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WILL A. CORSON V. MARY LEWIS ET AL.*

FILED NOVEMBER 10, 1906. No. 14,006.

1. **Attorney and Client:** CONTRACT: ASSIGNMENT. A contract for legal services is personal in its nature and cannot be assigned by one party without the consent of the other.
2. ———: ———: ANNULMENT. Death or disability, which renders the performance of such a contract impossible, annuls the contract.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Will A. Corson and *Cooper & Dunn,* for plaintiff in error.

John L. Webster, contra.

OLDHAM, C.

On May 14, 1900, Mary Lewis instituted an action in the district court for Douglas county, Nebraska, against the Omaha Street Railway Company to recover damages for personal injuries. The suit was filed by Will A. Corson, an attorney of Douglas county, and the proposed intervener in this cause of action. After the suit was filed a demurrer was interposed to the petition by the street railway company and was sustained by the district court. Mr. Corson then employed George W. Cooper, Esq., to assist in the prosecution of the case, and on January 16, 1901, an amended petition was filed, and issues were joined thereon. While the cause was pending, negotiations for a settlement of the claim were had between Mr. Corson, as attorney for the plaintiff, and Honorable John L. Webster, as attorney for the defendant. While these negotiations were pending, in April, 1902, Mr. Corson became temporarily mentally deranged from nervous pros-

*Rehearing allowed. See opinion, p. 449, *post.*

tration, and was placed in a private sanitarium for treatment, and was treated at different sanitariums without the state until August, 1903, when his health was restored and he returned again to Omaha and reengaged in the practice of his profession. During the time Mr. Corson was receiving treatment his office was closed, and all his books and papers were removed to his residence within the city. Before instituting the suit for Mrs. Lewis, Mr. Corson had entered into a written contract with her husband, who assumed to act as her agent, by the terms of which Mr. Corson was to receive one-half the money procured on the claim either by compromise or judgment, and plaintiff was to pay the costs of litigation. When Mr. Corson was taken away for treatment, Mr. Cooper went to the court in which the cause was pending, and had his name entered as of counsel for the plaintiff, and procured a continuance of the case on account of the absence of Mr. Corson who was the managing counsel. In the meantime Mr. Howe G. Corson, brother of the proposed intervener, requested John W. Parrish, Esq., to look after whatever legal business had been in the hands of his brother, and on October 30, 1902, Mr. Parrish, acting alone and on this suggestion, and without any conference or communication with Mr. Will A. Corson, as appears from his testimony, filed in the cause then pending a notice of attorney's lien, as follows: "To the Omaha Street Railway Company, and all other persons concerned: Notice is hereby given that W. A. Corson, attorney for plaintiff in the above entitled action, claims a lien herein for one-half (½) of the amount of whatever judgment is recovered and entered in this suit. W. A. Corson, Atty. for Plff., by John W. Parrish, his agent and attorney."

In September, 1902, and about five months after Mr. Corson's illness began, Mrs. Lewis, being wholly unable, as she said, to confer with her attorney, and having learned that his office was closed and that he was in an asylum for treatment, communicated through Mr. Neary with T. J. Mahoney, Esq., and requested him to enter into

the prosecution of her suit and conduct it to judgment or final settlement. Mr. Mahoney, knowing the condition of Mr. Corson's health and believing that he was permanently disabled from practicing his profession, called upon Mr. Cooper, who had been making an unsuccessful effort to find the office files in the case, and the list of witnesses that Mr. Corson had in his possession, and to get ready to try the case, if necessary, to save it from being dismissed, and Mr. Cooper turned the matter over so far as he was concerned to Mr. Mahoney. Mr. Mahoney also called upon Mr. Parrish to inquire if he had any connection with the case, and Mr. Parrish explained that he had none, and that all he had done was to file a notice of a lien for Mr. Corson, as above set out. Mr. Mahoney thereupon proceeded to effect a settlement of the cause, and compromised the claim for $1,200, and in conformity with the stipulation between the parties the cause was dismissed on the 3d day of February, 1903. Mr. Mahoney settled with Mr. Cooper for the services he had rendered, paying him $100 therefor and taking a receipt for his claim for services rendered. At the second term of court after the judgment of dismissal was entered, Will A. Corson filed a motion to set aside the judgment, as having been entered into collusively and in fraud of his rights to an attorney's lien on the money received on the compromise, and also asked leave to file an intervening petition for the determination and enforcement of his lien. His application was tried on affidavits and counter-affidavits, and the motion was overruled and leave to file an intervening petition was denied by the district court. To reverse this judgment the proposed intervener brings error to this court.

It is only fair to the professional standing of all the attorneys involved in this controversy to say that there is not a syllable of testimony in the record that even remotely tends to show any collusion or fraud on the part of any of them in procuring a settlement of the claim.

They each appear to have acted with professional courtesy and strict integrity in the matter.

It is a principle universally recognized in the courts that a contract for legal services is personal in its nature, and consequently unassignable, and that death or disability, which renders performance impossible, discharges the contract. Now, there is no dispute in the record as to the fact that Mr. Corson, before either procuring a judgment or settlement of the claim, was unfortunately disabled by disease from performing his duties as plaintiff's attorney, and as he was without authority to assign his contract to anyone else, the contract was annulled, and Mrs. Lewis was fully justified in procuring other counsel to protect her interests in the suit. As there is no valid claim for services existing in favor of the proposed intervener and against his client, no lien could attach to any money received in settlement of the claim. In this view of the matter it is unnecessary to express any opinion on the other questions discussed in the briefs. We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed December 18, 1907. *Former judgment of affirmance, as modified, adhered to:*

1. **Attorney and Client:** DISABILITY: ACTION. If the party to an entire contract for personal services, who is to render the service, becomes, by reason of physical disability, through no fault of his own, unable to perform the same, the contract is discharged, but he may recover the reasonable value of his services rendered upon a *quantum meruit.*

2. **Attorney's Lien.** An attorney may have a lien upon the claim of his client in an action for personal injury.

3. **Intervention After Dismissal.** Where a settlement has been made between the parties to an action and the action dismissed after notice of an attorney's lien has been given, the attorney may, in a proper case, move to set aside the judgment of dismissal and be allowed to intervene as a party plaintiff to establish his lien.

4. ———: REVIEW. Under the facts set forth in the opinion, *held* that the order of the district court refusing to set aside the order of dismissal and to allow a hearing upon a petition in intervention was not erroneous.

5. **Former opinion** adhered to, save as modified by paragraph one of the syllabus.

LETTON, J.

This is an action for personal injuries. A contract was made by the plaintiff, Lewis, with the intervener, Corson, for legal services. The case was settled by the parties and judgment of dismissal was entered. Corson now seeks to reopen the case to establish an attorney's lien which he asserts against the defendant. A full and detailed statement of the facts in the case may be found in the former opinion by Mr. Commissioner OLDHAM, *ante*, p. 446.

In the former opinion the principles are laid down that a contract for legal services is personal in its nature, and consequently not assignable, and that death or a disability, which renders performance impossible, discharges the contract; that therefore, since Corson, before procuring a judgment or settlement of the case, was disabled by disease from performing his duties as attorney for plaintiff, the contract was annulled; that he had no valid claim for services performed against his client and therefore no lien could attach. We have no fault to find with the holding that a contract for legal services is personal in its nature and nonassignable, or that disability discharges such a contract. We think, however, that, if a disability occurs after a special contract for services has been partly performed, this does not prevent the disabled party, if the breach of the contract was made through no fault of his own, but by the act of God or unavoidable casualty,

from recovering upon a *quantum meruit* for the reasonable value of the services rendered prior to the disability. This is the more modern rule, and we think is founded upon right and justice. *Coe v. Smith,* 4 Ind. 79, 58 Am. Dec. 618; *Parker v. Macomber,* 17 R. I. 674, 16 L. R. A. 858, and note; *Johnston v. Board of Commissioners,* 78 Pac. (N. M.) 43. This court has gone even further. In *Murphy v. Sampson,* 2 Neb. (Unof.) 297, it was held that, when services were rendered under a contract, a party breaking the same may recover the value of the services rendered before the breach, less such damages as the employer may have sustained by reason of the breach.

It is contended that the lien which was filed was not sufficiently specific or particular to give the defendant notice that the lien was claimed upon anything but a judgment which might be rendered. The notice was that the attorney claimed a lien for one-half of "whatever judgment is recovered," and it is said, since no judgment was recovered, no lien can be asserted. We think this is carrying refinement to excess. The object of the notice was to give the defendant knowledge that the attorney claimed one-half of any money which the plaintiff was entitled to recover from the defendant upon the cause of action, as a recompense for his services as attorney. As a matter of fact, the notice proved effectual to do this, because the record shows that Mr. Webster, the attorney for the defendant, spoke to Mr. Parrish, who had acted for Corson in the filing of Corson's lien, of the existence of Corson's claim, and to Mr. Mahoney, who succeeded Corson as attorney for Mrs. Lewis. We do not think that the law contemplates that parties can come together and settle pending actions in such a way as to deprive an attorney of his right to compensation, when both know that he makes such a claim and has given notice of it. *Cones v. Brooks,* 60 Neb. 698.

It is objected, further, that the lien was not filed until after Corson had ceased to be the attorney for Mrs. Lewis, and after Mr. Mahoney had been employed. It is suffi-

cient to say it was filed before the settlement and in sufficient time for the attorney for the defendant to ascertain its existence. It is said that the filing of the notice of the lien was not authorized, and that, since the settlement was consummated before its ratification, it cannot affect the parties. Under the circumstances any act which was taken by Mr. Corson's friends or relatives in his behalf, which was afterwards ratified by him, is as effectual as if it had originally been performed by himself or by his express direction. As soon as he learned of Mr. Parrish's act in filing the lien, which was soon after his return to the state, he approved the action, and in seeking to avail himself of any benefits which its filing may confer upon him he again ratifies and adopts Parrish's act as his own and his ratification relates back to the original time of filing. It is claimed that Corson has no standing in court without Mrs. Lewis having been brought in and made a party to his petition in intervention; that in no event could he recover from the defendant more than Mrs. Lewis might be indebted to him, and that in the ascertainment of that amount Mrs. Lewis is a necessary party. In answer to this, it is said Mrs. Lewis is insolvent, and that, since whatever sum might be recovered by him for his services against her must necessarily be paid by the defendant, the street railway company is the only real party in interest, and the value of the services can as well be ascertained without her as if she were a party to the proceeding. This is the view taken by the supreme court of Kansas in *Kansas P. R. Co. v. Mihlman,* 17 Kan. 224, and seems a sufficient answer to the argument.

It is strongly contended that the action being one not arising out of contract, but to recover damages for a personal injury, and the claim not having been reduced to judgment, the right to a lien does not exist. We are aware that many courts are committed to the doctrine that parties to suits for personal injuries may settle or compromise such actions between themselves without reference to whether services have been rendered to the plaintiff by at-

torneys, for which no compensation has been given, and regardless of whether a contract for fees based upon the amount of recovery exists, and notice has been given to the defendant of a claim under such contract. Some of these decisions are based upon the common law doctrine of the nonassignability of causes of action for injuries to the person, and others upon the language of the particular statute under which the charging lien is claimed. Among these cases are *Weller v. Jersey City, H. & P. Street R. Co.*, 66 N. J. Eq. 11, 57 Atl. 730; *Randall v. Van Wagenen*, 115 N. Y. 527; *North Chicago Street R. Co. v. Ackley*, 171 Ill. 100; *Anderson v. Itasca Lumber Co.*, 86 Minn. 480. In the last mentioned case, the supreme court of Minnesota held, under a statute the same as that of Nebraska, that a statutory lien would not apply in such a case as this prior to the rendition of a judgment and the ascertainment thereby that there actually was "money in the hands of the adverse party belonging to his client." This case sought to distinguish the case of *Smith & Baylies v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, on the ground that in that case a judgment had actually been rendered against the defendant; but this seems to be an error, the judgment mentioned in the opinion being one against the client for the amount of the fee charged. The language of the opinion of the Iowa court indicates that the settlement between the parties was made before judgment. This case holds that, under a statute like ours, an attorney may assert a statutory lien in an action for injuries to the person. In an opinion by Judge Brewer, under a statute which reads: "An attorney has a lien for a general balance of compensation * * * upon any money due to his client, and in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party"—it was held in a personal injury case where notice of a lien was given and before final judgment, there having been a settlement of the case and a dismissal, that the attorney may maintain a separate action to recover the amount due

on the lien and his client is not a necessary party to such action. *Kansas P. R. Co. v. Thacher,* 17 Kan. 92. In *Abbott v. Abbott,* 18 Neb. 503, this court held that an attorney's lien could not be had under our statute before judgment in a cause of action for a personal tort which abates by death; the reason evidently being that, since such a right of action was nonassignable at common law, no claim could be made to a part of it by agreement of the parties. But as our statute provides that pending actions in cases of the nature of the present one do not abate by death, the holding of that case does not bind us in this. We prefer to follow the courts of Kansas and Iowa in holding that in a pending cause of this nature notice of an attorney's lien properly given binds the defendant so that a settlement between the parties and payment, before judgment, will not operate to defeat the attorney's right.

The point in the case which has given us the most difficulty is one which is, to some extent, discussed in the original brief of the defendant. It appears that after Mr. Mahoney took charge of the case for Mrs. Lewis and negotiations of settlement were pending between Mr. Webster and him, Webster stated to Mahoney that Mr. Cooper claimed some interest in the case, and that Mr. Parrish also claimed to represent Mr. Corson, and that he, Webster, wished to have a final and complete settlement so that all the parties would be satisfied. Mr. Webster also, on two occasions, spoke to Mr. Parrish on the street regarding the case, and mentioned the fact to him that Mr. Mahoney now appeared for the plaintiff, and suggested that if Mr. Parrish claimed any interest in the case for Mr. Corson he had best confer with Mr. Mahoney about it before the settlement should be completed. As to these facts there is no conflict in the testimony. Mr. Parrish testified that he, on one or two occasions, had some conversation with Mr. Webster regarding the case, or a possible settlement thereof, and was advised by Mr. Webster that Mr. Mahoney claimed to represent Mrs. Lewis, and that he was endeavoring to negotiate a settlement, and

suggested to Parrish to confer with Mr. Mahoney about the matter; that he did not do so, but that he did talk with Mr. Cooper of the talk he had with Mr. Webster. Under this state of facts, where the attorney for the street railway company used every effort to apprise all of the parties concerned as attorneys in the case, or who had been thus concerned, of the fact that a settlement was about to be made and of his desire to make a final and complete settlement, and after he had spoken to the attorney who had acted for Mr. Corson in the filing of the notice of the lien, and who Corson states in his brief, and testifies, was authorized to file the lien, and also duly authorized to carry on or settle the case, and who was apparently the only person besides Mr. Cooper who was interested in the case or who had apparent authority to act for Mr. Corson, and suggested a conference with Mr. Mahoney, the then attorney for the plaintiff, we think it would be unjust and improper to hold the defendant liable because of its settlement of the case after having in good faith done everything in its power to advise and notify all parties concerned. If either Mr. Cooper or Mr. Parrish had notified Mr. Webster that Corson still claimed an interest in the matter, or that if he, Webster, settled the case it would be at his client's peril, the defendant would not have been placed in the position in which it now is. We think that Mr. Webster had a right to rely upon the fact that neither Mr. Cooper, who had been associated with the intervener in the conduct of plaintiff's cause, nor Mr. Parrish, who had acted for intervener as agent or attorney in the filing of the lien and who had authority to settle the case, desired to assert, or did assert, any claim of any kind in behalf of Mr. Corson, and was justified in believing that, since no claim was made, it was intended to waive it as against the defendant. Taking this view of the case, while we adhere to the legal principles stated in the former opinion and in the syllabus that death or disability, which renders the performance of a contract for legal services impossible, annuls the contract, and while we are of the opinion that

in such case the disabled party may recover the value of the services actually performed under the contract upon a *quantum meruit,* still we think that the defendant was justified in settling the case, under the circumstances, and that the intervener is estopped by the failure of his agent to assert himself in regard to the matter. The intervener cannot accept the benefit of Parrish's actions so far as they are beneficial to him, and disaffirm his acts or omissions in so far as they operate to his detriment.

The opinion in the former case is adhered to, as modified by the foregoing.

AFFIRMED.

CONTINENTAL LUMBER COMPANY, APPELLEE, V. MUNSHAW & COMPANY, APPELLANT.

FILED NOVEMBER 10, 1906. No. 14,471.

1. **Directing Verdict.** Where there is competent testimony tending to support a defense properly pleaded, it is error for the trial court to direct a verdict for the plaintiff.
2. **Question for Jury.** When the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the determination of the jury. *Langan v. Whalen,* 67 Neb. 299, followed and approved.

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

A. H. Murdock, for appellant.

E. R. Leigh, contra.

OLDHAM, C.

This action was originally instituted in the county court of Douglas county by the plaintiff, Continental Lumber Company, against the defendant, Munshaw & Company, to recover the remainder alleged to be due on a car-load of lumber, shipped F. O. B. to defendant at South Omaha,

Nebraska. Defendant answered, admitting that it had ordered a car-load of No. 2 shiplap lumber from plaintiff at the price per thousand feet alleged in plaintiff's petition; that, when the lumber was received and inspected, about half the load was under grade and in a damaged condition; and that for this reason defendant refused to receive the lumber, and so notified plaintiff, and still held the lumber subject to plaintiff's order. Each and every other allegation in plaintiff's petition was denied, and defendant asked judgment on a counterclaim for the amount of freight paid before the lumber was inspected. Plaintiff replied with a general denial, and alleged that, defendant having filed a claim for damages for the inferior condition of the lumber shipped, it was by that act estopped from a rescission of the contract of purchase. At the trial in the county court defendant had judgment, but on an appeal to the district court, where the same issues were tendered, the court, after the testimony was all in, directed a verdict for the plaintiff, and entered judgment on the verdict. To reverse this judgment defendant has appealed to this court.

As a verdict was directed for plaintiff, our attention must be directed to the answer filed and the evidence offered by the defendant in support thereof; and, as the answer on its face shows a sufficient reason for the rescission of the contract, we will pass to a consideration of the testimony offered. The plaintiff alleged that the order was made subject to the rules of inspection of the Southern Lumber Manufacturers' Association, and that these rules were in general use, and known to and acquiesced in by all retail lumber dealers. Defendant denied this allegation, however, and offered evidence tending to show that the lumber was ordered by Mr. Munshaw, a member of the defendant firm, from one of plaintiff's traveling salesmen, with the agreement that the lumber was to be up to the grade of that of other associations; that he (Munshaw) refused to sign any written order for the lumber, which might contain conditions that he did not understand; that

under this arrangement he ordered two car-loads of boards and one carload of No. 2 shiplap; that the two car-loads of boards arrived first, and were unloaded and found to be according to the representations, and that defendant accepted the same; that, when the third car arrived, and after defendant's foreman had paid the freight, which was required by a rule of the railroad company at South Omaha before an inspection was permitted, the lumber was unloaded, and, on an inspection, over half of it was found to be of a very inferior quality and below the grade of No. 2 shiplap. The evidence of lumber dealers in Omaha was also introduced in support of defendant's claim that the lumber was under grade. When the lumber was received, after its inspection, defendant sent the following communication to plaintiff: "South Omaha, Neb., Dec. 17, 1903. Continental Lumber Co., Houston, Tex. Gentlemen: We have just unloaded car No. 2,210 M., K. & T. and find 592 pcs. 8" 14' shiplap, and 589 pcs. 8" 12' shiplap in very bad condition, so badly blued they are almost rotten. Will have to charge you back $3 per M on above number of pieces or 10,237 ft. and make a claim of $30.71. Kindly send us credit memorandum for same. We have piled this stuff up separate, and would be glad to show it to anyone you might send to see it. Very respectfully, Ed Munshaw & Co."

In response to this letter plaintiff, on December 19, 1903, wrote to the defendant the following: "Your favor of the 17th, and we are surprised that you would make such a modest claim on a single car of lumber, as you desire to make against car M., K. & T., 2,210. We are not agreeable to the claim you file and you will therefore hold the entire shipment intact—subject to our order, unless you are prepared to pay for the same as invoiced. We will send an official inspector right up to Omaha, Neb., to investigate the matter." Mr. Munshaw testifies that on the receipt of this letter defendant piled all the lumber received in the car in dispute in separate piles in its yard, and still holds it there subject to plaintiff's

order. On December 22, 1903, defendant wrote to plaintiff, as follows: "Yours of the 19th at hand. We are not surprised in the least that you are not agreeable to the claim that we made on car No. 2,210 M., K. & T., as there certainly must be something very wrong in a concern shipping stuff of this kind, if they knew the condition in which it was in. We have the stuff piled up in our yard, and will welcome an official inspector to investigate the matter."

In reply to this communication plaintiff wrote, under the date of December 24, as follows: "Yours of the 22d relative to M., K. & T. car 2,210, and have forwarded both copy of complaint and invoice to Mr. Geo. K. Smith, Sect'y, S. L. M. A., with request to have official inspector call on you at once and inspect this shipment. We understand from your letter that you are agreeable to making settlement on the result of this inspection."

On January 6, 1904, defendant answered this letter, saying: "Your official inspector has not as yet shown up to investigate contents of car No. 2,210 M., K. & T. Kindly attend to this matter at your earliest convenience, and oblige." Shortly after this communication an inspector, named Warren, arrived in South Omaha, and examined the lumber and made an official report, in which he found 862 feet of same below grade, and that defendant was entitled to a reduction of $1.73 on the purchase price of the lumber. On receipt of the report of the inspector, plaintiff, under the date of January 16, wrote to defendant informing it of the inspector's report, notifying it that it had been allowed the discount awarded, and that under the rules of the association the cost of the inspection had been $18.45, of which defendant was entitled to pay $16.90, and that plaintiff would pay the remainder. The letter requested a remittance of the remainder due under the inspector's report. In answer to this communication defendant, on January 21, 1904, sent the following letter to plaintiff: "We are in receipt of yours of the 16th inst., answering, we beg to advise you that the contents of car

2,210 M., K. & T. is piled in our yard, subject to your disposition. We absolutely refuse to accept this car, only on conditions named in ours of Dec. 17th." From this correspondence the learned trial judge appears to have held that the defendant, with full knowledge of all its rights and remedies, elected to affirm the contract and abide by a settlement under the rules of the association, and that, having so elected, it is bound by its election.

The printed rules of the association were admitted in evidence, and contained, among other things, the requirements for the inspection of different grades of lumber. But there is no printed rule which binds the seller and purchaser to abide by an official inspection when one is made. Mr. Warren testified that, so far as he knew, settlements were generally made according to the report of the official inspector, but this is as far as his testimony goes. He also testified that, when he began the inspection, Mr. Munshaw, acting for the defendant, objected to the inspection, and told him that he would not be bound by it, and that unless the company would accept the proposition contained in the letter of December 17, 1903, he would not accept the lumber. Now, the question arises whether or not this correspondence and all other facts and circumstances connected with the transaction clearly and conclusively show that defendant, with full knowledge of the rules of the Southern Lumber Manufacturers' Association, intended to abide by the official inspection of the lumber under such rules.

One reasonable interpretation of this correspondence between plaintiff and defendant might be that, on the receipt of the lumber, defendant objected to the quality and offered to take it, not at the schedule price, but at a considerable discount; that, when the plaintiff received this notice, it directed defendant to hold the entire car-load subject to plaintiff's order, and also informed the defendant that an inspector would be sent to investigate the condition of the lumber. It might be contended that the correspondence up to this point shows that plaintiff had

elected to rescind the contract of sale rather than pay the damages claimed by the defendant, and that the next letter from defendant showed that it was willing that plaintiff should send an inspector to verify its statement as to the condition of the lumber, but that this letter contained no agreement on the part of defendant to abide by the decision of the inspector. The reply to this letter by the plaintiff shows that plaintiff expected defendant to abide by an official inspection; but, when the inspector came, it is in evidence that defendant notified him that it would not be bound by the inspection, and that, when the inspection was made, defendant utterly repudiated it and rescinded the contract unless plaintiff would settle according to defendant's first offer. We do not intend to be understood as holding that there is no evidence in the record tending to support plaintiff's claim. What we do say is that there is competent evidence in the record to support defendant's theory of the case, and that in this state of the record the question of the intention of the parties at the time the inspection was agreed upon was a question of fact that should have been submitted to the jury under proper instructions. In *Langan v. Whalen,* 67 Neb. 299, the rule is laid down that, "when the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the determination of the jury." Applying this rule to the facts and circumstances surrounding the transaction herein, we think that the learned trial judge erred in declaring, as a matter of law, that defendant, with full knowledge of all its rights, had elected to abide by its contract of purchase and submit its dispute as to damages to the final determination of an official inspector of the Southern Lumber Manufacturers' Association. We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

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

REVERSED.

DENNIS GODFREY, APPELLANT, V. ANNA CUNNINGHAM, APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,447.

1. **Partition: SALE: CONFIRMATION.** After the filing of a stipulation signed by the attorneys of both parties, agreeing that an order of sale in a partition case and all proceedings thereunder be vacated, a confirmation of such sale without a consideration and disposition of the stipulation is an irregularity within the meaning of section 602 of the code.

2. ———: ———: MOTION TO VACATE. In a motion to set aside the confirmation of a judicial sale for irregularities under the provisions of section 602 of the code, it is sufficient to allege the existence of irregularities which would have been sufficient to avoid the sale had they been considered at the time of confirmation.

3. **Interlocutory Orders: VACATING.** "An interlocutory order or ruling may be reversed and vacated at a subsequent term by the same court, without compliance with the provisions of section 602 *et sequitur* of the code, relating to the vacation and modification of judgments and final orders at a term subsequent to that in which rendered." *Huffman v. Rhodes*, 72 Neb. 57.

4. ———: ———: REVIEW. Unless an abuse of discretion of the trial court in setting aside an interlocutory order is shown, an appellate court will not interfere therewith.

5. **Judicial Sale: MOTION TO VACATE: WAIVER.** A motion to set aside the confirmation of a judicial sale is not waived by later filing a motion to set aside interlocutory orders, and no prejudicial error results in considering both motions at the same time.

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

Will H. Thompson, for appellant.

James H. Van Dusen, contra.

EPPERSON, C.

This is an action for the partition of real estate. In 1901, the district court for Douglas county confirmed the shares of the parties and appointed referees to make partition. On the same day there was filed in the case a stipulation, signed by the attorneys of the respective parties, in which it was agreed that the decree should not be carried out except by written consent of counsel. On June 4, 1904, the referees reported to the court that they could not make a fair and equitable partition of the premises, and recommended sale. This report was afterwards confirmed, and the referees directed to sell the property as required by law. On the date of sale there was filed a stipulation, signed the previous day by the only counsel appearing of record, in which it was agreed that the order authorizing the sale of the property be vacated, and all proceedings thereunder be declared void, and that the proposed sale be discontinued. The stipulation recites that it is made by reason of the former stipulation and because of the fact that the parties had not agreed to proceed with the case. Ignoring this stipulation, the referees sold the land. Plaintiff was the purchaser at the sale. Two days subsequent to an order of the court confirming the sale, defendant filed a motion to set aside the order of confirmation, alleging as her reasons the existence of the above facts relative to the stipulations. At the next term of court defendant filed another motion, in which she asked that the order confirming the report of June 4, 1904, and an order of July 27, 1904, modifying the same, be vacated, and the sale set aside. From the judgment of the court sustaining defendant's motions plaintiff appeals.

1. It is not necessary to consider the legal effect of the first stipulation. Both parties complied with its terms for three years. Finally, referees took steps toward making a sale of the property. Then it was that the second stipulation was filed. There was no contention that it was

made through fraud. It was on file when the court confirmed the sale. The court's attention was not called to it. No attempt was made to have it annulled. If unjust, it might have been set aside upon proper showing, with notice. *Keens v. Robertson,* 46 Neb. 837. Plaintiff's present counsel should not have moved for confirmation with that stipulation on file, without calling it to the court's attention. In our opinion, the confirmation of the sale without consideration of the stipulation was an irregularity justifying the court in setting aside the order of confirmation under section 602 of the code.

2. Plaintiff argues that before defendant can obtain relief she must allege and prove that she was prejudiced by the irregular proceedings. Many cases are cited by appellant to the effect that the moving party must allege and prove that he has a valid cause of action or defense which would *prima facie* entitle him to relief. These cases pertain to judgments or orders which from their nature require evidence as to the merits of the cause of action or defense. Such cases need not be distinguished here. Indeed, we desire to adhere strictly to that rule. But the nature of the judgment or order assailed governs the sufficiency of the motion to annul and the proceedings thereunder. Where the judgment required evidence on the merits to sustain it, the motion or petition assailing it should allege, and the evidence in support thereof should prove, not only the irregularities complained of, but facts relative to the merits which show a *prima facie* cause of action or defense. There must be presented to the court such matters as could have been presented upon the trial or hearing wherein the judgment or order assailed was rendered. Where the order assailed was not based upon evidence, but was the natural sequence of the court's proceeding, such as the confirmation of a judicial sale, the motion assailing needs to set forth only such irregularities as would *prima facie* show a meritorious reason why the sale should not be confirmed. As to whether or not the defendant was prejudiced is to be determined from the evi-

dence, which, in the case at bar, is sufficient to sustain the court's finding that the defendant is entitled to the relief she seeks. In a similar case in this court, *Fisk v. Thorp*, 60 Neb. 716, it is said by HOLCOMB, C. J.: "It is not required in such instances that there shall be tendered an answer, but only that the court shall find from the evidence that a valid defense exists. This may be found from evidence offered in support of the motion filed asking the vacation of the judgment." It cannot be said that the court should, before granting the relief, determine that the defendant would fare better had the proceedings been regular.

3. Plaintiff contends that by the filing of the second motion defendant either waived the first, or that the court could not entertain the second while the first was pending. The first motion attacked the order of confirmation, and the second interlocutory orders. The latter was not a waiver of the former, and no prejudicial error resulted in a consideration of both motions at the same time.

4. Plaintiff alleges error in the court's ruling upon the second motion filed. That motion assailed the interlocutory orders of the court. In *Huffman v. Rhodes*, 72 Neb. 57, it was held that an interlocutory order may be vacated at a subsequent term by the same court, without compliance with the provisions of section 602 of the code. No special procedure therefor is required on the part of the trial court in dealing with such orders, and unless an abuse of discretion is shown the reviewing court will not interfere with the judgment of the trial court in such matters. The evidence in this case not only shows the existence of the stipulations hereinbefore referred to, but the evidence of the defendant discloses that the successful bid at the sale was grossly inadequate. And, in addition to this, a written appraisement of the property in controversy clearly indicates that there could have been actual partition of the land without prejudice to either party.

We recommend 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.

PHILANDER G. LOSO, APPELLANT, V. LANCASTER COUNTY, APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,450.

1. Counties: PERSONAL INJURY: IMPUTED NEGLIGENCE. The doctrine of identification or imputed negligence does not apply to one injured while riding in a private vehicle, where no privity exists between the injured person and the owner or driver of the vehicle, and the injured person himself is not guilty of contributory negligence.
2. ———: ———: ———. One who is injured by reason of a defective bridge while riding in a private vehicle may recover from a county otherwise liable, notwithstanding the negligence of the driver, which may have contributed to produce the injury, the injured party being free from negligence and having no authority or control over the driver.
3. Case Modified. The first paragraph of the syllabus of *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, modified.

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

Field, Ricketts & Ricketts, for appellant.

J. L. Caldwell, F. M. Tyrrell and *Charles E. Matson, contra.*

EPPERSON, C.

Plaintiff Loso and an assistant went by rail to the village of Agnew, in Lancaster county, and from there

walked a mile and a half to the farm of one Rhoman to repair a well. After the work was completed Rhoman's son volunteered to convey them back to the village. A horse was hitched to a single buggy, and the three men started north along the highway in the direction of Agnew. A ravine, over which the defendant, the county of Lancaster, maintained a bridge, crosses the highway at right angles. The bridge was 16 feet long, was not protected by guard rails, and one corner had settled about a foot, causing the structure to slope toward the southeast. When the buggy approached the bridge, plaintiff was sitting on the east side, his assistant on the west, and Rhoman in the middle, driving the horse. A mist was falling and it was getting dark. As they approached to cross the bridge, the horse slipped on the wet boards and fell. In his efforts to arise he fell from the bridge, carrying the buggy and the three men with him to the bottom of the ravine, 16 feet below. Plaintiff was injured, and, under the provisions of the statute, brought this action against the county, alleging that the county was negligent in not providing side-rails and in permitting the bridge to slope toward one corner. The county contended that the driver, Rhoman, was guilty of contributory negligence, and a verdict was returned for defendant. The court instructed the jury "that, if the driver was negligent in driving upon the bridge in the manner he did under the circumstances, his negligence would be imputed to the plaintiff, and in that event the plaintiff could not recover." The giving of this instruction presents the principal question in the case.

As a general rule, "there can be no such thing as imputable negligence, except in cases where that privity which exists in law between master and servant and principal and agent is found." 16 Am. & Eng. Ency. Law (1st ed.), 447. The doctrine of imputed negligence or identification as to vehicles was first stated in the English case of *Thorogood v. Bryan,* 8 C. B. 115. It was there held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the

vehicle as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. This decision has been followed by a few of the courts of this country, notably Wisconsin. *Prideaux v. City of Mineral Point,* 43 Wis. 513. *Thorogood v. Bryan,* however, has been recently overruled by the courts of England, because the reasons upon which the decision rests are "inconclusive and unsatisfactory," and the "identification upon which the decision * * * is based has no foundation in fact." *Mills v. Armstrong,* 58 L. T. n. s. 423.

The supreme court of the United States has also declined to follow *Thorogood v. Bryan.* In *Little v. Hackett,* 116 U. S. 366, Mr. Justice Field, speaking for the court, said:

"The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal cooperation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world."

Not only are the authorities to the effect that the doctrine of identification or imputed negligence has no application to public conveyances, but the overwhelming weight of authority is that the doctrine cannot be extended to private vehicles.

Sanborn, J., speaking for the court, in *Union P. R. Co. v. Lapsley,* 51 Fed. 174, uses this language: "But, where the owner and driver of a team and carriage invites another to ride in his carriage, no relation of principal and agent is created; no relation of master and servant is established; the owner and driver of the team is not controlled by and is not in any sense the agent of the invited guest; and to hold him responsible for the negligence of

the former, by whose permission alone he rides, is unauthorized by law and repugnant to reason. That he who suffers injury from another's negligence may recover compensation of the wrongdoer is a principle founded in natural justice, and sustained by every precedent. That where the negligence of the person injured has contributed to the injury he cannot so recover, because it is impracticable in the administration of justice to divide and apportion the compensation in proportion to the varying degrees of concurring negligence, is equally well settled. But that he whose wrongful act or omission has caused the injury and damage, and who upon every consideration of justice and reason ought to make compensation for it, shall be permitted to escape because a third person, over whom the injured person had no control, and whose only relation to him was that of a guest to his host, has been guilty of negligence that contributed to the injury, is neither just nor reasonable. According to the verdict of this jury, a loss of $1,000 was entailed upon the decedent by the negligence of this defendant. The defendant's wrongful omission was the proximate cause of this damage. The decedent in no way caused or contributed, by any act or omission of hers, to this injury. She had no control over her brother, the driver, who may have contributed by his carelessness to the damage. Upon what principle, now, can it be justly said that the decedent must bear all this loss when she neither caused, was responsible for, nor could have prevented it, because this third person assisted to cause the injury, the proximate cause of which was the wrongful act of the defendant company? If there exists in the realm of jurisprudence any sound principle upon which so unrighteous a punishment of the innocent and the discharge of the guilty may be based, we have been unable to discover it."

In *Dean v. Pennsylvania R. Co.*, 129 Pa. St. 514, 6. L. R. A. 143, it is said: "Quotations might be given from many cases in the different states, illustrating the very firm and emphatic manner in which the doctrine of this

celebrated case (*Thorogood v. Bryan*) has been denied. The authorities in England, and the great current of authorities of this country, are against it. Nor can I see why, upon any rule of public policy, a party injured by the concurrent and contributory negligence of two persons, one of them his common carrier, should be held, and the other released from liability. As to this, I speak only for myself. In my opinion there is no principle consonant with common sense, common honesty, or public policy, which should hold one not guilty of any negligence, either of omission or commission, for the negligence of another, imputed to him under such circumstances. * * * Dean was riding in the wagon merely by invitation of Fields, who happened to be going in the direction of Dean's home with a load of provisions. He was carried without compensation, merely as an act of kindness on the part of Fields, who had sole control of the team and of the wagon. The case is similar in this respect to *Carlisle v. Brisbane*, 113 Pa. St. 544, and the case of *Follman v. Mankato*, 35 Minn. 522. We are clearly of opinion that if Dean himself was guilty of no negligence, the negligence of Fields cannot be imputed to him." See also *Bunting v. Hogsett*, 139 Pa. St. 363.

In *Dyer v. Erie R. Co.*, 71 N. Y. 228, the plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horse and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing without giving the driver of the wagon any warning of its approach. The horses, becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown, or jumped, from the wagon, and was injured by the train, which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and although he traveled voluntarily, he was not responsible for the negligence of the

driver, where he himself was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses.

In *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1, it is said by Church, C. J.: "It is, therefore, the case of a gratuitous ride by a female upon the invitation of the owner of a horse and carriage. The plaintiff had no control of the vehicle, nor of the driver in its management. It is not claimed but that Conlon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated, or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him, but as he was in every respect competent and suitable, she was not negligent in doing so. Can she be held by consenting to ride with him to guarantee his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person, and was free from negligence herself, and I am unable to perceive any reason for imputing Conlon's negligence to her. * * * I am unable to find any legal principle upon which to impute to the plaintiff the negligence of the driver. The whole argument on behalf of the appellants on this point is contained in the following paragraph from the brief of its counsel: 'So if the plaintiff had proceeded on this journey upon the invitation of Conlon for the like purpose, she having voluntarily intrusted her safety to his care and prudence, and thus exposed herself to the risk of injury arising from his negligence or want of skill, she should be precluded from recovering if he thereby contributed to her injury.' If this argument is sound why should it not apply in all cases to public conveyances as well as private? The

acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stage-coach, or even in a train of cars, providing there was no negligence on account of the character or condition of the driver, or the safety of the vehicle, or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury, for whose acts the plaintiff was not responsible. The rule of contributory negligence is very strict in this state, and should not be extended, nor should the rule of imputable negligence be extended to new cases where the reason for its adoption is not apparent."

In 7 Am. & Eng. Ency. Law (2d ed.), 447, the rule is stated thus: "Occupants of private conveyances. In the second class of cases there has been, and still is, much conflict among the authorities, but the true principle seems to be that when a person is injured by the negligence of the defendant and the contributory negligence of one with whom the injured person is riding as a guest or companion, such negligence is not imputable to the injured person; while, on the other hand, it may be imputable when the injured person is in a position to exercise authority or control over the driver."

In 1 Thompson, Commentaries, Law of Negligence, sec. 502, it is said: "While there are a few untenable decisions to the contrary, nearly all American courts are agreed that the rule under consideration extends so far as to hold that where a person, while riding on a private vehicle by the invitation of the driver, or the owner, or the custodian of the vehicle, and having no authority or control over the driver, and being under no duty to control his conduct, and having no reason to suspect any want of care, skill, or sobriety on his part, is injured by the concurring negligence of the driver and a third person or corporation, the negligence of the driver is not imputed to him so as to prevent him from recovering damages from the other tort feasor." See also: *Covington T. Co. v. Kelly*, 36 Ohio St. 86; *Masterson v. New York C. & H. R. R. Co.*,

84 N. Y. 247; *Strauss v. Newburgh E. R. Co.*, 39 N. Y. Supp. 998; *Kessler v. Brooklyn H. R. Co.*, 38 N. Y. Supp. 799; *Metropolitan Street R. Co. v. Powell*, 89 Ga. 601; *City of Leavenworth v. Hatch*, 57 Kan. 57; *Cahill v. Cincinnati, N. O. & T. P. R. Co.*, 92 Ky. 345; *Noyes v. Boscawen*, 64 N. H. 361; *Omerson v. City of Grafton*, 5 N. Dak. 281; *St. Clair Street R. Co. v. Eadie*, 43 Ohio St. 91; *Carlisle v. Brisbane*, 113 Pa. St. 544; *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149; *Baltimore & O. R. Co. v. State*, 79 Md. 335; *Alabama & V. R. Co. v. Davis*, 69 Miss. 444; *Follman v. Mankato*, 35 Minn. 522; *Board of Commissioners v. Mutchler*, 137 Ind. 140; *Becke v. Missouri P. R. Co.*, 102 Mo. 544; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; *Larkin v. Burlington, C. R. & N. R. Co.*, 85 Ia. 492; *Randolph v. O'Riorden*, 155 Mass. 331; *Tompkins v. Clay Street R. Co.*, 66 Cal. 163; *Duval v. Atlantic C. L. R. Co.*, 134 N. Car. 331, 65 L. R. A. 722; *Louisville & N. R. Co. v. Molloy's Adm'x*, 91 S. W. (Ky.) 685.

The overwhelming weight of authority in this country is that the negligence of the driver of either a public or private vehicle is not imputable to the passenger or guest. Especially should this rule apply to a case like the one in hand, where it was not shown that the relation of master and servant, or principal and agent, or the like, existed, and where it was not shown that the plaintiff had any control, or right of control, of the driver.

In 1 Shearman & Redfield, Law of Negligence, sec. 66, the authors, after giving the history of the doctrine announced in *Thorogood v. Bryan*, say: "The only remnant of this doctrine which remains in sight anywhere is the theory that one who rides in a *private* conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hair-splitting judges in *Thorogood v. Bryan*, was invented in Wisconsin, and sustained by a process of elaborate reasoning. * * * The notion that one is the

'agent' of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three states mentioned (Wisconsin, Nebraska, and Montana) and it must soon be abandoned even there."

We have not overlooked the case of *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627, referred to in 1 Shearman & Redfield, Law of Negligence, sec. 66, *supra.* In that case this court imputed to the plaintiff the carelessness of the driver of a private conveyance on the ground that the driver must be considered the agent of the plaintiff. It was held in the first paragraph of the syllabus: "(1) That the conveyance being a private one the driver was the agent of the injured person. (2) If the act of the driver in going upon the crossing without looking and listening was negligence which contributed to the injury received, the injured person cannot recover." A consideration of the doctrine of imputed negligence was not necessary to the disposition of the case. *Prideaux v. City of Mineral Point,* 43 Wis. 513, was followed without a discussion of the numerous authorities in conflict therewith. This question was not discussed in the opinion, but the learned commissioner assumed that the doctrine of imputed negligence applied to that case.

A correct conclusion was reached in the Talbot case, and it has been reaffirmed by this court in numerous subsequent cases, among which are: *Brady v. Chicago, St. P. M. & O. R. Co.,* 59 Neb. 233; *Hajsek v. Chicago, B. & Q. R. Co.,* 68 Neb. 539, 5 Neb. (Unof.) 67. However, the question of imputed negligence or identification was not necessarily involved, because in that case plaintiff was guilty of contributory negligence in attempting to cross a railroad track without taking the precaution to stop, look and listen. It was therefore immaterial in that case whether or not the negligence of the driver was imputable to the plaintiff. His own contributory negligence was a bar to a recovery against the railroad company.

See cases last above cited, and also *Colorado & S. R. Co. v. Thomas,* 33 Colo. 517. Mr. Commissioner AMES held in *Hajsek v. Chicago, B. & Q. R. Co.,* 68 Neb. 539: "Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state." Although this decision was vacated on rehearing and the judgment affirmed on the ground that the plaintiff was guilty of contributory negligence (5 Neb. (Unof.) 67), no doubt remains that what was said in that case concerning the doctrine of imputed negligence is the law in this state, and is sustained by the great weight of authority in this country. See, also, *Huff v. Ames,* 16 Neb. 139. We are therefore of opinion that the *Talbot* case should be modified in so far as it makes the driver of any private vehicle the agent of his guest, and applies the doctrine of identification or imputed negligence to all persons injured while riding in a private conveyance, no matter what the circumstances or relationship of the parties may be.

The defendant in the case at bar cites cases which, it is contended, support the theory of imputable negligence. In *Bartram v. Sharon,* 46 L. R. A. 144, 71 Conn. 686, it was held: "No recovery can be had under a statute giving a right of action for a penalty in case of injuries caused by a defective highway, where the injury is caused by such defect combined with the negligence of a third person." To the same effect is *Orr v. City of Oldtown,* 99 Me. 190, 58 Atl. 914. These cases were not based upon the doctrine of imputed negligence, but each was founded upon a statute which the court construed as giving a cause of action only in the event that the injury arose wholly from the defective highway. It is not contended that our statute is of such narrow scope. In *Mullen v. City of Owosso,* 100 Mich. 103, the contention of defendant herein is upheld, but by a divided court. Hooker, J., with whom concurred the chief justice, wrote an able dissenting opinion, concluding in these words:

"The time has arrived when the question must be settled. I think it should be in conformity to the weight of authority, and the better rule." *Evensen v. Lexington & B. Street R. Co.*, 187 Mass. 77, 72 N. E. 355, was disposed of very much as *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, and is subject to the same objection. The court apparently assumed, without discussion, that the doctrine of imputed negligence applied. Defendant cites other cases that may be distinguished from the case before us. These we will not review at length. Many of them were cases brought to recover for injuries received at railroad crossings by collision with locomotives, and where the injured party himself was negligent, or could by the exercise of ordinary care and prudence have checked or remonstrated with the driver as they were approaching a known place of danger.

We are convinced that imputable negligence exists only where there is privity between the injured person and the one whose contributory negligence cooperated with the negligence of the defendant in causing the injury. In the case before us, plaintiff was practically unacquainted with the defective bridge. He had no reason to believe it dangerous. He accepted an invitation from Mr. Rhoman, the owner of the vehicle in which the plaintiff was riding, when the injury was inflicted. Rhoman was not under the control of the plaintiff. He was not plaintiff's agent or servant. No privity existed between them. Plaintiff was acquainted with no facts which would prompt a prudent man to interfere with the course taken by the driver. The first danger he knew was the slipping of the horse when it fell upon the bridge. This was followed immediately by the precipitation of the plaintiff to the bottom of the ravine. At no time could plaintiff advise or remonstrate with his driver. We find no sound rule of law by which the negligence of Rhoman, if any, may be imputed to the plaintiff under the circumstances disclosed in this case. In our opinion, the instruction complained of imputing the negligence of the driver, if

any, to the plaintiff was wrong and should not have been given.

In his petition plaintiff alleged that the injury was caused "without any fault or negligence on the part of the plaintiff or the person driving said vehicle." Defendant now contends that by reason of this allegation plaintiff was required to prove that Rhoman, the driver, was without negligence. In construing a petition most strongly against a party pleading, courts should not resort to a technical construction of the words used. The allegation referred to was unnecessary. It did not add to plaintiff's cause of action. It was pleading a conclusion, and should be construed as though it read: "Said injury was without fault or negligence of the person driving, which could be imputed to the plaintiff."

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

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 a new trial.

REVERSED.

ST. PAUL HARVESTER COMPANY, APPELLEE, V. LOUIS FAULHABER, SR., ET AL., APPELLANTS.

FILED NOVEMBER 10, 1906. No. 14,488.

New Trial. Newly discovered evidence, merely cumulative in character, may be a sufficient ground for granting a new trial, if the circumstances of the record are such as to render it highly probable that it would, if produced, have changed the result of the trial. *German Nat. Bank v. Edwards*, 63 Neb. 604.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

Talbot & Allen, for appellants.

B. F. Johnson and *Clark & Allen, contra.*

EPPERSON, C.

In 1890, the plaintiff, St. Paul Harvester Company, recovered judgment against appellants in the district court for Lancaster county. This judgment became dormant, and in 1904 plaintiff instituted these proceedings to revive it. Defendant, Louis Faulhaber, Sr., objected to revivor because no summons had been served on him in the original action and the court never acquired jurisdiction over his person. Trial was had to the court, an order reviving the judgment was entered, and defendant, Faulhaber, Sr., appeals.

The principal questions argued are that the evidence does not sustain the judgment of revivor, and the court erred in not granting a new trial on the ground of newly discovered evidence. The officer's return showed that appellant was served by delivering to him personally a true and certified copy of the writ. The deputy sheriff, who made the return, testified that he did not remember anything about the circumstances of this particular summons, but that it was duly served that way or he would not have made the return. He stated that he did not know appellant personally. "Q. Would it have been possible for you to have served someone else instead of old man Faulhaber? A. If anybody had been at his house when I was there, and represented to be him when I asked him his name, and claimed that he was Faulhaber, Sr., I might have done that, not knowing him personally; but I don't think that would be possible. Q. You wouldn't swear positively now that you served Louis Faulhaber, Sr., as you have no recollection of that fact? A. I would only rely at this time on my return on the summons at that time." Appellant testified positively that no summons was ever served on him in this case; that

he was never sued in his life; that soon after the judgment was obtained he learned of it through a letter received from plaintiff's attorney, Mr. Stewart, and thereupon consulted his attorney, Mr. Stearns. John M. Stewart, who was at one time attorney for plaintiff, and who obtained the purported judgment herein sought to be revived, testified that soon after the judgment was obtained he, in company with appellant and his attorney Stearns, interviewed the deputy sheriff as to the service, after which witness told Stearns that he would not put appellant to the trouble and expense of an injunction suit to restrain the collection of the judgment, and that thereafter plaintiff made no attempt to collect the judgment from appellant. R. D. Stearns, who was attorney for appellant in 1890, corroborated the testimony of Mr. Stewart. Other testimony was introduced tending to show that appellant was financially responsible at the time the original judgment was entered, and that collection could have been made at any time from that date until the present suit was begun, but no effort was made along that line. We have read the evidence carefully and are convinced that there is serious doubt as to the correctness of the conclusion of the learned trial court. In this state of the record, defendant asked a new trial on the ground of newly discovered evidence. It was shown that the witness Stearns had discovered a written memorandum, which, omitting title, is as follows: "Action. Injunction Suit. Date, 1890, Sep—. Looked after the above matter and got judgment vacated as to Faulhaber, Sr." Stearns says in his affidavit: "Affiant, at the time of giving his testimony in the case, had forgotten that any record of the transaction had been made. Affiant further says that, owing to the agreement made between L. Faulhaber, Sr., and the attorney for the St. Paul Harvester Co., by which L. Faulhaber, Sr., was to be released from the judgment, said injunction suit was not filed." Other newly discovered evidence was to the effect that Mr. Stewart, plaintiff's attorney, had admitted that there was

no judgment against Faulhaber, Sr. A proper showing of diligence was made, and it seems clear to us that a new trial should have been granted. It is argued that the new evidence was merely cumulative. Be that as it may, in such a close case as this is, we think the offered evidence might have changed the result. *German Nat. Bank v. Edwards,* 63 Neb. 604. The testimony given by the witnesses as to conversations and transactions had 14 years previous was necessarily lacking in positiveness, and the newly discovered evidence would be of value in fixing certainty to the facts testified to by them.

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

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 a new trial.

REVERSED.

ISAIAH GOOD BEAM, APPELLEE, V. JAMES C. BEAM ET AL., APPELLANTS.

FILED NOVEMBER 10, 1906. No. 14,463.

Evidence examined, and *held* to support the finding of the district court.

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

Mockett & Mattley, R. D. Sutherland, George W. Groves and *C. F. Strop,* for appellants.

S. W. Christy, contra.

DUFFIE, C.

December 26, 1902, Michael Beam, the father of the plaintiff and of the defendants James C. Beam and Phoebe

Glock, made a contract with the plaintiff, by the terms of which plaintiff was to pay to Mrs. Carrie Mathis $1,200 with interest, to Philip Glock $350, to Robert Tweed $60, and to Mrs. Glock $1,000. In addition he was to furnish the said Michael Beam with a comfortable home, board, nursing, care, washing, mending, medicines, physician's care, when needed, and $100 per annum; in consideration of which the said Michael Beam agreed that plaintiff should have the full control, use and income from the north half of section 24, township 4, range 5, in Nuckolls county, for and during the term of the natural life of said Michael, and at his death the premises were to become the absolute property in fee simple of the plaintiff. Thereafter Michael Beam lived upon the farm with his son until July 21, 1903, when he demanded a surrender of the contract, which being refused, he left the house, and from that date until April 8, 1904, made his home with his daughter Phoebe Glock, spending, however, some time in Kansas with his son James C., and also visiting the territory of Oklahoma. On August 11, 1903, the plaintiff wrote his father, who was then in Kansas, stating that he and his wife had made up their minds to leave the farm and that his father could have it to do with as he pleased; that he would leave March 1, 1904. He concluded the letter by saying: "This is the last writing I ever expect to do to you, and I don't want you to answer this or to come near me or in my house so long as I live, for I have not misused you, and Emma says the same, to stay away. P. S. I will give you the contract March 1, 1904. Burn that will at once and forever shut up about thing. Hoping you will find some fool that you can run over and knock down, then kick him for falling." Thereafter the plaintiff visited his father in Kansas, and tried to induce him to return to his home. One or more letters asking his father to return were written by the plaintiff, but all without effect. On April 8, 1904, the old gentleman returned to the farm where, after a few days, he was taken sick and died on the 19th of April,

1904. After his death the plaintiff brought this action against the defendants, his brother and sister, to enforce specific performance of the contract made with his father, alleging full performance upon his part. It is not controverted that, after the making of the contract, the plaintiff paid Michael Beam $100, Carrie Mathis her claim of $1,200, and interest, Robert Tweed $60, and interest, Philip Glock about $200, and he tendered into court $100 for Philip Glock, and $1,000 for Phoebe Glock; that he paid something over $100 on account of doctor's bills and funeral expenses of his father. The answer of the defendants alleges that plaintiff had failed to comply with the terms of the contract made with his father, and had violated and repudiated that contract; that the contract was obtained by undue influence, and also alleges the mental incapacity of Michael Beam to make the contract. The evidence is contained in a voluminous bill of exceptions, and we will confine our consideration of the testimony to what we regard as most material in determining the rights of the parties.

The land in controversy is worth from $16,000 to $18,000. Prior to the making of the contract Michael Beam had advanced to his oldest son, James C., money and property to the amount of about $7,000. The daughter had been thoroughly educated in the usual branches, as well also as in music. These matters the father had discussed with a number of the witnesses, and one of them testified: "He told me what he had done for Mrs. Glock and Jim; that Jim had all that was coming to him, and that Mrs Glock had chosen between an education and interest in the estate, and she had taken the education, and Good had done the work at home all the time and should have the farm." Prior to the making of this contract the old gentleman had caused a conditional deed of the farm to be made to his son Good, and called on a notary to acknowledge it. The notary read it over, and advised that before he execute it he consult with one of his old friends, a Mr. Tweed. Tweed advised against the making of the

deed, and told him to keep his property in his own hands, and the deed was destroyed. This deed, like the contract in suit, provided for the payment to the old gentleman of a certain annual sum, $1,000 to his daughter, the debts mentioned above, and a certain amount to his son James C. Afterwards the contract in question was drawn up by some party at the solicitation of the plaintiff, who left it on the forenoon of the day of its date in the hands of a notary, and on the afternoon of that day Michael Beam called and executed it. Before execution, the notary, at his request, read it to him twice, and that part of it providing for his own "keep," as he termed it, was read three times, after which it was duly signed and acknowledged. We infer from a careful reading of the evidence that sometime after its execution the old gentleman was led to believe, from conversations with third parties, that the contract operated as an absolute conveyance of the land, or, as it is termed by one of the witnesses, "a bond for a deed," and divested him of all interest in it. It was then, apparently, that he became dissatisfied and demanded a return of the contract. This being refused, he left the farm, as before stated, and remained away from July until the following April. We cannot avoid the impression that, if the old gentleman's suspicions had not been aroused as to the character of the contract, if he had not been led to believe that it took from him all interest in the land, this controversy never would have arisen. Nevertheless, when he demanded a rescission of the contract and a surrender of the agreement, and the plaintiff, in his letter of August 11, agreed to surrender it, this may have operated as a rescission, unless it is further made to appear that the old gentleman returned to the farm of his own volition and with a full understanding of what he was doing. On his return, one of his grandchildren asked him when he was going away, and he replied that he had come to stay, that it was his home, that he never would have left it except for the interference of other parties. To one of the neighbors, with whom he rode from church on the Sunday preceding

his return, he said that he was going back, that there was no place like home. The doctor who attended him in his last illness, and others who saw him during the time, testified to his full mental capacity up to within two or three days of his death. There is some evidence in the record tending to show mental incapacity on his part about the time the contract was made, and thereafter, but its character is such as not to impress us as entitled to any great weight, and, when compared with that of his physician and those who were most intimately acquainted with him, is completely overcome. One other circumstance, while not affecting the legal rights of the parties, should be mentioned. While in Kansas, and before returning to the farm, the old gentleman had a will prepared, by the terms of which he gave his daughter Phoebe $2,000, and his son James $1,000. A life estate in the farm was vested in his son Good, with remainder over to Good's children. He had also prepared a deed, in which his property was disposed of in the same way. These several instruments, and his frequent talks with his friends and neighbors, impress us with the belief that the old gentleman had always thought that his eldest son had received his share of the estate, and that an additional amount of $1,000 or $2,000 was the full share of the daughter in addition to what she had already received in the way of education and other advancements, and that, even while the misunderstanding between himself and his son Good existed, he intended to hold the farm for Good and his children. The evidence is quite conclusive as to the good care and consideration which the father received while living with the plaintiff, and were it not for the letter which the plaintiff himself wrote to his father, and another one found in the record written to his brother James, we would be disposed to say that the relations between the parties were as pleasant as usually exist between father and son living in the same house and conducting the same farm. While there was some excuse for writing the letters referred to, in the heat of the moment, and while the son was laboring under the impression that

the large sums of money paid on behalf of his father were lost, we find in those letters the only strong evidence against the enforcement of this contract, but, on the whole, are satisfied that the district court took the correct view of the case in entering a decree ordering a specific performance.

We recommend an affirmance of the decree.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

WILLIAM REESE, APPELLANT, V. WATAEWE HARLAN, APPELLEE.

SOLOMON WOODHULL, APPELLANT, V. AGGIE WOODHULL, APPELLEE.

JOSEPHINE HARLAN, APPELLANT, V. ALICE FREMONT, APPELLEE.

FILED NOVEMBER 10, 1906. NOS. 14,490, 14,491, 14,492.

Indians: ALLOTTEE OF LANDS: ESTATE OF WIDOW. The widow of an allottee of Omaha Indian lands is entitled to a life estate in the equitable fee of her deceased husband, with remainder over to the issue of the marriage, or to the surviving father or mother of the husband if no issue survive her.

APPEALS from the district court for Thurston county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

H. Chase, for appellants.

Thomas L. Sloan, contra.

DUFFIE, C.

These three cases involve the right of the widow of an allottee under the act of congress, approved August 7, 1882,

to a life estate in the unexpired equitable title of the allottee to Indian lands after the death of her husband as against the father or the mother of the deceased. The appellant claims that the unexpired term of 25 years during which the United States holds the legal title in trust is a chattel real which, under the terms of the sixth section of the act, descends to the next of kin, and that our statute giving the widow a life estate in the absence of issue is not applicable. The sixth section, so far as it affects the case, is as follows: "That upon the approval * * * by the secretary of the interior, he shall cause patents to issue * * * of the legal effect and declare that the United States does and will hold the land thus allotted for the period of 25 years in trust for the sole use and benefit of the (allottee) * * * or in case of his decease, of his heirs according to the laws of the state of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in said state shall apply thereto after patents therefor have been executed and delivered." 22 U. S. St. at Large, p. 342, ch. 434.

In *Porter v. Parker,* 68 Neb. 338, and *McCauley v. Tyndall,* 68 Neb. 685, the question was examined and determined against the contention of the appellant, and, following these cases, we recommend an affirmance of the decree of the district court.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

MYERS ROYAL SPICE COMPANY, APPELLANT, V. WALLACE B. GRISWOLD, APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,456.

Sale: BREACH OF CONTRACT: DAMAGES. Plaintiff, through its traveling salesman, took defendant's order for a quantity of "stock food." At the time the order was taken such salesman was assisting the defendant in selling and creating a market for stock food of the same kind previously sold to the defendant by plaintiff, and the order was given on condition that such salesman would continue thus to assist the defendant for a certain time. The salesman left immediately after taking the order, and gave the defendant no further assistance. *Held*, That the measure of defendant's damage is the reasonable value of the services which were to be rendered to him by the salesman according to the terms of the contract of sale.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

Wilson & Brown, for appellant.

H. J. Whitmore, contra.

ALBERT, C.

This litigation commenced in justice court, and reached the district court on appeal. The petition alleges the sale and delivery of certain stock food by the plaintiff to the defendant, and that there is due therefor from the defendant to the plaintiff the sum of $120, with interest from October 6, 1903, the date of sale. The answer contains a general denial, which is followed by these allegations: "Further answering defendant alleges that the goods for which plaintiff now asks judgment in this action were shipped by plaintiff to defendant upon the express condition and understanding that the plaintiff should have an experienced salesman come to and remain in defendant's territory for at least one week, actively at work soliciting orders from the trade for plaintiff's goods, and introduc-

ing same to the public, and thereby enable this defendant to build up a market for the goods theretofore received by him from plaintiff as well as the goods described in plaintiff's petition; that plaintiff wholly failed to keep and comply with the said agreement, and did not send a salesman to remain and work in said territory for at least one week, and that by reason thereof this defendant, when said goods arrived at Lincoln, refused to accept them, but placed them in his warehouse, and immediately notified plaintiff that he would not accept them and that they were in the warehouse subject to plaintiff's disposal, and that defendant has since repeatedly notified plaintiff of his rescission of said purchase, but that plaintiff has failed and neglected to remove said goods from defendant's warehouse where they still remain subject to plaintiff's order." As a further defense, in the nature of a counterclaim, the answer alleges that in May, 1903, and previous to the sale and delivery of the goods in question, the plaintiff had sold a quantity of goods of the same character, and that it was a part of the contract of the sale thereof that the plaintiff would "at once put one or more experienced men at work in defendant's territory who would travel with defendant's men, and introduce said goods and place orders for same with defendant, and said Caldwell assured defendant that the greater part, if not all of said trial orders, would be disposed of by plaintiff's own men, and without any expense to defendant, and that defendant's own salesmen would be instructed in the best method of handling said stock food, and be enabled to conduct a successful trade thereof in the future." It is further alleged that the plaintiff failed to keep and perform its said contract with respect to putting one or two men in defendant's territory for the purposes hereinbefore stated, and did not put a man in said territory until about September 1, 1903, "who visited but few places, and secured but a very few orders," and that by reason of plaintiff's failure to keep and perform that part of its said contract the defendant has been damaged in the sum of $170. The de-

fendant includes in his counterclaim a charge for freight and storage on goods covered by the second sale, that being the sale upon which plaintiff bases its right to recover. The reply is a general denial.

