the owner thereof opportunity for a hearing, deprives him of his property without due process of law.

2. **Act Unconstitutional.** Section 3, article III, chapter 31 of the Compiled Statutes, in so far as it provides for the seizure, forfeiture and transfer of title to property without providing for a hearing, *held* unconstitutional and void.

ERROR to the district court for Boone county: JAMES N. PAUL, JUDGE. *Affirmed.*

F. N. Prout, Attorney General, Noris Brown, William B. Rose and *C. E. Spear,* for plaintiff in error.

H. C. Vail, contra.

LETTON, C.

On the 3d day of August, 1902, P. E. McKillip, D. B. McMahon and W. E. Harvey were engaged in hunting prairie chickens in Boone county, in violation of the game law of 1901, using three shotguns. The deputy game warden, Harry L. McConnell, seized the three shotguns, while they were so engaged in hunting prairie chickens. P. E. McKillip was the owner of the guns, which were valued at the sum of $75. McKillip brought an action of replevin against the defendant, deputy game warden, for their possession. The case was tried to the district court upon an agreed statement of facts substantially as above stated. The court found for the plaintiffs and rendered judgment accordingly. The defendant

brings error to this court. The game warden claims the right to hold the guns under authority of section 3, article 3, chapter 31 of the Compiled Statutes (Annotated Statutes, 3272), which is as follows:

"All guns, ammunition, dogs, blinds and decoys, and any and all fishing tackle, in actual use by any person or persons while hunting or fishing in this state without license or permit, when such license or permit is required by this act, shall be forfeited to the state; and it is made the duty of the commissioner and every officer charged with the enforcement of this act to seize, sell or dispose of the same in the manner provided for the sale or disposition of property on execution, and to pay over the proceeds thereof to the county treasurer for the use of the school fund."

He contends that the statute authorizing game wardens to seize and forfeit to the state all guns in actual use by persons hunting in violation of the game law is a valid exercise of the police power of the state, while the defendant in error contends that the aforesaid statutory provision violates the provisions of the 14th amendment to the constitution of the United States which declares: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and of section 3, article I of the constitution of the state of Nebraska, which provides: "No person shall be deprived of life, liberty or property, without due process of law."

The protection of wild animals suited for the purpose of food from indiscriminate slaughter by hunters has been the object of legislation from the most ancient times. The theory upon which the lawmaking power assumes to act is, that all wild game belongs to the state in its sovereign capacity as a trustee for the whole of the public, and that, consequently, the state may, as a proper exercise of its police power, adopt such rules and regulations with reference to its preservation, and such penalties with reference

to a violation of such regulations, as are necessary to accomplish the end desired—the preservation to the people of the state of the pleasure, sport and profit derived from the hunting, pursuit and capture of the wild animals living therein.

In this case the defendant in error, McKillip, admits that it is within the power of the state, in the just exercise of its police powers, to prohibit the killing of fish and game at certain seasons of the year, but denies that it has the right to take his property from him and confiscate it to the state without giving him his day in court. He contends that the police power in regard to the confiscation of guns, dogs, blinds, decoys and fishing tackle is upon exactly the same footing as the police power in regard to the regulation of the sale of intoxicating liquors, and that, since, before liquors which have been seized are destroyed, there must be a judicial determination by a court as to whether the owner was engaged in unlawfully selling or keeping for sale intoxicating liquors, so there must be as to his property. He further contends that, since the statute contains no provisions for determining whether the property was liable to condemnation for the criminal acts of those who had it in their possession, and since it merely authorized the game warden to seize the property without warrant or process, to condemn it without proof, and to sell it as upon execution, it deprives the defendant of the property rights which are guaranteed to him by the constitution.

The laws of the state of New York declare that any net or other means or device for taking fish found in the waters of the state, in violation of the laws for the protection of fish, is a public nuisance, and authorize game constables to destroy such nets. Certain nets were seized and destroyed, and an action being brought against the officers for their value under these provisions, the court of appeals of the state of New York held that the declaration by the legislature that the nets or other devices found in the waters of the state are a public nuisance, is a valid

exercise of the legislative power; and that the further provision requiring the destruction of such nets, such destruction being an incident of the power of abatement of the nuisance, and not a forfeiture inflicted as a penalty upon the owner, is not in violation of the constitutional prohibition of taking property without due process of law; but further held that that part of the act authorizing the destruction of nets found upon the shore was unconstitutional, since nets not found in the waters are not a nuisance *per se*. *Lawton v. Steele*, 119 N. Y. 226. A writ of error being sued out to the supreme court of the United States from this judgment, that court affirmed the judgment of the supreme court of New York, and say, Mr. Justice Brown delivering the opinion:

"The main, and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, 'and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove and forthwith destroy the same.' The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. * * * In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the

boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the paths of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark & S. O. H. C. R. Co. v. Hunt,* 50 N. J. Law, 308; *Blazier v. Miller,* 10 Hun (N. Y.), 435; *Mouse's Case,* 12 Rep. (7 Coke) 63; *Stone v. Mayor,* 25 Wend. (N. Y.) 157, 173; *American Print Works v. Lawrence,* 21 N. J. Law, 248, 23 N. J. Law, 590." *Lawton v. Steele,* 152 U. S. 133.

The state of Wisconsin has an act substantially the same as that of New York, providing for the protection of fish and authorizing the destruction of nets, declaring the same to be public nuisances. In the case of *Bittenhaus v. Johnston,* 92 Wis. 588, the validity of this provision came before the supreme court of Wisconsin. The court say, it has been repeatedly said, neither the 14th amendment, nor any other amendment to the constitution of the United States, " 'was designed to interfere with the power of a state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.' *Barbier v. Connolly,* 113 U. S. 31; *Mugler v. Kansas,* 123 U. S. 623; *In re Kemmler,* 136 U. S. 436, 448." The court

further say: "The plaintiff, having voluntarily put the nets to an unlawful use which made them public nuisances under the statute, is in no position to recover damages from the defendants for having, as public officials, obeyed the law in abating the nuisance by seizing and destroying the nets. Of course, the plaintiff had his right of action to determine whether the nets were or were not in such unlawful use. We must hold that the plaintiff has not been deprived of his property without due process of law."

No case has been brought to our attention in which a court has construed a statute which provides for the seizure, forfeiture to the state and sale of property of the kind involved in this case, which has been used in violation of the game laws. As a rule the statutes have declared nets and like devices, which can only be used in violation of law, to be public nuisances, and provided for their abatement by their destruction by public officers.

The distinction between nets, which under the laws of the states providing for their destruction can only be used for an unlawful purpose, and fire arms which under the laws of this and other states may be used for many other purposes, innocent and lawful in their nature, is clearly apparent, and has been recognized by our legislature in the act under consideration.

In section 1, article III of this act, the legislature of this state has provided:

"Every net, seine, trap, explosive, poisonous or stupefying substance or device used or intended for use in taking or killing game or fish in violation of this act, is hereby declared to be a public nuisance and may be abated and summarily destroyed by any person, and it shall be the duty of every such officer authorized to enforce this act to seize and summarily destroy the same, and no prosecution or suit shall be maintained for such destruction; provided, that nothing in this division shall be construed * * * as authorizing the seizure or destruction of fire arms, except as hereinafter provided."

The provisions of this section as to nets and like devices are substantially the same as those contained in the game laws of New York and Wisconsin, heretofore referred to, and with the conclusions of these courts with reference to laws of like nature, we have no fault to find. But there is a broad distinction between this section and section 3 under which the plaintiff in error justifies.

The legislature has not declared a gun to be a public nuisance and has not ordered its destruction as an abatement of the same. The seizure of the property provided for by this section is evidently intended, not only to put it out of the power of the offending person to carry on the destruction of game by depriving him of the implement of destruction, but also to operate as a penalty or punishment for an unlawful act committed by him. It is of the nature of a common law forfeiture of goods upon conviction of a crime.

In *Ieck v. Anderson*, 57 Cal. 251, it appeared that the plaintiff had rented certain boats and nets to a Chinese fisherman; that the property was used in violation of a statute of the state which provided that all nets, seines, fishing tackle, boats and other implements used in catching or taking fish in violation of the provisions of this chapter shall be forfeited, or may be seized by a peace officer of the county or his assistant, and may be by him destroyed or sold at public auction, upon notice posted in the county for five days. The court held that so much of the statute as authorized the property to be sold without judicial proceedings was unconstitutional and void. It will be noticed that boats were included, which were susceptible of a lawful use.

Varden v. Mount, 78 Ky. 86, was an action in conversion to recover the value of certain hogs. The town ordinance provided that it was the duty of the town marshal to take up hogs running at large upon the streets, to advertise them for three days, and to offer them at public sale to the highest bidder, and, after paying the expenses thereof, to pay over to the rightful owner the balance, if

any. The court held the right to forfeit "should not be extended beyond impounding the hogs. When that is done, the necessity for summary and precipitate action ceases, and judicial proceedings looking to forfeiture may then properly begin," and that the ordinance was unconstitutional.

Lowry v. Rainwater, 70 Mo. 152, was an action to recover the value of a dining table. The defendant pleaded that he was a member of the board of police commissioners of the city of St. Louis, and that under the statute it was his duty, when he had knowledge that there was a prohibited gaming table kept or used in the city of St. Louis, to issue a warrant directing some officer of the police force to seize and bring before him such gaming table, and made it his duty to cause the same to be publicly destroyed by burning or otherwise. These provisions were held unconstitutional and void.

In *Lawton v. Steele*, 119 N. Y. 226, the supreme court of New York was of the opinion that it was only because the nets found in the water were a public nuisance that they might be destroyed, and that if the destruction of the nets was intended as a penalty it was unconstitutional, and also that nets not actually found in the water could not be seized. "But," say the court, "the legislature can not go further. It can not decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment of the wrong, nor even, we think, to prevent a future illegal use of the property, it not being a nuisance *per se*, and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and under guise of exercising the power of summary abatement of nuisances, the legislature can not take into its own hands the enforcement of the criminal or *quasi* criminal law. See opinion of Shaw, C. J., in *Fisher v. McGirr*, 1 Gray, 1, and

in *Brown v. Perkins*, 12 Gray, 89." When the same case reached the supreme court of the United States, while the majority of the court held that the law in question was a valid exercise of the police power, Chief Justice Fuller, with whom concurred Mr. Justice Field and Mr. Justice Brown, filed a dissenting opinion, in which he says: "The police power rests upon necessity and the right of self protection, but private property can not be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard." *Lawton v. Steele*, 152 U. S. 133, 144.

In *Sentell v. New Orleans & C. R. Co.*, 166 U. S. 698, it is said by Justice Brown: "But in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction."

In *Colon v. Lisk*, 153 N. Y. 188, a later case than *Lawton v. Steele*, a statute, providing that every vessel unlawfully used in interfering with oysters planted in the waters of the state may be seized by the game protectors, and upon six days' notice a justice might take evidence and, if found to be so engaged, the vessel should be ordered sold and the proceeds paid to the commissioners of fisheries, game and forestry, was held unconstitutional, the court saying: "It is to be observed, in passing, that the use for which vessels and fixtures may be forfeited under this act does not constitute a nuisance, either at common law, or under this, or any other statute. Nor is the property itself a nuisance. Hence, it is obvious that the validity of this act can not be maintained upon the

ground that either the act or the property is a public nuisance, and, consequently, that the legislature had the power to authorize its abatement."

In *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549, 565, this court held: "The legislature can not, under the guise of a police regulation, arbitrarily invade private property or personal rights," but it must appear to the court, when such regulation is called in question, that there is a "clear and real connection between the assumed purpose of the law and its actual provisions."

There is a clear and marked distinction between that species of property which can only be used for an illegal purpose, and which therefore may be declared a nuisance and summarily abated, and that which is innocent in its ordinary and proper use, and which only becomes illegal when used for an unlawful purpose. We know of no principle of law which justifies the seizure of property, innocent in itself, its forfeiture and the transfer of the right of property in the same from one person to another as a punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged, before the forfeiture takes effect. If the property seized by a game keeper or warden were a public nuisance, such as provided for in section one, he had the right under the duties of his office at common law to abate the same without judicial process or proceeding, and the great weight of authority is to the effect that such common law rights have not been abrogated or set aside by the provisions of the constitution; but if the property is of such a nature that, though innocent in itself and susceptible of a beneficial use, it has been perverted to an unlawful use, and is subject to forfeiture to the state as a penalty, no person has a right to deprive the owner of his property, summarily, without affording opportunity for a hearing and without due process of law. The usual course of proceedings in such case has been either, as in admiralty and revenue proceedings, to seize the property, libel the same in a court of competent jurisdiction and have it con-

demned by that court, or, as in criminal matters, to arrest the offender and to provide that upon his conviction the forfeiture of the property to which the offender's guilt has been imputed, and to which the penalty attaches, should take place. These have been the methods of procedure for centuries. No other has been pointed out to us in the brief of the plaintiff in error. We are therefore constrained to the opinion that, in so far as the section under consideration provides for the seizure, forfeiture and transfer of title to property without a hearing upon the guilt or innocence of its owner, it violates the constitutional provisions. Whether or not a forfeiture can be provided for as a punishment for crime under our constitution is a question not raised or decided in this case.

We recommend that the judgment of the district court be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

HELEN L. JONES V. ALICE S. DANFORTH.

FILED APRIL 21, 1904. No. 13,362.

1. **Creditor's Bill:** ATTACHMENT: JURISDICTION. When a creditor's bill is brought to set aside a cloud upon the title of property which has been seized in an attachment suit against a nonresident debtor, the court will look at the entire record in the attachment case to see whether jurisdiction was obtained therein. If from all the affidavits the essential facts to confer jurisdiction appear, the judgment will not be declared void. The defect in one affidavit may be supplied by the other and, if enough appears from all, it is sufficient.

2. **Attachment:** PROCESS: JUDGMENT. A judgment rendered without substituted service on the defendant in an attachment case against a nonresident, whose property has been seized in this state, is merely erroneous and not void. *Darnell v. Mack*, 46 Neb. 740, followed.

3. ———: ———: ———. If it appears that service of summons has actually been made upon the defendant and that the time given him by the summons to answer has elapsed before judgment, the fact that an error was made in the return day of the summons is merely an irregularity, which might have been taken advantage of by the defendant before judgment, but which does not render the judgment void.

4. Deed: RECORD: NOTICE: STATUTE OF LIMITATIONS. The recording of a fraudulent deed is not of itself, under all circumstances, sufficient to charge all parties with notice of the fraud. When accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry which, if pursued, would lead to the discovery of the fraud, the statute begins to run from the recording of the deed, but not otherwise. *Forsyth v. Easterday*, 63 Neb. 887, followed.

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

Thomas H. Matters, for plaintiff in error.

Joel W. West, contra.

LETTON, C.

This was a creditor's bill brought by Alice S. Danforth, as plaintiff, against Helen L. Jones, L. D. Fowler and others. It appears that L. D. Fowler is the father of the defendant Helen L. Jones; that at one time he had been in partnership with one Cowles, the former husband of the plaintiff; that Cowles died in 1890, and, after his death in 1893, she loaned Fowler, who was then in the banking and farm loan business, about $8,000, Fowler giving his unsecured promissory note for the same. That this note was renewed from time to time, and that, at the time the last note was given in 1901, Fowler gave her a second mortgage on some property in Omaha to secure the same, which property was afterwards taken by the foreclosure of the first mortgage, so that she received nothing upon the note. Fowler at one time resided in Clay county, Nebraska, afterwards moving to Omaha and living there in 1893 when the money was loaned to him,

and is now a resident of Washington, D. C. In February, 1902, Mrs. Danforth commenced an action in the district court for Clay county against Fowler, to recover the amount due upon the note, at the same time filing an affidavit for attachment and garnishment, alleging among the grounds therefor that the defendant was a nonresident of the state of Nebraska, and that the affiant had good reason to believe and does believe that each of two corporations, named in the affidavit, within the county of Clay, have possession of property of the defendant Fowler, describing it. A writ of attachment and garnishment was issued by virtue of the affidavit, and was levied by the sheriff of Clay county upon numerous parcels of real estate and shares of stock as the property of the defendant L. D. Fowler. On the same day that the petition was filed, an affidavit for service by publication was made and filed in the case, which stated the object and prayer of the petition was to recover the amount due upon a promissory note, and "that the plaintiff has procured a writ of attachment in said action, by which it is sought to subject to the payment of said debt all the rights, credits, goods and chattels, lands and tenements of said L. D. Fowler, which may be found in said Clay county and state of Nebraska. Affiant further says that said defendant L. D. Fowler is a nonresident of Nebraska and that service of summons can not be made within this state upon him." Summons was personally served upon Fowler in the District of Columbia by a person regularly appointed to serve the same, no appearance was made by the defendant, and, upon the hearing on the 24th day of March, 1902, a judgment was rendered in the case for the amount due, and ordering the sheriff to proceed, as upon execution, to advertise and sell so much of the attached property as will satisfy the judgment and costs. After this judgment had been rendered, it appearing that the attached property had been transferred by Fowler to the defendants herein, this action was begun for the purpose of clearing the title to the attached property so that it

might sell to advantage under the order of sale. No consideration was paid by Mrs. Jones to Fowler for any of the property.

The defendant contends that the evidence fails to show that the plaintiff was a judgment creditor of L. D. Fowler. Her position is that the judgment was absolutely void for the reasons: First, that the summons was served after the return day: Second, that the affidavit on which the service was based failed to show the existence of grounds for service by publication or personal service out of the state.

For convenience, we will consider the second assignment first. The argument of the defendant is that the language of the affidavit for service by publication, "That the plaintiff has procured a writ of attachment in said action, by which it is sought to subject to the payment of said debt all the rights, credits, goods and chattels, lands and tenements of said L. D. Fowler, which *may* be found in said Clay county and state of Nebraska," does not show that Fowler had any property in Clay county or in Nebraska, and, therefore, does not show that the court had jurisdiction to enter a judgment *in rem*, and that it is equivalent to a declaration that the plaintiff would subject, under her writ, any property belonging to Fowler in Clay county or state of Nebraska, if he had any therein, and that, in order to be sufficient, it was necessary to state that property of Fowler had been taken under the writ or that he had property or credits in this state.

It is questionable whether if this affidavit for publication stood alone it would furnish the proof of sufficient facts to warrant service by publication, but the record shows that, upon the same day, an affidavit in attachment and garnishment was filed which alleged, in the language of the statute, that the affiant "has good reason to believe and does believe" that certain corporations within the county of Clay each has in its possession property of the defendant L. D. Fowler, describing, specifically, the prop-

erty which it is charged each holds; and the record further shows, that an order of attachment was issued under the affidavit, and that, on the 11th day of February, the personal property described was attached, and that, on the 21st day of March, certain real estate of the defendant Fowler was also attached in Clay county. Judgment was rendered in the action upon the 24th day of March. At the time that judgment was rendered, the court found that due and legal service of summons had been made personally upon the defendant. In *Miller v. Eastman*, 27 Neb. 408, the facts were, that an action was brought in the district court for Otoe county to recover upon a promissory note. The defendant was a nonresident of this state. An affidavit for attachment was filed, setting forth, among other matters, that the defendant is a nonresident of the state of Nebraska, and that the affiant makes this affidavit for the purpose of procuring an order of attachment in said action. The affidavit for publication set forth the object of the action, that the defendant is a nonresident of the state of Nebraska, that service of summons can not be made upon the defendant within the state of Nebraska, and that affiant makes this affidavit for the purpose of procuring service upon said defendant by publication in manner prescribed by law. These affidavits were filed when the action was begun. It was objected that the district court never acquired jurisdiction in the attachment proceedings, but the court say:

"It will be observed that the affidavit complies substantially with the statute and is sufficient. And in a case of this kind, the court will look at the entire record, and if it appear from all the affidavits before the court issuing the attachment that the essential facts to confer jurisdiction were duly sworn to therein, the judgment will not be declared void; therefore, even if the affidavit for publication was defective, the defect is supplied by the affidavit for attachment, and is thereby cured. The court, therefore, in any view of the case, had jurisdiction and its judgment is not subject to collateral attack."

In *Welch v. Ayres,* 43 Neb. 326, it is held that the right to institute and prosecute an action against a nonresident debtor for the recovery of money only, and to serve summons upon him by publication under the third clause of section 77 of the Code, depends as much upon the existence of the fact of the defendant's ownership of the property within the state as upon the fact of his nonresidence, and the existence of both facts is essential to the validity of the proceedings. That service by publication can only be had against a nonresident who has property in this state, and that it is proper and competent for the court to hear testimony as to whether or not the defendant owned property in the state, to determine the question of jurisdiction. If it is clear, as is held in that case, that the defendant may show that he owns no property within this state, then jurisdiction does not depend alone upon the averments in the affidavit for publication. If the affidavits show even in inapt or unskillful language that the defendant has property in the state, and property is afterwards seized under the writ of attachment, then jurisdiction is complete. In this state the court acquires jurisdiction over the *rem* by its seizure, and failure to give the notice does not thereby cause the court to lose jurisdiction so long as the action remains pending. The main question raised has been discussed and the law settled by the well considered opinion of Commissioner IRVINE in *Darnell v. Mack,* 46 Neb. 740, in which it is held that a judgment rendered without substituted service on the defendant in an attachment case against a nonresident whose property has been seized in this state is merely erroneous and not void. See also *Rachman v. Clapp,* 50 Neb. 648; *Brown v. Bose,* 55 Neb. 200.

By the affidavit for attachment and garnishment, the service of the notice upon the garnishee thereunder and the levy of the writ of attachment the plaintiff acquired a lien upon the property of the judgment debtor in this state. The return of the officer showing these facts was proper to be considered by the district court upon the

question of jurisdiction before the judgment was rendered. At the time of the rendition of the judgment, these facts were all before the court, it passed upon the question of service, and the judgment, so far as it subjects the attached property to its payment, is proof against collateral attack.

As to the objection to the time of service of the summons, it appears that the summons was issued to the sheriff of Clay county and was made returnable upon the fourth Monday after its date. The requirement of the statute is that it be made returnable upon the second Monday after the date thereof, and that, if issued to another county, it may be made returnable at the option of the plaintiff upon the third or fourth Monday after its date. The service was made and the summons returned within the time specified upon its face, but the argument of the defendant is that the clerk had no authority to extend the return day from the second until the fourth Monday, that his action in doing so was a nullity, and that therefore the summons was returned after the return day and was therefore wholly void. The question of the effect that the inserting of an erroneous return day in a summons has upon the service made under such circumstances, was before this court in *Ley v. Pilger,* 59 Neb. 561, and it was there held that this defect is merely an irregularity and does not render the process void.

Where there is actual personal service of process upon the defendant, and the defendant does not appear and object on the ground of irregularity in the summons, and a judgment is rendered against him under such service, the judgment is not void but voidable, and is not open to collateral attack. It appears that Fowler was actually served with the summons and that time was given him to answer. The fact that an erroneous date was mentioned as the date of the return of the summons might have been taken advantage of by him by proper motion. This not having been done, and a judgment rendered wherein the court considered the question of

service, its judgment in that respect is final. *Gandy v. Jolly,* 35 Neb. 711; *Campbell Printing Press & Mfg. Co. v. Marder,* 50 Neb. 283.

The defendant's second proposition is that the plaintiff's action is barred by the statute of limitations, for the reason that the deed of conveyance of the real estate was dated April 17, 1897, and was recorded in the office of the county clerk of Clay county upon April 23, 1897. This action was begun upon April 24, 1902, which was 5 years after the recording of the deed. Our statute provides that an action for relief on the ground of fraud must be brought within 4 years, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. The shares of stock in the corporations were transferred upon the books of the corporations in September, 1896. There is no evidence to show that the plaintiff had any knowledge of Fowler's ownership of this stock before he transferred it, or of the transfer of the same until a short time before the beginning of this action. As to the transfer of such shares of stock she had no notice or knowledge, either actual or constructive, until within 2 years before her action was begun, and hence her right to reach the same has not been barred by the statute of limitations.

As to the real estate, at the time the deed to the same was recorded, it was sent by Fowler from Washington, D. C., to the county clerk of Clay county for record and, after recording, was returned to him at the same place. There is no evidence in the record to show at what time, if ever, it was delivered to Mrs. Jones. When the deed was recorded, the property had only been conveyed to Fowler about 9 months previously. The parties were divided by the width of the continent. Fowler had not lived in Clay county for more than 6 years, and Mrs. Danforth was a resident of Los Angeles, California, and had never lived in Clay county. The note sued upon in the attachment suit was dated 37 days after the fraudulent transfer of the real estate was made, and nearly 18

months after the certificates of stock had been transferred. At the time the note was given, Fowler stated to the plaintiff that the Omaha property was all that he had and all that he could give her. The rule undoubtedly is, in this state, that, in an action brought more than 4 years after the recording of a conveyance seeking to set the same aside as fraudulent, the plaintiff must show that the circumstances were not such as to put a person of ordinary intelligence and prudence upon inquiry which, if pursued, would lead to a knowledge of the fraud. The recording of a deed is a circumstance strongly tending to show knowledge or the means of knowledge, but the circumstances of each case must govern. The same strictness is not to be enforced where the parties live at a distance from the county where the real estate lies, and where the plaintiff in the case had no knowledge that any property stood in the name of the judgment debtor in that county, as where both parties live in the county where the land lies, or are so situated in other respects that knowledge could fairly and reasonably be presumed from all the circumstances of the case. There may be circumstances under which the recording of a fraudulent deed to his real estate by a debtor is sufficient to put the creditor upon inquiry which, if pursued, would lead to the discovery of the fraud, and thereby amount to a discovery of the fraud sufficient to set the statute in motion, but the fact of the recording of the fraudulent deed is not of itself alone sufficient to charge the creditor with notice of the fraud. That part of the syllabus in *Gillespie v. Cooper*, 36 Neb. 775, as follows: "It seems that the fraud, within the meaning of said section 12, is discovered when the fraudulent deed is recorded in the county where the debtor lives," is disapproved, and the rule followed which is announced in *Forsyth v. Easterday*, 63 Neb. 887, as follows: "The recording of a fraudulent deed is not of itself, under all circumstances, sufficient to charge all parties with notice of the fraud. When accompanied with circumstances sufficient to put a person

of ordinary intelligence and prudence upon inquiry, which, if pursued, would lead to a discovery of the fraud the statute begins to run from the recording of the deed, but not otherwise."

In this case, where the creditor and debtor lived 5,000 miles apart, and the property which was fraudulently conveyed was situated in Nebraska, where neither resided, where the evidence showed that the debtor had owned the property only a few months before the transfer, and stated to the creditor, at the time he executed the note which was sued upon, that he had no other property except that upon which he was then giving her a second mortgage, where some degree of trust and confidence between the parties might exist from the former close business relations of the plaintiff's former husband with the debtor, and where it is proved that the plaintiff had no actual knowledge of the fraudulent transfer until a short time before the beginning of this action, her right to bring the same has not been barred by the statute.

The defendant's third proposition is that the plaintiff was a subsequent creditor and, under the state of pleadings and evidence, is not entitled to relief against the defendants. This argument is based upon the fact that the fraudulent conveyances were made a short time before the giving of the note which was afterwards merged in the judgment, and upon the theory that the giving of the new note paid the antecedent debt, and, consequently, made the plaintiff a subsequent creditor who would have no right to complain of any voluntary conveyance made by the debtor before the debt was contracted. It seems to us that this contention merits slight consideration.

It is nowhere alleged in the defendant's answer that the debt which existed, at the time of the transfers complained of, had been fully settled and discharged by Fowler, at the time of the giving of the new note; and it is clear that, where a note is merely given in renewal of a former note, this fact does not change the relations between the parties with reference to a fraudulent transfer

of his property by the debtor. "According to the general doctrine a promissory note, though negotiable, given by a debtor to his creditor, does not operate as payment of a preexisting indebtedness, in the absence of an agreement between the parties that it shall so operate." 22 Am. & Eng. Ency. Law (2d ed.), 555, and cases cited. That this note was taken in payment of the debt has neither been pleaded nor proved, and hence this contention can not be sustained.

For these reasons, we recommend that the judgment of the district court be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

HENRY C. CUTLER ET AL., APPELLEES, V. N. H. MEEKER ET AL., APPELLANTS.

FILED APRIL 21, 1904. No. 13,535.

1. **Decedent's Estate: LANDS UNDER CONTRACT OF PURCHASE.** The interest of a vendee in possession of real estate under a contract of sale, part of the purchase price of the land having been paid, at his death, descends to his heirs, and does not pass to his administrator. It is alienable, descendible and devisable in like manner as if it were real estate held by a legal title.

2. **Action to Quiet Title: DOWER: TRUSTS.** Where, by the mutual consent of the heirs and the widow of a deceased vendee in possession under contract of sale of school lands from the state of Nebraska, the equitable interest therein has been treated as if it were real estate of which the decedent died seized, and dower therein has been assigned to the widow, a deed issued to her in her own name by the state for the portion of the land assigned to her as dower, upon her payment of the balance due *pro tanto* under the contract, creates no new right in her as against the heirs; the title she thereby acquired inures to their benefit and, in equity, she took the legal title only as trustee for them.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

Byron Clark and *Samuel M. Chapman,* for appellants.

C. S. Polk and *O. B. Polk, contra.*

LETTON, C.

Martin B. Cutler, a resident of Cass county, Nebraska, died on the 29th day of March, 1885, intestate, leaving a widow, Gertrude Cutler, and two sons, Henry C. Cutler and George H. Cutler, his only heirs. Prior to his death, Martin B. Cutler had purchased from the state of Nebraska 520 acres of school lands in Cass county, and had made the first payment of one-tenth upon the principal, and also part of the interest upon the deferred payment, the balance of the principal not being due until 20 years from date of purchase. Under the contract he was bound to pay the interest at 6 per cent. per annum anually, in advance, upon the deferred payments, until the principal became due. At the time he died, Cutler was in possession of the 520 acres of land referred to, and also was seized in fee of a 10 acre tract of timber land adjoining the same. After his death, letters of administration were granted in the probate court of Cass county to his widow and his oldest son, as joint administrators, upon a petition for administration signed by Gertrude Cutler and George H. Cutler, which alleged, among other things, that Martin B. Cutler died seized and possessed of real and personal estate, consisting of farm lands, live stock and implements. On the 11th day of July, 1885, an inventory was filed in the county court of Cass county, signed and sworn to by George H. Cutler and Gertrude Cutler, describing the real estate as in the petition and setting forth its value as if held in fee.