The evidence shows that the first contract of sale, as well as that upon which plaintiff seeks to recover, was made by the defendant with a traveling salesman acting for the plaintiff, and fully sustains the allegations of the answer with respect to the conditions upon which the sales were respectively made. It further shows that at the time the second sale was made plaintiff's traveling salesman who acted for the plaintiff in making the sale was in the defendant's territory in pursuance of the first contract of sale assisting the defendant to establish a market for the goods; that he represented to the defendant that the goods on hand could not be sold on account of the size of the packages, unless there were larger packages to go with them, and that at his solicitation defendant gave an order for a ton of the goods in packages of a larger size, on condition that the salesman would continue a week longer in his efforts to dispose of the goods already on hand. The order was made out in writing and forwarded to the house, the salesman adding thereto this provision: "Provided my services are continued for a time." It appears from the evidence that the salesman left the territory immediately after taking the order and made no further effort to dispose of the goods on hand or establish a market for them. The defendant offered evidence tending, it is claimed, to show a rescission of the contract of sale on which the suit was brought, which was excluded. The reason of this ruling is not clear, but it was apparently on the theory that, the goods having been delivered, the defendant could not rescind, but was left to his remedy for damages for breach of contract, and the cause was submitted on that theory. Ordinarily under such circumstances the defendant would be entitled to rescind.

Among the instructions given by the court are the following: "(5) If you find and believe that the plaintiff

so failed in its contract, and that the defendant has been damaged, then and in that event you are instructed that the measure of the defendant's damage would be the difference between the contract price for such merchandise and the actual value thereof in the city of Lincoln, in the defendant's possession, after the failure of the said plaintiff to comply with its said contract. (6) That is, in event you find and believe that the said plaintiff failed to comply with its contract and furnish an agent for a reasonable length of time, and that on account thereof the merchandise became valueless to the defendant, and there was no market therefor, and on account of plaintiff's failure the defendant could not sell the same, then and in that event the defendant's set-off for damages would be equal to the amount of the plaintiff's claim herein and there would be no recovery on the part of the plaintiff. On the other hand, if you find and believe that such goods still had a value, notwithstanding the plaintiff's failure to comply with its contract, but that the defendant was only embarrassed in the sale thereof, and hindered and delayed in the disposition of the same, then and in that event, from all the evidence now before you, it is for you to say what actual damages the defendant sustained by reason of such failure on the plaintiff's part." The jury found in favor of the defendant in the sum of $185 and, after deducting therefrom $131.90, the amount found due the plaintiff on its cause of action, returned a verdict in favor of the defendant for the remainder. From a judgment rendered on the verdict the plaintiff appeals.

The appeal is prosecuted in pursuance of the provisions of an act of 1905, providing for appeals to this court in all civil cases, and repealing the provisions of the code providing a remedy by proceedings in error in such cases. Code, sec. 675. The defendant contends that the appeal should be dismissed because the act in question is unconstitutional. Even were we to resolve that question in favor of the defendant, it would avail him nothing, because we should still be required to review the case. The

plaintiff filed a transcript within the time required by the amendatory act, as well as within the time required by the former provisions of the code with respect to proceedings in error. The transcript is accompanied by an assignment of errors, wherein the errors are assigned with all the particularity required in a petition in error. The defendant has entered a general appearance. The jurisdiction of this court is therefore complete and its duty to review the cause imperative, whether the new act providing a remedy by appeal or the former provisions of the code with respect to proceedings in error be held to be in force. Consequently, the constitutionality of the act in question is not necessarily involved, and we must forego its discussion.

The plaintiff complains of the instructions hereinbefore set out because they do not state the correct rule for the measure of damages and have no foundation in the evidence. This complaint we think is well founded. There is no evidence from which the jury could find that the goods had depreciated in value in any specific amount because of the plaintiff's failure to comply with its part of the contract with respect to furnishing a salesman to assist in disposing of them. Indeed, it is hardly conceivable that such evidence is attainable, because, of necessity, it must be based on mere conjecture and speculation as to the profits the defendant would have realized in consequence of the efforts of the salesman furnished by the plaintiff had one been furnished. The plaintiff's default consists of its failure to furnish a salesman according to the terms of its agreement. The defendant's loss on account of such failure is the loss of the services of such salesman, and his damage is the reasonable value of the services of a salesman to perform the services which the plaintiff agreed as part of its contract of sale its salesman would perform for the defendant at the time and place specified. The plaintiff also complains of the ruling of the court on its motion to strike certain portions of the answer on the ground that they contain matters in

defense which were not pleaded in justice court. No complaint is made on this ruling in the motion for a new trial, therefore it is unnecessary to consider it at this time.

For the errors in the instruction as to the measure of damages, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, 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.

JOHNS & SANDY ET AL., APPELLANTS, V. IRA REED, SHERIFF, APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,465.

1. Sales: REPLEVIN. The creditors of a vendor who has made an illegal sale of his property cannot seize the same unless they can show that such transfer was an invasion of, and prejudicial to, their rights.
2. ———: VALIDITY. Ordinarily, a sale made with the knowledge and intention of both parties that the subject matter thereof shall be used for an illegal purpose, is illegal; but where such use is not in contemplation of the parties at the making of the sale, a subsequent use of the subject matter for an unlawful purpose does not render the sale illegal.
3. Conditional Sales: VALIDITY. A condition in a contract of sale, whereby the title is to remain in the vendor until the full amount of the contract price is paid, is void as against purchasers and judgment creditors of the vendee in actual possession, unless reduced to writing, signed by the vendee, and a copy thereof filed with the county clerk or register of deeds of the proper county. Comp. St., ch. 32, sec. 26.

APPEAL from the district court for Box Butte county: JAMES J. HARRINGTON, JUDGE. *Reversed as to defendant Reed.*

William Mitchell and *R. C. Noleman,* for appellants.

W. G. Simonson, B. F. Gilman and *Wilson & Brown, contra.*

ALBERT, C.

This is an appeal from a judgment rendered in an action of replevin brought against the sheriff to recover possession of certain property which he had taken under certain orders of attachment issued against one Tyler, who is not a party to this suit. On and prior to the 16th day of June, 1903, Tyler was a licensed saloon-keeper in the city of Alliance, and the owner of the saloon fixtures and stock of liquors, etc., in controversy in this action. At about that date he entered into negotiations with Johns & Sandy, the plaintiffs, looking to a sale of his stock and fixtures to them. Previous to that time the plaintiffs had been engaged in the saloon business in the state of Colorado, where, according to certain evidence, which was received without objection, a saloon license is transferable by assignment. The parties finally reached an agreement and a sale of the property from Tyler to the plaintiffs was consummated in the city of Denver. The nominal consideration paid by the plaintiffs was $4,864, and of this amount $3,864 was paid in cash. The remainder was evidenced by a promissory note which was deposited with a certain bank with the understanding that it was to be paid in case the plaintiffs were permitted to continue the saloon business under the license previously issued to Tyler, otherwise to be returned to the plaintiffs. The intervener Coors at the time of the transaction was the proprietor of a brewery in the city of Denver, and furnished the plaintiffs the money necessary to pay the cash consideration, upon their agreement to buy the beer required in their business from him, and took a mortgage on the stock and fixtures as security for the money advanced. The plaintiffs at once took possession of the property and, for some days at least, continued the saloon business

without taking out a license in their own names. About the first day of July, 1903, they were notified that they would not be permitted to conduct the business without taking out a license. There is evidence tending to show that as soon as it was brought to the notice of the intervener, Coors, that the plaintiffs could not carry on the business without taking out a license in their own names he ordered them to close the saloon and do no further business until they had procured such license. The evidence also shows that, in order to enable them to take out a license, Coors advanced the plaintiffs the further sum of $1,500, taking a second mortgage on the property in question. Both his mortgages were duly filed for record on the first day of July, 1903. Sometime before the sale by Tyler to the plaintiffs, he had negotiated with the National Cash Register Company, another intervener, for the purchase of a cash register. He finally telegraphed this intervener to send him the register, and they forwarded it by express. It is part of the property which was transferred to the plaintiffs by Tyler, and is one of the articles taken under the writ of replevin in this case. This intervener alleges that the sale was made to Tyler on condition that he should sign a conditional contract whereby the title should not pass until the price of the register had been paid, but that Tyler fraudulently, and without consent of this intervener, obtained possession of the register from the express company, and that no sale thereof was in fact made to him. The orders of attachment under which the defendant sheriff claims the right of possession issued in suits brought on debts which existed against Tyler at the time of his sale to plaintiffs, and were levied on the 20th day of July, 1903. At the conclusion of the evidence the court instructed the jury to return a verdict in favor of the defendant sheriff for the aggregate amount of the writs under which he had attached the property, but in favor of the plaintiffs and against the intervener, the National Cash Register Company. The plaintiffs and both interveners appeal.

We gather from the briefs filed in this court that the trial court proceeded on the theory that the sale made by Tyler to the plaintiffs was illegal and void as to the existing creditors of the former, because made with the understanding that the plaintiffs should use the subject matter of the sale for an illegal purpose, namely, the sale of intoxicating liquors in this state without a license in their own names, but under a license theretofore issued to their vendor. Assuming that the sale was made to the plaintiffs for that purpose, still we think the sheriff, as the representative of the attaching creditors, is in no position to assail it. In *Hall v. Hart,* 52 Neb. 4, it was held that "an insolvent debtor, or one in failing circumstances who parts with money or property under a contract in violation of statute, or which is void as against public policy, will be held to stand in the same position as one making a voluntary conveyance in fraud of creditors." The foregoing rule is more favorable to creditors than was required by the facts in that case, and it may be doubtful whether it can be sustained on authority. But a reexamination of the question is not required at this time, because the facts in the present case do not bring it within that rule, but rather within that announced in *Brower v. Fass,* 60 Neb. 590. In that case the court, dealing with a state of facts somewhat similar to those involved in the *Hall* case, *supra,* as well as those in the case at bar, said:

"But the illegality of the sale was not alone sufficient to justify the sheriff in levying upon the property as the property of Huette. It was held in *Hall v. Hart,* 52 Neb. 4, that, where property of an insolvent debtor, or one in failing circumstances, has been transferred to another by an illegal sale, it will be treated as though it had been disposed of without consideration and in fraud of the rights of the vendor's creditors. Counsel for Brower insist that we shall now go a step farther and declare that creditors of a solvent vendor may appropriate to the satisfaction of their claims property which has passed

out of his hands in execution of an illegal contract of sale. No decision is instanced in support of this contention, and we have been unable to find any that gives it the least countenance. In *Traders Nat. Bank v. Steere*, 165 Mass. 389, 393, it is said: 'The conveyance of property by a contract which is void as being against public policy in a particular which has no reference to creditors does not necessarily give creditors a right to pursue the property after the contract has been fully executed. Such a contract may or may not be fraudulent as against creditors. If it is, they may set it aside; if it is not, they cannot.' The sale here in question was not actually fraudulent as to creditors, and it should not be held to be presumptively fraudulent, in the absence of a showing that it was prejudicial to their rights. Huette, at the time of the sale to Fass, was neither insolvent nor in failing circumstances; at least, there is no evidence that he was, and, therefore, his creditors were affected by the illegal transfer, only as all other members of the community were affected. When an illegal contract has been executed and the parties thereto are *in pari delicto,* no action lies to recover back money paid under it, or for restitution of property delivered in pursuance of its terms; and this rule is applicable, not only to the parties themselves, but to all others claiming through or under them. Huette could not recover the property in dispute; he has no cause of action against Fass. Neither can Huette's creditors reclaim such property unless the sale and delivery of it to the plaintiff was actually, or by implication of law, an invasion of their rights."

In the case at bar, as in the case from which we have just quoted, at the time of the sale, the vendor was neither insolvent nor in failing circumstances; at least, there is no evidence that he was, and, on the authority of that case, his attaching creditors, or the defendant sheriff who stands as their representative in this litigation, are not in a position to attack the sale on the ground of illegality.

As the case must go back for a new trial it is proper

to notice some other matters which are likely to arise in the future. We seriously doubt whether the evidence shows that the goods were sold with the understanding that they were to be used in violation of the liquor laws of this state. There is no direct evidence of such understanding. Counsel for the defendant contends it is established, because it was agreed that an additional amount was to be paid to Tyler in case the plaintiffs were not required to take out a license in their own names, and because, after the sale, the plaintiffs ran the saloon for some time without taking out such license, and, consequently, in violation of law. We do not undertake to say that such facts would not warrant the inference that the parties to the contract of sale contemplated an illegal use of the goods at the time the sale was made. But we are satisfied that such inference is not the only one that may fairly be drawn from the evidence.

Both the plaintiffs and the intervener Coors, at the time of the sale, were residents of Colorado. The former had been engaged in the saloon business in that state, and the latter was engaged in the manufacture and sale of beer. The contract of sale was closed there. We cannot take judicial notice of the laws of Colorado, but the uncontradicted evidence is that a liquor license in that state is transferable. It may be inferred from the evidence that the parties, being ignorant of the laws of this state in that regard, made the provision with respect to placing the note for the remainder of the purchase price in *escrow*, not with a view to a violation of the laws of this state, but with a view to informing themselves with respect thereto, and intending to take out a license if the business could not be legally conducted without. If such were their intentions at the time of the sale, then the sale was legal, and would not be rendered illegal because the plaintiffs were subsequently engaged for a short time in selling intoxicating liquors contrary to the laws of this state, and making use of the property in such alleged traffic. It

would follow from what has been said that the trial court erred in directing a verdict in favor of the defendant sheriff.

There is no contest between the intervener Coors and the plaintiff, consequently it is unnecessary to go into the merits of the appeal filed by him. But there remains to be considered the appeal of the other intervener, whom we shall refer to as the "Company."

The evidence shows that in April, 1903 (one witness made an obvious mistake of a year), Tyler wrote the company that he wanted to buy a cash register. The company in response wrote him giving the price and the terms upon which they would sell him one. The terms were $40 cash, and $25 monthly, until the price was paid; the deferred payments to be secured by a contract to be executed by Tyler whereby the title to the register was to remain in the company until all payments had been made. On receipt of this letter, Tyler wired the company to ship the register, which it did at once, sending it by express, with instructions to the express agent at Alliance that it was to be by him delivered to Tyler upon payment by him of $40 cash, and his signing the contract hereinbefore mentioned and the notes evidencing the deferred payments. The register was received by the express agent at Alliance sometime in May, 1903, and delivered to Tyler upon his payment of $40 and signing the notes for the deferred payments. His signature to the contract was in some way overlooked. Upon discovering that the contract had not been signed by Tyler, the company insisted upon his signature thereto, and continued to insist until after the attachments in question had been levied. It has never returned, nor offered to return, the cash payment or the notes for the deferred payments. The company therefore is not in a position to treat their sale to Tyler as rescinded. By retaining the cash consideration and notes they must be held to have ratified the sale. That being true, the most favorable view that may be taken of its case is that the sale was conditional. But as

the plaintiffs had no notice, actual or constructive, of that fact and are *bona fide* purchasers, the alleged condition of the sale whereby the title remained in the company is void as to them. Comp. St. 1903, ch. 32, sec. 26. The court therefore properly instructed a verdict against the company.

It is therefore recommended that the judgment in favor of the plaintiffs and against the intervener, the National Cash Register Company, be affirmed, and that the judgment in favor of the defendant be reversed and the cause remanded for further proceedings.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment in favor of the plaintiffs and against the intervener, the National Cash Register Company, is affirmed, and the judgment in favor of the defendant is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

CHRIS SORENSON, APPELLEE, V. ERWIN TOWNSEND, APPELLANT.

FILED NOVEMBER 10, 1906. No. 14,473.

1. Contract: ACTION: GENERAL DENIAL. In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made.

2. Trial: INSTRUCTIONS. Where the evidence adduced by the defendant tends to establish a particular theory, which, if established, constitutes a defense, he has a right to have such theory submitted to the jury.

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

P. D. McAndrew and *Kirkpatrick & Schwind,* for appellant.

A. W. Scattergood and *L. K. Alder, contra.*

ALBERT, C.

The plaintiff (appellee) brought this suit to recover the remainder due on an alleged express contract of service. He alleges in his petition that in November, 1902, he entered into an oral contract with the defendants, whereby the defendants agreed to pay him the sum of $60 for the service of himself and team; that under and by virtue of said contract the plaintiff served the defendants, by himself and team, from the 15th day of November, 1902, to the 10th day of June, 1903, and duly performed all his part of the said contract. But one of the defendants answered, and his answer is as follows: "Comes now the defendant, Erwin Townsend, and answering plaintiff's petition for himself, and no one else, says: (1) That he admits that he and defendant, Melvin Hagerman, were in partnership running a dray line in Fairfax, S. D., in the year 1902, and that they hired the plaintiff to work for them on their said dray line with his horses and wagon, and that plaintiff did work for them on said dray line during a part of each of the months set forth in plaintiff's petition, and that the said firm bought a lumber wagon of the defendant. (2) This defendant, further answering plaintiff's petition, says and alleges the facts to be that the said firm engaged and contracted with the plaintiff to work for them on their said dray line for the agreed sum of $40 a month, and furnish board and lodging for himself and team, and that said firm fully complied with their part of the said contract in all particulars, and paid the plaintiff in full for said wagon and for all the said work and labor that the plaintiff performed for said firm, and fully settled with the plaintiff, and this defendant denies that there is any sum whatsoever due

the plaintiff thereon. (3) Further answering plaintiff's petition, this defendant says he denies each and every material allegation in plaintiff's petition not herein specifically admitted, and denies that said firm of Townsend & Hagerman contracted with or agreed to pay the plaintiff for the services of himself and team on said dray line the sum of $60 a month, and denies that plaintiff worked and labored for said firm during all the time specified in plaintiff's petition." The jury were instructed on the theory that a reply in the nature of a general denial had been filed to the defendant's answer, but it does not appear in the record. The cause appears to have been submitted on the theory that the other defendant was not in court, and as no question is raised in that regard further reference to him is unnecessary. The plaintiff introduced evidence tending to establish the allegations of his petition and made a *prima facie* case. The answering defendant was sworn as a witness, and from his testimony it would seem that the negotiations between the plaintiff and the defendants were conducted by him. He testified, in effect, that in his first conversation with the plaintiff with respect to entering the employment of the defendants he informed the plaintiff that they could not pay him more than $40 a month; the plaintiff insisted on $60 for the first month, whereupon the defendants informed him that they would give $60 for the first month, and $40 a month afterwards, and it was agreed between them that the plaintiff would enter their employment on those terms; that plaintiff did not proceed under this agreement, but before commencing to work for the defendants made a new contract with them, whereby it was agreed that the plaintiff should work for the defendants one month for $60, no reference being made to his employment or the wages he should receive after that time; that plaintiff entered their employment with that understanding, and at the expiration of one month the answering defendant informed him that they could not pay him $60 a month thereafter, but would pay him $40

a month, to which the plaintiff replied, "All right," and continued to work for them. The court instructed the jury that they should wholly disregard the testimony with respect to the agreement entered into between the parties at the end of the first month for the reason that no new contract was pleaded. The defendant excepted to this instruction, and now asks a reversal of the judgment on the ground that this instruction was erroneous.

We think the instruction is erroneous. The plaintiff declared on an express contract. The contract is, in effect, that the plaintiff undertook to work for the defendants for an indefinite length of time for $60 a month, and that in pursuance thereof he worked for them a certain length of time. The burden was upon him to establish those facts. When he had made a *prima facie* case it was perfectly competent for the defendant to overcome it by showing that the contract, instead of being for an indefinite period, was for a period of one month, and that the services rendered after the expiration of that month were rendered under a new contract whereby the plaintiff, instead of receiving $60 a month, was to receive $40. This evidence was competent under defendant's general denial, because it is well settled that in an action upon a contract the defendant may show under a general denial that the contract was a different one from that set out in the petition, or that no contract at all was made. 1 Ency. Pl. & Pr. 818.

It would seem that in giving the instruction in question the trial court proceeded on the theory that the defendant's evidence tended to show a modification of an existing contract, but we do not think that is a correct theory of the defense. The defendant's evidence tends to show, not a modification of the contract, but that after the original contract had by its own terms expired the plaintiff continued in the employment of the defendants by virtue of a new contract whereby he was to receive $40 a month. This appears to have been one theory of the defense, and as there was evidence tending to establish it the

defendant had a right to have it submitted to the jury. That theory is covered by a general denial, hence, the fact that it does not strictly conform to the contract set out in the answer does not render the evidence inadmissible nor warrant its exclusion from the jury. The evidence was admitted without objection and tends to negative the plaintiff's cause of action. Its exclusion, we think, constitutes reversible error.

Another complaint is that the court erred in permitting the plaintiff to testify to the contents of a certain letter written to him offering him employment, and stating the terms upon which the defendants would employ him. The contention now is that this letter was not acted on, but that the parties subsequently entered into new negotiations, which were all merged in the oral contract finally entered into between them. There is testimony tending to show that the letter was the basis of the negotiations between the parties and that the offer therein made was never withdrawn. Consequently, we think there was no error in the admission of this evidence.

Another complaint is that the court permitted the plaintiff to testify that at or about the time he quit work for the defendants they were financially embarrassed and unable to meet their obligations. This line of testimony was really brought out by defendant. On cross-examination of the plaintiff he laid great stress on the fact that plaintiff had not presented his claim to the defendants for payment before bringing suit, and an explanation of such omission seemed in order. The testimony now complained of is such explanation, and taking into account the nature of the cross-examination, which was of doubtful propriety, we think there was no error in admitting this testimony.

For the errors in the instruction hereinbefore mentioned, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE and JACKSON, 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.

H. WADE GILLIS, APPELLANT, V. SARAH E. PADDOCK, ADMINISTRATRIX, APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,460.

Trial: DIRECTING VERDICT. Where the evidence upon a question of fact material to the issue is conflicting and such that reasonable minds might reach different conclusions, the question is one for the jury, and it is error for the court to direct a verdict.

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

Jefferis & Howell, for appellant.

Hopewell & Hopewell, contra.

JACKSON, C.

The action is one on a promissory note executed by Solomon Paddock. It appears that Paddock was under arrest at the time the note was given, charged with murder. The plaintiff is an attorney at law, and took the note in consideration of services to be rendered the maker in the defense of his case. Some days later, and prior to the date fixed for the preliminary examination, Paddock took his own life while confined in the county jail. At the close of the trial the district court directed a verdict for the defendant, and the plaintiff appeals.

The position of the defendant is thus stated in the brief filed on behalf of the estate: "First. The note is fraudulent and void, being procured by undue influence of plaintiff over the maker Solomon Paddock, the relation

of attorney and client existing between them at the time of its execution. Second. There is a failure of consideration, the services contracted for not having been performed." It appears from the record that on November 27, 1903, Solomon Paddock, while in a drunken condition, killed his own son. He was taken into custody and placed in the county jail. The coroner of the county was notified, and was at the jail preparing to go to the scene of the homicide for the purpose of holding an inquest. The plaintiff was called over the telephone by the sheriff of the county, who advised him that Paddock desired to see him. After a moment's conversation with the prisoner he left the jail for the purpose of attending the inquest, which was held at a late hour in the night season. On the next morning the plaintiff again visited Paddock in the jail. From the testimony of Honorable W. G. Sears, one of the judges of the district court for Burt county, it is shown that he was in the jail at the time for the purpose of a conference with the sheriff, and that he was called into that portion of the jail where Paddock was confined, and it was there stated, either by Paddock or the plaintiff, that Paddock was about to execute a note for the sum of $1,000, payable to the plaintiff, in consideration of which the plaintiff was to represent the accused in whatever courts the case might appear and defend him against the charge of murder; that the sum of $1,000 was to be in full for all services so performed; that Paddock desired a witness to the agreement, and Judge Sears was asked by the accused whether the contract was binding and the plaintiff could recover more than the sum of $1,000 for his services; after being assured, both by Judge Sears and the plaintiff, that no more than $1,000 could be collected on the contract, the note was executed. The plaintiff delivered to the accused a written memorandum, signed by himself, containing the substance of the agreement.

It is urged on behalf of the estate that the contract of employment was entered into on the evening of November 27, and that the contract for the fee after the relationship

of attorney and client is established is presumably fraudulent, and that no recovery can be had in excess of the value of the services rendered. There is testimony in the record tending to show that the amount of fee agreed upon for the services which the plaintiff agreed to perform was not unreasonable, and it is in effect conceded upon the argument that the contract in that respect was not unjust. Under that state of facts the case should have been submitted to the jury with proper instructions to determine when the contract of employment was in fact made, whether the fee agreed upon was reasonable, and the amount, if any, which the plaintiff should recover.

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

DUFFIE and ALBERT, 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.

THOMAS GROCHOWSKI, APPELLEE, V. MICHAEL GROCHOWSKI ET AL., APPELLANTS.*

FILED NOVEMBER 10, 1906. No. 14,467.

1. Contract: VALIDITY. A promise made in consideration of an agreement to refrain from resisting the probate of a will is not void as against public policy where no persons or interests other than the persons and interests of the contracting parties are prejudicially affected thereby.

2. ———: SPECIFIC PERFORMANCE. Such a promise is not without consideration and will be enforced.

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

*Rehearing denied. See opinion, p. 510, *post.*

R. E. Evans, for appellants.

A. R. Oleson, contra.

JACKSON, C.

On February 25, 1897, John Grochowski died leaving a will by the terms of which he bequeathed $100 to St. Mary's Catholic Church at West Point, $15 to his son Thomas Grochowski, $200 to each of the five children of Thomas Grochowski, $1,000 to his grandson Mike Grochowski, $1,500 to his daughter Mary, and the remainder of his estate, including a farm of 160 acres, to his son Michael Grochowski, on the condition that the son Michael provide for the widow of the deceased during her lifetime. The son, Michael Grochowski, was appointed executor of the will. The will was proposed for probate in the county court of Cuming county, and the son Thomas appeared with his attorney for the purpose of contesting the will. Negotiations between the brothers, Michael and Thomas Grochowski, led to the following written contract: "Whereas, John Grochowski, in the seventh item of his last will and testament, bequeathed his farm, consisting of 160 acres, to his son Mike Grochowski upon certain conditions therein stated, and, whereas, said will was on this day offered for probate in the county court of Cuming county, Nebraska, and, whereas, Thomas Grochowski objected to the probate of said will: Now, therefore, for the purpose of avoiding litigation it is hereby agreed by and between the said Mike Grochowski and Thomas Grochowski that the said Thomas Grochowski withdraw all objections to the probating of said will and in consideration thereof that said Mike Grochowski hereby agrees with the said Thomas Grochowski that he will fulfil all the conditions and stipulations contained in the said seventh item in the last will and testament of the said John Grochowski, and after the death of their mother named in said item, he will divide whatever is left of the

farm named in said item or from the proceeds of the sale thereof with the said Thomas Grochowski, but said property is not to be sold by the said Mike Grochowski, unless it is necessary to do so for the purpose of supporting their mother in the manner provided in said seventh item of said will, unless with the consent of said Thomas Grochowski. Dated at West Point, April 5, 1897. Chas. McDermott, P. F. O'Sullivan, Peter Hasler, Mike Grochowski, Thomas Grochowski." The widow of John Grochowski died in 1902, and on February 24, 1903, this action was instituted by the plaintiff to enforce a specific performance of the contract with his brother Michael.

In the petition it was alleged that the contract, as agreed upon between the parties, included the residue of the personal estate of the deceased as well as the 160 acre farm, but by mistake of the scrivener the personal estate was omitted from the written agreement, and the prayer included a request for a reformation of the contract, an accounting of the personal estate, and the conveyance of an undivided one-half interest in the land. In the answer it is alleged that Mary Grochowski, daughter of the deceased and one of the legatees, was at the death of her father, and still is, an insane person, that she took no part in the compromise and settlement between the brothers, Thomas and Michael Grochowski, and for that reason the compromise and agreement between the brothers was void as against public policy; that the contract was without consideration; that the estate had not been fully settled, and the action was prematurely brought. At the trial, and after the plaintiff had rested, the defendant was permitted to amend his answer. In the amendment it was charged that the actual agreement between the brothers, Thomas and Michael Grochowski, was that in consideration of the withdrawal of the objections to the probating of the will by the brother Thomas, and an agreement by Thomas Grochowski to care for and keep their mother one-half of the time during the remainder of her life, the defendant would upon the death of the mother convey

one-half interest in the farm to the plaintiff; that by mistake the scrivener omitted the provision providing for the care of the mother one-half of the time by the plaintiff; and the prayer included a request for the reformation of the contract to that effect. It was alleged that the plaintiff had neglected and refused to perform the conditions of the contract on his part, and had never contributed toward the support of the mother; by reason of such refusal the defendant had been compelled to provide and had provided for the mother at his own expense. The decree of the district court gave the plaintiff an undivided one-half interest in the real estate and quieted the title in him to that extent. The court found specifically that in consideration of the care of the widow and the expenses incident to her maintenance the defendant was entitled to hold and receive all of the moneys and other property of the estate of the deceased received by him, and the rents of the real estate to March 1, 1905, and taxed the costs, one-half to each litigant. The defendant appeals.

The claim that the compromise and contract is void as against public policy does not seem to be well taken. It appears from the evidence that, while the contract was drafted in a law office in the city of West Point, yet it was revised and signed in the office of the county judge of Cuming county where the probate proceedings were then pending. A clerk in the county judge's office assisted in revising the agreement at the suggestion of the parties, and presumably the adjustment of the entire matter was had with the knowledge of the county judge. The rights of no persons other than the contracting parties were prejudicially affected, nor did the settlement affect the due administration of justice. There is no evidence of a connivance to defeat or defraud the insane sister of any of her rights. She was not a necessary party to the agreement, and we find no reason for disturbing the decree of the trial court in so far as it sustains the validity of the contract and the terms thereof as contended for by the plaintiff.

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

AFFIRMED.

The following opinion on motion for rehearing was filed May 10, 1907. *Rehearing denied:*

1. **Contract:** VALIDITY. A contract whereby one interested in defeating the probate of a will agrees to interpose no objection thereto is not void as against public policy, unless made collusively and in fraud of other parties interested in the estate.
2. ———: CONSIDERATION. Where opposition to the probate of a will is made by such party in good faith, a withdrawal of such opposition is a valid consideration for a promise on the part of one interested in sustaining the will.
3. **Evidence** examined, and *held* sufficient to entitle the plaintiff to a decree.

ALBERT, C.

This case is before us on rehearing. The former opinion is reported *ante,* p. 506, where the facts involved and the issues raised by the pleadings are stated at some length. It is again strenuously contended that the contract is void as against public policy. Authorities are not wanting to sustain that contention, but we think the better considered cases are the other way. *Seaman v. Colley,* 178 Mass. 478, 59 N. E. 1017, is similar in some respects to the case at bar. In that case the plaintiff and others contested the probate of a codicil to a will, and the findings of the lower court that the codicil was procured by the undue influence of the defendant was set aside. When the case was called for a new trial plaintiff, in consideration of defendant's agreement to pay him $500, withdrew his opposition, and without knowledge of the agreement the court admitted the codicil to probate. The only other interested party was a weak-minded son of the testator. There was no evidence of any connivance between the parties to defraud the testator's son or that he was influenced by the plaintiff's withdrawal of his oppo-

sition to the probate of the instrument. On appeal to the supreme judicial court it was held that the agreement was not void as against public policy. In the body of the opinion the court said:

"The other next of kin was a weak-minded son of the testator, who was under guardianship, but it does not appear that his conduct or that of any other person than the parties to the bargain was influenced, or was expected or even likely to be influenced, by the plaintiff's course. It does not appear that the other parties to the appeal were not informed of the plaintiff's arrangement and of the motives which induced his change. * * * The will and codicils are not before us, and it does not appear that there was any other interest to be affected. The only ground on which it can be argued that the bargain was against public policy is that such bargains cannot be made without informing the court, for, if the matter had been known to everyone, it would be absurd to say that the plaintiff was not free to consult his own interest in opposing or withdrawing opposition to the codicil, as well for money as without it. Indeed such arrangements as the present have been said to be entitled to the highest favor of the courts." Citing *Leach v. Fobes,* 11 Gray (Mass.), 506. See also *Rector, Church Wardens and Vestrymen of St. Mark's Church v. Teed,* 120 N. Y. 583, 24 N. E. 1014; *Barrett v. Carden,* 65 Vt. 431, 36 Am. St. 876; *In re Estate of Garcelon,* 104 Cal. 570, 43 Am. St. 134.

In the case at bar, as in the Massachusetts case, one of the heirs at law was a feeble-minded child of the testator. In the Massachusetts case it was said that "it does not appear that his (the weak-minded son's) conduct * * * was influenced, or was expected, or even likely to be influenced by the plaintiff's course." In the case at bar the contract was made in the presence of the court. It was made openly and without any effort at concealment. We cannot presume that the court would be a party to any arrangement that would operate as a fraud on the weak-minded sister or any other person interested in the estate.

That being true, we know of no rule of public policy requiring us to hold the contract void and of no effect

Another contention of the appellant is that the contract was without consideration. The argument in support of this contention proceeds on the theory that at the time the contract was made the plaintiff had no valid ground for opposition to the probate of the will, and that the ground upon which he did oppose it was so obviously untenable that there could be no difference of opinion among reasonable men with respect to it. At the time the contract was made the plaintiff had filed no formal objection to the probate of the will. The objection that he made orally to the court and in his conversations with the defendant was that he had been "slighted" and was entitled to a greater share of the testator's estate. It appears to have been made in good faith. The grounds upon which he based this objection are not very definite. His position at the time was not that of one who had entered a contest, but of one who contemplated doing so. That presupposes examination and investigation. It does not necessarily presuppose examination and investigation to defeat the will in its entirety, but to modify the provisions of the will relating to himself on the ground of mistake or for some other reason. By the contract in question the plaintiff agreed, in effect, to forbear such investigation and to allow the will, so far as he was concerned, to be admitted to probate without objection. The case in this respect does not differ in principle from one where the line between adjoining landowners is indefinite and uncertain, and the parties to avoid the expense of investigation agree upon and establish a boundary. In such case the line agreed upon will be sustained, although it may be subsequently found to vary from the true line. *Lynch v. Egan,* 67 Neb. 541. In the case at bar, as in the case just cited, the rights of the parties to the contract were uncertain, and could be ascertained only at considerable expense and inconvenience to each of them. To avoid such expense and inconvenience they entered into the contract in suit, the plain-

tiff agreeing to forbear opposition to the probate of the will, and the defendant, in consideration thereof, to make a division of the real estate after the mother's death. The promise of each was a sufficient consideration for the other.

The defendant further contends that the contract found by the court is not the contract pleaded by the plaintiff nor the one shown in evidence. The finding upon which this contention is based is as follows: "The court further finds that, in consideration of the care of his mother and the expenses incident to her maintenance and all other expenses incident thereto by the said Mike Grochowski, the said Mike Grochowski is entitled to hold and receive all the moneys and other property of the estate of John Grochowski received by him, and the rents by him received to March 1, 1905, upon said described premises, and that the same shall be in full of all claims against said estate and Thomas Grochowski by reason of such expense in connection with the care and maintenance of their said mother." With respect to this finding the plaintiff says in his brief: "The court takes an accounting from only a partial statement of the condition of the estate of John Grochowski, deceased, and assigns the entire personal estate to the defendant to pay for the care of the mother, and then assigns a one-half interest in the farm to the plaintiff. Where is the warrant for such a decree? In order to understand the finding just quoted, it should be kept in mind that the plaintiff was asking a reformation of the contract to include the residue of the personal estate of the testator, as well as the land described in the contract. The defendant claimed that the actual contract between himself and the plaintiff contained a provision to the effect that they should jointly provide for their mother. This was denied by the plaintiff. The defendant is the residuary legatee. Item seven of the will expressly imposes upon the defendant the duty of providing for the wife of the testator, who is the mother of the parties to

this suit. The written contract between the parties expressly provides that the defendant will fulfil all the conditions of that item of the will, and after the death of the mother "will divide whatever is left of the farm named in said item, or the proceeds of the sale thereof," with the plaintiff, but that the land is not to be sold unless necessary for the support of the mother. To our minds the contract clearly contemplates that the mother should be supported out of the income derived from the land or, in case that should be insufficient, out of the proceeds realized from the sale thereof. The evidence shows that the rents and profits were sufficient for that purpose. While it would appear from the finding of the court with respect to the residue of the personal estate that it was awarded to the plaintiff in consideration of his support and maintenance of the mother, it was in fact intended to dispose of the plaintiff's contention that by the terms of the actual contract between himself and the defendant he was to share in the residue of the personal estate.

Another contention of the defendant is that the district court was without jurisdiction, because the case involved the settlement of the accounts of an executor. The court was not attempting to settle the accounts of the executor, but, as we have already seen, to dispose of the plaintiff's contention that he was entitled to an equal share with the defendant in the residue of the personal property, and to ascertain the expense incurred by the defendant in supporting the mother according to the provisions of the will in order to make a just distribution of the real estate according to the terms of the contract between the parties.

Another claim put forward by the defendant is that the suit was prematurely brought, because there had been no final settlement of the testator's estate. This suit involves certain real estate. It affects only the parties to it. The record shows that all the debts of the estate have been paid, and that the personal estate is ample to pay the bequests under the will and all expenses of administration. It will not be necessary, therefore, to resort to the real

estate. By the terms of the contract the real estate was to be divided between the parties to this suit on the death of the mother, and she had died before the suit was instituted. On this state of facts there was no occasion for delay, and, as the suit binds only the parties to the record and their privies, there is no danger that others will suffer by the decree.

The evidence to sustain the decree is ample and convincing. We see no escape from the conclusion reached by the district court, and we therefore recommend that the motion for rehearing be overruled.

JACKSON, C., concurs.

By the Court: Motion for rehearing

OVERRULED.

BRAINARD & CHAMBERLAIN, APPELLANTS, V. BUTLER, RYAN & COMPANY ET AL., APPELLEES.

FILED NOVEMBER 10, 1906. No. 14,485.

1. Justice of the Peace: JURISDICTION. Defective notice of a conditional order vacating a default judgment before a justice of the peace does not deprive the justice of jurisdiction over the subject matter, and he may, on application of the moving party, continue the hearing for proper notice.
2. ———: ———: WAIVER. An objection to the jurisdiction over the subject matter is a waiver of objection to jurisdiction over the person.

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

L. H. Bradley, for appellants.

James B. Sheean, C. C. Wright and *B. H. Dunham, contra.*

JACKSON, C.

The action was instituted before a justice of the peace, an order of attachment was issued and levied on personal property, service was by publication, there was no appearance by the defendant, and judgment was entered August 15, 1903. On the 25th of the same month the defendant filed a motion to set aside the judgment by default, and offered to confess judgment for costs. A conditional order was that day entered, and hearing set for September 1. On September 1, at the hour fixed for the hearing, the defendant appeared, the plaintiff not appearing, and it having been discovered that the notice of the conditional order was defective, the defendant requested a continuance for the purpose of serving a new notice, and the case was continued to September 7. A new notice was served on September 1. On September 7, which was a legal holiday, the justice entered an order adjourning the hearing to the following day, at the same hour on which the hearing was set for September 7. The defendant appeared on the 8th, plaintiff failed to appear, the conditional order was made absolute, and on application of the defendant the case was continued for trial to September 16. On the latter date the plaintiff appeared specially, objecting to the jurisdiction of the court, and the case was adjourned to September 23, 1903. On September 23 the defendant again appeared with a motion to recall an order of sale which had been issued on the attachment, and the case was again continued to September 24, 1903, at 1 o'clock P. M. On September 24, at 2 o'clock P. M., the plaintiff filed another special appearance and objection to the jurisdiction of the court, which was overruled, and, declining to appear further, the order of sale of attached property was recalled and the case dismissed for want of prosecution. The plaintiff took error to the district court, where the judgment of the justice was affirmed, and the case is now brought to this court for review.

The objection to the jurisdiction filed on September 24

is as follows: "Now come the plaintiffs by their attorney and enter their special appearance for the sole purpose of presenting the following motion herein, to wit: The plaintiffs move the court to set aside and set at naught all orders or entries made herein subsequent to the entry of the judgment herein on the 15th day of August, 1903, for the reason that the defendant not having complied with the statute of Nebraska in such case provided, by not having given the notice required by such statute to be given to the plaintiffs. The said R. G. King as such said justice has not had and now has no power or authority in law to make any order or orders in said cause subsequent to said 15th day of August, 1903, the justice being without legal jurisdiction so to do either as to the parties or subject matter in suit." It is the contention of the plaintiff that, the first notice of the conditional order having been defective, the proceedings of September 1, 1903, terminated the controversy, and that the justice of the peace was without further jurisdiction to proceed; that the order of that date in the following language: "It appearing to the court that the notice of reopening judgment served upon plaintiff is defective, the same is hereby quashed. Defendant filed an affidavit for continuance for the purpose of serving a new notice of the reopening of judgment, thereupon cause adjourned to September 7, 1903, at 1 o'clock P. M."—amounted to an adjudication against the defendant's right to further proceed. This contention cannot be sustained. The provision of the statute controlling the action of the justice in such cases requires: "First.—That his motion be made within ten days after such judgment was entered. Second. That he pay or confess judgment for the costs awarded against him. Third. That he notify in writing the opposite party, his agent, or attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time, if the party reside in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice ten days before the

trial." Code, sec. 1001. This statute does not require, as seems to be urged by the plaintiff, that the entire proceeding be had within ten days after the entry of the judgment. The motion and offer to confess judgment for costs must be filed within the ten days, but time must thereafter be given for the service of a proper notice. *Smith v. Riverside Park Ass'n,* 42 Neb. 372. The justice acquired jurisdiction over the subject matter of the motion on account of its having been filed within ten days allowed by law for that purpose, and the fact that the first notice of the order was defective did not deprive that court of jurisdiction. It was clearly the duty of the court to continue the case for proper service upon the application of the defendant.

Again, it is urged that the second notice was insufficient in point of time, for the reason that September 6 was Sunday, and September 7 a legal holiday, and that five days did not intervene between the date of making the order, September 1, and the date of the hearing, September 7. It is evident that this contention is not well taken. The order having been returnable on September 7, a legal holiday, the motion, under the law, stood for hearing at the same hour of September 8. It is true that the court had no jurisdiction to make the order on September 7, but no such order was necessary; the case stood for hearing on the following day by operation of law. Furthermore, the objection was something more than an objection to the jurisdiction over the person of the plaintiff. It included an objection to the jurisdiction over the subject matter, and such an objection is a waiver of all objection to the jurisdiction of the court over the person. *Perrine v. Knights Templar's & M. L. I. Co.,* 71 Neb. 273; *Bankers Life Ins. Co. v. Robbins,* 59 Neb. 170.

It is evident that the judgment of the district court was right, and we recommend that it be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

BENJAMIN F. RUSSELL V. STATE OF NEBRASKA.

FILED NOVEMBER 22, 1906. No. 14,626.

1. Courts: ADJOURNMENT. The judge of the district court has power for sufficient reason to adjourn a regular term of court to a future time or without day, and this may be done by an order to that effect sent to the clerk of the court before the time fixed for holding the regular term.
2. ———: SPECIAL TERM. The judge of the district court may call a special term for the transaction of the general business of the court *if he deem it necessary.*
3. Jurors: SPECIAL VENIRE. When the regular panel of petit jurors is quashed for any reason, the district court may order jurors to be summoned under section 664 of the code.
4. Seduction: EVIDENCE. In a prosecution for seduction, evidence of specific acts of lewdness on the part of the prosecuting witness is incompetent. If the prosecuting witness was of good repute for chastity prior to the alleged seduction she is within the protection of the statute. The evidence upon this point should be confined to general reputation for chastity.
5. ———: ———. A teacher's certificate held by the prosecutrix at the time of the alleged seduction is not competent evidence of reputation for chastity.
6. ———: PROMISE OF MARRIAGE. The crime of seduction is not complete unless the illicit intercourse is had under promise of marriage. The promise must be an unconditional one. It must be of such character and made under such circumstances that the one to whom it is made might reasonably rely upon it. A promise conditioned upon pregnancy as the result of such illicit intercourse is not such promise.
7. ———: CORROBORATIVE EVIDENCE. The requirement of the statute that the evidence of the female must be corroborated relates both to the act of illicit intercourse and the promise of marriage, and the existence of one of these facts does not necessarily prove the

existence of the other, nor does it furnish the corroboration required by the statute.

8. ———: ———. The circumstances relied upon as corroborating the evidence of the prosecuting witness as to the promise of marriage must point so plainly to the truth of her testimony and be of such probative force as to equal the testimony of a disinterested witness.

9. Criminal Law: INSTRUCTIONS. If a defendant in a criminal case is a witness in his own behalf, it is error to instruct the jury that, "if the defendant by his own testimony has not denied in any way any material fact proved in the case within his personal knowledge, such testimony or material fact proved, if not denied by the defendant, is admitted by the defendant to be true." *Comstock v. State*, 14 Neb. 205, *distinguished.*

ERROR to the district court for Frontier county: ROBERT C. ORR, JUDGE. *Reversed.*

W. S. Morlan and *J. L. White,* for plaintiff in error.

Norris Brown, Attorney General, W. T. Thompson, L. H. Cheney, C. H. Tanner and *J. L. McPheeley, contra.*

SEDGWICK, C. J.

In the district court for Frontier county this defendant was convicted of the crime of seduction, and by these proceedings has brought the judgment of conviction here for review. This crime is defined by section 207 of the criminal code. One of the principal contentions of the defendant is that the conviction is not supported by the evidence. In disposing of that question, the evidence in the case will be referred to so far as may be necessary to that discussion.

1. It appears from the record that, in fixing the term of court in that county for the year in which this trial was had, the judge of the district court ordered that the first term of the district court should be held, commencing on the 5th day of March. And afterwards the judge sent from McCook two orders to the clerk of the district court for Frontier county, one of them canceling the regular term for that year, and the other ordering a special term

to transact the general business of the court. The manifest purpose of these two orders was to change the date and hold the term one week earlier. There is, of course, no doubt of the authority of the judge to postpone the regular term of court if good reason appears for so doing. He may, for sufficient reason adjourn the regular term without day. The statute, section 4735, Ann. St., authorizes the calling of a special term of court in the following words: "A special term may be ordered and held by the district judge in any county in his district, for the transaction of any business, if he deem it necessary. In ordering a special term he shall direct whether a grand or petit jury, or both, shall be summoned." This would seem to be sufficient authority for the action of the court in calling a special term, and the defendant cannot complain of such action unless he can make it appear that in some particular the statute has been violated. In the order calling a special term, the judge directed that a petit jury should be summoned. This was done, and the defendant moved to quash the panel. This motion was sustained, and the court then ordered the sheriff "to summon 24 persons, good and lawful men, from the body of Frontier county, having the qualifications of jurors, to appear forthwith and serve as jurors for this present term of court." This practice is justified by the provisions of section 664 of the code, which has been many times so construed by this court. We do not want to be understood as recommending the practice of changing the time of holding the regular term of court after the same has been fixed as the law provides. The law does not appear to contemplate such changes for trivial and insufficient reason. If the method pointed out by the statute for securing jurors is disregarded, no doubt the defendant may object to being tried upon a criminal charge before the jury so obtained. In such case the law will presume prejudice. If, however, the provisions of the statute have been complied with, and no prejudice to the defendant appears, it will be presumed that the court had sufficient reason for changing the time of holding the term.

This objection of the defendant, then, was properly overruled.

2. Upon the trial of the case the plaintiff showed that the prosecuting witness had been engaged in teaching school, and then offered in evidence her teacher's certificate, after having shown that it was regularly executed by the county superintendent and delivered to the prosecuting witness. It is now objected that this evidence was incompetent, and we think that there is merit in this objection. In the brief for the state it is said that this certificate was not offered "for the purpose of proving the general reputation of the prosecutrix for chastity. * * * The certificate, though it recites * * * *'to be a person of good moral character,'* was offered as proof only, and to corroborate other testimony, that the prosecutrix at the time was engaged in teaching school under the proper authority, it being a paper authorized to be issued under the laws of Nebraska." It is impossible to say from this record what the counsel for the state had in mind when this certificate was offered. No suggestion appears to have been made at the time that it was offered for any special purpose. The fact that the prosecuting witness was engaged in teaching school was already in evidence, and, if true, was not likely to be contradicted as it could, of course, be absolutely substantiated. This fact was not so material to the prosecution as to make it necessary to show what the qualifications of the prosecutrix as a teacher might be, nor that she was duly authorized to teach, and the evidence in question could have had no effect in the interest of the state unless intended to show that the prosecutrix was of good repute for chastity. For that purpose it was clearly incompetent. The evidence of the county superintendent upon that point in this criminal trial was of no more importance than the evidence of other witnesses, and ought in like manner to be subjected to cross-examination.

3. The defendant complains that he was not allowed upon the trial to prove specific acts of lewdness on the

part of the prosecutrix for the purpose of establishing her want of chastity. The statute under which this prosecution is brought provides: "Any person over the age of eighteen years, who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, shall be deemed guilty of seduction, and upon conviction, shall be imprisoned in the penitentiary not more than five years, or be imprisoned in the county jail not exceeding six months, but in such case the evidence of the female must be corroborated to the extent required as to the principal witness in case of perjury." Cr. code, sec. 207. It would seem that the language of our statute is sufficiently explicit to determine this question. Indeed, the language is so plain upon this point that it leaves no room for construction. Any female who is of good repute for chastity is within the protection of the statute. No condition is made that she must have deserved that reputation by a correct and pure life, and we cannot extend the statute by construction beyond its plain meaning. Similar statutes in other states have been so construed. *Bowers v. State,* 29 Ohio St. 542; *State v. Bryan,* 34 Kan. 63. In some of the states the statutes defining this crime are essentially different from ours. By the Missouri statute it is made a crime for any person "under promise of marriage" to "seduce and debauch any unmarried female of good repute." Under statutes like this there has been some difference of opinion as to the proper construction of the word seduce. Some courts have held that this word in itself means to corrupt and to draw aside from the path of virtue, and that one cannot be drawn from the path of virtue unless she is honestly pursuing that path, and that the charge of seduction involves the allegation that the woman seduced was at and prior to the time of her ruin of pure character and leading a virtuous life, so that in making such allegations she must be prepared upon the trial to establish its truth. *State v. Reeves,* 97 Mo. 668. Other courts perhaps have taken a different view, and have held

that the words "of good repute for chastity" indicate that the general reputation of the prosecutrix can be shown, but not specific acts of immorality. A statute which provides that the female must be of "previous chaste character" is, of course, also essentially different from ours. Our statute does not make it necessary to prove that the defendant has seduced his victim in the common law meaning of that word. The statute itself defines what shall be seduction. If the defendant was over 18 years of age and under promise of marriage had unlawful intercourse with a female of good repute for chastity, he is guilty of seduction without regard to whether the female so seduced was entitled to that good reputation. This contention of the defendant was properly overruled.

4. The defendant requested an instruction to the jury to the effect that, if the illicit intercourse was procured under a promise on the part of the defendant to marry the prosecutrix in case such intercourse should result in pregnancy, this would not be such a promise of marriage as the law contemplates, and the defendant should be acquitted. The law is correctly stated in this request for an instruction. A satisfactory reason for such a rule of law is given by the supreme court of Michigan in *People v. Smith*, 132 Mich. 58:

"Is a promise to marry, conditioned upon the illicit intercourse resulting in pregnancy, calculated to induce a pure woman to yield her chastity? In our judgment, this question admits of but one answer. Such a promise has no tendency to overcome the natural sentiment of virtue and purity. The woman who yields upon such a promise is in no better position than as though no promise whatever had been made. No wrong is done her if she is put in the class with those who commit the act to gratify their desire. She was willing to lose her virtue if some provision was made to conceal its loss. If pregnancy does not result from the illicit intercourse, her conduct is, in every respect, as culpable as that of her companion. If pregnancy does result, his con-

duct becomes more culpable than hers when, and not until, he refuses to marry her. The commission of the offence cannot depend upon the happening of a subsequent event."

See also *People v. Van Alstyne,* 144 N. Y. 361; *State v. Reeves, supra; Putnam v. State,* 29 Tex. App. 454, 16 S. W. 97; *State v. Adams,* 25 Or. 172, 35 Pac. 36. In some of the states from which these decisions are cited the statute is different from ours, in requiring proof that the female seduced was in fact of good character prior to the seduction, and not merely of good repute for chastity, but we do not see how this can make any difference in the construction of the statute upon the point now being discussed.

The reason urged for the refusal of the requested instruction is that there was no evidence justifying it. We do not take this view of the evidence. There was no direct evidence of a marriage contract of any nature except as testified to by the prosecuting witness. Whether this testimony was corroborated by circumstantial evidence will be considered later. According to the testimony of the prosecuting witness, the subject of marriage between them had never been mentioned directly or indirectly prior to the evening upon which it is alleged the crime was committed. They were riding in a buggy on the way from the home of the defendant to the boarding place of the prosecuting witness. She testifies that, when they had gone about a mile, he attempted to put his arm around her, but she prevented his doing so; that, a little later, he proposed that they have sexual intercourse. She several times refused, and then he said: "'We will get married, and no one will ever know it. Come on.' I told him 'No,' and, when we had only just crossed the Cedar, he turned and drove up into a little draw, and then he says: 'Well, come on. Nobody will ever know. Come on.' I told him 'No,' and he says: 'Well, come on. No one will ever know it. We will get married, and no one will ever be the wiser. No one will ever know it happened.' After

he had said it so many times, I submitted to him." According to her testimony, the only thing that was ever subsequently said between them in regard to marriage was more than two months later on the 8th of February. They were both alarmed about her condition. He had called at her house and brought her some medicine. She was going out, and as they were leaving the house she mentioned the matter. This is the way she states it in her testimony: "Before I got into the sled that evening, I said to him before he started, I said: 'What do you intend to do about that marrying deal?' He said: 'I have been teaching, and I haven't thought much about it.'" We think that under this evidence the jury might have found that, although there was no unconditioned contract of marriage between these parties, he promised her, and she so understood him, and was led by his promise to believe that they would hide their conduct and keep their shame from the knowledge of the world, and, if it was found to be necessary to that end, would enter the marriage relation. This was the defendant's theory of the view that should be given to the evidence of the prosecutrix if it was believed to be true, and he was entitled to have this theory submitted to the jury. This was not done by any instruction given by the court, and to refuse this request of the defendant was erroneous.

5. The statute requires that the evidence of the female be corroborated to the extent required as to the principal witness in the case of perjury. In *Gandy v. State*, 23 Neb. 436, this court said:

"In a prosecution for perjury the falsity of the testimony or oath of the accused, upon which the perjury is assigned, cannot be established by the testimony of one witness alone. It may be proved by the testimony of one reliable witness, and such corroborative facts and circumstances as will give a clear preponderance of the evidence in favor of the state if such preponderance excludes all reasonable doubt of the guilt of the accused. Such

corroborative facts or circumstances ought, at least, to equal the testimony of a single witness."

No doubt this provision of the statute relates both to the act of intercourse and the promise of marriage. The existence of one of these facts does not tend to prove the existence of the other so as to furnish the corroboration required by the statute. In this case the jury would have no doubt of the act of intercourse, but the promise of marriage was denied by the defendant. He was asked: "State what, if any, promises or offers, directly or indirectly, or otherwise, you ever made to Edna Richey to marry her," and answered: "I never referred to that, made no promises." He also stated that he never at any time or any place proposed to marry Edna Richey, nor did she ever propose such a thing to him. It is insisted that the evidence of the prosecuting witness upon this point is corroborated by circumstances proved, but we cannot find such corroboration in the record. Several times, when they were little children, they had opportunities to see each other. Afterwards, for several years, they had no knowledge of each other. Once the defendant attended a teacher's institute, and says the prosecuting witness may have been present, he thinks probably she was, but there is no evidence that there was any conversation between them or opportunity for such. There is evidence tending to show that on one or two occasions a few words passed between them such as might take place between casual acquaintances. There were no acts of even ordinary friendship between them. Within a very few minutes after the first advances of the defendant her ruin was accomplished, and the only suggestion of marriage on his part testified to by her was in the midst of the contention which resulted in her ruin. There had been nothing between them that suggested to any of their friends or acquaintances that they contemplated marriage, and she testifies that the first mention that she made of her engagement, even to her mother, was in the following May when she was compelled to admit

and explain her condition. In *State v. Richards,* 72 Ia. 17, it appears that the prosecuting witness was at the time of the alleged seduction living with the defendant's mother, and the defendant was living in the same family. She had been an inmate of this family on two occasions and several months at a time, and had the entire confidence of the defendant's mother. It was held that there was no corroboration of the evidence of the prosecuting witness as to a promise of marriage. In discussing the question the court said:

"This is the relationship and intimacy relied upon as tending to show that the defendant had gained control of the prosecutrix's affections, or at least had so far paved the way for a proposition of marriage as to relieve from strangeness a proposition made for the first time in the midst of a physical struggle for sexual intercourse. But, to our mind the relation seems to have been a mere family relationship, and such as exists in no small portion of all the households, and entirely consistent with absence of affection or show of affection. The case is noticeable for the want of attention on the part of the defendant. The prosecutrix lived in the family more than a year. During that time the defendant escorted her once to church and once to an entertainment at a public hall. We think that we should be going too far to say that the facts relied upon corroborated the prosecutrix."

If the corroboration is to be circumstantial evidence, the circumstances proved must point so plainly to the truth of her statement and be of such probative force as to equal the testimony of a disinterested witness. This is the rule stated in *Gandy v. State, supra,* and we do not feel it necessary to depart from it.

6. The defendant was a witness in his own behalf, and the court instructed the jury that "if the defendant by his own testimony has not denied in any way any material fact proved in the case within his personal knowledge, such testimony or material fact proved, if not denied by the defendant, is admitted by the defendant to be

true." It is insisted by the prosecutrix that this instruction is justified by the language of this court in *Comstock v. State,* 14 Neb. 205, but this is an error. In *Comstock v. State,* the defendant requested the court to instruct the jury that "The fact that the prosecution have not called a physician, or expert, to the fact of penetration of the person of the prosecuting witness, Coral Comstock, weakens the evidence of the prosecution in regard to the fact of penetration." The court held that it was not error to refuse this instruction. The principal reason given for this holding was that the evidence of penetration was so strong "that the prosecuting witness needed no support from physicians or experts." The thought of the court being that, if the evidence of that fact was already overwhelming, the state would not be held to have weakened that evidence by failing to make further proof upon the same point. After stating that the testimony on the point was "ample and left no reason for doubting that it took place," the court recite some of that testimony, which seems to have indeed been very strong, and they say:

"Besides, although the prisoner availed himself of the privilege of being a witness in his own behalf, and testified, he did not offer in a single particular to controvert what his daughters had sworn to respecting the fact of carnal connection. Had he not gone upon the witness stand, the fact of his not testifying against them would not have operated to his disadvantage, but having done so, his failure to deny what they said respecting a matter which must have been within his own personal knowledge, will be taken as an admission that it was true."

This does not mean that the jury must take it as an admission that it was true and that the court must so instruct. The meaning is that upon an argument of this kind the court will take that fact into consideration, because it would be natural for the trial court to have taken it into consideration in refusing to instruct the jury that

the failure to put experts upon the witness stand would weaken the testimony of the state upon a question that was so thoroughly established that no further testimony could have been thought necessary or even reasonable. To instruct the jury that defendant in a criminal case by a failure to deny any material matter that had been testified to against him must be held to have admitted its truth, would indeed be a strange doctrine. If upon a vital matter in a case, a matter that is of such great importance that it must be continually before the mind of the defendant, there is such ample proof in the case that it would be wholly unreasonable to offer further proof, and the defendant while on the stand fails to testify upon that matter, the court in considering the condition of the record, and determining therefrom the necessity or propriety of giving further instructions, might take into consideration the fact that the defendant had failed to deny the truth of a matter so thoroughly established. But, when the defendant under a charge of crime that may result in his imprisonment for a term of years goes upon the witness stand for the purpose of denying one of the material and essential elements of the case against him, it is not to be expected, much less required, that he have in mind all the material matters that may have been testified to in the case, and categorically deny everything of importance that has been said against him. The instruction given by the court in this case was to that effect and was clearly erroneous.

7. Other errors are complained of, and, indeed, it would appear that the prosecuting witness was allowed to testify to the contents of writings which she had sent to the defendant, and which apparently were then in his custody, without requiring the state to show that any attempt had been made to procure the writings themselves. The court once remarked in the presence of the jury that he considered certain evidence given by one of the state's witnesses as the strongest kind of evidence. If this cause should be retried it is not to be presumed that

these and similar errors will be repeated, and it is therefore not thought necessary to discuss them further.

For the reasons given, the judgment of the district court is reversed and the cause remanded.

REVERSED.

GEORGE S. MCCAGUE, APPELLEE, V. LEONE ELLER ET AL., APPELLANTS.

FILED NOVEMBER 22, 1906. No. 14,519.

1. **Mortgages: FORECLOSURE: REDEMPTION.** The right of redemption of real property from a mortgage debt and the right to extinguish that right by judicial foreclosure are mutual and reciprocal.
2. ———: **SECOND FORECLOSURE.** When the owner of a mortgage upon real estate acquires by judicial foreclosure and sale the legal title to all the mortgaged property, leaving an unpaid residue of the mortgaged debt, and the proceedings are by accident or mistake incomplete in the respect that they leave an equity of redemption in a part of the premises in the heirs at law of one of the mortgagors, the plaintiff in such action, being the purchaser at the sale, or his grantee, may maintain an action to foreclose the unextinguished equity of redemption for the unpaid residue of the debt.

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

J. W. Eller, C. G. McDonald and *Benjamin S. Baker,* for appellants.

Charles Battelle, contra.

AMES, C.

James W. Eller and Frances E., his wife, were the owners in severalty each of an undivided half of certain lots and a dwelling house situated thereon, and were in joint occupancy of the same as a homestead. In May, 1892, they joined in the execution of a note and of a

mortgage of the premises for the sum of $5,000, and interest, to the Globe Loan & Trust Company of Omaha. In February, 1896, they also joined in a warranty deed, then or soon afterwards duly made of record, conveying the premises to Ida M. Dolan. In December, 1898, Mrs. Eller died, leaving surviving her certain minor children of the marriage, who, together with their father, continued to occupy the premises. Afterwards the Randolph Savings Bank, having become the owner of the note and mortgage by purchase and assignment, began an action of foreclosure to which James W. Eller and Mrs. Dolan, as the apparent owner of the equity of redemption or fee title, and her husband, were made parties. The Dolans made default, but Eller answered, alleging, among other things, that the deed to Mrs. Dolan was executed and delivered by way of mortgage to secure an indebtedness. The action proceeded to a decree of foreclosure, but the order of sale was stayed for the statutory period at the request of Eller. After the expiration of the stay a stipulation was entered into between the plaintiff and Eller, by which the latter was released and discharged from liability to a deficiency judgment, and was permitted to retain possession of the premises for the term of one year, without payment of rent, in consideration of his agreement not to resist a sale of the premises, or a confirmation thereof, under the decree. A sale was thereafter had and duly confirmed for $4,667, leaving an unpaid residue of several hundred dollars of principal and interest, the plaintiff in foreclosure being the purchaser, to whom a sheriff's deed was issued.

The Randolph Savings Bank became insolvent and passed into the hands of a receiver, who sold the title acquired at the foreclosure sale to the plaintiff in this case, and executed and delivered to the latter a deed purporting to convey the premises to him. The note remained in the hands of the attorney, in the foreclosure suit, of the Randolph Savings Bank, and was delivered to the plaintiff McCague without further consideration.

Afterwards the plaintiff successfully prosecuted a suit in forcible detainer against Eller and obtained a writ of restitution against him. Eller then departed from the premises, but the children of Mrs. Eller, some of whom had attained to their majority, remained in possession of the premises claiming to be owners of an undivided half of the same as the heirs at law of their mother. It thus appears that the action of foreclosure was incomplete in the respect that the heirs at law of Mrs. Eller were not parties to, and their equity of redemption was not extinguished by, it. This is an action against the heirs to foreclose their equity of redemption in an undivided half of the premises for the unsatisfied portion of the mortgage debt. There was a decree for the plaintiff in the lower court, from which the defendants appeal.

So far as appears, the first actual notice that the Randolph Savings Bank, or its receiver, or the plaintiff had that the deed to Mrs. Dolan was intended as a mortgage only, or that the foreclosure was incomplete, was when the heirs set up their claim of ownership and right of possession, after Eller had personally vacated the premises in obedience to the writ of restitution issued in the forcible detainer suit. But, notwithstanding the purpose for which the Dolan deed was executed and delivered, it was effectual to convey the legal title to the premises. *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276; *Stall v. Jones,* 47 Neb. 706; *Gallagher v. Giddings,* 33 Neb. 222. It follows, as a matter of course, that the foreclosure decree, sale and deed operated to convey the legal title to the purchaser at the judicial sale, leaving in the heirs of Mrs. Eller nothing more than an equity of redemption of an undivided half of the premises, and in James W. Eller nothing at all. It follows equally, of course, that the deed from the receiver, which it is not sought in any way to impeach, conveyed the entire title to the plaintiff, subject only to the equity of redemption in the heirs, which it is sought in this action to foreclose. We can see no room for doubt, upon principle or authority, that it

also conveyed to the plaintiff the right to demand and obtain such redemption or to apply to a court of equity for its foreclosure. It is certain that no one else has that right. The effect of the transaction was to extinguish the mortgage by a merger of it in the legal title to the whole of the mortgaged premises, but a residue of the mortgage debt, for a payment of which the lands had been pledged, remains unsatisfied, and the equity of the heirs of Mrs. Eller to redeem an undivided half of the premises therefrom is still unextinguished. If this action had not been begun, and they had desired to enforce their right of redemption, against whom should their suit have been brought? Certainly against no one but the present plaintiff, in whom is vested the legal title which it would have been the sole object of such an action to recover. It would not be contended, we apprehend, that in such a case it would have been necessary for them to seek out the mortgagee, or his insolvent assignee, or the purchaser at the foreclosure sale, the rights, interests and titles of all of whom, as respects the realty, are united in the plaintiff. Nor can it be contended, we think, that the Randolph Savings Bank, or its representative, after having prosecuted the suit in foreclosure to a sale purporting to convey the entire title, both legal and equitable, and after having conveyed the premises by a deed of like purport through its receiver, would be heard to assert any claim on account of the unpaid residue of the mortgage debt, to the prejudice of its grantee, the plaintiff. It is evident beyond dispute that the incompleteness of the foreclosure is due to accident and misapprehension, and not to the intent of the plaintiff therein, and it cannot be doubted that if the latter had remained solvent and was prosecuting this action it would be entitled to the decree appealed from.

The right of redemption and the right to extinguish that right by judicial foreclosure are mutual and reciprocal, and we have no doubt that the plaintiff has become subrogated to the unpaid residue of the mortgage debt,

in so far as the same is requisite for the protection of his title, of which it is in equity one of the muniments. As is said in *Emmert v. Thompson,* 49 Minn. 386:

"It has been well said that the doctrine of subrogation has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons. It is not founded upon contract, but is the creation of equity, is enforced solely for accomplishing the ends of substantial justice; and, being administered upon equitable principles, it is only when an applicant has an equity to invoke, and where innocent persons will not be injured, that a court can interfere. It is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice and good conscience ought to pay it, and is not dependent upon contract, privity, or strict suretyship." See also *Brobst v. Brock,* 77 U. S. 519; *Rogers v. Benton,* 39 Minn. 39; *Givins v. Carroll,* 40 S. Car. 413; *Jackson v. Bowen,* 7 Cow. (N. Y.) 13.

The judgment in this case is the ordinary decree of mortgage foreclosure and sale of the undivided half of the premises for the satisfaction of the unpaid residue of the mortgage debt. In our opinion it is right, and we recommend that it be affirmed.

OLDHAM and EPPERSON, 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.

ZACK THOSTESEN, APPELLEE, V. CHARLES W. DOXSEE ET AL., APPELLANTS.

FILED NOVEMBER 22, 1906. No. 14,469.

Statute of Frauds: LEASE. Under the provisions of section 5, ch. 32, Comp. St., as amended in 1903, an oral contract for the leasing of lands for a period of more than one year from the making thereof is void.

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

R. A. Moore, for appellants.

H. M. Sullivan, contra.

OLDHAM, C.

This was an action in forcible entry and detainer originally instituted in the county court of Custer county, Nebraska and taken by appeal to the district court for that county, where a jury was waived and the cause submitted to the court on the following agreed statement of facts: "It is stipulated between the parties that the defendants entered into a written lease with the plaintiff on or about the 1st day of March, 1904, whereby the plaintiff leased to the defendants for the term of one year from March 1, 1904, the land described in the lease; that for the pasture they were to pay him cash $125 and for the land planted to small grain and corn they were to pay one-third; that sometime in December, 1904, the parties got together and it was orally agreed that the defendant, C. H. Doxsee, would not want the land for the year beginning March 1, 1905, but that the other defendant, C. W. Doxsee, would want it for the period of one year from the 1st of March, 1905, and it was orally agreed between the plaintiff and the defendant, Charles W. Doxsee, that he might remain on the place for the period of another year from

March 1, 1905, on the same conditions as were specified in the original lease. It is further agreed that before the beginning of this action in the county court notice as required by law was served upon the defendants to quit, and that at that time neither of them had planted any crops, and that they were in possession of said premises under the old lease up to March 1, 1905. It is further stipulated that in said oral lease it was specified that the contract existing between them for the year up to March 1, 1905, should extend from March 1, 1905, to March 1, 1906, with all the conditions contained in said lease, without it being signed anew, and the only change that should be made to it was that C. H. Doxsee should be released from its operations. And it was never the intention of the parties to sign up or execute a new lease, but the terms of the old lease were the terms of the new oral contract between the plaintiff and Charles W. Doxsee, made in December, 1904."

It seems to us that the only legitimate conclusion to be drawn from this stipulation is that there was a written contract between plaintiff and the two defendants for the leasing of the premises from March 1, 1904, to March 1, 1905, on the terms stated in the stipulation; that during the month of December preceding the expiration of the written lease there was a conversation between the three parties to the contract, in which it was understood that C. H. Doxsee did not desire to occupy the premises beyond the term of the written lease, but that defendant Charles W. Doxsee desired to lease the premises on the terms contained in the written lease for the year beginning March 1, 1905, and ending March 1, 1906; and that the plaintiff agreed that he would make such an oral lease with the defendant Charles W. Doxsee; that this verbal contract was entered into three months before the beginning of the lease; that a little while before the time of the expiration of the written lease plaintiff rescinded his oral contract for the lease of the premises to Charles W. Doxsee, and served the statutory notice to quit the

premises within three days after the expiration of the written lease; and that after defendants' failure so to do plaintiff immediately instituted this suit in forcible entry and detainer. The notice to quit was served before the defendant Charles W. Doxsee had either entered into possession under, or done any act in part performance of, the oral agreement for the lease. Section 5, ch. 32, Comp. St., provides as follows: "Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." To our minds the agreement between plaintiff and Charles W. Doxsee was nothing more than an oral contract for the leasing of lands for a period of more than one year from the making thereof, which is denounced as void by the provisions of the statute above quoted as it now stands as amended in 1903.

We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

NANCY E. CLINEBELL, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.*

FILED NOVEMBER 22, 1906. No. 14,484.

1. **Railroads: LIABILITY.** A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road. *Hendricks v. Fremont, E. & M. V. R. Co.*, 67 Neb. 120, followed and approved.

* Rehearing denied. See opinion, p. 542, *post*.

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

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

J. W. Deweese and *F. E. Bishop,* for appellant.

N. T. Gadd, R. G. Moore and *J. H. Broady, contra.*

OLDHAM, C.

This is an action for personal injuries, and is here for a second review by this court. At the first hearing a judgment in favor of the plaintiff was reversed because plaintiff's petition failed to allege any negligent act on the part of the defendant which was the proximate cause of the injuries. The opinion is reported in 5 Neb. (Unof.) 603. After the reversal of the judgment an amended petition was filed and issues joined, and on a trial to the court and jury plaintiff again secured a verdict and judgment, from which defendant appeals.

The only alleged error called to our attention in the brief of the appellant, which it will be necessary to consider, is as to the sufficiency of the testimony to support the judgment. There is no serious dispute as to the manner in which plaintiff's injuries were received. It appears that she was driving home with a gentle team in an open top buggy along a highway, which for some distance near the place of the accident runs nearly parallel to defendant's right of way. The general direction of the public highway is east and west, and the defendant's right of way crosses it at the place of the accident, running in a southeasterly direction. West of the crossing there is a cut about 300 feet long and about 7 feet deep. At the crossing the railroad embankment is about 12 feet high, with an approach leveled back about 37 feet, by which the wagon road crosses the track at right angles. Before reaching this approach the road follows a depression or

gully north of the railroad and comes up an incline to the level of the embankment. Just as plaintiff had driven to the top of the incline to turn in on the approach to the crossing, a freight train came out from the mouth of the cut, and probably caused plaintiff's team to shy and frighten plaintiff so that she jumped or fell from the buggy and received the injuries complained of.

Plaintiff's account of the accident is rather incoherent, probably because she was dazed from fright, as appears from the following extract from the record: "Q. State to the jury what happened. A. Well, I was driving along and I was careful. I was careful and looking. I didn't think of the train or nothing coming for I couldn't see. It was my view right towards home to see a train, but I didn't see any. I supposed maybe it had gone down. I didn't know and I drove along there, didn't hear any sound or nothing, and I drove up on the crossing, pretty near to the crossing, and the first thing I knew the horses threw their ears up, pricked their ears up, and that's all I know. I don't know how I got out or nothing. * * * Q. What happened afterwards, if you know? Where did you go? A. Well, when I come to myself the train was done gone, I discovered. I got up the best I can, I don't know how, but I was frightened, when I got up I saw my fingers was cut here and here (indicating), and I hobbled up and I discovered the box was loose from the buggy, and I didn't know what to do, anyway. I don't know how I got around, but I got around some way; and when I went to get the horses around and went to fastening up the tugs I was all this nervous. I didn't see any hurt, but I was bloody here, and I was just so nervous I couldn't fasten the tugs at all, but I got them fastened and I discovered the footsteps to get into the buggy, and I just threw my foot up on them, and I got into the buggy, and the team started off with me. When I got on the track everything was turned blind. I was turned blind. I couldn't see. I squatted right down in the buggy, and the team took me home. That is all I know about that."

She also testified that she did not hear either the bell or the whistle before seeing the train. It was further established that when she got home she was in a dazed, partially unconscious condition, and bore evidence of severe and painful injuries from her fall. Numerous witnesses, at various distances ranging from a quarter to a half a mile from the railroad, testified that they heard neither the bell nor the whistle when the train passed the crossing. The only witnesses, other than the plaintiff, who saw the accident were two brakemen on defendant's train. The brakeman near the front end of the train testified that he saw the horses turn slightly away from the track when the train approached, and saw plaintiff jump from the buggy. The brakeman who was on the caboose testified that, when his car passed the team, plaintiff was standing by the horses and apparently holding them. All the employees in charge of defendant's train testify positively that the whistle was sounded at the whistling post 200 feet west of the crossing, and that the bell was rung continuously while passing through the cut and over the highway.

The only negligent act relied upon by plaintiff as the proximate cause of the injury was the defendant's failure to ring the bell and blow the whistle on approaching the crossing, it being contended that if these signals had been given plaintiff would have heard them and would have remained down in the gully until the train had passed, and would thus have escaped the accident. While the failure to give these signals on approaching a public crossing constitutes statutory negligence, yet, unless such negligence is shown to be the proximate cause of the injuries complained of, proof of this fact alone is not sufficient to show a right of recovery. Even though we were willing to concede that the negative testimony of plaintiff's witnesses, as against the positive declarations of the persons in charge of the train, is sufficient to sustain the finding of the jury that the statutory signals were not given at the crossing, we are still unable to see how,

without entering on the domain of remote speculation, we could conclude that such failure was the proximate cause of plaintiff's injury. The contention that plaintiff would not have driven up onto the approach of the crossing if she had heard the statutory signals is purely conjectural and unsupported by any testimony contained in the record. To our minds, the only logical conclusion that can be deduced from the facts surrounding the accident is that the proximate cause of the injury was the fright either of plaintiff or her team at the ordinary operation of a passing train. In the recent case of *Hendricks v. Fremont, E. & M. V. R. Co.*, 67 Neb. 120, it was held that "a railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road."

We therefore conclude that the evidence is insufficient to sustain the judgment, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

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

REVERSED.

The following opinion on motion for rehearing was filed April 4, 1907. *Rehearing denied:*

OLDHAM, C.

Counsel for plaintiff below have filed a very clear, concise, and well-directed brief in support of a motion for a rehearing in this case, in which they ask us to set out more specifically our views on the liability of a railroad company for injury occasioned at or near a public crossing, where the failure to comply with the statutory requirements of ringing the bell and blowing the whistle is estab-

lished. In compliance with this request we would say that it is always a violation of the statute to neglect to give these signals at the distances from public crossings therein prescribed, and such failure subjects the railroad company to the penalties prescribed, whether injuries occur from such cause or not. But, where the failure to give these signals is relied on as actionable negligence in seeking to recover for injuries received at or near the crossing, such failure must be shown by competent testimony to have been the proximate cause of the injuries complained of, that is, it must stand in relation to the injuries as cause to effect. Now, in the case at bar, there is no dispute as to how the injury was received. The plaintiff was in her buggy on the public road, about 30 feet from the railroad track, when the freight train came along. She probably became frightened at the train, and jumped from the buggy and was hurt. The team did not run away and cause the injury, but remained standing while the train passed, and until the plaintiff had hitched up the loose tug and replaced the fallen tongue in the neck-yoke, when she drove home. We think there can be no question that the proximate cause of this injury was plaintiff's fright at a moving train operated in an ordinary manner. There can be no doubt, under the testimony, that if she had remained in the buggy no injury would have befallen her. Consequently, her misfortune falls within the large class of regrettable casualties for which no one is legally to blame. We therefore recommend that the rehearing be denied and the former opinion adhered to.

AMES and EPPERSON, CC., concur.

By the Court: Motion overruled.

JAMES MERRIMAN, APPELLANT, V. GRAND LODGE DEGREE OF HONOR, ANCIENT ORDER OF UNITED WORKMEN OF NEBRASKA, APPELLEE.

FILED NOVEMBER 22, 1906. No. 14,497.

1. **Insurance: APPLICATION.** Where a married woman is the holder of a policy of life insurance, it is not a false representation for her to sign a certificate, when she is pregnant, stating that she is in sound bodily health, if the certificate is otherwise true.
2. ———: ———. Where a married woman is an applicant for life insurance in a company that issues policies on the lives of married women, she is not required to inform the company of evidence of pregnancy discovered subsequently to her physical examination and application.

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

T. J. Doyle, for appellant.

A. G. Greenlee, contra.

OLDHAM, C.

This was an action on a fraternal benefit certificate issued by the defendant to Katherine Merriman, deceased, payable at her death to her husband, plaintiff in this action. The death of Katherine Merriman, her initiation into the order, the issuance of the certificate, and the payment by the deceased of all dues and assessments in conformity with the by-laws of the order and the provisions of the policy are all admitted. The sole defense relied on is that the deceased made false representations in her application for the benefit certificate in the order, it being alleged that she falsely represented that she had not had paralysis prior to making her application for membership, and that she had falsely represented that she was not pregnant at the time of such application. Defendant's testimony was all directed to the support of these two

alleged false representations. On a trial of these issues to the court and jury, there was a verdict and judgment for the defendant, and the plaintiff appeals to this court.

For an intelligent review of the assignment of error in the plaintiff's brief, which, we think, is worthy of serious consideration, it is essential to review the admitted as well as the disputed questions at issue in this case. The defendant society, the Degree of Honor of the Ancient Order of United Workmen of Nebraska, is primarily a social organization for women bearing certain relationship to the members of the Ancient Order of United Workmen. Any woman bearing the required degree of relationship to a member of the parent order is eligible to social membership in defendant's order, but there is also within the order a benefit department for the purpose of providing life insurance for those of the memebers who may be found to come within the requirements as to age and health. On the 11th day of September, 1902, Katherine Merriman made application for membership in the Mistletoe lodge, No. 104, of Lincoln, Nebraska, a subordinate lodge of the defendant order, and, on the 18th day of October she signed an application for membership in the benefit department and submitted to a physical examination by the examining physician of the department under the rules of the order. This application could not be acted upon until the applicant had been initiated into the order, and on November 27 following she presented herself and was initiated. After her initiation, her application and the report of the examining physician thereon and the certificate of membership were presented to the grand medical examiner of the order and approved, and forwarded to the Grand Recorder, and on the 17th day of December the benefit certificate sued on was issued and sent to the deceased. Between the time of making application and the time of final issuance of the certificate there had been a lapse in payment of dues and assessments, which required, under the rules of the order,

a certificate of health before the back dues could be received and the benefit certificate be made effective. The before the policy was issued: "I, Katherine Merriman, lowing health certificate, which she signed and returned before the policy was issued: "I, Katherine Merriman, a member of Mistletoe lodge, No. 104, located at Lincoln, in the state of Nebraska, to whom benefit certificate No. — was issued in the beneficial department of the Grand Lodge Degree of Honor, A. O. U. W. of Nebraska, having been suspended from all the rights, benefits and privileges of the said department, by reason of nonpayment of assessment No. —, which suspension and forfeiture occurred within a period of three months prior to the date of this certificate, and desiring to be reinstated in said department as provided by the laws thereof, do hereby certify and warrant that I am, at this date, in sound bodily health, and that I agree that the reinstatement of myself as a member of the department based upon this certificate shall be valid and binding only upon the condition that the statement herein contained, relating to my bodily health, is true in every respect upon the day and date recorded on this certificate. (Signed) Katherine Merriman."

In the application for membership there are two lists of questions or interrogatories, one list to be answered by the applicant, and the other to be answered by the examining physician from his personal examination of the applicant. Among the questions propounded to and answered by the applicant was the interrogatory, "Have you ever had paralysis?" This question appears from the application to have been answered, "No." Among the questions which the examining physician was required to answer, when the applicant was a married woman, is, "Is she now pregnant?" The physician answered this question, "No." Now, it is without dispute in the record that plaintiff's wife died on the 10th day of April, 1903, from placenta prævia, or hemorrhage in childbirth. There was evidence

in the record, offered by the defendant, tending to show that the deceased had suffered from a partial stroke of paralysis about 18 months before making her application for membership in the order, but, on the other hand, it was contended by plaintiff that her ailment at that time was of a temporary character, a mere prelude to childbirth, and a symptom caused by pregnancy and of temporary duration, and plaintiff introduced testimony strongly tending to show that after the applicant's confinement she recovered her normal robust health, and engaged in hard labor, and was, at least apparently, in excellent physical condition until the day before her death.

As there is little or no competent testimony in the record pointing to paralysis as a contributing cause of Katherine Merriman's death, it is highly probable that the jury returned a verdict for defendant on the theory that the applicant had fraudulently concealed her condition of pregnancy from defendant's examining physician. While the examining physician testified that he made a careful physical examination of deceased, yet he said that he saw no outward signs of pregnancy and relied on deceased's statement that she was not in that condition. He also testified that from his examination he believed her to be a first-class risk for insurance. Now, from the fact that a fully developed child was born to the deceased about six months after the examination, it is clearly established that she was about three months pregnant when the examination was made, so that the material question is whether or not she fraudulently and knowingly misrepresented her condition. The testimony of the medical experts in this case shows that before the quickening period pregnancy cannot be detected from general symptoms, and that the quickening period ordinarily occurs during the fourth or fifth month of pregnancy. Consequently, the evidence is very slight that tends to show that the deceased knew of her pregnancy on the 18th day of October, 1902, but it is much stronger on the probability of her having knowledge of such fact on the 1st

of December following, for that date was probably, under the testimony, within the quickening period.

At the trial of the cause plaintiff asked for an instruction which, in substance, confined the applicant's knowledge of the truth of her answers to the question to the time when the application was signed. The court refused to give this instruction, and told the jury in paragraph 3 of instruction on its own motion: "In considering the question whether any statement made by the deceased, Katherine Merriman, was true or false, you should consider it as of the time she signed the application, up to and including the time when the contract between her and the defendant company was completed, being the time of the final approval of the application by the company, to wit, December 17, 1902. This is true, for the reason that up to the time of the final approval of the application it would be her duty to correct any statement contained in her application made by her which she subsequently learned was false." The learned trial court evidently gave this instruction on the theory that the health certificate signed on the 1st day of December amounted to a reaffirmation of each of the answers to the questions contained in the original application. To our minds this would extend the scope of the certificate much beyond what might reasonably have been within the mind of the party signing it. *American Order of Protection v. Stanley,* 5 Neb. (Unof.) 132, and *Geare v. United States Life Ins. Co.,* 66 Minn. 91. This certificate should be construed so as to resolve all doubts and ambiguities contained in it, if any there be, in favor of the insured or her beneficiary, and, so construed, it simply warrants that the applicant was in sound bodily health at the time she signed it. It will not do, in sound morals, for an insurance company to issue risks on the lives of married women between the ages of 18 and 45 years, without anticipating the probability of the holders of such policies obeying the divine mandate to be fruitful and multiply and replenish the earth, and a condition, either in the by-laws,

articles of association, or certificate of benefit, providing for a forfeiture in the event that the holder should become pregnant at any time would be clearly void as against the highest principles of religion, morality, and common decency. Consequently, when an application is made and approved, there is no duty on the holder of the certificate issued on such application to notify the company of any subsequently discovered evidence of pregnancy, nor would the fact, if subsequently discovered, prevent her from certifying that she was in sound bodily health, if such certificate is otherwise true. The only representation here is as to her apparent state of health, and all the evidence in the record shows that at that time she was, to all appearances, a robust and healthy woman. We are therefore impressed with the opinion that the learned trial judge erred in refusing the instruction asked by the plaintiff, as well as in giving the third paragraph of instructions above set out, for under this instruction the jury might have found the evidence insufficient to carry knowledge of pregnancy to the deceased when she made application on October 18, and still sufficient to apprise her of such fact two months later, December 17, when the certificate was issued.

We therefore recommend that the judgment of the district court be reversed and the cause be remanded for further proceedings.

AMES and EPPERSON, CC., concur.

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

REVERSED.

JAMES SEGEAR, APPELLEE, V. GEORGE WESTCOTT, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,502.

Landlord and Tenant. The owner of land, in the possession of a tenant whose lease provides that the lessor may sell or dispose of any part thereof by making a corresponding reduction in the rent, may, without the consent of the lessee, dedicate a part thereof to the public for a highway.

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

W. C. Lambert, for appellant.

J. W. Eller, contra.

EPPERSON, C.

July 5, 1900, defendant agreed verbally to pay plaintiff $25 a month for the privilege of hauling garbage over a tract of land of which plaintiff was lessee. Defendant paid the stipulated amount until August 5, 1901, and plaintiff brings this action to recover for 22 months thereafter. Defendant admits the making of the contract, and alleges that from and after August 5, 1901, he used a public highway which the authorities of South Omaha had established over plaintiff's leased property. Plaintiff denies that the highway was established, and on this issue alone the rights of the parties depend. The facts relied on by defendant to prove the establishment of the street are substantially as follows: In June, 1901, the president of the United Real Estate and Trust Company, which was the owner of the land in controversy and plaintiff's lessor, made a written proposition to the mayor and council of South Omaha, agreeing to cause the strip of land here in controversy to be dedicated to the public as a highway in consideration of $100, payable to his company, and a further consideration that the city would

make certain specified improvements. Pursuant to this proposition the city council issued its warrant to the real estate company and proceeded with the improvement of the road substantially as specified in the proposition of the company. Afterwards the road was used generally by the public, the plaintiff herein, however, at all times maintaining that the public had no rights therein. The warrant payable to the real estate company was not called for, nor was it delivered, until after this suit was instituted, when it was delivered to the company and accepted. At no time did the company object to the establishment of the street. In the district court the jury returned a directed verdict for the plaintiff, and the defendant appeals.

The only theory upon which the plaintiff can recover is that the alleged street was established without the payment of damages to him and to the prejudice of his rights under the lease. The evidence did not disclose the contents of the lease. Defendant filed a motion for a new trial on account of newly discovered evidence, alleging that since the trial he had discovered that the plaintiff's lease reserved to the lessor the right to sell or dispose of the said tract of land, or any portion thereof, and that in the event of the disposition of a part the lessor was to refund a proportionate amount of the rent. A sufficient showing of diligence was made by defendant. He shows that he did not know the nature of the lease; that at the time of the trial the officers of the lessor, who were in possession of the lease, were not within the jurisdiction of the court; that he had no reason to believe it contained such a provision, and, further, that plaintiff had previously told defendant, and at the trial in the county court testified, that no person had a right to acquire interests in said property without plaintiff's consent. The newly discovered evidence, if as alleged, will show that plaintiff had no interest in the land which would prevent his lessor from disposing of the tract in controversy by a dedication thereof to the city for street purposes, and in such an event the plaintiff herein cannot complain

that the street was irregularly established. Ordinarily a landlord cannot dedicate any part of the property leased without the consent of the tenant. Where, however, the lease expressly provides that the landlord may dispose of a part of the land, with a corresponding reduction in the rental, such clause should be taken as a limitation of the lessee's estate and binding upon him.

The court erred in refusing the defendant a new trial, and we recommend that the judgment be reversed and the cause remanded for a new trial.

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 a new trial.

REVERSED.

ALBERT BAHR, APPELLEE, V. CARL MANKE, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,517.

Contract: BREACH: DAMAGES. To entitle one to recover in an action in damages for the breach of a contract, he must show that the wrong done and the injury sustained bear toward each other the relation of cause and effect. The damages which one has sustained to entitle him to recover must be the natural and proximate consequence of the wrongful act complained of.

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

Billingsley & Greene and *Berge, Morning & Ledwith,* for appellant.

George A. Adams, contra.

EPPERSON, C.

The parties hereto are brothers-in-law. That part of their differences out of which this litigation grew may

be stated as follows: In 1894, plaintiff purchased 160 acres of land, paying therefor in cash $1,400 and assuming a mortgage held by one Hartwick for $1,800 due August 3, 1897. At the time of the purchase plaintiff gave defendant a mortgage on the land purporting to secure a loan of $2,400 due March 1, 1899. Plaintiff alleges that the consideration for this note was an advance to him by defendant of $600 as a loan and the promise of defendant to pay the Hartwick mortgage of $1,800. Defendant contends that he advanced to plaintiff the full sum of $2,400. These facts were in issue and determined in a foreclosure suit instituted by Hartwick against the parparties hereto in Seward county. In that action defendant herein by cross-petition sought to recover the full amount of his $2,400 mortgage. The matter was adjudged against him, and he was permitted to recover only the $600 and interest. The foreclosure suit was instituted in 1899. The decree of foreclosure was entered in January, 1900, and the land ordered sold to satisfy $2,126 due Hartwick and $647 due defendant. Plaintiff herein stayed an order of sale one year. April 16, 1901, the land was sold under the decree to the defendant herein for $2,805. From an order confirming the sale plaintiff herein appealed to this court, where the order of confirmation was affirmed, and a mandate issued March 4, 1903. See *Hartwick v. Woods,* 4 Neb. (Unof.) 103.

Plaintiff brings this action to recover damages, alleging that the conduct of defendant in failing to pay the Hartwick mortgage and attempting to collect the full amount of his own mortgage was wrongful, and that he was damaged because such conduct prevented him from borrowing money with which to redeem from the lawful incumbrance. In the court below plaintiff recovered judgment for $1,987.37, and the defendant appeals.

There is no contention by plaintiff that defendant contemplated fraud at the inception of the agreement. When the $2,400 mortgage was given to defendant, $1,800, which was intended to redeem from the Hartwick mortgage, was

left with one Hagensick, who never used it for the purpose intended, nor did he repay it. Each party contends that Hagensick was the agent of the other. This question we consider was finally determined adversely to defendant herein in the foreclosure case above referred to. There is no evidence showing an obligation of defendant to pay the principal of the Hartwick mortgage before its maturity. It must therefore be considered that the defendant herein, upon the maturity of the Hartwick mortgage, broke his contract with plaintiff, and wrongfully maintained from that time until the decree of foreclosure was rendered that he held a mortgage for $2,400 instead of one for $600. This is the extent of the defendant's wrong. It will be observed that the foreclosure suit was not instituted until after the maturity of the defendant's mortgage. Plaintiff knew as early as February, 1898, that defendant had not paid the Hartwick mortgage and of his intentions not to do so. He then attempted to borrow money with which to pay all the incumbrances, and testifies that Hartwick promised to let him have the money, but changed his mind upon hearing that defendant claimed to have a mortgage for $2,400. Plaintiff at that time had a remedy which would have afforded speedy relief. He should have instituted an action to clear the title of his land from the cloud of the $2,400 mortgage, or an action to require the defendant to pay the Hartwick mortgage. Thereby the interests of the parties would have been established, and the amount of his liability fixed, and the title would have been such that a loan could have been procured. No greater relief, however, could have been granted in such action than was granted later in the foreclosure suit. In either event the courts were open to him. He awaited the institution of the foreclosure suit to have the matter adjusted. Had the defendant herein paid the Hartwick mortgage, as he agreed, he would have been entitled to foreclose his mortgage for the full amount, and on the date of the decree plaintiff would have owed no less than under the existing circumstances he owed on both mort-

gages. There is no evidence that plaintiff had no money with which he could have paid his indebtedness. There was standing against his land an incumbrance of $2,400, which he admitted owing, with interest. He has never been required to pay a greater sum.

Plaintiff testified that during the pendency of the foreclosure suit he attempted to borrow the amount necessary to redeem. Even were we to presume that the plaintiff did all in his power after the decree of foreclosure to procure funds to redeem by mortgaging his land, and that he failed on account of the security being insufficient, the fact still would remain that the amount of the decree was a legitimate indebtedness which would have existed had the defendant never broken his contract. It is elementary that the wrong done and the injury sustained must bear toward each other the relation of cause and effect. The damages which one has sustained to entitle him to recover must be the natural and proximate consequence of the wrongful act complained of. *Fitzgerald v. Fitzgerald Construction Co.*, 44 Neb. 463; *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210. After the decree of foreclosure, and before sale, it was plaintiff's privilege to exhaust his resources in attempting to redeem. Courts will consider that money is always in the market and may be had upon real estate security at a reasonable rate of interest. It is apparent in this case that the loss of plaintiff's farm by foreclosure was but the sequence of his failure to pay his legal obligation, and not the result of defendant's wrongful conduct.

We recommend 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 a new trial.

REVERSED.

WILLIAM A. GORDON V. CITY OF OMAHA.

FILED NOVEMBER 22, 1906. No. 14,311.

1. **Attorney and Client.** An attorney may, by virtue of his retainer, receive and receipt for money due his client in a case in which he is employed, and the act will bind his client, unless the party paying it had notice of a revocation of the attorney's authority to act in the case.

2. **Cities: NOTICE.** Notice affecting a city must, under section 7453, Ann. St., be in writing and be served on the mayor, or acting mayor, or, in the absence of both from the city, upon the city clerk.

3. **Petition: OBJECTIONS TO EVIDENCE.** An objection to the admission of evidence on the ground that the petition does not state facts sufficient to constitute a cause of action may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur. Where the objection is sustained, and the plaintiff elects to stand on his petition, or does not take leave to amend the same, judgment should be entered for the defendant.

4. **Officers: ASSIGNMENT OF SALARY.** Whether a city officer may bind the city by assigning his salary prior to the issue of a warrant therefor not discussed or determined.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

L. D. Holmes, for plaintiff in error.

Harry E. Burnam and *I. J. Dunn, contra.*

DUFFIE, C.

By the judgment of the district court for Douglas county entered July 5, 1902, Frank E. Moores, mayor of the city of Omaha, was directed to sign a certain warrant, No. 53,327, for the sum of $1,600, payable to Samuel I. Gordon, and drawn by the comptroller of the city in part payment of the salary of said Gordon as police judge of the city of Omaha for the year 1901. The judgment of the district court was, on appeal taken by the mayor, affirmed by this court, and the warrant thereafter duly executed.

J. W. Eller represented Judge Gordon as his attorney in that case, and on or about April 14, 1903, the warrant was delivered to Eller, who receipted the same as attorney for Gordon and who obtained the money thereon from the city treasurer. These facts are alleged in the petition filed in this case, and it is further alleged that on January 24, 1903, the said Samuel I. Gordon sold and assigned to the plaintiff all his right, title and interest in and to the sum of $2,500, due to him for salary as police judge of the city of Omaha for the year 1901, to be held by him as security for the payment of certain debts of the said Samuel I. Gordon, an itemized statement of which is set forth in the petition. It is further alleged that, before Eller presented the warrant for payment, plaintiff notified Eller of the assignment to him, and that he also notified the city treasurer that the said salary due to Judge Gordon, and which was in part evidenced by said warrant No. 53,327, had been sold and assigned to the plaintiff, who was the only party entitled to receive payment thereon. Judgment is prayed against the city for the amount of said warrant with interest. The answer alleges Eller's employment as attorney for Judge Gordon in the mandamus proceeding brought to require the mayor to sign and deliver the warrant, and in numerous other cases in which Gordon was a party, and that there was due him as fees for services rendered said Gordon in his various suits a sum largely in excess of the amount of the warrant; that it was agreed between Judge Gordon and Eller that the latter should hold and collect the warrant and apply the same upon fees due him for legal services. It is also alleged in the answer that Eller was the attorney of record for Judge Gordon in the district and supreme courts in the case involving the issue of said warrant, and so remained until April 27, 1904, and that as such attorney he was authorized to receive and receipt for the same. The reply denies that Eller remained the attorney of said Gordon or had any power to receipt for said warrant, and alleges the assign-

ment to him at a date long previous to the payment of the same to Eller. It reiterates the allegation of the petition that the city treasurer had notice that the warrant and the debt had been assigned to the plaintiff before the same was presented for payment by Eller, and it denies any indebtedness from Judge Gordon to Eller on account of legal services. The record discloses that a jury was impaneled and sworn, and that the evidence was in part adduced, when defendant objected to any further evidence being admitted, on the ground that the petition did not state a cause of action. The district court sustained this objection and, on motion duly made, directed the jury to return a verdict for the defendant, which was accordingly done. The motion for a new trial was overruled, and judgment entered upon the verdict that the city of Omaha go hence without day, and have and recover from the plaintiff its costs.

If Eller, as attorney for Judge Gordon, had no authority to receive and receipt for the warrant in question, and to obtain the money thereon, then it is evident that some one is still indebted to the legal owner of the warrant for the amount thereof. Section 3606, Ann. St., provides, among other matters, that an attorney has power "to receive money, claimed by his client in an action or proceeding, during the pendency thereof or afterwards, unless he has been previously discharged by his client, and upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment." This statute is merely declaratory of the common law. The authorities are numerous and uniform that an attorney, by virtue of his retainer, may receive his client's money in a case in which he is employed, and the act will bind his client, unless the party paying it had notice of a revocation of the attorney's authority to act in the case. *Ruckman v. Alwood*, 44 Ill. 183; *McGill v. McGill*, 59 Ky. 258; *State v. Hawkins*, 28 Mo. 366; *Yoakum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738. It is admitted that Eller was attorney of record for Judge

Gordon, and, under our statute and the decisions above referred to, he had authority to receive this warrant and collect the money thereon, unless previously discharged by Gordon and notice thereof brought home to the city. Judgment having gone in favor of the city on a demurrer *ore tenus* interposed to the petition, we must assume the truth of the allegation that notice of the assignment of this warrant to the plaintiff was given to the city treasurer before its payment. An assignment of a judgment is a revocation of the authority of the plaintiff's attorney to receive and receipt for the money due thereon, or to in any wise control the judgment. If the plaintiff in a judgment has parted with his right to control it by assigning it to a third party, it cannot be questioned that the power of his attorney ceased with such assignment, and that all parties in interest having notice thereon deal with the attorney thereafter in relation to the judgment at their peril. *Trumbull v. Nicholson,* 27 Ill. 149. This requires us to determine whether notice to the city treasurer of the assignment of the warrant, or rather the salary represented by the warrant, was notice to the city, no plea of any other notice being alleged in the petition, or of any facts from which notice might be inferred, such as an assignment on the record, or an entry or notice of record of Eller's discharge as attorney in the case. One of the provisions of the Omaha charter is in the following language: "The corporate name of each city organized under or governed by this act, shall be 'The City of ——' and all or every process or notice whatever, affecting any such city, shall be served upon the mayor, or acting mayor, or in the absence of both of said officers from the city, then upon the city clerk." Ann. St., sec. 7453. This statute undoubtedly contemplates a written notice, and it certainly requires notice to the executive head of the city, or, in his absence, to the clerk. No notice of the kind required by statute is pleaded, and we cannot judicially change or amend the statute by holding that notice to any other officer than the one mentioned in the statute

is sufficient. We conclude, therefore, that the allegations of the petition, if established, would not entitle the plaintiff to a judgment.

Complaint is made, as we understand from the appellant's brief, that the court directed a verdict and entered judgment thereon instead of dismissing the jury and the plaintiff's action. This requires us to consider what order should be entered on sustaining a demurrer *ore tenus* to the plaintiff's petition. The rule is well established that an objection to the admission of any evidence on the ground that the petition fails to state a cause of action may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur. *Curtis & Co. v. Cutler,* 7 Neb. 315; *Ball v. LaClair,* 17 Neb. 39. This is undoubtedly the correct practice under our code. Section 94 of the code specifies the grounds upon which a demurrer to a petition may be interposed. Section 96 is as follows: "When any of the defects enumerated in section ninety-four do not appear upon the face of the petition, the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." In *Marriott v. Clise,* 12 Colo. 561, 21 Pac. 909, the supreme court of Colorado, under a similar statute, sustained the district court in allowing a demurrer to the plaintiff's petition on the ground that it did not state facts sufficient to constitute a cause of action after trial and verdict, and the authorities are quite uniform that the objection to the petition upon this ground may be raised at any time. *Montgomery County Bank v. Albany City Bank,* 7 N. Y. 459; *Coffin v. Reynolds,* 37 N. Y. 640. The effect of such an objection to the petition is not greater nor different from sustaining a demurrer filed before answer.

Upon sustaining a demurrer to the petition, if the plaintiff elects to stand thereon, or if he does not take

leave to amend, final judgment in the case is entered against him. This is the practice under the Ohio code which we have adopted. *Devoss v. Gray,* 22 Ohio St. 159; Wild, Journal Entries (3d ed.), p. 29. While the usual practice may be to discharge the jury and dismiss the plaintiff's action upon sustaining a demurrer *ore tenus* to the petition, the fact that the court directed a verdict and entered judgment thereon is not material, and cannot be held reversible error. The authorities are numerous to the effect that, while a judgment on demurrer is a sufficient bar to a second action between the same parties on a cause involving the same facts, it is not a bar where the petition in the second action sets out material facts which were not passed upon in the first action. *Keater & Skinner v. Hock, Musser & Co.,* 16 Ia. 23; 1 Freeman, Judgments (4th ed.), sec. 267; 2 Black, Judgments (2d ed.), sec. 707; *State v. Cornell,* 52 Neb. 25. It is true that the journal entry made in this case shows a judgment entered on the verdict of a jury, but the whole record taken together shows that there was no trial on the merits, and the whole record when produced, should the judgment be pleaded in bar of another action based upon a sufficient petition, will have no further force or efficacy as a bar than a judgment entered for the defendant upon a demurrer interposed to the plaintiff's petition before answer filed.

We have discussed the case upon the theory that a city officer may bind the city by the assignment of his salary prior to the issue of a warrant therefor. We do not wish to be understood as having examined this question or to have expressed any opinion thereon. We prefer to leave it open for further consideration, it not being necessary to a determination of the case. Finding no reversible error in the record, we recommend an affirmance of the judgment.

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

AFFIRMED.

WILL CAPROON, APPELLEE, V. HAYDEN W. MITCHELL, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,494.

1. **Appeal:** REVIEW. An order overruling a motion to strike from a petition will not be reviewed on appeal when not assigned as error in the motion for a new trial.
2. **Sales:** RECOVERY OF PAYMENT. The plaintiff purchased a horse from the defendant, giving his note for the purchase price. The horse was lost to the plaintiff on account of a chattel mortgage made prior to his purchase, and his note had been transferred before due to a good-faith purchaser. *Held*, That he might recover from the defendant the amount of his note and interest.

APPEAL from the district court for Antelope county: JOHN F. BOYD, JUDGE. *Affirmed.*

E. D. Kilbourn, for appellant.

O. A. Williams, contra.

DUFFIE, C.

In an action commenced in county court, Caproon alleged that the defendant sold and delivered to him a horse for the sum of $45, then duly paid by a promissory note for that amount; that the horse at the time of the sale was mortgaged to the Edwards-Bradford Lumber Company, who thereafter took possession from the plaintiff, and that the horse was wholly lost to him. A trial resulted in favor of the plaintiff, and defendant appealed to the district court. The plaintiff's petition in the district court was the same practically as that filed in the county court, except that it contained the additional averment that the note which plaintiff had given to defendant on the purchase of the horse "had been sold and transferred by the defendant before maturity for a valuable consideration, to the Clearwater State Bank." In the district court a motion was made to strike from the peti-

tion this additional averment, for the reason that it presented an issue not raised or tried in the county court. The motion to strike was overruled, and this ruling is alleged as error. An examination of the motion for a new trial discloses that the ruling of the court on this motion was not alleged as error or urged as a reason why a new trial should be granted. We cannot, therefore, consider this assignment. *Barker v. Davies,* 47 Neb. 78. The evidence taken upon the trial has not been preserved in a bill of exceptions, and we have nothing before us but the pleadings and the judgment entered. We can, therefore, only determine whether the judgment is supported by the pleadings. If the defendant was still in possession of the note given him on the purchase of the horse, the plaintiff would have a perfect defense thereto, but it was sold before maturity to a good-faith purchaser. As against this purchaser the plaintiff has no defense. He has, therefore, been damaged to the amount of his note and interest by the horse being taken from him on a prior valid claim. We discover no error in the record, and recommend an affirmance of the judgment.

JACKSON, C., concurs.

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

AFFIRMED.

MARGARET BATTLES, APPELLANT, V. HAGERMAN TYSON, APPELLEE.

FILED NOVEMBER 22, 1906. No. 14,500.

1. **Slander: QUESTION FOR JURY.** Unless words upon which a charge of slander is based are plain and unambiguous in their meaning, the meaning intended by the defendant and the understanding of those hearing him should be left for the jury to determine.

2. ———. To charge a woman with being a lewd character, of using her body for commercial purposes, and with keeping a gambling room is actionable *per se*.

APPEAL from the district court for Fillmore county: LESLIE G. HURD, JUDGE. *Reversed.*

F. B. Donisthorpe, for appellant.

Curtis & Waring, contra.

DUFFIE, C.

The petition in this case alleges that the defendant, on or about August 21, 1904, in a conversation had with divers persons, falsely and maliciously spoke and published the following false and defamatory words of and concerning her: "I want it understood that I am not running a gambling house, and that if a girl could not have decent company she has no business to have company at all; that she had three men in her room with her." It is further alleged that in the presence and hearing of others the plaintiff falsely and maliciously did speak and publish the following false and defamatory words of and concerning the plaintiff: "She was locked up in her room with three men in my house, and after they had gone I found an empty whiskey bottle on her table." It is further alleged by way of innuendo that the defendant, in so speaking of the plaintiff, intended, and that it was so understood by those hearing him, that the plaintiff was entertaining company which was not decent, and was running a gambling room in his house; that she was a woman of immoral character, using her body for commercial purposes, and that she had three men in her room with her for that purpose; that she was a young woman of lewd character, permitting men to enter her room and lock the door for sexual intercourse, and that she was in the habit of using intoxicating liquors. The defendant interposed a demurrer to this petition, which

was sustained by the court, and the plaintiff electing to stand on her petition, her action was dismissed.

The district court undoubtedly sustained the demurrer upon the theory that the words spoken did not charge a criminal offense, and, as the petition did not allege special damages suffered by the plaintiff on account of the alleged slander, that it did not state a cause of action. The defendant, by demurring to the petition, admits speaking words as alleged. Whether they would bear the construction placed upon them in the petition, and whether those hearing them so understood them, is, we think, a question for the jury, and not for the court. It is true that no innuendo can give to plain and unambiguous words a meaning different from that in which they are generally understood, but in this case it does not require any far stretch of the imagination to accept the meaning contended for by the plaintiff in the use of the words defendant admits he used in speaking of her. As said by the supreme court of Minnesota in *Stroebel v. Whitney,* 31 Minn. 384, 18 N. W. 98: "It is going too far to argue that words must *necessarily* bear a criminal import, in order to render them actionable *per se.* It is not enough to show by ingenious argument that they might possibly admit of some other meaning. * * * It is not necessary that the words should make the charge in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime." Newell, in his work, Slander and Libel (2d ed.), ch. 7, sec. 5, says: "There is no offense which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by the most vulgar and obscene, in broad and coarse language. If the language used is such that in its ordinary acceptation a person of ordinary understanding could not doubt its signification it will be *prima facie* sufficient."

We have not had occasion to determine whether a charge of unchastity brought against an unmarried woman

is actionable *per se*. By the strict rules of the common law it was not; and special damages because of the charge had to be alleged and shown. That this rule was unsatisfactory to many courts is shown by the expression of the judges. In *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Campbell said: "I may lament the unsatisfactory state of our law, according to which the imputation by words, however gross, on an occasion, however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damages to her." Lord Brougham, in a separate opinion, commenting on this statement, said: "Instead of the word 'unsatisfactory' I should substitute the word 'barbarous.'"

In *Smith v. Silence*, 4 Ia. 321, the supreme court of Iowa, on examining the question, mentions a number of states, among which are North Carolina, South Carolina, Indiana, Illinois, Kentucky and Alabama, in which the rule has been modified by statute; and other states, including Massachusetts, New Hampshire, Connecticut, Ohio and Pennsylvania, in which, by the decisions of their courts of last resort, it is now held that charging a woman, married or unmarried, with unchastity is actionable without proof of special damages.

It may be admitted that, if there was nothing else than the number of cases holding to the old common law rule, and if our action here had nothing else to influence or recommend it, we would be compelled to follow that rule; but as society is now constituted, a female against whom the want of chastity is established is driven beyond the reach of every courtesy and charity of life, and sometimes even beyond the portals of humanity. By common consent such an imputation is now everywhere treated as the deepest insult and the vilest charge that could be given or inflicted upon the victim or her friends. She is denied the society in which she has been wont to move. If in want of employment, her character is gone, and her chance for self-support is injured beyond redress. In our

judgment, such a charge is more damaging in its effect than many which are most severely punished by our penal laws. If, as alleged by the plaintiff, the defendant, by the words spoken of her, meant, and intended to mean, that she was offering her body for sexual intercourse, or was the keeper of a room where gambling was carried on, and this was the meaning understood by those to whom the words were spoken, they are actionable *per se,* and no special damages need be alleged or shown in order to sustain the action.

We recommend a reversal of the judgment and remanding the cause for trial.

JACKSON, C., concurs.

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

REVERSED.

DAWES COUNTY, APPELLEE, V. SIOUX COUNTY, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,522.

Costs: CHANGE OF VENUE. The county from which a change of venue in a criminal case is taken is not liable to the county in which the trial is had for the fees of such jurors of the regular panel as did not sit upon the trial of that case.

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

M. J. O'Connell, for appellant.

J. E. Porter, contra.

DUFFIE, C.

Charles Russell was informed against for the crime of murder in the county of Sioux. The venue was changed to

Dawes county and the trial there had. We understand from the record that Sioux county has paid the *per diem* of the jurors actually sitting on the trial of the case, and refuses to pay for jurors drawn upon the regular panel and who did not sit upon the trial, but who were detained for five days during which the trial was in progress. The case was tried to the court without a jury, and judgment entered in favor of Dawes county for the amount claimed. From this judgment the county of Sioux has taken an appeal.

At the conclusion of the trial of the case of *State v. Russell,* the clerk of the district court for Dawes county made out a certified statement of all costs and fees in the case and forwarded it to the county clerk of Sioux county, and the county board of that county audited and allowed all such costs and fees except the *per diem* of the jurors of the regular panel who were not actually engaged in the trial of the case. No appeal was taken from the action of the board, and, while notice was given to the several jurors of the disallowance of a part of the claim made for their fees, no such notice was given to the county of Dawes. The appellant now claims that the only remedy existing in favor of any party dissatisfied with the action of the board was by an appeal to the district court, and that Dawes county, although having paid the fees, cannot present a second claim for the fees disallowed, but is barred of its remedy because of its failure, or the failure of the jurors, to take an appeal from the action of the board when the claim was first before them. We do not think it necessary to discuss the question of procedure. In our view of the case, the county of Dawes was entitled to recover jury fees to the amount only that was paid to the jurors actually sitting upon the trial. That part of section 456 of the criminal code, relating to the costs incurred on a change of venue in a criminal case, is as follows: "All costs, fees, charges, and expenses accruing from a change of venue, together with all costs, fees, charges, and expenses made or incurred in the trial of, or

in keeping, guarding, and maintaining the accused, shall be paid by the county in which the indictment was found, and the clerk of the trial court shall make a statement of the costs, fees, charges, and expenses aforesaid, and certify and transmit the same to the clerk of the district court where the indictment was found, to be by him entered upon his docket and collected and paid as if a change of venue had not been had." A statute nearly similar to our own has received a construction by the supreme court of of Iowa. In the case of *Jones County v. Linn County,* 68 Ia. 63, it was held: "When a criminal cause is tried in a county other than the one in which the offense was committed, the latter county is liable to the county where the trial is had for *all* of the fees paid to the jurors engaged in the trial." If the jurors engaged in the trial of the case are to look to the county from which the change of venue was taken for their fees, which we do not determine, certainly the remainder of the regular panel should not be compelled to do so, and it is only the costs, fees, charges and expenses of the trial that are to be certified by the clerk of the court of the county where the trial is had to the clerk of the county where the indictment was found. We do not wish to be understood as saying just what charges and expenses may be collected from the county from which the change was taken, but we are satisfied that such county is not liable for the fees of the jurors of the regular panel not actually sitting on the trial.

We recommend a reversal of the judgment and remanding the cause for another trial.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

FIRST NATIONAL BANK OF MADISON, APPELLANT, V. SCHOOL DISTRICT ET AL., APPELLEES.

FILED NOVEMBER 22, 1906. No. 14,483.

1. **Principal and Surety:** CONTRACT: CONSTRUCTION. Where a bond given by a contractor, conditioned on the faithful performance of a building contract on his part, provides that in case of default on his part the surety may take possession of the building and complete the work, and that in such event "the reserve in the hands of the owner (of the building), together with any other moneys due or to become due," shall be paid by the owner to the surety, in order to determine the rights of the surety under such provision the building contract proper and the bond should be construed together as constituting a trilateral contract *inter partes*.

2. ———. In such case, where the contractor defaults and the surety completes the building according to contract, the latter does not stand in the position of assignee with respect to the "reserve" in the hands of the owner and "other moneys due or to become due," but as an original party to the trilateral contract.

3. ———: ASSIGNMENT. Future earnings or profits under an existing contract either public or private are assignable.

APPEAL from the district court for Madison county: JOHN F. BOYD, JUDGE. *Reversed with directions.*

Allen & Reed, for appellant.

Kennedy & Learned, Moyer & Foster, Mapes & Hazen, S. O. Campbell, M. D. Tyler and *Samuel J. Tuttle, contra.*

ALBERT, C.

This is an appeal from a decree of the district court for Madison county, directing the payment of a fund in court to certain of the appellees, and excluding the appellant from participation therein. There appears to be no dispute as to the facts. The record shows that on the 21st day of June, 1900, Frank Moore entered into a contract in writing with a school district in Madison county, whereby he agreed to erect a school building and furnish

the labor and material therefor for $11,400, to be paid in instalments as follows: "On or about the first of each month during the progress of the work the architect shall prepare an estimate of the value of the materials furnished and the labor performed by the contractor during the preceding month and shall deliver such estimate in writing certified to over his signature to the contractor. Upon presentation of such estimate and certificate to the owner by the contractor the sum of 85 per cent. of the amount of such estimate will be paid by the owner to the contractor. The final payment shall be made within ten days after this contract is fulfilled." A bond in the penal sum of $6,000 being required of the contractor, conditioned on the faithful performance of his part of the contract, he made written application therefor to the Fidelity & Deposit Company of Maryland, which application contains the following clause: "And I do further agree in the event of any breach or default on my part of the provisions of the contract hereinbefore mentioned that the Fidelity & Deposit Company of Maryland, as surety upon the aforesaid bond, shall be subrogated to all my rights and properties as principal in said contract, and that deferred payments and any and all moneys and properties that may be due and payable to me at the time of such breach or default or that may thereafter become due and payable to me on account of said contract shall be credited upon any claim that may be made upon the Fidelity & Deposit Company of Maryland under the bond above mentioned." The surety company furnished the bond, becoming surety thereon, which was accepted and approved by the school district on the 28th day of June, 1900. It contains, among other provisions, the following: "If the said principal shall abandon said contract or fail to comply with any or all of the conditions of said contract to such an extent that the same shall be forfeited, then said surety, upon the notice above stated, shall have the right and privilege in its option to sublet or complete said contract, whichever said surety may elect to do, provided it is done in accordance

with said contract; and if said contract shall be sublet or completed by said surety, then the reserve in the hands of the said owner, together with any other moneys due or to become due, shall be paid by said owner to said surety, at the times mentioned in said contract, on account of any loss or expenses arising out of said contract and any loss or expenses sustained by said surety in subletting or completing said contract; and if said owner shall complete or relet the said contract, then all reserve, deferred payments and any or all other moneys and properties at that time due and payable or that thereafter may become due and payable to the said principal under and by virtue of said contract shall be credited upon any claim the said owner may make upon said surety because of the failure of said principal to comply with the terms of said contract; if any suits at law or proceedings in equity are brought against said surety to recover any claim thereunder, the same must be instituted within six months after the completion of the work specified in said contract." At the time the bond was furnished, and in accordance with the terms on which it was furnished, the contractor paid $1,500 into the hands of the surety company as indemnity against loss or damage on its part by reason of its suretyship. The money with which this payment was made was borrowed by the contractor from the Bank of Colfax, Iowa, in pursuance of an arrangement wholly between him and that bank. Afterwards, and in pursuance of his contract, the contractor began the erection of the building and went on with the work until November 9, 1900, when he abandoned it. Whereupon the surety company, exercising the option given it by the quoted provision of the bond, took possession of the unfinished building, material, etc., and completed the building according to the terms of the contract.

On the 11th day of September, 1900, the contractor borrowed $2,000 from the First National Bank of Madison, Nebraska, to pay for labor and material required in the erection of the building, and which was used for that

purpose, giving his note therefor, payable in 20 days after date, and bearing 10 per cent. interest. The note was not fully paid at maturity, and thereafter to secure the payment of the amount due thereon the contractor executed and delivered two instruments in writing to the First National Bank of Madison. The first bears no date, but was given October 3, 1900, and is as follows: "To the School Board of District No. 1. Gentlemen: I hereby assign my fourth estimate on my school contract to the First National Bank of Madison, Neb., or so much thereof as will be necessary to pay the balance of a $2,000 note after applying my present third estimate of $765, and I hereby authorize the architect to send said estimate to the said bank and I also authorize the school board to draw the warrants in their favor. In case the 4th estimate should not be sufficient to pay above claim I include the fifth estimate on the same conditions. Frank Moore." The second is in these words: "Madison, Nebraska, Oct. 27, 1900. I hereby assign to the First Nat'l Bank of Madison, Nebraska, any and all money due and to become due me on my contract with School District No. 1 of Madison county, to an amount sufficient to pay said bank the balance due on one promissory note in the sum of $2,000, on which $765 has been paid, and one note of $200, with interest on both notes. And I hereby authorize the architect, J. C. Stitt, to send my future estimates to said bank until said notes shall be fully paid; and I authorize and direct the board of trustees of said school district to draw the warrant or warrants for said money to said bank. My intention being that this assignment shall cover the first money to become due and payable under said contract. In presence of Peter Rubendall. Frank Moore." The foregoing instruments were presented to the school district by the bank and two payments made thereon by the former, one of $765 on October 8, 1900, another of $309.50 on November 9 of the same year. On the 9th day of November, 1900, the contractor gave the Bank of Colfax, Iowa, an order in writing on the surety company for the

$1,500 he had paid over to it as indemnity against loss or damage on its part, and a few days later an assignment in writing of all moneys not exceeding $3,000 due and accruing to him under his contract with the school district. The surety company had immediate notice of the order and assignment. In September, 1901, suit was brought against the surety company in the state of Iowa by the Bank of Colfax on the order given by the contractor November 9, 1900, and such suit was pending when the case at bar was decided. On the 3d day of December, 1900, the Omaha Hydraulic Press Brick Company brought suit aided by attachment in the county court of Douglas county against the contractor on an account for goods, wares and merchandise sold and delivered to him, wherein the surety company was summoned as garnishee. The garnishee answered, and service on the defendant was had by publication. In that case the court found $219.94 due the plaintiff therein, and gave it a lien on the funds in the hands of the surety company, ordering the company as garnishee to pay sufficient thereof into court to discharge the amount found due the plaintiff, with costs of that suit. A summons in garnishment issued against the surety company on the 14th day of December, 1900, on a judgment for $381.45, and costs, rendered in favor of James B. Hume and against the contractor in the county court of Madison county, but transcribed to the district court of that county, the writ in question issuing from the district court. The garnishee answered April 23, 1903, but no order appears to have been made thereon.

After the surety company had undertaken to complete the school building, certain payments on the contract price were made direct to it by the school district, which, with the amounts theretofore paid to the contractor, or on his orders, and a small amount of damage for delay in the completion of the building deducted from the entire contract price, left a balance of $1,802 due and owing from the school district by the terms of the contract. As there were several claimants for this fund and the school dis-

trict could not with safety decide between the rival claimants, the money was paid into court in order that the rights of the several parties might be litigated and determined. The First National Bank of Madison came in and laid claim to a sufficient amount of the fund to pay the remainder due on the $2,000 note it had taken from the contractor, basing its claim on his assignments to the bank hereinbefore set out. The surety company came in, alleging that after giving credit for all payments made direct to it by the school district, and for the $1,500 indemnity money paid it by the contractor when the bond was given, there was a certain remainder due it for the expense incurred in the completion of the building, and insisting that such remainder should be a first charge against the fund in court by virtue of the provisions of the bond. It also claimed to be entitled to the entire fund to protect itself against the claims of the Bank of Colfax and others not necessary to mention at this time. The brick company and Hume came in, claiming a right to a portion of the fund by virtue of their respective proceedings in garnishment. The Bank of Colfax, although made a party and constructively served, made default. There were other claimants, but they were cut out by the decree and have acquiesced therein. On the 13th day of March, 1905, the court entered a decree for the distribution of the fund. It found the remainder due the surety company for the completion of the building, after deducting the payments made to it by the school district and the $1,500 indemnity money, $685.05, and that the same was a first charge against the fund in court. The claim of the brick company was found to be $293.60, and that of Hume $524.89, and to be second and third charges respectively against the fund. The court further found that the surety company was entitled to the residue of the fund for the purpose of protecting itself against the claims of the Bank of Colfax. As to the claim of the First National Bank of Madison, the court found that the remainder due on the $2,000 note at the date of the decree was $1,362.50, but

that the bank had no right or interest in or to the fund in controversy. From a decree entered in accordance with the foregoing findings, the First National Bank of Madison appeals.

The appellant contends that the contractor's obligation to the surety company with respect to its succession to his right to payment from the district amounts to no more than "an agreement for a future assignment dependent on the condition precedent of a 'breach or default' on the part of Moore (contractor) in fulfilling his contract with the school district." This contention is based on that portion of the application hereinbefore quoted, the argument being, in substance, that, as the application preceded a binding contract between the contractor and the school district, the contractor's rights under such contract did not have even a potential existence when the application was made and therefore were not assignable. That argument would be of doubtful validity even were we to assume that the quoted language of the application amounts to an assignment, or attempted assignment, of the contractor's rights under his contract with the school district to the surety company. The application, until accepted by the surety company, was a mere offer, and did not become binding until the bond furnished thereon had been accepted and approved by the school district. On the other hand, the contract between the contractor and the school district was not perfected and did not become binding and effective until the bond had been accepted and approved by the school district. The two contracts, therefore, are interdependent, and became binding and effective at the same instant. It may be said in passing that the quoted clause of the application is substantially included in the quoted provisions of the bond. Whether an assignment of a subject matter which becomes potentially existent at the very instant the assignment is executed is valid, is a question we do not feel called upon to decide at this time, because, in our opinion, the surety company's relation to the fund is not that of an assignee, or one claim-

ing as assignee, but of an original party to what we regard as the contract *inter partes*. As we have seen, the building contract proper and the bond are interdependent and took effect at the same instant. They should be construed together as constituting a trilateral contract. According to the terms of such contract, so constituted, the school district was to pay $11,400 for the erection of the building. In case the contractor completed the building according to the terms of the contract the entire contract price was to be paid to him. But in case of default on his part and the completion of the building by the surety company in pursuance of the provisions of the bond," then the reserve in the hands of the said owner (school district), together with any other moneys due or to become due," was to be paid to the surety company "at the times mentioned in said contract," not as assignee, but as one of the parties to the trilateral contract. The decree of the district court to the extent that it makes the balance due the surety company a first charge against the fund in controversy is right.

This brings us to the contest between the appellant and the parties claiming by virtue of their proceedings in garnishment. As we have seen, the assignments under which the appellant claims are prior in point of time to either of those proceedings. Those claiming under such proceedings contend that the assignments to the appellant are of no effect because the subject matter of the assignments had no actual nor potential existence when they were made. This contention cannot be sustained. At the time the two assignments were made there was a valid and existing contract between the contractor and the school district, and his rights thereunder were assignable. As was held in *Perkins v. Butler County*, 44 Neb. 110: "An assignment of moneys not yet earned, but expected to be earned in the future under an existing contract, is in equity valid and enforceable." The rule is thus stated in 4 Cyc. 17: "Anticipated profits under existing agree-

ments may be assigned, although the contract under which the work is done may be indefinite as to the time of employment and the amount to be paid for the work." One of the cases cited in support of the text is *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486, where the rights of an agent under a contract, whereby he was to receive commissions on renewal premiums to accrue annually for a given period, were held assignable. See, also, 4 Cyc. 20, and cases cited. The foregoing rule, according to the great weight of authority, is applicable to both public and private contracts, in the absence of a statutory rule to the contrary. This proposition was at least tacitly recognized in *Perkins v. Butler County, supra*. See *Fortunato v. Patten*, 147 N. Y. 277; *Hipwell v. National Surety Co.*, 130 Ia. 656; *Dickson v. City of St. Paul*, 97 Minn. 258; 4 Cyc. 22. The assignments to the appellant, therefore, were valid, and operated as a transfer *pro tanto* of the contractor's interest in the trilateral contract. That interest, at the time the assignments were made, was the then unpaid remainder of the contract price, plus the $1,500 indemnity money paid the surety company, less the cost and expenses incurred by the surety company in the completion of the building and by reason of the contractor's default. Such cost and expenses, after deducting the payments made direct to the surety company by the school district and the $1,500 indemnity money, amounted at the date of the decree to $685.05, and bears interest at 7 per cent. per annum. The fund in court, then, representing the remainder due on the contract price, less the remainder due the surety company, is covered by the assignments to the appellant bank, and should be applied on the amount found due it, which, with the remainder due the surety company, exceeds the fund in court. Consequently, there would be nothing left for the other claimants, and a discussion of their rights *inter se* would be profitless.