On the 9th day of September, 1885, the petition of Gertrude Cutler was presented to said county court, alleging

that Martin B. Cutler died seized of real estate, described as in the petition. That the heirs, and the only persons interested in said lands, are George H. Cutler and Henry C. Cutler. That she is entitled to dower in all of said lands; and her right thereto is not disputed by the said heirs or any person claiming under them or either of them. On the next day, the court rendered a decree, after finding that said Gertrude Cutler is the widow of the deceased, and ordering that she be endowed of one-third part of the premises described in the petition of said Gertrude Cutler, and appointing commissioners to assign dower. The commissioners appointed to assign dower duly acted, and made their report setting apart the 200 acres of land in controversy to Gertrude Cutler as her dower in the estate of Martin B. Cutler. On the 23d day of December, 1886, a decree of confirmation of the report of the commissioners was rendered by the county court, and it was "ordered that said Getrude Cutler have the use and possession of the land so assigned during her life."

On the 27th day of June, 1887, the administrators, Gertrude Cutler and George H. Cutler, having filed their final report, the county court, after due notice given, found that the residue of personal property in the hands of the administrators was $4,106.40, and found further that the deceased died seized of all the real estate heretofore mentioned; that he left surviving him Gertrude Cutler, his widow, George H. Cutler and Henry C. Cutler his only heirs; and ordered that the residue of the personal estate be assigned to the widow and the heirs, one-third part to each, and that the real estate be assigned to the two sons, to each an undivided one-half, subject, however, to the assigned dower rights of Gertrude Cutler. After the assignment of dower had been made to the widow, the remaining land was divided between the two sons by agreement, and each took possession of his share, the widow taking possession of the land assigned to her as dower. Each of the sons paid the balance remaining

due to the state of Nebraska upon the respective tracts occupied by them, and Gertrude Cutler kept up the interest payments and finally made final payment to the state of Nebraska upon the 200 acres of land occupied by her. A deed was issued to her in her own name, as grantee, by the state of Nebraska for said lands, dated on the 25th day of October, 1897. Gertrude Cutler afterwards died, leaving a last will and testament by which the 200 acres of land were devised to the defendants. Henry C. Cutler and George H. Cutler brought an action in the district court for Cass county, setting forth the facts substantially as above, and praying that a judgment be entered finding that they are the owners of the 200 acres of land; that Gertrude Cutler, by the conveyance which she received from the state of Nebraska, took the legal title to the land in trust for their use, and asking that title be quieted in them as against her devisees, the defendants. The defendants, claiming under the will of Gertrude Cutler, asserted that, since Martin B. Cutler was 2 years in default at the time of his death, he had forfeited his right to the contract of purchase of the land; that the land was divided and that, by the subsequent payment by Gertrude Cutler of the full amount due upon said land and the conveyance of the same to her by the state of Nebraska, she took and received a perfect title in fee to the premises. They further claim by adverse possession.

The facts in this case are virtually undisputed. At the time of the death of Martin B. Cutler, he was possessed of an equitable interest in the tract of land purchased by him from the state of Nebraska. Under the law in this state, his widow had no right to dower in this equitable estate. *Crawl v. Harrington*, 33 Neb. 107; *Hall v. Crabb*, 56 Neb. 392. He was not seized in fee of the premises, but had merely an equitable estate, subject to be defeated by forfeiture for nonpayment of interest at any time. At the time of the final settlement of Cutler's estate, there was in the hands of the administrators the sum of $4,106.40. There was afterwards paid by the heirs and Gertrude

Cutler, severally, to the state of Nebraska, in full for the balance remaining due upon the whole 520 acres of land, $3,624.14, so that the whole amount necessary to be paid to the state, in order to procure a perfect title in fee simple to the whole tract of land, was in the hands of the administrators before final settlement of the estate, and might have been applied for that purpose. This was not done, but all parties interested in the estate elected to treat the equitable interest in the lands as if the decedent had died seized in fee of the same.

As to the contention of defendants, that the interest of Martin B. Cutler was forfeited at the time of his death, and that the state recognized Mrs. Cutler as the owner of the title, it is clear from the evidence that the state always recognized the title of Martin B. Cutler, and did, in fact, waive the forfeiture. No resale was ever had to Mrs. Cutler, and all the rights that the state recognized or gave her were based upon the contract with her husband. The deed which was issued to her was issued after an abstract of the probate proceedings, whereby the 200 acres were set apart to her had been sent to the land department of the state, and was made in accordance therewith. The receipts given upon the payment of interest show that the land was "sold to M. B. Cutler," and the letters and proceedings of the commissioner of public lands and buildings show that the state authorities executed the deed to her, believing that she had the right to complete the contract of purchase of Martin B. Cutler, and to receive a deed to the premises by reason of the same being awarded to her, as they mistakenly thought, by a decree of court.

Whatever rights, then, Mrs. Cutler had to the land she acquired through her husband's contract, and not adversely to it, and the right of her devisees, must be measured by that standard.

What was the actual and true interest of the heirs and the widow in the real estate at the death of Martin B. Cutler? Was it a mere personal interest that went to the

administrator or did it descend to the heirs? Is it of the nature of real or personal estate? If it descended to the heirs upon the death of Martin B. Cutler, they alone had the right to receive the deed from the state of Nebraska. In an early case in the supreme court of the United States this question was considered and the court say: Where an agreement is made to sell land, upon the execution of notes for the price and the title-bond, the vendor holds the legal title as trustee for the vendee, and the vendee is a trustee for the vendor as to the purchase money. "The seller under such circumstances has a vendor's lien. The equitable estate of the vendee is alienable, descendible and devisable in like manner as real estate held by a legal title. The securities for the purchase money are personalty, and in the event of the death of the vendor, they go to his personal representatives." *Lewis v. Hawkins*, 23 Wall. (U. S.) 119, 126. See also *Boone v. Chiles*, 10 Pet. (U. S.) *177, *225; 2 Story, Equity Jurisprudence (13th ed.), sec. 1212; *Hardin v. Boyd*, 5 Sup. Ct. Rep. 771; *Dorsey v. Hall*, 7 Neb. 460; 1 Dembitz, Land Titles, sec. 28; 2 Jones, Liens (2d ed.), sec. 1108, and cases cited.

This rule is recognized in the statutes of this state. Section 329, chapter 23, Compiled Statutes (Annotated Statutes, 5178), provides that, where any person who is bound by any contract to convey real estate shall die before making the conveyance, the person entitled thereto may bring specific performance to enforce the performance of the contract by the heirs, devisees or personal representatives of the deceased party who made the contract; and section 335, chapter 23, Compiled Statutes (Annotated Statutes, 5184), provides that, if the person to whom the conveyance was to be made should die before the commencement of proceedings or before the conveyance is completed, any person who would have been entitled to the estate under him as heir, devisee or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such deceased person for the benefit of the person who was entitled

to it, may commence such proceedings or may prosecute the same if already commenced, and the conveyance shall thereupon be so made as to vest the estate in the same person who would have been so entitled to it or in the executor or administrator for his benefit.

Also sections 94 to 98 inclusive of chapter 23, Compiled Statutes (Annotated Statutes, 4968-4972), provide that, if a deceased person at the time of his death was possessed of a contract for the purchase of land, his interest in such land and under such contract may be sold on the application of his executor or administrator in the same manner as if he had died seized of such land, and provide for proceedings by the administrator or executor whereby such sale may be made.

In *Hovorka v. Havlik*, 68 Neb. 14, it was contended by the plaintiff in error that a contract for the purchase of school lands from the state is personal property, the title to which passes to the administrator, and that he has the right to sell it the same as other personal property of the deceased. But this court say, after citing the statutory provisions:

"This statute, as we understand, was borrowed from the state of Michigan, and had as early as 1863 received a construction by the supreme court of that state by which it was held that '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 license.' *Baxter v. Robinson*, 11 Mich 519. But even in the absence of this statute and of its construction by the supreme court of Michigan, we can not believe that it was the intention of the legislature that valuable landed estates, held by the decedent under a contract of purchase, should pass to the administrator, to be disposed of by him in the same manner as the goods and chattels coming to his possession. There are numerous cases where valuable farms and other property are held under contract of purchase. The decedent and his family may have lived upon the property for years; the

purchase price may have been mostly paid; and it would be so unusual and unjust to allow the administrator to claim title to this property, and a right to dispose of it as personalty coming to his hands, without a showing that it was necessary in the settlement of the estate, that a statute authorizing such a procedure should be the only authority of this court to declare it to be the law."

"An equitable right to have a conveyance of land in fee, an equity of redemption, goes to the heir as land held in fee, though the statute of descents may only speak of land of which the decedent died seized." 1 Dembitz, Land Titles, sec. 28.

The heirs of a vendee in possession under a contract of sale of real estate are not possessed of "an estate of inheritance" at common law, hence, as we have seen, the widow of the deceased is not legally entitled to be endowed thereof. The right of their ancestor is merely in equity and though liable to be defeated by nonperformance of the contract on his part and consequent forfeiture, if the terms of the contract so provide, still it is in equity considered as real estate and, on his death, descends to his heirs.

In what position then do the defendants stand? Upon the death of Martin B. Cutler, the equitable interest in the lands of which he was possessed under the contract of purchase descended to his sons.

Gertrude Cutler, by the assent of the heirs, procured the 200 acres of land in controversy to be set apart to her as her dower, all parties treating the equitable estate as a legal one of which Cutler died seized. She entered into possession and paid out upon the contract, under the rights given thereby to Martin B. Cutler. While she took the title to the land in her own name, she could not assert it as against the true owners, it inured to their benefit and, though nominally the holder in fee, in equity, she held the legal title only as a trustee for them, and they were entitled to have their title quieted as against her devisees.

The judgment of the district court quieting the title in the heirs is correct and should be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

GEORGE E. BARKER ET AL V. BERT G. WHEELER.

FILED APRIL 21, 1904. No. 13,538.

1. **Official Bond:** SURETIES: ACTION. Under the provisions of sections 29 and 643 of the code, when an officer in this state by misconduct or neglect of duties renders his sureties liable on his official bond, any person who is by law entitled to the benefit of the security may sue upon the bond in his own name.
2. **Statutes:** CONSTRUCTION. The sections of statutes which require the giving of official bonds, which prescribe the form of the same as to being joint or several, which state the conditions thereof and designate the persons for whose use they are given, and statutes which provide the manner of procedure in actions upon such bonds, and in whose names such actions are to be brought, are in *pari materia* and must be construed together.
3. **Official Bonds:** JOINT AND SEVERAL: ACTION. Since the form of an official bond must be joint and several, a person injured by the misconduct of a public officer may bring a several action upon the officer's bond to recover his damages.

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

E. J. Cornish, for plaintiffs in error.

Isaac Adams and *J. P. Breen, contra.*

LETTON, C.

This case has already been before this court three times. See *Wheeler v. Barker*, 51 Neb. 846; *Barker v. Wheeler*, 60 Neb. 470, and *Barker v. Wheeler*, 62 Neb. 150. After it was remanded to the district court for the third time,

a fifth amended petition was filed by the plaintiff, and the defendants moved to strike this petition from the files, for the reason that the allegations of the same constitute a different cause of action from those contained in the original petition; that James W. Eller, the principal upon the bond, was made a party to the action in the original petition, whereas, the said Eller is not named as a party in this petition; and that in the original petition it was alleged that the money in controversy came into the hands of Eller as county judge, by virtue of his office, whereas in this petition it is alleged that the money was received by color of his office. This motion was overruled, whereupon the defendants filed a demurrer, for the reason that there is a defect of parties defendant, in this, that it appears that this is an action upon the official bond of one Eller, county judge, the liability of these defendants being simply as sureties thereon. That, at the beginning of the action, Eller was made a party herein, pleading was filed by him, and trial had in part, and that Eller is a necessary party defendant. Defendants further demur on the ground that the facts stated are not sufficient to constitute a cause of action. This demurrer was overruled by the court; defendants elected to stand thereon, and judgment was thereupon rendered in favor of the plaintiff upon the pleadings. This is an error proceeding brought to review the action of the district court. After this action was dismissed as against Eller, a separate suit was brought against him to recover upon the same cause of action, and a judgment rendered therein. This judgment is pleaded in the fifth amended petition.

The main question is, can a party injured by the misconduct of a public officer bring a several action against the sureties on the official bond of such officer? The argument of the plaintiffs in error is substantially as follows: That at common law an action upon a bond could only be brought by the obligee therein. That the right to bring an action by a private person in his own name upon a bond, the obligee of which is the state or county, is granted

solely by the provisions of section 643 of the code. That this section provides solely for a joint action against the principal and sureties; that the action must be prosecuted against all of the obligors, and that, since Eller the principal is not made a party in the petition under consideration, there is a defect of parties defendant which may be taken advantage of by demurrer. This contention of the plaintiffs in error is to some extent supported by the decision in the case of *Aucker v. Adams & Ford*, 23 Ohio St. 543, which holds that section 566 of the code of Ohio, of which section 643 of our code is a copy, prescribes the only manner in which persons injured by the official neglect or misconduct of a justice of the peace can have redress by action in their own names on the official bond of the justice. That the only form of action authorized by said section is a joint suit against all the obligors in the bond, and that, where a joint suit is the only remedy, it is error under the provisions of section 371 of the Ohio code, which is the same as section 429 of the Nebraska code, for the court to render a several judgment against one or more of the defendants, leaving the action to proceed against the others. He also cites *Albertson v. State*, 9 Neb. 429, and *Ryan v. State Bank*, 10 Neb. 524. *Albertson v. State* was an action brought against the county treasurer upon his official bond by the state of Nebraska, to recover a balance due the state upon taxes. The court held that the provisions of sections 29, 32 and 643 of the code cover two classes of cases, the one where the security is taken to protect the right of the public, and the other where it is taken to protect the rights of individuals—section 643 applying to private persons and section 32 to actions by the public. In *Ryan v. State Bank*, the Ohio case is cited, and it is said: "On the trial of a joint action against the principal and sureties on an official bond, the judgment may be against any number of the defendants, as the testimony warrants. But several actions on such bond can not be maintained." The case of *Auker v. Adams & Ford*, *supra*, was decided by the supreme court of Ohio

in 1873; *Albertson v. State* was decided in 1879, and *Ryan v. State Bank* was decided in 1880.

At the time these actions were brought, the statute of this state required joint bonds to be executed by public officers, and joint action brought upon the bonds could, therefore, alone be maintained. In 1881, however, the legislature of this state enacted an entirely new act with reference to the subject of official bonds, section 3, chapter 10 of which is as follows:

"All official bonds of county * * * officers must be in form, joint and several, and made payable to the county in which the officer giving the same shall be elected or appointed, in such penalty and with such conditions as required by this act, or the law creating or regulating the duties of the office."

The plaintiff in error contends that, since this act did not expressly repeal or amend section 643 of the code, the provisions of that section are still in effect, and that, while the form of the bond is required to be joint and several, yet, since no additional rights have been given to private persons to sue upon an official bond in their own name than those prescribed by section 643, no action can be maintained other than a joint action against all the obligors to the bond.

The sections of the code cited by the plaintiff in error are substantially the same as those contained in the first Ohio code adopted in 1853. Before the enactment of this code, an action upon a bond under the common law could only be brought by the obligee. The object of these provisions was in accord with the general line and purpose of the reformed procedure, which was to simplify and modify the technicalities of the common law procedure and furnish a more simple and speedy remedy to litigants. The provisions, that all actions should be brought by the real party in interest and that any person injured by neglect of duty of an officer might bring an action in his own name upon the bond, were intended to supersede the necessity of suing upon the bond in the name of the

obligee. As is held in *Aucker v. Adams & Ford, supra,* these provisions, while allowing a suit to be brought by a private person in his own name upon an official bond, did not change the character of the contract entered into by the sureties from a joint contract to a several contract, and, consequently, a joint action had to be brought upon the joint bond.

Are the provisions of section 643 exclusive? Mr. Kinkead in his work on Code Pleading (vol. 1, sec. 346), speaking of the Ohio code, says, "The correct construction to be placed upon section 4,993 of the code is believed to be that, in all cases where an individual has suffered an injury by the failure of an official to perform official duty, he may maintain an action upon the bond of such official." Section 4,993 of the Ohio code contains the provision that actions must be prosecuted in the name of the real parties in interest. And in 1 Bates, Pleadings, Parties and Forms Under the Code, p. 7, it is stated, that the Ohio reports are full of cases brought by individuals upon official bonds of public officers. This court has also held that one not a party to a bond may maintain an action thereon, when such bond was executed for his benefit. *Pickle Marble & Granite Co. v. McClay,* 54 Neb. 661; *Sample & Son v. Hale,* 34 Neb. 220; *Lyman v. City of Lincoln,* 38 Neb. 794; *Kaufmann v. Cooper,* 46 Neb. 644; *Doll v. Crume,* 41 Neb. 655; *Hickman v. Layne,* 47 Neb. 177; *Fitzgerald v. McClay,* 47 Neb. 816; *Rohman v. Gaiser,* 53 Neb. 474. In 17 Am. & Eng. Ency. Law (1st ed.), 527, note 2, it is said: "Under the general code provisions, the obligee in a bond can sue for all liabilities thereunder, while each person to be secured thereby may sue in his own name as the real party in interest for any liability to himself." Citing cases from Kansas, Kentucky, Louisiana and New York. See also Pomeroy, Code Remedies (4th ed.), secs. 77, 79, 104. It would seem that a liberal construction of the broad terms of section 29 of the code, providing that all actions shall be brought in the name of the real party in interest, with a few exceptions, would hold that these provisions are not

limited and confined by the provisions of section 643, and that, independent of the provisions of said section, a person belonging to the class for whose benefit an official bond is given, and who has been injured by the negligence or misconduct of the principal upon the bond, has a right to sue upon the same in his own name as being the real party in interest.

Aside from these considerations, however, under the principle of statutory construction, that statutes in *pari materia* are to be construed together, all acts of the legislature upon the same general subject matter must be construed as part of a single plan, and later statutes are to be considered as supplementary or complementary to the earlier enactments. In the passage of each act, the legislature must be supposed to have had in mind the existing legislation on the same subject and to have shaped its new enactment with reference thereto. Black, Interpretation of Laws, sec. 86. The sections of statutes which require the giving of official bonds, which prescribe the form of the same as to being joint or several, which state the conditions thereof and designate the persons for whose use they are given, and statutes which provide the manner of procedure in actions upon such bonds and in whose names such actions are to be brought are in *pari materia* and must be construed together. This being the case, a reasonable construction of the code provisions, including section 643, together with the provisions of the statute of 1881, would require that the provision requiring the form of the bond to be joint and several in the latter statute modifies the provision of section 643, so that the law in regard to the right of an individual to bring this action in his own name, while not expressly amended or repealed, is still left in force, and the action may be brought against the officer and his sureties, jointly or severally. To give the law the effect contended for by the plaintiffs in error would, in effect, undo all the legislature did when it provided that official bonds should be joint and several in form, since, if every action brought upon such a bond by

an individual must be a joint action, the object of the law would be rendered nugatory, and it might as well never have been enacted. With this interpretation of the statutes we can not agree.

As ground for the demurrer that the petition does not state facts sufficient to constitute a cause of action, and for the error assigned in overruling the motion to strike the fifth amended petition, the plaintiffs in error claim that the last petition alleges facts which show that the county judge received the money by color of his office and not by virtue of his office. In both petitions it is charged that, upon the final examination of the accounts of the administrator of the estate of B. G. Wheeler, deceased, it was ordered that said administrator pay into the county court on account of said estate the sum of $3,934.94, for distribution to the heirs of said estate, and that said sum was paid into said court for that purpose. The first petition alleges that the sum of $484.42 was paid by Eller, as county judge, to the plaintiff's guardian, and that Eller has neglected and failed to pay the remainder of the amount due her to her guardian, although requested so to do, while the fifth amended petition recites the same facts with reference to the payment of $484.42 to the guardian, and charges that said Eller by virtue and color of his said office, after having obtained possession of said money, as aforesaid, wrongfully, fraudulently and corruptly, and in gross violation of his duties as such county judge, converted said sum to his own use, and embezzled the same, and has retained all of said sum, notwithstanding payment thereof has been frequently demanded from him by plaintiff and plaintiff's guardian. While the allegations of the last petition are broader, fuller and more extended than those of the first, we can not see that there is a variance between them, or that the allegations of one recite acts done *virtute officii* and the other acts done *colore officii*.

As to the error assigned, that the amount of recovery is excessive, the demurrer admits the allegations of the pe-

tition that Eller, on the 29th day of March, 1902, obtained possession of the money, that he converted the same to his own use, and that, ever since the date of its payment, he has retained the same, notwithstanding payment has been frequently demanded from him by the plaintiff and the plaintiff's guardian. Under these admissions it would seem that interest was properly computed.

We recommend that the judgment of the district court be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

JOHN J. BOTHWELL V. STATE OF NEBRASKA.

FILED MAY 5, 1904. No. 12,656.

1. **Rape:** RESPONSIBILITY FOR CRIME. The generally accepted test of responsibility for crime, is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act. *Schwartz v. State*, 65 Neb. 196.
2. **Defense of Moral Insanity.** Moral insanity as a criminal defense is not recognized in this state. One who knows abstractly what is right and what is wrong must, at his peril, choose the right and shun the wrong. He can not yield to a vicious impulse, and allege mere weakness of will as an excuse. *Schwartz v. State*, 65 Neb. 196.
3. ———: INSTRUCTION. An instruction on the question of insanity, in principle substantially the same as one given in *Burgo v. State*, 26 Neb. 639, and approved, *held* not erroneous.
4. **Reasonable Doubt:** INSTRUCTION. Instruction concerning what is a reasonable doubt, *held* not prejudicially erroneous, following *Leisenberg v. State*, 60 Neb. 628.
5. **Nonexpert Witnesses.** Nonexpert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based. *Lamb v. Lynch*, 56 Neb. 135.

ERROR to the district court from Cherry county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

E. D. Clark and *Hamer & Hamer,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

HOLCOMB, C. J.

An information was filed in the trial court, charging the accused with the crime of rape upon his daughter. A plea of not guilty was interposed. Upon this plea, at the trial, it developed that the defense of insanity was relied on by the defendant to escape legal responsibility for the act charged. Upon a trial to the court and a jury of the issue raised by the plea of not guilty, a verdict was returned finding the defendant guilty as charged and, after the overruling of a motion for a new trial, sentence of imprisonment in the penitentiary during the natural life of the defendant was pronounced by the court. The defendant prosecutes error. To establish his defense, testimony as to the defendant's mental condition was introduced, both of an expert and nonexpert character. It is alleged in the petition in error that the verdict is not sustained by the evidence, the contention being that the evidence indisputably establishes the defense of insanity. It is conceded, however, by counsel for defendant that, in order for the court to reach this conclusion, it must establish a new rule as to the test of legal responsibility when insanity is interposed as a defense for an act otherwise criminal. The substance of the contention of counsel is that the defendant's mind was not at the time of the act charged perfectly sound and normal; that he was physically impaired by disease, and that his mental condition was the result of such physical impairment; that he was both a mental and physical wreck, and unable to control his action, and therefore not legally responsible for the act of which he was charged. Counsel say: "We desire

to have this court formulate a rule that shall secure the punishment of those who are strong enough to determine that which is right and that which is wrong, and who are able to choose between the two, but that no one should be punished who is so far mentally impaired as to be unable to choose between right and wrong." It is argued that the evidence discloses that the defendant was born with a taint of insanity within his veins, and that he was insane by heredity; that he was subject to severe attacks of headache and was nearly always melancholy; that he gave way to the most violent fits of anger without provocation, was brutal to his mother and his children, and unnaturally cruel; that he had tremors and hallucinations, and would give way to paroxysms of grief over the violences and viciousness which he could not help. A specialist on brain disease, one of the superintendents of an insane asylum of the state, who testified in the case, denominated the defendant a "degenerate." Says the witness, by the use of that term is meant that the defendant is not up to the standard of normal mankind, referring especially to his intellectual, moral and physical forces; that such an individual would be subject to, and the victim of, a violent temper, uncontrollable appetites and impulses which his will power could not control, and that the absence of such ability to control his impulses and desires, owing to the fact that they were stronger than his will, though his reason and his judgment might not be at fault, would constitute technical insanity. It is further said that such a person would not have a normal conception of what constituted right and wrong as to himself, nor to his family, nor to society. Testimony of other physicians of a similar character was also introduced in evidence, as was also the testimony of nonexpert witnesses who, after detailing the actions and conduct of the defendant, expressed it as their opinion that he was insane. To meet evidence of this character, the state introduced several witnesses who, after showing some familiarity with the defendant, were permitted to testify that, in their judgment, he was sane.

After the introduction of the evidence, the defendant's counsel requested the following instruction as embodying a correct principle of law, which was refused: "If the defendant acted under an irresistible impulse which his will was powerless to resist, and which overcame his will, and which impulse was the outgrowth or result of physical infirmity or disease, you will acquit." From what has been said, it is obvious that, in respect of the nature of the defense, this case is in all its essential bearings analogous to, and controlled by, the principles announced in the case of *Schwartz v. State*, 65 Neb. 196. It is there said:

"Capacity to comprehend the nature and moral quality of an act determines criminal responsibility. There is no other safe or practical test. It is entirely certain that the defendant in this case did not have a well balanced mind. He had an inherited tendency to insanity, and had in past years received treatment in a hospital for the insane. It seems, too, that he had at times illusions and delusions, but these were not in any way connected with the crime in question. He had groundless fears, and heard voices in the air, but it was not in consequence of these things that he debauched his daughter. It may be conceded that his mental powers were impaired, and his conscience blunted by disease, but that does not render him legally irresponsible. If he understood what he was doing, and knew it was wrong and deserved punishment, the obligation to control his conduct and keep within the law was absolute. Having this degree of mental capacity, he can not allege the sway of a turbulent passion as an excuse for his crime. The doctrine of moral insanity or uncontrollable impulse, upon which counsel seem mainly to rely, is not recognized in the jurisprudence of this state." We are not disposed to depart from the rule as to the test of legal responsibility thus announced, which has the support of an unbroken line of decisions in this state, beginning with the case of *Wright v. People*, 4 Neb. 407. While the brief of counsel for the defendant is interesting in its discussion of the

varied forms, manifestations and stages of mental diseases, and pleads for an idealistic state in the treatment of those who may not be possessed of the strong, healthy and vigorous minds possessed by the average of humanity, nevertheless, in this practical age and as society is at present constituted, we are of the opinion greater evils will flow from a departure, than in continuing to travel along the well-beaten paths which guide and determine legal responsibility for violations of the law. The objection that the verdict is not sustained by sufficient evidence is not well taken.

It is contended the court erred in giving an instruction on the question of insanity, but as this instruction is substantially the same and, in principle, identical with one given in *Burgo v. State,* 26 Neb. 639, and approved by this court, we are constrained, on the authority of that case, to hold that the exception in the present instance is not well taken.

An instruction concerning what is a reasonable doubt, such as would call for an acquittal, is strenuously excepted to, and much of the brief is devoted to an analysis of, and animadversions upon, the same. This instruction, as is expressed in *Leisenberg v. State,* 60 Neb. 628, although frequently used, has never received judicial condemnation and we do not now feel that we are justified in condemning it, and therefore must overrule the exception to the giving of the same.

A more serious objection arises regarding the admission of certain evidence offered by the state, in rebuttal, to overcome the evidence of the defense on the question of insanity. Several nonexpert witnesses were permitted to testify that, in their opinion, the defendant was sane at the time of the commission of the act charged. No physicians were called by the state to give testimony concerning the defendant's mental condition. The nonexpert witnesses were permitted to testify as to their opinion of the mental condition of the defendant, without first testifying to the appearance, conduct and actions of the accused, and

other facts upon which their opinions were based. These several witnesses were shown to have a more or less intimate acquaintance with the defendant, such as would probably qualify them to testify to reputation, but the jury were denied the benefit of any testimony as to his speech, actions or conduct, from which the inference of sanity was drawn, and were given only the naked opinions of the witnesses concerning the question. The rule in this jurisdiction is that, while one who is not an expert may give his opinion on the question of sanity, yet, it must be in connection with and after detailing the facts upon which he bases such opinion, so that the jury may have, not only the benefit of the opinion of the nonexpert, but also the facts upon which such inference is predicated. In *Lamb v. Lynch,* 56 Neb. 135, it is held:

"Nonexpert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based."