As to that portion of the decree which permits the surety company to take and hold any portion of the fund to protect itself against the claims of the Bank of Colfax,

little need be said. The claim of that bank is based on an order or assignment made long subsequent in point of time to those of the appellant. Nothing could pass by such an assignment giving the Bank of Colfax a claim against the surety company, save such remainder as might remain in its hands after the accounts between itself and the contractor had been adjusted. As we have seen, upon an adjustment of those accounts, nothing was found due the contractor but a remainder in favor of the surety company, which the court ordered paid out of the fund in court. As there was nothing due the contractor from the surety company on a final adjustment of the accounts between them, nothing passed by virtue of the order or the assignment given by the contractor to the Bank of Colfax, and it has no claim against the surety company by virtue thereof. Whether it thereby acquired any rights against the school district is another question, but, if it did, it is not asserting them; and, if it were, they are junior and inferior to those of the appellant. We know of no reason, and there is certainly nothing in the contract, that would warrant the court in allowing the surety company to take and hold a portion of the fund to protect itself against a groundless claim asserted in a foreign jurisdiction. The decree, to the extent that it gives the garnishing creditors priority over the appellant, excludes the appellant from participation in the fund, and permits the surety company to take or retain any portion of the fund over and above the remainder found due it, with interest, is erroneous, but in all other respects is right. It would seem, however, that a new decree is desirable, rather than a modification or correction of that entered by the district court.

It is therefore recommended that the decree of the district court be reversed and the cause remanded, with directions to enter a decree conforming to the views expressed in the foregoing opinion.

DUFFIE and JACKSON, 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 enter a decree in accordance with said opinion.

JUDGMENT ACCORDINGLY.

BARNES, J., not sitting.

BENJAMIN C. SAMMONS ET AL., APPELLANTS, V. KEARNEY POWER & IRRIGATION COMPANY ET AL., APPELLEES.

FILED NOVEMBER 22, 1906. No. 14,489.

1. **Mortgages**: SUBSEQUENT CONVEYANCES. While the general rule is that a subsequent purchaser or lessee of mortgaged property taking under a conveyance or lease from the mortgagor takes subject to the mortgage, yet, where the mortgage in express terms or by clear implication authorizes the mortgagor to make such sales or leases for the benefit of the mortgagee, a sale or lease made in pursuance of such authority is binding on the mortgagee and those claiming under him.
2. **Quasi Public Corporations**: DISCRIMINATION. A corporation formed for the purpose of supplying water or water power is a *quasi* public corporation, and as such is bound to serve the public without unjust discrimination.
3. ———: CONTRACTS: VALIDITY. A clause of a contract of a corporation of that character which, if enforced, would prevent its serving the public on such terms is illegal and void.
4. **Mortgages**: FORECLOSURE: LEASE: VALIDITY. In a suit for the foreclosure of such mortgage, and where the lessee is a party asserting the priority of his lease, the extent to which such lease is valid and enforceable is a legitimate subject of inquiry and adjudication.

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

E. C. Calkins, for appellants.

John L. Webster, B. R. Dysart, John N. Dryden and *H. M. Sinclair, contra.*

ALBERT, C.

The Kearney Power & Irrigation Company is a corporation organized under the laws of this state. The general nature of the business of the corporation is thus stated in its articles of incorporation: "The owning, constructing and operating canals, reservoirs, dams, and other works for irrigation and water power purposes, including the power to lease its own property, and to acquire by purchase such canals, reservoirs, and other works for irrigation and water power purposes and the application of such power to all purposes, including the power to execute mortgages or deeds of trust to secure such bond or bonds as may or shall be issued by the said company in furtherance of the objects of its incorporation." On the 15th day of July, 1898, it executed and delivered to the Mercantile Trust Company of New York, as trustee, a mortgage on a ditch or canal near the city of Kearney, including the right of way and other property and rights, to secure a bond issue of $150,000 in bonds of $500 each. Of these bonds only 274 were disposed of, the remaining 26 require no further mention. On the 1st day of November, 1889, the mortgagor entered into a contract in writing with the Northwestern Electric Heat & Power Company, a corporation, whereby for a consideration therein named the latter was given the right to take water from the canal in question for the period of 15 years, with the privilege of a renewal of the contract on the same terms for an additional 15 years, at its option, for the purpose of furnishing power for its electrical machinery. Default was made in the payment of the interest on the bonds, and on the 9th day of September, 1903, Sammons brought this suit to foreclose a mortgage, alleging that he was the holder of 239 of the bonds. The defendants all defaulted. Sarah Miller, claiming to be the owner and holder of some of the bonds, was permitted to intervene and joined in the prayer of the plaintiff for a foreclosure of the mortgage. The Northwestern Electric Heat & Power Com-

pany was permitted to intervene and set up its rights under its contract with the Kearney Power & Irrigation Company, the mortgagor. The court found in favor of the plaintiff and the intervener Sarah Miller in the full amount of the bonds which they respectively claimed to own, with the accrued interest thereon, and ordered a sale of the property for the satisfaction of the full amount of outstanding bonds and interest, but provided in the decree that such sale should be subject to the rights of the intervener, the Northwestern Electric Heat & Power Company, under its contract with the mortgagor, and that such contract should be binding upon the purchaser at such sale. Both the plaintiff and the intervening company appeal.

The plaintiff assigns several errors, but they all turn on the single question: Did the court err in providing in the decree that the sale thereunder should be subject to the rights of the intervening company under its contract with the mortgagor? The plaintiff invokes the general rule to the effect that, where a corporation mortgages its property, the mortgagee is not bound by subsequent contracts of the mortgagor with respect thereto, whether such contracts are leases, sales, mortgages, or other contracts. 3 Cook, Corporations (5th ed.), sec. 860; 5 Thompson, Commentaries, Law of Corporations, sec. 6239; Jones, Railroad Securities, secs. 567-569. See also 41 Cent. Dig. "Railroads," sec. 685. The foregoing rule is easily recognizable, as it is grounded on the general rule applicable to all mortgages that an interest subsequently acquired by a third party in the mortgaged property is subject to the mortgage; but the question is whether the facts in this case bring it within that rule. It will be conceded, notwithstanding the positive language in which such rule is stated, that it would be competent for the parties to a mortgage to take it out of the operation thereof by express stipulation. That is to say, that, in case the mortgage should expressly provide that the mortgagor should be authorized to lease the property or portions

thereof, or enter into contracts with respect thereto, and that such leases and contracts, when made, should pass to the mortgagee as further security for the mortgage debt, leases and contracts made by the mortgagor in the exercise of such authority would be valid and binding as against the mortgagee and those claiming under him. It will also be conceded that the same result would follow whether such authority rest on express grant or clear implication. Hence, in order to determine whether the mortgagor had authority under the mortgage to make the contract or lease under which the intervening company claims, an examination of the provision of the mortgage becomes necessary. It is not claimed that such authority is expressly given. It remains to determine whether it is given by implication. The solution of this question is to be found, we think, in the familiar rules of construction applicable to the facts in this case, rather than in precedents resting, as they must, on instruments differing materially from that under consideration.

The granting clause of the mortgage, after describing the canal and right of way, is as follows: "Together with all reservoirs, dams and lakes connected with or forming a part of said canal, including three lakes now known as 'Lake Echo,' 'Lake Greenwood' and 'Lake Kearney'; also all parcels and tracts of land purchased for or used by such company in the construction of head gates or basins or other purposes connected with the said canal; and also the right and franchises of said company to construct, maintain, operate or use said canal, and to lease or sell waters therefrom for irrigation, town, city, power or other purposes, and all erections and buildings, and all machinery of every kind, nature and description, engines, reservoirs, pumps, wells, pipes or other constructions of every kind and description, tools, implements and fixtures of every kind and nature made, manufactured, constructed, built, laid, purchased or in any way acquired in or about the construction, maintenance and operation of said canal, and which may hereafter be made, manufac-

tured, constructed, built, laid, purchased or acquired in or about the construction, maintenance and operation of the said canal, and all the income, rents, profits, emoluments and moneys derived by or from said irrigation company, including all revenues from all sources whatsoever; together with all and singular the tenements and appurtenances thereunto belonging, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof, and also the estate, title and interest of all kinds whatsoever as well at law as in equity of the said mortgagor, the Kearney Power & Irrigation Company, in and to the same and every part thereof; and also all the rights, franchises, easements and rights of way connected with and belonging to the above mentioned irrigation company; and also all things in action, contracts, leases, claims and demands of the said irrigation company, as well as all franchises of every kind or nature, rights, privileges and immunities of the said irrigation company, including all right of way in, through or over streets, avenues, lanes, alleys, lands, public grounds, bridges and other public and private places now owned by said irrigation company or hereafter acquired by said irrigation company, and all property of every kind and nature, real, personal and mixed, now owned or which may hereafter be acquired by the irrigation company. It being intended, however, that the foregoing description of the real estate of the irrigation company is not to exclude any piece or parcels of land whatever not herein especially described, now owned by the irrigation company or hereafter acquired, from passing to the trustee under this indenture." The habendum clause, so far as is material at present, is as follows: "To have and to hold all and singular the said property of every kind of the said irrigation company, together with its appurtenances, franchises, buildings, machinery of all kinds, tools, implements and fixtures of every kind and other appurtenances now owned or possessed or to be hereafter acquired by the said irrigation company, and all other premises, property, rights, interests, franchises,

leases, revenues, tolls, incomes, immunities, privileges and other things aforesaid now owned or hereafter acquired by the said irrigation company to the trustee as aforesaid, and its successors and assigns in trust." The mortgage contains further provisions, among which is this: "Eleventh. The irrigation company, for itself, its successors and assigns, doth hereby covenant and agree to and with the trustee and its successors in trust, and to and with the respective persons, firms and corporations who shall at any time be holders of the bonds hereby secured, that the said irrigation company, its successors and assigns, shall and will at any time, and from time to time hereafter, and at its own proper expense, make, execute and deliver such other and further acts, deeds, conveyances, assignments and assurances in law for the better assurance of the said trustee and its successor or successors in the trust hereby created upon the trust and for the purpose herein expressed or intended, upon all and singular the aforesaid described property, real, personal and mixed, including all rights, privileges and franchises of every kind whatsoever hereby mortgaged or conveyed in trust, or intended to be now owned or vested in the said irrigation company, its successors and assigns, as the said trustee and its successors shall be reasonably advised or required, so as to render not only all the property rights and franchises of every kind and nature herein conveyed, but also as well and especially such portion thereof as shall be hereafter acquired by the irrigation company, available for the security and satisfaction of the said bonds and each, and all of them, according to the intent and purpose of this mortgage or deed of trust expressed."

From the portions of the mortgage just quoted it clearly appears (1) that the mortgage covered all the property of the mortgagor of every character; (2) that the mortgage was intended to cover not only such things in action, contracts, leases, claims and demands as existed when the mortgage was given, but all such as the mortgagor might thereafter acquire; (3) that such things in action, con-

tracts, leases, claims and demands as the mortgagor might subsequently acquire should be duly assigned to the mortgagee as further security for the mortgage debt. But, when the construction of a contract becomes necessary, it is permissible to look beyond the language of a contract and take into account the nature of the subject matter, the condition and situation of the parties, and the facts and circumstances surrounding the transaction. The mortgagor was a corporation, and one of the purposes of its organization was to lease water rights. It was the owner of a plant designed to serve that purpose, but which, as the record shows, yielded no revenue, save such as might be derived from the sale or leasing of water rights. The bonds by their terms were made to run for a period of 20 years, and the interest thereon is payable semiannually. Now, taking into account these facts and circumstances in connection with those provisions of the mortgage hereinbefore set out, it is too clear to admit of argument that the parties to the mortgage at the time it was made contemplated that the mortgagor's plant covered by the mortgage should be maintained as a going concern, because in no other way could it meet the interest on the bonds from time to time, to say nothing of the discharge of the principal debt when it became due. But we must also take into account the nature of the uses for which water or power from the canal could be sold or leased. Such uses imply a large preliminary outlay on the part of those buying or leasing a water right. No business man would make such outlay if the only contract he could make for the use of water were one liable to be terminated at any time. Now, while the mortgage debt was to run 20 years, yet by the terms of the mortgage it might upon certain conditions be declared due and payable in case of default in the payment of the interest, which was to be paid semiannually. Hence, unless the mortgagor had implied authority to bind the mortgagee by contracts and leases like that under consideration, no one entering into a contract or lease for the use of water

or water power would have any assurance that his contract or lease would not be terminated at any time. The parties to the mortgage must have known that no one would care to enter into a contract subject to such hazards. Consequently, it is fair to presume that, when the authority to maintain a going concern was given, it was intended that the authority to do the things reasonably necessary to that end should go with it. A chattel mortgage on a stock of goods, which contained a provision whereby the mortgagor was given possession with power to sell in the usual course of business, the proceeds to go in satisfaction of the mortgage debt, is valid as against creditors if made in good faith. *Davis v. Scott,* 22 Neb. 154; *Lepin v. Coon,* 54 Neb. 664. *A fortiori* it is valid as between the parties, and therefore binding upon the mortgagee and those claiming under him. The principle which makes such provisions binding upon the parties to a chattel mortgage and those claiming under them applies, we think, with equal force to the provisions of the mortgage now under consideration.

The plaintiff presents an argument of considerable force against the construction we have just placed upon the mortgage, which is based on the following state of facts: During the negotiations leading up to the execution of the mortgage, it appears to have been understood that the canal and entire plant covered by the mortgage should be leased to the Kearney Cotton Mills for a term of ten years, with the privilege of an additional term of ten years, for a rental equal to 4 per cent. per annum of the amount of the prospective bond issue actually issued, the rent to be paid semiannually to the holder of the mortgage securing the bonds. A few days prior to the execution of the mortgage the mortgagor executed a lease on those terms to the Kearney Cotton Mills. The lease provided, among other things, that upon the nonpayment of the whole or any portion of the rent when the same should become due and payable, or upon a breach of any of the covenants and agreements of the lease by the lessee,

the lessor (the mortgagor) might, at its election, declare the lease at an end and recover possession of the property by summary proceedings in forcible detainer. The plaintiff argues that this is the only lease the parties to the mortgage had in contemplation when the mortgage was executed, and that such lease being of the entire plant precludes the idea that the mortgagor had implied authority to make leases and contracts with respect to the property with other parties which would be binding upon the mortgagee. But the provisions of the lease show that the parties took into account the contingency that the lessee might fail to pay the rent, or perform some other covenant of the lease on its part to be performed, and provided against it, giving the lessor the right upon the happening of such contingency to declare the lease at an end. Had the lease been the only one in contemplation of the parties at the time the mortgage was given, instead of speaking of leases, and attempting to cover not only such as were then in existence, but all such as should be made in the future, the plaintiff's argument upon this state of facts would be unanswerable. But, taking into account that the lease provided that it might be terminated at any time upon the happening of certain contingencies, and that the mortgage covers not only leases which were in existence when it was made, but all contracts and leases which might thereafter be made, and provides for their assignment to the mortgagee as further security for the mortgage debt, the argument is not convincing. No question of fraud arises. The evidence shows that the contract is fair and reasonable. Therefore, taking into account the provisions of the mortgage, the nature and condition of the subject matter, the situation of the parties at the time the mortgage was given and the attending facts and circumstances, we are satisfied that the mortgagor had authority to bind the mortgagee by the contract in question.

This brings us to the intervener's cross-appeal. Its contract for the use of water contains this clause: "The

party of the first part further agrees not to sell water for power to any person or corporation intending to compete with the party of the second part (intervener) in the generation of electricity for sale." The trial court held the foregoing clause to be contrary to public policy and void, and the intervener contends that the decree to that extent is erroneous. In support of this contention many cases are cited wherein exclusive franchises to operate ferries, construct bridges, or to supply cities with water or gas for a limited time have been upheld. See *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674; *Louisville Gas Co. v. Citizens Gas. Co.*, 115 U. S. 683; *Citizens Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1; *Des Moines Street R. Co. v. Des Moines Broad Gauge Street R. Co.*, 73 Ia. 513; *Davenport Gas & Electric Co. v. City of Davenport*, 124 Ia. 22; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. (U. S.) 116; *The Binghamton Bridge*, 3 Wall. (U. S.) 51. The distinction between those cases and the case at bar is obvious. A municipal corporation is an instrumentality of the state for the better administration of government in matters of local concern. *United States v. New Orleans*, 98 U. S. 381. The main purpose of its creation is the exercise of certain governmental functions within a defined area. While it has the power to make contracts and transact other business not strictly governmental in character, such powers are incidental or auxiliary to its main purpose. In none of the cases cited was there any attempt on the part of a municipality to restrict its governmental functions, or to place itself in a position where it would be incapable of carrying out the purpose for which it was created. In the case at bar we are dealing with an irrigation company—a *quasi* public corporation. It also is a governmental agency, but its main purpose is the administration of a public utility. To the extent of its capacity it is bound to furnish water from its canal to persons desiring to use it on equal terms and without discrimination.

In this respect it stands on the same footing as a railroad company. Neither has the right or power to place itself in a position where it cannot serve every person on equal terms with every other person. Neither has the right or the power to bind itself by contract which, if enforced, would render it unable to serve the public on those terms or to carry out its main purpose. In *State v. Hartford & N. H. R. Co.*, 29 Conn. 538, where a railroad company had placed itself in such a position, Ellsworth, J., pertinently asks: "What right have they to covenant with that corporation that they will not run cars to tide water, as the charter provides that they shall and as the public accommodation requires?" And with equal force it may be asked in this case: What right had the irrigation company, bound by the very nature of its organization to furnish water to the public without discrimination, to bind itself by the clause in question which would prevent it performing such services? In *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, one of the propositions of law laid down is that a corporation owing a duty to the public cannot make a valid contract not to discharge such duty. From this proposition it would necessarily follow that, where a corporation owes a duty to the public generally, it cannot bind itself by contract to serve one person to the exclusion of all others. In *West Virginia T. Co. v. Ohio River P. L. Co.*, 22 W. Va. 600, 46 Am. Rep. 527, a landowner had granted to an oil transportation company the exclusive right of way and privilege of laying and maintaining pipes for transporting oil through a tract of 2,000 acres, and the contract was held invalid, as an unreasonable restraint of trade and contrary to public policy. In that case a large number of authorities are reviewed, among which are many wherein contracts in restraint of trade have been upheld, and others again where they have been held void as against public policy. The court there holds that the test is whether the restraint is prejudicial to the public interest, and then uses this language:

"From the principles, which underlie all the cases, the inference must be necessarily drawn, that if there be any sort of business, which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint however *partial* on this peculiar business, provided of course it be shown clearly, that the peculiar business thus attempted to be restrained is of such a character, that any restraint upon it however *partial* must be regarded by the court as prejudicial to the public interest. Are there any sorts of business of this *peculiar* character? It seems to me that there are, and that they have been recognized as possessing this peculiar character both by the statute law and by the decisions of the court. Are not *railroading* and *telegraphing* forms of business, which are now universally recognized as possessing this *peculiar* character?"

The principle involved in the case at bar does not, as it appears to us, differ from that involved in the case from which we have just quoted. The business of the irrigation company is of the peculiar character mentioned by the West Virginia court. In the latter there was an attempt to give one person engaged in transporting oil an exclusive right to occupy certain lands for that purpose, to the exclusion of all others who under the laws of that state had an equal right to use the land, after proper condemnation proceedings, for the same purpose. Here there was an attempt to give the intervener an exclusive right for a term of years to use water which under the law the irrigation company was bound to furnish to the public on equal terms, and the one, no less than the other, is contrary to public policy and illegal.

But the intervener takes the position that the question of the validity of that clause of the contract is not involved in this case and, consequently, that the determination thereof by the trial court is error. This position is clearly untenable. The intervener came into court asserting the priority of its rights under its contract with the

mortgagor. Such contract or lease is in the nature of a prior incumbrance, and it was eminently proper for the court to ascertain and determine the nature and extent of such incumbrance. The position of the intervener is analogous to that of a first mortgagee who appears in a case asserting the priority of his lien, but not asking its foreclosure. In such cases the propriety of finding the amount due on the first mortgage and ordering a sale subject thereto has never been questioned. Whether the intervener, because of the public service required of it by its contract with the city of Kearney, would be entitled to a preference over those using water for private purposes is a question that does not arise at this time; and, when it does, if it ever does, we apprehend it will turn on questions of public policy rather than the contractual rights of the parties.

Other questions are presented by the cross-appeal; but, in the view we have taken of the case, they are not such as affected the rights of the intervener, consequently they will not be considered.

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

GEORGE CARMACK, APPELLANT, V. LOUIS ERDENBERGER, APPELLEE.

FILED NOVEMBER 22, 1906. No. 14,506.

1. Appeal: MOTION FOR NEW TRIAL. The change made by the act of 1905 in the procedure to obtain a review of a judgment at law in a civil case leaves the rule with respect to the necessity of a motion for a new trial unchanged.

2. New Trial: PROCEDURE. The statute requiring a motion for a new trial to be in writing and filed during the term at which the "verdict, report or decision" is rendered, and, except for the cause of newly discovered evidence, within three days after the verdict or decision is rendered, unless unavoidably prevented, is mandatory.

3. ———: POWER OF COURT. A court has no authority to rule on a motion for a new trial which has not been filed and is not before it, in anticipation that such motion may be subsequently filed.

4. Appeal: MOTION FOR NEW TRIAL. A motion for a new trial, filed out of time and not coming within any of the exceptions of the statute, is of no avail for the purposes of a review of errors in this court.

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

B. Ready and *C. H. Whitney,* for appellant.

J. C. Robinson, contra.

ALBERT, C.

This is an appeal from a judgment at law. The errors assigned are with respect to rulings made during the trial proper, and the sufficiency of the evidence to sustain the judgment. In short, only such errors are assigned as have been heretofore required to be brought to the attention of the trial court by motion for a new trial in order to obtain a review in this court.

Two questions are presented which, in our opinion, are decisive of this case. The first is: Has the amendment to our appellate procedure changed the rule with respect to a motion for a new trial in an action at law? This question must be answered in the negative. The reasons underlying the rule requiring the motion for a new trial are as urgent and forceful under the amended procedure as under the procedure whereby a review was obtained by a petition in error. As was said in *State v. Swarts,* 9 Ind. 221: "It is due to the lower court that its errors, if

any, should be pointed out there, so that it may retrace its steps while the record is yet under its control." In *Mills v. Miller,* 2 Neb. 299, 317, this court said: "Before a party is entitled to be heard here, he must have exhausted his remedy in the court below. For that purpose he must have presented the several questions of law fairly and fully, and must have obtained an unequivocal ruling thereon." The language in both of those cases is quoted with approval in *Cropsey v. Wiggenhorn,* 3 Neb. 108. The exception with respect to suits in equity was due to the fact that an appeal from a decree in such suits under the former statute brought the case here for trial *de novo,* and not for a review of errors of law.

The next question is: Does the record show that the alleged errors were brought to the attention of the trial court by motion for a new trial in the manner required by law? The judgment was rendered on the 5th day of June, 1905, and the term at which it was rendered adjourned *sine die* on the following day. Up to the time of final adjournment no motion for a new trial had been filed, although following the judgment entry, and of the date of the judgment, is an order overruling a motion for a new trial. Two days after the final adjournment of the term a motion for a new trial was filed. Section 316 of the code provides: "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." The motion in this case is not based on the ground of newly discovered evidence, nor is there any showing that its filing in due time was unavoidably prevented; hence, the general provisions of the statute control. In *Fox v. Meacham,* 6 Neb. 530, it was held that a motion filed out of term was of no avail, unless falling within the exception mentioned in the statute. In that case the court

quoted with approval *Williams v. St. Louis Circuit Court*, 5 Mo. 248, to the effect that, although the motion be filed out of time, the court, upon a suggestion that substantial justice had not been done, might look into the matter or not; but, if it should refuse to do so, error would not lie. This court has never departed from the rule announced in *Fox v. Meacham, supra.* It was reaffirmed in *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61, where the court, going a little farther, held that the provisions of the statute as to the time for filing a motion for a new trial were not directory, but mandatory, citing a large number of cases in support of that proposition.

The appellant contends that the record with respect to a motion for a new trial discloses a common practice; that is, that the courts frequently, during the hurry incident to the closing days of the term, rule on a motion in anticipation of one to be filed subsequently, and that, where this is done, the defeated party by custom is allowed to file his motion at any time within three days from the adjournment of the term. The trouble with that contention is that the alleged custom runs counter to the statute. Section 317 of the code provides that the application for a new trial must be by motion, upon written grounds, filed at the time of making the motion. Under the statute there is no such thing as an oral motion for a new trial, because the statute is mandatory that the application must be made by motion, upon written grounds, filed at the time of making the motion. The court has no authority under the statute to pass on a motion that has not been filed, or in anticipation of one being filed. It is also insisted that the appellee is precluded from raising this question, because he made no objection or protest in the district court. We are unable to see how he was called upon to enter a protest at that time. The ruling of the court in anticipation of a motion to be filed was in his favor, and we know of no way he could have prevented the filing of a motion in vacation, had he undertaken to do so. The errors assigned in this

court are of such a character that they are reviewable only after they have been brought to the attention of the trial court by motion for a new trial. The motion filed was filed out of time, and, under the repeated holdings of this court, is of no avail. It necessarily follows that the errors complained of cannot be reviewed in this court, and, consequently, that the judgment of the district court, supported, as it is, by the pleadings, must be affirmed.

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

FIRST NATIONAL BANK OF SUTTON, APPELLEE, V. SUTTON MERCANTILE COMPANY, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,511.

1. **Judgment:** DEFAULT. Where there is an answer on file setting up a valid defense, the fact that the defendant fails to appear either in person or by attorney when a cause is reached for trial does not entitle the plaintiff to a judgment without proof of the facts constituting his cause of action, unless the facts admitted by the answer make out a *prima facie* case in his favor.
2. **Appeal:** PRESUMPTIONS. The presumptions in favor of the regularity of the proceedings of superior courts are of no avail against facts shown by the record itself.
3. **Judgment on Pleadings:** REVIEW. Where a judgment at law is rendered on the pleadings alone, a motion for a new trial is not necessary to obtain a review in this court.

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

Paul E. Boslaugh, John A. Moore and *Hall, Woods & Pound,* for appellant.

T. H. Matters, contra.

ALBERT, C.

The First National Bank of Sutton, Nebraska, brought an action in the district court against the Sutton Mercantile Company on a promissory note purporting to have been given by the defendant to a third party, and by such third party transferred by indorsement to the plaintiff. The note is negotiable in form and purports to have been signed on behalf of the defendant by Charles Coleson, its secretary. In addition to the usual allegations on a promissory note, the petition filed by the plaintiff contains the following: "The plaintiff further alleges that said Charles Coleson was duly authorized by direct agreement and consent of all the stockholders, directors and officers of said association to sign said note, and that said Coleson was authorized to, and did, sign all notes, checks and drafts for said company while he remained as stockholder and secretary of said company, and which is, by general consent of said organization, the duty of the secretary of the Sutton Mercantile Company to sign all notes, drafts and checks for said company. Plaintiff further alleges that after knowledge of all the facts, that is, after knowledge of the signing of said note by the said Charles Coleson, secretary of said company, said corporation kept, retained and used the property for which the note hereinbefore set out was given." After a general denial of each and every allegation contained in the petition not subsequently admitted, the answer, while admitting that Coleson was its secretary at the time the note was signed, alleges that he signed the same without authority and without consideration, and alleges certain facts amounting to a charge of fraud in the inception of the note. Other matters not necessary to notice at this time are alleged in the answer. The reply, for present purposes, may be said to amount to a general denial.

The following taken from the transcript of the corrected record of the district court shows the subsequent proceedings had in that court, so far as they are material

at this time: "Now on this 10th day of May, 1905, the plaintiff appearing by its attorney, Thomas H. Matters, and the defendant not appearing in person or by attorney, this case coming on to be heard upon the petition of the plaintiff, the answer of the defendant, and the reply of the plaintiff, and the statement of plaintiff's counsel that the note sued on in this case is in the hands of the clerk, and that there is a certain amount due upon the same, and plaintiff asks for judgment for the plaintiff, and submits the cause to the court; upon consideration whereof the court finds that there is due plaintiff from the defendant, the Sutton Mercantile Company, upon their note herein sued upon the sum of four hundred and fifty dollars ($450). The court further finds that there is due interest on said note for four hundred and fifty dollars ($450) at the rate of 10 per cent. per annum from January, 1901, to May 10, 1905, making the sum of six hundred and forty-seven and no one-hundredths dollars ($647) owing by the defendant Sutton Mercantile Company to the plaintiff to this date." Then follows a formal judgment.

The defendant appeals, contending that error affirmatively appears on the face of the judgment record. This contention seems to be well founded. Where there is an answer on file setting up a valid defense, the fact that defendant fails to appear either in person or by attorney when a cause is reached for trial does not entitle the plaintiff to a judgment without proof of the facts constituting his cause of action, unless the facts admitted by the answer make out a *prima facie* case in his favor. The facts not thus admitted must be established by proof. In *Pultz v. Diossy,* 53 How. Pr. (N. Y.) 270, where the defendant had answered, but failed to appear at the time set for trial, the court said: "The plaintiff, though the defendant failed to appear on the adjourned day, is bound to establish his cause of action by evidence, and if he has not done so the judgment will be reversed." See, also, *Strong v. Comer,* 48 Minn. 66; *McMurtry v. State,* 19 Neb.

147. In the case at bar the petition contains an averment of express authority on the part of the secretary of the defendant to execute the note, and of facts relied upon as estopping the defendant to deny such authority. These averments are put in issue by the answer. The burden of proof, therefore, was upon the plaintiff to show either that the secretary had authority to execute the note or to establish the facts relied upon as an estoppel to deny such authority. As we have seen, the failure of the defendant to appear when the cause was reached for trial did not dispense with proof on these points. True, the judgment purports to have been rendered on the pleadings and a statement made by plaintiff's counsel. That statement was not evidence. That it was not so regarded by the trial court is reasonably clear from the fact that the record recites that the cause was heard on the pleadings and a specific statement of counsel, instead of following the common form and reciting that it was heard on the pleadings and the "evidence." This departure from the common and usual form is significant. Besides, the existence of the note and the amount thereof were not in issue. Counsel's statement, therefore, was not in support of any issue of fact presented for trial.

The presumptions in favor of the records of superior courts are invoked, but such presumptions are of no avail as against facts shown by the record itself. The judgment, then, as before stated, is a judgment on the pleadings. A judgment against the defendant on the pleadings is proper only when the answer contains no denial or averment constituting a defense. *Boldt v. First Nat. Bank,* 59 Neb. 283; *State v. Lincoln Gas Co.,* 38 Neb. 33; *Rourk v. Miller,* 3 Wash. 73; *Widmer v. Martin,* 87 Cal. 88. As at least one valid defense is pleaded in the answer, it follows that the judgment rendered against the defendant on the pleadings is erroneous.

But it is contended that such error is not available to the defendant at this time because no motion for a new trial was filed. A new trial is a reexamination in the

same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court (code, sec. 314); and a motion for a new trial is a motion for such reexamination. The judgment was rendered without an examination of any of the issues of fact, consequently there could be no reexamination of any such issues, and it would be absurd to hold that the defendant was required to ask what the court could not possibly grant. *Bannard v. Duncan,* 65 Neb. 179. The judgment involved a mere construction of the pleadings, and in such cases no motion for a new trial is required in order to obtain a review in this court. *Scarborough v. Myrick,* 47 Neb. 794; *Hays v. Mercier,* 22 Neb. 656; *Claflin v. American Nat. Bank,* 46 Neb. 887.

The judgment of the district court is clearly erroneous, and we recommend that it be reversed and the cause remanded for further proceedings.

DUFFIE and JACKSON, 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.

FARMERS STATE BANK OF SARONVILLE, APPELLEE, V. SUTTON MERCANTILE COMPANY, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,510.

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

Paul E. Boslaugh, John A. Moore and *Hall, Woods & Pound,* for appellant.

T. H. Matters, contra.

ALBERT, C.

This is a companion case to *First Nat. Bank of Sutton v. Sutton Mercantile Co., ante*, p. 596. It presents precisely the same questions and requires the same disposition.

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

DUFFIE and JACKSON, 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.

MARGARET C. FOX, APPELLEE, v. LENA FOX, EXECUTRIX, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,501.

Trusts: ENFORCEMENT: WITNESSES. A parent divided his property among his sons, who in return agreed to give each of their sisters $1,500 in cash, the sisters assenting to the plan as an arrangement by which they were to receive their portion of the parent's estate. One son assumed the payment of a sum due the plaintiff, one of the daughters. He died without having paid any portion of the amount agreed upon. *Held, First*, that a constructive trust arose which could be enforced against the estate of the deceased; *second*, that the action to enforce the trust could be maintained by the *cestui que trust* in her own name, although the parent was still living; *third*, that the parent had no such direct legal interest in the result of the action that would disqualify him as a witness in behalf of the plaintiff.

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

Matt Miller and *L. S. Hastings*, for appellant.

C. H. Aldrich and *L. B. Fuller, contra.*

JACKSON, C.

The facts as charged in the petition, and as they were in substance found by the trial court, are that Thomas Fox, with a family consisting of his wife, five daughters and three sons, was residing in Butler county. Two of the daughters were married, a son, Michael, was an adult, the other children were minors. He was possessed of about 800 acres of land and considerable personal property. The son, Michael, was desirous of working for himself, and the father called together the members of his family, and stated, in substance, that he desired in the near future to make a division of his land among his three sons, Michael, William and John; that the sons should pay their sisters the sum of $1,500 each, or a total of $7,500, as their share of the estate. This arrangement was assented to by all the members of the family. Michael was furnished with a span of mules, a horse, seed and implements necessary to farm 240 acres of land, which he did, free of rent, for a term of four years. In the fall of 1894 Michael Fox requested his father to assist him in buying 160 acres of land adjoining the 240 acre tract which he was then farming, and stated at that time that he would prefer this assistance in lieu of the arrangement of 1890. Thereupon the father called the three sons together, and the arrangement of 1890 was changed, so that the father provided Michael with $3,200 in cash and became surety for the further sum of $2,500. With the cash and credit so obtained Michael bought the 160-acre adjoining farm, and it was then agreed that Michael should pay the plaintiff in this action, at any time after five years that she might desire, the sum of $1,500 in cash as her share of the father's estate, and $1,000 to the other sisters. He was also to have rent free the 240-acre tract to farm for an additional period of two years. Later the father divided his lands between the sons, William and John, with the exception of 40 acres which was deeded to one of the daughters. Three of the five daugh-

ters have received from the sons, William and John, the full amount agreed upon as their share of the estate, one has received the sum of $500, and the plaintiff nothing. Michael Fox died, leaving a will by which he devised all of his property without making provision for the payment of the $1,500 to the plaintiff. She filed a bill in equity in the county court, asking that court to decree her the sum of $1,500 and charge Michael's estate with a trust to that amount. The bill was denied in the county court. Plaintiff appealed to the district court, where the decree was in her favor. The estate, through the executrix, appeals. Thomas Fox is still living, and was the principal witness on behalf of the plaintiff.

The appellant seeks a reversal of the decree for three principal reasons: First, that no trust existed, that the action was one at law, and the defendant was entitled to a jury trial; second, that the plaintiff is not the real party in interest, that the action could not be maintained by her, but was one which should have been brought by the father in his own behalf; and, third, that the father being the party in interest was disqualified as a witness. The two latter contentions may be disposed of together. The transaction, as we view it, amounted to a gift *inter vivos*. It was fully completed by the delivery to the son, Michael, and the arrangement agreed to by the plaintiff as one by which she would receive her portion of the parent's estate. The father could not, therefore, revoke the gift. The subject matter was beyond his control. He was not a party in interest, and the trial court did not err in receiving and considering his evidence.

This brings us to the question of whether or not a trust in fact existed and should be enforced in equity against the estate of Michael Fox. In 2 Story, Equity Jurisprudence (13th ed.), sec. 1244, it is said: "Another class of implied liens or trusts arises where property is conveyed *inter vivos,* or is bequeathed or devised by last will and testament, subject to a charge for the payment of debts or to other charges in favor of third persons. In

such cases, although the charge is treated as between the immediate parties to the original instrument as an express trust in the property, which may be enforced by such parties or their proper representatives, yet as between the trustee and *cestuis que trust* who are to take the benefits of the instrument it constitutes an implied or constructive trust only—a trust raised by courts of equity in their favor, as an interest *in rem* capable of being enforced by them directly by a suit brought in their own names and right."

The case, in principle, is not unlike that of *Ahrens v. Jones,* 169 N. Y. 555. Jones, in his lifetime, conveyed his property to his wife under an oral agreement that she was to pay his grandchildren the sum of $2,000. After the death of the husband the wife refused to perform the conditions of the agreement, and it was held that the estate should be impressed with a trust for the payment of the sum agreed upon; that, in fact, the widow became a trustee charged with the payment of that sum, which was declared a lien against the real estate given to the widow. To some extent the same principle was involved in *Pollard v. McKenney,* 69 Neb. 742. In the latter case the husband, being an invalid and in feeble health, expressed his determination to provide by will for a life estate in his widow in the real estate of which he was possessed, and upon her death the fee to vest in his son, subject to a charge of $2,000 to be paid to his daughters. However, upon the representations of his wife that the expense of administration might be saved by conveying the property to her directly and that she would carry out his intentions, this was done. After the death of the husband the wife retained the title until her own death. Prior to her decease she executed a will, making a disposition of the real estate different from the one intended by the husband. In an action by the son against those claiming under the will, it was held that a constructive trust arose upon the facts stated, and the property involved being real estate, the relief granted was a cancelation of the deed, as no trust

could be charged against the real estate itself by reason of the statute of frauds. Michael Fox was charged in his lifetime with the execution of the trust accepted by him, and good faith and equity require that his estate should not be relieved from the burden thereof.

The decree of the district court was right, and it is recommended that it be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

CHARLES F. GROTHE, APPELLEE, V. JAMES K. LANE, APPELLANT.

FILED NOVEMBER 22, 1906. No. 14,518.

Contracts: CONSTRUCTION. A contract should be construed to give effect to the intention of the contracting parties, keeping in mind the situation of the parties, the property which is the subject matter of the contract, and the use to which it is being applied.

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

G. H. Hastings and *F. I. Foss*, for appellant.

Abbott & Abbott and *Ray J. Abbott*, *contra.*

JACKSON, C.

On April 4, 1901, the plaintiff purchased of the defendant a mill property in Saline county consisting of some 45 acres of land, the mill buildings, dam and race. That portion of the description in the deed pertinent to the inquiry is as follows: "Also the right of flowage of said mill-race and of the tail-race of said mill hereinafter

conveyed, and the right to maintain said mill-race and the tail-race thereof as they now stand." It appears from the evidence that the water to operate the mill is taken from a running stream at a distance of a mile or more from the mill and is conducted to the mill by a race. Above the mill had been constructed, along a portion of one side of the race, a dike to prevent the water from overflowing adjacent lands. This dike had been constructed and maintained for some years prior to the time when the defendant became possessed of the property. In the year 1894 or 1895 the defendant constructed an inner dike, not so wide or high as the original one, leaving a space between the two dikes covering a fraction more than an acre of land. The defendant still owns land joining the outer dike. It also appears that prior to the commencement of this action, and after the sale to the plaintiff, the defendant had plowed and cultivated the outer dike, which had the effect to lessen its height and impair its utility as a means of preventing the overflow of water in case of flood or high water. This action was instituted by the plaintiff to obtain an injunction restraining the defendant from interfering with the dike and destroying its usefulness. A temporary injunction was allowed by the county judge. On the trial the temporary injunction was made permanent. The defendant appeals.

The real controversy is as to whether the premises conveyed included the outer dike or whether they were limited to the inner dike. It will be observed from the character of the deed that parol evidence was necessary to establish the boundaries of the mill-race. The evidence introduced on behalf of the plaintiff tends to prove that the boundary of the race, as agreed upon by the plaintiff and defendant at the time of the sale, was the outer dike; that while the water was at its normal stage the inner dike was sufficient to prevent an overflow, but in cases of high water the water would overflow the inner dike but be restrained by the outer dike within the mill-race proper. The evidence also tended to show that, if the water was

permitted to overflow, it would result in damage and possible destruction of the mill property. On behalf of the defendant the evidence tended to prove that the inner dike was agreed upon by the parties as the outer limit of the mill-race, and that the property conveyed extended to or included the inner dike only. It also appears in evidence, without conflict, that at the time the plaintiff purchased the premises the water was at a normal stage and extended only to the inner dike. Upon the conflicting evidence the trial court found for the plaintiff. The witnesses as to the actual contract testified in open court, their credibility was a matter that the trial judge was in a far better position to determine than the appellate court, and we are not disposed to disturb the finding.

It is urged, however, that, because of the fact that when the deed was made the water in the mill-race extended only to the inner dike, the description quoted from the deed must limit the plaintiff's boundary to the outer edge of the water as it then flowed. This contention was determined in the trial court adversely to the defendant, and the construction of the contract adopted was, without doubt, correct. It was plainly the duty of the court to construe the contract in the manner that would give effect to the evident purpose or intention of the contracting parties, keeping in mind the situation of the parties at the time the contract was made, the property which was the subject matter of the contract, the use to which it was being applied, and the probability that it was not the intention of the parties to enter into a contract that would be likely to result in damage or the possible destruction of the property. Plainly the words "as they now stand," appearing in that portion of the deed quoted above, were intended by the parties to apply to the right to maintain the mill-race and the tail-race, and were not intended to limit the right of flowage to the stage at which the water then stood. The outer dike, being necessary to protect the race in times of high water, was as much a

part of the race as it then stood as the natural bank, where no dike was necessary.

We are satisfied that the conclusion reached by the trial court is correct, and recommend that the judgment be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY v. ULRICH FICKENSCHER.

FILED DECEMBER 7, 1906. No. 12,592.

ERROR to the district court for Dawson county: HOMER M. SULLIVAN, JUDGE. *Reversed.*

John N. Baldwin and *Edson Rich,* for plaintiff in error.

Warrington & Stewart, H. M. Sinclair and *Roscoe Pound, contra.*

SEDGWICK, C. J.

This action was brought in the district court for Dawson county to recover damages caused by a fire alleged to have originated in the carelessness of the defendant. The case was argued and submitted with the motion for rehearing in the case of *Union P. R. Co. v. Fickenscher,* 74 Neb. 507, and, for the reasons stated in the opinion in that case, the judgment of the district court is reversed and the cause remanded.

REVERSED.

UNION PACIFIC RAILROAD COMPANY V. JOHN FOSBERG.

FILED DECEMBER 7, 1906. No. 13,786.

ERROR to the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Reversed.*

John N. Baldwin and *Edson Rich,* for plaintiff in error.

Warrington & Stewart, H. M. Sinclair and *George W. Thomas, contra.*

SEDGWICK, C. J.

This action was brought in the district court for Dawson county to recover damages caused by a fire alleged to have originated in the carelessness of the defendant. The case was argued and submitted with the motion for rehearing in the case of *Union P. R. Co. v. Fickenscher,* 74 Neb. 507, and, for the reasons stated in the opinion in that case, the judgment of the district court is reversed and the cause remanded.

REVERSED.

STATE, EX REL. ARTHUR V. OFFILL, APPELLEE, V. F. M. HALLOWELL ET AL., APPELLANTS.

FILED DECEMBER 7, 1906. No. 14,571.

Constitutional Law: ELECTIONS: POWER OF COURTS. Section 137 of the "Australian ballot law" (Ann. St., sec. 5775) is not in conflict with the constitution, and confers power upon county courts and upon judges of the district and supreme courts at chambers to summarily review the action of the officer with whom an original certificate of nomination is filed, and to make such order therein as the law requires.

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

H. M. Sinclair, for appellants.

Edwin E. Squires, contra.

SEDGWICK, C. J.

Prior to the general election in 1905, the question was raised before the county clerk of Buffalo county whether one Wheelock was entitled to have his name placed upon the official ballot of said county as a candidate for the office of register of deeds to be voted for at the then ensuing election. The decision of the county clerk was that Mr. Wheelock's name should be put upon the ballot. Application was then made to the county court of that county for an order commanding the county clerk to not place upon the official ballot the name of the said Wheelock as candidate. Afterwards such proceedings were had in the matter that a decree was had in the district court for that county by which it was determined that the county court had no jurisdiction or authority in the premises. The object of these proceedings is to reverse that decree of the district court.

The sole question presented in the brief and in the oral argument is whether the law gives the county court

power to hear and determine the question so raised. The statute provides: "All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed to be valid unless objection thereto shall be duly made in writing within three days after the filing of the same. * * * The officer with whom the original certificate was filed, shall in the first instance pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by a county court, or by a judge of the district court, or by justice of the supreme court at chambers on or before the Wednesday preceding the election. Such order may be made summarily upon application of any party interested, and upon such notice as the court or judge may require." Ann. St., sec. 5775. No brief was filed nor was any argument made at the bar in support of the decision of the district court. It was stated by counsel for the plaintiffs in error that the theory below was that the order referred to in the above quotation from the statute is a writ of mandamus obtained in regular proceedings for that purpose. Such could not have been the intention of the legislature, unless we suppose that the statute also confers upon county courts jurisdiction in mandamus proceedings, a jurisdiction which that court did not possess. The authority is given to a judge of the district court or a justice of the supreme court at chambers, and these judges do not have authority to issue peremptory writs of mandamus when a trial is necessary to determine the existence of facts upon which the right to the writ is based. From the nature of the case proceedings under this statute are summary in character; hence, the provision that "such order may be made summarily upon application of any party interested." There is no apparent reason for supposing that the statute, which in express terms names the court and the judicial officers who may make the order, and provides that it may be made summarily, is invalid, unless it should be found that the authority so given is administrative or ministerial, and

so could not be exercised by the judicial branch of the state government. That it is a judicial authority was expressly determined in *Porter v. Flick,* 60 Neb. 773. That case involved the right of a new political organization to use the party name which it had adopted. A judge of the district court, at chambers, made an order reversing the decision of the secretary of state, and upon petition in error to this court the order of the district judge was reversed. In the opinion of the court the statute is quoted, and its validity assumed. We think that the statute is valid, and confers power upon the county court and upon the judges of the district and supreme courts to summarily review the action of the officer with whom the original certificate of nomination is filed, and to make such order therein as the law requires.

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

REVERSED.

SETH TERRY ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 7, 1906. No. 14,843.

1. **Habeas Corpus.** A habeas corpus proceeding involving the permanent custody of a minor child is a proceeding *in rem,* in which the *res* is the child and its custody.

2. **Courts: JURISDICTION.** Where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; and where property is *in gremio legis,* if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the jurisdiction first obtained.

3. **Contempt.** Where a habeas corpus proceeding commenced in the district court has been prosecuted to final judgment, the institution by one of the parties therein of another action of the same kind, for the determination of the same question in the county court, before fully and fairly complying with such judgment, for the evident purpose of evading its effect and rendering it of no avail, is a contempt of the district court.

4. ———: DEFENSE. In such a case a disclaimer of intention, disrespect, or design to embarrass the due administration of justice is no defense.

5. ———: EVIDENCE. One who is not shown to have counseled, aided, or abetted such a proceeding, or to have even had knowledge of its commencement, and whose name as a petitioner seems to have been used without authority, cannot be convicted of contempt.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

R. W. Sabin, F. O. McGirr and *Hainer & Smith,* for plaintiffs in error.

Roscoe Pound and *Hazlett & Jack, contra.*

BARNES, J.

The plaintiffs severally prosecute error from a judgment of the district court for Gage county adjudging them in contempt of an order of that court. The facts underlying this controversy are, briefly stated, as follows: One J. Alfred Johnson, a resident of the state of Iowa, commenced a proceeding in habeas corpus in the district court for Gage county against the plaintiffs herein and one Laura Terry to obtain possession of his two minor children. A trial resulted in an order or judgment of that court remanding the custody of one of said children, who was 17 years of age, to the respondents, and awarding the permanent custody of the other, Effie Johnson, who was but seven years of age, to her father, the petitioner. Respondents in said action, the plaintiffs herein, brought the case to this court where on the 5th day of April, 1905, the judgment was affirmed. See *Terry v. Johnson,* 73 Neb. 653. A motion for a rehearing was filed in due time, and was overruled on October 27, 1905. Thereupon the mandate of this court was sent to the district court for Gage county directing the said court to carry out its said judgment and order. The complaint in the present pro-

ceeding shows: That on the 5th day of January, 1906, said judgment not having been complied with, the said J. Alfred Johnson filed a petition in the district court for an order carrying it into effect and on the 16th day of January, 1906, the respondents filed an answer and showing in support thereof, alleging matter claimed to have transpired since the original judgment, by reason of which it was claimed that J. Alfred Johnson was not a proper person to have the custody of his said daughter; that afterwards the said respondents withdrew their answer and showing, and on the 21st day of March, 1906, applied to the district judge, at chambers, for a suspension of the enforcement of said judgment on the ground that Laura Terry, one of the respondents, was seriously ill, and that compliance with said judgment would endanger her life. The district judge granted a stay of the order pending the recovery of said respondent; and on the 26th day of June, 1906, said respondent having fully recovered, it was agreed in open court that said judgment should be complied with on the 5th day of July, 1906, and an order of the district judge in writing to that effect was given to the respondents.

It further appears from the complaint and the evidence adduced at the trial that J. Alfred Johnson appointed his sister, Mrs. Gussie DeLorie, his agent to receive the child from the respondents; and on the 5th day of July the respondents went through the form of delivering her to the said Gussie DeLorie, but prior to such delivery prepared the papers in a habeas corpus proceeding in the county court, and immediately thereupon caused the papers theretofore prepared to be formally filed. A writ issued, and within a few minutes the sheriff retook possession and custody of the child from the agent of her father, who being absent, and represented only by his sister aforesaid, it was found necessary to enter into an arrangement whereby the respondents again obtained the custody and control of said child. On the hearing of the complaint, the foregoing facts together with others having been made

to appear, the district court found, among other things, as follows: "That on July 5, 1906, the defendants, Seth Terry and Menzo Terry, each intending not to obey the judgment and decree of this court that the said Effie Johnson be delivered to her father, caused a writ of habeas corpus to be prepared and sued out in the county court of Gage county, Nebraska, against Mrs. Gussie De Lorie and J. Alfred Johnson, commanding the sheriff of said county to take said Effie Johnson from the care and custody of each. That said defendants then caused a formal delivery of said infant child to be made in pretended compliance with the order of this court, and then immediately caused said writ of habeas corpus so sued out in the county court to be served, and said child retaken from the custody of said Johnson and his sister, Mrs. Gussie DeLorie; that said delivery by the defendants, and each of them, under the order of this court was colorable merely, and not in good faith, and not intended by them, or either of them, to be in compliance with the order of the district court, and each of said acts was done by them, and each of them, with intent to prevent the delivery of said infant child to her father as heretofore ordered, adjudged and directed by this court. The court further finds that subsequently to July 5 the defendant, Seth Terry, caused a proceeding to be instituted in the county court of Gage county, Nebraska, for the appointment of a guardian for said infant child, Effie Johnson, and in this he was aided, counseled and advised by the defendant, Menzo Terry; and the court finds said proceedings were intended by these defendants, and each of them, to further obstruct the due enforcement of the execution of the judgment of this court heretofore entered decreeing the custody of the said Effie Johnson to her father. The court further finds that each of said proceedings on the part of said defendants, Seth Terry and Menzo Terry, if allowed to stand, are well calculated to bring this court and its processes, judgments and decrees into public contempt." It was thereupon ordered and decreed that "the defend-

ants, Seth Terry and Menzo Terry, forthwith dismiss and discontinue the habeas corpus proceedings commenced by them in the county court of Gage county, Nebraska, July 5, 1906, and that the defendants, and each of them, forthwith comply in good faith with the order of this court heretofore issued, and deliver said infant, Effie Johnson, to her father, or his sister for him; and that the defendants, Seth Terry and Menzo Terry, each stand committed to the county jail of Gage county, Nebraska, until said order, judgment and decree in this proceeding is fully and in all respects obeyed."

The plaintiffs herein contend, among other things, that the findings and judgment of the district court are not sustained by the evidence. It is unnecessary to consume time or space in quoting the evidence. It is sufficient to say the record shows that the plaintiffs herein, after litigating the question of the right of the father to the custody and control of his minor child for at least two years, and after having hindered and delayed the execution of the judgment of the district court commanding them to deliver her into the permanent custody of the petitioner, merely made a colorable compliance with the order, and before doing so prepared the papers to procure a writ of habeas corpus from the county court of Gage county in order to recover possession of the child at the very moment of her delivery in pretended compliance with the order of the district court; that they commenced such proceeding, caused the writ to be issued and served, and thus attempted to render the judgment of no avail whatever. It is also clear that there was no excuse for such a proceeding, for the evidence fails to show any material change in the conditions existing at the time the order was made, and the only purpose of the proceeding complained of was to defeat and nullify such order of the district court. So we are of opinion that the evidence fully sustains the findings and judgment complained of, and justified the conclusion of the trial court.

It is further contended that the facts found by the court

are not sufficient to constitute a contempt, because the writ of habeas corpus is a writ of right; that the judgment in one court on an application for the writ is not *res judicata* of another application before a different court; that plaintiffs had the right to institute the proceeding for the writ before the county court on the 5th day of July, 1906. These statements may be taken as true, and yet the plaintiffs may be guilty of contempt. It is a well-settled rule that where one court of competent jurisdiction in a proceeding *in rem* obtains jurisdiction of the *res,* or, in other words, the thing in controversy, no other court can acquire jurisdiction over it. "It is a rule well known to the profession that where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; that where property is *in gremio legis,* if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the jurisdiction first obtained." *Ryan v. Donley,* 69 Neb. 623. A proceeding involving the custody of a minor child is a proceeding *in rem,* in which the *res* is the custody of the child. *Richards v. Collins,* 45 N. J. Eq. 283. It follows that, until the order or judgment of the district court had been fully and substantially performed by putting the custody of the child permanently where that court had ordered it, the jurisdiction of that court continued; and a new proceeding brought in another court was an interference with the order and judgment of the district court and its custody of the minor child, Effie Johnson. Such interference before the jurisdiction of that court was at an end was a contempt of court. *In re Chiles,* 22 Wall. (U. S.) 157; *Statcler v. California Nat. Bank,* 77 Fed. 43; *In re Tift,* 11 Fed. 463; *Hines v. Hobbs,* 2 Am. Rep. 581.

Plaintiffs further contend that in any event they were not guilty of contempt, because the proceeding in question was not commenced with any such intention. While intention is sometimes a necessary ingredient of the offense, yet there are many cases where the act done

constitutes a contempt of court irrespective of the question of intention. "Disclaimer of intentional disrespect or design to embarrass the due administration of justice is, as a rule, no excuse, especially where the facts constituting the contempt are admitted or where a contempt is clearly apparent from the circumstances surrounding the commission of the act." 9 Cyc. 25; *People v. Wilson,* 64 Ill. 195; *In re Chadwick,* 109 Mich. 588; *Wilcox Silver Plate Co. v. Schimmel,* 59 Mich. 524. In the case last cited the defendants were restrained from selling certain property under a chattel mortgage. The solicitor, Stephen H. Clink, for the defendant, Lewis Schimmel, filed a motion to dissolve the injunction, which was overruled, and thereafter he sold the property in question as the agent of one William Schimmel. He was attached for contempt, and his defense was that in making the sale he did not act as the attorney, agent or solicitor of the defendants, or either of them, but as the agent of William Schimmel, whom he claimed was at all times the owner of the mortgage in question; that the defendant, Lewis Schimmel, was at all times acting for William, and took no title or interest by virtue of a formal assignment of the mortgage to him; that in making such sale he had no intention to commit a contempt. He was found guilty, and it was held that his acts constituted a contempt without regard to his intentions in the matter. It was further said in the opinion: "Injunctions, issued by courts of competent jurisdiction, must be fairly and honestly obeyed, and it would be unbecoming the dignity and self-respect of the court if it should permit them to be evaded by mere subterfuges or tricks." So it seems clear that the intention with which the proceeding in question was commenced is not material, and lack of intention to commit a contempt is no defense herein.

It is also urged that, because this action was dismissed as to Laura Terry, the plaintiffs must also be discharged. This does not follow. It seems clear that she did not commence the proceeding in question, was not present when it

was commenced, and there is no evidence in the record showing that she counseled, aided or abetted its commencement, or that she even knew anything about the matter. It seems clear, therefore, that her name was used by the plaintiffs as one of the petitioners without her knowledge or consent, and she was rightly found not guilty and discharged from any liability herein.

Lastly, it is insisted that, because Laura Terry was one of the petitioners in the habeas corpus proceeding before the county court, the plaintiffs cannot dismiss that proceeding as to her, and for that reason the order should be set aside, and they should be discharged from custody herein. It is a sufficient answer to this contention to say that, if they used the name of Laura Terry in commencing the habeas corpus proceeding upon their own responsibility, and without her knowledge or consent, they cannot be heard to object to the order of the court until they have themselves complied therewith as far as they are able.

After a careful examination of the whole record, we are of opinion that it contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

JOSEPH E. COBBEY V. STATE JOURNAL COMPANY ET AL.*

FILED DECEMBER 7, 1906. No. 14,122.

Corporations: PROCESS. Section 65 of the code applies to corporations as well as individuals, and, if an action is rightly brought in one county, summons may be issued to another county for service upon a corporation.

ERROR to the district court for Gage county: ALBERT H. BABCOCK, JUDGE. *Reversed.*

* Rehearing allowed. See opinion, p. 626, *post.*

L. M. Pemberton and *Hazlett & Jack,* for plaintiff in error.

Hall, Woods & Pound, contra.

LETTON, J.

The plaintiff in error brought this action in the district court for Gage county against the defendants in error, jointly, to recover damages for an alleged unlawful conspiracy by them for the malicious prosecution of an injunction suit. The defendant Stonebraker was the only defendant served with summons in that county, but a summons was issued to Lancaster county and served therein upon the other defendants. These defendants, the State Journal Company and the Nebraska State Journal Association, are corporations organized under the laws of this state, each having its principal place of business in Lancaster county and having no place of business in Gage county. The corporations appeared separately and objected to the jurisdiction of the court over their persons. The objections were sustained, and the suit dismissed as to them. The plaintiff seeks by this proceeding to review the judgment of dismissal.

The question for determination is whether, when an action is rightly brought in any county, a summons may be issued to another county and served upon a domestic corporation, or whether the provisions of section 55 of the code are exclusive as to the venue of actions against domestic corporations, whether sued alone or jointly. Section 55 is as follows: "An action other than one of those mentioned in the first three sections of this title, against a corporation created by the laws of this state, may be brought in the county in which it is situated, or has its principal office or place of business; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose." "The first three sections" referred

to have reference to real estate. Sections 54, 56, 57, 58 and 59 refer to actions for specific causes and against specific individuals and corporations, the provisions of none of these sections having reference to an action of the nature of this one. Section 60 provides: "Every other action must be brought in the county in which the defendant, or some one of the defendants resides, or may be summoned." All of these sections from 51 to 60 inclusive are found under title IV of the code, referring to "the county in which actions are to be brought." Section 65, found under title V, which is entitled "Commencement of a Civil Action," is as follows: "Where the action is rightly brought in any county, according to the provisions of title IV, a summons shall be issued to any other county, against any one or more of the defendants, at the plaintiff's request."

Plaintiff in error contends that this action, having been rightly brought in Gage county against the defendant Stonebraker, a summons was properly issued from that county to Lancaster county for service upon the other defendants; while defendants in error insist that under section 55 no jurisdiction in such an action as this can be had over a domestic corporation, other than insurance companies, in a county other than that in which it is situated or has its principal office or place of business. Section 15, art. III of the constitution, provides: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever." Section 3, art. XI*b*, provides: "All corporations may sue and be sued in like cases as natural persons." Section 4117, Ann. St., provides that corporations may have power "to sue and be sued, to complain and defend in courts of law and equity"; and it has been held that the general provisions of the code authorizing a confession of judgment by any person are by reason of these provisions applicable to corporations. *Solomon v. Schneider,*

56 Neb. 680. It seems apparent that the purpose of the makers of the organic law and of the legislature was to confer no greater or higher privileges upon corporations, with respect to immunity from suit than are conferred upon natural persons, and that in the eye of the law a corporation is regarded, so far as liability to sue and be sued is concerned, the same as an ordinary individual. 10 Cyc. 1333. So that, in proceeding to the consideration of the various sections of the statute bearing upon the question, that construction should be given which, without imposing undue burdens upon domestic corporations, would most nearly assimilate their condition, in respect to liability to suit, to that of natural persons. It may be well to notice in this connection that this is the first time this question has been presented to the court for consideration, and that it has not been an uncommon practice for actions to be brought against individuals and corporations, service to be had upon the individual, and a summons sent to another county for the corporation. This practice of itself, of course, would constitute no reason for setting aside a plain statutory provision, but, in a matter as to which the statute is ambiguous and requires construction, the fact of acquiescence by the profession in the practice for many years is worthy of consideration. In construing statutes, all provisions bearing upon the same subject should be taken together and the intention of the legislature determined from a comprehensive survey of the whole, rather than by passing upon isolated sections. The position of defendants in error is, in effect, that the word "may" in section 55 means "must," that the section should read that an action other than one of those mentioned in the first three sections of this title, against a corporation created by the laws of this state, other than an insurance company, *must* be brought in the county in which it is situated, or has its principal office or place of business, and they take the position that, in an action other than those provided for in sections 51, 52 and 53 of the code, no jurisdiction is obtained over a

domestic corporation, not an insurance company, in a county in which it neither is situated nor has its principal office or place of business, by issuance of summons to another county where it has its principal office or place of business, and service there.

This action is for a joint tort, in which one of the defendants was properly served in Gage county. The action, then, was rightly brought as to him in that county, and if the other defendants had been individuals there is no question but that they might have been summoned in any other county in which they might have been found, and jurisdiction thereby obtained over their persons. Does the fact that they are domestic corporations alter the case? In *Adair County Bank v. Forrey,* 74 Neb. 811, we construed section 59 of the code, which is in terms equally as exclusive as to actions against nonresidents of this state as section 55 is with reference to corporations. It provides that an action other than one of those mentioned in the first three sections of this title, against a nonresident of this state, may be brought in any county in which there may be property or debts owing to said defendant, or where said defendant may be found, and it was strenuously urged, upon the same grounds as urged by the defendants in error in this case, that this section was exclusive, that it related to venue, and that an action could not be brought in one county and a summons sent to another for service upon a nonresident, so as to confer jurisdiction upon the court of the first county. In that case it is said:

"Under section 59, title IV, relating to venue, the proper venue of the action was in Douglas county. The provisions of title V do not apply to venue, but provide for the manner in which actions may be commenced, and section 65 provides for the place where summons may be served when an action has been rightly brought under the provisions of title IV. It is an imperative rule of construction that effect be given, if possible, to every portion of a statute. To adopt one construction would eliminate

section 65 entirely, while the other construction gives effect to both sections. Further than this, the construction contended for by defendant in error would necessitate a multiplicity of actions in a case where nonresident defendants were numerous, if service might be had upon them in different counties within this state, whereas, by the other construction, one action only would be required, though they might be summoned in different counties. These sections must be construed together, and, where an action has rightly been brought in one county, a summons may be issued to any other county in the state, and served upon any person personally present therein, whether resident or nonresident. If a person is personally present within the confines of the state, it makes no difference whether he is a resident or nonresident, so far as his liability to personal service of summons is concerned. A nonresident has no greater privilege in that regard than a resident of the state."

Recently this identical question has been presented to the courts of Ohio, but apparently has not yet reached the court of last resort in that state. In *Baltimore & O. R. Co. v. McPeek,* 16 Ohio C. C. 87, the facts were that two railroad companies objected to the jurisdiction upon like grounds as in this case. The court held that the venue against one of the companies was properly laid in the county where the suit was begun, and that, since the petition averred a joint liability, the other defendant was properly brought into court under the provisions of the section of their code which is the same as our section 65. Two later cases arose in that state—*Stanton v. Enquirer Co.,* 7 Ohio N. P. 589; *Baldwin v. Wilson,* 7 Ohio N. P. 506. It is pointed out by the Ohio court that there are no special provisions governing the venue for actions brought jointly against two or more corporations, or against a corporation and individuals jointly, in the sections preceding section 60, and therefore such actions are embraced within the class denominated "other" actions in this section, and that, if the construction contended for by

the defendant in error is correct, then there are absolutely no provisions whereby a corporation and an individual can be sued together in a county outside of the residence of the corporation, nor can a suit ever be maintained against two corporations jointly, if they are residents of different counties, and, if this was intended, then it can be said that corporations enjoy immunities not granted to them, and that a citizen is not protected in his right to enforce a claim against a corporation as he is against a natural person under the law of the state. See, also, *Newberry v. Arkansas, K. & C. R. Co.*, 52 Kan. 613. In *Nebraska Mutual Hail Ins. Co. v. Meyers*, 66 Neb. 657, opinion by Mr. Commisssioner AMES, it is said, after stating that title IV applies alone to venue:

"Section 60 alone, among all the provisions of this title, treats of transitory actions, and permits the venue in such cases to be laid in any county in which the defendant, or one of several defendants, resides or may be summoned." And, after quoting section 65, he proceeds: "We think an erroneous impression as to the force of this section has prevailed, to some extent, among members of the bar. It is not confined in its operation, as some have seemed to suppose, to transitory actions, in which at least one of the defendants has been properly served with process in the county in which the action is brought, but, as its language expresses, applies to all actions, local as well as transitory, which are 'rightly brought in any county.'"

While certain expressions in *Western Travelers Accident Ass'n v. Taylor*, 62 Neb. 783, may be taken to be inconsistent with these views, a consideration of the question actually decided therein will show no conflict. In that case it is held that a domestic insurance company may be sued either in the county where its principal place of business is fixed by its charter, although its actual business is carried on and its offices are in another county, or in the county where it is situated and maintains a

place of business, or in any county where the cause or some part thereof arose. In that case the defendant was a mutual insurance company located at Grand Island. The cause of action arose in Iowa. The only service had was upon its secretary while temporarily in Douglas county, where the company had no agency and no place of business, and the court held that such a service did not confer jurisdiction upon the corporation. This was an action against the corporation alone, and it is very clear that the service attempted to be upheld was not justified by any provisions of the statute.

We are of the opinion that a proper regard for the legislative intent requires that the provisions of all these sections should be construed together; that the intention was to make it possible to bring a joint action against several defendants in a county in which one might be found, and thus prevent a number of suits for the same cause; that it was not the intention of the legislature to treat domestic corporations, when defendants in joint actions, in any other or different manner than natural persons; and that, if the venue was properly laid in Gage county against one of the defendants, a summons may properly issue from that county to any other county in the state, to be served in the manner provided by law for service upon either corporations or individuals.

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

REVERSED.

The following opinion on rehearing was filed July 12, 1907. *Former judgment of this court reversed and judgment of district court affirmed:*

1. **Malicious Prosecution.** An action for the malicious prosecution of a civil suit cannot be maintained if there was probable cause for bringing the suit complained of.

2. ———. Both malice and probable cause must exist in order to justify an action for malicious prosecution.

3. ———: PROBABLE CAUSE: EVIDENCE. A judgment in a civil suit or a conviction in a criminal suit by a court of competent jurisdiction is *prima facie* evidence of the existence of probable cause, but this is a rule of evidence, and is subject to rebuttal by proof that no probable cause in fact existed.

4. ———: ———. Where the question at issue was whether or not a statute was void as being in conflict with the constitution, the judgment of the district court to the effect that the statute was void constitutes *prima facie* evidence of the existence of probable cause, under the rule laid down in *Nehr v. Dobbs*, 47 Neb. 863; but, since in such a case the ultimate question of whether probable cause existed depends upon a construction of the law by this court, it is determined that the circumstances were sufficient to justify the bringing of the suit and that probable cause existed.

5. Petition examined, and *held* not to state a cause of action against the defendants for maliciously combining and conspiring together to injure the plaintiff's business. LETTON, J., dissents, as to this proposition.

BARNES, J.

At the former hearing of this case, the only point considered was the objection to the jurisdiction of the district court on the ground that the service could not be made upon a domestic corporation in a county other than that in which it was situated and had its principal place of business. Another objection was presented, but not orally argued, which was that the petition did not state a cause of action against Stonebraker, the sole defendant served in Gage county; that the court acquired no jurisdiction against him, and therefore acquired no jurisdiction of the defendants who were served in Lancaster county. The action was brought against Orville M. Stonebraker, Charles D. Traphagen, Hiland H. Wheeler, the State Journal Company and the Nebraska State Journal Association. The petition charges that the two corporation defendants are engaged in the publication of a daily and weekly newspaper, called the "Nebraska State Journal"; that the defendants Stonebraker and Traphagen are employed by said corporations and financially interested in each of them; that the corporations are both en-

gaged in the publication and sale of a compilation of the statutes of Nebraska made by the defendant Wheeler, who is also interested with the other defendants in the sale of that book, and the acts committed by the defendants, jointly and severally, were done for the purpose of promoting the sale of said book. The petition further alleges that the plaintiff is engaged in compiling and publishing annotated statutes of Nebraska; that he was authorized by the legislature of 1903 to prepare a statute of the state, and that 500 sets of such statutes, of two volumes each, were to be delivered, as soon as published, to the secretary of state, to be distributed to the members of the legislature and state officers, at the price of $9 a set; that, when said statutes were nearly completed, and for the purpose of hindering and delaying the plaintiff in the publication of said statutes, and of discrediting the said statutes of the plaintiff in the eyes of the public, and of thereby hindering and preventing the sale of the plaintiff's statutes, when published, and to prevent advance sales of said statutes, and for the enhancement of the sales of the said "Compiled Statutes of Nebraska" published by the defendants, the defendant Stonebraker, at the instigation and connivance of the other defendants, commenced an action against the secretary of state to enjoin him from accepting and receiving the 500 sets of statutes sold to the state, and against the auditor of public accounts to enjoin him from issuing a warrant to pay for the same, alleging that the act which authorized such purchase was unconstitutional, well knowing that this was not the case, and that the State Journal Company had sold thousands of copies of statutes to the state under like circumstances; that a temporary injunction was granted by the district court, which, on a final hearing, was made permanent, and a judgment therein was rendered against this plaintiff; that on appeal to the supreme court the judgment of the district court was reversed, and the case was dismissed. The petition further charges that the defendant published in the "State Jour-

nal" numerous articles in praise of their compiled statutes, and reflecting upon the plaintiff and the work done in the preparation of his annotated statutes, and that the sales of his statutes have been largely decreased thereby; that by reason of the acts of the defendants the publication of plaintiff's statutes was delayed, and that he was obliged to pay interest upon the money which he borrowed to enable him to publish the books, and was obliged to pay premiums for insurance upon the books prepared for delivery, and that he was put to great expense in looking after the action and trying to secure its dismissal; that he lost the sale of a large number of statutes by reason of the defendant's conduct; all to his damage in the sum of $5,000.

Stonebraker's objection to the jurisdiction of the court is, in effect, a demurrer to the petition, and will be so considered. At the outset, we are met by a sharp controversy between the parties as to the nature of the cause of action. The plaintiff contends that the action is one to recover for the malicious prosecution of a civil suit and for a conspiracy to injure the plaintiff's business by publishing false and malicious statements concerning plaintiff's statutes in a newspaper controlled by the defendants; while the defendants insist that the action is one to recover damages for the malicious prosecution of a civil action only. Since both parties agree that the action is, in part at least, one for the malicious prosecution of a civil suit, we will first determine whether the petition is sufficient to sustain such an action. We assume, but do not decide, that an action for the malicious prosecution of a civil suit may be brought by a person, not a party to the suit, but whose property or business was affected by the proceeding; and it is no longer an open question in this state that an action may be maintained for the malicious prosecution of a civil suit, even where there has been no restraint of the person or seizure of property. *McCormick Harvesting Machine Co. v. Willan*, 63 Neb. 391. It is also equally well settled that the essential

grounds upon which such an action rests are malice and want of probable cause, and both of these elements must be established by the plaintiff. *Turner v. O'Brien*, 5 Neb. 542; *Vennum v. Huston*, 38 Neb. 293; *Hagelund v. Murphy*, 54 Neb. 545. In an action for the malicious prosecution of a civil suit it is necessary to prove want of probable cause, malice and actual damage to the plaintiff resulting from the maintenance of the suit. *Parmer v. Keith*, 16 Neb. 91; *Jones v. Fruin*, 26 Neb. 76.

The facts pleaded in the petition show that the injunction suit was prosecuted to final determination in the district court by the defendant, Stonebraker. A temporary injunction was obtained, which was afterwards made permanent, and a final judgment was rendered by that court in his favor. Under the rule of the older cases such a judgment, rendered by a court of competent jurisdiction after a full consideration of the case, would be held to be conclusive evidence of the existence of probable cause for the institution of the suit; but the later cases hold mainly to the doctrine that, though in a criminal case there has been a conviction or in a civil case a judgment in favor of the plaintiff, yet the presumption that probable cause existed, based upon the fact of the adjudication, may be rebutted by proof that the judgment had been procured by fraud, perjury or other undue means upon the part of the defendant. *Nehr v. Dobbs*, 47 Neb. 863. The plaintiff in that case was convicted of having maliciously and unlawfully killed a certain dog belonging to Dobbs. Upon error to this court the judgment was reversed and the cause ordered dismissed. The conviction in that case, as also the judgment in the injunction suit in question in this case, was the result of a mistake of law upon the part of the district court, but there is a distinction in the cases which is a very material and important one. In the *Nehr* case, Dobbs was aware that his dog had no collar, and the statutes expressly provided: "It shall be lawful for any person to kill any dog found running at large on whose neck there is no collar as aforesaid, and no action shall be

maintained for such killing." Comp. St. ch. 4, art. I, sec. 20. The question before the trial court in that case was a mixed one of law and fact; while in the injunction suit in question herein there was no question of fact involved. the matter presented for determination was simply whether the law authorizing the purchase of the statutes was unconstitutional. This was purely a question of law, upon which the best legal minds might reasonably differ, and we are convinced from a consideration of the legal question involved, that there was room for an honest belief on the part of a reasonable man that the law authorizing the purchase of the statutes from the plaintiff herein was unconstitutional, and therefore there existed probable cause for the bringing of the injunction suit. The plaintiff argues, however, that there cannot be probable cause when the action is groundless, and the motive prompting the bringing of the action is bad or malicious. He concedes that defendant Stonebraker had a right to apply to the court for the *bona fide* purpose of settling the question of the constitutionality of the law, but asserts that, if he did not honestly believe that the law was unconstitutional, and did not bring the suit solely for the purpose of settling that question, but for the malicious purpose of injuring the plaintiff, then there was probable cause. This position assumes that the action was groundless, which is the very point in dispute, and, further, it confuses the question of malice with that of want of probable cause. If the defendant had probable cause for bringing the action, his motive was immaterial. If probable cause existed he had a legal right to maintain the action, and ordinarily, when a legal right is exercised, the motive with which it is done cannot and does not make it illegal. Stonebraker had the legal right, as a taxpayer, to enjoin the payment of state money to Cobbey under an unconstitutional statute, and his act in attempting to prevent the unlawful expenditure of state funds was, ostensibly at least, for a laudable purpose. If the suit had been brought by any other taxpayer, there would have been, as we have seen,

probable cause for its prosecution; and the fact that it was brought by Stonebraker who, it is alleged, acted from an evil motive, does not make that unlawful in him which was lawful if done by another.

Experience shows that, perhaps in a majority of the cases where taxpayers have sought to prevent the expenditure of public funds, pure philanthropy and an unselfish public spirit was not the sole motive which prompted the act, and no court, so far as we are aware, has ever dismissed such a case for the reason that the plaintiff's motives were not entirely altruistic and disinterested. If this might be done, the time of the courts would be taken up in attempting to ascertain the hidden motives of the parties, rather than the real merits of the controversy between them. *Jacobson v. Boening*, 48 Neb. 80; *Letts v. Kessler*, 54 Ohio St. 73; 1 Cyc. 669. In *Stewart v. Sonneborn*, 98 U. S. 187, it is said that it is well established that, unless malice and want of probable cause concur, no damages can be recovered. However blameworthy the prosecutor's motives, he cannot be cast in damages if there was probable cause for the complaint he made. The allegations of the petition that Stonebraker's motives in bringing the injunction suit were to prevent the sale of Cobbey's Statutes, and enhance the sale of a rival publication in which he was interested, tended to show that the action was begun with intent to injure the plaintiff herein without just cause or excuse, and, hence, would be malicious; but, since both malice and want of probable cause must exist, and one of these essential elements is lacking, the petition is defective and fails to state a cause of action against him for malicious prosecution.

The plaintiff claims, however, that the petition states a cause of action against the defendants for combining and conspiring to injure and destroy his business and prevent competition in the manufacture and sale of the statutes of this state. As we have seen, the petition charges that the defendant corporations, who are owners of a newspaper, are jointly interested with the defendants

Stonebraker, Traphagen and Wheeler in the publication and sale of a compilation of the statutes of Nebraska, known as the "Compiled Statutes," and that in pursuance of a combination and conspiracy between them they brought an action to restrain the purchase by the state of Nebraska of 500 sets of statutes from the plaintiff for the sum of $4,500; that the defendants had failed in having the legislature appropriate money for the purpose of purchasing the Compiled Statutes, as had been done by former legislatures; and that, after the plaintiff had expended large sums of money in the preparation of the manuscript and the printing of his statutes, they began this action for the purpose of hindering and delaying the plaintiff in the publication thereof, discrediting the same in the eyes of the public, preventing its sale, and in order to enhance the sales of the Compiled Statutes. It was further charged that, for the purpose of bringing the plaintiff's statutes into discredit and disrepute among the attorneys and people of the state, the defendants published and caused to be published in the Nebraska State Journal numerous articles, under glaring headlines, reflecting on the plaintiff and his work done in the preparation of his said statutes, an article alleging that said statutes prepared by the plaintiff were not authorized by the legislature, and said act was passed by the legislature in order that the individual members thereof might get statutes for nothing, and wrongfully published and advertised that their Compiled Statutes was the authorized compilation of the statutes of the state of Nebraska, thus representing to intending purchasers that plaintiff had been enjoined from publishing his statutes, and it could not and would not be published and orders given for plaintiff's statutes could not and would not be filled; that by reason of said acts the sale of plaintiff's statutes has been largely discredited, and in a great measure prevented, and the defendants have thereby largely increased the sale of said Compiled Statutes of Nebraska published by them.

The petition, in effect, charges a combination by the defendants to injure the plaintiff's business by bringing a vexatious suit and preventing the sale of a large number of copies of his statutes, and by slandering his work and circulating false statements as to the value, authority and usefulness thereof. It will be observed, however, that all of the matter above set out is pleaded by way of inducement, or by way of aggravation in order to increase the plaintiff's damages, which he alleges he has sustained by reason of the alleged malicious prosecution of the civil suit. And it seems clear, if we eliminate that cause of action, the matters so pleaded by way of inducement and aggravation fall of their own weight, and are not sufficient to constitute a cause of action for conspiracy.

Again, in order to state a cause of action for conspiracy to injure the plaintiff's business, there must be in connection with, and in addition to, the foregoing general statement, allegations or statements of facts from which, if established, the law will imply such a conspiracy or combination. The defendants were together engaged in preparing and publishing a rival statute. This, of course, of itself was not unlawful. It was the very thing that the law encourages as competition in business, and if the combination and conspiracy of the defendants was to publish a more acceptable statute than that published by the plaintiff, and so supply the demand, such an agreement and conspiracy, instead of being unlawful, would be in every way lawful and commendable. Therefore, in order to state a cause of action against the defendants, it was necessary to allege some overt act on their part intended to injure the plaintiff's business, and not reasonably appropriate and adapted to legitimately building up their own business. The fact that the defendants had failed in having the legislature appropriate money for the purpose of purchasing their statutes, and that the plaintiff had expended large sums of money in the preparation of manuscripts and the printing of his statutes, would not of

course, justify the charge against the defendants that they began the action complained of for the purpose of hindering and delaying the plaintiff in the publication of his statutes, or for the purpose of discrediting his statutes in the eyes of the public, and preventing its sale in order to enhance the sale of the Compiled Statutes.

The first overt act charged against the defendants is that, for the purpose of bringing plaintiff's statutes into discredit and disrepute among the attorneys and people of the state, the defendants published, and caused to be published, in the Nebraska State Journal numerous articles, under glaring headlines, reflecting upon this plaintiff and his work done in the preparation of his statutes. This is not an allegation of any wrong done on the part of the defendants. If they published true statements in regard to the quality of their statutes and of the plaintiff's work done in the preparation of his statutes, and did so for the purpose of enhancing the sales of their statutes by giving correct information in regard to the value of their respective works to the purchaser, then their action would be commendable, and certainly would be legitimate as a means of increasing their business.

The second overt act alleged is that the legislature was moved by unworthy motives to pass the act authorizing the purchase of plaintiff's statutes. The plaintiff construes this to be a charge of bribery against himself, and, if such construction is correct, it would reflect upon his character generally, and thus might indirectly injure the sale of his statutes. This allegation would be appropriate in an action for libel in which the plaintiff was seeking to recover damages for injury to his reputation, but such injury to the business of publishing his statutes as might be caused by such insinuation against him is too remote to be capable of being estimated with such accuracy as to form the basis of a judgment for damages.

Again, the publishing of such a statement was equally consistent with the honest belief in its truth and a justifiable desire on the part of the defendants to promote their

own business. The representation that the plaintiff had been enjoined from publishing his statutes was based upon the fact that the purchase of his statutes by the state had been enjoined, which was literally true, and there was just ground to suppose, at that time, that the injunction would be made perpetual. So far as anything alleged in the petition shows, the defendants might well believe that the plaintiff's statutes could not be, and would not be, published, and that orders given therefor would not be filled. So that this statement furnished no indication that the defendants were conspiring to maliciously injure the plaintiff's business. On the other hand, they were entirely consistent with the just desire to promote their own business by legitimate means.

As above stated, the gist of this action was to recover damages from the defendant for the malicious prosecution of a civil action. This supposed cause of action having failed, the court ought not to find that another and different cause of action was alleged in the petition, because of fugitive statements, appropriate, as they were, to the main cause of action, unless those statements contain such allegations of fact as to clearly present a legal ground for the recovery of damages. The general rule is that the allegations of a pleading are to be taken most strongly against the pleader. This is a wholesome and necessary rule. One who states a cause of action or defense is supposed to state all of the facts that are favorable to his claim, and state them in the most favorable light. Nothing, therefore, ought to be taken in his favor by implication; and, tested by this rule, the petition fails to state a cause of action for a conspiracy. The defendant Stonebraker's objection to the jurisdiction was therefore properly sustained.

For the foregoing reasons, our former judgment is reversed and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

LETTON, J.

The foregoing opinion expresses my ideas upon the question of whether a cause of action is stated for malicious prosecution, but runs counter to my views upon the question whether the petition states a cause of action for malicious injury to business. In effect, the petition charges a combination of the defendants to injure the plaintiff's business by beginning a vexatious suit, by slandering his work and circulating false statements as to the value, authority and usefulness of the plaintiff's compilation of statutes, by stating it would not, and could not, be published, and that they thereby prevented the sale of a large number of the books to intending purchasers. While it is often difficult to draw the line between injuries to business caused by legitimate competition, which are not actionable, and cases in which the means employed to increase one's own business and to interfere with the rights of a competitor, and injure and damage his business, are wrongful and actionable, still it seems to me that the allegations in this petition, while general and not very definite in their nature, if proved, are sufficient to constitute a cause of action.

The necessity of a free field for business enterprise permits of interfering with the business of another by a competitor selling goods at a lower price, or by advertising the merits of a rival's wares and merchandise, or by seeking to add attractiveness and desirability to the goods one sells over those of his business rival, or by praising his own wares and comparing them with those of his competitor to the disadvantage of the latter, and in many other ways, but there is a limit beyond which fair and legitimate competition and business enterprise may not go. A man's goods may be slandered as well as his good name, and where the article which he has to sell derives its special value from the individual skill, experience and qualifications for its compilation of the editor or compiler, or from the fact of its having been authorized to be

used in the courts by the legislature, a serious wrong may be committed by false and damaging statements as to these particulars. In 1 Bacon, Abridgement, "Actions on the Case," p. 119, illustrations are given of actions on the case of a nature similar to this: "If A, being a mason and using to sell stones, is possessed of a certain stone-pit, and B, intending to discredit it, and deprive him of the profits of the said mine, imposes so great threats upon his workmen, and disturbs all comers, threatening to maim and vex them with suits if they buy any stones, so that some desist from working and others from buying, etc., A shall have an *action upon the case* against B, for the profit of his mine is thereby impaired." "If a man discharges guns near my decoy pond with design to damnify me by frightening away the wild fowl resorting thereto, and the wild fowl are thereby frightened away, and I am damnified, an action on the case lies against him." *Carrington v. Taylor,* 11 East, 571. The latter principle was established in the case of *Keeble v. Hickeringill* (11 East, 574, note), where it was said by Lord Holt: "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 Henry IV, p. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school and their parents would not let them go thither, sure that schoolmaster might have an action for the loss of his scholars."

In this case the charge is that by the bringing of the

lawsuit and by the use of the false statements in the newspapers of the defendants, the worth of the plaintiff's edition of the statutes was discredited, and attorneys and officers who would have purchased plaintiff's statutes were prevented from so doing by the fear that they were unauthorized and of little value. In a Texas case, *Brown v. American Freehold Land Mortgage Co.*, 97 Tex. 599, 80 S. W. 985, it was charged that the defendants procured a certain loan company for whom the plaintiffs had been agents to take the business agency in Texas away from the plaintiffs by making false and malicious representations as to the management of its business by the plaintiffs, and had prevented their continuing their business with a large number of other clients by publishing false statements and reports that the plaintiffs were insolvent and unable to accomodate their customers, and by other undue means, the petition alleging with great particularity many acts performed by the defendants for the purpose of accomplishing their end. The court held this petition to state a cause of action, and in this connection quoted from *Walker v. Cronin,* 107 Mass. 555, as follows: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from a malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria,* unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

Wildee v. McKee, 111 Pa. St. 335, was an action for conspiracy to defame and injure a person in his business. The plaintiff was a school teacher and it was charged that the defendants, maliciously intending to injure him in his good name, and in his business and profession,

did unlawfully combine and form themselves into a conspiracy to defame, and that they did publish certain scandalous words charging that he was incapacitated for his business on account of insanity and monomania. This was followed by an averment of special damages. The court held that the petition stated a cause of action, reversing the lower court.

In *Smith v. Nippert*, 76 Wis. 86, 44 N. W. 846, the petition charged a malicious conspiracy to injure the plaintiff's business as dressmaker and seamstress by suing out an inquisition of lunacy against her, and by causing it to be believed that she was insane, and not a proper person to be employed in the household where she had formerly found employment. The court held that the petition stated a good cause of action for an injury to the plaintiff's reputation and business. *Farley v. Peebles*, 50 Neb. 723; *Hartnett v. Plumbers' Supply Ass'n*, 169 Mass. 229, 38 L. R. A. 194; *Delz v. Winfree, Norman & Pearson*, 80 Tex. 400, 26 Am. St. Rep. 755; *Van Horn v. Van Horn*, 52 N. J. Law, 284; *Kimball v. Harman* 34 Md. 407; *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun (N.Y.), 587; *Doremus v. Hennissy*, 62 Ill. App. 391, which is an instructive case. See, also, a full discussion of the law upon this subject, as affected by *Allen v. Flood*, L. R. App. Cas. (1898) 1, and *Mogul S. S. Co. v. McGregor*, 23 L. R. Q. B. Div. 598, and L. R. App. Cas. (1892) 25, by the supreme court of Wisconsin in *State v. Huegin*, 110 Wis. 189. In *Quinn v. Leathem*, L. R. App. Cas. (1901) 495, which is a very interesting case, it is pointed out that *Allen v. Flood, supra*, has been misunderstood and that the doctrine of the common law as to combinations to injure a man's business has not been changed by that decision, as the Wisconsin court assumes, but is still adhered to by the English courts. See, also, *Temperton v. Russell*, 1 L. R. Q. B. Div. (1893) 715.

The petition alleges facts of a nature which do not constitute lawful competition. It charges the malicious interference with and injury to the plaintiff's business

by reason of malicious acts on the part of the defendant Stonebraker, in combination and conspiracy with the other defendants. The allegations are stated in general terms, are not properly separated from the cause of action for malicious prosecution, but, while lacking in particularity, are not assailed for that reason, and, in my opinion, are sufficient to state a cause of action.

EMMA STEHR, APPELLEE, V. MASON CITY & FORT DODGE RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,694.

1. **Eminent Domain:** SPECIAL DAMAGES. Under the constitutional provision that "the property of no person shall be taken or damaged for public use without just compensation therefor," where there has been a disturbance of a right which the owner of real estate possesses in connection with his estate and which gives to it an additional value, by reason of which disturbance he sustains special damages in respect to such property in excess of that sustained by the public at large, he is entitled to recover damages.

2. ———: DAMAGES. In such case the damages recoverable properly include all damages arising from the exercise of eminent domain which cause a diminution in the value of the property.

3. ———: USE OF STREETS: ABUTTING PROPERTY: DAMAGES. Where an ordinance is passed granting the use of public streets to a railway company for the construction and operation of its road, an abutting property owner cannot be prevented from recovering from the railway company damages to his property caused by the construction of the railway in and across the streets by inserting in such ordinance a provision vacating the portions of the streets to be so used by the railway company.

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

A. G. Briggs and *W. D. McHugh,* for appellant.

Baldrige & De Bord and *J. B. Fradenburg, contra.*

LETTON, J.

The plaintiff is the owner of the west one-third of lot 3, block 12, Kuntze & Ruth's addition to the city of Omaha, being a strip of ground 48 feet wide and 50 feet long fronting west upon Nineteenth street in that city. The defendant has recently built and put in operation certain railroad tracks and a terminal freight station near the plaintiff's property. The tracks leading from the main line to the terminal station are constructed parallel with Nineteenth street for a distance of about 1,000 feet upon land belonging to the railroad company to a point nearly across the street from plaintiff's property, from thence curving in a northeasterly direction across Nineteenth street and Mason street and extending to the terminal station, which is situated about three blocks east and two blocks north of the plaintiff's property. Directly opposite the property there are four tracks. These tracks are situated in the bottom of a deep cut or excavation which is partly upon the land belonging to the railroad company and partly in Nineteenth street and in Mason street, which intersects Nineteenth street about 50 feet north of the plaintiff's lot. About one-half of the width of Nineteenth street has been cut away in front of the premises. The plaintiff complains that by the construction of these tracks the defendant has largely changed the natural surface of the ground immediately in front of and near her property: that it has cut off the access to the property upon Sixteenth, Seventeenth, Eighteenth and Nineteenth streets, and that she is deprived of ready access to the business part of the city of Omaha and to a schoolhouse which is near by; that her property is residence property; that it has been damaged and will continue to be damaged from jars and concussions caused by passing cars and engines, and that the occupants of the property are and will be annoyed by smoke, cinders and soot and by the noise of whistles, bells and passing trains.

The contention of the defendant railway company is that, since the plaintiff has no property right in the surface of the lot across Nineteenth street upon which the defendant built its railway, the excavation of the lot did not invade any property right which she enjoyed in connection with her property and hence she has no right to recover; that, since a lot owner could excavate, provided he preserved the lateral support of the lot of his neighbor, without being liable for damages, so also could the railway company, and though such excavation might affect the value of the plaintiff's property, still this would be *damnum absque injuria* and no recovery permitted.

The questions at issue are substantially the same as were considered by the court in the case of *Chicago, K. & N. R. Co. v. Hazels,* 26 Neb. 364. In that case, as in this, the tracks were laid upon land belonging to the railway company, and the plaintiff's damage was caused in part by the closing of certain streets and the partial obstruction of others, thus depriving him of convenient ingress and egress to and from his property, and, by the construction and operation of the railway, smoke, soot and dust from the engines were thrown thereon, and, by the ringing of bells, sounding of whistles and noise of trains, the property was damaged and rendered undesirable for residence purposes. Several of the cases cited in that case are again cited by defendant's counsel in this case, with later cases holding the same doctrine. However, after full consideration and exhaustive discussion, the court in the *Hazels* case held that "the words 'or damaged' in section 21, art. I of the constitution, includes all damages arising from the exercise of eminent domain which causes a diminution in the value of private property," and that in arriving at the diminution in the value it is proper to take into consideration all elements of damage caused by such construction which tend to diminish the value of the property. The doctrine of this case was in harmony with *Burlington & M. R. R. Co. v. Reinhackle,* 15 Neb. 279; *Republican Valley R. Co. v.*

Fellers, 16 Neb. 169; *City of Omaha v. Kramer,* 25 Neb. 489, and *Omaha Belt R. Co. v. McDermott,* 25 Neb. 714, decided previously, and it has been cited and followed in *Omaha & N. P. R. Co. v. Janecek,* 30 Neb. 276; *Atchison & N. R. Co. v. Boerner,* 34 Neb. 240; *Jaynes v. Omaha Street R. Co.,* 53 Neb. 631; *Chicago, R. I. & P. R. Co. v. Sturey,* 55 Neb. 137, and *Chicago, B. & Q. R. Co. v. O'Connor,* 42 Neb. 90.

The defendant quotes and relies on the following language in the opinion in *Gottschalk v. Chicago, B. & Q. R. Co.,* 14 Neb. 550: "The evident object of the amendment was to afford relief in certain cases where, under our former constitution, none could be given. It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large." It further cites and relies on the case of *Rigney v. City of Chicago,* 102 Ill. 64, which is largely quoted in the *Gottschalk* case, and is a leading case upon the subject. The vacation of the streets mentioned, and the cutting down and narrowing of that part of Ninteenth street immediately in front of plaintiff's property, is shown by the testimony to have been a direct injury to the property, by cutting off the plaintiff's means of access by way of Nineteenth street, or the other vacated streets, to the business portion of the city, and by rendering more inconvenient the ingress and egress of others to the property, and is further shown to have directly depreciated the value of the property. She was entitled to the use of the whole of Nineteenth street in front of her property and to the use of that portion thereof north of the center line of Mason street. Further than this, the evidence shows that, on account of the proximity of the railway, smoke and soot is blown upon her property to such an extent as to make the property less desirable as a place of residence, to lessen its value in the

market and to depreciate its rental value. It is not a direct physical injury to the real estate itself, but it is a special injury to the property in excess of that sustained by the public at large, and the owner of the property suffers damage to her right of access and to her right of free and undisturbed enjoyment. The facts in this case bring it within the rule of the *Gottschalk* case, and the rule adopted by this court is substantially the same as that adopted in the *Rigney* case, and which is now applied by the supreme court of Illinois in like cases. See *Pittsburg, Ft. W. & C. R. Co. v. Reich,* 101 Ill. 157; *Chicago, P. & St. L. R. Co. v. Nix,* 137 Ill. 141; *Chicago, M. & St. P. R. Co. v. Darke,* 148 Ill. 226; *Chicago v. Taylor,* 125 U. S. 161.

It appears that the city council of the city of Omaha passed an ordinance granting the use of a portion of certain streets, the obstruction of which is complained of by the plaintiff, to the defendant railway company, for the operation of its road, and vacating the same, and the defendant now contends that, since the streets were vacated prior to its occupancy of them, the plaintiff is not entitled to recover for damages to her right of ingress and egress, the same having been taken away by the vacation before the railroad was built. It appears, however, that the grant of the use of the streets and the attempted vacation were made for the benefit of the defendant, and were made at the same time and by the same ordinance. Under the rule laid down in *Burlington & M. R. R. Co. v. Reinhackle,* 15 Neb. 279, these facts do not in any way militate against the right of the plaintiff to compensation from the defendant for the damages she may have sustained.

The issues presented do not require the enunciation of any new doctrine. The instructions requested by the appellant and refused were properly refused under the facts shown, and the instructions given by the court, when considered in connection with the evidence, were not prejudicial. The question as to the right of the owner of

an abutting lot to damages for the whole or partial closing of a street is differently answered in different states, but the law is settled here. The right to damages is not restricted merely to a recovery for an interference with the right of ingress and egress in front of the property and with the right to light and air, but the owner of such property is entitled to recover for all such damages, direct and consequential, as he may suffer by reason of the interference with his right of property. Where there has been a disturbance of a right which the owner of real estate possesses in connection with his estate and which gives it additional value, by reason of which disturbance he sustains special injury in respect to such property in excess of that sustained by the public at large he is entitled to recover all the damages, both direct and consequential, which may result from such invasion of his property rights. The plaintiff therefore was entitled to recover in this case for both direct and consequential damages.

What has been said disposes of all points raised in the requests for instructions by the appellant, except that in which the court was requested to instruct the jury "not to allow any damages based upon the diminution in the value of her property caused solely by the fact that the railway company, defendant, made the cut and excavation upon its own property west of the property of plaintiff." As to this, it may be said that the instruction does not properly reflect the evidence, since the cut and excavation were not in fact entirely upon the railway company's own property, but also in Nineteenth and Mason streets; and, further, it would be impossible for a jury to separate and distinguish the damage accruing to the property from that part of the excavation on the street and that portion on the company's own premises. The court did not err in refusing this instruction.

The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,482.

Judicial Sales: APPRAISEMENT: ESTOPPEL. A purchaser at a judicial sale, at which certain apparent liens have been duly certified and deducted in the appraisement, is a purchaser subject to such liens, and is estopped, after confirmation without objection, to dispute their validity, and this rule is equally applicable to the judgment plaintiff and to strangers. A stipulation that the supposed liens are in fact void is not, without more, a waiver of the estoppel.

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

W. A. Saunders, for appellant.

H. E. Burnam and *W. H. Herdman, contra.*

AMES, C.

George M. Grant, as the holder of a mortgage on a certain tract of land in the city of Omaha, procured a decree of foreclosure and sale of the same, and became the purchaser of it at the sale which was consummated by confirmation and deed according to the usual course of procedure in such cases. The appraisers appointed by the sheriff found the gross value of the property to be $5,280, from which they deducted $1,024 on account of the apparent tax liens thereon as shown by treasurer's certificates procured by the sheriff pursuant to the statute, and the amount of the bid was $4,000 or $250 less than the "net" value of the land as shown by the appraisal, and $480 more than two-thirds of the amount of the gross appraisal. This is an action in the name of the state to foreclose the supposed tax liens pursuant to the so-called "Scavenger" act of the last legislature. A grantee of the purchaser at the foreclosure sale was made defendant, and answered, denying the validity of the alleged taxes on account of which the foreclosure is sought; and it was

stipulated before the trial that said supposed taxes were and are, in fact, wholly void, but the district court nevertheless entered a decree of foreclosure and sale, from which the defendant appeals.

This court has held so many times and so frequently that "a purchase of property at a judicial sale at which certain liens have been duly certified and deducted in the appraisement is a purchase subject to such liens, and the purchaser will be estopped from questioning their validity in subsequent proceedings, although he may have paid more than two-thirds of the gross appraisement" (*Battelle v. McIntosh,* 62 Neb. 647), that a reiteration of the decision now can serve no useful purpose. See, also, *Omaha Loan & Trust Co. v. City of Omaha,* 71 Neb. 781. Nor is any reason given why the rule thus settled should be inapplicable to cases in which the purchaser is also the judgment plaintiff, because the estoppel operates upon him in his character as purchaser only, and that character is not affected by the other mentioned fact when it exists. But it is argued that the estoppel is waived or discharged by the admission by stipulation that, as a matter of fact, the alleged taxes were and are void. But this stipulation, we think, amounts to no more than a waiver of the production of evidence to prove that fact. It is the fact itself that is rendered by the estoppel incompetent to be received in evidence or considered by the court, and such incompetency the stipulation does not purport to waive or remove, nor, evidently, was it within the intent of the parties that it should do so.

We are of opinion, therefore, that the judgment of the district court is right and recommend that it be affirmed.

OLDHAM and EPPERSON, 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.

PETER LENAGH ET AL., APPELLEES, V. COMMERCIAL UNION ASSURANCE COMPANY, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,507.

1. **Insurance:** HOUSEHOLD FURNITURE. Husband and wife have each and both a pecuniary and insurable interest in all articles comprised in the furniture of their household, or which are necessary or convenient and actually in use in the maintenance of their domestic relation, regardless of whose money paid for them, or by what means or from what sources they were obtained.

2. ———: ASSIGNMENT: RIGHTS OF INSURED. When an insurance company consents in writing to an assignment of a policy of fire insurance without restriction or limitation with reference to the purposes of the assignment or the extent of the interest assigned, which is in fact, as between the parties, less than the absolute or entire interest or rights of the insured under the contract, and when, after a loss has occurred, but before payment has been made, the rights and interests of the insured are brought to the knowledge of the company, they cannot be defeated or impaired by a compromise and settlement and attempted satisfaction between the latter and the assignee without the consent of the insured.

3. ———: DESIGNATION OF INSURED. When there is no fraud, accident or mistake as to the description or ownership of property, or articles intended to be covered by a fire insurance policy, and the person intended to be insured and who pays the premium is in fact the owner of the same, or has an insurable interest therein, it is immaterial by what name he is designated in the policy.

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

Greene, Breckenridge & Kinsler, for appellant.

Lambert & Winters, contra.

AMES, C.

The plaintiffs, Peter Lenagh and Bridget, his wife, were in possession of a dwelling house, and of certain household furniture situated therein, in the city of Omaha. Who owned the building or whether it was used for any

other purpose than that of a dwelling, we do not know, and is perhaps immaterial. The ultimate ownership of a part of the furniture was, as was testified upon the trial, in the husband, and a part in the wife, and of some minor articles in the children of the family. The property, as is stated in the brief of counsel for the defendant, "consisted of beds, bedding, a carpet, three pairs of shoes, two suits of clothes, two or three dresses belonging to Mrs. Lenagh, three trunks, a fiddle, a sewing machine, 'the kids' clothes, a shotgun, two writing desks, dishes and crockery, some pictures, two stoves and a safe," some of which had been bought with money of the husband, and some with that of the wife.

In 1902, articles of incorporation were prepared and subscribed and filed with the county clerk for an institution to be named the "Star Coal Company," but the instrument was never filed elsewhere, and no capital stock was ever subscribed or paid in, and no certificates of capital ever issued or executed, nor any attempt made at organization, but Lenagh and his wife carried on a business in the proposed corporate name, and in December of that year procured by that name a policy from the defendant insuring the building in the sum of $1,000, and the furniture in the sum of $250, against loss or damage by fire. It is not pretended that there was in this transaction any fraud or mistake, or any unlawful intent, or any misdescription or ignorance by either party of the property intended to be covered by the contract of insurance, for which the plaintiffs, or one of them, paid the stipulated premium. Former decisions of this court appear to us to have put the validity of this policy beyond the region of controversy. *Cook v. Westchester Fire Ins. Co.*, 60 Neb. 127; *Farmers & Merchants Ins. Co. v. Mickel*, 72 Neb. 122. Its validity is attempted to be disputed with respect to the personal property only, solely on the ground of the alleged separate and individual ownership of parts of the latter, in consequence of which it is contended that neither the husband nor wife had an insurable interest

in all of it, and the policy stipulated that it should be void if the insured was not the sole and absolute owner of the property covered by it. There is reason and authority for holding that this defense, if otherwise sufficient, was waived by failure to plead it. *Farmers & Merchants Ins. Co. v. Peterson,* 47 Neb. 747. But we are quite clearly of opinion that if it had been pleaded it would have been unavailing. In an overwhelming majority of cases the separate ownership in members of a family of articles comprised in the furniture of a household is a pleasing fiction rather than a reality and the presence of it is a concession to sentiment rather than a representation of fact. To our minds the assertion that husband and wife have not each and both separately and jointly a pecuniary and insurable interest in all such articles, regardless of whose money paid for them, and from what sources or by what means they were obtained, as are necessary or convenient and actually in use in the maintenance of the domestic relation, is palpably absurd. It can only be at or after the dissolution of the family, or when an attempt has been made to transfer or incumber the property, or some of it, that the question of separate ownership or right of possession can have any practical significance. The family is a unit, and those articles of personalty which it possesses, and which are necessary or convenient for the maintenance of the domestic relation, are in a very real, though perhaps not in an absolute sense the property of the institution so long as the latter continues to exist. The fact that the policy named the nonexistent Star Coal Company as the insured is plainly of no significance. It was merely a trade or fictitious name of the parties owning the property and paying the premium, and of none other, and was the occasion of no mistake or injury.

After the issuance of the policy the plaintiff conveyed the building by an instrument in form a deed, but intended as a mortgage, to secure the payment of a debt to one Moriarity and thereupon, with the written consent of

the company, and in compliance with the terms of the policy, assigned the same by the execution of a blank form, printed on the back of it, to the grantee. The assignment was executed in form as by the "Star Coal Company," by "Peter Lenagh, President," and the consent was given to the "Star Coal Company as owner of the property covered by the policy," and the instrument was delivered to the assignee. Afterwards, and during the life of the policy, the building and contents were destroyed by fire. Shortly thereafter the company paid to Moriarity $1,000, the amount of the insurance on the house, and received from him a receipt: "In full compromise and settlement of all claims and for loss and damage by fire on the 5th day of September, 1904, to property insured under (the policy), and the said policy is hereby canceled and surrendered." It is entirely clear that Moriarity never had any title, lien or interest to, in or upon the personal property, and that his proof of loss was intended to cover and did cover the amount of loss and insurance upon the building only, and that these facts were known to the company at the time of the payment to him and of the execution of the above mentioned receipt. Before that time the plaintiffs had made proof and demanded payment of loss on account of the destruction of the furniture, and the company was fully aware that the assignment to Moriarity was not absolute, but by way of collateral to the mortgage security and indebtedness to the latter. This is an action in equity to reform the assignment so as to show that it was intended by way of security, and not absolute, and to recover for the loss of the personal property. There was a judgment for the plaintiffs from which the defendant appeals.

The defendant contends that there is insufficient ground for the reformation of the assignment because there is no allegation of fraud or of mutual mistake, and because Moriarity, one of the parties to the assignment, is not a party to the action. We think the objection is immaterial, because there is no necessity for the reformation in

question. The assignment, though absolute in form, was intended by the parties to it as security for the payment of a debt, and, as is the case with all such transactions, is treated by the court as having taken effect according to such intent, and not otherwise. The company has no cause for complaint. It has not been misled to its prejudice, and neither the policy nor the assignment contained any restriction as to the purpose or purposes for which the latter could be made, and the company consented without any inquiry in that regard. It is not contended, nor could it be successfully, that the assignment was void and by consequence the policy forfeited and annulled because of the purpose for which the former was made, but, if it is valid, it is so according to the intent of the parties. The court cannot, certainly, make a contract for them which they did not intend or attempt to make for themselves. A case identical with this, in essential particulars, is *Merrill v. Colonial Mutual Fire Ins. Co.*, 169 Mass. 10, in which the same conclusion here reached is fortified by reason and authority not necessary now to be reiterated, but which we adopt as our own.

It follows as a matter of course that Moriarity was without power to compromise, settle or discharge the obligation arising under the policy beyond the extent of his own interest therein, and that the company having had, before the settlement was made, knowledge of the extent of that interest and of the rights of the plaintiffs in the premises, was equally as powerless as was the assignee to prejudice the latter by the transaction.

We are of opinion, therefore, that the judgment of the district court is right and recommend that it be affirmed.

OLDHAM and EPPERSON, 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.

NELLIE BURSON, APPELLEE, V. CHARLES W. PERCY, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,515.

Evidence examined, and found to support the findings and judgment of the district court.

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

A. W. Crites, for appellant.

D. B. Jenckes and *Grant Guthrie, contra.*

AMES, C.

There was a small stream of water that was wont to flow through lands of both the plaintiff and defendant, and also through an intermediate tract, the lands of defendant being nearest its source. This is an action to restrain the defendant from diverting and consuming the waters of said stream upon his own land so as to wholly deprive the plaintiff of the use thereof for domestic and agricultural purposes. Although the answer contains a general denial, the sole real defense is that of adverse possession, it being alleged in the answer, and sought to be established by evidence, that the defendant had thus wholly diverted the waters of the stream and enjoyed the exclusive use of them under claim of right and ownership for more than ten years prior to the beginning of the action. A large number of witnesses were sworn and testified, and their testimony is in some respects conflicting. We cannot conceive that any useful purpose would be subserved by setting forth the evidence *in extenso,* or by a comprehensive review and criticism of it in a judicial opinion by the court. The cause was submitted without oral argument, and we do not gather from the briefs of counsel that there was any dispute either as to the suf-

ficiency of the defense, if it is established by the evidence, or as to the character of evidence requisite to that end.

The sole question is as to the preponderance of the evidence upon certain vital points, and mainly as to the length of time during which the admittedly adverse user has been enjoyed. The trial court, who heard the testimony, all of which was given in open court, found that the period was of less than ten years prior to the date of the beginning of the action, and perpetually restrained the defendant from consuming more than two-thirds of the water or diverting more than that portion thereof from the stream at the point of departure of the latter from his lands, with leave, however, to either party to make future application to the court for a modification of the decree with respect to the quantity of water of which the defendant should be permitted to make exclusive appropriation, or which should be permitted to flow over the lands of the plaintiff, for use for domestic and agricultural purposes. This decree, as a consequence of the facts found, appears to us to be in exact harmony with the rule announced by this court in *Meng v. Coffee,* 67 Neb. 500, and, as respects the facts, we think it ought to suffice to say that we have made a careful investigation of them, as disclosed by the record, and have not been led to the opinion that the trial court erred in his conclusion with reference to them.

We therefore recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, 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.

SAMUEL H. PERRY, APPELLANT, V. WILLIAM L. STAPLE ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,527.

Evidence examined, and *held* insufficient to prove an abandonment or adverse occupancy of a public road.

APPEAL from the district court for Antelope county: JOHN F. BOYD, JUDGE. *Affirmed.*

A. F. Mullen, for appellant.

George F. Boyd, contra.

AMES, C.

The petition alleges in substance that the plaintiff is the owner of a certain tract of land in Antelope county across which the county board of that county located and established a public road in the year 1887, but that more than six years prior to the beginning of this action the public abandoned the road for the use of various trails, drives or pathways across his lands, to protect his property against which he had built fences around the tract. It is further alleged that shortly before the beginning of this action one of the defendants, who is the county surveyor of said county, and the other of them, who is overseer of roads for the district in which said land lies, had proceeded, under the direction and authority of the county board, definitely to ascertain the line and location of said abandoned road, and to cut and destroy the fences of the plaintiff so far as they obstruct travel thereon. The plaintiff avers that he and his predecessors in title are, and have been for more than ten years last past, the owners and in the exclusive possession of the tract of land over and upon which said road was located, and for more than six years prior to the beginning of the action have been in the open, notorious, exclusive and

adverse possession of the particular strip of ground upon which the road lies, claiming to be owners thereof free from any interest therein or easement thereupon by the public by reason of said road, or otherwise, and that the conduct of the defendants, actual and threatened, is and will be of irreparable injury to him, which cannot be adequately compensated in an action at law. The prayer is for a perpetual injunction and for general relief. Issues were joined by answer and reply, and a trial was had resulting in a judgment for the defendants, from which the plaintiff appealed.

Before the trial began, the plaintiff was refused leave to amend his petition by substituting ten years for six years as the length of time of the alleged abandonment and adverse occupancy of the strip of ground comprised in the road. We think this request should have been granted, but it does not appear to us that he suffered any prejudice from its denial. We have not been assisted by oral argument of counsel in an investigation of the question of fact involved, but we have carefully read the entire record and bill of exceptions, and we concur in the opinion of the trial court that the evidence is insufficient to establish an abandonment or adverse holding of the highway for any length of time. The surface of the tract of land across which it stretches is composed of an exceedingly light, in some places drifting, sand. As a consequence, when a road has been used sufficiently to destroy the grass roots it becomes impassable, or nearly so, and travelers have on that account diverged from the established highway at various places and made and followed divers new and unauthorized paths and trails across parts of the lands of the plaintiff, and it is likely that in this way the use of parts or sections of the lawful road has been discontinued for several years, possibly, of some of them, for as great or a greater length of time as or than the plaintiff alleges. But, although the corporate authorities have established and improved another and better

highway which accommodates much of the travel in the vicinity, they do not appear to have done any act indicating an intent to abandon the one in controversy, nor do we think such an intent can be inferred from the fact that no attempt has been made to improve the latter, if it is capable of improvement, which is not shown. Neither do we think that the above described trespasses upon the lands of the plaintiff are indicative of an intent by the public to abandon the road, but rather of a disposition by individual travelers to avoid its difficulties by the unlawful use of private property.

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

OLDHAM and EPPERSON, 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.

MARY A. LANGAN ET AL., APPELLANTS, V. THOMAS WHALEN ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,537.

Costs. Nothing can be taxed as costs in an action except such items as are prescribed by statute or are expressly authorized by the consent or agreement of the parties.

APPEAL from the district court for Hall county: JAMES R. HANNA and JAMES N. PAUL, JUDGES. *Reversed with directions.*

O. A. Abbott, for appellants.

R. R. Horth, contra.

AMES, C.

Appellants prosecuted in the district court an action against the appellees, which resulted in a trial and judg-

ment for the defendants. From the judgment appellants desired to prosecute appeal or error to this court, and paid in advance to the official stenographic reporter of the court the compensation to which he was entitled by law for making a transcript of the oral evidence to be embodied in a bill of exceptions. The reporter neglected to make a transcript, and absconded from the state. Because of this circumstance, which deprived the plaintiffs of their right of review, they began and prosecuted an action to obtain a new trial in the district court. Appellees alleged, by way of defense, that the stenographic notes of the testimony made by the reporter were in the possession of his deputy, and that the latter was competent and willing to make the requisite transcript thereof. This allegation the plaintiffs denied, but upon its being supported by the oath of the deputy, a young woman, the court directed her to perform the service and continued the cause so as to afford her sufficient time for so doing. Afterwards she produced what she testified was a true transcript of the reporter's notes, but the plaintiffs objected to it as not being accurate and as being otherwise not in compliance with the statute. At the final hearing the court found "that no true and correct bill of exceptions can be procured," and rendered a judgment vacating the former judgment and granting a new trial as prayed. The order directing the transcript to be made by the deputy prescribed that each of the parties should bear one-half of the expense thereof until the final order of the court, but this direction was not complied with, and there was taxed against the plaintiffs, in the judgment awarding a new trial, the sum of $50.75 as an item of costs for the making of the transcript and of certain exhibits attached thereto. The plaintiffs moved to retax the costs by expunging this item, but the court overruled the motion, and they appealed to this court.

The order denying the motion to retax is sought to be sustained by the oath of the deputy, who testified that before making her transcript, but immediately after the court had ordered the same to be made, she had a conversa-

tion with the plaintiffs' attorney, outside the court room, in which she told him that her charge for doing the service would be 25 cents a folio, five times the statutory rate, and that the latter replied: "That's all right; that's very reasonable." This testimony was not disputed, but it was admitted over the objection and exception of the plaintiffs, and was, we think, wholly impertinent to the issue being tried. The most that can be inferred from it, if even so much can be inferred, is that the attorney entered into a contract with the deputy entitling her to certain compensation for certain contemplated services.

We suppose it to be unnecessary to cite authority to the effect that nothing can be taxed as costs in an action except such items as are prescribed by the statute or are expressly authorized by the consent or agreement of the parties. *Geere v. Sweet,* 2 Neb. 76. Not only is there in this record nothing tending to show such a consent, but the record discloses an explicit and persistent dissent and objection by the plaintiffs to the procurement of the services in question and to the incurring of any obligation with respect to them. If any agreement can be inferred from the conversation outside the court room, it falls far short of a consent that the amount of compensation there mentioned, or any other amount, shall be taxed as costs in the action.

We recommend that the order of the district court be reversed and the cause remanded, with instructions to retax the costs in conformity with law.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the order of the district court be reversed and the cause remanded, with instructions to retax the costs in conformity with law.

REVERSED.

NETTIE J. KIRKPATRICK ET AL., APPELLANTS, V. EMMANUEL G. SCHAAL, APPELLEE.

FILED DECEMBER 7, 1906. No. 14,540.

Deed: CONSTRUCTION. A deed purporting to convey a half of a government quarter section of land that has not been previously subdivided by plat or survey, or otherwise, is operative as a conveyance of a quantitative half of the tract without regard to the rules of the United States land department with reference to the subdivision of such tracts.

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

H. Z. Wedgwood, for appellants.

George A. Magney, contra.

AMES, C.

The northeast quarter of section 3, in township 12, range 11, Sarpy county, as the same was surveyed and platted by the United States government, contains 164.85 acres. The government did not plat or survey this quarter section into halves or quarters, and at the time of the transaction hereinafter discussed there was no plat or survey of it except that above mentioned. In 1897 Milton G. Armes was the owner and in possession of it, and in July of that year executed and delivered to the defendant, Emmanuel G. Schaal, a warranty deed purporting to convey to the latter the "south half" of said quarter section, and thereupon the latter, with the knowledge and consent of his grantor, went into, and has since remained in, possession of the south half in quantity of the tract, to wit, 82.425 acres, and has continuously since said time cultivated and claimed the whole thereof as his own. In 1901 Armes executed and delivered to Kirkpatrick a warranty deed purporting to convey to him the "north half" of said quarter section. At and since the time of the execution of

this latter deed there was and has been a fence, erected by the common grantor, extending easterly and westerly across the tract at a place a rod or so north of where a divisional line would have separated the tract into two exact halves, so that Kirkpatrick did not come into actual possession of quite one-half of the ground; but it was not claimed by either party that the fence was intended to be or was upon the divisional line between their respective properties. It is well understood that a quarter section of land by government survey ordinarily contains 160 acres of land, but that on account of inaccuracies in surveying certain sections upon the north or east boundary of a township may contain more or less than that quantity, and this fact accounts for the 4.85 acres of "surplus" land in the quarter section in question. The regulations of the United States land department provide that, when in such cases the government surveyor subdivides a quarter section, the excess or deficiency so arising shall accrue to or be taken from the north or west half, or both, as the case may be, of the tract. Hence arose a controversy between the plaintiffs and the defendant with respect to the ownership of the above mentioned 4.85 acres, Kirkpatrick claiming the whole, and Schaal claiming half of it. But, as we have said, the land had not been subdivided by survey or plat. This action was begun in ejectment by the successors in title of Kirkpatrick to recover the 4.85 acre strip. The defendant answered by cross-bill, pleading the foregoing facts and praying a decree quieting his title in one-half the tract. There was an express waiver of a jury and a trial to the court, who found in favor of the defendant and rendered judgment according with his prayer. The plaintiffs appealed.

We can discover no error. The conveyance to the defendant was first in time and was half of an undivided quarter section of land. Presumably the reference was to quantity which was ascertainable and capable of being rendered certain, rather than to a regulation of the United States land department, of which both parties may have

been ignorant, and with which no compliance had been, or thereafter could have been, attempted. The defendant was put in peaceable possession, or, as the older lawyers would have said, had "livery" of a quantitative half, and thereafter continued to occupy and enjoy it.

It will hardly be contended that his grantor could have ousted him of any part of it, and if he could not have done so, his subsequent grantee, who merely succeeded to his remaining rights, was equally powerless. There is some oral evidence of what was said and done by the parties at and subsequently to the time of the transaction which may, perhaps, tend to support the foregoing conclusion, but there is doubt about its competency or admissibility, and we have excluded a consideration of it as well from our opinion as from our decision.

We recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, 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.

ANDREW P. ROSENBERG V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED DECEMBER 7, 1906. No. 13,936.

1. **Railroads: FENCES: QUESTION FOR JURY.** Evidence examined, and *held*, that whether or not the defendant railroad company was excused for not fencing its track at the unincorporated station of Adelia was a question of fact that should have been submitted to the jury under proper instructions.
2. **Case Followed.** *Chicago, B. & Q. R. Co. v. Sevcek*, 72 Neb. 793, followed and approved.

ERROR to the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

J. E. Porter, for plaintiff in error.

J. W. Deweese, F. E. Bishop and *N. K. Griggs, contra.*

OLDHAM, C.

This was an action by the plaintiff in the court below to recover damages for stock killed by trains on the defendant's right of way near the station of Adelia in Sioux county, Nebraska. The only allegation of negligence in the petition, which appears to have been supported by evidence sufficient to have sustained a judgment for plaintiff, is the allegation of defandant's failure to fence its track along its switch limits at the station where the injury occurred. At the close of all the testimony, the court directed a verdict for the defendant and entered judgment on the verdict. To reverse this judgment plaintiff brings error to this court.

It appears from the evidence contained in the record that Adelia is a station on defendant's line of railroad 14 miles northwest of Crawford, Nebraska. At this station is a depot, attended by a station agent, and there is a sidetrack half a mile long. From the depot about 300 feet to the northeast is a general store and post office, about 100 feet to the southwest is a stock yard, and about 25 feet to the northwest is a water tank and a pump house. There is a private road crossing the railroad right of way at the east end of the station. One of the cattle killed was struck near the switch frog about a quarter of a mile east of the depot; another about 27 rails east; and another about 20 yards east and near the private road. The switch limits extend a quarter of a mile on either side of the station, and according to the testimony the track was not fenced within about a half a mile on either side. There is no dispute as to the fact that the cattle were actually killed by defendant's cars at about the points above mentioned.

Defendant sought to avoid its statutory liability for its failure to fence its track by attempting to show that public

convenience and safety in the transaction of business at the depot, as well as the safety of the employees of defendant in switching and operating trains on the side track, were paramount to the letter of the requirements of the statute.

In the recent case of *Chicago, B. & Q. R. Co. v. Sevcek*, 72 Neb. 793, and in opinion on rehearing, 72 Neb. 799, it was held, after a careful review of the authorities, that at an unincorporated station the railroad company is not bound to fence its road in such a manner as to prevent the public from having proper access to its station grounds, but that the failure to fence is only excusable to the extent of affording the public and the railroad company an opportunity for transacting business reasonably to be expected at such locality, and that the liability for not fencing should be determined by the necessity of not fencing at the point where the stock comes upon the railroad track. Now, clearly, the burden was upon the defendant to excuse itself from fencing by showing the necessity, under the above rule, for an open and unfenced station ground at the point at which the cattle sued for went upon the track where the injury occurred, and, unless this showing is so clear and convincing that reasonable minds could not differ in the conclusion reached, this question of fact should be submitted to the jury under proper instructions. We are fully convinced, after an examination of the record, that reasonable minds might well differ as to whether the business of the public with the depot and stock yard, or the proper operation of the railroad with due regard to its employees' safety, would have been in any manner interfered with by fencing the track at the points where the injuries occurred. We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES, C., concurs.

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

REVERSED.

ACME HARVESTER COMPANY ET AL., APPELLEES, V. EDWARD CURLEE, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,459.

1. **Principal and Agent:** ACCOUNTING: PLEADING: EVIDENCE. Where defendant is sued for an accounting for goods alleged to have been received under the terms of a written contract of agency, he may, under a general denial, show that the goods in controversy were received under another and different contract from that laid in the petition.
2. **Rulings:** ERROR. Action of the trial court in the exclusion of testimony examined, and *held* prejudicial.

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

Hall, Woods & Pound, for appellant.

E. M. Bartlett and *W. S. Morlan, contra.*

OLDHAM, C.

This is an appeal from a judgment rendered by the district court for Red Willow county in a suit for an accounting originally instituted by the Acme Harvester Company against the defendant, in which the First National Bank of Chicago was afterwards joined as plaintiff by leave of the court. The suit was based upon a written contract of agency entered into by the Acme Harvester Company with the defendant, and asked for an accounting of moneys, notes, machinery and other property, which was alleged to have come into the defendant's hands under the written contract of agency. The petition also prayed

for an injunction to restrain the defendant from disposing of the property, and for the appointment of a receiver to take charge of the property pending the litigation. The First National Bank of Chicago was the assignee of the contract, and held it as security for an indebtedness owed to the bank by the harvester company. The answer to the petition was a general denial. On a trial of the issues to the court, a judgment was rendered in favor of the plaintiff, as prayed for in its petition. To reverse this judgment defendant has appealed to this court.

The conditions of the written contract of agency, on which plaintiff relies, were set forth at length in the petition. The contract contains provisions for the sale on commission of machines and extras thereafter to be ordered by the defendant. The company did not unconditionally bind itself to furnish the machinery and extras when ordered, but agreed that it would do so "as fast as the same are ordered to the extent of its ability so to do; provided, however, if from any cause whatever it is unable to furnish the machines ordered, or any extras thereto, it shall not be liable for any damages whatever." The amount of the commission on certain of the machines named in the contract was to be determined at a later time than the signing of the contract, and the exhibit attached to the contract contained a certain list on which no prices were fixed or commissions named at the time of the signing of the contract. The contract also had a provision concerning the machines then on hand, but, as there were none in defendant's possession at the time it was signed, this portion of the contract has no bearing on the controversy, for the suit was brought only for an accounting for machines and repairs alleged to have been delivered to the defendant after the signing of the contract and under the conditions therein enumerated. Under this condition of the contract, the plaintiff, in support of its cause of action, offered the depositions of two of its agents, W. A. Howard and W. G. Michael, for the purpose of showing, among other things, that there were

thirteen or fourteen sample or second-hand machines delivered to defendant for sale on commission, on which no prices were fixed in the written contract and on which, by a subsequent oral agreement between the agent of the company and the defendant, a 20 per cent. commission was to be allowed on whatever the machines could be sold for. When plaintiff had closed its testimony, defendant was offered as a witness in his own behalf. After admitting his signature to the written agreement alleged upon, and that that was the only written agreement that he had signed for the sale of machines during that year, he was asked by his counsel:

"Q. You may state whether or not there was a subsequent oral contract between yourself and the Acme Harvester Company with reference to the handling of machinery for the company. A. There was."