This rule is adverted to and the reasons for its existence discussed in *Hay v. Miller,* 48 Neb. 156, and *Hoover v. State,* 48 Neb. 184. Touching this subject, it is said by the supreme court of the United States: "The jury, being informed as to the witness' opportunities to know all the circumstances, and of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity, are able to test the accuracy or soundness of the opinion expressed, and thus, by using the ordinary means for the ascertainment of truth, reach the ends of substantial justice." *Connecticut Mutual Life Ins. Co. v. Lathrop,* 111 U. S. 612, 621. To the same effect are *Schlencker v. State,* 9 Neb. 241; *Polin v. State,* 14 Neb. 540; *Shults v. State,* 37 Neb. 481; *Pflueger v. State,* 46 Neb. 493; *Snider v. State,* 56 Neb. 309; *Clarke v. Irwin,* 63 Neb. 539. See also McKelvey, Evidence, p. 197, notes 51 and 52; *Armstrong v. State,* 30 Fla. 170, 17 L. R. A. 484; *Ryder v. State,* 100 Ga. 528, 38 L. R. A. 721, and notes; *Burt v.*

State, 38 Tex. Cr. App. 397, 39 L. R. A. 305; *In re Christiansen,* 17 Utah, 412, 41 L. R. A. 504. As to the admissibility of the evidence of the character referred to, it is said by the state that, if it be held the prosecution failed sufficiently to qualify the witnesses, the reception of their testimony was without prejudice because the defendant had wholly failed to introduce any evidence to sustain the plea of insanity. The defense, it is said, has shown an abnormal mind and moral degeneracy, but not insanity. We find ourselves unable to adopt the suggestion. There was some competent evidence both of expert and nonexpert witnesses tending to prove the defense of insanity. The question was one of fact peculiarly within the province of the jury to determine. If was for them, upon the whole of the evidence properly admissible, to say, whether the defendant was guilty or not guilty. It was his constitutional right to have this question determined by the jury upon competent evidence. Whether the evidence in support of the plea of insanity introduced by the defendant, when standing alone, was sufficient to create in their minds a reasonable doubt of the defendant's guilt, was for the jury and not the court to determine. We are not prepared to say that no competent evidence tending to prove insanity was introduced, nor that guilt was indubitably established. Whatever might be our own views, with some competent evidence before the jury in support of the plea of insanity, we are constrained to say that it is for them to say whether guilt in a legal sense is shown by the evidence. When the state undertook to overcome the proof offered to sustain the defense of insanity by other evidence, inadmissible in the form in which it was presented and which was received over objections, this constitutes prejudicial error for which the judgment must be reversed and the cause remanded for further proceedings. Reversed and remanded accordingly.

REVERSED.

ROBERT S. TRUMBULL V. SCOTT FREY.

FILED MAY 5, 1904. No. 13,267.

Verdict: EVIDENCE. Evidence examined, and found sufficient to sustain the verdict of the jury.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

Lewis C. Paulson, for plaintiff in error.

J. L. McPheeley, contra.

HOLCOMB, C. J.

The defendant in error had been in the employment of the plaintiff in error as a farm hand and, upon his discharge from such employment, brought an action and recovered judgment on the ground that his contract of employment had been violated, in that he had been discharged before the expiration of the term for which employed and without any just cause therefor. Counsel for plaintiff in error says that the contract of hire is based on a written contract, and that the defendant was, under the evidence, justified in discharging the plaintiff when he did because there had been a failure of crops which, under the contract, was a ground for its termination; that the contract of employment was for an indefinite period, and also the discharge was justified because the plaintiff was not a competent farm hand. "We think," says counsel for plaintiff in error, "the only proposition involved in this case is whether or not the circumstances and the evidence in the case justified the discharge of the defendant in error." The controversy thus resolves itself into a question of whether the evidence is sufficient to sustain the verdict. The contract of employment is evidenced by a written correspondence between the parties. The plaintiff was at the time living in Illinois. He was a man of a family and was induced, by reason of the contract, to move to Kearney

county, on a farm belonging to the defendant, to do the ordinary work of a farm hand. In the first letter of the defendant to the plaintiff, of date November 17, 1900, after stating the details regarding the proposed employment, and that work was to commence April the first next, it is said: "If you think you want to try it one year, I will give you first chance, as I have no one hired yet." In a second letter of later date, in answer to one from the plaintiff, defendant says: "I will pay a good man $25 per month and, unless there is a failure of crops, I will want him steady all the time." While not altogether clear, we think a fair construction of the letters referred to, in view of the situation of the parties, means that the employment was to continue for one year, and the plaintiff's services would be wanted steadily for a longer time, unless there was a failure of crops. But, if it be held that the true interpretation is that the condition applied to the first year of the employment, it can hardly be said that the evidence is so overpowering on the point of the failure of crops in that year as to allow the defendant, at his pleasure, to terminate the contract. The evidence does not disclose a total but only a partial failure of crops. The trial court took the view, and so instructed the jury, that it was for them to determine, as a question of fact, whether there was, under the evidence, such a failure of crops as was within the contemplation of the parties to the contract.

There is yet another consideration which we think must dispose of the defendant's contention in this regard. The answer does not plead the happening of the condition relative to crop failure, whatever view may be taken as to the proper construction of the contract in this respect. All that is alleged is: "Defendant met to a great extent with failure of crops during said year." This does not amount to an allegation that there was such a failure as gave him a right to terminate the contract, nor does he allege that it was terminated on that account. On the contrary, it appears that the employment of the plaintiff was continued till after all of the fall work on the farm was done,

and long after the crop production became known, when he was then discharged for other alleged reasons. On the question of his incompetency and failure to do satisfactory farm work, the evidence is conflicting, and we are satisfied it is sufficient to support the finding of the jury on that issue. Upon a consideration of the whole record, we are constrained to say that the evidence supports the verdict, and that the judgment rendered does substantial justice between the parties and should be affirmed, which is accordingly done.

AFFIRMED.

JOHN EMANUEL V. EDWIN H. BARNARD ET AL.

FILED MAY 5, 1904. No. 12,757.

1. **Insolvent Corporation**: ATTACHMENTS: LIABILITY OF DIRECTORS. Where, by an attachment proceedings, without any fraud or irregularity, certain *bona fide* creditors of an insolvent corporation secure the application of all of the corporate assets to the payment of their claims, the fact that the directors of the corporation who had guaranteed the payment of such claims requested, and thus induced, the creditors to institute the attachment suits, without giving the said creditors any advantage or rights, other than those which as a matter of law they already possessed, does not make such directors liable in an action at law to the other creditors of the corporation.
2. **Action in Tort.** One is not liable in tort for procuring or inducing others to pursue a clear legal right, although such action may result to his advantage.
3. **Action at Law**: PETITION: PRAYER. In an action at law, a prayer for equitable relief is of no avail, unless the petition states facts which will authorize the court to grant such relief.
4. ———: CREDITORS' BILL. A single creditor can not maintain an action at law against a part of the stockholders of an insolvent corporation for a violation of the provisions of section 136, chapter 16 of the Compiled Statutes. Such action should be brought in equity, by the receiver if there be one, or by a creditor on his own behalf, and for all the other creditors similarly situated, against all of the stockholders of the corporation.
5. **Judgment**: REVERSAL. A plaintiff in error is not entitled to have a judgment of the district court reversed because the rights of a

part of the defendants are not adjudicated, when no right of recovery exists in his favor against any of them.

6. **Misjoinder:** REVIEW. In such a case, the question as to whether there was a misjoinder of causes of action, or of parties, does not affect the plaintiff, when he is the only party complaining.

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

George L. Loomis, for plaintiff in error.

Courtright & Sidner, E. F. Gray and *Stinson & Martin, contra.*

BARNES, J.

This was an action at law brought by the plaintiff, an individual creditor of an insolvent corporation, in the district court for Dodge county, against the defendants who were respectively the president, secretary and general manager, as well as directors and a part of the stockholders of the corporation. The plaintiff was the owner of two judgments against the association, upon which executions had been issued and returned unsatisfied, and these judgments are the basis of the action which was brought against the defendants jointly. After the issues were joined and the cause had been pending for some considerable time, a stipulation was entered into by the parties, on which, together with the pleadings, the cause was submitted to the court. Thereupon the defendants, Barnard and Hinman, moved for a judgment in their favor on the pleadings and stipulation. The attorney for defendant Huette refused to join or participate in the motion. After the argument and submission of the case, the defendant Hinman was granted leave to, and did, withdraw the motion on his part. The court thereupon sustained the motion of defendant Barnard, and rendered a judgment in his favor dismissing the plaintiff's cause of action. A motion for a new trial was filed and overruled, and thereupon the plaintiff prosecuted error.

Two distinct theories are advanced in support of the plaintiff's right to recover. The first one is based on the following facts: It appears that, on the 28th day of July, 1896, the corporation was justly indebted to two creditors, Hall and Chase, on certain promissory notes, then past due, which it was unable to pay by reason of its insolvency. The defendants Barnard and Hinman had guaranteed the payment of these notes, and it is alleged that the defendant Huette had agreed to share their responsibility. It is alleged in the petition:

"The defendants fraudulently and wrongfully procured the said Hall and the said Chase to commence suits on said notes, so made to and held by them, in the district court for Dodge county, Nebraska, and to attach, in said suits, all the property and assets of every kind belonging to said corporation, and to have all of said property and assets sold under said attachment, and the proceeds thereof entirely applied toward the payment of said three several notes, themselves agreeing to and paying all the costs and expenses of said proceedings; and all of the property and assets of the said corporation were sold by the sheriff of said county, upon orders of sale issued in said attachment suits, on the first day of February, 1897, and on the 16th day of February, 1897, for the sum total of $6,259.50, and the proceeds of said sales were applied to the payment of said notes for $3,000 and $2,000 to said Hall, and the part payment of said note for $5,000 to said Chase."

It was admitted by the defendants that the debts due the attaching creditors existed and were guaranteed; that the attachment proceedings were had, the property sold and the proceeds applied as stated; but the allegation that the defendants procured the attachment proceedings to be commenced was denied; and the defendant Huette denied any liability for the debts. The contention of the plaintiff is that, because the defendants were officers of the corporation and were liable for the debts which were the foundation of the attachment proceedings, and because the entire property of the corporation was, by

sale under such proceedings, applied to the debts for which the defendants were so liable, by procuring the attachments to be sued out, they misappropriated the property of the corporation and rendered themselves liable to him in an action at law for the entire amount of his claim.

This action can not be maintained as one for the misappropriation of the funds of the corporation, because every dollar of such funds went to pay its just debts, and no stockholder or party directly interested in the corporation has cause to complain. The defendants did not convert any of the corporate property to their own use; there is no pretense that the attachments were not regularly issued, or that the debts upon which the property was applied were not genuine; nor is it contended that the attaching creditors were wrongdoers in any sense, or that they did anything they had not a legal right to do. It is true that they exercised their unquestioned legal right in a manner that relieved the defendants of a portion of their liability for the debts of the corporation; but the mere fact that the defendants requested, and thus induced, the creditors to take this course does not render them liable to the plaintiff, even in a suit in equity. There is no property or assets of the corporation in their hands which the plaintiff can reach, and they have received no payment upon any debts owed to them, as the result of their action as officers of the corporation. If the plaintiff has any cause of action against the defendants, it is an action at law sounding in tort. The facts alleged are not sufficient to give the plaintiff the right to maintain such an action, the petition does not charge the defendants with conspiracy with the attaching creditors; and such creditors are not parties to this suit. It has been well said that there can be no conspiracy to do that which is lawful, in a lawful manner. *Porter v. Mack & Boren,* 50 W. Va. 581, 40 S. E. 549. It is lawful for a diligent creditor to secure the payment of his debt from an insolvent corporation, and there is no pretense in this case

that such act was done in an unlawful way. Unless an act is wrongful in the sense of being unlawful, it will not sustain an action for damages. In the case at bar, the action of the defendants conferred no new right on the attaching creditors, and gave them no advantage over the other creditors which they did not already possess. No liability is created against one for procuring a third person to do an act which may lawfully be done. In 1 Cooley, Torts (3d ed.), sec. 93, it is said: "That which is right and lawful for one man to do can not furnish the foundation for an action in favor of another." We are of the opinion that one is not liable in an action for damages because he procures another to do that which is neither legally nor morally wrong. That the defendants paid the costs of the attachment proceedings is no cause for complaint on the part of the plaintiff. If it is true that they were guarantors of the debts due the creditors, which were the basis of the attachment proceedings, they were liable for the costs made in collecting these debts. Their guaranty upon the notes in question was an express agreement to pay all costs and expenses paid or incurred in collecting the same. None of the cases relied on by the plaintiff sustain his contention. A careful examination discloses that, in a part of them, the officers themselves had taken the assets to pay debts due them from the corporation, thus giving themselves a preference over the other creditors; and that, in the others, they had, by some action of their own, turned over the assets of the corporation for the payment of debts on which they themselves were liable. As before stated, the defendants in this case had taken no action by which any property of the insolvent corporation was misapplied. We fail to find a single case supporting the plaintiff's first theory; and we hold that the judgment of the district court was correct on this point.

The plaintiff's second contention is that the defendants were liable as stockholders for the failure of the corporation to give the notice required by section 136, chapter

16 of the Compiled Statutes (Annotated Statutes, 4128). The pleadings and stipulated facts show that the notice was published, but was insufficient in this, that it was not signed by a majority of the board of directors. And it is contended that the plaintiff can maintain this action for his sole benefit, and in this form against the defendants, without joining all of the stockholders of the insolvent corporation. On the other hand, the defendants contend that plaintiff must bring his suit in equity, for himself and all other creditors similarly situated, against all of the stockholders; and, having failed to do so, the district court was right in dismissing the action. It must be conceded that we are firmly committed to the doctrine that the double liability of stockholders in banking corporations, and other corporate bodies, and the liability of the stockholders in such corporations for unpaid subscriptions can only be enforced after the assets of the corporation are wholly exhausted, and, then, at the suit of a receiver for all of the creditors, or a single creditor, in behalf of himself and all others similarly situated, against all of the stockholders of such corporation. *Van Pelt v. Gardner,* 54 Neb. 701; *Pickering v. Hastings,* 56 Neb. 201; *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353; *State v. German Savings Bank,* 50 Neb. 734; *Hastings v. Barnd,* 55 Neb. 93; *Brown v. Brink,* 57 Neb. 606; *Fremont Package Mfg. Co. v. Storey,* 2 Neb. (Unof.) 325. In the case last above cited it was said:

"Under the rule established in this state, this action must be brought against all the delinquent stock subscribers, and if all are not made parties defendant, a good and sufficient reason should be set forth in the petition for not doing so to warrant a recovery against any. The rule established in this state is supported by strong authority in the decisions of other states; and, commenting upon this rule, the supreme court of Michigan, in *Dunston v. Hoptonic Co.,* 83 Mich. 384, 47 N. W. 322, say: 'This seems to be the rule as established by the great weight of authority, and I think it is the just, reasonable and

equitable one. Any other rule would permit the creditors of the corporation to select one or only a few of the stockholders within the jurisdiction, and compel payment by them of all the debts of the corporation, at least up to the unpaid balance of their subscription, and such subscribing stockholders, in order to compel the others to contribute, would be remitted again to the courts, thus leading to a multiplicity of suits.'" It is contended, however, that there is a distinction between such liability of the stockholders and the one sought to be enforced in this action. It is insisted that the liability here in question is penal in its nature, and therefore the action can be maintained. This contention, pursued to its ultimate conclusion, means that, where there has been a failure to comply with the terms of section 136, by publishing the notice in the exact manner and form as provided therein, any one of the stockholders of the corporation may be sued, and a recovery had for the full amount of the debt due by the corporation to any individual creditor, without regard to the rights of any other creditor, or the liability of any other stockholder. We can not accede to this proposition. The section in question reads as follows:

"Every corporation hereafter created shall give notice annually, in some newspaper printed in the county or counties in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest paper in the state, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and if any corporation shall fail to do so, after the assets of the corporation are first exhausted, then all the stockholders of the corporation shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given, to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto the amount of capital stock owned by such individuals."

It will be observed that, while the liability declared for such default seems to be *quasi* penal in its nature, yet, the amount of recovery depends upon the sum due from the stockholder on his contract as a subscriber to the capital stock of the corporation, with an additional liability, to the amount of the stock held by him. Again, section 139 provides:

"If any corporation fail to comply substantially with the provisions of this subdivision in relation to giving notice, and other requisites of organization, after the assets of the corporation are first exhausted, then the property of any stockholder shall be liable for the corporate debts to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto, the amount of capital stock owned by such individual."

It thus appears that while, in a certain sense, that is to say, to the extent of creating an additional liability, the statute in question is penal (*Kleckner v. Turk*, 45 Neb. 176; *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175), yet, the right to recover anything at all thereunder depends upon the contractual relation of stockholder. Again, it is provided that no liability attaches, at all, under this statute until all of the corporate assets are exhausted, and we are aware of no case in which an action like the one at bar has been maintained. Section 4, article 11*b* of the constitution, provides:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." We have held, in an unbroken line of cases, that notwithstanding this section of the constitution makes each stockholder individually liable to the extent of his unpaid subscription, yet, in order to enforce such liability, the amount of the claims must be first

ascertained by the judgment of a court, and the corporate assets exhausted, by the issuance of an execution upon such judgment and the return of the same unsatisfied. In addition to this we have held that a suit in equity, based on this situation of affairs, must be brought, either by the receiver of the insolvent corporation or by a creditor, for himself and all other creditors similarly situated, against all of the stockholders of the corporation. Section 136, in express terms, provides that the stockholders are not made liable for the debts of the corporation by a failure to publish the required notice, until all of the corporate assets are first exhausted. Again, as before stated, the liability of each individual stockholder depends upon the amount of stock owned by him, and the amount due and unpaid on his contract of stock subscription. It follows that the reasons which impelled us to adopt the rule in the one case are equally potent in the other. If, as is claimed, this is a penal action, then the question of the amount of the defendant's stock subscription, and the amount of the stock owned by him, would cut no figure whatever. Such an action, if purely penal, could be maintained by any individual creditor of the corporation against any individual stockholder, for the full amount of the corporate debt due to him. That such was not the intention of the legislature seems quite clear to us. It is apparent that it was the purpose of that body to simply create an additional fund for the payment of a certain class of creditors, to be reached in the same manner, and by the same procedure, as the amount for which the stockholders were theretofore liable. In order to enforce this liability, it is necessary for the receiver of the insolvent corporation, if there be one, or a creditor, for himself and on behalf of all other creditors similarly situated, to bring an action in equity against all of the stockholders. The decree in such an action should find the amount due each creditor entitled to participate in the fund, together with the amount for which each individual stockholder is liable. Such a decree would be

just and equitable, and would, at once, put an end to all further litigation.

We therefore hold that the plaintiffs' petition, so far as this question is concerned, did not state facts sufficient to constitute a cause of action. It is contended, however, that, while this was an action at law, yet, the petition contained a prayer for general equitable relief, and therefore the court erred in dismissing the action. In answer to this contention, it is sufficient to say that a prayer for equitable relief is of no avail, unless the petition contains an averment of facts upon which such relief may properly be granted.

It is next contended that the case was never submitted for judgment by the defendants Hinman and Huette. We think this question is immaterial. It was submitted for judgment by the defendant Barnard, and the facts which would entitle the plaintiff to recover against Barnard would also entitle him to recover against Hinman and Huette. If, however, as we have held, no recovery could be had against Barnard, then no judgment could be rendered against either of the other defendants.

Lastly, we may say that the question as to whether there was a misjoiner of causes or of parties in this case is of no importance to the plaintiff. He is the only party here complaining, and judgment was properly rendered against him.

For the foregoing reasons the judgment of the district court was right and is therefore

AFFIRMED.

JAMES L. KENNEDY V. STATE OF NEBRASKA.

FILED MAY 5, 1904. No. 13,650.

1. **Evidence.** Evidence examined, and *held* sufficient to sustain the verdict.

2. **Burglary: EVIDENCE.** Where one is arrested for the crime of burglary, evidence of what was found in his room at the time

of his arrest, together with his conduct and statements on that occasion, is proper and competent as tending to show his consciousness of innocence or guilt, as the case may be.

3. **Evidence of Attempts to Escape.** The attempts of the accused to escape, while confined in jail awaiting his trial, may be shown as an inculpatory circumstance properly to be considered by a jury, and to be given such weight as it seems fairly entitled to, with the other evidence introduced at the trial, in determining the question of his guilt or innocence.

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

James B. Kelkenney, W. I. Allen and *E. D. Hodsdon* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

BARNES, J.

In the night season of the 17th day of April, 1903, the store house of Peter Vetter, and bank building of Englebert F. Folda, situated in the village of Rogers in Colfax county, in this state, was broken into; the vault of the bank, in which the safe containing the bank's money was situated, was entered by tunneling a hole through the brick wall thereof; the safe was wrecked by explosives, and there was taken therefrom, and carried away, the sum of $2,200 in lawful money of the United States, the property of the said Folda. On the first day of June, following, James L. Kennedy was arrested, in the city of Omaha, taken to Colfax county, and was there charged with the commission of the crime above described. His trial in the district court for that county resulted in a verdict of guilty, as charged in the information; and he was thereupon sentenced by the court to imprisonment in the state penitentiary for a period of seven years. From that judgment and sentence he prosecuted error to this court, and will hereafter be called the plaintiff.

His first contention is that the evidence is not sufficient

to sustain the verdict. And it is strenuously urged that no facts or circumstances were disclosed that in any manner connected him with the crime charged. After making ample proof of the commission of the crime, the state introduced evidence from which it appeared, beyond a reasonable doubt, that the plaintiff was seen in Rogers on the morning before the robbery occurred, standing in front of the bank and looking into the building from a point where he could see the location of the safe, through the open vault door. He was accompanied by a person described as Frank Sherwood. About six o'clock the next morning, plaintiff and Sherwood were seen by several persons coming into North Bend, a town on the Union Pacific railroad, seven miles east of Rogers. They were traveling on foot, entered the town from the west, went to the depot and boarded the first train which came along. It was also shown that these persons had been frequently seen together in North Bend and Rogers; that they had been hanging around Columbus, Fremont, Grand Island and Aurora for about two months next before the robbery took place; that once, at least, during that time, and just before the crime was committed, plaintiff had visited Omaha for a day or two. It was further shown that these parties were not engaged in any business whatever; that they frequented the saloons in those towns, and spent most of their time in drinking and playing cards; that the plaintiff, for a considerable time, had rented a room at a restaurant in North Bend, called "Maloney's Place." It further appeared that the plaintiff had no money before the robbery occurred, and that immediately thereafter he had plenty of it. It was shown that he had a wife in the city of Omaha with whom he corresponded, and occasionally visited; that they lived in a rented flat on North 16th street; that immediately after the robbery they sold their furniture, which cost them $350, for the small sum of $65, the plaintiff stating, as an excuse therefor, that his wife was ill and he desired to take her to Hot Springs, Arkansas; that, in giving the bill of sale for the furniture to the purchaser,

they signed their names thereto as James Bardsley and Mabel Bardsley; that, accompanied by Frank Sherwood, and one whom he called his wife, they went to Hot Springs, where they all remained until the last of May, when they returned to the city of Omaha. Certain letters were introduced in evidence, written by the plaintiff to his wife while he was in Grand Island and North Bend, which contained statements well calculated to arouse suspicion. For instance, in the letter written from Grand Island, plaintiff said to his wife, "that they had done no business last night, because it snowed." In another letter he stated to her, that he had been out the night before and got "a short bunch of money." It was further shown that, about three days before the robbery occurred, the plaintiff purchased fifty feet of tape fuse, of Waldridge & Clark, dealers in sporting goods, powder, dynamite and ammunition in the city of Omaha, together with some dynamite caps and a quantity of explosive containing seventy-five per cent. of nitroglycerin. There was found in the vault, near the safe, tape fuse, like that purchased by the plaintiff, some caps, a small, hard rubber syringe, some soap, some court plaster, some cotton, and the tools which had been used to tunnel through the wall, and to prepare the safe to receive the explosive. These tools had been stolen from a blacksmith shop near the bank building. It was also shown that the explosive used in wrecking the safe was composed largely of nitroglycerin. When the officers went to the house where the plaintiff and his wife were stopping to make the arrest, they rapped on the door, and thereupon they heard the plaintiff go out of a back window. One of them ran around the house, chased him down one alley and part way up another, finally overtaking him. He appeared to drop something or throw something away, and, upon being questioned, said that his name was Clayton, that he had just come into town on the Missouri Pacific, and that he worked for the government. When they returned to the house he changed his statement, and claimed that his name was Kennedy,

and that he worked for one George Moore. After accused was taken to the station, the officers searched the room occupied by him, and found therein, among other things, a grip sack containing three revolvers; they then went to the place where he was overtaken and found another revolver, which he had either dropped or thrown away when he was arrested. Upon a more careful search in the room there was found, under the sink or washbasin, some tape fuse, like that found near the wrecked safe, some cotton, a hard rubber syringe, and two small bottles of explosive, similar to that used in wrecking the safe in the bank building at Rogers. So that the circumstantial evidence seemed amply sufficient to connect the plaintiff with the commission of the crime. But whatever it lacked, if anything, was supplied by the plaintiff himself upon his cross-examination. After the state had rested, he offered himself as a witness, and attempted to explain away the incriminating circumstances, and it may be said that his explanation was one which certainly did not explain. The story he told of his visits to the different towns near by and surrounding Rogers; the account that he gave of himself and of the man Sherwood, and his unsuccessful attempt to account for the money which he still had in his possession when arrested, and the sums that he had spent in his trip to Hot Springs, together with his statement that he did not know what he meant by the expressions above quoted, which were contained in his letters to his wife, left no doubt, in the minds of the jury, of his guilt. After a careful and searching examination of the record, we are constrained to hold that the evidence was amply sufficient to sustain the verdict, and this assignment of error must fail.

It is next claimed that the court erred in admitting the testimony of the witnesses Ferris and Dempsey, regarding the finding of revolvers in the room occupied by the plaintiff and his wife in the city of Omaha. This evidence was received in connection with the description of what the officers found in his room, at the time of the plaintiff's

arrest; that part of it relating to the revolvers was objected to, but the objection was not kept good, and no motion was ever made to strike it out of the record. All of the testimony relating to what was found in the room, which articles included the revolvers, was afterwards detailed several times, without objection, both upon direct and cross-examination, and the plaintiff attempted to explain his possession of the revolvers, as well as the other things, when he testified in his own behalf. Again, it was proper and competent to show the situation, the surroundings and what was found in the room of the accused when he was arrested. This could not well be done without speaking of the revolvers. Evidence of this kind, where it has a bearing on or a relation to the facts constituting the crime charged, is always admissible, in a case like the one at bar, because it has a bearing on the conduct of the party accused, and, to some extent, may show on his part a consciousness of innocence or of guilt, as the case may be.

Lastly, it is contended that the court erred in admitting the evidence of the witness Van Housen, wherein he detailed the plaintiff's attempts to escape from the jail where he was confined, while awaiting his trial. In *Williams v. State*, 69 Neb. 402, it was held:

"An attempt to escape by one under arrest accused of crime is an inculpatory circumstance properly to be considered by a jury and to be given such weight as it seems fairly entitled to, with the other evidence introduced at the trial, in determining the question of the guilt or innocence of the accused." See also *George v. State*, 61 Neb. 669. *Hittner v. State*, 19 Ind. 48.

It is apparent from an examination of the record that the plaintiff had a fair trial, and, there being no prejudical error shown, it follows that the judgment of the district court should be, and is, hereby

AFFIRMED.

EDWARD HOFRICHTER V. CHARLES ENYEART, ADMINISTRATOR.

FILED MAY 5, 1904. No. 13,344.

Negotiable Paper: PROTEST. Presentment, notice and protest of negotiable paper, in order to be effectual to bind an indorser, must be by one lawfully authorized by the holder to make them.

ERROR to the district court for Butler county: SAMUEL H. SORNBORGER, JUDGE. *Reversed.*

A. M. Post, for plaintiff in error.

A. M. Walling and *Matt Miller, contra.*

AMES, C.

On the 24th day of September, 1901, the Platte Valley State Bank issued, for value, a certificate of deposit for a sum of money payable to the order of the plaintiff in error Hofrichter, six months after date, upon a return of the certificate properly indorsed. Afterwards, and before maturity, the certificate was, for value, delivered to the intestate of the defendant in error, with the following indorsement: "Pay to the order of Jacob Enyeart. Ed Hofrichter." A few days before the instrument became due, Enyeart entrusted it, without further indorsement, to one Seiffe, with instruction to deliver it to one Stowell, a notary public, for collection or for demand, notice and protest. These instructions were wholly disregarded, and the paper never came into the possession of Stowell, but was delivered by Seiffe to a firm of attorneys who were engaged in his own service. Upon becoming acquainted with this fact, Enyeart caused to be transmitted to the firm of attorneys, over his own name, a letter which is lost, but the purport of which, as testified to by one of the recipients, was that the certificate of deposit belonged to the writer, and that he, the latter, "didn't want us to take any steps toward collecting it, or to do anything with

it whatever; that it belonged to him, and that he didn't want us to transact any business for him of any kind or character." It thus appears that the instrument, doubtless, without the knowledge of the attorneys, at the time, came wrongfully into their possession; that they were expressly notified of that fact, immediately afterwards, and that, thenceforward, they had no more right or authority over or concerning it, than if it had remained in Enyeart's pocket, except that of mere custodians or naked bailees. On the day of the maturity of the certificate, the witness whose testimony has just been quoted, from excess of caution and for his own protection, demanded payment, and, upon refusal, gave the notice and made the protest usual in such cases.

Prior to the time of the presentment, the bank had suspended business and its assets had passed into the hands of a receiver in insolvency. No other demand or notice was given. This is an action by the administrator of Enyeart, now deceased, against the indorser. Upon the foregoing facts, which are not in dispute, the court instructed a verdict for the plaintiff; and the defendant prosecutes error. The sole question litigated is, whether the demand and notice were effectual to fix the liability of the indorser. To our minds, the answer is clearly evident. The law is settled, without conflict among authorities, that a demand or notice, to be effectual to bind an indorser, or discharge the maker or drawer paying to the person making it, must be by one having real or ostensible right to receive payment. 1 Parsons, Notes & Bills, p. 387; Bigelow, Bills (2d ed.), p. 100; 2 Randolph, Commercial Paper (2d ed.), sec. 572; Zane, Banking, sec. 240; 1 Daniel, Negotiable Instruments (5th ed.), sec. 455; *Lawrence v. Miller*, 16 N. Y. 235.

The notary in this instance had neither. The instrument was not current so as to be payable to bearer. If the notary had himself demanded payment on the day before or on the day after the attempted presentment and protest, the maker would have complied, at its peril, only

after satisfying itself by inquiry that the former had become the lawful holder of the instrument by purchase and assignment, or that he was the duly authorized agent of such holder. Presumptively, such inquiry would have elicited the truth, and the maker, in a suit against it by Enyeart, would have been charged with actual knowledge of all the facts it would have learned by such a quest. Why, then, was the situation, or the rights or obligations of the parties, different on the day of maturity? Counsel has offered neither argument nor authority to convince us. It is true, as he says, that a notary, entrusted by the owner of negotiable paper with its custody, is presumably authorized by his principal to demand payment, and to give notice and make protest, but that is a matter of presumption, only, which, like other such presumptions, may be rebutted by proof of the fact. He derives no authority from his notarial commission, and his certificate of protest creates no obligation upon anyone, but is, like other official certificates of like character, merely evidence of the truth of its own recitals. The liability of an indorser is fixed, if at all, by the demand and notice, not by the certificate of protest. In this instance, the recitals themselves fall short of showing authority from the lawful and apparent owner of the paper. It is recited that he made the presentment at the request, not of Enyeart, but of "Wm. Sieffe for Jacob Enyeart." Suppose the bank to have been "a going concern," and the demand to have been in that form; would not the very phrase itself have led the bank officials to inquire by what authority Sieffe made the request? And the notice that was served upon the indorser was in the same form, saying that the presentment and demand had been made "at the request of Wm. Sieffe for Jacob Hofrichter." Can this be said to be a notice that a presentment and demand had been made at the request of the indorsee? We think not, but, if so, it was notice of a supposed fact which, as the record proves, never occurred. It is quite clear to us, therefore, not only that no lawful demand was made, but that, if one

had been made, the paper served upon Hofrichter would not have been notice of it. Upon the facts disclosed by the record, the jury should have been instructed to return a verdict for the defendant.

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

HASTINGS and OLDHAM, 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.

JENNIE B. WARDELL v. JAMES W. WARDELL, ADMINISTRATOR.

FILED MAY 5, 1904. No. 13,413.

1. **Equity.** Equity has jurisdiction to supply the omissions and defects of legal procedure, when necessary to accomplish the ends of the law and to the due administration of justice.

2. **Decedent's Estate: HOMESTEAD: SALE.** When a husband dies, the owner of a tract of land selected and occupied by himself and family as a homestead, but which exceeds the value of $2,000, and which is so situated that the dwelling house and the grounds upon which it stands, to the value of the homestead exemption, can not be set apart from the residue of the tract, the district court has jurisdiction, in equity, upon application of the administrator, to decree the sale of the whole tract for the payment of the debts of the deceased, and to direct that, of the proceeds of the sale, $2,000 shall be invested at interest during the life of the widow, the interest and income thereof to be paid to her for her own use until her death, and, upon the happening of that event, the principal to descend as in case of other such exemptions.

3. ———: ———. A homestead exemption is by the law of this state limited to the value of $2,000, and if, upon the death of a husband, the dwelling and the tract of land adjacent thereto, selected from his estate and occupied by himself and family as a homestead, exceeds that value and are so situated that the dwelling together with the grounds upon which it stands, and not exceeding that value, can not be set apart from the residue of the tract,

no legal estate in the land, or in any part of it, passes to the widow and heirs under the homestead act, but in lieu thereof an equitable interest to the value of $2,000 in the entire tract does pass to them thereunder.

ERROR to the district court for Washington county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

E. C. Jackson and *Clark O'Hanlon,* for plaintiff in error.

Walton & Mummert, contra.

AMES, C.

It is not requisite to an understanding of the sole question of importance litigated in this case that the facts shall be set forth in detail. The circumstances essential to that purpose are the following: One George Wardell died the owner of an equitable estate in 120 acres of land of the value, including that of a dwelling house and buildings thereon, of which he and his family were in occupancy as a homestead, of about $14,000. The defendant, James W. Wardell, was appointed administrator of the estate of the deceased, and, after having exhausted all other means for the payment of debts approved and allowed against the latter, applied to the district court for a decree authorizing him to sell the homestead and apply the proceeds to the payment of a remainder of them. In this proceeding the widow intervened, and prayed that her homestead estate in the premises be protected. Upon a trial, it was found that the value of the dwelling house alone was $3,000, and of the buildings appurtenant to it $3,500, and of the equitable title to the lands $7,200; and that the premises were not susceptible of division or partition so as to permit the dwelling house, and the grounds upon which it was erected, together of a value not exceeding $2,000, to be set apart as a homestead exemption. The court thereupon decreed a sale of the entire tract, and the investment of $2,000 of the proceeds thereof at interest during the life of the widow; she to receive the

interest and income thereof to her own use until her death, and, upon the happening of that event, the principal to descend to the heirs at law of the decedent, as in the case of other such exemptions.

From this decree, the widow prosecutes error to this court, alleging it to be unauthorized by law. Her contentions are that the provisions of the statute for appraising and setting apart of the homestead during the lifetime of the person from whose estate it was selected (in this instance the husband), or the sale of it, in instances in which it is not susceptible of division, and the setting apart of $2,000 of the proceeds of the sale, are not applicable after his death, and that hence the statutory restriction as to the value of the exempt property ceases with that event, and that therefrom the entire premises occupied as a homestead, to the whole extent of the territorial limits prescribed by statute, acquire the character of exemption regardless of values. Counsel thus attempt to found a title to real property upon the absence or defect of expressly prescribed legal procedure for attacking the person in possession. It was largely for the purpose of supplying such omissions in legal machinery, and preventing them from becoming the means or occasion of injustice, that courts of equity were instituted. We entertain no doubt that, for this reason alone, if for no other, the present circumstances call for the beneficial exercise of the jurisdiction of a court of chancery. This being so, the court properly adopted such methods of practice and procedure as are customary with it, and were adapted to the situation and to the accomplishment of the desired end, and committed no error in omitting to appoint appraisers as though the proceeding had been pursuant to the statute; it not being made to appear that any error in valuation resulted in such omission. The contention that equity was without jurisdiction because the claims had not been reduced to judgment in the lifetime of the debtor, we can not think to have been seriously made. The nearest possible approach thereto had been attained

by the proof and allowance of them before the probate court.

Counsel for plaintiff in error lay much stress upon the proposition, often reiterated by this court, that, upon the death of a married person from whose lands a homestead was selected, an estate for life therein vests in the surviving spouse, leaving an unincumbered reversion in fee in the heirs of the deceased, also vested. Hence, they say, such estate in an entire tract not exceeding 160 acres, however valuable, having passed in this manner, free from general or special liens created in the lifetime of the decedent, the law having prescribed no condition subsequent upon which it may divest, the land ceased to be a part of the estate of the latter or liable for debts contracted by him.

We think this reasoning is at fault in overlooking the fact that that which constitutes the homestead, and that alone, therefore, which passes to the surviving spouse, in cases of this kind, is not necessarily any defined tract of land, but only so much of a definable tract, if any, as, including the dwelling house and appurtenances, shall not exceed $2,000 in value; and, inasmuch as the homestead exemption is rigidly limited to that value, if there be no describable tract, including the buildings, the value of which falls within that sum, there is no property answering to the statutory definition of a homestead; and, if the statute were to be literally adhered to, nothing would pass under it to the survivor or to the heirs. So literal an interpretation of the statute as is contended for by counsel would, in our opinion, deprive the widow of all interest other than dower in the premises in question, and devote the entire property to the payment of the debts of her late husband. Such an outcome would obviously defeat the benevolent and plain intent of the legislature, however inadequately expressed; and, the statute being remedial in character, we think a court of equity is justified in holding that, although, under the circumstances, no legal estate in the land or any of it can pass under the

act, yet, an equitable interest therein of the value of $2,000 does so pass, and that the court will protect it in case it becomes necessary to appropriate the tract to the payment of the debts of the deceased.

We discover no error in the record, and recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

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J. E. EBERSOLE V. OMAHA NATIONAL BANK.

FILED MAY 5, 1904. No. 13,517.

1. **Debt: PART PAYMENT: STATUTE OF LIMITATIONS.** A part payment operates to revive a contract debt, barred by the statute of limitations, of its own vigor and not as evidence of an acknowledgment or new promise.

2. **Evidence.** The evidence in this case held to be insufficient to support the defense of the statute of limitations.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

Frank Heller, for plaintiff in error.

Hamilton & Maxwell, contra.

AMES, C.

This is a proceeding in error to reverse a judgment, pursuant to a verdict for the plaintiff below, returned in obedience to a peremptory instruction by the court. The action was upon a book account and three promissory notes of the defendant. The defense was the statute of limitations. The notes were dated and given January 31, 1893, and were payable on demand. The book account

was of transactions extending from that date until November 30, 1897. The plaintiff below is assignee of the payee of all these obligations. At some time, not specified by counsel, the debtor delivered to the payee, one J. A. Fuller & Co., a policy of insurance upon the life of the former, as collateral security for the payment of the indebtedness. On February 12, 1898, the policy was entrusted to the debtor to enable him to obtain its cash surrender value, and pay the proceeds upon the indebtedness, and to substitute a new policy for the old one. On the 14th of July, 1898, the debtor transmitted the money and the new policy to his creditors, inclosed with the following letter:

"*Messrs. J. A. Fuller & Co., Omaha*—GENTLEMEN: Herewith please find policy number 120,968 on my life, assigned to J. H. Dumont, to secure payment of my indebtedness to him and you. Also check for $75.35, dated August 1, 1898, being the amount of the surrender value of the policy of like amount held by you for the same purpose, the cash value clause of which was extended until next anniversary on account of payment of last premium by note. Paid up insurance becomes automatic under the policy condition.

"Respectfully, JAMES E. EBERSOLE."

There was no later communication between them. Fuller & Co. applied a part of the money, proceeds of the check, on each of the notes, and a part on the book account. This action was begun within 4 years thereafter. The maker contends that the notes were barred, and therefore no longer a subsisting indebtedness against him, and that all the money should have been appropriated toward the payment of the book account as being the only indebtedness of his to which it was applicable, or, in other words, that his creditors were without authority to make use of the money to revive the obligation of the barred notes.

The statute enacts (code, sec. 22): "In any cause founded on contract, when any part of the principal or interest shall have been paid, * * * an action may

be brought in such case within the period prescribed for the same, after such payment." The section provides that the debt may also be revived by a new promise or acknowledgment in writing, so that it would seem that a part payment does not effect the removal of the bar, because of being evidence of a new promise or of an acknowledgment, which are void if not written, but because of its own proper vigor. This being so, authorities cited by plaintiff in error, deciding that the holder of collateral who collects the same can not apply the proceeds upon barred debts, because his right to collect and appropriate does not include authority to make a new promise or an acknowledgment for his debtor, seem to us to be not in point. Here, as it seems to us, the only question is, whether the application of the money to the barred notes was a lawful appropriation of it. If it was so, it constituted part payment upon them, and had all the legal consequences of any other such part payment. If it was not, the payee is accountable for the money, in the same manner, and to the same extent, as in any other case of tortious conversion or embezzlement of trust funds. We can not think that any court would hold him so liable. The debt upon the notes was not discharged, but remained a moral obligation. The letter gave, in effect, general authority to apply the proceeds of the collateral to the payment of the indebtedness of the maker, without specifying in what manner it should be distributed among the different descriptions thereof, and we do not see that the creditor exceeded his authority.

The question was discussed somewhat at the bar, whether the statute ever ran against the notes. They were payable on demand, and no demand of their payment seems ever to have been made. They were secured, in part at least, in common with the book account, by collateral, and, until within less than 5 years before the beginning of the action, business relations and transactions other than with reference to these obligations continued between the parties. If the intent of the parties may be gathered

from their conduct, the substitution of collateral and the payment of money above related had as direct reference to the notes as to the book account. The old policy was admittedly collateral to the notes. When it was entrusted to the plaintiff in error, he gave a written receipt for it, reciting that its cash surrender value and a new policy were to be "substituted" for it. That is, to take the place of it and to be charged with the same duty and obligation as it had been bound for. This transaction was within 2 weeks after the lapse of 5 years from the date of the notes. Under such circumstances we are inclined to think that the receipt was written acknowledgment of the debt evidenced by the notes, but, whether it was so or not, we do not think that the record discloses such an unreasonable delay in demanding payment of the notes as would operate to bar them under the statute, 5 months later, when the plaintiff in error substituted the new policy and made the partial payment in controversy.

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

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

OMAHA LOAN & TRUST COMPANY ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,533.

Judicial Sale: ESTOPPEL. A purchaser at a judicial sale of lands offered subject to apparent liens, who makes no attempt to have the priority, validity or amount of the latter otherwise adjudicated until after confirmation and conveyance, is estopped to impeach them.

APPEAL from the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Affirmed.*

H. W. Pennock, for appellants.

W. H. Herdman, contra.

AMES, C.

Appellants were purchasers at mortgage foreclosure sale of three tracts of land situate in the city of Omaha. The sheriff's appraisers deducted from the gross value of each tract, as found by them, a certain sum as being a lien thereon in favor of the city, because of a special assessment and levy to defray the cost of local improvements. After procuring confirmation and conveyances pursuant thereto, appellants brought this action to perpetually enjoin the city from enforcing the collection of the taxes, for the alleged reason that the tax proceedings were in violation of law and void. Two of the tracts were purchased for slightly more than two-thirds of the gross amounts of the appraisements respectively, and the other for two-thirds of that amount less the assumed amount of the tax lien. There was a judgment for the city with respect to all. Appellants try to distinguish in principle between the purchase of the former two lots and that of the latter, because, as counsel urges, although it may be said to have been advantaged or benefited by the deduction in one instance, it was not so in the other. But this very point was decided otherwise, and we think rightly so, in *Battelle v. McIntosh,* 62 Neb. 647. The two principal objects of the appraisement law are to protect the judgment debtor from spoliation by the forced sale of his property below its fair value, and to inform the judgment creditor of the existence and amounts of apparent prior liens upon it, so that he may not unwittingly bid for it more that it is worth; but neither of them dispenses with or affects the rule of *caveat emptor* as applied to purchasers at judicial sales. If the purchase is made at more

than two-thirds of the amount of the "net appraisal" as it is called, that fact, by itself, indicates nothing but that the bidder believes the gross appraisement to be below the unincumbered value of that which he is buying. Presumably, in such cases, he reappraises the land in his own mind, and bids for it what he believes it to be worth, subject to the prior liens appearing upon the face of the record. He has thus had all the advantage of the appraisement and notice he could have otherwise had, and no injustice has been done him. For the rest, appellants attack the long settled rule, that a purchaser at a judicial sale of lands, offered subject to apparent liens disclosed by the appraisement, who makes no attempt to have the priority, validity or amount of the latter otherwise adjudicated, until after confirmation and conveyance, is estopped to impeach them. Decisions enforcing this rule are very numerous, extending through the past 13 years. *Koch v. Losch,* 31 Neb. 625; *Viergutz v. Aultman, Miller & Co.,* 46 Neb. 141; *Nye & Schneider Co. v. Fahrenholz,* 49 Neb. 278; *Norfolk State Bank v. Schwenk,* 51 Neb. 146; *Farmers' Loan & Trust Co. v. Schwenk,* 54 Neb. 657; *Peterborough Savings Bank v. Pierce,* 54 Neb. 721; *Arlington Mill & Elevator Co. v. Yates,* 57 Neb. 286.

It would be an unprofitable task to attempt to reexamine the principles by which the foregoing decisions are thought to be justified. The court has recently done so and found them satisfactory. It should be sufficient to say that they have long since acquired the character of a rule of property, and, if their operation is considered unjust, the legislature is the proper forum in which to seek remedy. The assumption by appellants' counsel that these decisions, or any of them, are overruled, or in any wise shaken, by the opinion of this court in *Hart v. Beardsley,* 67 Neb. 145, is wholly unwarranted. The principles by which they are governed are not involved in that case, and the then Chief Justice, SULLIVAN, in writing the leading opinion, paused to refer to them only for the purpose of stating that fact. The present Chief Justice, HOLCOMB,

prepared a concurring opinion, for the sole purpose, as appears, of declaring and emphasizing the intention of the court to adhere to them in all future cases to which they shall be applicable. Judge SEDGWICK also wrote a concurring opinion, in which he set forth, briefly, some of the conditions and qualifications upon which he supposed their applicability to depend, none of which he deemed pertinent to the case then under discussion. In *Omaha Savings Bank v. City of Omaha,* 4 Neb. (Unof.) 563, and *Equitable Trust Co. v. City of Omaha,* 69 Neb. 342, the rule in question was again recognized and enforced, although the attention of the court was expressly called to *Hart v. Beardsley, supra,* by Chief Justice SULLIVAN, in a paragraph by which he dissented, without, however, stating his reasons for so doing beyond a bare reference to the case last mentioned.

Counsel for the appellants seeks to distinguish between this case and those cases in which it is attempted to enforce alleged liens as incidental or collateral to personal obligations. It seems to the writer that such a distinction would be reasonable and just. The existing rule may often sacrifice the property of financially embarrassed, and therefore helpless, debtors for the satisfaction of illegal demands from which their more fortunate, because wealthier, neighbors will escape without difficulty. But we suppose this phase of the matter to have been hitherto considered by the court as insufficient to warrant the modification suggested, and that it is not worth while to pursue the subject. We therefore conclude that the contentions of the appellants have been deliberately and finally discredited by this court, and that their further discussion would be bootless.

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

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CHADRON OPERA HOUSE COMPANY, APPELLANT, V. SHELDON M. LOOMER ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,585.

Trade Name. To entitle a party to an injunction restraining another from the use of a trade mark or trade name, he must make it appear, with at least reasonable certainty, that his adoption of the name was prior in time to that of his adversary, that he adopted and made use of it in such manner as to reasonably apprise the public that he intended it as a distinctive appellation for his trade, commodity or place of business, and that it was not, at the time of his attempted appropriation of it, in common or general use in connection with like businesses, commodities, buildings or localities.

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

Allen G. Fisher, for appellant.

A. W. Crites, contra.

AMES, C.

This is an appeal from a decree dismissing the plaintiff's action after a trial upon the merits. Appellant, a corporation, brought the suit as lessee of a building in Chadron, styled "The Chadron Opera House," seeking to enjoin the use of the same name for the carrying on of a business similar to that of the plaintiff in, and in connection with, another building in Chadron.

The evidence is in some conflict and confusion but, as nearly as we can make out, the appellees, defendants below, are conducting their business in a frame building, erected in 1886 for a skating rink, but provided with a stage and drop curtains, and some other appliances adapt-

ing it to use as a place of dramatic entertainment, to which it became subsequently mainly, if not solely, devoted. It seems to have been known for some time by the names, indifferently, of "The Rink" and "The Rink Opera House," and is still perhaps more or less commonly known by one or the other, or both. In or about 1896, defendants began, in correspondence and conversation with play actors and others, to style their building the "Chadron Opera House," and some three years later caused that name to be painted upon its outer walls. Since that time the three names have more or less generally and indiscriminately been applied to it by the public.

In 1889, one Nelson erected the building, of brick, in which the business of appellant is carried on. The lower story of the structure was and is adapted to and used for business rooms, and the rear part of the upper story for a place of entertainment. Upon a stone let into the front of it were engraved the words "P. B. Nelson, Opera Block." Subsequently, Nelson and the public habitually referred to the building indiscriminately by the names "Nelson's Opera House" and "The Opera House." Shortly before the beginning of this action, he and appellant adopted the custom of calling it the "Chadron Opera House," but that was not until after that name had been painted on the defendants' building and they had been using it some time in their correspondence, conversation and otherwise. As to whether Nelson or the defendants first begun this latter use of the name, the evidence is in conflict and the fact uncertain. The plaintiff was incorporated in April, 1903, by the name of the "Chadron Opera House Company," apparently about the time Nelson begun adding the name of the town to that of his building. We do not think there is thus disclosed such a distinctive prior adoption and appropriation of the name by the appellant as to entitle it to the exclusive enjoyment of it, or to the relief prayed. For some unaccountable reason, the briefs and arguments of both counsel are on the same side of this question, and that, the one which is the oppo-

site of that which seems to us the more applicable to the circumstances.

It seems evident to us that, before one can avail himself of the extraordinary remedy of injunction to protect him in the exclusive possession and enjoyment of a trade mark or trade name, he must have acquired, to use a common law expression, an exclusive "seizin" of it. This record does not disclose that either of the litigants have done so. On the contrary it is apparent that both have made use of the coveted name, if not in common, at least contemporaneously, and, for a time at least, each without the knowledge of the other, and without any definite intention to enjoy such use exclusively. In other words, neither seems, until about the time this litigation was begun, to have attempted to appropriate the name to his own peculiar and exclusive use, or to adopt it as a sole or principal designation of his building or business.

We have ourselves not succeeded in finding decisions precisely in point in this respect, but we think that the general principles underlying the authorities upon this subject uphold the conclusion that, to entitle a party to the remedy here sought, he must make it appear, with at least reasonable certainty, that his adoption of the name was prior in time to that of his adversary; that he adopted and made use of it in such manner as would reasonably apprise the public that he intended it as a distinctive appellation for his trade, commodity or place of business, and that it was not, at the time of his attempted appropriation of it, in common or general use in connection with like businesses, commodities, buildings or localities. See 26 Am. and Eng. Ency. Law (1st ed.), p. 324, and notes. However, whether the foregoing formula is correct or not, we are satisfied that this record is insufficient to support a judgment for the plaintiff, and recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, it is ordered that the judgment of the district court be

AFFIRMED.

LEE CARD V. DAWES COUNTY.

FILED MAY 5, 1904. No. 13,587.

Counties: AUTHORITY OF COUNTY ATTORNEY. A county is not bound to pay for legal services rendered at the instance of the county attorney, without the previous authorization or subsequent official ratification of the county board.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher, for plaintiff in error.

E. M. Slattery, contra.

AMES, C.

In 1902, Dawes county seems to have engaged extensively in the business of the foreclosure by the county, as plaintiff, of delinquent tax liens upon real property situate within its territorial limits. The county attorney procured the plaintiff in error, Card, who was an attorney at law, to assist him in compiling the data requisite for the purpose, in a very large number of cases, and in the formulation of pleadings and preparation of notices for publication necessary to be employed in the foreclosure suits. It is not disputed that the services so rendered by Card were of the reasonable value of $150, or that he was assured by the county attorney that the county would compensate him therefor. But the county board is not alleged to have authorized the employment, or officially, and as a body, to have subsequently ratified or affirmed it, although some of its members, perhaps while the board was in session, are testified to have approved of it, if not to have given assurance of its ratification. That the county

attorney availed himself of this service, and that thus the county may have derived an indirect benefit therefrom, is not disputed, though it is not clear that the county attorney could not or would not have done the work himself, if he had not persuaded Card to do it for him. This is the whole case, as we gather it from the briefs and the record which were submitted without oral argument.

Card presented his claim for the services in question to the county board, by whom it was rejected, and, upon appeal, the district court affirmed their order. From the judgment of affirmance this proceeding is prosecuted. We can discover no error. The county board appears not to have employed the plaintiff in error, or to have authorized his employment by the county attorney, or to have officially ratified the latter. However meritorious the services of plaintiff in error may have been, and that they were largely so is not disputed, his claim for compensation for them from the county appears to have no legal foundation, the mere fact that the county may have benefited from them does not obligate it in a case like the present, in which it had no direct connection with their rendition, and no official opportunity to decline their reception.

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

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

JAMES MCADAMS V. CITY OF MCCOOK.

FILED MAY 5, 1904. No. 13,502.

1. Cities: ABANDONING SEWERS: LIABILITY. When a city makes provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot

owner in a worse condition than he would have been if the city had not constructed such drains.

2. Instructions: REVIEW. It is a well established rule of this court that an instruction, not warranted by the pleadings or evidence, will require a reversal of the judgment if it have a tendency to mislead the jury. *Esterly & Son v. Van Slyke*, 21 Neb. 611, followed and approved.

3. ———. Instructions examined, and found prejudicial.

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

W. S. Morlan, for plaintiff in error.

W. R. Starr and *Fayette I. Foss, contra.*

OLDHAM, C.

This is an action for damages for injuries sustained by the flooding of the basement of plaintiff's storeroom in the city of McCook. The material facts underlying the controversy are, that the city of McCook is situated in a basin, with the elevation rising from the southeast to the northwest of the corporate limits of the city, and is surrounded on the north and west by a line of bluffs, so that the natural flow of the surface water in the city, if unimpeded, would be from the northwest to the southeast. Main street is the principal business street of the city, and runs north and south. Manchester avenue is the street immediately west and parallel with Main street. Dennison street is a street running east and west and crossing both Main and Manchester at right angles. Railroad street runs parallel to and south of Dennison. Dodge and Douglas streets are each north and parallel with Dennison street. Plaintiff in the court below, who is also plaintiff in error in this court, conducted a general merchandise store in a building situated on the northeast corner of Main and Dennison streets. The building has 25 feet frontage on Main, and 80 feet frontage on Dennison street. On the 17th day of June, 1901, the city of Mc-

Cook was visited by a very severe rainstorm, in which 2 and 6-10 inches of water fell in a period of 35 minutes; the rain was accompanied by hail and a high wind. As a result of this storm, the basement of plaintiff's store was filled with water and the goods situated therein were damaged to the extent of about $534. The fact and the extent of the damage are undisputed. In the petition filed by plaintiff it is alleged, in substance, that several years prior to the injury the city of McCook had constructed a system of drains, ditches and culverts for the purpose of conducting the surface water through the city, across Railroad street and into the natural basin south of the city. That in the construction of this system of drainage, it had, by means of its ditches and culverts, diverted the flow of the surface water north of plaintiff's building, westward along Douglas street from Main street to Manchester avenue, and had conducted the water from thence south, by means of a system of ditches and culverts, down to and across Railroad street; that for 3 or 4 years before the injury, the city had carelessly and negligently permitted the embankment on the east side of Manchester and between Dennison and Dodge streets to be worn down and reduced to a level, by permitting teams and vehicles to drive over and across the embankments of the drain; that when the heavy rainfall occurred on the 17th day of June, the system of drainage established by the city diverted and conducted the surface water north and west of plaintiff's building over to Manchester avenue, and carried it down in heavy torrents to the place just north of Dennison street where the embankment had been leveled down, and precipitated it from this place in a southeasterly direction over and against the north side of plaintiff's building, thereby occasioning the injury complained of. There was no allegation in the petition that there was any carelessness or negligence in the original construction of the drainage system. It appeared from the testimony that the level of Manchester street was two feet above the level of Main street.

The city, in answer to plaintiff's petition, denied negligence in permitting the drains and culverts to be and remain in an unsafe condition, and alleged that plaintiff's injury was occasioned by the "act of God," and that the storm on the 17th of June was of such an unusual and unprecedented character, that ordinary prudence on the part of the city in keeping its drains and culverts in proper condition would not have protected against the injury. On the issues thus joined there was trial to a jury, judgment for the defendant, and plaintiff brings error to this court.

The only complaint urged by plaintiff which it will be necessary to examine, in view of the conclusion soon to be reached, is as to the action of the trial court in giving misleading, confusing and contradictory instructions in his charge to the jury. However, before going in detail into a discussion of the objections, it is perhaps well to suggest, as the matter is in controversy, that plaintiff's petition does state a good cause of action, and that there is competent testimony in the record sufficient to sustain a judgment for the plaintiff, had he prevailed in the court below. While the petition, as before set out, does not charge any negligence on the part of the city in the original construction of the drainage system, yet it does charge with great precision, that the city negligently permitted the drains and ditches, particularly on the east side of Manchester avenue and north of Dennison street, to be leveled down by passage over the ditches, and to remain in such condition for a long period of time prior to the injury complained of. While it is rightly urged on the part of the city that it was under no obligations to construct a system of drainage for protection from the surface water, yet it does not follow, because in the first instance the city was not bound to construct this system of drainage, that this absolved it from liability for injury occasioned to private property by its failure to keep the ditches in proper condition after they had been erected. When a city makes provision by sewers or drains for

carrying off the surface water, it may not discontinue or abandon the same when it leaves the lot owner in a worse condition than he would have been if the city had never constructed such drains. *City of Atchison v. Challiss,* 9 Kan. 603.

It is also urged by the city, that the injury complained of by the plaintiff was occasioned by surface water, which is a common enemy, and that for injuries arising from this source no one is liable. This contention, however, so far as it applies to cases of this character, is qualified by the principle that the city, like a private individual, must so use its own as not to injure another. *City of Kearney v. Themanson,* 48 Neb. 74.

While it is practically conceded on the part of the city that some of the instructions given by the trial court had, as they say in their brief, "better have been left out," yet it is contended that, under the evidence, no other verdict could have been reached, because the testimony clearly shows that the injury was occasioned by such an unusual rainfall, accompanied by hail and wind, as to constitute an "act of God." While there is testimony on the part of the city tending to support this contention, there is also evidence, as before suggested in this opinion, on the part of the plaintiff, which tends to show that his injury was caused by a precipitation of surface water, diverted by the ditch from its natural course, and discharged against his property, over the low bank on the east side of the drain on Manchester avenue, a few feet north of Dennison street. Consequently there was this issue of fact involved in the controversy, which should have been submitted to the jury under proper instructions. And we think that the learned trial judge might, and probably would, have clearly and concisely directed the jury on this question, had he not given so many instructions. 5 instructions were given at plaintiff's request, 12 at defendant's request, and 11 on the court's own motion; and among the different ones so given there is a babel of confusion.

It is a well established rule of this court, that an instruction, not warranted by the pleadings or evidence, will require a reversal of the judgment if it have a tendency to mislead the jury. *Esterly & Son v. Van Slyke*, 21 Neb. 611.