"Plaintiff objects as not admissible under the issues joined, incompetent and irrelevant. Sustained. Defendant excepts. The defendant offers to prove by the witness on the stand that subsequently to the date of the alleged contract attached to the petition he did make an oral contract with the Acme Harvester Company through its agent, Mr. Howard, and that the machinery in controversy was sold to him and handled by him under and pursuant to said oral contract, and not in pursuance of the written contract claimed by the plaintiff. Plaintiff objects on the ground that no such issue is tendered by the answer, and on the further ground that whatever machinery he received from the plaintiff was to be disposed of according to the terms of the written contract. Sustained. Defendant excepts." Being thus excluded from introducing evidence to support the defense relied on under his general denial, defendant offered little other material testimony, and now assigns the action of the trial court in excluding this evidence as reversible error.

The first objection interposed to the testimony, which was that it was not admissible under the issues joined, we think is untenable from an inspection of the pleadings.

The suit was instituted for an equitable accounting between the plaintiff and defendant under an alleged written contract of agency, by the terms of which defendant was said to have received the machines and extras in controversy. This contract on its face was not completed at the time it was signed, and required other acts to be done by the parties before machines should be delivered under it; that is, it required defendant to order the goods and plaintiff, if it were possible and convenient, to fill the orders. Consequently, a general denial put in issue the question as to whether or not the goods were actually ordered and received under the terms of this contract. In other words, the writing, standing alone, did not evidence an executed contract, but rather an executory one requiring in some of its terms a subsequent oral agreement between plaintiff and defendant for its completion. Again, there is nothing in the contract that either specifically binds the defendant to order any number of machines from the plaintiff, or, as before pointed out, that required plaintiff to unconditionally furnish the machines when so ordered. Consequently, until the order for and delivery and receipt of machinery under the contract, there was no completed contract. It was therefore incumbent upon the plaintiff to show that the machines were actually sold and delivered under the contract alleged upon. *Kingman & Co. v. Davis,* 63 Neb. 578. It would then follow that, under a general denial, defendant might show the receipt of machines and extras under another and different contract from that alleged upon by the plaintiff. *Wiedeman v. Hedges,* 63 Neb. 103. *Young v. Jones,* 8 Ia. 219. In the latter case it was said: "It is evident that the defendant may be allowed to show, in any manner, that the contract laid in the petition was not the agreement of the parties; and what mode so effectual for this purpose, as to prove an entirely different contract and promise of defendant?" It must be remembered that this is not an action at law for the breach of an alleged written contract, but rather a suit in equity for an accounting for property charged to have

been received under such contract, so that at the threshold of the issue lies the question as to whether or not the goods were received by defendant under the contract alleged upon.

The second ground of objection, "that whatever machinery he received from the plaintiff was to be disposed of according to the terms of the written contract," rests upon a mere assumption of the truth of the allegations to be established. Of course, if the defendant received the goods under the terms of the written contract, he must account for them according to such terms, but, if, as he was attempting to prove, he received them under another and different contract, his accounting would be made accordingly.

Again, the court permitted the plaintiff to show in chief that a portion of the machinery was sold and delivered to defendant under a subsequent oral contract, and, having permitted plaintiff to go into this question in chief, it was clearly erroneous to prevent the defendant from showing how many of the machines were received under such subsequent oral agreement.

We are therefore of opinion that the learned trial court erred in excluding the testimony offered, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

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

REVERSED.

JOHN K. MCMILLAN ET AL., APPELLANTS, V. WILLIAM DIAMOND ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,513.

Appeal: EVIDENCE: PRESUMPTIONS. This court will take jurisdiction of an appeal in equity, where no bill of exceptions is filed with the transcript; but if the judgment of the district court is one which might be supported by competent testimony on questions of fact arising on the pleadings, in the absence of a bill of exceptions containing the testimony, we will presume that the judgment is supported by the evidence.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

C. O. Whedon and *Berge, Morning & Ledwith,* for appellants.

Field, Ricketts & Ricketts, contra.

OLDHAM, C.

This was a petition in equity by numerous plaintiffs, who were owners of lots and tracts of land within the corporate limits of the village of College View, Lancaster county, Nebraska, against the trustees of that village, in which the plaintiffs asked to have the various tracts of real estate owned by them excluded from the corporate limits of the village. The petition alleged, among other things, that many of the owners of the various tracts of land were not legal voters of the village, and for that reason they had no adequate remedy at law under section 101, ch. 14, art. I, Comp. St. 1905. The defendants answered plaintiffs' petition, admitting that the different plaintiffs were the owners of the tracts of land; that such tracts were situated within the corporate limits of the village, but denied that the lands were not suitable for village purposes, and alleged that plaintiffs and their grantors had joined in a petition asking for the incorpora-

tion of the territory sought to be excluded from the limits of the village. On issues thus joined there was a trial to the court, it appearing from the record that evidence was taken for two days on the disputed questions of fact arising on the pleadings, and that the cause was taken under advisement by the judge, who thereafter entered the following findings and judgment: "This cause, having been heretofore on a day of a former term of this court tried and submitted to the court, now comes on for final determination, and after due consideration, and being fully advised in the premises, the court finds that all of the property described in plaintiffs' petition was upon the 25th day of April, 1892, by the board of county commissioners of Lancaster county, Nebraska, acting upon a petition signed by over 200 residents of the territory in said petition described, incorporated in the village of College View; that no protest on the part of any of the relators herein was made to such action on the part of said board of county commissioners, nor was any appeal or error proceedings prosecuted therefrom. The court further finds that a bill in equity will not lie for the relief prayed for in plaintiffs' petition, but that the only remedy is by quo warranto proceedings to vacate the order of said board, in event it should appear that said order was made without authority. Wherefore, the court finds that there is no equity in the relators' bill, and that the same should be dismissed at their costs. It is therefore considered, ordered and adjudged by the court that this action be, and the same hereby is, dismissed at the costs of the relators, taxed at $99, for which execution is hereby awarded." To reverse this judgment plaintiffs have appealed to this court on a transcript of the proceedings, without having a bill of exceptions containing the testimony prepared and filed with the transcript.

The first question with which we are confronted is as to the jurisdiction of this court to entertain an equity appeal without a bill of exceptions containing the testimony offered in the court below. In the early case of *Arnold v.*

Baker, 6 Neb. 134, it was held that, where a demurrer had been sustained to plaintiff's petition, the action of the trial court in sustaining the demurrer might be reviewed on appeal, without a bill of exceptions. This holding has been followed in an unbroken line of decisions down to and including *National Wall Paper Co. v. Columbia Nat. Bank,* 63 Neb. 234, so that we take it as the settled rule of this court under the former statute that we should take jurisdiction in an equity appeal, where the transcript is filed within the time prescribed by statute, although no bill of exceptions is prepared and filed therewith. The new statute of appeals has not changed this rule.

While it is clear that we have jurisdiction of the cause, we cannot lose sight of the principle that a judgment of the district court is presumed to be right until sufficient of the record of the proceedings in which it was rendered is presented to this court to establish the contrary, and that, if the judgment be one which might be supported by competent testimony on disputed questions of fact properly pleaded, we will presume, in the absence of a bill of exceptions containing the evidence, that such testimony was produced at the trial of the cause.

While it is true that in the judgment rendered by the trial court the court expressed the opinion that a bill in equity will not lie for the relief prayed for in plaintiffs' petition, yet it also recites findings of fact with reference to the incorporation of the village and the acquiescence of plaintiffs therein that might, if supported by proper testimony, sustain the judgment that there was no equity in the bill, even if a bill in equity would lie for the relief sought. On this latter question, however, we express no opinion; but, because the record shows that testimony was taken at the trial, and because there were disputed questions of fact on which plaintiffs' theory of the case depended, we think it our duty to presume, in the absence of a showing to the contrary, that the evidence introduced was sufficient to support the judgment of the trial court. If a demurrer

had been sustained to the petition, or if on a demurrer *ore tenus* the court had excluded the evidence offered by plaintiffs, the record would then present the question of the jurisdiction of a court of equity to grant the relief prayed for. But there was no demurrer filed, and there is no record showing that any evidence was excluded, and the facts on which plaintiffs relied for equitable relief were put in issue by defendants' answer. Hence, we feel constrained to presume that the judgment of the trial court was sustained by the evidence.

We therefore recommend that the judgment be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

ESTATE OF CHRISTIAN G. RAPP, APPELLEE, V. CHARLES S. ELGUTTER, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,535.

1. **Executors and Administrators:** CONTRACT FOR LEGAL SERVICES. Where a contract for legal services which is reasonable and beneficial to the estate has been entered into by an administrator or executor, such contract may be upheld and enforced by the court having charge of the administration of the estate.
2. **Attorney and Client:** CONTRACT: ESTOPPEL. An attorney at law who agrees with an executor or administrator to conduct certain legal business of the estate for a sum named is estopped to deny that such sum is a reasonable consideration for the services rendered pursuant to such agreement.

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

Charles S. Elgutter, pro se.

T. J. Mahoney, contra.

OLDHAM, C.

On the 14th day of January, 1902, Christian G. Rapp departed this life in Douglas county, Nebraska, leaving a last will and testament, in which he nominated L. E. Roberts as executor, and by the terms of the will provided that, after the payment of his debts, the residue of his estate should be devoted to the erection of a suitable monument over the grave of his parents. When the will was offered for probate by the proponent, a contest was filed against it, and, pending the probate proceedings, Roberts was appointed and qualified as special administrator of the estate. He thereupon employed the claimant in this cause of action, Charles S. Elgutter, a practicing attorney at the bar of Douglas county, to defend the contest of the will and to perform other services for him as special administrator of the estate. At the trial of the contest in the county court, judgment was rendered in favor of the proponent, and the will was admitted to probate. This judgment was appealed from by the contestants, but the appeal was dismissed on motion of the proponent in the district court. After the will was finally admitted to probate, Roberts qualified as executor and proceeded with the administration of his trust. Mr. Elgutter filed his claim in the county court for legal services rendered in behalf of the special administrator and in the defense of the contest of the will, all in the sum of $500. The executor contested this claim, alleging that, before rendering any services in the contest of the will, Mr. Elgutter had agreed to try the case for $50 in the county court and $50 additional compensation if the case was appealed to the district court. It was agreed between the parties that the extra services rendered for the special administrator were of the reasonable value of $50, and, on a hearing of the claim in the county court, judgment was rendered for $150 in favor of the claimant. To reverse this judgment the claimant appealed to the district court, where, on a trial to the court and jury, a verdict was returned in

favor of the claimant for $150, the amount allowed by the county court. This verdict was set aside for numerous errors alleged in a motion for a new trial filed by the claimant, and a new trial granted. At the subsequent trial, a jury was waived by consent of the parties and the cause was submitted to the court, and judgment was again rendered in favor of the claimant for $150. To reverse this judgment the claimant has appealed to this court.

As before stated, the reasonable value of the extra services rendered for the special administrator was agreed upon, so that the only question at issue here is as to the allowance for services rendered in the will contest. The testimony of the executor tends to show that Mr. Elgutter agreed to defend the will for the specified sum of $50 in the county court, and $50 in the district court. His testimony is corroborated in this particular by the evidence of the clerk of the probate court, Mr. Sunblad, who was present when the contract was made. He also testified, however, that Mr. Elgutter said: "It didn't make much difference what arrangements they might make, that the court would fix the fee anyhow." Mr. Elgutter admitted that he may have named $50 in each of the courts as the probable fee, but that this was merely a matter of opinion, without knowledge of the full extent of the services to be rendered, and that what he intended to offer was to render the services for such sum as the court would find to be reasonable and just. We are satisfied, from an examination of the testimony, that the trial judge was fully justified in finding, as a matter of fact, that the conversation had at the time of the employment led the executor to believe that the sum intended to be charged for the services was $50 in each of the courts, and no more.

The claimant practically concedes that the evidence is sufficient to support the findings of fact in this branch of the case, but he contends that, because the contract with Roberts was not binding upon the estate, it could not and should not be held to have bound the claimant; and that, as the trial court in his special finding held that, aside

from the existence of the contract, the services rendered by the claimant were shown by the evidence to have been worth more than $100, this special finding is inconsistent with the general finding and judgment of the court. Many hair-splitting distinctions are indulged in by the claimant in attempting to determine the exact capacity in which Roberts was acting when he made the alleged contract for services in defending the will. It is contended that, although at that time he was acting as special administrator, Roberts was not executor, but simply proponent of the will, and that as administrator he had no interest in the outcome of the contest of the will and could not contract with reference to it. So far as the conclusion about to be reached is concerned, we do not care to enter into a discussion of these niceties. It is clear from the record that, in view of his nomination as executor of the will, Roberts qualified as special administrator and offered the will for probate, and, when the will was finally admitted to probate, he qualified as executor. So that, in any event, he acted in a trust relation toward the effects of the estate when the contract was made. And, while it is true that he was not authorized in his trust relations to bind the estate by an unreasonable contract for legal services, it is equally true that in any one of them he was entitled to a just and reasonable compensation for legal services procured for the benefit of the estate. So that the question of the legality or illegality of the contract at issue depended upon its being reasonable and beneficial to the estate. *McCoy v. Lane,* 66 Neb. 847. The fact that an executor or administrator cannot bind the assets of his estate for the payment of an exorbitant or unreasonable fee for legal services does not prevent an attorney at law from binding himself in a reasonable and beneficial contract for services to be rendered in behalf of such executor or administrator. And we think that, in sound reasoning and good morals, an attorney who has induced an administrator, executor, or guardian to employ him to represent the interests of an estate by the use of language that would

reasonably lead such executor, administrator or guardian to believe that such services would not exceed a sum named is, and should be, estopped from demanding of the estate a greater sum than that suggested as an inducement to his employment.

There is a further contention in the brief of the claimant that, because a motion for a new trial was granted after the first trial of the cause in the district court, and because one of the grounds of the motion was the refusal of an instruction practically directing a verdict for the plaintiff for the reasonable value of the services rendered as shown by the testimony, the action of the trial judge sustaining this motion was binding as the law of the case on the judge who subsequently tried the cause. This contention is wholly unavailing in any view of the case, and especially in view of the fact that numerous reasons were alleged in the motion for a new trial, and there is nothing in the judgment granting it which shows the reason of the judge for doing so.

Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

ANDREW YOUNG ET AL., APPELLANTS, V. CITY OF ALBION ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,827.

Appeal: TEMPORARY INJUNCTION: FINAL ORDER. An order dissolving a temporary injunction, and which does not determine or make some final disposition of the case in which the injunction was issued, is not final, and is not alone, or until after a final judgment in the action, reviewable on error or appeal in this court. *Meng v. Coffee*, 52 Neb. 44, followed and approved.

APPEAL from the district court for Boone county: JAMES N. PAUL, JUDGE. *Dismissed.*

E. E. Spear and *H. C. Vail,* for appellants.

M. W. McGan, J. S. Armstrong and *Edwin Vail, contra.*

OLDHAM, C.

Prior to the 28th day of May, 1906, the city of Albion, a city of the second class, having less than 5,000 inhabitants, had been divided by ordinance into three wards, each ward having two members of the council. On the 28th day of May the mayor and council of the city, by ordinance duly enacted, provided for dividing the city into but two wards and defining the boundaries of each of the wards so provided for. The ordinance also contained a provision that all members of the council who had been duly elected thereto should continue in office until the expiration of their respective terms. On June 2, 1906, the plaintiffs herein, as resident taxpayers and qualified voters of the city, filed a bill in equity, in which they alleged the passage and publication of the ordinance above referred to by the mayor and council of the city of Albion, and that prior thereto the city had been divided into three wards, containing practically the same number of voters and the same area of territory, and that the change contemplated by the division provided for in the ordinance of May 28 was not nearly as equal or practical as to either area or inhabitants as the former division of the city in the ordinance repealed by the act of May 28. The petition then set out that the ordinance alleged against attempted to illegally continue certain members of the council as councilmen from wards from which they were not elected. It also alleged that the council is about to pay for the publication of the ordinance objected to, and will, unless restrained, illegally pay for salaries of officers contemplated in said ordinance, and will illegally expend public money

in holding elections in the wards provided for, and that they will attempt to transact the business of the city in an illegal manner under the provisions of this ordinance, unless restrained by an order of the district court. The prayer of the petition is, in substance, that the ordinance be declared illegal and void, and that the defendants be enjoined from enforcing or attempting to enforce the provisions thereof in any manner, and from disbursing any public money for the publication of the ordinance or in payment of any expenses incurred by the defendants, or any of them, thereunder, and from doing any act or thing whatsoever that was made possible by said ordinance that could not have been done if said ordinance had not been enacted. On an application to the county judge of Boone county, in the absence of the district judges, a temporary order of injunction, as prayed for in the petition, was procured on the 2d day of June, 1906. On the 8th day of June an answer to the petition was filed in the district court, and on the 9th day of June a motion to dissolve and vacate the temporary order of injunction was filed. Notice of this motion was duly served upon the attorneys of the plaintiffs, and on the 13th day of June the motion was heard, and the following judgment was rendered: "Now, on this 14th day of June, 1906, one of the days of the June, 1906, term of court, trial hereof was concluded, evidence having been fully adduced herein, and the cause was submitted to the court on the pleadings, the stipulations in open court made, and the evidence, and the court, being fully advised in the premises, finds that there is a want of equity in the petition, and it is therefore by the court ordered, adjudged and decreed that the temporary order of injunction heretofore granted herein be, and the same hereby is, vacated, set aside and dissolved, to which finding and judgment the plaintiffs except, and are allowed 40 days in which to prepare and serve a bill of exceptions, and the bond necessary to be filed on dissolution of this injunction to supersede the judgment of this court is hereby fixed in the sum of $3,000, and to the fixing

of a supersedeas bond in any amount whatever the defendants and each of them except." To reverse this order and judgment, plaintiffs have appealed to this court.

A motion was filed in this court by the defendants to dismiss the appeal, because the order from which the appeal is taken is interlocutory and not a final order. By agreement of the parties, argument on the motion to dismiss was continued until the final hearing of the cause on November 21, 1906. We think the order appealed from is, on its face, clearly interlocutory and not a final order. The motion on which it was rendered sought to vacate and set aside the injunction theretofore granted, that is, the temporary order granted by the county judge. No other relief was asked in the motion, and the judgment of the court is "that the temporary order of injunction heretofore granted herein be, and the same hereby is, vacated, set aside and dissolved." There is no order made that touches upon a final disposition of the plaintiffs' petition, and from aught that appears the petition and answers thereto are still pending in the district court for Boone county, awaiting such final order and judgment as the court may hereafter render. In the early case of *Scofield v. State Nat. Bank*, 8 Neb. 16, it was held that an order of a judge of a district court dissolving a temporary injunction is not final, but interlocutory merely, and insufficient to support a petition in error. Again in *School District 15, Douglas County, v. Brown*, 10 Neb. 440, it was held that an order dissolving a temporary injunction could not be reviewed upon appeal, and this in a case where the only relief sought was an injunction. In the later case of *Meng v. Coffee*, 52 Neb. 44, the former decisions of this court were reviewed, and the rule was announced in the syllabus that "an order dissolving a temporary injunction, and which does not determine or make some final disposition of the case in which the injunction was issued, is not final, and is not alone, or until after a final judgment in the action, reviewable on error or appeal to this court."

We therefore conclude that, under the well-established

rule of this court, the motion to dismiss the appeal should be sustained, and we recommend that the appeal herein be dismissed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the appeal herein is

DISMISSED.

UNION PACIFIC RAILROAD COMPANY ET AL. V. LILLIE EDMONDSON, ADMINISTRATRIX.

FILED DECEMBER 7, 1906. No. 14,307.

1. Master and Servant: INJURY: EVIDENCE. In an action for damages caused by alleged defects in defendant's machinery, evidence of the same defective condition immediately before and after the accident complained of is admissible for the purpose of proving the condition of the machinery, and, as to its prior condition, for the additional purpose of showing knowledge on the part of the defendant.

2. Evidence: DECLARATIONS. In an action for the negligent killing of an employee by a railroad company, alleged as the result of a defective condition in the engine, evidence of a declaration of the engineer in charge regarding such defective condition, made at the time, and under such circumstances as to raise the presumption that it was an unpremeditated and spontaneous explanation of the casualty, is admissible as a part of the *res gestæ*.

3. Appeal: RECORD. To obtain a review of the rulings of the district court on objections to alleged misconduct of counsel in addressing the jury, the record must show, not only that objections were made, but the matter objected to, and the rulings of the court thereon.

4. Trial: WITHDRAWING REST. The district court may permit a party to withdraw his rest and introduce additional evidence, when it appears that the same is required in the furtherance of justice, and no undue advantage is thereby acquired over the adverse party.

ERROR to the district court for Platte county: CONRAD HOLLENBECK and JAMES G. REEDER, JUDGES. *Affirmed.*

John N. Baldwin and *Edson Rich,* for plaintiffs in error.

John J. Sullivan, contra.

EPPERSON, C.

Cameron Edmondson, a brakeman in the employ of the defendant company, was thrown from the top of a freight car by the sudden stopping or slacking of the train on which he was employed, and was instantly killed beneath the car. The administratrix of his estate brought this action to recover damages, alleging that the death was the result of defendant's negligence in maintaining a defective air pump and apparatus attached to the engine in control of the train. It was further alleged that defendant Herod was in the employ of his codefendant, and that it was his duty to see that the engine was kept in good order and was safe and fit for use. The undisputed evidence shows the following facts: At the time of the accident the train was engaged in switching at Spalding, in this state. In the course of the switching, the deceased, as his duty required, gave a signal for a service or gradual stop. In response, the engineer properly adjusted the lever. There was a change in the motion of the train, and the deceased, who was standing near the rear end of the last car, in a train of about 11 cars, was thrown to the ground and killed. Plaintiff's theory is that, on account of the defective condition of the machinery, the train, instead of coming to a service stop, came to an emergency or sudden stop, which was the proximate cause of Edmondson's death. Plaintiff recovered $3,000 in the court below, and defendants bring error.

Defendants contend that the court erred in admitting evidence of the defective condition of the engine, from three to six days subsequent to the injury, arguing that such evidence was not proper for the purpose of showing negligence on the part of the defendants. The evidence

was given by a former employee of the defendant company and is as follows: "Q. Do you remember the occasion while you were in the employ of the Union Pacific Railroad Company, that engineer Dolan started out with his engine, and after having gone some distance on his trip he returned with the engine to the roundhouse, and leaving it there for repairs and taking out another engine to complete his run? A. I remember of his bringing the engine back to the roundhouse shortly after the accident in which Mr. Edmondson was killed." So far this testimony only shows that the engine was taken from the roundhouse and returned. Reasons for its return are not apparent. The evidence was, without more, immaterial but was not prejudicial. Continuing, this witness gave testimony, objected to, in substance as follows: "I don't know much about the air, but I know it was out of repair quite often. Q. Do you know it was ever reported for repairs? A. Not positively. Of course I saw some reports * * * I noticed once he (the engineer) made a report for the air pump to be fixed. * * * That was shortly after Mr. Edmondson was killed. * * * It might have been three days afterwards, and it might have been six." It is a rule lately followed in most courts where this question has been considered that evidence of subsequent repairs to machinery alleged to have caused an injury is incompetent as proof that the defendant was guilty of negligence. *Columbia & P. S. R. Co. v. Hawthorne,* 144 U. S. 202; 1 Wigmore, Evidence, sec. 283; 1 Elliott, Evidence, sec. 186; *Morse v. Minneapolis & St. L. R. Co.,* 30 Minn. 465. The evidence was, however, proper for the purpose of showing the defective condition of the machinery. It was incumbent upon the plaintiff to show the dangerous condition of the machinery, the defendants' knowledge thereof, and their negligence in maintaining the same. In 2 Labatt, Master and Servant, sec. 820, it is said, in part: "But a more logical theory is embodied in the statement that, in an action by an employee against an employer for an injury caused by a defect in the plant, it is

not necessary to adduce evidence of the condition of the plant at the precise moment the casualty occurred, and that it is enough to prove such a state of facts shortly before or after the casualty as will induce a reasonable presumption that the condition was unchanged."

Defendants also except to evidence showing that within 30 days prior to the accident the apparatus in question failed to respond properly and that its defective operation was the same as at the time of the accident. The same rule applies to this testimony as to the evidence regarding the subsequent condition of the machinery, and it is admissible for the additional purpose of showing knowledge on the part of the defendants. In *Brewing Co. v. Bauer*, 50 Ohio St. 560, it was held: "In an action by an employee against his employer for damages resulting from an injury received in operating a machine caused by its defective construction, the defects being charged to the negligence of the employer, it is competent to prove that, on a former occasion, while it was being operated by another, the machine worked in a manner similar to when the plaintiff was injured. But such evidence is only competent to prove the defective character of the machine and the employer's knowledge of the fact; it is not competent to prove actionable negligence on the part of the employer at the time the plaintiff was injured." Being competent for one purpose, its admission over a general objection was proper. The defendant failed to ask for an instruction limiting the consideration of this evidence by the jury and may not now complain that it was admitted without qualification. 1 Elliott, Evidence sec. 151.

During the trial plaintiff called several witnesses who testified that at the time of the accident and when the dead body of Edmondson was discovered by the engineer in charge of the train, he said: "My God! There must be something the matter with the air. It has bothered me ever since I left Genoa." Defendants objected to this evidence, and now contend that its admission was reversible error. The engineer had been in charge of the

train from Genoa to Spalding, the place of the accident. He was in control of the engine, though not personally operating it, when Edmondson was killed. He was in the line of his duty when he made the statement. Defendants contend that the statement, if made, was only the conjecture of the engineer as to a possible cause of the accident and for that reason was not admissible as a part of the *res gestæ*. The exclamation, in our opinion, was a statement of a fact, or a declaration made under such circumstances as to raise the presumption that it was the unpremeditated and spontaneous explanation of the fatal accident. Being such it was a part of the *res gestæ* under the rule often followed by this court. *Union P. R. Co. v. Elliott*, 54 Neb. 299; *Missouri P. R. Co. v. Baier*, 37 Neb. 235; *Collins v. State*, 46 Neb. 38; *City of Friend v. Burleigh*, 53 Neb. 674. The testimony objected to being proper, we reach the conclusion that the verdict was sustained by sufficient evidence. Defendants present no theory of the accident, and the inference deducible from the evidence is consistent with plaintiff's theory.

Defendants contend that a new trial should be granted on account of alleged misconduct of plaintiff's counsel. During the cross-examination of one of the defendants' witnesses, the engineer, plaintiff's counsel asked: "Before the man was cold, before the blood stopped flowing, you directed Speice to hunt up evidence, didn't you?" The only objection interposed was that it was incompetent, irrelevant and immaterial. The question was not answered. Then followed: "Was the man's body cold before you directed Speice to look around for evidence?" This was objected to as "incompetent, irrelevant and immaterial, and asked for the purpose of prejudicing the jury." This objection was overruled. We do not think this question would necessarily prejudice the defendants in the minds of the jurors. This, however, seems to have been the object of counsel and such conduct might well have been reprimanded by the court. The facts brought out might have affected the credibility of the witness as

showing his interest. Such purpose of the query would be legitimate. It seems to us that the question was not so plainly prejudicial as to require reversal of the judgment.

During the argument of the case to the jury by plaintiff's counsel, certain statements were objected to by defendants as improper. To some of the objections no ruling was made by the court, but counsel was told to confine his argument to the evidence. No definite ruling was asked for by the defendants, nor did they request an instruction directing the jury to disregard the remarks of counsel. The prejudicial statements do not appear in the record. Not only should the record show the objections made, but also the matter objected to, and the rulings of the court thereon. In the case of *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 134, this court, after citing many prior decisions pertaining to the conduct of attorneys in the argument of cases to the jury, said: "These cases establish the further proposition that the defeated party in a litigation, in order to take advantage of the alleged misconduct of opposing counsel, must call the attention of the trial court to such misconduct at the time it occurs, ask the trial court for protection therefrom, preserve in a bill of exceptions the alleged misconduct of counsel, with the rulings of the trial court and the party's exceptions thereto, and present the record of what occurred and the rulings of the trial court as an assignment of error in the proceedings brought here." In the case at bar the record only shows the objections made. This is insufficient to show that the statements appearing in the objection were in fact made by counsel. Neither can we conclude that the district court erred in the matter, as his rulings do not appear of record, nor did the defendants insist upon a ruling. In *Chicago, B. & Q. R. Co. v. Krayenbuhl,* 70 Neb. 766, it was held: "Alleged misconduct of counsel in addressing the jury must be objected to when the language is used, and a ruling of the trial court procured on such objection and

an exception saved to the ruling to make the objection available in this court."

After plaintiff rested her case, defendants asked for a directed verdict. This request was denied. The court thereupon permitted plaintiff to withdraw her rest and introduce proof showing the administrative capacity of the plaintiff. It is established as a rule of practice in this state that the trial court may permit a party to withdraw his rest and introduce additional evidence, when the same is required in the furtherance of justice, and no undue advantage is thereby acquired over the adverse party. *Tomer v. Densmore,* 8 Neb. 384; *McClellan v. Hein,* 56 Neb. 600; *Fremont, E. & M. V. R. Co. v. Crum,* 30 Neb. 70. The action of the trial court in permitting additional testimony to be introduced was not an abuse of discretion.

We find no error in the record, and recommend that the judgment of the district 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.

THEODULE KERTSON, APPELLANT, V. BARTHOLOMEW KERTSON ET AL., APPELLANTS; MARIE V. DESAUTELS ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,435.

1. Contract: RATIFICATION. When a party who claimed he had been fraudulently induced to enter into a contract by reason of the concealment of material facts afterwards employs counsel, and after full investigation ratifies and indorses the contract and accepts benefits under it, he is bound by such ratification, and cannot again question the validity of the original contract.
2. Evidence examined, and *held* to uphold the judgment of the district court.

APPEAL from the district court for Madison county: JOHN F. BOYD, JUDGE. *Affirmed.*

M. B. Foster, Tibbets & Anderson and *J. W. Molyneaux*, for appellants.

Allen & Reed and *M. D. Tyler, contra.*

EPPERSON, C.

George S. Kertson, a bachelor, 76 years of age, and a resident of Madison county, in this state, died in said county on the 11th day of April, 1902, seized of a tract of 480 acres of land lying in said county, which is the subject of this litigation. He left surviving him four brothers and one sister of the half and one of the full blood, and issue of a deceased sister. Of these persons, three of the brothers and one George E. Marquette, sole issue of one of the deceased sisters, were residents of the United States and the remainder were residents of the Dominion of Canada and subjects of the British crown. All of these persons claimed to be heirs at law of the deceased. He also left at his death an instrument purporting to be his last will and testament by which he disposed of his entire estate, except the said tract of land, to persons other than those above mentioned. Some two years prior to his death Kertson executed a deed purporting to convey the land to William A. Lafleur and deposited it with the First National Bank at Madison, together with a written direction to the bank that the instrument should be retained by it and should not become effective until after his death, when it should be delivered to the grantee.

Upon the death of the grantor, the deed was delivered to Lafleur, who filed it for record with the register of deeds of the county, and the will was also proposed for probate by one of the executors therein named. The sister and half sister and one of the brothers and the issue

of one of the deceased sisters of the deceased, through William V. Allen and Willis E. Reed, as their attorneys, filed objections to the probate of the instrument on the ground of the alleged mental incompetency of the testator. The objections were overruled and an order of probate rendered from which an appeal was taken to the district court. By this instrument a legacy and bequest were given to Lafleur aggregating about $6,000 in amount and value. At about the same time A. Napoleon La Forest and others, claiming as heirs at law of the deceased, began an action by Allen & Reed, as their attorneys, to restrain Lafleur from disposing of or incumbering the land until such time as the title thereto could be judicially ascertained and determined, and praying that it be declared and quieted in themselves and others who should be found to be such heirs. On the 3d day of June, 1902, a written stipulation in this action was entered into to the effect that, in order to prevent delay in the probating of the will, and tedious and expensive litigation, Lafleur should and did relinquish all claims as beneficiary under said will, and should convey the land by separate deeds to one Peter Rubendall in trust, one-half thereof for the heirs at law of the deceased, and the other half for William V. Allen and Willis E. Reed. And, in further consideration of the premises, it was stipulated that Lafleur should be paid the sum of $6,000 in money out of the first distribution of the proceeds of the personal estate of the deceased, which sum should be charged as a lien upon the land, and should become due in April, 1903, until which time the deeds should be in escrow. This instrument was signed by Lafleur, by his attorneys of record, and by Allen and Reed, as attorneys for certain of the heirs at law named therein, and purported to be for the benefit of all other such heirs as should see fit to participate therein and in the settlement thereby effected. One Mary Sweeney, a resident of the state of Illinois, was bequeathed by the will a legacy of $5,000, and after the execution of the foregoing agreement Allen

& Reed carried on such negotiations with her as resulted in the execution by her on the 11th day of November, 1902, of a written assignment to them, for the benefit of their clients, of her right thereto for the sum of $2,500 in money, which they advanced.

On the first day of May, 1903, a further stipulation was entered into by and between Lafleur and all the heirs at law of the deceased, by which the former stipulation of June 3, 1902, was expressly ratified and confirmed, and the heirs expressly assumed and agreed to pay the $6,000 reserved to Lafleur out of the first moneys derived from a distribution of the proceeds of the personal estate, and by which Lafleur again stipulated to relinquish his demands upon the estate and to make conveyance of the land to or for the benefit of the heirs and Allen & Reed pursuant to the former agreement. This latter stipulation was executed by Lafleur, by his attorneys of record, and by George E. Marquette in person, and as agent of Raymond, Theodule and Bartholomew Kertson, three of the brothers of the deceased, and by the rest of the heirs, by Allen & Reed, as their attorneys. At the same time a one-fourth interest in or part of the above mentioned Mary Sweeney legacy, amounting to $625.65, was assigned by Allen & Reed for the benefit of George Marquette and Raymond, Theodule and Bartholomew Kertson, all of whom acknowledged and approved of the assignment in writing. On the previous day, to wit, April 30, 1903, all the four last named persons had executed, the first of them by his own hand, and the other three by Marquette, as their agent, an express ratification in writing of all former agreements and contracts entered into between Allen & Reed and all or either of said persons. At or about the same time Raymond, Theodule and Bartholomew, each by quitclaim deed, conveyed his interest in the land to Marquette, and the latter executed a mortgage thereon to secure a promissory note for $2,700 to the attorneys of himself and his grantors. And at the same time, also, each of the four persons last named received

from Rubendall written assignments of the several interests of each in the estate of the deceased formerly acquired by said Rubendall. Subsequently the appeal in the probate proceeding was abandoned, and the administrator with the will annexed paid to Lafleur the stipulated sum of $6,000 and interest, and obtained his receipt therefor. The affairs of the estate were thereupon fully administered upon and settled.

This action was begun in February, 1904, by Theodule Kertson in behalf of himself and Raymond and Bartholomew, all brothers of the deceased, and George E. Marquette, sole issue of a deceased sister of the deceased, claiming that they were the sole heirs at law of the deceased to the exclusion of all others claiming to be such, for the reason that the latter were nonresident aliens and excluded by the statutes of this state, and alleging the invalidity of the deed from the deceased to Lafleur and of the conveyance from Lafleur to Rubendall, on the grounds that the latter instruments were without consideration, and were executed with notice that the former was void, both because it was testamentary in character and because of the alleged mental incapacity of the deceased at the time of its execution, and praying to have said instruments canceled and set aside, and title to the entire tract quieted, one undivided fourth in each of themselves in severalty. Raymond and Bartholomew Kertson and Marquette were made nominal defendants, and filed answers and cross-petitions, alleging substantially the same matters contained in the petition of the plaintiff. Allen & Reed filed answers and cross-petitions, alleging their employment by written contract with the plaintiff and cross-petitioners, already named, and others claiming to be heirs at law of the deceased, for the purpose of prosecuting and defending suits, actions and proceedings at law and in equity necessary for testing and determining the validity of the will and of the conveyance by the deceased to Lafleur, and for collecting and preserving the estate of the deceased, with full authority to compromise and settle any such litiga-

tion in such manner as to them should seem proper, and stipulating that they should be entitled to demand and receive or retain, in consideration of their services in the premises, an undivided one-half of all of said estate they should thus be able to obtain or recover. And they further alleged that the said conveyance of an undivided one-half of said tract of land, pursuant to the stipulations before mentioned, to the said Rubendall in trust for the said Allen & Reed was made in consideration of said stipulations and agreements and of the services thereby contemplated and rendered thereunder.

An explicit analysis of the 800 pages of the pleadings and evidence would serve no useful purpose. The only important issue presented is founded upon the contract of employment entered into by the appellants and Allen & Reed. This contract and the subsequent ratification agreement of April 30, 1903, appellants contend is not binding upon them because, it is alleged, they were deceived and misled into signing them. The evidence tends to disclose that prior to April 30, 1903, appellants doubted the integrity of Allen & Reed. They were suspicious that they had been imposed upon in the agreement previously made. Being thus apprehensive that the attorneys had perpetrated a fraud upon them, Marquette, armed with authority to represent Raymond, Theodule, and Bartholomew Kertson, came to Madison county and employed resident counsel of his own selection, who were in no way identified with Allen & Reed, and who, it appears, were industrious and faithful in their employment. whatever facts, if any, were withheld from appellants when the original contract of employment was entered into were known to Marquette on April 30, 1903. A discussion, therefore, of the original transactions we deem unnecessary. Suffice to say that on its face there is no appearance of fraud or unconscionable or unprofessional conduct on the part of the attorneys. And the record discloses that they rendered valuable services, and the com-

pensation contracted for is not alleged nor proved to be excessive.

After Marquette had investigated the matter and employed counsel as above stated, acting for himself and his uncles, he signed the following agreement: "Madison, Neb., April 30, 1903. Upon due consideration and being fully advised in the premises of all facts and circumstances respecting the matter of the estate of George S. Kertson, deceased, I, George E. Marquette, for and on behalf of myself and my uncles, Raymond Kertson, Theodule Kertson and Bartholomew Kertson, for whom I am duly authorized to act, do hereby ratify and confirm the written contract heretofore entered into between said firm of Allen & Reed and the undersigned George E. Marquette, and also the contracts respectively entered into between Allen & Reed and Theodule Kertson, Raymond Kertson and Bartholomew Kertson, respectively. (Signed) George E. Marquette. Raymond Kertson, by George E. Marquette, his agent. Theodule Kertson, by George E. Marquette, his agent. Bartholomew Kertson, by George E. Marquette, his agent. Witness: M. B. Foster."

Appellants further contend that Marquette had no authority to sign the above agreement in their behalf and that it was signed in ignorance of the true state of affairs. This contention is incredible and is contradicted by the full history of the transaction. Contemporaneous with the agreement above set out, Marquette had, while acting in the same capacity, entered into other arrangements and contracts under which he and those for whom he was acting received money and property which they still retain. It is apparent from the record that Marquette's visit to Madison county was for the purpose of investigating the conduct of Allen & Reed, and in addition thereto to bring about a settlement of the estate. The several contracts signed by him promoted these objects, and the administration of the estate proceeded, and a settlement of the entire matter was effected, as far as the litigation then pending or threatened and the probate proceedings were con-

cerned. By their ratification of the former proceedings they themselves wholly exonerated Allen & Reed, and the attack they now make is wholly unjustifiable.

The district court found the issues joined in favor of the defendants Allen & Reed, adjudging them to have a first and prior lien upon the tract of land to the amount of one-half the value thereof, and ordered the tract sold for the purposes of partition, and the proceeds distributed among the several persons, lienors and heirs at law of the deceased, in manner and amounts specifically determined by the decree. Lafleur filed a cross-bill in which he prayed to be released from his covenants of warranty in the deeds executed by him to Rubendall, and it was so adjudged, rightly so, we think, because, as the matter eventuated, he served merely as a conduit through which the title passed from the deceased to the heirs at law of the latter, Lafleur, as the settlement established and as the court in effect adjudged, never having had any beneficial interest therein. Other parts and dispositions of the decree which are not in controversy and which are not affected by this decision need not be here set forth.

We are satisfied that the judgment is fully sustained by the pleadings and the evidence, and recommend that the judgment 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.

JAMES E. LEYDA, APPELLANT, V. ISHAM REAVIS, APPELLEE.

FILED DECEMBER 7, 1906. No. 14,495.

Trust Funds: PETITION: SUFFICIENCY. In an action to subject a trust fund to the payment of services rendered, it is necessary to allege not only the existence of the trust fund, but that some amount remains due for such services.

APPEAL from the district court for Richardson county: ALBERT H. BABCOCK, JUDGE. *Affirmed.*

E. Falloon, for appellant.

John L. Webster, contra.

EPPERSON, C.

On August 12, 1903, plaintiff Leyda, an attorney at law, filed a petition in the district court for Richardson county in words and figures following: "James E. Leyda, plaintiff, complains of the defendant, Isham Reavis, and for cause of action alleges that on the 15th day of November, 1895, the defendant, Isham Reavis, entered into a contract with William Deroin, by the terms of which contract the said William Deroin leased to Isham Reavis for a period of five years the east half of the northeast quarter of section 9, town 1, range 17, in Richardson county, Nebraska; that some time afterwards, about the 9th day of January, 1896, the defendant, Isham Reavis, sublet said farm to one Peter Boltz; that the object in making said lease and sublease was to procure money to make a defense for the said Deroin, who had been informed against in the district court for Richardson county, Nebraska, and charged with shooting with intent to kill; that at this time C. F. Reavis was the county attorney of Richardson county, Nebraska, and as the public prosecutor was charged with the duty of, and did, prosecute said William Deroin on said charge; that said C. F. Reavis was a son of the defendant, Isham Reavis, and the defendant, not wishing to appear as a defending attorney in said case, in which his son was acting as a public prosecutor, requested the plaintiff, James E. Leyda, and E. W. Thomas to appear in the district court during the latter part of the year 1895 and look after the defense of the said William Deroin; that at the time said case of *State of Nebraska v. William Deroin* was pending in the district court for

Richardson county, Nebraska, during the years 1895, 1896 and 1897, the plaintiff and E. W. Thomas did appear, at the request of the defendant, and make the defense for the said William Deroin on said charge; that said Isham Reavis collected, by virtue of the said lease, from Peter Boltz the sum of $450 as rent money on said land, and which money was to be used in the payment of fees to the plaintiff and E. W. Thomas for defending the said Deroin on said charge of shooting with intent to kill; that the said defendant, Isham Reavis, had no interest in the said $450, but held the same as naked trustee for the use and benefit of E. W. Thomas and this plaintiff; that the defendant, disregarding his duties as a trustee in this matter and for the purpose of cheating and defrauding this plaintiff out of his just proportion of said $450, concealed from this plaintiff all knowledge of said lease and sublease and his collection of said $450, and this plaintiff never knew until within about 30 days before this suit was brought that said lease and sublease had been made for his benefit, or that said Isham Reavis, as trustee, had collected said $450. A copy of said lease and sublease are hereto attached, marked exhibits 'A' and 'B,' and made a part thereof. Said trustee and defendant, Isham Reavis, has never paid the plaintiff his share of said $450, or any part thereof. Wherefore, plaintiff prays that there may be an accounting had between plaintiff and defendant; that defendant be held a trustee of said fund, and that plaintiff have and recover from said defendant the sum of $225, being one-half the amount that said Isham Reavis collected as trustee of said fund, together with interest thereon at 7 per cent. per annum from the 9th day of January, 1896, and costs of suit."

That part of the original lease which is material to this action is as follows: "Said sum to be paid in the manner hereinafter stated, to wit, in services as attorney in defending said Deroin against two criminal charges in the district court for Richardson county, also in the supreme court of Nebraska. That part of the sublease which is ma-

terial is as follows: "The said Peter Boltz is to pay to his lessor, Isham Reavis, for the use of himself and associates in the defense of William Deroin, as mentioned in said original lease to which this is attached, the sum of $450 as their attorney fees for defending said Deorin against said charge in the district and supreme courts to a final issue, said Deroin being defended by Isham Reavis, E. W. Thomas and J. E. Leyda; and it is agreed by the parties that after said attorney fees are paid the said Peter Boltz is to pay the remainder of the rent for the term to William Deroin."

Defendant demurred to this petition on the ground that the petition did not state facts sufficient to constitute a cause of action.

It appears from the petition that defendant employed plaintiff to appear in court and assist in the defense of Deroin. Deroin did not employ plaintiff. Defendant, as far as the petition discloses, being the only person liable to plaintiff, was not guilty of fraud by his subsequent conduct. The lease from Deroin to defendant does not create an express trust in favor of plaintiff, or any other person. It simply recites that the rental is to be paid to defendant for services as attorney in defending Deroin. It cannot be said that the sublease was made for plaintiff's benefit. The excerpt therefrom *supra* was a declaration on the part of defendant as to what he then intended to do with the rental, but it was not necessary for the creation of a valid lease. Defendant's lessee was not in privity with plaintiff, and the declaration was no more than a statement of what defendant then intended to do with the funds of which he had control; and, for aught that appears in the petition, all the rent money may have been paid to Thomas. If so, it is not made to appear that plaintiff was wronged thereby. Plaintiff assumes that the making of the lease and his appearance in defense of Deroin, at the request of defendant, entitled him to recover one-half of the rent collected. In our opinion, the most serious trouble with plaintiff's petition is the omis-

sion of certain allegations necessary to complete a cause of action. Plaintiff does not allege the value of his legal services, nor that he was not paid from sources other than the alleged trust fund. It was not sufficient for plaintiff to allege the existence of the trust fund, but he should have alleged that there was due him some amount which the fund was created to secure.

We think the court rightly sustained the demurrer, and recommend that its judgment 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.

CHARLES ALBERTS, APPELLEE, v. WILLIAM HUSENETTER, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,504.

1. **Damages: EVIDENCE.** In an action for damages to growing trees, evidence showing the effect the destruction of the trees had on the value of the land is admissible when the nature of the trees destroyed is such that they have no value, except with reference to and as a part of the real estate.
2. **Trial: DISCRETION OF COURT.** It is discretionary with the trial court to permit the jury to view property which is the subject of litigation.
3. Evidence examined, and *held* that the damages awarded were not excessive.

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

J. A. Douglas and *A. W. Scattergood,* for appellant.

L. K. Alder, contra.

EPPERSON, C.

This action was brought to recover damages for the negligent burning of plaintiff's cottonwood and mulberry trees. Plaintiff recovered judgment in the court below, and defendant appeals.

The most important question argued pertains to the admission of evidence as to damages sustained. Plaintiff as a witness in his own behalf was asked: "Now what effect does it (the grove) have upon the value of the land for the purposes for which you were using or preparing it, as a ranch?" Another witness was asked: "Now, can you fix the value of those trees in the grove there, standing there as growing timber, taken in connection with the effect they would have on the value of the land just prior to the fire?" Questions of like import were asked of other witnesses. Defendant's objections to these questions were overruled. The answers were favorable to plaintiff, and prejudicial if erroneous. This question was before the court in *Kansas City & O. R. Co. v. Rogers,* 48 Neb. 653. During the trial of that case a witness testified to the amount of damages to his trees. On cross-examination he was asked to give the basis of his valuation, and answered: "Because they were worth that to me as ornamental trees." "Q. What are the elements that enter into the estimate that you have made? A. Adding to the value of the land and the farm." It was held that a motion to strike out this testimony as to value was properly overruled. In the case at bar, the elements making up the witnesses' estimates of the damages were shown by the direct instead of the cross-examination. Otherwise, the two cases as to this point are similar. We can see no difference in principle. Plaintiff herein did not attempt to recover for damages to his land, nor to measure his damages by the difference in the value of the land before and after the fire. The witnesses testified to the value of the damaged trees before the fire and their value afterwards. In arriving at the value of the trees, it is

shown by the evidence objected to that they considered the trees valuable because they added to the value of the land. They were of little or no value when severed from the land. In other words, the wood or lumber, when severed, could not be practically utilized. This being true, the trees would have no market value. But it does not follow that they were worthless. In this state there is little natural timber, and in the western portion of the state but little timber of any kind. Brown county is in the territory unfavored by nature in this respect. Trees have a value independently of their intrinsic worth as wood or for other purposes for which they may be practically utilized. They are ornamental. They furnish shade in the summer and shelter in the winter. When thus considered, their value as growing timber must be estimated with reference to their situation as to the land or farm upon which they stood. In *Union P. R. Co. v. Murphy*, 76 Neb. 545, this court held: "The measure of damages to growing trees, having no value for purposes of transplanting, is the value of the trees with reference to the land in the situation in which they stood prior to the damage, less their value for practical purposes afterwards." If we cannot consider the trees with reference to the land, and as affecting the value of the land, then, under the case made, we must hold that plaintiff was not damaged by the burning of the trees. Defendant contends that the *Rogers* case is contrary to *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 70, wherein it was held: "The measure of damages is the amount of damage the trees and timber suffered by reason of the fire, and not the difference in the value of the land with standing trees and timber before the fires and afterwards." That rule was adhered to in *Missouri P. R. Co. v. Tipton*, 61 Neb. 49, and the same measure of damages applied to fruit trees. A discussion of these cases is unnecessary. The rule there followed does not preclude evidence relating to the effect the destruction of trees would have on the value of the land when the nature of the trees destroyed is such that

they have no value, except as they exist as growing timber with reference to and as a part of the real estate.

2. After plaintiff's evidence was introduced the court, on motion of the plaintiff, permitted the jury to view the grove. Defendant alleges error in this, contending that, if justified at all, the visit of the jury should have been after the introduction of all the evidence. Under the provisions of section 284 of the code, the viewing of property by the jury is entirely within the discretion of the trial court, and unless an abuse of discretion is shown the judgment will not be reversed.

3. Defendant's final contention is that the verdict is excessive. Several witnesses placed the value of the property destroyed at $1,000. Others at a less figure. We cannot say that $250 was excessive.

The judgment should be affirmed, and we so recommend.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

FARMERS & MERCHANTS IRRIGATION COMPANY, APPELLANT, v. PHŒBE A. BRUMBAUGH, APPELLEE.

FILED DECEMBER 7, 1906. No. 14,530.

Fraudulent Conveyances: EVIDENCE. In an action to set aside an alleged fraudulent conveyance, it appeared that the debtor, prior to the date of the judgment sought to be enforced, was indebted to various parties in large sums; that it was then agreed between the debtor and his wife that if she should pay the indebtedness, which at that time exceeded the value of the land, she should have a deed to the premises. It also appeared that the debtor's wife had advanced most, if not all, of the purchase price of the farm; that the wife, in pursuance of the agreement, paid the indebtedness of her husband from her own funds in an amount

exceeding the value of the land at the time the agreement was made, and secured a deed to the premises; that the creditor at the time of extending credit to the husband had full knowledge of the contract of the wife to purchase. *Held*, That the wife's deed could not be set aside by the creditors of the husband as a fraudulent conveyance.

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

E. A. Cook, for appellant.

Warrington & Stewart and *H. M. Sinclair, contra.*

EPPERSON, C.

The plaintiff company (appellant) brought this action against appellee, Phœbe A. Brumbaugh, and John H. Brumbaugh, her husband, alleging, in substance, that on November 5, 1903, plaintiff recovered judgment against John H. Brumbaugh in the county court of Dawson county, and later filed a transcript in the district court; that execution was issued and returned *nulla bona*, and that John H. Brumbaugh is insolvent; that on May 17, 1890, the Union Pacific Railroad Company conveyed by warranty deed to John H. Brumbaugh certain land in Dawson county, and on July 12, 1893, Brumbaugh and wife conveyed the land to H. V. Temple as security for money loaned defendants and for no other purpose; that appellee knew of the indebtedness of John H. Brumbaugh to appellant and knew that the same had not been paid; that on July 24, 1902, Temple, by quitclaim deed, conveyed the premises to appellee at the request of her husband, with the intent on the part of the said John H. Brumbaugh of defrauding this plaintiff; that at the time said land was conveyed to appellee she knew of the indebtedness of John H. Brumbaugh to plaintiff, and knew the same had not been paid, and knew that her husband had no other property from which said indebtedness could be paid. Plaintiff prayed that the conveyance

of Temple to appellee be set aside and the land decreed to be the property of John H. Brumbaugh, and that appellee be decreed only to have a lien thereon for money advanced by her for said John H. Brumbaugh, and for such other relief as may be just and equitable. Plaintiff introduced testimony tending to support the allegations of his petition.

Appellee alleged and proved that she was the wife of John H. Brumbaugh; that she and her husband came to Lexington, Nebraska, in 1884; that she has been engaged in business for herself from that date to the present time; that she carried a $5,000 stock, and had purchased several residence properties with her own funds; that she advanced from her own funds the purchase price of the farm in question, and paid for the improvements thereon; that her husband became indebted to the bank of which Temple was cashier, and also to other parties, in large sums, and the land was deeded to Temple as security; that in January, 1897, an oral agreement was entered into between appellee and her husband, by the terms of which it was agreed that appellee should pay off her husband's said indebtedness and have the land; that a written contract was made by appellee with Temple, whereby Temple agreed to convey the land to appellee when the indebtedness to the bank was fully paid. It is undisputed that, in pursuance of this understanding between the parties, appellee paid from her own funds more than $8,525.73 of her husband's said debts, and paid the taxes and placed improvements on the land, and thereupon Temple transferred the premises to her. The evidence of both parties discloses that in 1897, when the contracts above referred to were made, the land was worth only $4,000 or $5,000. In conformity to the prayer of appellee's answer, the court dismissed plaintiff's action and quieted the title to the land in appellee. Plaintiff appeals, contending that the decree is not sustained by the evidence and is contrary to law.

We are convinced that the learned trial judge reached the only conclusion warranted by the evidence. It is clear

that Mrs. Brumbaugh advanced most, if not all, of the purchase price of the land, and paid $8,525.73, and more, from her own funds for the deed from Temple to herself. The premises, therefore, are not subject to the payment of the husband's debts created after Mrs. Brumbaugh purchased the land. Again, it appears that Temple held the title as security, and had entered into the written contract to convey to appellee; that Temple was an officer of the plaintiff company, and, as such, in 1900 took from Brumbaugh the note upon which plaintiff obtained the judgment here sought to be enforced. We must conclude, therefore, that plaintiff extended credit to the husband with full knowledge of the appellee's title to the land, and thereby the question of fraud—the foundation of plaintiff's action—is eliminated from the case.

The district court was clearly right in dismissing the action and quieting title in appellee, and we recommend that the judgment 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.

JOHN FLANAGAN, APPELLANT, V. WILLIAM C. FABENS ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,533.

1. **Review**: EVIDENCE. The verdict of a jury based upon conflicting evidence will not be set aside by this court when sustained by competent evidence.
2. ———: HARMLESS ERROR. Rulings of the trial court upon the reception and rejection of evidence, *held* without prejudicial error.

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

John T. Cathers, for appellant.

Howard B. Smith and *Charles Battelle, contra.*

EPPERSON, C.

November 16, 1870, William C. Fabens became the owner of block 9, in Boyd's addition to the city of Omaha, and has since held the record title thereto, except two lots which were sold in 1899. John Flanagan brought this action in ejectment claiming to have acquired title to all of block 9 by adverse possession from 1868 to 1899, at which time he alleges he was unlawfully ejected therefrom. Trial was had resulting in a verdict and judgment for defendants and plaintiff appeals.

1. Plaintiff now contends that the verdict is not sustained by the evidence. He testified that he farmed the land in controversy from 1868 to 1899. His testimony was corroborated by several witnesses, especially as to the use of the land subsequent to 1880. On the other hand, defendant and his witnesses directly contradicted plaintiff's testimony as to the possession of the land, except, as to one or two years. Manifestly the jury's finding on this conflicting evidence cannot be disturbed by this court.

2. While plaintiff was on the stand, the following questions were asked: "Q. State whether or not you were in possession of block 9, which is the land in controversy here? Q. Did you all of that time have the exclusive use and occupancy of that land?" Defendants objected as incompetent, immaterial, irrelevant, and calling for the conclusion of the witness, and the court sustained the objections. The first question was indefinite as to time, and an answer thereto would subserve no useful purpose. The last question was, perhaps, calling for the conclusion of the witness, and was for that reason subject to objection. However, further examination of this witness brought out the facts sought, and the ruling of the court was without prejudice. Other assignments, challenging

the court's rulings on the reception and rejection of evidence, are called to our attention, but, upon examination, are found to be without merit, and do not require discussion.

No prejudicial error is disclosed in this record, and we recommend that the judgment of the district 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.

STATE OF NEBRASKA ET AL., APPELLEES, V. SEVERAL PARCELS OF LAND ET AL., APPELLANTS.

FILED DECEMBER 7, 1906. No. 14,552.

Cities: IMPROVEMENTS: PETITION. The evidence examined, and *held* insufficient to support a finding that appellant Gibson was paid a consideration for signing a petition for local improvements.

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

A. H. Murdock, for appellants.

W. C. Lambert, contra.

EPPERSON, C.

This is a suit under the scavenger act to foreclose certian special assessments levied by the city of South Omaha against the property of L. C. Gibson. It is conceded that the special tax is void, and the only point at issue is whether Gibson is estopped to question the validity of the assessment.

The lower court found that Gibson was the owner of

the property described in the petition, and that he was paid a consideration for signing the petition and was estopped from questioning the validity of the tax. The record discloses that Cash Brothers contracted with the city to grade the streets in question, and on November 2, 1899, lodged with the city clerk the following order: "South Omaha, Nebraska, Nov. 2, 1899. To the City Clerk of the City of South Omaha, Neb. Dear Sir: You are hereby authorized and directed to issue and deliver to L. C. Gibson a warrant on grading district No. 42 (being for the grading of 22d st. between N & O sts. in the city of South Omaha) for a sum equal to the amount of grading tax assessed and made a lien on the east eighty (80) feet of lots one (1) and two (2), in block one hundred and twelve (112), and the north ½ of lot three (3), in block one hundred and twelve (112), South Omaha, Nebraska. The refunding to him of a sum equal to the tax (to be assessed against the above described lots owned by him) for the grading of the said street as above specified is a consideration offered to him by me for his signature to the petition to grade the said street, which said signature to grade it is understood will be withdrawn unless the grading of said street in said district shall be without cost to him. Cash Bros. Witness, R. A. Carpenter." It further appears that a warrant was issued to Cash Brothers, of which the following is a copy: "$360.90. City of South Omaha, State of Nebraska. Amount levied $———. Am't. issued. $375.90. No. 4. South Omaha, Neb. 4-10-900. City Treasurer: Pay to Cash Bros. or order, three hundred and sixty 90-100 dollars for grading 22 N to O and charge to the account of G. Dist. No. 42 fund. A. R. Kelly, Mayor. S. C. Shrigley, City Clerk. (Seal)." Stamped on the face of the warrant are the following words and figures: "Assignment to R. A. Carpenter, City Clerk." Paid Apr. 10, 1900. F. A. Broadwell, City Treas., South Omaha, Neb." Stamped on the back thereof are the following words and figures: "Presented and registered for payment, Apr. 10, 1900. Not

paid for want of funds. F. A. Broadwell, City Treas. Reg. No. ——, page 186." There was also written in ink across the back of the warrant: "L. C. Gibson."

No other evidence was introduced tending to show that Gibson received a consideration for signing the petition. It does not appear that the order above referred to was delivered to Gibson, or acted upon by him. The order was dated prior to the awarding of the contract to Cash Brothers, and how it was foreseen that they would be the successful bidders is not disclosed. There is no evidence that the warrant was delivered to Gibson, nor that he received the proceeds therefrom. Neither was it shown that the signature "L. C. Gibson" on the back of the warrant was in the handwriting of Gibson, nor that Cash Brothers indorsed the warrant. We are unable to draw the inference from the evidence contained in this record that Gibson received a consideration for signing the petition, and hence decline to discuss the question of estopppel at this time. The evidence under review being "written evidence," the finding of the lower court thereon does not have the binding effect upon this court claimed for it by appellee's counsel. *Faulkner v. Simms*, 68 Neb. 299. The evidence, as now presented, is insufficient to sustain the finding that Gibson was estopped from questioning the validity of the special assessment, and we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

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 a new trial.

REVERSED.

GEORGE M. NICHOLSON, APPELLEE, V. CITY OF SOUTH OMAHA, APPELLANT.

FILED DECEMBER 7, 1906. No. 14,508.

1. **Cities: ACTION FOR DAMAGES.** Section 107, ch. 17, laws 1903, does not require the presentation to the city council of a claim for damages for a personal injury sustained in consequence of a defective street or sidewalk of the city, and an appeal from the action of the council thereon. An original action may be maintained therefor in the district court.

2. **Negligence: QUESTION FOR JURY.** It is not the plaintiff's knowledge of the defect in a walk or street that precludes his recovery, but his want of such care as a prudent man would exercise in view of the danger. This is usually a question for the jury.

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

W. C. Lambert and *S. L. Winters,* for appellant.

T. J. Nolan, contra.

DUFFIE, C.

The plaintiff and appellee, George M. Nicholson, brought this action against the city of South Omaha to recover damages alleged to have been sustained on October 31, 1903, in consequence of the defective condition of a sidewalk extending along the east side of Thirteenth street between M and N streets in said city. A verdict was returned in favor of the plaintiff below for $500, and from a judgment entered thereon the defendant city has appealed. It is one contention of the city that the court had no jurisdiction to try the case; that by the provisions of section 107, ch. 17, laws 1903, the claim was one which had to be presented to the city council for its action, and an appeal taken from the finding of the council to the district court if the claimant was not satisfied with the amount allowed him. A construction of that section

is not free from difficulty, but careful consideration of the question leads us to believe that the claimant might reach the district court by an original action commenced therein and was not driven to taking an appeal from the action of the council. So far as necessary to an understanding of the question involved, the provisions of the section are as follows: "All claims against a city, including unliquidated claims for damages to person or property, must be presented in writing, with a full account of the items, verified by the oath of the claimant, his agent, or attorney, that the same is correct, reasonable and just, and no claim shall be audited or allowed unless presented and verified as provided for in this section and read in open council. All claims against a city must be filed with the city clerk, and when the claim of any person against the city is disallowed in whole or in part by the city council, such person may appeal from the decision of said city council to the district court of the same county by causing a written notice to be served on the city clerk of said city within twenty (20) days after making such decision." Then follows provisions for taking the appeal and getting the record into the district court. After providing the steps necessary to an appeal, the section continues: "No city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks, or other public places within such city, unless a notice in writing of the accident or injury or damage complained of, with a statement duly verified, by the claimant, his agent, or attorney, setting forth the nature and extent of such injury or damage, and of the time when and the place where the same occurred, shall be proved to have been filed in the office of the city clerk within twenty (20) days of the date of the injury or damage complained of, and it is hereby made the duty of the clerk to keep a record of such notice showing the time when and by whom such notice was given and describing the defect complained of, and report the same to the city council at its next meeting: Provided, that in all cases of claims for

injuries to the person, the person claiming to have been injured shall, at any time after giving notice of such injury, be subject to a personal examination by the city physician and such other physician as the city attorney may designate, or by either of them, for the purpose of ascertaining the extent and character of the alleged injury, and a refusal to submit to such examination shall bar any action and all right to recover damages thereon against the city. All actions against such city for damages or injury to person or property hereinafter sustained by reason of the negligence of such city must be brought within six (6) months from the date of sustaining the same."