In the 19th instruction, requested by defendant and given by the court, it was said: "The jury are instructed that, for a mere error in judgment in the adoption of a plan or system of sewerage or drainage, a city can not be held responsible." Without determining whether this instruction correctly states an abstract proposition of law, it is certainly foreign to any issue involved in this controversy, for, as already set out, plaintiff did not contend that there was any negligence or carelessness in the construction of the system of drainage. The vice of this instruction is, that it might have led the jury to conclude that, unless plaintiff alleged and proved negligence in the construction of the drainage system, the city was not liable.

The 12th instruction given by the court at the request of defendant was as follows: "The jury are instructed that, unless you believe from the evidence in this case that the defendant city had been careless and negligent in the grading and establishment of the grade for the sewers and drains as alleged in plaintiff's petition, then the jury should find for the defendant, and the burden is upon the plaintiff to prove, by a preponderance of the evidence, that the defendant city was careless and negligent as alleged in plaintiff's petition." This instruction was plainly misleading, and might, and probably would, cause the jury to go no further in their investigation than to determine whether or not the city had been negligent in grading and ditching its streets, and then, having found this fact, as they were bound to do, in the defendant's favor, render a verdict accordingly. There are other instructions equally as objectionable which it will not be necessary to consider, since, for errors already pointed out, we recommend that the judgment of the district court

be reversed and the cause remanded for further proceedings.

AMES and LETTON, 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.

REVERSED.

WILLIAM E. MUELLER V. WILLIAM N. PARCEL ET AL.

FILED MAY 5, 1904. No. 13,557.

1. **Chattel Mortgages**: PRIORITIES. A verbal chattel mortgage, not coupled with possession by the mortgagee, will not take precedence over a subsequent written mortgage, taken without notice of the secret lien of the verbal mortgage.
2. **Rulings.** Action of the trial court in admission of evidence examined, and *held* not prejudcial.
3. **Replevin**: VERDICT: SPECIAL FINDING. Where plaintiff was in possession of the property replevied, under a claim of a special ownership as mortgagee, and the jury returned a verdict finding the right of property and the right of possession in plaintiff, and that the value of this right in said property was $117.17, the amount due on the mortgage, and the general verdict was supplemented with a special finding that the value of the property is $160, *held*, that such verdict and special finding are sufficient to sustain a judgment that plaintiff is entitled to the possession of the property, and that the value of his special property in the goods replevied is $117.17.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed with directions.*

Hoagland & Hoagland for plaintiff in error.

A. H. Davis and *Beeler & Muldoon, contra.*

OLDHAM, C.

This is an action of replevin instituted by the plaintiff against the defendants to recover possession of 400 bushels

of corn, under the claim of special ownership based on a chattel mortgage held by the plaintiff on the corn in controversy. There was a judgment for plaintiff in the court below, and the defendant William E. Mueller alone brings error to this court.

The facts underlying this controversy are, that defendant William E. Mueller is the owner of a farm in Lincoln county, Nebraska, and that, in the year 1902, J. H. Nagle cultivated a crop of corn on a portion of defendant's lands for two-fifths of the corn raised on the lands so cultivated; that about the time the corn was gathered he, Nagle, executed two chattel mortgages on this corn. One of these mortgages was executed to the plaintiff, and the other to one Young, who assigned and sold the same to plaintiff before the suit was instituted. Each of these mortgages was given to secure a *bona fide* indebtedness to the respective mortgagees. It appears that before the corn was gathered, defendant William E. Mueller went on a visit to Oregon, and left his property in charge of his wife. It also appears that defendant Herman Mueller, who is a son of William E. Mueller, entered into a contract with Nagle to gather and crib the corn, and to deliver a certain portion thereof to plaintiff Parcel, for a consideration named in the contract with Nagle. After the corn was gathered, plaintiff demanded possession of the amount covered by his mortgage, and was refused possession by Mrs. Mueller and Herman Mueller, and this suit was instituted, naming all these parties as defendants. They were all summoned, and appeared and answered. Defendant William E. Mueller filed a general denial. Mrs. Mueller answered, disclaiming any ownership in the property, and alleging that she held possession of the corn in controversy as agent of her husband. Herman Mueller answered, disclaiming ownership, and denying that he had ever had possession of the corn as agent of defendant Nagle. Under the issues thus formed, the court, over the defendants' objection, permitted the plaintiff to allege and prove the contract of Nagle with Herman Mueller to

gather and crib the corn. This is one of the alleged errors called to our attention in the brief of William E. Mueller, and will be presently considered. Defendant William E. Mueller contended, first, that Nagle had no property in any portion of the corn, because the land had never been leased to him, and he had abandoned his contract to cultivate the land for two-fifths of the corn raised thereon. This issue, however, was fairly submitted to the jury on conflicting testimony, and was found in plaintiff's favor. Defendant's second contention was that, if Nagle was the owner of two-fifths of the corn raised and cribbed on the Mueller land, then the defendant was entitled to the possession of the corn so raised, on a verbal chattel mortgage made by Nagle to defendant to secure an advancement of money, prior to the execution of the mortgages relied upon by plaintiff. There is no evidence in the record tending to show that plaintiff had either actual or constructive notice of this secret lien of defendant, if it ever in fact existed. The court, however, submitted this defense to the jury in paragraph 4 of the instructions requested by defendant, saying in substance that, if they believed that an agreement for such lien was verbally entered into between Nagle and defendant Mueller, prior to the execution of the mortgages in suit, and that defendant had retained possession of such corn under such agreement, then they would find for the defendant for the value of his lien. This instruction of the trial court appears to have submitted this defense to the jury under conditions as favorable as defendant was entitled to, either under the law or the testimony contained in this record.

The action of the trial court, in permitting the plaintiff to plead and prove that Nagle employed defendant Herman Mueller to gather and crib the corn for him, is complained of as having been prejudicial to the interest of defendant William E. Mueller. We think, however, that this testimony was properly admitted for the purpose of showing that Nagle, after cultivating the corn, had employed Mueller to gather and crib it, as he, Nagle, was

bound to do under his contract. The court, however, instructed the jury that they were not to take this contract into consideration as affecting the rights of the defendant William E. Mueller in any manner, as he was not shown to have been a party to it. Consequently, William E. Mueller, who alone brings error, is in no shape to complain of this evidence.

It is next contended that the verdict of the jury and judgment of the court rendered thereon are fatally defective, and that, for this reason alone, the case should be reversed and remanded. The form of the verdict returned by the jury was as follows: "We, the jury in this case, being duly sworn and impaneled, do find and say that the right to the property and possession of said property when this action was commenced was in plaintiff, and that the value of this right in said property was the sum of $117.17." It is contended that this verdict is fatally defective, in that it finds both the right to the property and the right of possession in plaintiff, when he only alleged a special property interest, by virtue of his chattel mortgage, in his affidavit and petition. And we are cited to the case of *Hayes v. Slobodny*, 54 Neb. 511, as decisive of the question. In *Hayes v. Slobodny*, as in the case at bar, the plaintiff had secured possession of the property on his writ of replevin, and alleged a claim to a special and not a general ownership therein. The verdict in that case was in the following form: "We, the jury, duly sworn and impaneled in the above entitled cause, do find that the right of the property and right of possession of said property when this action was commenced was in the plaintiff and assess his damages in the premises at the sum of one cent."

In disposing of this case, RYAN, C., speaking for the court, says, "At the time of the trial the replevied property was in his (plaintiff's) possession, and with reference to that property there was no finding as to the value of his possession as in such cases required by the provisions of section 191*a*, code of civil procedure, but the finding in his

favor was of general ownership and an unlimited right of possession." There is an unfortunate reference in this opinion to section 191*a* of the code, as controlling the form of the verdict in the case, where plaintiff has possession of the goods replevied, either under a claim of general or special ownership. The form of a verdict in his favor is prescribed by section 192, and not by section 191*a* of the code. The opinion, however, in *Hayes v. Slobodny, supra,* turned on the question that the verdict was not supported by the pleading. Now in the case at bar, the jury, by special finding, answered that the value of the property in plaintiff's possession was $160 and by their verdict they found that plaintiff's interest in this property was of the value of $117.17, which was the amount due on the notes and mortgages. While the verdict was technically erroneous in finding that the right of the property as well as the right of possession was in the plaintiff, yet we think this error was cured by finding the value of plaintiff's property in the replevied corn. The general rule is that where the successful party in a replevin action claims less than the full interest in the property replevied, the value of his interest should be fixed. Cobbey, Replevin (2d ed.), sec. 854.

While it is always good practice to follow this rule, yet our code does not require it to be followed, where plaintiff prevails in the action and is possessed of the property replevied. In such case, it is only required that the jury by their verdict shall assess adequate damages to the plaintiff for the illegal detention of the property, and for costs. Now, it seems to us, that the general verdict of the jury, finding the right of property and the right of possession in the plaintiff, should have been construed in the light of the special finding, as a determination by the jury that plaintiff was entitled to the possession of the property in dispute as mortgagee, and that the value of his special property was intended to have been determined by the jury at $117.17, the amount of his debt and interest, and that the value of the property was $160. We think

this verdict was sufficient to have supported a judgment by the trial court, finding plaintiff entitled to the possession of the property, and that the value of his special property in the corn replevied was $117.17, and awarding him a judgment for the costs of the suit. Instead of rendering such a judgment as this, the trial court rendered a judgment finding generally for plaintiff. In this, we think, there was technical and possibly substantial error. But as we are of opinion that the verdict of the jury was modified by its special finding, which supports a judgment as above suggested, we recommend that the judgment of the district court be reversed and the cause remanded, with directions to the district court to enter a judgment on the verdict of the jury, finding that plaintiff is entitled to the possession of the property replevied, under his mortgage lien, and that the value of his possession was, at the time of the return of the verdict, $117.17, with interest at 7 per cent. from the date of the verdict, and that he recover his costs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the district court to enter a judgment on the verdict of the jury, finding that plaintiff is entitled to the possession of the property replevied, under his mortgage lien, and that the value of his possession was, at the time of the return of the verdict, $117.17, with interest at 7 per cent. from the date of the verdict, and that he recover his costs.

REVERSED.

BLANCHE COLEMAN AND HELEN R. COLEMAN, A MINOR, BY HER NEXT FRIEND, BLANCHE COLEMAN, APPELLANTS. v. S. W. MCGREW, EXECUTOR, ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,575.

1. **Fraternal Insurance Certificates: PROCEEDS: INJUNCTION.** Under the provision of section 97, chapter 43, Compiled Statutes, the proceeds of a certificate of a fraternal benefit association are not, before payment to the person entitled thereto, liable for any debt of a certificate holder, or of any beneficiary named in such certificate.

2. **Equity: TRUSTS.** A court of equity has jurisdiction to enjoin a trustee from the misappropriation of trust funds at the suit of a *cestui que trust.*

APPEAL from the district court for Gage county: CHARLES B. LETTON, JUDGE. *Reversed.*

E. O. Kretsinger and *M. B. Davis,* for appellants.

Griggs, Rinaker & Bibb and *Reavis & Reavis, contra.*

OLDHAM, C.

On April 14, 1897, Robert W. Coleman and Alice M. Coleman, his wife, signed and delivered their promissory note to the State Bank of Humboldt, Nebraska, for the sum of $350, with interest at the rate of 10 per cent. On the 2d day of July, 1897, Robert W. Coleman departed this life, and on the 28th day of August, 1897, Alice M. Coleman also departed this life, leaving the defendant, S. W. McGrew, as executor of her last will and testament, and plaintiffs Blanche Coleman and Helen R. Coleman as sole legatees of the will. Defendant S. W. McGrew, executor of the estate of Alice M. Coleman, was also the personal representative of the estate of Robert W. Coleman. The note of the defendant bank was proved against each of these estates. The estate of Robert W. Coleman was insolvent, and paid but 50 cents on the dollar of its indebtedness, leaving one-half of the amount due on the note

to the defendant bank as a charge against the estate of Alice M. Coleman. After the note to the defendant bank had been allowed against the estate of Alice M. Coleman, the executor sought, by motion filed at the succeeding term of the county court, to have the order allowing the claim against the estate of Alice M. Coleman set aside. This order was granted in the county court, but on error proceedings instituted in the district court, the order was reversed. The order of the district court, reversing the judgment of the county court, was reviewed on error proceedings in this court, in the case of *McGrew v. State Bank*, 60 Neb. 716, and affirmed.

Afterwards, Blanche M. Coleman and Helen R. Coleman, as sole legatees of Alice Coleman, instituted the present cause of action, for the purpose of restraining the executor of their mother's estate and the defendant bank from applying the funds in the hands of the executor, received from the proceeds of three fraternal benefit policies, to the payment of the claim of the bank against the mother's estate. The petition filed is quite lengthy, the material allegations being that the plaintiffs are the sole legatees and heirs at law of Alice M. Coleman, deceased, and that defendant S. W. McGrew is the executor of her last will and testament; that, at the time of the death of Alice M. Coleman, she was possessed of no separate estate of her own, but was beneficiary in a certificate held by her husband in the Modern Woodmen of America, for $2,000, in the Ancient Order of United Workmen, for $2,000, and in the Knights of Pythias, for $2,000; that each of these companies were fraternal benefit associations, authorized under the laws of the state of Nebraska; that there were no other assets except the proceeds of these policies in the hands of the executor, with which to pay the claim against the estate. The petition also alleged that the claim had been allowed through a conspiracy between the executor and the bank; but, before passing, we might say that there is no proof whatever in the record to sustain this allegation. The de-

fendant executor answered the plaintiffs' petition, admitting each of the allegations except that of a conspiracy. The defendant bank answered, denying the capacity of the plaintiffs to maintain this cause of action, challenging the jurisdiction of the district court, and pleading a former adjudication of the claim against the estate of Alice M. Coleman. On issues thus joined, there was trial to the court, judgment for the defendants, and plaintiffs appeal to this court.

All the facts necessary to an adjudication of this case are either admitted by the pleadings or established without contradiction in the record. These are, that the claim of the defendant bank had been formerly proved against the estate of Alice M. Coleman; that there were no funds of this estate in the hands of the executor, except the proceeds of the three fraternal benefit certificates above set forth; that the executor had finally settled all matters connected with the estate of Alice M. Coleman, except the claim of the defendant bank, and that, when restrained, he was about to pay this claim from the proceeds of one of these fraternal benefit certificates.

The first question, then, to be determined is, were the funds derived from the proceeds of these fraternal benefit certificates assets of the estate of the beneficiary, which are liable for the payment of the debts of the estate, or, are they a trust fund in the hands of the executor for the benefit of the children, heirs at law and legatees of the defendant? If these funds are assets of the estate, and liable for the debts of the deceased, then plaintiffs could not maintain this cause of action, for want of a present interest in the funds; but, if these funds are held in trust by the executor for the plaintiffs, their interest is immediate and the capacity to sue clearly exists. Section 97, chapter 43, Compiled Statutes (Annotated Statutes, 6489), which was originally section 7 of the fraternal beneficiary association act of this state (ch. 47, laws of 1897), provides: "The money or other benefit, charity, relief or aid to be paid, provided or rendered by any society authorized to

do business under this act, shall not be liable to attachment by trustee, garnishee or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder or of any beneficiary named in a certificate, or of any person who may have any right thereunder." This statute clearly exempts these funds from the debts of the testatrix, and constitutes them a trust fund in the hands of the executor for the benefit of plaintiffs, who are legatees and sole heirs at law of the deceased.

Having arrived at the conclusion that the proceeds of these fraternal benefit certificates are not an asset liable for the debts of the estate, it follows that the plea of *res judicata* relied upon by the appellees is entirely unavailing. The filing of the claim for probate and its allowance amounted to no more than an adjudication of the fact that the estate of Alice M. Coleman was indebted to the defendant bank in the sum found to be due on the note, but there was nothing in this finding that could determine the question of the liability of the funds now in the hands of the executor for the payment of the claim. When the claim was allowed, it became a lien on such funds in the hands of the executor as might legally be appropriated in its discharge, and no other.

The same course of reasoning disposes of the objection of the appellees to the jurisdiction of the district court to hear and determine this cause of action. This objection is based upon the proposition that the county court has sole and exclusive jurisdiction of probate matters, but, if we are correct in the conclusion already reached, the question involved has no connection with the proceedings connected with the probate of the will of the deceased. It is simply an application by the *cestui que trust* to a court of equity for an order restraining the trustee from misappropriation of the trust funds, and the jurisdiction of a court of equity to grant this relief is grounded on the fundamental principles of equity jurisprudence.

We therefore conclude that the learned district court erred in dismissing plaintiffs' bill, and we recommend that the judgment of the district court be reversed and the cause remanded, with directions to the lower court to render judgment in favor of the plaintiffs, permanently enjoining the executor and the judgment creditors from applying the proceeds of the fraternal benefit certificates in the hands of the executor to the payment of any indebtedness against the estate of the testatrix.

AMES, C., concurs. LETTON, C., not sitting.

By the Court: For the reasons set forth in the above opinion, it is recommended that the judgment of the district court be reversed and the cause remanded.

REVERSED.

JAMES MONTAGUE v. MINNA MARUNDA.

FILED MAY 5, 1904. No. 13,586.

1. **Jurisdiction:** APPEARANCE. When a party who had made a special appearance in an action or proceeding moves the court for affirmative relief in his own behalf, he thereby makes a general appearance and subjects himself to the jurisdiction of the court.
2. **Mortgage Foreclosure:** DISTRIBUTION OF SURPLUS: NEW PARTIES. Upon the foreclosure of a mortgage, and a sale and confirmation thereunder, if a surplus remains after the payment of the mortgage debt and costs, the district court, in its equitable jurisdiction, has full power, upon an application being made for a distribution of the surplus, to bring in all parties necessary to a determination of the ownership of the fund, and to try and determine that question.
3. **Title by Prescription:** TACKING: PRIVITY. Privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription; but this privity may exist by grant, devise, purchase or descent, and the adverse possession of an ancestor may be taken advantage of by his heirs, if their possession has been continuous with his, exclusive, and under the

same claim of right as made by him. In such case, the ouster and disseisin made by the ancestor is continued by the heirs and relates back to his original entry.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher, for plaintiff in error.

A. W. Crites and *W. W. Wood, contra.*

LETTON, C.

This is a proceeding in error to review the action of the district court for Dawes county in distributing a surplus of money arising from a sale under a mortgage foreclosure. The facts are as follows: In 1888, Albert Neuman and Lulu Neuman, his wife, resided upon a certain tract of 160 acres of land in Dawes county, which he had taken as a preemption claim and had made final entry upon. On the 1st day of August, 1888, Neuman and his wife executed a mortgage to W. H. Lanning, trustee, to secure a loan on the premises. After the execution of the mortgage a deed was apparently executed by Lulu Neuman, as grantor, her husband joining with her in the execution of the deed, to one Edward Roberts. This deed was acknowledged by Mrs. Neuman alone before one Peter Hall, a justice of the peace in and for Dawes county. Roberts moved upon the land with his family in March, 1890, and lived there for several years, when he moved to other land adjoining the same, but fenced the Neuman tract, together with his other land, in one inclosure, living within the inclosure. In 1895 Roberts died, but his widow remained in possession of the premises until about the 30th day of March, 1900, when deeds were executed by the heirs of Roberts and his widow to one Ed Marunda, and Marunda took possession under the same. On May 17, 1900, an action was begun in the name of the McKinley-Lanning Loan & Trust Company to foreclose the mortgage. Albert Neuman, Lulu Neuman, Edward

Roberts, Mrs. Edward Roberts and the unknown heirs of Edward Roberts were made parties defendant.

It is stated in the briefs that Ed Marunda was made a party to this foreclosure action on his own application, and the record shows that he filed an answer, setting up that he had a legal interest in the land in controversy, "said legal interest being an equitable title to the lands described in the plaintiff's petition herein, by a conveyance dated April 3, 1900," and praying that he be permitted to participate in any surplus money remaining from the sale of the lands. No service was had upon Albert Neuman, and no decree taken as to him, but a decree of foreclosure was rendered in the case against the other defendants, ordering the land sold to satisfy the mortgage. The decree of foreclosure makes no finding with reference to the interest of Marunda in the premises. A sale was had under the decree, and Marunda bought the land, but this sale was set aside and a new sale made to James Montague. This sale was confirmed, and a deed ordered and made to Montague, March 13, 1903. After the payment of the mortgage debt, there remained in the hands of the sheriff a surplus of $610.45, which is in controversy in this case. On the 11th day of January, 1901, a quitclaim deed was executed by Albert Neuman to James Montague for this land, which was filed for record on February 9, 1901, in the office of the county clerk of Dawes county. The consideration recited in this deed was the mortgage indebtedness upon the land and $5 in hand paid. Ed Marunda died in August, 1902, and his wife, Minna Marunda, was apparently appointed administratrix of the estate.

A motion was afterwards filed by Minna Marunda, asking the court to return to her, as administratrix of Ed. Marunda, the money paid in by Marunda to the sheriff upon his bid for the land, and also praying for an order upon the sheriff, to pay to the clerk of the court the surplus in his hands arising from the sale to Montague. In the meantime Montague had demanded the surplus from the

sheriff, which demand was refused, and an action was brought by him against the sheriff to recover the same. On the 17th of April, 1903, a hearing was had upon these motions of Minna Marunda. The motions were sustained, and the sheriff ordered to pay to the clerk of the court "the surplus now in his hands, amounting to $610.45, and to further pay said administratrix the $900 bid by Ed Marunda at the sale which had been set aside. Montague excepted to these orders. It appears that Minna Marunda, as the widow of Ed Marunda, and one Herman Marunda, a brother of Ed Marunda, had, before this time, filed petitions for a part of the surplus, and the court ordered that the plaintiff and James Montague plead to said applications within 30 days. On July 13, 1903, Montague filed a special appearance, and objections to the jurisdiction of the court, which objections were overruled, and exceptions taken, whereupon he presented to the court a demand for a trial by jury, which was refused and exception taken. Afterwards, he filed an answer, setting up that he was plaintiff in another action pending against the sheriff for the same money; that the court has no jurisdiction; denies the ownership of Ed Marunda or his heirs to the land in question; alleges that the premises were the homestead of the Neumans until the year 1900, and alleges that the facts set forth in the petition do not constitute a cause of action. A reply was filed by the Marundas denying every allegation in this answer. Hearing was had upon the 21st day of July upon the issues thus framed. The court found that the land, at the time of the death of Ed Marunda, belonged to him, and descended to his heirs, subject to the dower estate of his widow, Minna Marunda; ascertained the value of her dower estate, and the shares of the respective petitioners; directed the payment of the same to them, and found generally in favor of the petitioners and against Montague. Exceptions were taken, and a bill of exceptions duly settled and filed, which presents the evidence in support of this proceeding for review.

As to the special appearance and objections to the

jurisdiction of the court, filed by James Montague on the 13th of July, 1903, it is sufficient to say that, on the 17th day of April, at the time that the hearing was had upon the motions of Minna Marunda, above mentioned, the record shows that an appearance was made by Montague, objecting to the motions; and, further, a motion was made on his own behalf by Montague, seeking to put the powers of the court in motion for his own benefit. By thus appearing and invoking the action of the court, Montague appeared generally in the cause, and could not afterwards be heard to say that his appearance was only special. The objections to jurisdiction were properly overruled. As to the demand for a jury made by Montague, a court of equity had obtained jurisdiction of the parties and of the subject matter, by virtue of the foreclosure proceeding and the subsequent appearance made by Ed Marunda and Montague, and the widow and heirs of Marunda. Confirmation had been had, and the surplus had been brought into court as section 854 of the code provides. All persons who claimed to have any interest in the surplus being before the court, it was within its power, as it was its duty, to retain the cause for all purposes necessary to determine the matters still pending, and to do complete and final justice between the parties. To voluntarily relinquish its jurisdiction over the fund, which was in its possession, would be to surrender one of the most beneficial powers of a court of chancery. The fund being in the hands of the court, it was its duty to ascertain to whom it belonged, and not to relegate the parties to another court for that purpose. No error was committed in retaining the matter of the determination of the ownership of the surplus in its hands, and in refusing the demand for a jury made by Montague. The action was not one of those in which a constitutional right to a jury trial exists. It was not in assumpsit, as was *Yager v. Exchange Nat. Bank,* 52 Neb. 321, cited by plaintiff in error. These considerations also dispose of the assignment that the court erred in directing the sheriff to pay the surplus into court.

Objection is made that the decision is not sustained by sufficient evidence, is contrary to the weight of evidence and is contrary to law; and further objections are made to the court's admitting the documentary evidence of the applicants. As to the deed from Lulu Neuman to Edward Roberts, it appears that, at the time this deed was made, the property was the homestead of Albert Neuman and Lulu Neuman. The deed was not acknowledged by Albert Neuman, and consequently is void, since, in order to convey a homestead in this state the instrument must be executed and acknowledged by both husband and wife. It appears, however, that, immediately upon the execution of the deed, the Neumans moved off from this land to another tract in the vicinity, and possession was taken by Roberts, under claim of title, in March, 1890. Roberts resided thereon with his family for 4 or 5 years. He then bought an adjoining tract, known as the Heckman claim, and moved there, but retained possession of the Neuman tract and fenced it in with 40 acres of the Heckman claim. There is evidence that Roberts cut hay upon this land and cultivated part of it, and that he exercised exclusive control and actual ownership over it during his lifetime, under claim of title. After Roberts' death, his widow and family continued to live upon the 200 acre tract, and, in 1900, deeds were executed by Caroline Roberts, the widow of Edward Roberts, and by all his children and heirs to Ed Marunda. The evidence shows that Marunda took possession of the land under these deeds, and kept the same until his death, and that his widow continued his possession until the spring of 1903. The testimony is conflicting in regard to the condition of the fences around the Neuman and Heckman tracts, but there is sufficient evidence to support the conclusion of the district court that the acts of Roberts, of his widow and heirs after his death, and of Marunda in relation to the occupancy and possession of such land, were sufficient to constitute a notorious, exclusive, adverse and continuous possession, under claim of title, as against all the

world, during the period from March, 1890, until after the death of Marunda in August, 1902. The void deed from Neuman and wife to Roberts, under which he took possession of the premises, was sufficient to constitute color of title. The statute of limitations began to run as soon as he took possession of the premises under this deed. His subsequent removal to the Heckman 40 acres adjoining this tract did not stop the running of the statute, because he kept continuous adverse possession of the Neuman land, nor did his subsequent death, since his widow and heirs continued to hold under his claim of title. It would seem that the bar of the statute was complete in favor of the heirs of Roberts before the deed to Marunda, but Marunda's possession being derived under the title of Roberts continued the adverse possession. The Roberts' title by prescription had fully ripened into a perfect title before the beginning of the foreclosure suit, and before the execution of the quitclaim deed from Neuman to Montague, under which Montague claims the title to the surplus.

A number of the objections made in the brief of the plaintiff in error are not available to Montague with reference to the title of Ed Marunda, for the reason that, under the testimony, the bar of the statute was complete as against Neuman and Montague, while the title was still in the heirs of Roberts. Since neither Neuman, nor his grantee, Montague, had any title to the land at that time, or at the time Marunda took it, they have no standing in court to complain as to technical defects in the conveyances from Roberts' widow and heirs to Marunda.

It is further urged that, under the authority of *Zweibel v. Myers*, 69 Neb. 294, the possession of the widow and heirs of Roberts can not be tacked to the possession of Roberts, in order to continue the running of the statute of limitations. There is no doubt of the correctness of the rule laid down in the syllabus of that case, that privity must be shown between adverse claimants, before the possession of one can be tacked to the possession of the

other, for the purpose of completing title by prescription. But the plaintiff in error asserts that, under the holding of the opinion in that case, there can be no privity of possession unless by direct grant or devise. While it is possible that the language of the opinion may be so construed, we do not think that it was intended to hold, in that case, that there can be no privity of possession between ancestor and heirs without a specific grant. It is essential that each occupant must show a derivative title from his predecessor, in order to link his possession with that taken under the original entry, but the possession of the heir is regarded as a continuance of that of the ancestor on account of his privity of blood. Bliss, Code Pleading (3d ed.), sec. 235; *Leonard v. Leonard,* 7 Allen (Mass.), 277; *Rowland v. Williams,* 23 Ore. 515, 32 Pac. 402; *Low v. Schaffer,* 24 Ore. 239, 33 Pac. 678; *Witt v. St. Paul & N. P. R. Co.,* 38 Minn. 122, 35 N. W. 862; *Haynes v. Boardman,* 119 Mass. 414. Where the widow and heirs continue to hold possession acquired by the ancestor under the same claim of title, there is such a privity between them that the ouster and disseisin begun by the ancestor is continued by them, and relates back to his original entry. In the *Zweibel* case, the facts did not show such a continuous possession, under claim of title made by the heirs, and the language must be construed with reference to the facts in that case.

A number of other objections to the decree of the court are urged in the brief of the plaintiff in error, but, under the view which was taken by the trial court of the evidence in the case, with which we agree, they can not be urged by Montague, since, if he had no title to the surplus, he can not complain of the manner of its distribution.

Upon a consideration of the whole record, we are of the opinion that the judgment of the district court was right and that it should be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

DAVID A. STRONG V. ARTHUR EGGERT.

FILED MAY 5, 1904. No. 13,588.

1. **Verdict:** INSTRUCTIONS. A verdict clearly contrary to the instructions of the court should be set aside.
2. ———: EVIDENCE. Evidence examined, and *held* not to sustain the verdict.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

Allen G. Fisher, for plaintiff in error.

A. W. Crites, contra.

LETTON, C.

This action was originally brought before a justice of the peace in Dawes county by the defendant in error, hereinafter called the plaintiff, who sought to recover from the plaintiff in error, hereinafter called the defendant, the sum of $170.58, for work and labor which he alleged he performed for the defendant at his request. A trial was had and judgment rendered, an appeal taken to the district court where the cause was tried to a jury, and judgment rendered in favor of the plaintiff for the exact amount claimed by him, to wit, $170.58. Error proceedings have been prosecuted by the defendant to this court. The defendant is engaged in farming and also to a certain extent in lumbering. In April, 1900, the plaintiff agreed to work for him by the day on his farm, for $1 a day, no time being specified during which the contract should run. Afterwards, he worked at the sawmill and lumbering camp of the defendant. It appears

that sometime in August or September, 1900, a verbal agreement was made between the plaintiff and defendant, by which the defendant agreed to convey to the plaintiff a certain tract of land, upon which there was standing a quantity of saw timber, in payment for which the plaintiff was to allow the defendant to retain $30 then due him for labor, and plaintiff was to cut all timber fit for saw purposes over 12 inches in diameter, then standing upon this tract of land. The evidence shows that this lumber camp was situated some 5 or 6 miles from the farm of the defendant; that when the plaintiff first moved near the sawmill, he moved into a house belonging to one Brennan; that, afterwards, some dispute arising between the parties, this house was torn down, and he was forced to move into a tent which stood near the sawmill, on the tract of land defendant was to convey to him under the oral agreement; and that, afterwards, a house was built by the plaintiff, with lumber furnished him by the defendant. But his house proved to be erected upon land which was outside of the limits of the tract. After the land was surveyed, and it was found that it did not belong to defendant, plaintiff again moved into the tent near the sawmill, where he lived until the fall of 1901, when he left the place.

The principal defense is, that a settlement had been had between the parties; and the defendant further sets up a counterclaim for damages in the sum of $300, which he claims he suffered by reason of the failure of plaintiff to cut the timber upon the land. Both the settlement and counterclaim were denied by the plaintiff. The defendant brought into court and tendered a deed to the land to plaintiff, to be delivered when he completes the cutting of the timber thereon. The evidence in the case very largely consists of entries in the books of the plaintiff and defendant, together with the explanations of the same, the principal conflict being with regard to the settlement which the defendant claims to have made on November 11, 1900, and as to whether or not the contract for the

purchase of the land was rescinded by defendant. It appears from the testimony that there were about 58,000 feet of saw timber left standing upon the land, at the time the plaintiff left it. The court instructed the jury with reference to the counterclaim: "As to the counterclaim interposed by the defendant, you are instructed that the burden of proof is upon the defendant; and, before he can recover upon the said counterclaim he must satisfy you by a preponderance of the evidence that he sold and delivered possession to the plaintiff of the land heretofore described; that plaintiff, to pay for the same, was to cut the saw timber as set forth in the said counterclaim, and that he at all times has been ready and willing to make a good and valid deed to the said land, when the plaintiff should comply with his part of said contract. If you believe from the evidence that said contract for the sale of the land was made between the parties as alleged in defendant's answer and counterclaim, and that the plaintiff complied with his part of said contract, with the exception of cutting about 58,000 feet of saw timber therefrom, then you are advised that the defendant, upon making a deed to the plaintiff, would be entitled to recover from the plaintiff the value, as shown by the evidence, of cutting said 58,000 feet of logs." The giving of this instruction was excepted to by defendant and is assigned as error. It is urged that this instruction is erroneous, because it omitted the fact that $30 was to be credited to plaintiff as a first payment on the land, and for various other reasons which it is not necessary to consider, since it is apparent from the verdict that the jury must have found that the defendant failed to prove that he sold and delivered possession of the land, and that he has been ready and willing to make a valid deed to the same when the plaintiff should comply with his part of the contract. There is a sharp conflict in the testimony in regard to this matter. While the parties agree that the timber was to be cut in exchange for the land, yet they disagree as to the time within which this was to be done.

They further disagree as to whether possession of the land was ever actually taken by plaintiff, and further disagree as to whether or not defendant informed plaintiff that he wanted to use the land himself, and rescinded the contract. Upon this conflicting evidence it is apparent from the verdict that the jury found for the plaintiff and against the defendant upon the matter of the counterclaim, and this finding being supported by the evidence will not be disturbed. Hence, the defendant could not have been prejudiced by the omission from this instruction of the matters of which he complains.

It is further assigned that the verdict is not sustained by the evidence and is contrary to the instructions of the court. The jury were properly instructed as to the defense of settlement. It appears from the evidence of both parties that a settlement was had between them upon the 14th day of September, 1900, by which $30 was credited to plaintiff upon the contract for the sale of the land, and $10 was found to be still due and owing to him. Accepting the testimony of plaintiff as true in regard to the labor that he performed after the 14th day of September, 1900, and giving him credit for the $40 still in the hands of Strong, the evidence fails to show that the defendant owes him the amount found due by the verdict. It is apparent that the jury disregarded the settlement, entirely, when they gave the plaintiff a verdict for the full amount claimed.

We doubt very much whether the most expert bookkeeper could arrive at any clear or definite conclusion from the defendant's books, as to what credits he was entitled to. After our examination of the defendant's bookkeeping, we do not wonder that the jury entirely disregarded all his entries and his oral testimony, as to payments made by him. Apparently, being unable to arrive at any definite conclusion from his books or his testimony, as to what credit he should have, the jury gave the plaintiff all he asked for, by way of penalty for the defendant's carelessness. Such a verdict can not stand.

Under the instruction of the court, the jury should have taken into consideration the settlement of September 14, 1900, and given Eggert credit only for what he earned after that time, in addition to the amount then due him. For the failure of the jury to follow the instruction of the court with reference to settlement, and the verdict being in excess of the amount shown by the testimony to be due the plaintiff, the case should be reversed.

AMES and OLDHAM, CC., concur.

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

REVERSED.

HUDSON J. WINNETT ET AL., APPELLANTS, V. GEORGE A. ADAMS ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,386.

1. **Civil and Political Rights.** A civil right is a right accorded to every member of a district, community or nation; a political right is one exercisable in the administration of government.
2. **Primary Election: EQUITY.** A court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

Hall & Marlay, for appellants.

Billingsley & Greene, contra.

ALBERT, C.

This is a suit for relief by injunction, brought on the 19th day of May, 1902. As the only question in the case is, whether the facts stated in the petition are sufficient

to constitute grounds for equitable relief, it will be necessary to examine the petition at some length. Omitting the formal parts, and some matters not necessary to an understanding of the case, the petition is as follows:

"The plaintiffs complain of the defendants and say that the defendant George A. Adams is the chairman of the republican county central committee of Lancaster county, and that the said Walter L. Dawson is secretary of said committee, and the defendants Frank A. Graham, Julius Dietrich, George H. Moore, Stanley Wicks, Howard L. Beatty, William Lawlor, James Stevenson, Charles W. Spears, William A. Green, Andrew G. Billmeyer, John S. Bishop, Dominick G. Courtney, William A. Leese, Edwin R. Mockett, Alva L. Pound, James H. Valentine, Victor Seymour, Lee J. Dunn, William J. Blystone, Charles B. Capron, J. H. Amos and Harry G. Abbott are members of such central committee, representing the several precincts of the several wards in the city of Lincoln in said county; that said republican county central committee consists of 20 members from the city of Lincoln and its various precincts, and that there are 32 members of said central committee from the various country precincts in said county; that the country precincts are represented on said central committee as follows:" (Here follows a list of the members from the country precincts.) There being in all 52 members from both city and country precincts of said county central committee. That it requires a majority of said members to adopt any rules or regulations for the governing of primary elections to be held in said county. That said republican county central committee is the governing authority of the republican party within said county and in said several precincts and wards of said city, within the meaning of chapter 27 of the laws of 1899, being sections 125*a* to 125*l*, chapter 26, Compiled Statutes, 1901 (Annotated Statutes, 5800-5811).

"That the plaintiffs herein are republicans and qualified electors of the city of Lincoln, Lancaster county, Ne-

braska, and as such the said Hudson J. Winnett is a candidate for the nomination of the republican party of said county of Lancaster for the office of state senator; and that Orlando W. Webster and William B. Linch are candidates for the nomination of the republican party of said county for the house of representatives of the Nebraska legislature, and are seeking nomination to said respective offices at the hands of the republican county convention of Lancaster county, Nebraska, and intend, if nominated by said convention, to run for said offices at the general election to be held on the.....day of November, 1902; and as such candidates for said respective offices they desire to submit their names to the qualified republican voters of said several precincts and wards in said city and to submit to the qualified republican voters of said wards, and each precinct thereof, a list of delegates to the regular republican county convention of the republican party, in their respective interests and favorable to their nominations for said respective offices.

"That the regular county convention of said republican party in said county, for the purpose of making nominations to be voted upon at said regular election, is fixed to be held at the city of Lincoln, aforesaid, on Wednesday, the 21st day of May, 1902; and that the regular primary election of said party within said county is set for Tuesday, the 20th day of May, 1902, at which election delegates are to be chosen to take part in said county convention. That such primary election in said several precincts of said several wards in the city of Lincoln will be under the control and supervision of said defendants, respectively, as chairman, secretary and committeemen, as aforesaid; that the said George A. Adams as chairman of said central committee, by and under the rules of practice governing said primary, is to print the ballot to be voted upon at such primary election and have full and complete charge of the preparation and distribution thereof.

"And the plaintiffs further say that the said defendants

and each of them unlawfully, wrongfully and fraudulently, and for the purpose of preventing these plaintiffs from submitting a list of delegates favorable to them and their interests in each of said precincts, and for the purpose of preventing said qualified republican electors in said several precincts from voting upon a proposed list of delegates favorable to each of said plaintiffs herein for said offices for which they are candidates, are threatening, and are about to put in force and apply a pretended rule or regulation, alleged to have been adopted by said central committee, in words and figures following, to wit:

"'All ballots shall be printed by the chairman of the county central committee. Nothing shall be placed upon the ballot except the list of delegates selected at the caucus, the names of the candidates, and at the top of the ballot shall be printed "Official Ballot," and between the names of the delegates sufficient space shall be left in which to write a name or names, other than those printed on the ballot, and at the top of such ballot shall be printed a circle, so that, if desired by the voter, the whole list of delegates may be voted for by one mark; those that neglect to make said mark shall not invalidate such ballot, but the vote will be counted for the delegates unscratched. Said list of delegates shall be printed on plain white paper.

"'Provided, that, in such voting precincts as may have two or more candidates contesting for the delegates to the county convention, said candidates may submit their respective tickets to the primary election for settlement, and not be bound by the caucus rule. Said tickets shall be certified to the secretary of the county central committee by the committeemen of the precincts and printed by the chairman of the county central committee, but said agreement between the candidates shall not operate to prevent holding a caucus, if the committeeman sees fit so to do, and the caucus ticket shall also be printed by the chairman of the county central committee. The tickets presented by the candidates shall be printed the same as

in sec. 4. All of said candidates shall file with the secretary of the county central committee a written statement of their agreement as to the tickets to be used at the primary. And the name of the office for which the candidate is running shall be placed thereon; also the name of the nominees selected by the caucus, whether he resides in that precinct or not.'

"That the said pretended rule is unreasonable, fraudulent and unjust, and beyond the power of said committee to enact, and contrary to the provisions of the statute governing primary elections in this state; and neither under said statute nor by virtue of their general authority did said committee have the power or right to enact and to put in force an unreasonable or unjust rule, designed to prevent the republican voters of said several precincts and wards from expressing their choice, and preventing these plaintiffs and each of them from submitting to such electors a list of delegates in his interests to be voted upon at said primary election. * * *

"The plaintiffs further allege that, while said rules and regulations pretended to have been passed or adopted and promulgated at a meeting of the county central committee, yet, your plaintiffs allege the fact to be that there was in truth and in fact no meeting of the republican county central committee of said county; but the fact is that the city members only of said republican county central committee met together, formulated and pretended to adopt and promulgate said rules and regulations for the government of said primary election; but plaintiffs allege that they did not have a majority present at such meeting of said county central committee, but had in fact only about 20, and that more than 32 members of said county central committee were absent, and knew nothing about, and had nothing whatever to do with said rules and regulations; and that said rules and regulations are void, for the reason that the city members of said committee have no right or authority to formulate, adopt and pass rules and regulations for the government of

said primary election in the absence of the members of said central committee from all of the various country precincts, said members being 32 in number.

"Plaintiffs further say that the caucuses provided for in said rule, and to which the full and complete authority is pretended to be given to dictate what shall be placed upon the ballot to be voted at such primary election, are in no way subject to the restriction as to qualifications of voters provided by law above referred to; and that the aim and object of said pretended rule is to nullify and evade the provisions of said statute as to qualifications of voters, by leaving the real and substantial selection to the caucus instead of to the real primary election; and that at said caucus meetings no rules as to qualifications of voters will be applied, and if said rule is put in full force and effect it will annul and make a mere form and farce the primary election.

"Plaintiffs further allege that, if said defendants are permitted to apply said rule and enforce the same, they will be wholly without remedy; that by and under the pretended rules which said defendants have threatened and are about to enforce, as aforesaid, the said defendants, except the said Dawson and Adams, and each of them, are made the chairman of the several caucuses of the several precincts in which they are committeemen and are given the power to name the secretaries thereof, and that they are threatening, and are about and intend to exercise said power and operate said caucuses in such wise as to wholly prevent these plaintiffs and each of them from bringing before the republican voters any delegates or proposed delegates favorable to their nomination.

"That if said rules and regulations as promulgated are permitted to be put in force by said defendants, as they now contemplate doing, it will result in each of said plaintiffs being prevented, unless they can control the caucuses in their respective wards, from submitting a list of delegates to be voted for at the primary election to the county convention, because, under such rules, no

candidate can submit a list of delegates to be voted for at said primary election unless such candidate can control the caucuses in the various precincts of said city of Lincoln; and that at said caucuses there is no regulation or qualification for voters, any person from any part of the city, whether republican, democrat or populist can attend such caucuses and vote; so that the right to have a list of delegates to the county convention voted for at said primary election depends upon the ability of each candidate to pack and control a caucus; and that said method of selecting delegates under said rules becomes largely a question of brute force, and that said rules and regulations are vicious, unfair and unjust.

"In consideration whereof, and inasmuch as the plaintiffs are without adequate remedy at law, and will suffer great and irreparable injury in case said defendants are permitted to carry out their wrongful and fraudulent scheme, as aforesaid, the plaintiffs pray that a temporary injunction issue, enjoining said defendants and each of them, their agents, servants, employees or representatives, from putting in force or in any manner applying said pretended rule or rules, or any other rule or rules or pretended regulations of any sort, designed to or which will operate to prevent the said plaintiffs and each of them from fairly submitting to the republican voters of said several precincts or any of them at said primary election proposed list of delegates favorable to their nominations and interests, to be voted upon, and enjoining and restraining them from printing or authorizing to use at such primary election in said precincts or any of them any form of ballot which does not contain the list of delegates in each precinct proposed by and favorable to these plaintiffs and each of them, and to be voted for along with such other proposed delegates as may be presented to said defendants, in order that a full, fair and free expression of a preference and choice of the republican voters of said several precincts may be had; that upon the final hearing of this cause, said injunction may be

made permanent, and for such other and further relief as justice and equity may require."

A general demurrer to the petition was sustained, and the suit dismissed. The plaintiffs appeal.

The doctrine that equity is conversant only with matters of property and the maintenance of civil rights, and will not interpose for the protection of rights which are merely political, is supported by an almost unbroken line of authorities. *Fletcher v. Tuttle,* 151 Ill. 41, 25 L. R. A. 143; *Sheridan v. Colvin,* 78 Ill. 237; *State v. Aloe,* 152 Mo. 466, 47 L. R. A. 393; *Giles v. Harris,* 189 U. S. 475; *In re Sawyer,* 124 U. S. 200; *Green v. Mills,* 69 Fed. 852, 30 L. R. A. 90. In the last case, the authorities in support of this doctrine are reviewed at some length. In *Giles v. Harris* it is said: "The traditional limits of proceedings in equity have not embraced a remedy for political wrongs."

A civil right is "A right accorded to every member of a district, community or nation," while a political right is "A right exercisable in the administration of government." Anderson's Law Dictionary, 905. In 2 Bouvier's Law Dictionary, 929, it is said: "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal or marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of his civil rights, which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of his civil rights." The rights, for the protection of which the plaintiffs invoke the chancery powers of the court in this case, fall squarely within the definition of political rights.

Notwithstanding the array of authorities which support it, we should not care to commit ourselves unqualifiedly to the doctrine that a court of equity will not under any circumstances interfere for the protection of political rights. But, we think it is perfectly safe to adopt the doctrine to the extent of holding that a court of equity will not undertake to supervise the acts and management of a political party, for the protection of a purely political right. We do not overlook the fact that primary elections have become the subject of legislative regulation, and it may be conceded that each member of a political party has a right to a voice in such primaries, and to seek nomination for public office at the hands of his party. But, when he is denied these rights, or unreasonably hampered in their exercise, he must look to some other source than a court of equity for redress. To hold otherwise would establish what could not but prove a most mischevous precedent, and would be a long step in the direction of making a court of equity a committee on credentials, and the final arbitrator between contesting delegations in political conventions. The voters themselves are competent to deal with such matters without the guiding hand of the chancellor, and it will make for their independence, self reliance and ability for self government, to permit them to do so. It is true, they may make mistakes, but courts themselves have been known to err.

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

GLANVILLE, C., concurs.

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

AFFIRMED.

SEDGWICK, J.

It does not appear from the allegations of the peti-

tion, as quoted in the opinion, that the committee had taken the necessary steps to hold a legal primary election under the statute.

I concur in the conclusion reached but not in the reasoning employed.

LUSETTA SOLT, ADMINISTRATRIX, ET AL., APPELLANTS, V. LEWIS C. ANDERSON, APPELLEE.

FILED MAY 5, 1904. No. 13,508.

1. **Homestead: CONVEYANCE.** The acknowledgment by both husband and wife of an instrument whereby it is sought to convey or incumber a homestead, is an essential step in the due execution of such instrument.
2. **Acknowledgment.** That such instrument was thus acknowledged should appear from the instrument itself in the form of a certificate of the officer before whom the acknowledgment was taken, and, in the absence of such certificate, it is not competent to show by parol that the instrument was in fact acknowledged.

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

Hainer & Smith, for appellants.

J. M. Day, contra.

ALBERT, C.

Three opinions have already been filed in this case. See 62 Neb. 153, 63 Neb. 734, 67 Neb. 103. The following from the last opinion is sufficient, for present purposes, to show the nature of the suit.

"Lusetta Solt, widow and administratrix of Jacob Solt, brought this suit against Anderson, joining the heirs at law of the intestate, as required by section 335*a*, chapter 23, Compiled Statutes (Annotated Statutes, 5185), setting up a contract 'entered into' between said Jacob Solt, in his lifetime, and said Anderson, for the sale of certain

land held by Solt, and praying for specific performance thereof."

When the case reached the district court, an amended answer was filed, setting forth that the premises in question, at the time the contract was made, were the family homestead of the plaintiff and her husband, not exceeding $2,000 in value and less than 160 acres in extent, and that the said contract was not acknowledged by the plaintiff and her husband, or either of them, as required by the homestead act, and is therefore void. It is conceded that the premises were the homestead of the parties at the time the contract was made. The contract was introduced in evidence, and bears no certificate of any officer authorized to take acknowledgments that it was acknowledged, nor does it appear that any such certificate was ever made. It was signed and witnessed before a justice of the peace, and the plaintiff introduced parol evidence to the effect that it was in fact acknowledged. This evidence is contradicted by evidence introduced by the defendants, but the evidence on that point clearly preponderates in favor of the plaintiff. The court found in favor of the defendants and decreed accordingly. The plaintiff appeals.

The only question presented by the record is, whether it is competent to show by parol that an instrument, purporting to convey or incumber a homestead, which bears no certificate of acknowledgment, was in fact acknowledged? If it is, then the decree of the district court is clearly against the weight of evidence and should be reversed.

We think the question should be answered in the negative. Section 12, chapter 73, Compiled Statutes (Annotated Statutes, 10212), provides: "Every officer who shall take the acknowledgment * * * of any deed, shall indorse a certificate thereof, signed by himself, on the deed." Section 46 provides: "The term 'deed,' as used in this chapter, shall be construed to embrace every instrument in writing, by which any real estate or interest

therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or for a less time." Section 4 of the homestead act (Compiled Statutes, ch. 36; Annotated Statutes, 6203) provides: "The homestead of a married person can not be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

The foregoing sections are *in pari materia,* and should be construed together. Section 4 makes the acknowledgment of an instrument affecting the title to the homestead of a married person an essential step in its execution, and unless such step is taken the instrument is void. *Horbach v. Tyrrell,* 48 Neb. 514; *Havemeyer v. Dahn,* 48 Neb. 536; *Linton v. Cooper,* 53 Neb. 400. Section 12 provides that the evidence of such step shall be perpetuated by the certificate of the officer taking the acknowledgment indorsed on the instrument itself. The sections read together show, we think, that it was the intention of the lawmakers that it should appear from the instrument itself, that every step essential to its due execution had been taken. As we have seen, the acknowledgment is an essential step, when the property affected by the instrument is a homestead, and it should therefore appear on the instrument itself; and its omission therefrom, like the omission of any other essential step, renders the instrument invalid; and it can not be supplied by parol.

We do not overlook the cases holding that, as between the parties, an acknowledgment of a conveyance or an instrument affecting the title to real estate is not essential, and that the office of an acknowledgment is to furnish authentic evidence that the instrument has been duly executed, and is entitled to record. *Linton v. Cooper,* 53 Neb. 400; *Fisk v. Osgood,* 58 Neb. 486. But those cases have no application where, as in the case of a homestead, the acknowledgment is an essential step in the execution of the instrument, and neither of them contain

any hint or suggestion of a relaxation of the rule which requires such instruments to show, of themselves, a substantial compliance with all the requirements of the statute.

Because of the peculiar statutory provisions of the different states, it is not easy to find authorities directly in point. Those bearing on the question under consideration are collected in 1 Cyc. p. 616. In *Elliott v. Peirsol,* 1 Pet. (U. S.) *328, the court said:

"What the law requires to be done, and appear on record, can only be done, and made to appear by the record itself, or an exemplification of it; it is perfectly immaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination, only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert.*"

In *Lessee of Watson v. Bailey,* 1 Binn. (Pa.) 470, 2 Am. Dec. 462, where the certificate of acknowledgment was defective, parol evidence was offered to supply the omission, and was refused. Yeates, J., who delivered the opinion, said: "Such parol testimony ought not to be received. It leads to great uncertainty and mischiefs in tracing titles to real estates at a distant day." This language was cited with approval by Tilghman, C. J., in *Jourdan v. Jourdan,* 9 S. & R. (Pa.) 268, 11 Am. Dec. 724. To the same effect is *Barnet v. Barnet,* 15 S. & R. (Pa.) 72, 16 Am. Dec. 516; *Louden v. Blythe,* 27 Pa. St. 22, 67 Am. Dec. 442. In *Lindley v. Smith,* 46 Ill. 523, the question arose, whether a defect in the acknowledgment could be explained or supplied by parol evidence. The court said:

"We next come to the consideration of the question, whether the defect in the acknowledgment could be explained by the parol evidence of the justice who certified it? In the case of *Elliott v. Peirsol,* 1 Pet. (U. S.) *328, the court held that where an acknowledgment failed to state that a *feme covert* was examined separate and apart

from her husband, as to whether she had executed the deed voluntarily, the defect could not be supplied by parol. At the common law, a *feme covert* could only acknowledge that she transferred her real estate or relinquished her dower by a fine and recovery, and it was, and could only be, by matter of record. The acknowledgments prescribed by statute are intended to take the place of such alienations by record, at least so far as the wife's estate or interest is concerned. And the acknowledgment can not rest partly in writing and partly in parol. When it is remembered, that the deeds of conveyance by married women for the transfer of their real estate or the relinquishment of their dower, do not take effect by delivery as other deeds, but only by being acknowledged in the mode prescribed by the statute, we should hesitate long to permit the officer who made the defective certificate, or some other person, to subsequently supply the defect by oral evidence."

Running through all the cases will be found a strong feeling against the admission of parol evidence to show the due execution of instruments affecting the title to real estate. The present case shows that such feeling is not unreasonable, and that sound considerations of public policy demand that, where an acknowledgment is necessary to give effect to an instrument, the evidence of the fact of such acknowledgment shall be preserved in a permanent form, and not left to the memory of living witnesses. In this instance, after the lapse of ten years, witnesses took the stand and testified to the exact legal phraseology used by the parties in acknowledging the deed; other witnesses were quite clear that no such language was used. Human memory should not be put to such a strain, nor land titles left to rest on so uncertain ground.

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

FAWCETT and GLANVILLE, CC., concur.

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

AFFIRMED.

JULIAN S. ALLEN ET AL., APPELLANTS, V. PRISCILLA DUNN ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,474.

1. **Mortgage Foreclosure:** NONNEGOTIABLE INSTRUMENTS. A mortgage securing a note containing a provision that, in case any taxes or assessments shall be levied against the legal holder of the indebtedness on account of the loan within the state in which the mortgaged property is situate, the party of the first part will pay the same, renders the note nonnegotiable.
2. **Note and Mortgage:** NOTICE. A note and mortgage executed at the same time and as parts of the same transaction will be construed together, and the purchaser of the note and mortgage will be charged with knowledge of the contents of the mortgage.
3. **Usury.** Contract for the loan of money as set out in the opinion, *held* to be usurious.
4. ———. There is no authority under the laws of this state for the taking of interest on any loan or forbearance of money for more than one year in advance, for the purpose of obtaining more than the legal rate of interest on the money loaned.
5. **Answer:** SUFFICIENCY. An answer will be liberally construed with a view to upholding it as stating a defense, if its sufficiency is challenged for the first time on appeal.
6. **Evidence.** Evidence examined, and *held* sufficient to sustain the plea of usury.

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

J. A. Douglas and *Guy Laverty*, for appellants.

C. I. Bragg and *E. J. Clements, contra.*

KIRKPATRICK, C.

On the 4th day of September, 1886, Priscilla Dunn procured a loan of $600 from the American Investment

Company. A note and mortgage were executed to P. O. Refsil, who seems to have been acting as a trustee for the investment company. A mortgage was given on certain lands in Garfield county to secure the loan. Soon after the note and mortgage were made, they were sold to the trustees of the estate of William S. Pierson. Subsequently, and after the commencement of this foreclosure proceeding, the trustees died, this cause having been revived in the name of the present appellants.

The defense interposed by the appellees is that the contract for the loan was usurious. The trial court so found, and the cause is brought to this court on appeal. The correctness of the judgment of the trial court is challenged upon three grounds: First, that the trial court erred in adjudging the contract usurious; second, that, even if it is usurious, appellees failed to establish this defense by competent evidence; third, that, in any event, the note and mortgage were sold long before maturity, for value, in the usual course of business, and, for that reason, the defense of usury can not be successfully interposed.

Regarding the contention last mentioned, it is disclosed that the mortgage contains a provision in the language following: "It is further agreed that, in case any taxes or assessments shall be levied against the legal holder of this indebteness on account of this loan, within the state or territory in which the property mortgaged shall be situate, the said party of the first part agrees to pay the same." The note and mortgage were executed on the same day, and are parts of the same transaction, and must be construed together. In the case of *Consterdine v. Moore*, 65 Neb. 296, this court had under consideration a mortgage containing a condition identical in language with that quoted above; and in that case it was expressly held, that such a provision in a mortgage rendered the note which it secured, the note and mortgage being parts of the same contract, nonnegotiable. To the same effect is *Garnett v. Meyers*, 65 Neb. 287. We are content with the doctrine announced in these cases, and upon their

authority the note in controversy is nonnegotiable, and it follows that appellants are in no better position than the payee named in the note.

The first question argued by appellants, and mentioned as first in this opinion, is, whether the transaction as detailed by appellees is, in fact, usurious. The testimony discloses that appellees desired a loan of $600. There is some uncertainty under the evidence, whether the written application for the loan signed by appellees was for $600 or for $690. But, in any event, appellees only desired a loan of $600, and this is the amount of money received. The note and mortgage which appellees executed were for $690, and drew interest at the rate of 7 per cent. per annum. The interest paid by appellees was $48.30 a year, or a total for 5 years of $241.50. Add to this the $90 which was added to the face of the note as principal, and which appellees never received, and it will make the interest on the $600 for 5 years $331.50; or $31.50 more than 10 per cent. interest on $600 for 5 years.

It is contended on behalf of appellants that adding the $90 to the principal was simply taking 3 per cent. in advance for the 5 years, and that under the statute this is permissible. We do not think that the contention made can be sustained under the statute fixing the rate of interest that may be charged. Section 1, chapter 44, Compiled Statutes (Annotated Statutes, 6725), concerning interest, is in the following language: "Any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods or things in action; which rate of interest so agreed upon may be taken yearly, or for any shorter period, or in advance, if so expressly agreed." This section authorizes the taking of interest annually, or for a shorter period, or in advance, if expressly so agreed; but we fail to find therein any authority for taking interest for 5 years in advance. The $90 added to the note as principal, together with 7 per cent. on the $600, which appellees actually received,

would just equal 10 per cent. on the $600 loan for the period of 5 years. By the terms of the contract entered into between the parties, the mortgagee each year received $6.30 upon the $90 added to the face of the note, and which appellees had never received—more than 10 per cent. This was a mere device to enable the payee to collect more than 10 per cent. interest on the money loaned, and taints the transaction with usury.

We have made a careful examination of the authorities cited by appellants and find none which sustain the doctrine contended for, so that we do not deem an extended discussion of the cases necessary. It is quite clear that under our statute the taking of interest for more than one year in advance is unauthorized, if by such action more than 10 per cent. interest is received.

It is finally contended that, even though usury did in fact exist in the transaction, yet, the burden of establishing that fact is upon the appellees, and that they have failed in the proof. From a careful examination of the entire record, we are of opinion that the finding of the trial court upon that question is clearly right. On the oral argument of the cause, it was contended by appellants that the answer filed in the case is insufficient as a plea of usury. This question is not presented in the briefs, and seems not to have been brought to the attention of the trial court. Under this state of the facts, the answer will be liberally construed, with a view to upholding it as stating a good defense, and, so construed, it is sufficient as a plea of usury. From an examination of the entire record, we are convinced that the judgment of the trial court is right. It is therefore recommended that the judgment be affirmed.