Relating to claims founded on contract, express or implied, whether the damages be liquidated or unliquidated, the presentation of such claims to the city council for its action, and an appeal therefrom, is clearly contemplated by the first part of the section. So, too, we think that on claims sounding in tort, in those cases where the claimant might maintain an action against the city at common law, a presentation to the city council, and an appeal from its action, is the only way of reaching the district court. The latter part of the section, however, seems to contemplate that class of actions not known to the common law and given to a party by statute, viz., damages for personal injuries arising from the neglect of the city to keep its streets, alleys, sidewalks, public parks or other public places within the city in proper repair and safe condition for use by the public. So far as this class of actions is concerned, there is no doubt that, in order to recover, the claimant must bring himself within every provision of the statute giving him a right of action. The common law did not recognize such a claim. The legislature, in giving a right of action therefor, may impose upon the injured party any condition which it thinks proper. One condition is that he shall, within 20 days, give notice in writing to the city council of the nature and extent of his injuries, and of the time when and the place where the

injury occurred. Another is that he shall submit himself to an examination by the city physician or a physician named by the city attorney; and a third is that his action for damages shall be instituted within six months. It is a general rule in the construction of statutes that each of its provisions shall, if possible, be given effect. There is no need of limiting the time within which an action must be commenced, if the only way of reaching a court is by appeal from the city council; and it is hardly permissible to say that a statute limiting the time for commencing an action does not contemplate a right to bring an action by the party thus limited. It seems to us that the statute contemplates two classes of claims: One where action must first be had by the city council and an appeal taken by the claimant, if not satisfied with the allowance made; and the other for damages sustained in consequence of negligence on the part of the city for failure to keep its streets and other public places in proper repair, in which cases the injured party may commence directly in the courts of the state, first giving notice of the time, place and extent of his injury. This conclusion is somewhat strengthened by the general rule that the jurisdiction of superior courts cannot be taken away, except by express words or by necessary or irresistible implications. 23 Am. & Eng. Ency. Law (1st ed.), 406, 407, and cases cited. Another circumstance, while not of controlling weight, leads to the same conclusion. At the next session after the enactment of the section in question, the legislature, with the evident purpose of making plain the proceedings to collect claims against the city, amended the section so that it now reads: "All claims and demands against the city, whether of contract or in tort, must be presented in writing and filed with the city clerk thereof. When disallowed, in whole or in part, the city clerk shall notify the claimant in writing, his agent or attorney, within five days thereafter. The notice may be served by any sheriff or his deputies, by any policeman or constable, and if the claimant is a nonresident, the clerk

shall notify him by mail. The claimant may appeal from the order or decision of the city council by causing a written notice to be served upon the city clerk within twenty days after the order or decision, of his intention to appeal." The statute then defines the steps necessary for perfecting the appeal, and provides for an appeal by a taxpayer of the city who thinks the allowance too large. It is then further provided as follows: "All claims and demands against the city, except those for damages to property, or for the taking of property for public purposes, and those for injury to the person or property on account of negligence and those for fixed salaries and compensation of the officers and employees of the city, must be presented as aforesaid giving a full, and correct account of the items sworn to by the claimant, his agent or attorney, that the same are full, correct, complete, reasonable and just." Laws 1905, ch. 20, sec. 107.

It will be observed from this reading of the statute as amended that claims for the taking of property for public use and those for injury to the person or property on account of negligence are not required to be presented to the city council, and that original action may be brought against the city in the district court notwithstanding the broad language of the first part of the statute requiring all claims and demands, whether of contract or in tort, to be so presented. The uniform course of legislation in this state has been to allow original suits to be brought against municipalities in cases of personal injury, and we cannot now call to mind any act of the legislature denying to one having a cause of action against a municipality for a personal injury received the right to institute an action in court for his damages without first presenting his claim to the governing body of the municipality for allowance. The right of one suffering from a personal injury to present his claim to the city council for allowance cannot be disputed, and if he does so, then, in order to recover a greater amount than allowed by the council, he must, under the statute now in force, proceed by way of appeal to the

district court. Relating to such procedure the statute now reads: "When any such claim is disallowed, in whole or in part, * * * the claimant may appeal from the order of the council in the manner hereinbefore provided; and failing to appeal as hereinbefore provided, he shall not be entitled to recover thereon in any court on any claim, an amount in excess of the allowance made him by the council." This clause of the statute clearly recognizes the right to commence an original action in the district court after a claim has been disallowed in part, but limits the recovery to the amount allowed by the council. If the claimant prefers a judgment of the court rather than an order of the council allowing his claim, the statute, we think, still contemplates his right of action to recover such damages as he may prove, not, however, exceeding that allowed by the council; his only advantage being to change his claim against the city to the form of a judgment instead of an allowed claim.

A second claim made by the city is that the plaintiff himself was negligent, and that contributed directly to his injury. The accident happened in the evening after dark. There was no street light in the near vicinity of the place where the accident is claimed to have occurred. The plaintiff is an old man and somewhat enfeebled. The evidence for the plaintiff shows that the walk had been defective for some months. It shows, further, that the plaintiff himself knew of the defective condition of the walk, and had passed it on numerous occasions, as it was the only passable way to reach the city from the place of his residence during bad weather and a muddy condition of the ground. He frankly states that on the night in question he was not thinking of the dangerous condition of the walk at the time he approached it, that his mind was absorbed by a matter of business upon which he had been engaged during the day and which he was anxious to conclude. He does not claim that his attention was diverted by any passing object or by anything taking place which distracted his attention. Under this state of the evidence

the city asked the following instruction: "You are further instructed that the testimony of the plaintiff shows that at the time of the alleged injury he was not thinking of the defect in the sidewalk, and was making no effort to avoid stepping therein; that his attention was not elsewhere attracted by any object or circumstance, but was simply occupied by his own thoughts, and that he was not deceived or misled by darkness as to the whereabouts of the defect; that the plaintiff was at that time not using the care and caution required of him, and that he was guilty of contributory negligence and is not entitled to recover in this case, and your verdict will, therefore, be for the defendant."

We think this instruction assumes as a fact one element that was not clearly shown and which was properly left to the jury. It is not at all clear, as stated in the instruction, that the plaintiff was not deceived or misled by darkness as to the whereabouts of the defect. On his cross-examination the question was plainly put to him whether he could have seen it if he had been thinking about it, and his answer is: "It was dark; I do not know." The fifteenth instruction of the court gave to the city every advantage to which we think it was entitled regarding the plaintiff's knowledge of the condition of the walk and the care required of him to avoid an injury. As stated in many cases, it is not the plaintiff's knowledge of the defect in a walk or street that precludes his recovery, but it is his want of such care as a prudent man would exercise in view of the danger. This is usually a question which must be left to the jury, and it is only in a clear case that the court will, as a matter of law, direct a verdict in consequence of contributory negligence on the part of the plaintiff. The case appears to have been carefully and fairly tried, and, while we would not have been dissatisfied with a verdict for the defendant, we cannot say that any errors of law prejudicial to the city are shown by the record.

We recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

ALPHILDA NELSON, APPELLEE, V. WILLIAM H. SCHMOLLER ET AL., APPELLANTS.

FILED DECEMBER 7, 1906. No. 14,526.

1. **Justice of the Peace: JUDGMENT: ENTRY.** The entry of a judgment by a justice of the peace, although informal and not technically exact, is sufficient as against a collateral attack, if his docket entry, taken as a whole, shows that he reached and entered a conclusion as a final determination of the action then pending before him. *Fowler v. Thomsen*, 68 Neb. 578.
2. **Conversion.** The plaintiff in a replevin action cannot be held for conversion of the property taken on the writ pending a trial of the cause, unless he has sold or otherwise appropriated the property, and such an action will not lie after judgment finding him entitled to the possession on account of a special ownership, unless he has done some act in relation to the property inconsistent with the right conferred on him by the judgment.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

A. S. Ritchie and *Charles L. Fritscher*, for appellants.

John F. Stout and *A. C. Wakeley, contra.*

DUFFIE, C.

December 6, 1899, Schmoller & Mueller, the appellants, commenced an action in replevin in justice court against Alphilda Nelson, the appellee, to recover possession of a certain piano. The case was tried January 15, 1900, and

the following judgment entry made by the justice: "Plaintiff and defendant appeared by their attorneys. A. C. Mueller and W. H. Schmoller, plaintiffs, and Charles E. Adolf, bookkeeper of plaintiffs, having been duly sworn and testified, after consideration the court finds the right of possession of property in controversy to the plaintiffs and assess his damages for the tention of same at one cent and the defendant pay costs. Witness my hand this 15th day of January, 1900. William Alstadt, Justice of the Peace." Mrs. Nelson appealed to the district court, where, as appears from a stipulation of parties, the appeal on plaintiff's motion was dismissed and the justice court ordered to proceed with the execution of judgment. Thereafter, and on December 7, 1903, this action was commenced to recover from Schmoller & Mueller the value of the piano in controversy, upon the theory that the same had been converted by the defendants. The answer justified the taking of the piano by the defendants, alleging that prior to such taking they leased the piano to the plaintiff, and that title thereto and ownership thereof had at all times been in the defendants; that on December 6, 1899, the defendants commenced suit in replevin to recover possession of the property, and that on January 15, 1900, on a trial before Justice Alstadt, a judgment was rendered adjudging the right of possession and right of property to be in Schmoller & Mueller; that an appeal from said judgment to the district court had been dismissed, and the case remanded to the justice court, and the judgment of the justice had ever since remained in full force and effect. After the plaintiff had introduced her evidence, which included the judgment entry above quoted, together with a full transcript of the proceedings had before the justice in the replevin action, the court directed the jury to return a verdict for the plaintiff, upon which judgment was entered, and Schmoller & Mueller have appealed.

It is argued with great earnestness that the entry by the justice on the final trial amounts to nothing more

than a finding, upon which no judgment has ever been entered, and that no final judgment has yet been entered in the replevin action. Numerous cases are cited in support of this contention, and *Brounty v. Daniels,* 23 Neb. 162, which was also an action in replevin, is especially relied upon by the appellee. In that case the material part of the judgment entry objected to was as follows: "Whereupon, after having duly considered the evidence offered by plaintiff, the court finds that the right to the property and right to possession of said property, when this action was commenced, was in the plaintiff, and assess his damages in the premises in the sum of $35; and also his costs herein expended, taxed at $9.20." Relating to this entry this court, by chief justice REESE, said: "The questions presented by this record are: First, was there a judgment rendered in the county court? * * * As to the first question we think there can be no doubt. A judgment is defined to be 'a final determination of the rights of the parties in the action.' Civil code, sec. 428. In this case there is simply a finding of fact as to the ownership of the property and the assessment of damages. * * * In the proceedings now under consideration, we find that the county judge in effect rendered the finding and verdict upon the facts, similar to what is required of a jury in a similar case. Nothing more can be claimed for it. This being done, it then remained for the county court to render judgment against the defendant, which *was not* done. A finding in fact is not a judgment." If this case and several others cited by the appellee were the only authorities to guide us, we would be compelled to hold that the entry made by Justice Alstadt, and relied on by the appellants as constituting a judgment, was nothing more than a finding of facts corresponding to the verdict of a jury; but in *Fowler v. Thomsen,* 68 Neb. 578, nearly all the cases heretofore passed on by this court relating to the sufficiency of a judgment entry by a justice of the peace were reviewed, and the rule finally adopted that the judgment entry is sufficient if it shows the relief granted,

and that it was made by the court whose record it is, and that this rule is to be applied liberally to justice's proceedings. For this purpose it was held that resort may be had to the marginal notes, to the files in the case and to the the entire record to ascertain what was done and who did it, and the judgment entry similar to the one in question, except that the action was on a money demand, was held to show a valid judgment, and not subject to collateral attack.

In the case at bar the marginal notes on the justice's docket refer, among other items, to the entry of a judgment and the taxation of the justice's fees therefor, and the whole record shows without doubt that it was the intention of the justice to enter final judgment in the case. This intention, it would seem, under our last holding, is sufficient. As said in *Fowler v. Thomsen, supra*: "The question is, does this transcript, taken as a whole, show that he reached that conclusion as a final determination of the action then pending before him? If it shows that he did, and that he entered it as such determination, until it is reversed, it will support an execution." Assuming, as we must, that the judgment of the justice is not void, what are the rights of the parties? That conversion cannot be maintained by Mrs. Nelson for the conversion of a piano taken from her on the writ of replevin by Schmoller & Mueller while the action is pending, unless before the trial Schmoller & Mueller had sold and disposed of the same, is a question not open to controversy. There was no evidence before the court to show a conversion by Schmoller & Mueller before the trial in justice court. That question is, therefore, not in the case. The trial in justice court having resulted in a judgment finding Schmoller & Mueller entitled to the possession of the property, their retention of possession, unless they have done some act inconsistent with the rights conferred upon them by the judgment, cannot amount to a conversion of the piano. Their affidavit in replevin alleged "that the plaintiffs have a special ownership in the above described

property by virtue of a lease executed by defendant and given plaintiffs, and there is due the sum of $15.37." It appears, therefore, from their own affidavit that their interest in the piano was a special interest, amounting to $15.37, and their right of possession would continue until this amount, with the costs of suit, was paid or tendered to them. The judgment of the justice must be construed in the light of the record made, and while it fails to describe the interest of Schmoller & Mueller in the piano, that interest is fully set forth in their own application for the writ. If since the entry of the judgment Mrs. Nelson had paid them this amount, with the costs of suit, or made a tender thereof, then their interest in the piano and their right of possession has ceased, and their further retention of the piano would amount to a conversion; but no such payment or tender is alleged in the plaintiff's petition, nor was any evidence of such payment or tender offered. Neither was it shown that Schmoller & Mueller had sold the piano and converted the proceeds. It may be that Schmoller & Mueller are still holding the piano as security for their claim. In this condition of the case the court erred in directing a verdict for the plaintiff below. It may be that Mrs. Nelson will be able to amend her petition, alleging facts showing a conversion by the appellants, but on the record made the judgment of the district court will have to be reversed and the cause remanded, and we so recommend.

ALBERT and JACKSON, 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.

HENRY E. FREDRICKSON, APPELLANT, V. NICHOLAS SCHMITTROTH ET AL., APPELLEES.*

FILED DECEMBER 7, 1906. No. 14,536.

New Trial: JOINT MOTION. Two defendants made separate answers, alleging separate and distinct defences to the plaintiff's petition. The court directed a verdict for one defendant and a finding of 6 cents damages in favor of the plaintiff against the other defendant. Plaintiff filed a joint motion for a new trial, which was overruled. The verdict being good as to one defendant, the motion was properly overruled, and the judgment as to both must stand. *Lydick v. Gill*, 68 Neb. 273.

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

Fawcett & Abbott, for appellant.

A. S. Ritchie, Charles L. Fritscher, B. F. Thomas and *Carl E. Herring, contra.*

DUFFIE, C.

October 31, 1902, Schmittroth purchased an automobile from Fredrickson for the sum of $1,000, and executed a promissory note for that amount due April 30, 1903, upon which note the defendant Mengedoht became surety. The note by its terms provided that title to the automobile should remain in Fredrickson until the full amount of the purchase price was paid. Schmittroth claimed that the automobile was not giving satisfactory service, and it was placed in the possession of the Utah Automobile Company at Salt Lake City for the purpose of being overhauled and adjusted, Fredrickson doing this work through the above company as his agent. While the machine was in the possession of the Utah Automobile Company, the evidence tends to show that Mengedoht became alarmed lest he should have the note to pay, and made Fredrickson the

* Rehearing allowed. See opinion, p. 724, *post.*

following written proposition: "Mr. H. E. Fredrickson, Omaha, Neb. Dear Sir: In regard to the machine sold to Mr. Schmittroth on note which bears my signature, I ask you to have the machine shipped here and put in running order. If Mr. Schmittroth is unwilling to take the machine after it has been made to run and will not pay for it, I will take the machine and pay for it, and take up the note which was given for the machine, and also pay the freight from Salt Lake City to Omaha. It is understood that the note is not to draw any interest. Fred Mengedoht." Fredrickson instructed the company in Salt Lake City to ship the machine to Omaha, and then a short time after its arrival here he repaired the machine, and there is evidence tending to show that after testing it Mengedoht was satisfied with its operation, and agreed to accept and pay for it. This suit was originally commenced June 3, 1903, against Schmittroth and Mengedoht upon the note given for the machine. The case was passed from term to term until after the machine was shipped to Omaha and repaired, and until Mengedoht finally refused to take and pay for the machine, after which an amended petition was filed by the plaintiff, the amendment setting up a cause of action against Mengedoht upon his written proposition above set forth and the acceptance of the same by the plaintiff. At the conclusion of the evidence the court directed a verdict for the defendant Schmittroth, and it further directed a verdict in favor of the plaintiff and against Mengedoht for damages in the sum of 6 cents. Judgment was entered upon these verdicts, from which the plaintiff has appealed.

Both of the defendants filed answers in the case, the answers setting up different and separate defenses. The motion for a new trial was a joint motion, and the order overruling the same is alleged as error. It has long been the settled rule of this court that, where a motion for a new trial is insufficient as to one defendant, it should be overruled. *Long v. Clapp*, 15 Neb. 417; *Scott v. Chope*, 33 Neb. 41; *Dorsey v. McGee*, 30 Neb. 657; *McDonald v.*

Bowman, 40 Neb. 269; *Lydick v. Gill*, 68 Neb. 273. The district court was of opinion that the contract of sale of the automobile was rescinded by Fredrickson when, on the request of Mengedoht, he ordered the same shipped from Salt Lake City to Omaha without the consent of Schmittroth. In this we think the court was correct. He certainly could not recover the consideration for the automobile after having taken possession and while retaining possession thereof. The motion was, therefore, properly overruled as to the defendant Schmittroth, and, this being so, under the authorities above cited, we cannot investigate any of the other questions raised by the appellant or reverse the judgment. If the court committed no error in refusing a new trial, as it is clear that the judgment must stand if there was no error in denying the motion for a new trial, we recommend an affirmance.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed June 7, 1907. *Former judgment of affirmance vacated and judgment of district court reversed:*

1. **Conditional Sale:** WAIVER. A vendor, by commencing an action on a note given for the purchase price of a machine, by the terms of which the title thereto is not to pass to the purchaser until full payment is made therefor, will ordinarily be held to have waived his title to the property and have vested the title thereto in the vendee.

2. ———: ———. Where, however, after commencement of such a suit, the vendor takes possession of the machine pending the action, with the consent of the vendee, for the purpose of repairing it and delivering it to a third person (the surety on the note) under a contract between himself and the surety only, and fails to redeliver it to the vendee, such conduct will relieve the vendee from his obligation to pay for the property.

3. **Directing Verdict.** Where the action proceeds against such surety on his agreement to take the property and pay the note given for its purchase price, and is defended on the ground of a breach of the agreement, if the evidence is conflicting the questions in issue should be submitted to the jury, and it is error for the court to direct a verdict for plaintiff for nominal damages only.

BARNES, J.

This case comes here on appeal from a judgment of the district court for Douglas county. By our former opinion, *ante,* p. 722, it was held that the motion for a new trial was a joint motion as to both of the defendants, and, as the ruling in favor of defendant Schmittroth was correct, the plaintiff was entitled to no relief. The case has been reargued, and we are now of opinion that our former decision was wrong. While but one motion for a new trial was filed in the court below, yet it appears to be not only joint but several in form, and asks for a new trial as to each of the defendants. Hence, the case of *Lydick v. Gill,* 68 Neb. 273, on which our former opinion was based, is not in point. Again, it appears that *Lydick v. Gill* was decided on its merits, and not upon the form of a motion for a new trial. It is true that matter was discussed in the opinion, but we have serious doubts as to the soundness of that discussion. We are therefore constrained to consider the several grounds presented by the appellant for a reversal of the judgment of the trial court.

It appears that on the 31st day of October, 1902, the defendant Schmittroth purchased an automobile from the plaintiff Fredrickson for the sum of $1,000, which was later on delivered to him at Salt Lake City; that Schmittroth delivered to the plaintiff 4,000 shares of mining stock and his promissory note for $1,000, signed by defendant Mengedoht, as surety, and it was agreed that plaintiff should have the option to keep the mining stock in full payment for the automobile and return the note, or return the mining stock to Schmittroth within 90 days and retain the note as payment for the machine. By the terms of the

note the title to the machine was not to pass to Schmittroth until the purchase price should be fully paid. Within the proper time plaintiff exercised his option, returned the mining stock and kept the note. Later on Schmittroth refused to pay for the automobile, and notified the plaintiff that he had left it with plaintiff's agent at Salt Lake City, subject to his order, because it could not be made to run and was wholly worthless. The plaintiff thereupon attempted, through his agents, to put the machine in running order, but failed to do so. He afterwards brought suit on the note in the district court for Douglas county against both of the defendants. Meanwhile the plaintiff continued his efforts to put the machine in running order, and negotiations were entered into between him and the defendant Mengedoht, which culminated in the following agreement: "Mr. H. E. Fredrickson, Omaha, Neb. Dear Sir: In regard to the machine sold to Mr. Schmittroth on note which bears my signature, I ask you to have the machine shipped here and put in running order. If Mr. Schmittroth is unwilling to take the machine after it has been made to run and will not pay for it, I will take the machine and pay for it, and take up the note which was given for the machine, and also pay the freight from Salt Lake City to Omaha. It is understood that the note is not to draw any interest. Fred Mengedoht." The plaintiff accepted the agreement according to its terms, brought the machine to Omaha, Mengedoht paying the freight, and claims to have adjusted it, repaired it and put it in perfect running order, and to have offered to send it to Schmittroth, and that Schmittroth refused to receive and pay for it. He thereupon amended his petition in the pending suit by setting up his new agreement with Mengedoht, and prayed for a judgment against both defendants for the purchase price of the machine. The defendants answered the amended petition separately, each admitting the execution of the written instruments sued on, and each pleaded fraud, misrepresentation and a failure of consideration, in that the automobile could not

be made to run and was wholly worthless for the purpose for which it was sold. A trial was had on these issues, and at the close of the plaintiff's evidence the court directed the jury to return a verdict for the defendant Schmittroth, and this order is assigned as error.

The plaintiff's brief contains a lengthy and learned discussion of the rights and obligations of the parties under the several contracts, and especially as to the effect of the commencement of the action. It is contended that by bringing suit on the note in question the plaintiff elected to waive the ownership or title retained by him by the terms of that instrument; and the title to the machine thereupon vested fully and completely in the defendant Schmittroth. There is no doubt but this statement would be correct if the plaintiff had not taken the machine away from Schmittroth, and assumed the possession and ownership thereof for the express purpose of carrying out his agreement with the defendant Mengedoht. His action in that behalf was inconsistent with such waiver, and, when he failed to put the machine in running order and redeliver it to Schmittroth, he relieved him from his obligation to pay for it, and the court properly directed the jury to return a verdict in his favor.

It is insisted, however, that the verdict should be set aside because it did not dispose of Schmittroth's counterclaim for $156. By asking for the instruction complained of, and accepting the verdict, it seems clear that Schmittroth has waived his right to any relief on his counterclaim, and the plaintiff should not be heard to complain because no judgment was rendered against him thereon.

It further appears that after the introduction of all of the evidence the defendant Mengedoht waived his right to recover on his counterclaim, requested the court to direct a verdict against him, and in favor of the plaintiff, for the sum of 6 cents: His request was granted, and the jury returned a verdict accordingly. This direction is complained of, and is also assigned as error. Much discussion is indulged in by the plaintiff as to the nature and

effect of his contract with the defendant Mengedoht. It is insisted that his agreement did not amount to a novation; that it was not a new contract, and did not affect the rights of the parties as they stood under the original agreements. We think all of this discussion is beside the mark; for it clearly appears that the case, as to the defendant Mengedoht, was tried on the theory that the plaintiff had complied with the new agreement, had put the automobile in good running order, had tendered it to Mengedoht, and was therefore entitled to a judgment against him for the face of the note, the payment of which he had assumed by his new agreement. On this theory much evidence was introduced by both parties. One attempting to prove that the automobile was put in good running order and was a practical machine—and that it was tendered to the defendant; while the defendant attempted to show that the automobile would not run, was of no value whatsoever, and therefore he was justified in refusing to accept it, and carry out his contract to pay for it and take up the note in suit.

It appears that Mengedoht defended the action upon the ground of a breach of warranty; and, while this action was pending on the note, he made the contract which is set out in the opinion, by which he agreed, upon certain things being done by Mr. Fredrickson, he would take the automobile and would pay the note upon which he was sued. This agreement was set up in the supplemental petition, and the failure of the automobile as warranted being still insisted upon, the issue presented by the petition and supplemental petition of the plaintiff and the answer of defendants tried, and the judgment upon this trial is the one here complained of. There seems to be no question in regard to the delivery of the automobile upon its sale to Schmittroth. It was never returned generally to Fredrickson, but he was allowed to take possession of it for a special purpose to enable him to comply with the contract that was made with a view to a settlement of the litigation. The question tried was whether Fredrickson

had complied with the terms of the supplemental agreement of settlement with Mengedoht, the surety. This question should have been submitted to the jury, and the court erred in instructing the jury to find a verdict for the plaintiff for nominal damages only.

For the foregoing reason, our former judgment is vacated, and the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

JOHN WEIS, JR., APPELLANT, V. JOHN W. FARLEY ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,559.

Evidence examined, and *held* to justify the decree.

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

J. S. Armstrong, A. E. Garten and *J. M. Armstrong,* for appellant.

H. C. Vail and *W. W. Thompson, contra.*

DUFFIE, C.

John Weis, a judgment creditor of John W. Farley, brought this action to subject certain property claimed by Mary J. Farley, Frank M. Ryner and Osborn Patterson to the payment of his judgment. His bill was dismissed by the district court, and he has appealed. He makes no complaint of the decree so far as it dimisses his bill against Ryner and Patterson, his whole complaint being that the evidence demands a decree subjecting the property claimed by Mrs. Farley to the payment of his judgment. Some time after her marriage in Michigan,

Mrs. Farley received $700 from her father's estate. This money she loaned to her husband, or at least it was used in moving from Michigan, and in securing and improving a homestead in Boone county, Nebraska. The testimony is undisputed that, in consideration of this loan, the husband was to deed her 80 acres of the homestead. This was not done, but a timber claim adjoining the homestead was later purchased, the title taken in the name of Mr. Farley, who held it about two years and then conveyed to his wife through a third party. This conveyance, it is claimed, was made in consideration of the money loaned by Mrs. Farley to her husband, but, even if that were not the case, it appears quite clearly from the evidence that Farley, at that time, was not so badly indebted as to render the conveyance invalid, even if we regard it as a gift. This timber claim was later traded for a stock of boots and shoes, the ownership of which was vested in the husband, he giving to his wife a note for a little more than $1,700 on account of her ownership of the land traded for this stock. Later the stock of boots and shoes was traded for a stock of hardware, and about the time that Weis obtained his judgment against John W. Farley he conveyed the hardware stock to his wife by bill of sale in payment of the $1,700 note. It is this stock of hardware which is sought to be subjected to the payment of the plaintiff's judgment. A careful reading of the evidence convinces us that Farley was indebted to his wife in the amount claimed, that the timber claim was conveyed to her on account of such indebtedness, that she assented to the sale of her timber claim for the stock of boots and shoes, taking her husband's note for $1,700 for her interest in the land, and that the note has not been paid, except by transfer to her of the stock of hardware in controversy in this suit. Being a creditor of her husband, she had the same right as any other creditor to secure payment of the indebtedness, and fraud cannot be predicated upon such a transaction.

The decree of the district court is well supported by the evidence, and we recommend its affirmance.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

GEORGE C. LETHERMAN ET AL., APPELLANTS, V. ADAM HAUSER ET AL., APPELLEES.

FILED DECEMBER 7, 1906. No. 14,329.

1. **Highways:** VACATION. The statutory provision that a petition for the establishment or vacation of a public road shall be signed by at least ten electors residing within five miles of the road is jurisdictional.
2. ———: JURISDICTION. The facts essential to the jurisdiction of a county board to establish or vacate a road must affirmatively appear on the record of the proceedings.
3. **Nuisance:** INJUNCTION. A party complaining of a public nuisance is not entitled to relief by injunction, unless he shows some special injury to himself different from the common injury to the public.
4. **Highways:** VACATION. An elector residing within five miles of a public road has such special interest therein, independent of that which he has in common with the public, as will enable him to maintain a suit to restrain the unlawful closing of such road to public travel.
5. **Injunction:** REMEDY AT LAW. On the facts stated, *held* that the plaintiff had no adequate remedy at law.

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

Aaron Wall, H. M. Mathew and *R. J. Nightingale,* for appellants.

T. S. Nightingale, R. P. Starr and *J. S. Pedler, contra.*

ALBERT, C.

This suit was brought to restrain the defendants from obstructing and closing an alleged public road. The petition describes the road, shows that at least one of the plaintiffs resides within five miles of it, and charges that the defendants are obstructing and closing it to public travel. The defense is based on three grounds: (1) That previous to the obstruction and closing of the road by the defendants it had been duly vacated by the county board; (2) that the plaintiffs sustain no other or different injury from the obstruction of the road than that sustained by the public generally; (3) that plaintiffs have one or more adequate remedies at law. As to the first defense the court made no finding, but as to the others found for the defendants, and dismissed the suit. The plaintiffs appeal.

The record shows that proceedings were had before the county board looking to the vacation of this road. But there are several reasons why such proceedings are not available as a defense to this suit, one of which is that they were not carried forward to a final order or judgment vacating the road. Another reason is that the record of the proceedings before the county board fails to show that any of the parties who petitioned for the vacation of the road reside within five miles of it. Section 4, ch. 78, Comp. St. 1903, provides, in substance, that the petition for the establishment or vacation of a public road shall be signed by at least ten electors residing within five miles of the road to be established or vacated. That at least ten of the petitioners reside within five miles of the road is a jurisdictional fact which must affirmatively appear on the record of the proceedings. *Doody v. Vaughn,* 7 Neb. 28; *Lesieur v. Custer County,* 61 Neb. 612, and cases cited. As it does not thus appear in this case, the record is fatally defective.

But it is insisted that the plaintiffs must fail because they have failed to show any special injury to themselves different from the common injury to the public. The acts

charged against the defendants constitute a public nuisance, and it is well settled that a party complaining of a public nuisance is not entitled to relief by injunction unless he shows some special injury to himself, different from the common injury to the public. 1 High, Injunctions (4th ed.), sec. 762; 4 Pomeroy, Equity Jurisprudence (3d ed.), sec 1349; *Taylor v. Portsmouth, K. & Y. Street R. Co.,* 91 Me. 193, 64 Am. St. Rep. 216; *Zettel v. City of West Bend,* 79 Wis. 316, 24 Am. St. Rep. 715; *Clark v. Chicago & N. W. R. Co.,* 70 Wis. 597, 5 Am. St. Rep. 187. But in this case at least one of the plaintiffs (Letherman) is an elector, and resides within five miles of the road in question. In the proceedings instituted before the county board for the vacation of the road he and the other plaintiffs appeared and remonstrated against such action. In *Throckmorton v. State,* 20 Neb. 647, the relator asked a writ of mandamus to compel the county board to open a certain section line road. His right to maintain the suit was assailed on the same ground upon which plaintiffs' right to maintain this suit is now assailed. But the court there held that the fact that the relator was an elector residing within five miles of the road gave him such a special interest therein, independent of that which he had in common with the public, as would enable him to maintain the suit. The reasoning in that case applies with equal force to this, and justifies the conclusion that the plaintiff Letherman at least has a sufficient special interest in the road, independent of such as he shares in common with the public, to enable him to maintain this suit.

As to the third defense, so far as the plaintiff Letherman is concerned, he has, as we have seen, a special interest in the road. It is his best and most available route to his market town and county seat. He has a present right to its use. The damages resulting to him by its obstruction, while real and substantial, could hardly be ascertained by reference to any pecuniary standard. Proceedings at law, whether civil or criminal, would not be sufficiently prompt to be effective. In such circumstances

injunction is the proper remedy. Elliott, Roads and Streets, ch. 33, p. 665; 1 High, Injunctions, secs. 594-596. See, also, *Eidemiller Ice Co. v. Guthrie,* 42 Neb. 238.

We discover no defense to this case as made by the plaintiff Letherman, and we recommend that the decree of the district court be reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff Letherman, enjoining and restraining the defendants and their successors, agents and employees from obstructing or closing the road in question.

DUFFIE and JACKSON, 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 enter a decree in favor of the plaintiff Letherman, enjoining and restraining the defendants and their successors, agents and employees from obstructing or closing the road in question.

JUDGMENT ACCORDINGLY.

R. A. MCMASTER, APPELLEE, V. C. E. DOUTHIT ET AL, APPELLANTS.

FILED DECEMBER 7, 1906. No. 14,461.

Evidence examined, and *held* to sustain the findings and decree of the trial court.

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

C. A. Kingsbury and F. S. Berry, for appellants.

John V. Pearson and *F. A. McMaster, contra.*

ALBERT, C.

The appellant Douthit built a house for the appellee. The other appellant furnished a large portion of the ma-

terial. After the house was built, and within the time required by law, the appellants each filed a lien against the premises on which the house was built, Douthit claiming $1,329.86 for labor and material furnished by him, the lumber company claiming $1,169.86 for material furnished by it. Afterwards the appellee brought this suit against the appellants, alleging in effect, among other things, that the house had been erected under a contract between herself and Douthit, whereby it was agreed that he should furnish the labor and material necessary to build the house for $1,965, and that afterwards certain minor changes were agreed on, and the price thereof fixed, whereby the contract price was raised to $2,045, which amount had been fully paid to Douthit before his lien was filed; that she never had any contract with the appellant lumber company to furnish the material for the erection of the house, and that its contract therefor was with the appellant Douthit. She further alleges these liens stand of record and constitute a cloud on her title, and asks to have them canceled and the cloud removed. The appellants, in addition to certain defenses, each filed a cross-petition, asking a foreclosure of his lien. The court granted the appellee the relief prayed, and the appellants prosecute separate appeals.

The case between the appellee and Douthit involves only a question of fact, the former claiming in effect that the latter agreed to build the house and furnish all the labor and material necessary therefor for $2,045, the latter claiming, in effect, that he agreed to build the house and to furnish the labor and material necessary therefor, but that no price was fixed. It is conceded that before the building was commenced the plaintiff submitted a rough plan thereof to Douthit, and that he offered to build the house for $1,850. The parties then took the rough plan to an architect, who prepared plans and specifications in detail.

According to the testimony of the plaintiff's husband, who acted for her throughout the entire transaction, there

was a little delay in getting the plans, and when the ground plan was brought to the attention of Douthit he insisted that it called for a house somewhat larger than the one he had agreed to build for $1,850; that after some discussion it was agreed that Douthit should proceed with the building, and should be allowed $1,965, instead of $1,850; that some minor changes were afterwards made, the price of which was fixed by agreement in advance, raising the entire price at which Douthit was to build the house to $2,045. In short, the testimony of this witness is to the effect that there was a definite and fixed price to be paid for the erection of the building. This testimony is corroborated by that of numerous other witnesses, who testified, in effect, that at various times while the building was in progress Douthit complained of his contract, stated that he was losing money by it, expressing the wish that he was out of it, all tending to show that he fully understood while the work was in progress that he was bound to finish the building at a fixed price.

According to Douthit's testimony, when the plans of the architect were first submitted to him, or a portion of them, he called the attention of appellee's husband to the fact that such plans called for an entirely different house than the one he had agreed to build for $1,850, and that the appellee told him to proceed with the erection of the house according to the plans and specifications, and she would pay him the difference, or what the work and material was reasonably worth. This testimony is corroborated by that of another witness, who testified to a conversation he overheard between Douthit and appellee's husband tending to show the same state of facts. But the force of this corroborating testimony is much impaired by the subsequent testimony of the witness showing that he dealt with the parties on the theory that the consideration to be paid Douthit for building the house was fixed by contract. Aside from the testimony of this witness, the only evidence relied on as corroborating Douthit is such as tends to show that the amount for which

the appellee claims he agreed to build the house was far below what it was reasonably worth. To our minds, such evidence is entitled to little, if any, weight. If evidence that the obligations which a party has assumed by his contract are onerous and burdensome is to be received as evidence that he never made the contract, it would be an easy matter to avoid a bad bargain. Besides, it sometimes happens that a contractor purposely undertakes to erect a building for less than the work can be done, expecting to recoup on extras, or by a showing of such departures from the original contract as would enable him to recover on a *quantum meruit*. The record would indicate that something of that kind has been attempted in this case. We are satisfied that the appellee established her theory of the transaction by a clear preponderance of the evidence.

We come now to the appeal of the lumber company. Its original cross-petition was framed on the theory that it had filed a subcontractor's lien for material furnished to Douthit, as contractor, for the construction of the building. It afterwards filed an amended cross-petition, framed on the theory that the material was furnished under a direct contract with the appellee. The evidence is clear and conclusive that the material was furnished to Douthit. It was charged to him on the books of the lumber company. There is no evidence that we have been able to discover in the record tending to show a direct contract between the appellee and the lumber company for this material. On the contrary, the evidence adduced on behalf of this company itself shows that they knew that Douthit was under a contract to build the house for a stated consideration. Their agent who transacted the business for them testified on their behalf as a witness. Running through his testimony are to be found statements which show that at the time the material was furnished he had in mind the possiblity that Douthit might lose money on the contract and not be able to pay the bills for material furnished. Taking this evidence in connection with the testimony hereinbefore referred to showing

a contract for the erection or construction of the building for a specified sum, it precludes the idea that Douthit was the agent of the appellee, or could bind her for this material, or that the lumber company had any reason to believe he had. The lumber company's rights, if it has any, are those of a subcontractor, but, as it made its election in the district court to proceed on the theory that it had a direct contract with the appellee to furnish this material, it is bound by that theory now. It might be said, in passing, that its election to proceed on that theory was not ill advised, because, under the evidence, its lien would be defeated on either theory.

The decree of the district court is clearly right, and we recommend that it be affirmed.

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

ANNA D. SCHALLENBERG, APPELLEE, V. CARL KROEGER ET AL., APPELLANTS.

FILED DECEMBER 7, 1906. No. 14,541.

1. **Suits: CONSOLIDATION.** Where the defendant in a suit to quiet title files a separate suit against the plaintiffs asking the same relief against them with respect to the same property, and the two suits are consolidated, the parties are in no different position than if, instead of a separate suit, the plaintiff in such separate suit had filed a cross-petition in the original suit asking for a decree quieting her title.
2. **Decrees: VACATION.** Although separate decrees are entered after such consolidation, they are, in effect, one decree, and an order vacating the one vacates both.
3. **Record, Correction of: REVIEW.** Error cannot be predicated on an order correcting a record, making it show expressly what it already shows by necessary implication.

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

Courtright & Sidner, for appellants.

Loomis & Maynard, contra.

ALBERT, C.

On the 12th day of July, 1899, two suits were pending in the district court for Dodge county between the same parties, which we shall hereafter refer to as case No. 1, and case No. 2, respectively. In case No. 1 Carl and Theodore Kroeger were plaintiffs, and Mrs. Anna D. Schallenberg was defendant. In case No. 2 the parties were in reverse order. The pleadings in case No. 1 are not before us, but from the proceedings had, and the answer filed in the other case, it appears that the plaintiffs sought to quiet their title to certain real estate as against the defendant. In case No. 2 the plaintiff sought to quiet her title to the same real estate as against the defendants. On the date mentioned, the parties agreed in open court that the two cases "be tried as one case." The cases came on for trial on the 19th day of June, 1903. At that time Mrs. Schallenberg was mentally incompetent, and her attorney, for some reason, had withdrawn from the cases. A trial was had in her absence, and without anyone appearing for her. The two cases were tried at the same time, and submitted on the same evidence, but separate decrees were entered, one in case No. 1 quieting and confirming the title of the plaintiffs therein to the land in controversy, and one in case No. 2 dismissing the bill. Afterwards a guardian was appointed for Mrs. Schallenberg, who, during the term at which the decrees were entered, filed a motion purporting to be filed in case No. 1, and containing no reference to case No. 2, asking for a vacation of the decree, and for opportunity to make a defense for his ward. A hearing was had on this motion,

at which the Kroegers were represented by counsel, and the motion was allowed, and an order vacating the findings and decree was entered on the 7th day of November, 1903. This order on its face refers only to the findings and decree in case No. 1. At a subsequent term the guardian filed a motion, entitled in case No. 2, for the entry of an order *nunc pro tunc* vacating the decree in that case. This motion was made on the theory that, while the motion for the vacation of the decree was entitled in case No. 1, it was, in effect, a motion for a vacation of both decrees, and was so considered by the court, and that the order of the court thereon was in fact that both decrees be vacated. The motion for the order *nunc pro tunc* was allowed, and an order entered as of November 7, 1903, vacating the decree in case No. 2. From the order allowing this motion the Kroegers appeal to this court.

It may well be doubted whether the entry of the order *nunc pro tunc* was necessary to protect the rights of the party on whose behalf the motion therefor was made. The two suits involved precisely the same issues. In case No. 1 the Kroegers prayed for a decree quieting their title as against Mrs. Schallenberg; in case No. 2 she prayed for a like decree against them. When the cases were consolidated for trial they became one case. Thereafter the parties were in no different position than they would have been in had Mrs. Schallenberg filed a cross-petition in case No. 1, asking a decree quieting her title, instead of commencing a separate suit asking such relief. That two decrees were entered instead of one is a mere matter of form. They constitute, in fact, a single decree disposing of the issues in a single controversy. An order vacating such decree, under whichever title entered upon the record, is an order vacating the entire decree, that is, the decree disposing of the entire controversy. As such was the legal effect of the order actually made vacating the decree, there could be no error in permitting the record to show expressly what would necessarily be implied therefrom.

We recommend that the order for the entry of the order of vacation *nunc pro tunc* be affirmed.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order for the entry of the order of vacation *nunc pro tunc* is

AFFIRMED.

OMER C. FLORA, APPELLANT, V. BRAZILLA F. CHAPMAN, APPELLEE.

FILED DECEMBER 7, 1906. No. 14,542.

Evidence examined, and *held* sufficient to sustain the verdict of the jury.

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

George C. Gillan, for appellant.

E. A. Cook, contra.

ALBERT, C.

Omer C. Flora brought an action against Brazilla F. Chapman to recover the reasonable value of certain work and labor performed by him at the instance and request of the defendant. The defendant entered a plea of accord and satisfaction, and issue was joined thereon. The evidence shows that there was a dispute between the parties as to the amount due. It also shows that the defendant paid an attorney, who claimed to represent the plaintiff and to have authority to compromise and collect the claim, a certain amount in full satisfaction of the debt. The only question in the case is whether such attorney had authority to bind the plaintiff by the compromise and the acceptance of the amount agreed upon in satisfaction of

the debt. The evidence adduced by the plaintiff negatives such authority. But the evidence of the attorney himself was introduced, and is to the effect that the plaintiff left the claim with him for collection; that afterwards, according to his recollection of the matter, the defendant offered a certain amount in satisfaction of the claim, which offer was submitted to the plaintiff, who instructed the attorney to accept it, and that the defendant then paid him the amount agreed upon and he accepted the same for the plaintiff in full payment of the claim. At this late day it is unnecessary to cite authorities to support the proposition that, where a question is submitted to a jury on conflicting evidence from which reasonable minds might reach different conclusions, the finding thereon will not be disturbed by this court. Such is the state of the record in this case. The jury found for the defendant on conflicting evidence, and there is no good reason shown for disturbing their verdict.

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

R. M. WOLCOTT, APPELLEE, V. STATE FARMERS MUTUAL INSURANCE COMPANY, APPELLANT.*

FILED DECEMBER 7, 1906. No. 14,466.

1. **Mutual Insurance Companies: ASSESSMENTS.** Mutual fire insurance companies cannot make assessments upon their members, as provided in section 12, ch. 33, laws 1891, until loss has first occurred, unless such assessments are authorized by a two-thirds vote of their directors.

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* Rehearing denied. See opinion, p. 746, *post*.

2. ———: ———. When it is sought to avoid a policy of insurance for the nonpayment of an assessment, not made for the payment of a loss, the records of the company are insufficient to establish the validity of such assessment, unless it affirmatively appears therefrom that the statute has been complied with.

APPEAL from the district court for Merrick county: JAMES G. REEDER, JUDGE. *Affirmed.*

E. R. Leigh and *J. E. Dorsheimer,* for appellant.

Martin & Ayres, contra.

JACKSON, C.

The defendant is a mutual insurance company organized under the law of Nebraska. One February 21, 1902, the plaintiff made written application to the defendant for a fire insurance policy covering a hay barn and its contents. The application contained this printed memorandum: "I hereby agree to be governed by the articles of incorporation, by-laws, and rules now in force or that shall hereafter be adopted by said company." On March 4 following defendant issued its policy, one of the conditions of which is: "It is agreed and understood that this policy or certificate of membership is issued and remains in force on the condition that said applicant complies with the by-laws, rules and regulations that are now in force or that may hereafter be adopted, and are made a part of this certificate." On the back of the policy is printed what purported to be a copy of the by-laws of the company. The only provision for assessments in the by-laws as they appear on the policy is: "In case of an assessment each member assessed shall be notified by letter post paid, by the secretary, to the address named in his application, and if the insured shall refuse or neglect to pay such assessment within thirty days after mailing the notice as above specified, then this company shall not be liable in case of loss under his certificate until such payment is made; if the loss is approved by the board and

such loss exceeds in amount the cash fund on hand of the company, the secretary shall assess all who are members at the date of said loss, and prorate according to the amount of insurance." On August 28, 1904, plaintiff sustained a loss of the barn covered by the policy and its contents, due notice of which was given to the defendant, resulting in a refusal to pay the loss. Suit was instituted in the district court, where the judgment was favorable to the plaintiff, and the defendant appeals.

The defense was grounded on the claim of a suspension of the policy by reason of the nonpayment of an assessment. At the trial the defendant offered to prove that its by-laws had been amended on April 3, 1901, to provide that assessments should be made by order of the board of directors and prorated according to the time the insurance had been in force, and at the same meeting a resolution was adopted requiring members to pay an assessment of 10 cents a month on each $1,000 for combined insurance, and 5 cents a month on single, on memberships that had been in force over two years. About June 20, 1904, the plaintiff received from the defendant the following notice: "State Farmers Mutual Insurance Company, South Omaha, Nebraska, June 17, 1904. R. M. Wolcott, Archer. Dear Sir: You are hereby notified that the assessment against your policy No. 7207, in force 24 months, is $3.75, on combined. Total $3.75. Which amount please remit by money order or draft payable to the State Farmers Mutual Ins. Co., South Omaha, Neb. If by personal check, add 10 cents for exchange. Return this notice with remittance. Your policy will lapse in 60 days from the date of this notice unless assessment is paid. March assessment. B. R. Stauffer, Secretary." It is admitted that this assessment was not paid at the time of the loss, more than 60 days after the receipt of the notice.

By section 12, ch. 33, laws 1891, it is provided with reference to mutual insurance companies: "Whenever the amount of any loss shall have been ascertained, which exceeds in amount the cash funds of the company, the sec-

retary shall make an assessment upon all of the property insured by the company; Provided, that any company may provide in its by-laws for making assessments at stated intervals only, and may also provide that assessments shall be made by the board of directors." Section 13 is: "It shall be the duty of the secretary, whenever such assessment shall have been made, to immediately notify every person composing such company, personally, or by a letter sent to his usual post office address, of the amount of such loss, and the sum due from him as his share thereof, and of the time and to whom such payment is to be made; but such time shall not be less than twenty (20) nor more than forty (40) days from the date of such notice." By section 19 it is provided: "Such mutual insurance companies shall never make assessments upon their members, as provided in section twelve (12) of this act, until loss has first occurred, unless the directors by a two-thirds (2-3) vote order an assessment. They shall never make any dividends."

It will thus be seen that there are two methods allowed by statute for making assessments in mutual insurance companies: First, where a loss has actually occurred and the cash on hand is insufficient to make payment thereof; and, second, by a two-thirds vote of the board of directors after being duly authorized by the by-laws. The record contains no proof, or offer of proof, to show that an assessment was necessary to pay the losses of the company, so that the assessment and failure to pay the same constitute no defense to the plaintiff's action, unless it can be sustained under that provision of the statute authorizing assessments by a two-thirds vote of the directors. It is evident that the minutes of the meeting of the board of directors, by which the defendant offered to prove the assessment, were insufficient for that purpose. An assessment, in the absence of loss could only be made by a two-thirds vote of the board of directors. It does not appear in the record, or in any proof tendered, how many members constituted the board

of directors, nor does it appear how many voted for the assessment and how many against it. There is a memorandum in the minutes that the motion to adopt the plan of assessment was carried, but it is not disclosed in the record that the minutes were approved by the board of directors. While, ordinarily, in an action between a corporation and one of its members the records kept by a proper officer are admissible in evidence, yet, where, as in this case, it is sought by the record alone to avoid a contract, we think the record should show affirmatively that the statute has been complied with.

The errors, if any, in excluding the evidence offered were without prejudice, and we recommend that the judgment of the district court be affirmed.

DUFFIE 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 May 10, 1907. *Rehearing denied:*

1. **Mutual Insurance Companies: ASSESSMENTS.** A by-law which provides "that assessments shall be made by order of the directors, and shall be prorated according to the time the insurance has been in force," is not authority for making assessments at stated intervals.
2. ———: ———. An assessment levied by such company must be against the entire membership, and if levied against a part only is invalid.
3. **By-Law: VALIDITY.** The authority of the board of directors to adopt a by-law authorizing themselves to levy assessments, questioned.

ALBERT, C.

The facts in this case are set forth at some length in our former opinion, *ante,* p. 742. From an examination of that opinion it will be seen that the vital question

between the parties is whether the assessment there referred to was authorized and valid. If it was, the plaintiff was in default when the loss occurred, and the defendant is not liable on the policy. The reargument leaves some doubt in our minds whether the fact that the minutes of the defendant company failed to show affirmatively that the assessment in question was authorized by a two-thirds vote of the directors would justify their exclusion, when offered in evidence for the purpose of showing that the assessment had been made. For that reason, and since their exclusion may be justified on other grounds, it is thought best to leave that question open.

As shown in the former opinion, the defendant company exists under and by virtue of chapter 33, laws 1891. The authority to levy assessments is restricted, and the manner of its exercise prescribed by section 12 of that act, which is as follows: "Whenever the amount of any loss shall have been ascertained, which exceeds in amount the cash funds of the company, the secretary shall make an assessment upon all the property insured by the company. Provided, that any company may provide in its by-laws for making assessments at stated intervals only, and may also provide that assessments shall be made by the board of directors." An analysis of this section shows that there are two agencies of the company by which assessments may be made: (1) The secretary, under the general authority conferred upon him by the statute; (2) the board of directors, when authorized by by-law. It also shows that, as a prerequisite to a valid assessment, there must be either an actual loss, for the payment of which the assessment is required, or a by-law authorizing assessments at stated intervals. The assessment in question was not made by the secretary, nor was it made for the payment of a loss which had actually occurred. Consequently it was incumbent upon the defendant to show: (1) A by-law authorizing the board of directors to make assessments; and (2) a by-law authorizing assessments to be made at stated intervals. In order to do this the defendant

offered in evidence the minutes of a meeting of the board of directors held on the 8th day of January, 1901, showing that the following amendment to the by-laws had been proposed: "That assessments shall be made by order of the directors and shall be prorated according to the time the insurance has been in force." It also offered in evidence the minutes of a meeting of the board of directors held the following April, showing the adoption of the proposed amendment to the by-laws. The minutes in each instance were excluded, and, we think, properly. The most that can be claimed for the amendment is that it authorizes assessments to be made by the board of directors instead of the secretary. It contains no hint that assessments shall be made at stated intervals, or at any time other than when required to meet a loss which has actually occurred. Besides, the assessment in question, which it is claimed was levied under this amendment, was levied only against those who had been members of the association more than two years. The entire act contemplates that assessments shall be levied upon the entire membership, and even if it were possible to change this feature of the act by a by-law of the company, the one offered in evidence contains nothing to indicate that any such change was intended. Besides, the power of the board of directors to adopt a by-law conferring authority upon themselves to make assessments may well be doubted. There is certainly some ground for the belief that the legislature intended to confer no such power on the directors, but to leave it in the hands of the membership at large. But upon that point we express no opinion. The evidence was properly excluded, and, as this left the defendant without any proof that the assessment in question was authorized or legal, the court properly directed a verdict in favor of the plaintiff.

It is recommended that the motion for rehearing be overruled.

DUFFIE and JACKSON, CC., concur.

By the Court: Motion for rehearing

OVERRULED.

GREELY BAKER, APPELLANT, V. SWIFT & COMPANY, APPELLEE.

FILED DECEMBER 7, 1906. No. 14,544.

Directing Verdict. Where from the undisputed evidence it appears as a matter of law that the plaintiff should not recover, the action of the trial court in directing a verdict for the defendant *held* to be the only proper course to pursue.

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

John O. Yeiser, for appellant.

Greene, Breckenridge & Kinsler, contra.

JACKSON, C.

The action is one to recover damages for a personal injury which the plaintiff claims to have sustained on account of the negligence of the defendant. At the close of the plaintiff's evidence the jury were instructed to return a verdict for the defendant. The plaintiff appeals.

The only testimony in the record is that of the plaintiff himself, and it tends to prove that the plaintiff was employed in the hog-killing department of the defendant, who is engaged in operating a packing house in South Omaha. He was employed in the same room with some 40 or 50 other workmen, all engaged in the same character of employment. On the 8th day of April, 1902, their duties for the day were terminated at about 3 o'clock in the afternoon. The plaintiff went immediately to one of the benches used by the employees in the course of their labor, where he was engaged in washing himself and clean-

ing his tools preparatory to leaving the building, when another workman, who was at that time using a hose through which hot water was being forced under pressure of steam for the purpose of cleaning up the room, as it was a daily custom to do after the killing operations for the day had ceased, either carelessly or purposely turned the hose in the direction of the plaintiff so that the water was forced onto his person, resulting in his being severely scalded. The employee who was using the hose was a negro boy about 14 years of age, and had previously been performing the same character of service as that required of the plaintiff. Whether he was so employed on the day of the injury does not appear. The plaintiff and other employees in his department were all under the direction of the same foreman. It appears also from the testimony of the plaintiff that the day before the injury he had engaged in an altercation with the negro.

It is contended by the appellant that at the instant the last animal passed through their hands for the day the relation of master and servant ceased, and that the application of the fellow servant rule no longer applied, and that he was entitled to the same protection a stranger would be entitled to who came upon the premises of the defendant by invitation; that no rule of the establishment required him to wash himself or clean his tools on the premises, but that the fact that conveniences were at hand for that purpose was a mere invitation to do so. It is worthy of notice in that connection that a time keeper was employed by the defendant, who gave each laborer a time-check when he entered the establishment in the morning, and that each, as he completed his day's labor deposited his check when he passed out. This the plaintiff had not done at the time of the injury.

We do not regard the fact that the appellant had actually ceased from labor for the day as being at all important in a determination of the questions involved. He was still on the appellee's premises, and it does not follow that, because the injury resulting from the negligence of

his fellow servant was not concurrent in point of time with his actual employment, the master would be thereby liable. *Butler v. Townsend,* 126 N. Y. 105. We entertain no doubt that the appellant and the negro boy were fellow servants under the rule of *Kitchen Bros. Hotel Co. v. Dixon,* 71 Neb. 293. The case in some respects is similar to that of *O'Neil v. Pittsburg, C. C. & St. L. R. Co.,* 130 Fed. 204. The same principle, at least, was there involved as in the present case. It is urged, however, that the employment of a negro boy of the age of 14 years for the performance of the service required was of itself negligence. From the testimony of the appellant it is evident that the negro was well developed for a boy of his age, as much so as the appellant himself, who was some years older, and we do not concur in the views expressed by appellant that the race to which he belonged is a proper element to be considered in determining whether or not he was capable of performing the service required of him.

Several assignments of error relate to objections to questions propounded by counsel for appellant, which were sustained by the trial court. They are all disposed of in the brief by the statement: "The other assignments only affect the record in showing the court prevented plaintiff from clearly rebutting the attempt to show consociation. Had the court not sustained objections to questions asked to show two distinct gangs and two separate foremen and different times of work for each gang as shown in remaining assignments of error, we would have affirmatively shown no possibility even for the existence of any such possible matter to have been interposed as a defense."

There are two answers to the suggestion: First, that the appellant was finally permitted to testify that he did not know whether there was any other boss or foreman after the last hog went over the line, or whether the foreman of the hog-killing gang stayed and continued to be boss over any other gang that might follow; and, second,

no offer to prove any special fact was made after the objections to the interrogatories were sustained.

The judgment of the district court was right, and we recommend that it be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA V. STATE JOURNAL COMPANY.*

FILED DECEMBER 21, 1906. No. 13,833.

1. **Principal and Agent.** An agent cannot avail himself of any advantage his agency may give him to profit out of the subject of the agency beyond the agreed compensation for his services.
2. **Contract: SUPREME COURT REPORTS, PUBLICATION OF.** The contract of the state with the defendant to print and manufacture for the state certain volumes of the supreme court reports, and that the "plates" upon which such printing was done should be delivered to, and become the property of, the state, did not constitute the defendant the agent of the state in the "publishing business."
3. ———: ———. Under such contract the law will imply an agreement on the part of the defendant not to use the property of the state, intrusted to its care to enable it to perform its contract with the state, for any other purpose than that contemplated in the contract. By a violation of such implied agreement it would become liable to the state for the value of such unauthorized use, and also for any injury done to the property thereby.
4. **Copyright.** The word copyright is generally used to mean the "exclusive right of multiplying copies of a work already published." This right can only be preserved by complying with the act of congress for that purpose. The word has sometimes also been used to denote the right which an author has in his literary work to keep it for his own private use, to publish it, or to refrain from publishing it, at his pleasure. This right exists at common law. It does not depend upon any statute. It can only exist

* Motion for leave to file amended petition overruled. See opinion, p. 771, *post.*

as long as the work is kept private. If it is published without complying with the copyright act the right is abandoned.

5. **Literary Property**: CONTRACT. The literary matter intrusted to the defendant to enable it to perform its contract with the state was not copyrighted, and had already been given to the public. Any citizen of the state had full right to print and sell the same on his own account. The law therefore will not imply an agreement on the part of the defendant not to manufacture and sell volumes containing such literary matter on its own account, there being no such limitation in the contract between the parties.

ORIGINAL action for damages for breach of contract. Defendant demurred. *Demurrer sustained and action dismissed.*

Norris Brown, Attorney General, and *W. T. Thompson,* for plaintiff in error.

Hall, Woods & Pound, contra.

SEDGWICK, C. J.

When the ruling upon the second demurrer was sustained for the reasons stated in the opinion, 75 Neb. 275, a motion for a new trial was filed, this being an action brought originally in this court. Upon this motion the attorney general filed an able and exhaustive brief. The propositions of law advanced by him as showing that our former decision was wrong are vigorously supported both in his brief and upon the oral argument. Many decisions of other courts, both in this country and England, are cited and discussed with earnestness and ability. It became very manifest that, whatever might be thought of the conclusion reached by this court, the opinion filed had not served its intended purpose; it had not made plain the views of the court upon all the legal principles upon which a right determination of the case must rest. The case is an important one both on account of the amount involved, if the contentions of the state are sustained, and on account of the character of the allegations upon which the claim of the state rests.

In the brief filed and upon the argument the state admits that it has no claim "for infringement of copyrights or for damages for misuse of literary productions." The position taken by the state upon this point is stated in the brief in these words: "It is correctly stated in the opinion that all persons have a right to publish the decisions of this court. The West Publishing Company does so. It buys copies of the opinions from the reporter of this court. It edits its own manuscripts, sets its own type, makes its own plates, prints its own copies, binds them, and sells them openly to the public." We do not think that the counsel for the state have fully appreciated the quality and force of this admission. The importance of the fact so admitted must be continually borne in mind in the investigation and determination of the questions involved. The literary matter involved in these reports became the property of the public before the manuscripts, or any other property of the state, were placed in the hands of the defendant to enable it to carry out the terms of its contract with the state. The syllabi of the opinions are regularly published in the newspapers of the state as soon as the decisions are rendered, and frequently extracts from the opinions, and sometimes the opinions themselves, are also so published. Copies of the opinions as well as the syllabi are furnished to any and all parties desiring them upon payment for copying them, and no attempt is made to preserve any claim on the part of the state in these syllabi or opinions. It was therefore impossible that the defendant should cause any injury to the state by making this matter public.

What interest or right of the state then has been interfered with or damaged by the acts of the defendant? The answer of the state's brief is: "The state engaged in the enterprise of publishing the decisions of the supreme court for the purpose of creating a fund to buy books for the state library. * * * For the purpose of creating a fund to purchase books for the benefit of the state library the state has by statute made provision for engaging in

the business of publishing the supreme court reports. The care of the state library and the enterprise of publishing the supreme court reports for the benefit thereof has been by the constitution and statutes committed to this court and its officers. * * * The constitution and statutes, therefore, have placed on this court and the reporter the responsibility for the management of the state's enterprise of publishing the supreme court reports, and the judges of the supreme court constitute a board of directors of the law division of the state library. Both the library and the means of creating the funds by which it is kept up are exclusively within the jurisdiction and management of the supreme court and the reporter thereof. This official power carries with it the responsibility for the proper management of the publishing enterprise, the funds created thereby, and the library books when purchased." We do not coincide with the view that the main purpose of the statute is to establish a printing and publishing business to make profits with which to replenish the library funds. The purpose would seem rather to be to make the opinions of the court easily accessible to all the citizens. We will assume, however, for the purpose of this discussion, that one of the objects of the state was to realize a profit upon the sale of the reports, and that the intention was to use that profit for the benefit of the library fund.

1. The first point stated in the argument is: "Defendant accepted employment in the state's publishing enterprise, and thereafter could make no clandestine profit out of its employer's business, and such profit belongs to the state." It is not entirely clear whether counsel intended to urge that this rule is applicable more especially to publishing enterprises, or whether it is the relation of principal and agent which they are intending to present in the discussion of this proposition. The first case cited under this point in the argument is an old English case, in which the defendant was employed by the plaintiff to make copies of certain drawings, and, while in that employment,

made other copies on his own account. Then follows the citation of a large number of cases from the courts of this country, in which the general doctrine is held that the agent cannot, without the consent of his principal, acquire an interest in the subject matter of the agency adverse to the interest of his principal. After citing these cases illustrating the law of principal and agent, a case is cited involving the right of a photographer to sell or exhibit copies of photographs, and other cases not depending upon the law of principal and agent.