DUFFIE and LETTON, CC., concur.

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

AFFIRMED.

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3. A mortgage securing a note containing a provision that, in case taxes shall be levied against the legal holder of the indebtedness on account of the loan, the party of the first part will pay the same, renders the note nonnegotiable. *Allen v. Dunn*..... 831
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1. Where a part of an act is unconstitutional, the invalid portion has no legal force. *State v. Insurance Co.* 335
2. The provision of section 33, chapter 43, Compiled Statutes, 1873, providing for a reciprocal tax on foreign insurance companies, is a valid exercise of legislative power. *State v. Insurance Co.* 320
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4. That the exaction may not be demanded in advance does not change the principle justifying the levying of such tax, and the imposition of such tax in no way violates the provisions of section 1, article IX of the constitution. *State v. Insurance Co*..... 320

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7. A legislative act should not be declared unconstitutional, unless it is so clearly in conflict with some provision of the fundamental law that it can not stand. *State v. Nolan*.... 136

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9. Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless made necessary by the evident intent of the legislature. *Schafer v. Schafer*..... 708

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12. Chapter 69, laws 1899, an act to provide for the registration, leasing, selling and management of educational lands, and "to repeal chapter 80, Compiled Statutes of 1897," in terms repeals the chapter referred to, but reenacts certain sections thereof, the subjects of which are not within its title. *Held*, That such sections continue in force. *State v. Sams*.. 669

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2. Want of mutuality is no defense, even in an action for specific performance, where the party not bound has performed all of the conditions of the contract. *Dickson v. Stewart* 424

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2. The state may impose on a foreign corporation, as a condition of doing business in the state, any conditions and restrictions not repugnant to fundamental laws. *State v. Insurance Co*..... 320

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18. Where a prisoner has been found guilty on a criminal charge, and the only error that appears on the record is the failure of the court to pronounce a legal judgment, the supreme court has the power to remand the case to the district court with instructions to render judgment on the verdict in the manner provided by law. *McCormick v. State* 505

19. Confinement in the penitentiary under a void sentence is in no sense a part execution of a legal sentence; and, by the rendition and execution of a legal judgment, the accused is not twice punished for the same offense. *McCormick v. State* 505

20. An ineffectual attempt of the district court to render a judgment on a verdict does not deprive that court of the power to pronounce a valid judgment against the accused. *McCormick v. State* 505

Damages. See ACTION, 1-3. MUNICIPAL CORPORATIONS, 7.

In an action against a county for death, damages are limited to pecuniary compensation for injuries resulting to the next of kin. No damages can be given on account of bereavement or mental suffering. An instruction which does not limit the assessment of damages to the pecuniary injury sustained is erroneous. *Johnson County v. Carmen* 682

Deeds. See EVIDENCE, 9, 10.

Demurrer. See PLEADING AND PRACTICE, 7-10.

Depositions.

1. A county judge has the same power in taking depositions that is conferred by law upon a notary public, including authority to commit a witness for contempt. *Olmsted v. Edson* 17

2. A petition against a county judge to recover damages for false imprisonment, based on such a commitment, must allege facts from which it appears that the officer proceeded without jurisdiction, or that the evidence sought to be elicited was of such a nature as to justify a refusal to testify. *Olmsted v. Edson* 17

Descent and Distribution. See EXECUTORS AND ADMINISTRATORS. HOMESTEAD.

1. The interest of a vendee in possession of real estate under a contract of sale descends to his heirs. *Cutler v. Meeker* .. 732

Descent and Distribution—*Concluded.*

2. Under the decedent law, a nonresident who claims under a will which has never been probated in this state, is not a necessary party to a suit against the heirs to subject the land to payment of the claims of creditors. *Coulson v. Saltsman* 495

3. Under section 34, chapter 23, Compiled Statutes, 1903, oral testimony is incompetent to prove advancements. *Boden v. Mier*..... 191

4. In the distribution or partition of an estate, a debt due from a distributee, which is barred by the statute of limitations, can not be deducted from the share of such distributee. *Boden v. Mier*..... 191

Divorce.

1. When a wife, without cause, refuses to live with her husband, and the evidence shows that she did not assist in or contribute to the accumulation of any of his property, the husband on obtaining a divorce on the ground of desertion, will not be required to pay alimony. *Isaacs v. Isaacs*..... 537

2. The district courts of this state have no jurisdiction of the subject of divorce except such as is given them by the statute. *Aldrich v. Steen*..... 57

3. The residence of one of the parties in the county in which an action for divorce is brought is necessary to the jurisdiction of the court. *Aldrich v. Steen*..... 57

4. A decree of divorce obtained without collusion by a defendant on a cross-bill in a suit begun in a county where neither party resided, but by a resident of the state, whose motion to dismiss the cross-bill for want of jurisdiction was denied, and who contested its allowance at the trial but took no appeal, is not open to collateral attack by his heirs claiming his property. *Aldrich v. Steen*..... 33

5. Sections 1 and 2, chapter 49, laws of 1885, *held* to apply to the commencement of proceedings in the supreme court, and not to repeal section 602 of the code in its application to proceedings commenced in the district court to vacate a decree of divorce. *Schafer v. Schafer*..... 708

6. The provisions of section 602 of the code authorizing a court to vacate or modify a decree or judgment after the term apply to divorce proceedings. *Schafer v. Schafer*.... 708

Domicile.

The general rule is that the domicile of the husband is the domicile of the wife. *Isaacs v. Isaacs*..... 537

Dower. See HOMESTEAD. MORTGAGES, 2.

An unassigned dower interest in land is not the subject of a leasehold contract conveying any interest in the lands. *Jackson v. O'Rorke*..... 418

Easements.

An easement consisting of the right to maintain a mill-pond upon the land of another, does not deprive the owner of the land of any use thereof which does not interfere with the enjoyment of the easement. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co*..... 452

Elections. See CONSTITUTIONAL LAW, 21, 22.

Elevators. See TAXATION, 1-4.

Eminent Domain.

1. Under the constitution, mere passive acquiescence by a land owner in the taking of his property for a public use, not continued for the statutory period of limitations, is not a waiver of his right to compensation therefor and can not be made so by statute. *Kime v. Cass County*..... 680

2. The owner of land attempted to be taken for a public road may enjoin the use of the same for such purpose until his damages have been paid. *Kime v. Cass County*..... 677

Equity. See LANDLORD AND TENANT, 2. TRUSTS, 3.

1. Equity has jurisdiction to supply the omissions and defects of legal procedure, when necessary to the due administration of justice. *Wardell v. Wardell*..... 774

2. Although minors are not bound by contract or estoppel, equity will not aid them to take an unjust advantage of their adversaries. *Tindall v. Peterson*..... 166

Estoppel. See MORTGAGES, 7. REFERENCE, 1.

A party who fails to read a release of claims for damages for personal injuries signed by himself is estopped from claiming that the release is not legal and binding upon him according to its terms. *Osborne v. Missouri P. R. Co*..... 181

Evidence. See ACKNOWLEDGMENT. BANKS AND BANKING, 2. CONTRACTS, 3. CRIMINAL LAW, 4-11. DESCENT AND DISTRIBUTION, 3. LIMITATION OF ACTIONS, 2. MORTGAGES, 8. QUIETING TITLE, 3. REFERENCE, 3. TRIAL. TROVER, 3. WITNESSES.

1. Evidence that minor sons of a deceased were required to devote their time to the support of the family and were unable to attend the public schools, *held* properly admissible in response to evidence that no pecuniary loss had been sustained by those claiming a right to recover for loss of support. *Horst v. Lewis*..... 370

Evidence—*Continued.*

2. Evidence as to the payment of the debts of the deceased from the proceeds of the products raised on the farm, *held* not erroneously admitted. *Horst v. Lewis*..... 370

3. Expert evidence is permitted where the facts are such that the witness is supposed, from his experience, skill and study, to have peculiar knowledge upon the subject of inquiry. *Horst v. Lewis*..... 370

4. The Carlisle table of mortality is admissible in evidence in determining the probable duration of the life of the deceased. *Horst v. Lewis*..... 370

5. Declarations, to be admissible as a part of the *res gestæ*, must accompany and be a part of the transaction in controversy. *Horst v. Lewis*..... 370

6. Where a book contains voluminous accounts, an accountant, who has made an examination of it, may testify as to the result of his computation, but not as to inferences. *Mendel v. Boyd*..... 657

7. Where the question was whether certain drafts had been paid for when issued, an accountant who has examined the books of the bank can not testify as to what they show. *Mendel v. Boyd*..... 657

8. Though the language of a note executed by directors of a corporation imports a personal obligation, it may be shown by parol evidence, on an issue of reformation, that the intention of both the makers and the payee was to execute an instrument binding the corporation. *Western Wheeled Scraper Co. v. McMillen*..... 686

9. Evidence *held* not to show such total want of understanding as to avoid a deed in the absence of fraud or undue influence. *Aldrich v. Steen*..... 33

10. Evidence *held* sufficient to avoid, for undue influence, the deeds concerning all his property, of the value of many thousand dollars, made by a frail old man, who had shown symptoms of dementia, to his housekeeper, without consideration. *Aldrich v. Steen*..... 33

11. Under section 339 of the code the entire conversation on the same subject may be inquired into, or one necessary to make the other fully understood. *Pettis v. Green River Asphalt Co.*..... 513

12. The value of real property can not be shown by proof of independent sales. *Union P. R. Co. v. Stanwood*..... 158

13. When a witness to the value of real estate has testified that he has based his opinion upon sales of other real estate, an offer of evidence of the prices obtained at such sales must

Evidence—*Concluded.*

include an offer to prove that such prices were, in fact, different from what the witness understood them to be. *Union P. R. Co. v. Stanwood*..... 158

14. It is not within the scope of the authority of a hired manager of a hotel to bind his employer by admissions concerning a trespass after it had been committed. *Clancy v. Barker* 83

15. Evidence *held* to warrant the finding of the trial court that an appeal taken by the defendant had not been determined or disposed of. *Bonacum v. Murphy*..... 463

16. Evidence of the omission of a child from a will *held* insufficient to sustain the findings of the trial court. *Brown v. Brown* 200

17. Evidence in a suit for divorce *held* to fully sustain the findings and judgment of the trial court. *Isaacs v. Isaacs*.. 537

18. Evidence in a creditors' suit *held* sufficient to sustain the finding and decree of the trial court. *Coulson v. Saltsman*.. 495

19. Evidence in a foreclosure *held* sufficient to sustain the judgment of the trial court. *Meinhardt v. Newman*..... 532

20. Evidence in an action to construe a will *held* sufficient to sustain the decree of the district court. *Second United Presbyterian Church v. First United Presbyterian Church*.. 563

21. Evidence in an action for an accounting *held* to sustain trial court's finding of amount due. *Dickenson v. Columbus State Bank*..... 260

22. Evidence *held* sufficient to sustain the plea of usury. *Allen v. Dunn*..... 831

23. Evidence in an action for work and labor *held* sufficient to sustain the verdict. *Trumbull v. Frey*..... 754

24. Evidence in an action for work and labor *held* not to sustain the verdict. *Strong v. Eggert*..... 813

25. In an action on a contract, *held* that the verdict and judgment are sustained by the evidence. *Henry v. Dussell*..... 691

Exceptions, Bill of. See JUSTICE OF THE PEACE, 1.

Executors and Administrators. See DESCENT AND DISTRIBUTION.

1. An administrator has no authority to lease the lands of his intestate after the payment of the debts and final settlement of the estate. *Jackson v. O'Rorke*..... 418

2. An order of a county court refusing an application to file a claim against an estate, because presented after the expiration of the time allowed for presenting claims, is a final order from which an appeal to the district court will lie. *Ribble v. Furmin*..... 108

Executors and Administrators—*Concluded.*

3. Where notice of the expiration of the time for presenting claims against an estate was published prior to making the order fixing such time, *held*, that claimant is entitled to an order allowing her claim to be filed and directing a hearing thereon. *Ribble v. Furmin*..... 108

4. A judgment of the district court, upon an appeal from an order denying the filing of a claim against an estate, remanding the cause to the county court, with direction to permit the filing of the claim, is not the proper judgment, but a hearing in the district court on such claim should be had. *Ribble v. Furmin*..... 108

5. A homestead of less value than $2,000 can not be disposed of at administrator's sale, and a license purporting to authorize such a sale is absolutely void. *Tindall v. Peterson*, 160

Exemptions. See INSURANCE, 3.

False Imprisonment. See CRIMINAL LAW, 16.

False Pretenses.

1. To constitute the crime of obtaining money under false pretenses, the pretense or pretenses relied on must relate to a past event or an existing fact. *Cook v. State*..... 243

2. On the trial of one charged with the violation of section 125 of the criminal code, the giving of an instruction that representations as to a future act, with intent to defraud, will render the defendant guilty, is reversible error. *Cook v. State* 243

Foreclosure. See MORTGAGES.

Fraud. See CHATTEL MORTGAGES, 2. VENDOR AND PURCHASER, 1.

The general rule is that, where ordinary prudence would have prevented the deception, an action for fraud will not lie. *Osborne v. Missouri P. R. Co*..... 180

Game. See CONSTITUTIONAL LAW, 19, 20.

Gaming. See MANDAMUS, 7-9.

Guardian ad Litem.

The appointment of a guardian *ad litem* is not a mere matter of form, nor are his duties merely perfunctory. *Boden v. Mier*..... 191

Guardian and Ward.

1. There is a well defined distinction between the privileges accorded to parents and guardians in their communications with children and wards, with reference to their domestic relations, and that which exists between strangers. *Trumbull v. Trumbull*..... 186

Guardian and Ward—*Concluded.*

2. Where advice is given by a guardian, which leads to a separation by the ward from husband or wife, the presumption is that the advice was given in good faith. *Trumbull v. Trumbull* 186

3. In a suit against a guardian for damages for alienation of affections of a ward, it is a good defense that he advised the ward from honest motives. *Trumbull v. Trumbull*.... 186

4. A guardian may lease the ward's lands for the term of his guardianship, but any excess in such lease will be void at the election of the ward on attaining his majority. *Jackson v. O'Rorke*..... 418

Highways. See EMINENT DOMAIN.

1. Act of February 25, laws 1875, page 190, *held* to have no relation to the protection of users of highways against unconfined hogs. *Heist v. Jacoby*..... 395

2. One permitting young hogs to go at large upon his own premises, so that they wander across the highway and frighten a passer's horse, *held* not liable for injuries to the passer's equipage and person produced by such fright. *Heist v. Jacoby*..... 395

3. If the public has acquired no right by prescription or dedication to a way across the land of an individual, the court may examine the proceedings by which it was attempted to lay out a highway across the same, to ascertain whether or not the county board had jurisdiction to act, and the lapse of time alone will not supply a jurisdictional defect in the proceedings. *Peterson v. Fisher*..... 238

Homestead. See EXECUTORS AND ADMINISTRATORS, 5. MORTGAGES, 1.

1. The county court has jurisdiction to assign dower and homestead. *Tyson v. Tyson*..... 438

2. In order to oust the county court of such jurisdiction, the right of the widow must be disputed by an issue of fact, which the county court is unable to try. *Tyson v. Tyson*... 438

3. In a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and $2,000 in value. *Tyson v. Tyson*..... 438

4. The acknowledgment by both husband and wife of an instrument to convey or incumber a homestead is necessary. *Solt v. Anderson*..... 82

5. When a husband dies possessed of a tract of land occupied as a homestead, but which exceeds the value of $2,000, and the homestead can not be set apart from the residue of the tract, the district court has jurisdiction to decree a sale of

Homestead—*Concluded.*

the whole tract, reserving $2,000 of the proceeds for the widow and heirs. *Wardell v. Wardell*..... 774

6. Where the homestead of a decedent can not be set apart from the residue of a tract of land, no legal estate passes to the widow and heirs under the homestead act, but in lieu thereof an equitable interest to the value of $2,000. *Wardell v. Wardell*..... 774

7. A homestead may be composed of contiguous parts of different governmental subdivisions. *Tindall v. Peterson*.... 160

Homicide.

1. Where one points a loaded pistol at another, although he has reason to think it is not loaded, he is guilty of an assault; and if the person assaulted is killed thereby, he is guilty of manslaughter. *Ford v. State*..... 246

2. Instructions in case of accidental shooting *held* properly refused. *Ford v. State*..... 246

3. A defendant in a prosecution for murder is entitled to have the theory of his defense submitted to the jury by proper instructions; but where, by his own theory, he is guilty of manslaughter, his rights are not prejudiced by a failure to give his instructions. *Ford v. State*..... 246

4. Where a defendant, in sport or through wantonness, pointed a pistol at the deceased, and a shot followed which killed him, *held*, that a sentence of seven years was excessive. *Ford v. State*..... 246

5. Where all of the elements necessary to constitute murder in the first degree are proved, a verdict of guilty will not be set aside because the state did not establish a motive for the commission of the crime. *Robinson v. State*..... 142

Husband and Wife. See GUARDIAN AND WARD, 1-3.

1. While antenuptial agreements may essentially alter the interest which either the husband or wife takes in the property of the other, they can not vary the terms of the conjugal relation itself. *Isaacs v. Isaacs*..... 537

2. An antenuptial agreement by a man about to be married that after marriage he will reside in a particular state can not be enforced. *Isaacs v. Isaacs*..... 537

3. The wife is bound to follow her husband when he changes residence, if such change is made in good faith. *Isaacs v. Isaacs*..... 537

4. When a wife, without just cause, refuses to live with her husband, he is not required to contribute to her support. *Isaacs v. Isaacs*..... 537

Infants. See EQUITY, 2.

Injunction. See EMINENT DOMAIN, 2. INSURANCE, 4, 5, 8-10. RELIGIOUS SOCIETIES, 2. TRUSTS, 3. WATERS, 2-6.

Innkeepers.

1. A hotel keeper impliedly undertakes that a guest shall be treated with due consideration for his comfort and safety. *Clancy v. Barker* 83
2. A trespass committed upon a guest in a hotel by a servant of the proprietor is a breach of such implied undertaking, for which the proprietor is liable in damages. *Clancy v. Barker* 83
3. It is the duty of a hotel keeper to protect his guests while in his hotel against the assaults of employees. *Clancy v. Barker* 91

Instructions. See APPEAL AND ERROR, 7. CRIMINAL LAW, 12-15. DAMAGES. FALSE PRETENSES, 2. HOMICIDE, 2. PARTNERSHIP, 2. TRIAL.

1. Instructions in a prosecution for kidnapping *held* to have been properly given. *Gould v. State* 651
2. Instructions requested, given and refused in an action on a contract, *held* not prejudicial. *Henry v. Dussell* 691
3. Instructions in an action for damages against a city *held* to be without prejudice. *City of South Omaha v. Ruthjen* .. 545
4. Instructions in an action for alienation of affections *held* prejudicial. *Trumbull v. Trumbull* 186
5. Instructions in an action for personal injuries *held* to be erroneous and prejudicial to the defendant. *Cudahy Packing Co. v. Roy* 600
6. Instructions in an action for damages for injuries sustained by the flooding of the basement of a storeroom *held* prejudicial. *McAdams v. City of McCook* 789
7. An instruction not warranted by the pleadings or evidence will require a reversal of the judgment. *McAdams v. City of McCook* 789

Insurance. See CONSTITUTIONAL LAW, 1-6. CORPORATIONS, 2. STATUTES, 9. TAXATION, 5-7.

1. The business of insurance is not interstate commerce. *State v. Insurance Co* 348
2. An action upon a benefit certificate or insurance policy is transitory and not local in its nature. *Perrine v. Knights Templar's & Masons' Life Indemnity Co* 267
3. Under the provision of section 97, chapter 43, Compiled Statutes, the proceeds of a certificate of a fraternal benefit association are not, before payment to the person entitled thereto, liable for any debt of a certificate holder, or of any beneficiary named in such certificate. *Coleman v. McGrew* .. 801

Insurance—*Continued.*

4. When a fraternal beneficial association refuses and neglects to comply with any of the provisions of the statute, it is the duty of the auditor to notify the attorney general in writing, and the duty of the attorney general to immediately commence an action against such society to enjoin the same from carrying on any business. *State v. Bankers Union of the World*..... 622

5. When, in such action, it appears that any of said causes exist, the court must enjoin the defendant from transacting business until such violation complained of shall have been corrected. *State v. Bankers Union of the World*..... 622

6. When such violation complained of shall have been corrected, and costs are paid, it is the duty of the auditor to reinstate such defendant. *State v. Bankers Union of the World* 622

7. A fraternal beneficial association must have a representative form of government. The directors or other officers must be chosen by the members. *State v. Bankers Union of the World*..... 622

8. Diverting the funds of the society from the purposes for which they are contributed is a violation of the statute and will be enjoined. *State v. Bankers Union of the World*.... 622

9. All claims for death losses must be included in the annual reports to the auditor. A failure to make such report as the statute requires is sufficient cause for enjoining the society from transacting business. *State v. Bankers Union of the World*..... 622

10. The books and records of such society must show the true condition of its business and finances, and if they fail to do so, or if the society fails to report to the auditor the details of its business and financial affairs required by the statute, the society will be enjoined from doing business. *State v. Bankers Union of the World*..... 622

11. Such societies are not allowed to take members who are above the age limit, nor without medical examination, and to do this indirectly by the purchase of the business and risks of another similar society, and consolidating such society with itself, is a violation of law. *State v. Bankers Union of the World*..... 622

12. Such a society can not be said to be insolvent when it is reasonably probable that, by its authorized assessments, it can provide sufficient funds to meet its just liabilities. *State v. Bankers Union of the World*..... 622

13. Under the pleadings and evidence, *held* that it is not a case for the appointment of a receiver and winding up the af-

Insurance—*Concluded.*

fairs of the society; but, to secure a correction of abuses and irregularities, the defendant is enjoined, under section 16, chapter 47 of the laws of 1897, from transacting business until the law is complied with in the matters specified. *State v. Bankers Union of the World*..... 622

Interest. See JUDGMENT, 4.

1. Payments are first applied to discharge interest, and if there be a surplus, such surplus is applied to sink the principal. *Dickson v. Stewart*..... 424
2. Where the plaintiff in an action does not pray for interest, none can be recovered. *City of South Omaha v. Ruthjen*.. 545

Intoxicating Liquors.

1. Persons engaged in selling intoxicating liquors under license in this state are jointly and severally liable for all damages arising from such traffic, and such liability extends to the sureties upon their bonds. *Horst v. Lewis*..... 365
2. All such persons and sureties may be joined in a single action and, if a part of them do not reside in the county in which the action is brought, summons may be served upon them elsewhere. *Horst v. Lewis*..... 365
3. A brewing corporation may become liable as surety upon a liquor license bond, executed by it to induce the licensee to lease a building from it and deal exclusively in its products. *Horst v. Lewis*..... 365
4. All dealers in intoxicating liquors who contribute to the intoxication of an individual which causes his death, and the sureties on their bonds, may be joined in one action to recover for loss of the means of support by those who have suffered injury by reason of the death of such individual. *Horst v. Lewis*..... 370
5. Under the provisions of section 1, chapter 50, Compiled Statutes, the licensing board, upon an application to grant a liquor license, must pass upon the character and standing of the applicant, and the board is without authority to delegate these functions to another by issuing the license in the name of one shown to be not the real party in interest. *In re Application of Tierney*..... 704
6. A wife, living with her husband on land, the title to which is in the latter and which is occupied by them as a family homestead, is not a freeholder within the meaning of section 25, chapter 50, Compiled Statutes, regulating the sale of intoxicating liquors. *Campbell v. Moran*..... 615

Judgment.

1. When a creditor's bill is brought to set aside a cloud upon the title of property seized in an attachment suit against

Judgment—*Concluded.*

a nonresident debtor, the court will look at the entire record in the attachment case to see whether jurisdiction was obtained therein. If from all the affidavits the essential facts to confer jurisdiction appear, the judgment will not be declared void. *Jones v. Danforth*..... 722

2. A judgment rendered without substituted service on the defendant in an attachment case against a nonresident, whose property has been seized in this state, is merely erroneous and not void. *Jones v. Danforth*..... 722

3. If service of summons has actually been made upon a defendant and the time to answer has elapsed before judgment, the fact that an error was made in the return day of the summons is merely an irregularity. *Jones v. Danforth*, 722

4. A public officer who has by mandamus compelled the payment of the principal of his salary can not afterwards recover interest thereon. *Gordon v. City of Omaha*..... 570

5. When the record affirmatively shows the nonexistence of some fact necessary to the jurisdiction of the court over the subject matter of the action, a judgment pronounced therein will be void and may be collaterally attacked. *Aldrich v. Steen*..... 57

6. The dismissal of an application made by a nonresident defendant to open a decree under the terms of section 82 of the code for want of notice, when such dismissal is based on defects in the answer tendered, does not bar a new application in which such defects are remedied. *Oakes v. Ziemer* 65

7. A dismissal bars another on the same grounds as the first, unless it affirmatively appears from the record that such matters were not considered on their merits. *Oakes v. Ziemer* 65

8. In an action for conversion, a plea of *res judicata* against plaintiff's title is not sustained by proof that plaintiff, who was made defendant in an attachment case, but against whom no judgment was rendered, had moved to discharge the attachment. *Fred Krug Brewing Co. v. Healey*..... 662

9. A ruling made upon a motion to dissolve an attachment is not *res judicata* against one who is dismissed by the final judgment entered in the action. *Fred Krug Brewing Co. v. Healey*..... 667

10. Where, upon appeal in equity, the decree is reversed and the cause remanded for further proceedings upon amended pleadings, nothing has become *res judicata*. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.* 452

Jurisdiction. See APPEARANCE. CRIMINAL LAW, 3. DIVORCE, 2, 3.

1. Where jurisdiction has not been obtained by due service of process, a court acquires no jurisdiction over minor defendants by the appointment of a guardian *ad litem*, and the filing of an answer by such guardian. *Boden v. Mier*... 191
2. When a party who has made a special appearance in an action asks for affirmative relief, he thereby makes a general appearance and subjects himself to the jurisdiction of the court. *Montague v. Marunda*..... 805

Jury. See BILLS AND NOTES, 2. CONSTITUTIONAL LAW, 13. MASTER AND SERVANT, 4. SALES, 1. TRIAL, 13.

Justice of the Peace.

1. The affidavits upon which a justice of the peace decides an objection to his jurisdiction can not, on error to the district court, be reviewed, unless incorporated in a bill of exceptions. *Zeigler v. Sonner*..... 501
2. Upon error from a judgment of a justice of the peace to the district court, if error does not affirmatively appear in the proceedings, the judgment should be affirmed. *Zeigler v. Sonner* 501

Kidnapping. See CRIMINAL LAW, 17.

Landlord and Tenant.

1. In the absence of a statute providing otherwise, unless such demand is waived by the terms of the lease, a demand of rent on the day it becomes due is necessary to work a forfeiture of the lease for nonpayment. Lease *held* to contain no waiver of such demand. *Godwin v. Harris*..... 59
2. When a court of equity has taken cognizance of a case involving the right of rival claimants to the possession of leased premises, it has full power to place the party entitled thereto into possession. *Gaffey v. Northwestern Mutual Life Ins. Co*..... 304

Liens. See CHATTEL MORTGAGES.

Life Estates.

1. A life tenant who pays off an incumbrance is entitled to be reimbursed by the remainderman. Rule for computing amount. *Tindall v. Peterson*..... 166
2. A life tenant who has paid off an incumbrance upon the fee is entitled to reimbursement from the remaindermen. *Tindall v. Peterson*..... 160

Limitation of Actions. See MORTGAGES, 2, 6. PLEADING AND PRACTICE, 4.

1. A part payment operates to revive a contract debt, barred by the statute of limitations, of its own vigor and not as

Limitation of Actions—*Concluded.*

evidence of an acknowledgment or new promise. *Ebersole v. Omaha Nat. Bank*..... 778

2. Evidence in an action on notes *held* insufficient to support the defense of the statute of limitations. *Ebersole v. Omaha Nat. Bank*..... 778

3. Where undue influence is alleged and shown to have continued to the grantor's death, the statute of limitations against an action to set aside his deeds will not commence to run until his death as against his heirs. *Aldrich v. Steen*, 33

4. The recording of a fraudulent deed is not of itself sufficient to charge all parties with notice of the fraud. When accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry which, if pursued, would lead to the discovery of the fraud, the statute begins to run from the recording of the deed, but not otherwise. *Jones v. Danforth*..... 722

5. Where, after conveyance of property by sheriff's deed, the premises are leased by the purchaser to the mortgagor, possession of any portion of the property derived by third persons from the tenant will not stop the running of the statute of limitations in favor of the lessor's title. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co*..... 452

Liquors. See INTOXICATING LIQUORS.

Mandamus.

1. The levy of a tax under the provisions of sections 1 to 5 inclusive of article VI, chapter 77, Compiled Statutes, with which to satisfy a judgment against a municipality, will not be enforced by a writ of mandamus where such proposed levy is in excess of constitutional or statutory limitations. *State v. Royse*..... 1

2. In an action to compel the levying of a tax to satisfy a judgment against a city, a court will look behind the judgment and ascertain the nature of the indebtedness on which it is based, in order to determine the limit of the tax which may be levied for its satisfaction. *State v. Royse*..... 1

3. Where judgments have been obtained against a city of less than 5,000 population, for hydrant rentals, by a water works company operating under an ordinance and statute limiting a levy of tax for such purposes to a rate not exceeding 7 mills on the dollar valuation, and such tax has been levied, the court will not compel an additional levy for the satisfaction of such judgments. *State v. Royse*..... 1

4. A demurrer to the answer to a writ of mandamus will be

Mandamus—*Concluded.*

overruled if the writ fails to show refusal or neglect to perform an official duty. *State v. Sams*..... 669

5. It is not error to dismiss the action and render judgment against relator for costs upon overruling a demurrer to a writ of mandamus which fails to show neglect or refusal of official duty, when no offer or request for leave to amend the writ is made. *State v. Sams*..... 669

6. When one, whose term as a public officer has expired, has made full report of the public moneys which came into his hands, but retains some of them under a claim of right, alleged to be unlawful, mandamus is not a proper action by which to litigate the claim. *Maurer v. State*..... 24

7. That one of two relators asking a mandamus admits that his motive in assailing a pool room was the belief that a certain citizen was interested in its profits, is no ground for reversing a judgment in favor of the relators. *Moores v. State* 522

8. Only in a clear case of abuse of discretion will the granting of a mandamus to a city be reversed. *Moores v. State*,... 522

9. Where a number of prosecutions have failed to bring about the closing of a public gambling house, the existence of the remedy by complaint and arrest of the offenders will not prevent a writ of mandamus to require the mayor and chief of police of a metropolitan city to use their summary powers to prevent such open violation of law. *Moores v. State* 522

Manslaughter. See HOMICIDE, 1-4.

Marriage.

Mental weakness or even unsoundness, not proceeding to the extent of inability to contract in ordinary affairs, will not alone avoid a marriage. *Aldrich v. Steen*..... 33

Master and Servant.

1. A bell boy in a hotel and the elevator boy in charge of the elevator, both being employed and subject to the directions of the same master, are fellow servants. *Kitchen Bros. Hotel Co. v. Dixon*..... 293

2. Petition *held* to charge negligence to the acts of a fellow servant. *Kitchen Bros. Hotel Co. v. Dixon*..... 293

3. If a servant's injury is the direct result of his own disobedience of orders given by one in charge of the work in which he is engaged, he is guilty of contributory negligence and is not entitled to recover therefor. *Western Mattress Co. v. Ostergaard*..... 572

4. When there is evidence that an employee disobeyed the

Master and Servant—*Concluded.*

orders of his superior, and that obedience to the order would have avoided the injury of which he complains, the question of whether the orders were given should be submitted to the jury. *Western Mattress Co. v. Ostergaard*.... 572

5. A master is bound to use such care as the circumstances demand to see that appliances furnished his servants are reasonably safe. He is not liable for defects of which he has no notice, unless the exercise of ordinary care would have resulted in notice. *Cudahy Packing Co. v. Roy*..... 600

6. The relation of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment. *Clancy v. Barker*..... 91

Mortgages. See BILLS AND NOTES, 3, 4.

1. One who has fraudulently executed and put in currency a mortgage upon his homestead can not, in an action to foreclose the instrument, gain any advantage by his own wrong. *Pittman v. Mann*..... 257

2. A mortgagee obtained a decree of foreclosure in the year 1877, but there was no adjudication of dower. In 1901 a supplemental cross-petition was filed asking that the mortgagor's wife be decreed to pay the balance due on the mortgage, or be barred of her dower right. *Held*, That the attempted proceedings were barred by the statute of limitations. *Du Bois v. Martin*..... 577

3. Where notes are barred by the statute of limitations at the time of the commencement of foreclosure proceedings, a mortgagee is not entitled, under the provisions of section 847 of the code as it existed prior to the legislative act of 1897, to a deficiency judgment, after a sale of the mortgaged property. *Cady v. Usher*..... 236

4. Where a sheriff's deed, made as the result of foreclosure of a mortgage, conveys mill property with the appurtenances, easements used by the mortgagor pass therewith. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co*..... 452

5. Upon the foreclosure of a mortgage and sale thereunder, the district court has power to bring in all parties necessary to a determination of the ownership of the surplus. *Montague v. Marunda*..... 805

6. An action to redeem may be brought at any time before the statutory bar of ten years is complete. *Dickson v. Stewart*, 424

7. A purchaser at a judicial sale of lands offered subject to apparent liens, who makes no attempt to have them adjudicated until after confirmation and conveyance, is es-

Mortgages—*Concluded.*

topped to impeach them. *Omaha Loan & Trust Co. v. City of Omaha*..... 781

8. Where a party acquires title by purchase at a sheriff's sale, in pursuance of a parol agreement that he is to hold the title as security for the money paid, parol evidence is admissible to show the deed to be a mortgage. *Dickson v. Stewart* 424

Municipal Corporations. See BONDS. MANDAMUS, 1-3, 8.

1. A levy of a special assessment is not invalidated because the city council, sitting as a board of equalization under the provisions of section 132, chapter 12*a*, Compiled Statutes, 1893, after meeting in pursuance of notice take a recess, provided, the city clerk or some member of such board is present to receive complaints. *John v. Connell*.... 10

2. Where a board of equalization, in pursuance of published notice, meets at the office of the city clerk, organizes, transacts some business and then takes a recess, subject to the call of the chairman before expiration of the time mentioned in the notice, it will be presumed that the city clerk remained present at his office to receive complaints and give information. *John v. Connell*..... 10

3. A finding by a board of equalization that all real estate on which special assessments are levied are specially benefited, *held* not so fatally defective as to invalidate the special assessment and render it subject to collateral attack. *John v. Connell*..... 10

4. Section 69, chapter 12 of the laws of 1887, does not authorize the issue of negotiable bonds by cities and villages to aid private parties in the construction of a system of waterworks for such city or village. *Village of Grant v. Sherrill*, 219

5. The provisions of subdivision 15, section 69, article I, chapter 14, Compiled Statutes, 1887, empowering cities of less than 5,000 population to levy a tax of not exceeding 7 mills on the dollar valuation, for hydrant rentals or water furnished such city or village under contract, is a limitation on the taxing power to raise revenue to satisfy an indebtedness created for such purposes. *State v. Royse*..... 1

6. When a city makes provision by sewers or drains for carrying off surface water, it may not discontinue the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains. *McAdams v. City of McCook*..... 789

7. Damages are not recoverable against a metropolitan city because of delay or neglect of its mayor and council in the performance of a ministerial duty. *Gordon v. City of Omaha*, 570

Municipal Corporations—*Concluded.*

8. The statutes require the mayor and chief of police of a metropolitan city to actively interfere to prevent or stop open violations of law. *Moores v. State*..... 522

9. The legislature may, by statute, confer upon the governor the power to appoint the board of fire and police commissioners for cities of the first class. *State v. Nolan*..... 136

Murder. See HOMICIDE, 5.

Negligence. See CARRIERS, 4. MASTER AND SERVANT.

New Trial. See PLEADING AND PRACTICE, 11.

Notice.

The requirement of the statute that notice of the sitting of the board of equalization shall be published in three daily papers is met by the publication of such notice in two daily papers printed in the English language and one printed in the German language, when these are all the daily papers published in the city. *John v. Connell*..... 10

Parties. See COURTS, 1. DESCENT AND DISTRIBUTION, 2. MORTGAGES, 5.

Section 50*a* of the code, which provides for intervention before trial, does not curtail the power of a court to bring other parties before it, when their presence is necessary to a proper determination of the cause. *Brown v. Brown*..... 200

Partition.

Where an action in partition involves an accounting it is the duty of the trial court to state the account, so that an appellate court may form a judgment as to whether the conclusion reached is justified by the law and the evidence. *Baldrige v. Coffman*..... 286

Partnership.

1. A partner's share of a single transaction may be recovered by an action at law, if all the other partnership dealings are settled. *Dorwart v. Ball*..... 173

2. When plaintiff's evidence tends to establish such a state of facts it is error to direct a verdict for defendant. *Dorwart v. Ball*..... 173

Petition. See PLEADING AND PRACTICE.

Pleading and Practice. See COUNTIES AND COUNTY OFFICERS, 11. CRIMINAL LAW, 16. MANDAMUS, 4. MASTER AND SERVANT, 2. QUO WARRANTO. TRIAL. VENUE, 2. WATERS, 2-5.

1. The allowance of amendments to an answer is not an abuse of discretion, even though a demurrer to the answer has been overruled, where opportunity is given to produce additional proof, and the amendments are as to material facts

Pleading and Practice—*Concluded.*

of which there is evidence. *Dickenson v. Columbus State Bank* 260

2. An answer will be liberally construed if its sufficiency is challenged for the first time on appeal. *Allen v. Dunn*..... 831

3. In an action against a county for damages caused by the giving way of a bridge, the petition contained a general statement that the bridge was "out of repair and unsafe." *Held*, That a motion for a more specific statement should be sustained. *Johnson County v. Carmen*..... 682

4. The filing of an amended petition in an action for conversion against a bailee for sale, *held* not to be the commencement of a new action, so as to permit the statute of limitations to interpose as a bar between the filing of the original petition and the amendment. *Gourlay v. Prokop*.. 607

5. In an action for conversion, *held* that the amended petition does not state a new and different cause of action from that attempted to be stated in the bill of particulars and the original petition. *Gourlay v. Prokop*..... 612

6. Petition *held* not sufficient to authorize the court to appoint a receiver for a corporation. *Smiley v. Sioux Beet Syrup Co.* 586

7. Petition in an action on an indemnifying bond *held* not subject to demurrer upon the ground of improper joinder of causes of action. *Omaha Gas Co. v. City of South Omaha*, 115

8. Petition in an action to recover a broker's commission *held* not to state facts sufficient to entitle plaintiff to any relief. *Danielson v. Goebel*..... 300

9. Petition in an action for conversion *held* to state a cause of action. *Fred Krug Brewing Co. v. Healey*..... 662

10. Petition in an action on a real estate broker's contract *held* not to state a cause of action. *Covey v. Henry*..... 118

11. Petition for a new trial under the provisions of section 602 *held* to state a cause of action. *Schafer v. Schafer*..... 708

12. Where the plea of *ultra vires* is interposed by a corporation in its answer, facts not inconsistent with the petition may be pleaded in the reply to show that the corporation was empowered to enter into the contract, the obligation of which is sought to be avoided. *Horst v. Lewis*..... 370

13. A failure to state a cause of action in the petition can not be cured by averments in the reply. *Covey v. Henry*..... 118

14. In an action at law, a prayer for equitable relief is of no avail, unless the petition states facts which will authorize the court to grant such relief. *Emanuel v. Barnard*..... 756

Police Judge. See STATUTES, 2.

Principal and Agent. See AGENCY. REAL ESTATE AGENTS.

1. An agency is not revoked for all purposes by the death of the principal. *Meinhardt v. Newman*..... 532
2. In order to exempt an agent from liability upon a negotiable note executed by him within the scope of his agency, he must not only name his principal, but he must express that the writing is the act of the principal. *Western Wheeled Scraper Co. v. McMillen*..... 686
3. An agent who, in good faith and without negligence, acts upon his own understanding of faulty or ambiguous instructions, is not liable in damages to his principal, although his interpretation of them may be erroneous. *Falsken v. Falls City State Bank*..... 29

Process. See INTOXICATING LIQUORS, 2. VENUE, 1.

1. Section 22, chapter 20, Compiled Statutes, does not authorize the county court to order personal service on a nonresident minor, no affidavit that service can not be made in this state being on file. *Boden v. Mier*..... 191
2. Personal service outside the state, in pursuance of section 81 of the code, is a nullity, in the absence of an affidavit for service by publication. *Boden v. Mier*..... 191

Quieting Title.

1. In a suit to quiet title, plaintiff showed adverse possession for 10 years. *Held*, That plaintiff was entitled to a decree. *City of South Omaha v. Meehan*..... 230
2. Where one goes upon land as a mere intruder, he can acquire title by adverse possession only to so much of the land as he actually occupies and uses for the period prescribed by statute. *City of South Omaha v. Meehan*..... 230
3. Evidence in an action to quiet title *held* sufficient to sustain a decree for plaintiff to so much of the land as she is shown to have used and occupied. *City of South Omaha v. Meehan*, 230

Quo Warranto.

An answer in quo warranto, which alleges that respondents are holding office by lawful appointment, under the provisions of a legislative act, and which sets forth the facts in relation thereto, is sufficient to put the validity of such act in issue. *State v. Nolan*..... 136

Rape. See CRIMINAL LAW, 1, 2.

Real Estate Agents.

1. A verbal contract with an agent to sell land for the owner or to obtain a purchaser therefor is void. *Covey v. Henry*.. 118
2. Services as a real estate broker rendered for the owner of the land, without a written contract, can not be

Real Estate Agents—*Concluded.*

recovered for, as such, upon a *quantum meruit*. *Blair v. Austin* 401

3. Under the provisions of section 74, chapter 73, Compiled Statutes, 1901, a contract for the sale of land between the owner thereof and an agent must be signed by the owner and broker, must contain a description of the land, and set forth the amount of compensation the agent is to receive for negotiating a sale, or it will be void and furnish no basis for recovery. *Danielson v. Goebel*..... 300

Receivers. See CORPORATIONS, 4. INSURANCE, 13.

The appointment of a receiver in an equitable action is an ancillary remedy and incidental to the main object or purpose of the suit. *Smiley v. Sioux Beet Syrup Co*..... 586

Reference.

1. Where parties consent that the report of a referee shall be submitted to the court for determination on the merits, they are precluded from assigning error by the court in substituting therefor the findings of the court. *Hodges v. Graham* 125

2. In such case this court will only consider the correctness of the findings and judgment of the district court. *Hodges v. Graham*..... 125

3. Evidence *held* to sustain the findings and judgment of the district court. *Hodges v. Graham*..... 125

Rehearing.

On rehearing, former judgment entered in this court vacated, and judgment rendered by the district court affirmed. *Smith v. Clay County*..... 614

Religious Societies.

1. The courts will not review judgments of the governing authorities of a religious organization with reference to its internal affairs, but they will inquire whether a church tribunal, which undertakes to expel a member, has been organized in conformity with the constitution of the church, and whether a member of such tribunal is disqualified from sitting as a judge in the case. *Bonacum v. Murphy*..... 463

2. Where an appeal has been taken by an accused party to an appellate church tribunal, the civil courts have jurisdiction to enjoin the enforcement of a sentence pronounced against the accused until the appellate ecclesiastical tribunal has disposed of the appeal. *Bonacum v. Murphy*..... 463

3. Where the district court has enjoined the enforcement of a decree of an ecclesiastical court, until an appeal has been determined by the appellate ecclesiastical court, the injunc-

Religious Societies—*Concluded.*

tion must be obeyed until the appeal has been disposed of. *Bonacum v. Murphy*..... 463

4. The courts of this state will not review the process or proceedings of church tribunals for the purpose of deciding whether they are regular or within their ecclesiastical jurisdiction, nor will they attempt to decide upon the membership or spiritual *status* of persons belonging or claiming to belong to religious societies. *Bonacum v. Murphy*..... 487

Repeal. See STATUTES, 8, 9.

Replevin.

Where the jury return a verdict finding the right of property replevied and the right of possession in plaintiff, and the value of this right $117.17, the amount due on a mortgage, and a special finding that the value of the property is $160, *held*, that such verdict and special finding are sufficient to sustain a judgment that plaintiff is entitled to the possession of the property, and that the value of his special property in the goods replevied is $117.17. *Mueller v. Parcel*... 795

Res Judicata. See JUDGMENT, 6-10.

Review. See APPEAL AND ERROR.

Riparian Rights. See ACCRETIONS. WATERS, 1-6.

Sales.

1. The purchaser of personal property, under an implied warranty, has a reasonable time within which to determine whether it is as warranted, and such question is ordinarily one for the jury. *Von Dohren v. John Deere Plow Co*..... 276

2. After he has made the test, and the seller refuses to make any changes, the purchaser must at once return it, or his right to do so will be lost. *Von Dohren v. John Deere Plow Co.* 276

3. Where the purchaser of a corn sheller continues to use the machine, after such refusal by the seller, and keeps the machine for twenty-four days before offering to return it, it will be *held*, as a matter of law, that he has elected to affirm the contract as made. *Von Dohren v. John Deere Plow Co*..... 276

Specific Performance. See CONTRACTS, 2.

Statutes. See CONSTITUTIONAL LAW. TAXATION.

1. The several provisions of a legislative act should be construed together; and, if there is a conflict in them, general expressions must give way to special provisions. *State v. Nolan*..... 136

Statutes—*Continued.*

2. That part of the charter of South Omaha, providing for the election and defining the jurisdiction of the police judge, is separable from the rest of the act, and may be rejected without affecting the validity of the charter. *State v. Nolan*, 136

3. Where a later statute contains matter so repugnant to an earlier one that both can not stand, the provisions of the earlier law will be deemed to have been repealed by implication by the later act. *State v. Insurance Co*..... 320

4. When the legislature in the later act refers especially to a former act, and excepts from the operation of the last act a portion of the former, the inference is warrantable that there was an intention to repeal by implication repugnant provisions of the earlier statute not embraced within the terms of the exception clause. *State v. Insurance Co*..... 320

5. Where the words of a statute are specific and unambiguous, the meaning which the words import must be held conclusively presumed to be the meaning which the legislature intended. *State v. Insurance Co*..... 320

6. A statute repugnant in some of its features to some constitutional provision will yield only to the extent of the repugnancy and no further. *State v. Insurance Co*..... 320

7. Where the act eliminating the unconstitutional feature is complete and capable of enforcement, it will be held valid and enforceable, except where the invalid portion was manifestly an inducement to the passage of the remainder. *State v. Insurance Co*..... 320

8. Section 38, chapter 77 of the revenue act of 1879, as amended in 1887, being repugnant and inconsistent with the reciprocal tax feature of section 33, chapter 43, passed in 1873, to the extent of such repugnancy and inconsistency, repeals the latter mentioned section by implication. *State v. Insurance Co*..... 320

9. That part of the revenue act (Compiled Statutes 1901, ch. 77, art. I, sec. 38), providing "Insurance companies shall be subject to no other tax, fees, or licenses under the laws of this state, except taxes on real estate and the fees imposed by section 32 of an act regulating insurance companies, passed February 25, 1873," being unconstitutional, can not operate as a repeal by implication of the provisions of section 33, chapter 43, Compiled Statutes, or any portion thereof. *State v. Insurance Co*.....335, 341

10. Where general and special provisions of a statute come in conflict, the general law yields to the special; and a special law will not be repealed by general provisions, unless by express words or by necessary implication. *State v. Nolan*.. 136

Statutes—*Concluded.*

11. Statutes *in pari materia* should be construed together and, if possible, effect given to all of their provisions. *State v. Royse*..... 1

12. Chapter 124 of the laws of 1903 does not vest ownership of the statutes therein mentioned in the officers to whom said statutes are to be delivered by the secretary of state. *Marsh v. Stonebraker*..... 224

13. The sections of statutes which require the giving, form and conditions of official bonds, and in whose names actions are to be brought, are in *pari materia* and must be construed together. *Barker v. Wheeler*..... 740

Taxation. See CONSTITUTIONAL LAW, 1-6. MUNICIPAL CORPORATIONS, 1-3.

1. An elevator is a storehouse within the meaning of section 39, article I, chapter 77, Compiled Statutes, 1899. *Adams County v. Kansas City & O. R. Co*..... 549

2. The phrase "outside of said right of way," in the proviso to said section qualifies only the word "property" immediately preceding it, and not the specific terms used in the enumeration of other classes of property therein. *Adams County v. Kansas City & O. R. Co*..... 549

3. By virtue of such proviso, elevators situate on the right of way of a railroad are subject to assessment by the local authorities, and not by the state board. *Adams County v. Kansas City & O. R. Co*..... 549

4. The owner of such elevators can not escape local assessment and taxes thereon by voluntarily listing and returning them for taxation to the auditor of public accounts. *Adams County v. Kansas City & O. R. Co*..... 549

5. That a less reserve fund is required of domestic insurance companies than is required of companies doing business in the state of Pennsylvania, does not militate against the enforcement of the provisions of the reciprocal tax law on companies organized under the laws of Pennsylvania, and doing business in this state. *State v. Insurance Co*..... 335

6. The provisions of section 33, chapter 43, Compiled Statutes, for a reciprocal tax on insurance companies organized under the laws of other states, whose laws discriminate against insurance companies organized under the laws of the state of Nebraska, apply and become operative from the time of the enactment of such laws by such other states, whether any company of this state shall have established agencies there or not. *State v. Insurance Co*..... 335

7. The act mentioned is in force and effect, and requires a

Taxation—*Concluded.*

foreign insurance company doing business in this state to pay the same license fees, etc., required by the laws of the foreign state of companies of this state doing business therein. *State v. Insurance Co*..... 335

8. Lands purchased at a tax sale by the county, under the provisions of chapter 75, laws 1903, are held in trust for the political subdivisions entitled to any portion of such delinquent taxes. Such lands are not acquired by escheat or forfeiture, and do not belong to the permanent school fund. *Woodrough v. Douglas County*..... 354

9. The remedy provided for in chapter 75, laws 1903, is declared by the act itself to be cumulative. *Woodrough v. Douglas County*..... 354

10. The scavenger act, chapter 75, laws 1903, is a constitutional exercise of legislative power. *Woodrough v. Douglas County*, 354

11. The provisions of chapter 75, laws 1903, do not delegate legislative authority. *Woodrough v. Douglas County*..... 354

Tenancy in Common.

A lease by one tenant in common of an entire estate is void as to the interest of his cotenants. *Jackson v. O'Rorke*..... 418

Torts.

One is not liable in tort for procuring or inducing others to pursue a clear legal right, although such action may result to his advantage. *Emanuel v. Barnard*..... 756

Trade Marks and Trade Names.

To entitle a party to an injunction restraining another from the use of a trade name, he must show his adoption of the name at a time prior to that of his adversary, and that it was not in general use. *Chadron Opera House Co. v. Loomer*, 785

Trial. See APPEAL AND ERROR. BILLS AND NOTES, 2. MASTER AND SERVANT, 4.

1. Whether or not, after argument by counsel for plaintiff to the jury, the defense can cut off further argument by waiving argument on his own behalf is a matter within the sound discretion of the trial court. *Henry v. Dussell*..... 691

2. In an action on a contract, if issues of illegality of consideration and duress are properly submitted to the jury, upon which their verdict is adverse to defendant, it is not error prejudicial to the defendant that the court instructs the jury incorrectly as to what constitutes a valid consideration for the contract. *Henry v. Dussell*..... 691

3. An instruction which contains an inaccurate statement of the law will not work a reversal of the judgment, if the instruction could not have misled the jury. *Henry v. Dussell*, 691

Trial—*Concluded.*

4. When a request is made for a proper instruction, the court should give the instruction requested or substitute another in its stead which embodies the same principle. *Western Mattress Co. v. Ostergaard*..... 575

5. When an allegation of negligence is unsupported by any competent testimony, it should not be given in an instruction to the jury. *Western Mattress Co. v. Ostergaard*.... 575

6. An instruction which is applicable neither to the issues nor to the evidence is prejudicially erroneous. *Chicago, B. & Q. R. Co. v. Jamison*..... 252

7. A party entitled to a particular instruction waives his right by omitting to ask for such instruction. *Union P. R. Co. v. Stanwood*..... 150

8. That a witness to values testifies on cross-examination that he took into consideration matters not proper for that purpose, does not entitle a party to have the entire testimony of the witness upon that subject withdrawn from the jury. *Union P. R. Co. v. Stanwood*..... 150

9. The burden of sustaining the affirmative of an issue does not shift during the progress of the trial. *Rapp v. Sarpy County* 382, 385

10. Paragraphs of a petition, which have been struck out on motion, should not be submitted to the inspection of a jury. *Trumbull v. Trumbull*..... 186

11. When necessary to a proper determination of the cause, it is not error to permit an amendment to a pleading after trial, and reopen the case for a trial of the issues tendered by such amendment. *Brown v. Brown*..... 200

12. The supplying of missing records is a matter resting in the sound discretion of a court. *Sheldon v. Gage County Society of Agriculture*..... 411

13. In a hearing upon an appeal from an order denying the filing of a claim against an estate neither party is entitled to a jury trial. *Ribble v. Furmin*..... 108

14. Where, in an action on a contract, the defendant pleads illegality of consideration and duress, upon a return of a finding as to the two defenses adverse to the defendant, it is proper for the court to instruct the jury to find for the plaintiff. *Henry v. Dussell*..... 691

15. When the evidence is not sufficient to warrant a verdict for plaintiff, the court should direct a verdict for defendant. *Sattler v. Chicago, R. I. & P. R. Co*..... 213

Trover.

1. One who has possession of personal property, claiming a lien thereon, may maintain an action for conversion against one who wrongfully attaches the property. *Fred Krug Brewing Co. v. Healey*..... 667

2. In an action for conversion where defendants justify under an order of sale of attached property upon judgment against plaintiff's vendor, they must show a valid judgment in the attachment case. *Fred Krug Brewing Co. v. Healey*..... 662

3. In an action for conversion a motion to strike out certain evidence of proceedings in an attachment case, *held* properly sustained. *Fred Krug Brewing Co. v. Healey*..... 662

Trusts.

1. One who purchases land at a foreclosure sale for the benefit of the owner of the equity of redemption, can not set up the statute of frauds against the party for whom he purchased; the law will hold him to be a trustee for the owner. *Dickson v. Stewart*..... 424

2. Where, by mutual consent, an equitable interest in land has been treated as real estate of which a decedent died seized, and dower therein has been assigned to the widow, a deed issued to her in her own name upon her payment of the balance due under a contract, creates no new right in her as against the heirs; the title inures to their benefit and, in equity, she holds the legal title only as trustee for them. *Cutler v. Meeker*..... 732

3. A court of equity has jurisdiction to enjoin a trustee from the misappropriation of trust funds at the suit of a *cestui que trust*. *Coleman v. McGrew*..... 801

Usury.

1. Contract for the loan of money as set out in the opinion, *held* to be usurious. *Allen v. Dunn*..... 831

2. There is no authority for taking interest on any loan of money for more than one year in advance, for the purpose of obtaining more than the legal rate of interest on the money loaned. *Allen v. Dunn*..... 831

Vendor and Purchaser.

1. Where fraudulent representations are based on special knowledge of the vendor, and are believed by the vendee, and acted upon by him to his injury, they amount to actionable fraud. *McKibbin v. Day*..... 280

2. Where a vendee has an opportunity for inspection, representations as to the value of the property are regarded as mere expressions of opinion. *McKibbin v. Day*..... 280

Venue.

1. Where a resident of the county where a personal action is brought is joined with a resident of another county, to authorize service upon the latter in the county of his residence there must be a right to recover against the defendants jointly. *McKibbin v. Day*..... 280
2. Where the allegations of the petition are such as to include both a joint and several liability, the jurisdiction of the court as to a nonresident of the county on his several liability is sufficiently challenged by a plea to the jurisdiction. *McKibbin v. Day*..... 280

Verdict. See APPEAL AND ERROR, 17-20. TRIAL, 14, 15.

Waters. See ACTION, 3.

1. A riparian's right to the use of the flow of a stream passing through or by his land, is a right inseparably annexed to the soil; such right is a property right. *Cline v. Stock*.... 70
2. A riparian proprietor, whose use of a stream for water power is impaired by subsequent appropriations, is not required in an action to enjoin such appropriations, to set up specifically what rights are claimed by the appropriators severally or jointly. *Cline v. Stock*..... 70
3. It is not a fatal objection to a petition for injunction against a large number of defendants taking water from a stream to the injury of plaintiff's mill, without compensation, that it asks no other specific relief than the writ. *Cline v. Stock*, 70
4. In an action by a lower riparian owner to enjoin irrigation corporations and others from diverting water from a stream to the injury of his mill, a petition does not state a cause of action without alleging facts showing that such appropriation and use of water by defendants is unlawful. *Cline v. Stock*..... 79
5. The allegations of the petition being consistent with the lawful use of the water by the defendants, they will be so construed as against the pleader. *Cline v. Stock*..... 79
6. Parties who have appropriated water for irrigation purposes pursuant to law, and continued the use of water under such appropriation for more than seven years, can not be enjoined from the continued use of such right by a lower riparian owner whose mill privilege may be injured thereby; his remedy is an action for damages. *Cline v. Stock* 79
7. If one owning land traversed by a stream sells a portion thereof, and gives by parol the right to overflow the remainder by erecting a dam on the land conveyed, the parol

Waters—*Concluded.*

agreement becomes enforceable. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.*..... 452

8. The erection of the dam and a mill is a sufficient consideration therefor. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co*..... 452

9. Where a mill is erected and a water-power obtained by the aid and cooperation of adjoining landowners, any right of flowage over their premises of water for the mill becomes appurtenant thereto. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co*..... 452

Wills.

1. The mere misnomer of a legatee or devisee does not render a gift void, if, from the context of the will or proof *dehors* the instrument, it can be ascertained who was actually intended. *Second United Presbyterian Church v. First United Presbyterian Church*..... 563

2. Where one claiming as devisee under a will is not designated therein by his proper name, he may show that he is also known by the name used in the will to designate the devisee, although the name of another claimant exactly corresponds to the name thus used. *Second United Presbyterian Church v. First United Presbyterian Church*..... 563

3. In such case there arises a latent ambiguity, which may be removed by evidence of circumstances tending to show which of the two claimants the testator intended as the object of his bounty. *Second United Presbyterian Church v. First United Presbyterian Church*..... 563

4. Under section 149, chapter 23, Compiled Statutes, *held*, (1) that parol evidence is admissible to show whether the omission of a child from a will was intentional; (2) that the burden of proof is on the pretermitted child to show that the omission was unintentional. *Brown v. Brown*.... 200

Witnesses. See CRIMINAL LAW, 8.

1. Section 329 of the code allows evidence of an interested party against the representative of a deceased person as to transactions testified to by the other party's witness. *Dickenson v. Columbus State Bank*..... 260

2. Where a party representing a deceased person has introduced evidence of certain payments made to the other party, that party may show to what the payments were applied and that it was with the deceased's assent. *Dickenson v. Columbus State Bank*..... 260

3. Witnesses as to value of property alleged to have been damaged by grading a street *held* to be competent. *City of South Omaha v. Ruthjen*..... 545

Work and Labor. See EVIDENCE, 23.