Let us first inquire how the law of principal and agent affects the determination of this case. As before stated, a great many authorities on this question are cited in the brief, but they are all substantially to the same effect. In *Cottom v. Holliday*, 59 Ill. 176, the court in its opinion used this language: "The duties and obligations of an agent are such that he cannot avail himself of any advantage his position may give him to speculate off his principal. All the profits or advantages gained in the transaction belong to the principal." This expression is copied in the brief as being applicable to the facts in this case, but to our minds the rule of law declared in *Cottom v. Holliday* has no application whatever to the case at bar. In that case Mr. Cottom had employed Holliday to buy for him a piece of land from one Ritchie. Mr. Holliday purchased the land, and reported to Mr. Cottom that the land cost more than in fact it really did, and so obtained from Cottom more money than he was entitled to. It was held that Holliday, being the agent of Cottom to transact this business, could not be allowed to "speculate off his principal" in such manner. In the case at bar the defendant was not employed as an agent to carry on a printing and publishing business for the state. Its contract was to manufacture certain plates and certain books for the state. When they were manufactured they were to be delivered to the state and the defendant paid a certain agreed price therefor. This was the special employment of the defendant by the plaintiff. It was not

acting as the agent of the state in making these plates and books. It did the work in its own name. The state could not be held responsible for any acts or omissions of the defendant, or any contracts entered into or liabilities incurred by it in carrying out this contract with the state. One who contracted with a wagon maker to make him a wagon, and loaned the wagon maker certain tools with which to do the work, could with equal reason claim to be the owner of, or have some property interest in, a second wagon made by the wagon maker from his own materials while he was engaged in the contract with his employer, on the ground that the wagon maker was his agent in the enterprise of making wagons and could not speculate on his employer's business. In *Cottom v. Holliday, supra,* it was said: "The law will not permit the agent, without the assent of his principal, to acquire an interest in the subject matter of the agency adverse to that of his principal." If the defendant was the agent of the state in the transaction set out in the petition, what was the subject matter of that agency? It certainly was not to conduct a publishing enterprise. If the subject matter of the agency was the plates and books to be manufactured and delivered to the state, then the defendant has not acquired or attempted to acquire any interest in such subject matter.

2. One of the oldest cases cited by the state, and a case which may be regarded as a leading one, is *Pulcifer v. Page,* 32 Me. 404, 54 Am. Dec. 582. In that case the facts were that the plaintiff and defendant each had an iron chain which had been broken into various pieces. The plaintiff took the pieces of the two chains to a blacksmith and had them united so as to make two other chains. The defendant took one of these chains, and the plaintiff brought the action to recover from him. The court in stating the case began with this expression: "This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods. It is a general rule of

law that if the materials of one person are united to the materials of another, by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole, by right of accession." Counsel surely are not seriously contending that the principle involved in the case cited has anything to do with the case at bar. The materials of the state were the manuscripts of the literary matter and the plates from the time the plates became the property of the state. No materials of the defendant were united to the materials of the state in any way. There was no joint product produced.

3. The proposition is stated in the brief that, when one employs another to manufacture pictures or books for him, the person so employed has no right to make any other copies for his own benefit. Several cases are cited as illustrating this proposition and its application to the case at bar. *Pollard v. Photographic Co.*, 40 L. R. Ch. Div. 345, is one of the cases relied on. That was an action to restrain the defendant "from selling, or offering for sale, or exposing by way of advertisement or otherwise a certain photograph of the plaintiff, Alice Morris Pollard, got up as a Christmas card, and from selling, or exposing for sale or otherwise dealing with such photograph." The lady was photographed at defendant's shop, and paid for a likeness of herself taken from negatives then made. "It was found by the plaintiff that a photographic likeness of Mrs. Pollard taken from one of the negatives, got up in the form of a Christmas card, was being exhibited in the defendant's shop window at Rochester." In the course of the argument one of the judges remarked: "Injunctions have been granted to restrain a libel." The photograph was a private matter, it never had been published, and the attempt to publish it on the part of the defendant was the injury complained of. The case illustrates the doctrine of the right of privacy. This right of the plaintiff to prevent her photograph being made public against her wish was so well established in English law that it was unnecessary to discuss that right. The question dis-

cussed was whether she had waived that right by employing the photographer to make the negative without at the same time stipulating that he should not publish it, and the court held, after much discussion, that it was not necessary to make the express stipulation in the contract that they should not be published, that such stipulation would be implied, and this is the whole matter discussed in the case. The court referred to several other cases, some of which are cited and relied on by the state in this case, and then said that the cases referred to were the cases "in which there was some right of property infringed, based upon the recognition by the law of protection being due for the products of a man's own skill or mental labour." The court then stated that an English statute provides: "When the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed." So that by express statute in England the plaintiff had a right to her photographs, and might copyright them, if she chose. In this connection it will be remembered that the author of a manuscript is in this country not obliged to give it to the world, he may keep it as a private matter as long as he does not publish it, and at any time when he decides to publish it he may obtain a copyright thereon; so that, while he holds the matter unpublished, he has a special interest in it which would entitle him to prevent its publication. The English statute gave a similar right to one who was photographed to prevent the photograph from being made public. In the state's brief it is said that this case was followed by the United States circuit court for the district of Massachusetts in *Corliss v. Walker Co.*, 57 Fed. 434. In that case an injunction

was allowed in the suit of Mrs. Corliss to prevent the publication of a picture of Mr. Corliss, who was then deceased. Afterwards a motion was made to dissolve this injunction. This motion was sustained, and in passing upon this motion the court said: "But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication." *Corliss v. Walker Co.*, 64 Fed. 280. Distinctly holding, and construing *Pollard v. Photographic Co., supra,* also as holding, that it is the publication of the photograph or writing that the law would prohibit, and that this right to so prohibit this publication is "surrendered or dedicated to the public * * * by the act of publication." These cases and other similar cases plainly have no application to the making of pictures or printing of matter that has already been given to the public.

Another case quoted from in the brief and strongly relied upon by the state is *Tuck & Sons v. Priester,* 19 L. R. Q. B. Div. 629. In the syllabus the case is stated as follows: "The plaintiffs employed the defendant, who was a printer in Berlin, to make for them copies of a drawing of which they had the copyright. The defendant executed the order, and also, without the plaintiff's knowledge or consent, made other copies, and imported them into England. After this the plaintiffs registered their copyright under 25 & 26 Vict. c. 68, and after the registration the defendant sold in England some of the copies which he had imported." The court held: "There was an implied contract that the defendant should not make any copies of the drawing other than those ordered by the plaintiffs, and that, independently of the statute, the plaintiffs were entitled to an injunction and damages by reason of the defendant's breach of contract." It

is this holding that is quoted and relied on by the state. It is manifest that the meaning and force of this holding has been entirely misunderstood. These pictures had never been published. The plaintiffs were procuring them to be made for the purpose of disposing of them to the public for the profit of the plaintiffs themselves. Every principle stated in the opinion is inconsistent with the idea that the court was dealing with matters that had already been given to the public. This fact must be kept in mind in ascertaining what was in reality decided in the case. Another important matter has been overlooked in the plaintiff's discussion. It is mentioned in the opinion of Lindley, L. J. He said: "I am quite aware of the ambiguity of the word 'copyright,' but that which is called 'copyright' at common law has been shown by the decision of the House of Lords in *Jefferys v. Boosey* to be an incident of property and nothing more. 'Copyright' under the act is something far beyond that; it is the exclusive right of multiplying copies of a work already published." In the discussion of the case before the divisional court the difficulties which have arisen from this ambiguous use of the word 'copyright' are plainly pointed out. The word has sometimes been applied to the "right to publish, or to abstain from publishing, a work not yet published at all." This is the common law right which every one has in his own productions, whether they be literary, ornamental or of a more substantial nature. He may keep them entirely to himself as long as he chooses, and, while he does so, he has an exclusive right to them, and no person has a right to interfere with them or destroy them. To make them public would be to destroy this right. This right is perhaps not strictly a copyright, but that name has frequently been applied to it, and in the case under discussion it is said by a majority of the court to be a copyright. Whatever it may be called, it is the registering of this right, or in our country the complying with the law in regard to copyright, which preserves the right in the work after it has been published.

Unless the copyright laws are complied with, publication works an abandonment of all further right. Grove, J., of the divisional court quoted the following language from Lord Brougham: "Whatever may have been the original right of the author, the publication appears to be of necessity an abandonment; as long as he kept the composition to himself, or to a select few, placed under conditions, he was like the owner of a private road; none but himself or those he permitted could use it; but when he made the work public he resembled that owner after he had abandoned it, who could not directly prohibit passengers, or exact from them a consideration for the use of it." *Tuck & Sons v. Priester*, 19 L. R. Q. B. Div. 48, 55. A further quotation is made from language used by Lord Brougham in speaking of a copyright in the sense of exclusive right of multiplying copies of a work already published, as follows: "That which was before incapable of being dealt with as property by the common law became clothed by the lawgiver's acts with the qualities of property, and thus the same authority of the lawgiver, but exercised righteously and wisely for a legitimate and beneficent purpose, gave to the produce of literary labour that protection which the common law refused it, ignorant of its existence, and this protection is, therefore, in my opinion, the mere creature of legislative enactment." These pictures had never been published. The court recognized the right which the designer and maker of the pictures had to keep them for his own private use, and to publish them or refrain from publishing them at his pleasure. That right, which was independent of their statute, was violated by the defendant, and the discussion is as to whether under the circumstances there was an implied contract that the defendant should not violate that right. The court found that there was such an implied contract and so allowed the plaintiff to recover damages. After publication nothing but compliance with the statute will save the right. This is the ordinary and strictly proper use of the word copyright—the right to make it public and

still retain the beneficial interest in it. No right remains in a literary production which has been made public, except under the federal copyright act. This is the sense in which the word copyright was used in the former opinion. The fact that the state had dedicated to the public the literary matter embraced in the manuscript furnished to the defendant, by furnishing it to the West Publishing Company for publication, and in various other ways pointed out above, was not denied in the petition and was understood by all parties. Upon this understanding the case was presented to the court. Upon the theory that this was private matter, and had never been dedicated to the public, the proposition of law involved in the first paragraph of the former opinion would not be technically correct, and the same might be said of some of the expressions of the opinion.

The case of *Murray v. Heath,* 1 Barn. & Ad. (Eng.) 698, was decided in England in 1831. The plaintiff delivered certain drawings to the defendant to be by him engraved on copper plates for the plaintiff's sole use. The defendant engraved the drawings for the plaintiff, but while the drawings and copper plates were in the hands of the defendant he took off impressions on paper from the plates for his own use, and this was the foundation of the action against him. In the first count against the defendant it was alleged "that the plaintiff was possessed of and had the right to the sole use of" the drawings in question; and, in the seventh count, "that the plaintiff was entitled to the pecuniary profit, benefit, and advantage to be derived in any way from all impressions taken and to be taken" from the copper plates; and, in the eighth count, "that the plaintiff was the *proprietor* of certain prints, which had been etched and engraved (named them), and had and was entitled to the sole right and liberty of printing and reprinting the same." The other counts are not set out in the opinion. These allegations in these three respective counts do not appear to have been denied. No question was made in regard to these allegations. They

were necessary and material allegations, and if the drawings had been published these allegations would have been untrue. In that case the public, and any person that desired to, would have the liberty of printing and reprinting the same, and the plaintiff would have no such sole right. Upon the theory, however, that the allegations were true, and that the plaintiff did have the sole right, and that "the engraver had contracted to engrave the plate, and to appropriate the prints taken from it to the use of another, an action at common law would lie against him from the breach of that contract." If the engraver took copies of these drawings and offered them for sale to the public, such an injury would require no act of parliament to put an end to it. The court so declared in these words: "The injury complained of in this case required no act of parliament to put an end to it; for the engraver having contracted to engrave the plate, and to appropriate the prints taken from it to the use of another, an action at common law would lie against him for the breach of that contract." This expression of that court is quoted in the briefs and appears to be much relied on. It plainly has no bearing upon the right of the defendant in this case to copy and publish the supreme court reports. The state had the right in the manuscripts and in the plates, and the defendant did wrong in using them without the consent of the state, and would be liable under suitable allegations for such injury as the state suffered by reason thereof. The contract between the plaintiff and the state was of such a nature that the agreement on the part of the defendant not to use the plates and manuscripts of the state for such purpose might be reasonably implied, because the defendant had no right to so use them; but we cannot imply from the contract an agreement not to do that which the defendant in common with all other citizens had full right to do. When the contract was made both parties must have known that the defendant had the right to obtain and publish the opinions of the supreme court. There was nothing in the contract incon-

sistent with that right, and no implication can be drawn from the contract that the defendant renounced or waived that right. The injury to the state, then, is in the use that the defendant has made of the manuscripts and plates, and does not arise from the manufacture and sale of the volumes of the reports, which the defendant might have done by other means and without the use of the plaintiff's property.

4. It is said in the brief that the rule contended for has been stated in a different form as follows: "Where material is delivered by the owner to a workman to be worked up, together with some additional materials to be furnished by the workman, into a manufactured article, the general doctrine is that the property in the finished product, including the accessorial material furnished, remains in the original owner." What material of the state has been worked up with other material into a manufactured article? The only "materials" delivered by the state to the defendant are the written manuscripts furnished, and the plates made by defendants for the state. Have these been worked up, together with some additional material, into books now in defendant's possession? Can such authorities be seriously regarded as applicable to this case?

5. It is argued that the court was wrong in holding in the former opinion that no confidential relations were created between the parties by the contract in question, except such as arises from ordinary contracts of employment or bailment. Without doubt the law will imply an agreement on the part of the defendant not to use for its own private purposes the property of the state, entrusted to defendant's care to enable it to carry out the contract; and, so far as defendant has done so, it is liable to the state for such damage as it has suffered on that account. The measure of such damages is pointed out, and we think correctly, in the former opinion. The state has a right to control the use of its own property, and, when by contract it places its property in the hands of its employees

for a special purpose, the law, in the absence of anything in the contract to the contrary, will imply an agreement that the property shall be used only for that purpose. This is because any further use of it would violate the right of the state to control its use. This principle cannot extend to the making and selling the reports on defendant's own account, because this did not violate a right of the state. The state could not restrict the right of any citizen to make and sell these reports, because they had been already published, and were not copyrighted. If the state had required the defendant to stipulate in the contract that it would not make and sell any copies of the reports on its own account, it may be that such stipulation could have been enforced. The law will not imply such a stipulation in the contract, when, in fact, none exists, because the state had no private ownership in the literary matter; that private ownership, if any ever existed, having been waived and abandoned by publication. The state therefore had no right that could be violated by making and selling the reports, and there is no basis for the implication of an agreement on the part of the defendant that it would not make and sell reports on its own account.

We think that the judgment heretofore entered is right and it is adhered to.

DEMURRER SUSTAINED AND ACTION DISMISSED.

LETTON, J., dissenting.

The former opinion of the court, and the opinion of Chief Justice SEDGWICK, filed herewith, in substance, hold: (1) That the state has no literary property in the opinions of the supreme court so that the defendant or any other person can be restrained from printing and publishing the same upon its own account as an independent enterprise; (2) that the allegations of the petition with reference to recovery of damages are insufficient to support

an action at law for damages. So far I concur with the majority.

These propositions being settled there still remains the inquiry whether, under the conditions of the contract between the parties, the defendant has been guilty of, and is threatening such a violation of its terms as a court of equity will grant an injunction to restrain, on account of the inadequacy of the remedy by suit at law. The contract between the parties was entered into with knowledge by the defendant of the statute providing for the publication and sale of the supreme court reports. This statute became a part of the contract, of which the defendant was bound to take notice. It knew therefore that the purpose of the contract was to procure 1,000 copies of each original volume and 500 copies of each duplicate to be printed from the state's own plates furnished from its vaults, for the purpose of distributing a certain number of the copies to various officers and libraries, and of selling a much larger number, to create a library fund for the benefit of the state library. It was therefore fully aware that the preparation of the manuscripts, the indexing, editing, proof reading, and the arrangement of the contents of each volume was performed under the contract by the officers of the state for the pecuniary benefit of the state. This was not the only object, but it was one of the purposes of the contract.

It may be laid down as a general principle that no person has the right to use the property of another contrary to the will and against the interest of its owner. This rule applies with greater force where the property of one has been delivered to another under a contract to use it for certain specified purposes, and when the unauthorized use of the property for the benefit of the wrongful user would defeat the very object of the contract. When the state employed the defendant to print from its materials, furnished for the purpose, several thousand copies of supreme court reports, which the law prohibits the reporter of the supreme court from selling at less than a specified

price, if the defendant might use these plates and print an unlimited number of copies for its own use and sell at any price, the effect might be to deprive the state of any benefit from the contract and leave it with the books it had paid for a useless burden on its shelves. If such were the only force and meaning of the agreement, no man of ordinary business capacity would ever enter into it. Lord Holt said: "Every man's bargain ought to be performed as he intended it," and to believe that the contract entered into would permit such conduct on the part of the defendant would be to say that the state's officers were void of ordinary judgment.

With that portion of the opinion of Chief Justice SEDGWICK quoted hereafter I therefore concur: "The state had the right in the manuscripts and in the plates, and the defendant did wrong in using them without the consent of the state, and would be liable under suitable allegations for such injury as the state suffered by reason thereof. The contract between the plaintiff and the state was of such a nature that the agreement on the part of defendant not to use the plates and manuscripts of the state for such purpose might be reasonably implied, because the defendant had no right to so use them." And, further: "Without doubt the law will imply an agreement on the part of the defendant not to use for its own private purposes the property of the state, entrusted to defendant's care to enable it to carry out the contract. * * * The state has a right to control the use of its own property, and, when by contract it places its property in the hands of its employees for a special purpose, the law, in the absence of anything in the contract to the contrary, will imply an agreement that the property shall be used only for that purpose." I further concur in so far as the opinion holds that the fact that the defendant entered into the contract with the state in nowise deprived it of the right which it had, in common with every other citizen, to procure in the ordinary manner copies of the opinions of the supreme court, to arrange, index, correct the proof,

and otherwise prepare them for publication, and to print and publish them, since there is no private ownership in the literary matter of the opinions themselves. In fact, the only difference of opinion there seems to be between the majority of the court and myself is with reference to the remedy; their idea being that, by the violation of the implied contract, the defendant would become liable to the state only for the value of the unauthorized use of the state's materials and also for any injury done to the plates, while my view is that the legal remedy of damages, under all the circumstances of the case, is inadequate, and an equitable remedy necessary. Mr. Pomeroy says: "Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is evidently the only mode of enforcement; but the remedy of an injunction is not confined to contracts whose stipulations are negative; it often extends to those which are affirmative in their provisions, where the affirmative stipulation implies or includes a negative. The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs." 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1341. See, also, 5 Pomeroy, Equity Jurisprudence, Equitable Remedies, sec. 270, and note 2. The rule is that, where there is a continuing breach of a negative covenant in a contract, and where an injunction against its violation will do justice and equity between the parties by compelling the defendant to carry out his contract according to the intention of the parties, or to keep him from reaping any profit or benefits from the breach of it, and where the remedy at law is not adequate, a court of equity will restrain the defendant from such a breach. *Western Union Telegraph Co. v. Union P. R. Co.*, 1 McCr. (U. S. C. C.) 558; *Singer S. M. Co. v. Union B. H. & E. Co.*, 1 Holmes (U. S.), 253; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.*,

24 Fed. 516; *New York Bank Note Co. v. Hamilton Bank Note, E. & P. Co.*, 31 N. Y. Supp. 1060; *Saltus v. Belford Co.*, 133 N. Y. 499; *Myers v. Steel Machine Co.*, 67 N. J. Eq. 300, 57 Atl. 1080; 2 Beach, Modern Equity Jurisprudence, secs. 769, 770. The question involved in this case is not one of copyright or of literary property, but is one of contract and the proper remedy for a breach thereof, and this is why I think much of my brother SEDGWICK'S opinion is not germane to the question involved.

From the nature of the contract it will be observed that the damages which may flow from its breach are almost impossible of ascertainment. They may continue for a long period of years by the defendant's glutting the market with the reports which it is alleged it printed in violation of its contract, and thus deprive the state of the opportunity to reimburse itself for the money which it has paid for the printing of the books. The difficulty of ascertaining or recovering any specific damages furnishes a foundation for the interposition of a court of equity. Can it be questioned that, if the defendant was still in possession of these plates and manuscripts, and was using and threatening to use them in printing copies of the reports for its own use with the intention of selling them at reduced prices, it could not be enjoined? If it can be enjoined from using these plates, and from using the editorial labors paid for by the state in the preparation of indexes and the arrangement of manuscripts in violation of the contract, why should it not be enjoined from selling the unauthorized copies and thus profiting by its breach of the contract?

To sum up, the contract implied by its terms a negative covenant or restriction that the defendant would not use the property and material of the state, furnished it for the purpose of executing the contract, in such a manner as to defeat the object of the agreement and against the interest of the state. It made a breach of this implied agreement. The ordinary remedies provided by a legal action are clearly inadequate and, hence, a court of equity

should enjoin any further violation of the implied contract. See Bispham, Principles of Equity (6th ed.), secs. 461-464.

Of course, this discussion has proceeded upon the assumption that the allegations of the petition are true. What the proof may show, if issues are made up, we cannot foresee.

In my opinion the petition states a cause of action in equity to enjoin a breach of contract, and the demurrer should be overruled.

The following opinion on motion for leave to file amended petition was filed March 7, 1907. *Motion overruled:*

Judgments, Vacating After Term. The provisions of sections 602-609 of the code apply to original actions in the supreme court. The court therefore has no power or jurisdiction to set aside a judgment and allow the amendment of a petition, in its discretion, after the final adjournment of the term at which the judgment was rendered.

LETTON, J.

Application has been made during the present term of the court to file an amended petition in this case. A final judgment of dismissal, upon the demurrer to the petition being sustained, was entered at the September, 1906, term, since the plaintiff had formally announced that it would stand on its pleadings. The defendant contends that, since that term adjourned without further proceedings, the judgment entered was a final disposition of the case.

The action was brought under the original jurisdiction of this court, which is concurrent with that of the district court in like actions. Ordinarily a judgment of the district court, after the adjournment of the term at which it was rendered, becomes final. The power of the district court to vacate or modify its judgments, after the expiration of the term at which such judgments or orders are

made, is controlled by the provisions of sections 602-609 of the code. In *Huntington & McIntyre v. Finch,* 3 Ohio St. 445, it is said: "The court of common pleas has ample control over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of the court." This rule has been repeatedly upheld in this state with reference to the powers of the district court. *Smith v. Pinney,* 2 Neb. 139; *McBrien v. Riley,* 38 Neb. 561; *Ganzer v. Schiffbauer,* 40 Neb. 633; *Schuyler B. & L. Ass'n v. Fulmer,* 61 Neb. 68; *Sherman County v. Nichols,* 65 Neb. 250. Section 610 of the code provides as follows: "The provisions of this title subsequent to section 601 shall apply to the supreme court and probate court, so far as the same may be applicable to the judgments or final orders of such courts." These provisions of the statute place it beyond the power of the court in an original cause at a subsequent term to set aside a judgment and permit an amendment of a petition, except in the manner and for the reasons prescribed in section 602.

Independent of these provisions, we are of the opinion that under the statutes we have no power to allow the amendment at this time. A discussion of the rules relative to original actions in the supreme court is to be found in *In re Petition of Attorney General,* 40 Neb. 402, and the conclusion is there reached that, since section 2 of the code provides there shall be but one form of action, and in section 903 it is provided that where the statute gives an action, but does not describe the mode of proceeding therein, the action shall be held to be the civil action of this code, therefore, original cases in this court must be governed by the rules of the code. If this action had been brought in the district court the right of the court in its discretion to set aside the judgment and to allow the plaintiff to amend its petition would expire with the term. As we have seen, both by the special provisions of section 610

and by the general provisions of the code, this court is governed as to judgments in original actions by the rules pertaining to judgments in the district court, and, since if the judgment had been rendered in the district court its power to set the judgment aside would have ended with the term, so that of this court ended with the adjournment of the September, 1906, term, and we have now no power or jurisdiction to allow the amendment.

Leave to file an amended petition is therefore

DENIED.

LAWRENCE MCCONNELL V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1906. No. 14,689.

1. **Criminal Law: EVIDENCE.** Bill of exceptions examined, and the evidence of the physicians contained therein found to be competent.
2. **———: INSTRUCTIONS.** On the trial of one charged with a heinous crime, where the charge set forth in the information or indictment fully embraces all of the ingredients of a lesser offense, it is proper for the trial court to define the lesser offense and instruct the jury that, where the evidence requires it, they may convict of such offense, but a failure to so instruct is not reversible error, unless such an instruction is requested by the defendant.
3. **———: ———.** An instruction in a prosecution for assault with intent to commit rape, which may be construed to mean that it is not essential to a conviction that the prosecutrix be corroborated, should not be given. And where it is probable that the rights of the defendant were prejudiced thereby a new trial will be granted. *Dunn v. State*, 58 Neb. 807, distinguished.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

L. M. Pemberton and *A. Hardy*, for plaintiff in error.

Norris Brown, Attorney General, W. T. Thompson and *S. D. Killen, contra.*

BARNES, J.

Lawrence McConnell, hereafter called the defendant, was tried by the district court for Gage county on an information charging him with assault with intent to commit rape. He was found guilty and sentenced to the penitentiary for a period of seven years. To reverse that judgment he brings error to this court.

1. His first contention is that the court erred in receiving the evidence of Doctors Boggs and Fall as to the nature of certain stains found on the clothing of the prosecutrix. It is urged that this evidence was incompetent, because the doctors did not sufficiently qualify themselves to testify as expert witnesses. While this question seems to be a close one, still we are of opinion that each of them showed such professional standing, knowledge and experience as required the court to receive their evidence for what it was worth, and the attack of counsel should have been directed to its weight, credibility and probative effect rather than its competency.

2. Defendant also claims, and strenuously insists, that the court erred in failing to instruct the jury that under the charge contained in the information the defendant, if the evidence warranted, might be found guilty of an assault and battery, or a simple assault. This assignment is argued with great force and at length. An examination of the record shows that the court failed to so instruct, and it also discloses that the defendant made no request for an instruction of that kind. That the charge of assault with intent to commit rape necessarily includes a charge of assault and battery and one of simple assault seems clear. In *Prindeville v. People,* 42 Ill. 217, the court said: "From all of the authorities, we are satisfied, that the general rule is, that, where a higher and more atrocious crime fully embraces all of the ingredients of a lesser offense, and when the evidence requires it, the jury may convict of the latter." And no case occurs to us which can come more fully within the rule than does an

assault with intent to commit rape. So, this is a proper case for the application of the rule contended for. We find, however, that the authorities are divided on that question, and, although it may be said that the weight of authority favors the defendant's contention, yet we are already committed to the rule that the failure of the court to give such an instruction is not reversible error, unless such request is tendered and refused. In *Barr v. State,* 45 Neb. 458, it was held: "In a prosecution for a felony error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do." In *Hill v. State,* 42 Neb. 503, we said: "Mere nondirection by the trial court is not sufficient ground for reversal on appeal, unless proper instructions have been asked and refused." The same rule is stated, without qualification, in *Gettinger v. State,* 13 Neb. 308, and in *Housh v. State,* 43 Neb. 163, also in *Edwards v. State,* 69 Neb. 386, and in many other cases. It may be said for this rule that it is not without reason for its support. It may happen that, where a defendant is charged with a heinous crime, and the evidence against him is slight, he would prefer to have the jury understand that he must be found guilty of the particular crime charged, or else not guilty. For in such a case the jury might well refuse to convict of the heinous crime, and yet readily agree to find the defendant guilty of a lesser offense, amounting, perhaps, to no more than a misdemeanor. By adhering to this rule we offer a defendant an opportunity to exercise his election, and have such an instruction by requesting the court to give it. So, we are of opinion that the defendant's contention on this point cannot be sustained.

3. Counsel for the defendant further contends that the court erred in giving paragraph 10 of the instructions on his own motion; that the effect of that instruction was to inform or at least lead the jury to believe that the defendant could be convicted without any corroboration of the evidence of the prosecutrix. We are fully committed to

the rule that in cases of rape and seduction the prosecutrix must be corroborated, or, in other words, the uncorroborated evidence of the prosecutrix is not sufficient to sustain a conviction, and we see no good reason, nor is any suggested, why the same rule should not prevail where the charge is assault with intent to commit rape. By the instructions complained of the jury were told, in substance, that in case of an assault with intent to commit rape it is not essential that the prosecuting witness should be corroborated by the testimony of other witnesses as to the particular act constituting the offense; that if the jury should believe, beyond a reasonable doubt, from the testimony of the prosecutrix, and the corroborating circumstances and facts testified to by other witnesses, that the defendant did make the assault, as charged in the information, the law does not require that the testimony of the prosecutrix should be corroborated by other witnesses as to what transpired at the immediate time and place when it is alleged the assault was made. The vice of this instruction seems to be that too much emphasis was given to the idea or thought that the prosecutrix need not be corroborated by the evidence of any other witness, and thereby the necessity of the corroboration was, in effect, lost sight of. Again, in this instruction the jury is first told that it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. Then follows the statement that if the jury should believe beyond a reasonable doubt, from the testimony of the prosecutrix, and corroborating circumstances, in fact testified to by other witnesses, that the defendant did make this assault, as charged in the information, the law does not require that the testimony of the prosecutrix should be corroborated by other witnesses as to what transpired at the time and place the alleged assault was made. This would seem to virtually tell the jury that there was sufficient corroborating circumstances and facts testified to by other witnesses to justify them, if they saw fit, in finding the defendant guilty. It is true the lan-

guage used does not necessarily have that meaning, but in the absence of any other instruction correctly stating the law in regard to the necessary corroboration the jury would probably be misled in regard to the matter. The record discloses that no other or correct instruction in regard to the necessity of corroboration was given by the court, and we think that the giving of the instruction complained of was therefore erroneous. While *Dunn v. State*, 58 Neb. 807, approves of a similar instruction, yet it is to be presumed that a correct instruction as to the necessity of corroboration was given in that case.

4. Lastly, it is contended, and strenuously urged, that the evidence is insufficient to sustain a conviction. While we have carefully reviewed it, yet we decline to express any opinion upon that question. It is quite probable that the case may be tried again, and it would therefore be improper for us to do so at this time.

For failure to correctly instruct the jury as to the necessity of corroboration and giving the paragraph of the instruction complained of, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

JOHN G. STETTER ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1906. No. 14,780.

1. **Criminal Law**: PLEA IN ABATEMENT. Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury.

2. ———: COUNTY COURT: JURISDICTION. A county court or county judge has the same powers and jurisdiction in criminal matters as a justice of the peace, and may entertain a complaint, issue a warrant, conduct the preliminary hearing in a case where the offense is beyond his jurisdiction, and may hold the defendant to bail for his appearance in the district court.

3. **Statutes:** ENACTMENT: EVIDENCE. An enrolled bill, as found on file in the office of the secretary of state, bearing the signature of the legislative officers and approved by the governor, is *prima facie* evidence of its passage, and cannot be overthrown by the legislative journals where they are silent on that matter.

4. **Gaming:** EVIDENCE. *Held*, That the evidence contained in the bill of exceptions is sufficient to sustain a conviction for a violation of the provisions of section 215 of the criminal code.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher and *A. M. Morrissey*, for plaintiffs in error.

Norris Brown, Attorney General and *W. T. Thompson, contra.*

BARNES, J.

An information was filed in the district court for Cherry county against John G. Stetter and Harry F. Hilsinger, hereafter called the defendants, charging them with a violation of section 215 of the criminal code, which provides: "Every person who shall set up or keep any gaming table, faro bank, keno, or any kind of gambling table or gambling device or gaming machine of any kind or description, under any denomination or name whatsoever, adapted, devised and designed for the purpose of playing any game of chance for money or property, except billiard tables, or who shall keep any billiard table for the purpose of betting or gambling, or shall allow the same to be used for such purpose, shall, upon conviction, be punished by fine of not less than three hundred dollars and not exceeding five hundred dollars, or be imprisoned in the penitentiary not exceeding two years." To the information they filed a plea in abatement by which they alleged, in substance, that they had never had or waived a preliminary examination, because the original complaint on which they were arrested was filed before the county judge of Cherry

county, and such officer had no jurisdiction to receive the complaint, to issue a warrant thereon or conduct a preliminary examination in the premises. They also alleged in said plea that the section of the statute on which the information was founded had never been legally or constitutionally passed by the legislature of the state, and for that reason was unconstitutional and void. The state filed an answer to the plea, and the defendants thereupon demanded a jury trial on the issues thus raised. This was denied by the court, and the defendants excepted. Thereupon the issues were tried to the court, and resolved against the defendants. Thereafter they filed what they called a plea in bar, which was overruled and a trial on the merits of the case was had to a jury. They were convicted, and sentenced to pay a fine of $300 each, together with the costs of the prosecution, and from that judgment they have brought the case to this court by separate petitions in error.

1. Defendants now contend that the district court erred in not granting their request for a jury trial on their plea in abatement. This contention cannot be sustained. The plea presented no disputed question of fact. The questions raised thereby were questions of law, as applied to the record before the court, and arising on an examination of the original bill attested by the legislative officers, signed by the governor and found on file in the office of the secretary of state, together with the legislative journals concerning its passage. In such a case it is the duty of the trial court to determine the legal questions presented without the intervention of a jury.

2. It is claimed that the court erred in overruling said plea: First, because the county court or county judge was without jurisdiction as an examining magistrate, and therefore the defendants had never had or waived a preliminary examination; second, for the reason that section 215 of the criminal code is unconstitutional, because it was never passed by the legislature in the manner provided by law; that the title of the bill, attested by the legislative

officers, signed by the governor, and found on file in the office of the secretary of state, is different from the title of the bill introduced and passed by the legislature.

The first of these two questions was before us in *Ex parte Maule,* 19 Neb. 273, where it was held that a county judge has authority to receive a plea of guilty in a misdemeanor case, to render a judgment thereon of conviction within his jurisdiction, and enforce the same by imprisonment as in other cases of misdemeanor. The matter was before us again in the case of *In re Chenoweth,* 56 Neb. 688, where it was said that the criminal jurisdiction of a county court or county judge is the same as that of a justice of the peace. It will not be contended that a justice of the peace is not an examining magistrate, and so we are of opinion that the defendants' contention on this point is not well founded.

Defendants' counsel, however, devote most of their argument to the proposition that section 215 of the criminal code is unconstitutional. It may be conceded that this point is well taken, provided the record sustains the fact relied upon. It appears that on the trial of this question there was introduced a certified copy of the original bill containing the section in question, as found in the office of the secretary of state. This bill bears on its face a complete refutation of the claim made by the defendants. There was also introduced by the defendants a copy of the legislative journals relating to the passage of the act in question, and it is claimed that this evidence is sufficient to overthrow the evidence of the bill itself. On this question we are not without authority. In *State v. Frank,* 60 Neb. 327, it was held that the enrollment, authentication and approval of an act of the legislature are *prima facie* evidence of its due enactment. While the legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted, yet the silence of these journals is not conclusive evidence of the nonexistence of a fact which ought to be recorded therein regarding the enactment of a law. In the body of the opinion in that

case we find the following: " 'So, here, it must be made to affirmatively appear that amendments of the house bill in question were adopted by the senate and were not concurred in by the house.' The enrolled bill has its own credentials; it bears about it legal evidence that it is a valid law; and this evidence is so cogent and convincing that it cannot be overthrown by the production of a legislative journal that does not speak, but is silent. Such seems to be the conclusion reached by a majority of the courts; and such, certainly is the trend of modern authority. To hold otherwise would be to permit a mute witness to prevail over evidence which is not only positive, but of so satisfactory a character that all English and most American courts regard it as ultimate and indisputable." Again in *Colburn v. McDonald*, 72 Neb. 431, the same question was presented, and it was there said: " 'The silence of the legislative journals is not conclusive evidence of the nonexistence of a fact, which ought to be recorded therein, regarding the enactment of a law.' *State v. Frank*, 60 Neb. 327. In order to overthrow such enrolled bill, it must be made to affirmatively appear by the journals that it did not pass." We find nothing in the copy of the senate and house journals relating to the passage of the act in question that shows any change or amendment, nor is there any affirmative showing therein that the bill, as introduced originally in the senate, was not properly passed. So we are of opinion that the defendants' plea in abatement was properly overruled. It is contended, however, that a former attorney general was of the opinion that the law was not properly passed. And, again, it is said that the defendants should not be punished, because the city council had passed a resolution allowing gambling to be conducted in the saloons of the city of Valentine. But these propositions are practically abandoned by the defendants, and do not deserve our serious consideration.

3. Counsel for the defendants contend, in a general way, that the evidence is not sufficient to sustain the verdict.

This has compelled us to carefully read the bill of exceptions. It seems to be an undisputed fact that the gambling devices found by the sheriff in the possession of the defendants when he arrested them, were in a building situated in Valentine, Cherry county, Nebraska, occupied by defendants at that time, and for several months prior thereto, as a saloon. The evidence also shows conclusively that there had been what is commonly called a "poker table," together with cards and chips, in the back room of the saloon; another such table, together with what is called a "roulette wheel," in the back end of a pool room occupied by the defendants for more than a year prior to the time of their arrest. And it was shown by the testimony of seven apparently reputable witnesses that these devices had all been used in playing games for money, frequently, during all that time. So we are constrained to hold that the evidence is amply sufficient to sustain the verdict.

From an examination of the whole record we are satisfied that the defendants had a fair and impartial trial, and, finding no reversible error therein, the judgment of the district court is

AFFIRMED.

JAMES L. GANDY V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1906. No. 14,884.

1. **Witness, Bribery of:** INFORMATION. An information for the crime of attempting to corrupt a witness must allege that the person sought to be corrupted was a witness; that the defendant knew such person to be a witness, or must state such facts constituting the offense as show conclusively that the defendant had such knowledge.

2. ———. One who has not been summoned or recognized as a witness in a pending suit, and who is not acquainted with either of the parties thereto, and has no knowledge of any fact either direct or collateral which may be the subject of inquiry therein, is not a witness within the meaning of section 164 of the criminal code.

3. ———: EVIDENCE. On the trial of one charged with the crime of attempting to corrupt a witness, it is reversible error to allow the state to introduce evidence tending to show that the defendant offered a person the sum of $500 to steal a written instrument called a certain power of attorney, where the information contains no charge of that kind or nature.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

Edwin Falloon, C. F. Reavis and *S. P. Davidson,* for plaintiff in error.

Norris Brown, Attorney General and *W. T. Thompson, contra.*

BARNES, J.

James L. Gandy, hereafter called the defendant, was convicted of a violation of section 164 of the criminal code, which provides: "If any person shall attempt to corrupt or influence any juror or witness, either by promises, threats, letters, money, or any other undue means, either directly or indirectly, every person so offending shall be fined in any sum not exceeding $500 or imprisoned in the penitentiary not more than five years nor less than one year." From the judgment and sentence of the district court for Nemaha county based on such conviction he brings the case to this court by a petition in error. His petition contains a large number of assignments, but few of which will be considered in this opinion.

1. The first question to be determined is defendant's contention that the trial court erred in overruling his demurrer to the amended information. It is urged that the omission to allege that the defendant knew the person sought to be corrupted was a witness renders the information fatally defective. In support of this our attention is directed to the case of *State v. Howard*, 66 Minn. 309, where it was said: "An indictment for the crime of offering a bribe to a juror, under the provisions of Gen. St.

1894, sec. 6348, must directly allege that the person to whom the bribe was offered was a juror; that the defendant knew it; also, what was offered, naming it, and the fact that it was of value; and that it was offered with intent to influence the action of the juror as such." An examination of the Minnesota statute discloses that, like our own, it fails to set forth all that is essential to constitute the offense intended to be punished. It will be observed by an examination of the section of our statute on which this prosecution is founded that it simply names or defines the crime sought to be punished by its legal result, and does not purport to set forth all of the elements of the offense. In such a case an indictment or information in the words of the statute is not sufficient. *State v. Carpenter,* 54 Vt. 552; *State v. Smith,* 11 Or. 205, 8 Pac. 343; *Collins v. State,* 25 Tex. Supp. 204. And this does not conflict with the other well-established general rule that an indictment or information for a statutory crime is generally sufficient if it follows the language of the statute, for this is the exception to such general rule. It is claimed by the state, however, that *Chrisman v. State,* 18 Neb. 107, announces a contrary doctrine. We do not so understand that decision. The question there decided was whether the indictment charged that the person sought to be corrupted was a witness. And it was held that the language of the indictment was sufficient to so charge. It may be stated, in passing, that the indictment in that case contained the allegation that the defendant well knew that the person sought to be corrupted was a witness. We are therefore of opinion that in such case the information should charge that the defendant knew the person sought to be corrupted was a witness, or should contain such a statement of facts as would lead to the irresistible conclusion that the defendant had such knowledge. The information in this case charges in express terms that Fisher was a witness in the civil case of Gandy v. Estate of Bissell (deceased), and then sets forth facts relating to the conduct of the defendant which, if true, show conclusively that

he knew Fisher was to be a witness in that case. We therefore hold that the information is sufficient to charge a violation of the section in question, and the demurrer thereto was properly overruled.

2. It is also contended that the evidence does not support the charge contained in the information and is insufficient to sustain the verdict, for the reason that it shows conclusively that Fisher was not a witness within the meaning of section 164 above quoted. This requires us to determine who is a witness within the meaning of the statute on which this prosecution is founded. A witness, in the strict legal sense of the term, means one who gives evidence in a cause before a court. *Barker v. Coit,* 1 Root (Conn.), 224. In 29 Am. & Eng. Ency. Law (1st ed.), p. 533, note, it is said a witness is "a person who, being present before a court, magistrate, or examining officer, orally declares what he has seen or heard or done relative to a matter in question." When the books speak of a witness, they always mean one who gives oral testimony. *United States v. Wood,* 14 Pet. (U. S.) 455. In *Bliss v. Shuman,* 47 Me. 248, it was said: "The word witness is a most general term, including all persons from whose lips testimony is extracted to be used in any judicial proceeding." If we were to apply this rule, it could not be contended for a moment that Fisher was a witness. It is our opinion, however, that the word "witness," as used in the statute in question, should receive a broader and more general definition. 8 Words and Phrases, p. 7511, defines a witness to be one who has knowledge of a fact. See, also, *State v. Desforges,* 47 La. Ann. 1167, 17 So. 811. A witness is one who has knowledge of a fact or occurrence sufficient to testify in respect to it. *In re Losee's Will,* 34 N. Y. Supp. 1120. We are unable to find a broader and more general definition of the word than those above quoted. Applying this rule to the facts disclosed by the evidence in this case, we are satisfied that Fisher was not a witness within the meaning of the statute. He testified

positively that he was a stranger in Nebraska, that he had never heard of the case of Gandy v. Estate of Bissell; that he never knew any of the parties to the action; that he knew nothing in regard to any fact relating to it; and that he never intended to be a witness in that case. His evidence was that Gandy sought to induce him to become a witness; that he paid him a certain sum of money, trifling in amount; told him to go to the house of one of his tenants, and that later he would tell him what he wanted him to testify to. He also said that Gandy offered him $500 to steal a certain writing, called "a power of attorney," from one Hawley, who he was told was a witness in the case above mentioned. So, it is apparent that, if the evidence of the prosecution is true, when Gandy approached Fisher he (Fisher) was not a witness within the meaning of the statute, and never intended to become one. So, it would seem that the defendant's contention that the evidence discloses an attempt to suborn perjury, and does not support a charge of attempting to corrupt a witness, is well founded. While the action of the defendant was reprehensible in the extreme, and well calculated to pervert justice, yet we are satisfied that it is not covered by the statue under which the prosecution is brought. The facts of the case present a matter for proper legislative rather than for judicial action. So, we are of opinion that the evidence in this case is insufficient to support the verdict.

3. It is further contended that the court erred in permitting the witness Fisher to testify, over proper objections, that the defendant offered him $500 to steal the power of attorney above mentioned. An examination of the information discloses that no such charge is contained therein. Neither is that matter mentioned in setting out the facts constituting the crime charged. So while it is not necessary to determine this question, yet it is not improper for us to say that the rule is quite general that to receive evidence on the part of the prosecution of facts tending to prove other and extrinsic charges which relate

to some offense not contained in the information, on the trial of one charged with crime, is reversible error.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

DODGE COUNTY, APPELLEE, V. SAUNDERS COUNTY, APPELLANT.*

FILED DECEMBER 21, 1906. No. 14,729.

1. **Counties: BRIDGE REPAIRS.** A county which refuses to enter into a contract with an adjoining county to repair a bridge across a stream dividing the counties is liable to the county making the repairs under contract for "such proportion of the cost of making said repairs as it ought to pay, not exceeding one-half of the full amount so expended," when the county making the repairs has followed the procedure pointed out by the statute as to notice, etc.

2. ———: ———: **NOTICE.** Where the only notice served under the statute notified the adjoining county that a bridge across a stream dividing the two counties was "unsafe for public travel and that same must be repaired to make it safe for public passage," the county so notified cannot be compelled to contribute toward the cost of new ice breaks not specified in nor contemplated in the notice, and not necessary to make the bridge safe for public travel.

3. ———: ———: **ISSUES.** Where the proper steps have been taken to render an adjoining county liable for the repair of such a bridge, and where an issue is raised as to the necessity of the repairs or as to the amount paid being more than the actual and reasonable cost thereof, then the amount that the defaulting county ought to pay is a question for the jury, but, if no such issue is tendered, the county in default is liable for one-half of the cost of repairs.

4. ———: ———. The fact that a bridge across the Platte river where it divides the counties of Dodge and Saunders is not one con-

* NOTE.—On motion to modify this opinion, it was ordered that judgment of lower court be affirmed upon appellee filing a remittitur of amount of judgment in excess of $150 and interest.

tinuous structure, but consists of two separate portions separated by an island, one of which portions is entirely within Dodge county, does not, under the circumstances, relieve Saunders county from the burden of contributing to the repair of the entire structure.

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

M. B. Reese, B. E. Hendricks and *Simpson & Good,* for appellant.

J. W. Graham and *Stinson & Martin, contra.*

LETTON, J.

This action has been here before to review a judgment of dismissal rendered upon a demurrer to the petition being sustained. 70 Neb. 442, 451, 454. The judgment of the district court was reversed and the cause remanded for further proceedings, and from a judgment for plaintiff upon a jury trial the defendant appeals.

The substance of the petition is set forth in the first opinion. 70 Neb. 412. The defendant answered, alleging that the bridge is wholly within the county of Dodge; that the Platte river does not divide the two counties; that there is a large island lying within the county of Dodge, separated from Saunders county by a stream of the width of 175 feet; that Dodge county maintained a highway across said island to another bridge of much greater length, remote from the line dividing the two counties, and that the defendant is not liable for the cost of maintaining or repairing said north bridge, it being wholly within the county of Dodge. The reply was a general denial, with an admission of the existence of the island, and an allegation that that portion of the Platte river north of the island is about 2,600 feet wide; that portion south of the island 220 feet wide, and the island itself, where the bridge is located, 1,900 feet wide. It appears that the cost of the repairs upon the short bridge south of the island was $30,

and that the cost of the repairs and ice breaks on the north bridge was $964, of which sum $775 was expended in building ice breaks, which were placed at a distance of about 30 feet up stream from the bridge. These ice breaks, consisting of piling and caps, were new, though there were some old ice breaks in existence in places which were connected with the bridge and extended some 20 feet up stream. After the evidence was taken, the court refused all instructions asked by the defendant and instructed the jury to return a verdict for the plaintiff for one-half of the cost of the work, being the full amount claimed. A motion for a new trial was overruled, judgment rendered, and from this judgment defendant appeals.

1. The first assignment of error is that the court erred in compelling the jury to include in their verdict one-half of the cost of the new ice breaks. On August 11, 1899, the county board of Dodge county passed a resolution reciting that it appeared that the Platte river bridge south of Fremont and the Platte river bridge at North Bend, between Dodge and Saunders counties, are out of repair and should be repaired forthwith, and providing that the county commissioners of Saunders county should be notified that the aforesaid bridges "are unsafe for public travel, and that the same must be repaired forthwith to make the same safe for passage by the public," and requesting that board to fix a time and place to meet, for the purpose of providing all arrangements for making a joint contract for the needful repair of the bridges, and further providing that, if the Saunders county board refused to fix a time or place within 20 days after the service of these resolutions, said board would proceed to advertise for bids, and would hold Saunders county liable for one-half of the cost of said repairs as provided by law. It further appears that service of a copy of these resolutions was made upon the chairman of the board of county commissioners of Saunders county. No heed being paid by the board of Saunders county to this notice, the county clerk of Dodge county advertised for bids for repairs under the

direction of the Dodge county board, and included therein "five ice breaks in north channel at Fremont." After due notice a contract was awarded to one F. H. Wallace, whose bid for the ice breaks was $778. The notice served upon Saunders county contained no indication that any new ice breaks were to be constructed, but only provided for "the needful repair of said bridge to make the same safe for passage by the public." It is apparent from the evidence that substantial ice breaks were proper and necessary to be constructed at a short distance up stream from the north bridge in order to preserve the same from injury or destruction by moving ice. It is contended that these ice breaks are not repairs, and that they are not necessary for the purpose of repairing the bridge and making it safe for public travel. Whether this be so or not, it is very clear that their construction is not within the terms of the notice served upon Saunders county. It may well be that the county board of Saunders county was willing to entrust the expenditure of the amount of money necessary for "the repairing of the bridge and making it safe for passage" to the discretion of the county board of Dodge county, and therefore took no action, but that if it had been notified that the expenditure of nearly $800 was contemplated in the building of new ice breaks, it would have appeared at the time and place mentioned in the notice for the purpose of participating in the discussion as to the propriety and advisability of letting a contract for such purpose. However this may be, we think that the liability of Saunders county to contribute to the cost of building these ice breaks rests upon the question whether the county board of that county was notified that it was the purpose to make such improvements, and that a notice that the bridge is "unsafe for public travel and must be repaired forthwith to make the same safe for passage" is too narrow to impose such a liability upon it.

The defendant contends that under the statute the question of what proportion of the cost of making repairs Saunders county ought to pay should be submitted to a

jury for determination. In *Brown v. Merrick County,* 18 Neb. 355, decided in 1885, it was held that as the statute then stood there was no power in the county board of one county, in the absence of a joint contract, to erect or repair a bridge across a stream which divides counties and compel the other county to contribute. There was an attempt to amend the law made in 1881, but this act was unconstitutional and void, and a later amendment was made in 1899, which constitutes a part of the act now in force, being the proviso to section 88, ch. 78, Comp. St. In *Cass County v. Sarpy County,* 63 Neb. 813, the enactment and force of these statutory provisions are considered and the conclusion arrived at that section 87, when considered alone, imposes the obligation to build and repair bridges mentioned therein upon both counties equally and without qualification; that section 88 provides the manner of making and entering into joint contracts for the purpose of building or keeping in repair such bridges, regulates the manner of procedure, and enforces the liabilities growing out of a neglect of duty in reference thereto; and that section 89 provides for the method of procedure when a contract or agreement has been made in regard to the bridge, and when the county board of either county neglects or refuses to build or repair. It is further pointed out that "under the act of 1879, as well as under the amendment, two kinds of contracts are authorized—one for the building of bridges, and one for the repair of such structures. To the subject matter of the former of these two classes the proviso makes no reference, but the subject matter of the latter of them is its one sole subject. It makes no regulation with respect to the construction of bridges, nor to the repair of them, in instances in which there is an existing contract for such repair." See, also, *Saline County v. Gage County,* 66 Neb. 839, 844; *Iske v. State,* 72 Neb. 278. If, as we have seen, the purpose of the proviso is to provide for the repair of bridges when no joint contract has been made between the counties, and section 89 provides only for the manner and measure of the recovery when a con-

tract or agreement has been made between the counties, then this case is governed by the proviso, and not by section 89, since no joint contract was entered into between Dodge and Saunders county. Saunders county refused to enter into such contract. Dodge county then entered into a contract for the repairs, and is entitled to recover, as provided by the proviso, "by suit from the county in default, such proportion of the cost of making such repairs as it ought to pay, not exceeding one-half of the full amount so expended." The proviso must be construed in connection with section 87. We think the true intent of the statute is that in case an issue is raised as to the necessity of the repairs, or that the amount paid was more than the actual and reasonable value thereof, then that the county which is being sued is only liable for such proportion of the cost of the repairs as it ought to pay. The intention is that each county shall pay one-half of the reasonable cost of necessary repairs, and no more, and that the county making the repairs cannot recover one-half the amount expended by it, unless such amount is the reasonable cost of necessary repairs.

2. Another assignment of error is based upon the contention that under the law no part of the cost of repairs expended upon the north bridge is payable by Saunders county. It appears that the south boundary of Dodge county is the south bank of the Platte river, and that the island mentioned is entirely within the limits of Dodge county; that it contains from 160 to 180 acres; that it is the subject of private ownership, and taxes are assessed and collected upon it by Dodge county. The bridge across the north branch of the Platte connecting this island with the main land is 2,545 feet long. There are two bridges across the stream south of the island—one 264, and the other 278 feet long. The roads crossing the island from these two bridges to the main bridge are respectively 1,366 and 1,948 feet long, and are maintained and worked by Dodge county. It is strenuously urged by the defendant that since the statute refers to "streams" that divide

counties, and since the south branch of the river is the only "stream" that divides Saunders county from Dodge county, the island and the north bridge being entirely within Dodge county, the former county is only liable to contribute to the repair of the bridge across the south channel, and that it was error to include in the recovery one-half of the cost of the repairs upon the north bridge. It seems that this question was attempted to be raised in a motion for a rehearing in this case, but the court held that the question could not arise upon demurrer, and that "conditions may be such that each part of the river, that part lying on the north side and that part lying on the south side of the island, should be considered a stream as that word is used in the statute." 70 Neb. 454. While it was said in the former opinions that by the word "stream" the legislature meant "river," we think that this was said with reference only to the question whether the Platte river divided the two counties. It is argued that it is unreasonable to suppose that the statute would make an adjoining county liable to contribute toward the cost of repairing bridges across every branch or channel of such a river, even though such branch or channel might be situated miles away from the dividing stream, as might well happen in the case of the spreading streams constituting the delta of a river. But this statute was enacted with reference to the conditions in the state of Nebraska, and the legislature had in mind the streams and rivers of Nebraska, and not those of some other state or country. It is reasonable to presume that one of the moving causes of the enactment of this law was the existence of the wide and almost unfordable channel of the Platte river extending for hundreds of miles through the center of this state, and having scattered along its channel many islands, some of but little extent, while others contain within their limits hundreds or perhaps thousands of acres of land. It would seem unreasonable to adopt a construction of the statute which would hold that, if a bridge should be built across the river a few feet from the extremity of an island, both

counties should contribute to its maintenance, while, if the existence of the island should be taken advantage of for the purpose of reducing the cost of the erection of a bridge or furnishing a better site therefor, one of the counties should be relieved from a large portion of the burden of keeping it in repair. At the locality in question it appears that, if a bridge had been erected at a point either immediately above or below this island, the length of the structure in either case would be greater than that of the combined length of the bridges over both the north and south channels. It is apparent, also, that the inhabitants of both counties share in the benefit derived from the entire length of the passage way across the river; that the use of the bridge across the south channel alone would be of little or no benefit to the citizens of Saunders county were it not connected with the north bank by the other portion of the bridge extending across the north channel. Moreover, it is evident that there is no such necessity for connection with the island by the inhabitants of Dodge county as would warrant the erection of a bridge for that purpose alone. It is possible that, where necessity for communication with an island of extended area would warrant the erection of a bridge for that sole purpose, an adjoining county would not be held to contribute to the cost of repairs on such a bridge, but such a case is not before us. We are of the opinion, therefore, that the cost of repairing the entire length of the bridge or bridges across both the north channel and the south channel should be borne by both counties.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

EDWARD BETTLE, JR., ET AL., APPELLANTS, V. JOHN F. TIEDGEN ET AL., APPELLEES.*

FILED DECEMBER 21, 1906. No. 14,189.

1. **Mortgages:** EQUITY OF REDEMPTION, PURCHASER OF. A mere purchaser of the equity of redemption of mortgaged lands is given all the protection that the statute was designed to afford him, if he is permitted to deal with safety with one who appears by the record to be the owner of a mortgage securing a nonnegotiable debt.

2. ———: ASSIGNMENT: PAYMENT. In the circumstances disclosed by this record, the mortgagee was authorized to receive payment and discharge the lien, although the mortgage had been assigned and the assignment made of record before the payment was made.

APPEAL from the district court for Madison county: JOHN F. BOYD, JUDGE. *Affirmed.*

Francis A. Brogan and *M. J. Moyer*, for appellants.

W. V. Allen and *O. A. Abbott, contra.*

AMES, C.

Tiedgen owned a tract of land upon which he executed a mortgage to secure a promissory note payable to the Omaha Loan & Trust Company. After the note had become due and had lost its negotiable character under the law merchant, the payee assigned it to the Boston Safe Deposit & Trust Company, soon after executing also to the latter company a formal assignment of the mortgage. Subsequently the Boston company sold and transferred the note and mortgage to the plaintiffs, who are still the lawful holders of them, but without formal assignment, except as already mentioned. The defendant Reimers became the owner of a second mortgage on the land and foreclosed it upon the equity of redemption, of which he

*Rehearing allowed. See opinion, p. 799, *post.*

became the purchaser at judicial sale after the date of the transfer and assignment first above mentioned, but before the assignment was made of record in the county, and without knowledge or notice of it. Nor did he ever know of it actually or constructively, or of either of the sales and transfers of the securities, until after he had in good faith paid the amount of the mortgage debt to the payee named in the instrument, the Omaha company, unless he was charged with notice by the record of the assignment several months after he had acquired title to the equity of redemption, in manner aforesaid, and his sheriff's deed had been made of record, and he had gone into possession of the land. The Boston company, at all times after it had disposed of the paper, was the agent of its assignee, the plaintiffs, for its collection, and payment to it would have discharged the debt, but the Omaha company became insolvent, and never remitted the money paid to it by Reimers for the satisfaction of the lien.

The facts thus briefly stated and their legal effect, as thus indicated, are, as we understand, not in dispute. They gave rise to the first of two questions presented by this record of the dismissal by the district court of an action to foreclose the mortgage. The case reached this court by appeal. This question, which was debated at length by counsel both in their briefs and orally at the bar, is whether Reimers is a subsequent purchaser within the meaning of section 16, ch. 73, Comp. St. 1903, and, as such, charged with constructive notice of the transfer of the paper by the record of the assignment before he made his payment. There is good reason for regarding him as such. This court held in *Ames v. Miller*, 65 Neb. 204, that an assignment of a mortgage is, without doubt, a "deed" within the meaning of section 46 of the statute, because it affects the title to, and transfers an interest in, real estate, and is entitled to be made of record by the provisions of the act. This being so, one who purchases a release or surrender of the interest and becomes also entitled to an instrument of record evidencing that fact

must, under the circumstances of the case at bar, be regarded as a subsequent purchaser of it and bound by record notice that his vendor had already parted with his title thereto. It will be observed that section 39, ch. 73, *supra,* exempts from the constructive notice of the record of the mortgage three classes of persons only, namely, mortgagors and their heirs and personal representatives; but a purchaser of the equity of redemption who does not become obligated for the payment of the mortgage debt is a mere volunteer, who may or may not afterwards purchase, also, the outstanding lien or interest, and whose intention in that regard the mortgagee or his assigns can have no certain means of ascertaining. In fact, it was admitted in argument that for a considerable time after Reimers acquired the equity of redemption he had no fixed or formed intention with respect to the payment of the mortgage lien in suit, and for that reason expressly declined to enter into an agreement for the extension of the debt. Under such circumstances he can hardly be regarded as a "personal representative" of the mortgagor, who is still living and a party to the suit. We think that, in view of the decisions of this court, a mere purchaser of the equity of redemption of mortgaged lands is given all the protection that the statute was designed to afford him, if he is permitted to deal with safety with one who appears by the record to be the owner of a mortgage securing a nonnegotiable debt. *Eggert v. Beyer,* 43 Neb. 711.

The remaining question is one of fact, concerning which, however, the evidence is not conflicting, viz.: Was the Omaha company an agent of the Boston company for the collection of the debt in controversy, it being admitted by counsel, as we understand them, that such an agent would have possessed authority to bind the plaintiffs also? This question should, we think, be answered in the affirmative. The transaction and manner of dealing between the Omaha company and the Boston concern, briefly stated, was this: The former executed its obligations, called "debentures," to the latter for a loan of money, and de-

posited with the latter a very large number of notes, secured by mortgages to itself, as collateral security for the loan. The collateral notes appear not to have been indorsed and delivered under the law merchant, and that fact in this instance is significant, but were transferred by an assignment embodying a guaranty of collection of the principal, and of subsequently accruing interest thereon, and evidently not intended, or having the legal effect, to give the paper currency in the market. The arrangement extended over a considerable term of years. The course of business between the parties which seems to have been contemplated, though not set forth in detail, by their written contract was that, whenever any of the pledged obligations became due, or were about to become so, they were returned to the Omaha company, which was afforded an opportunity for 60 days to secure their payment or renewal, and to substitute with the Boston company new and underdue obligations in their stead. The business of making loans, collections and renewals was carried on by the Omaha concern and in its name exclusively, formal assignments not being made of record, and the connection of the Boston company with the paper, or its name even, not being made known to the borrowers and mortgagors or other persons with whom the Omaha company dealt. A very large volume of business was carried on for a long time in this way, and this was the way in which the mortgage in suit was dealt with, except that after the Omaha company became insolvent, or it was about to become so, the assignment mentioned above was executed and filed for record. The undertaking by and between the two corporations was a joint enterprise for mutual gain very closely resembling a partnership. The Boston company furnished the money capital for a definite share of the profits under the name of interest, and for the residue thereof the Omaha company conducted the business, and, as between the parties, incurred, to the extent of its financial responsibility, the sole risk of loss. The principles applicable to such an association are elementary and

familiar. Each member is obligated by the conduct of every other in the transaction of the affairs of the concern.

We are therefore of the opinion that the judgment of dismissal was not erroneous, and recommend that it be affirmed.

OLDHAM and EPPERSON, CC., concur.

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

AFFIRMED.

SEDGWICK, C. J. I concur in the conclusion reached.

The following opinion on rehearing was filed June 4, 1908. *Judgment of affirmance vacated and judgment of district court reversed:*

1. **Mortgages:** EQUITY OF REDEMPTION, PURCHASER OF. "A mere purchaser of the equity of redemption of mortgaged lands is given all the protection that the statute was designed to afford him, if he is permitted to deal with safety with one who appears by the record to be the owner of a mortgage securing a nonnegotiable debt." *Bettle v. Tiedgen, ante*, p. 795, adhered to.

2. ———: ASSIGNMENT: PAYMENT. And where such purchaser pays the principal sum of a note and mortgage to the original mortgagee, after an assignment of such mortgage to a third party has been duly recorded in the office of the register of deeds of the county in which the lands described in such mortgage are situated, and the original mortgagee fails to pay over such money to the record assignee of the mortgage, such payment to said original mortgagee will not, in the absence of proof of agency, estoppel, or the like, operate as a discharge of the debt secured by such mortgage.

3. ———: FORECLOSURE: PLEADING: SUFFICIENCY. An answer which alleges that on a certain day the defendant in a suit for the foreclosure of a mortgage, having no knowledge or notice of an alleged transfer of the note and mortgage, in order to relieve his premises of the apparent incumbrance thereby created, paid the original mortgagee the amount of said mortgage, and that the original mortgagee accepted said sum in full payment and satis-

faction of the note and mortgage sued on, and that at said time said original mortgagee had lawful authority to receive the same, does not constitute a plea of either agency or estoppel, and is not sufficient to entitle such defendant to prove that said original mortgagee, in accepting said payment, was acting as the agent of an assignee of said original mortgagee who had, prior thereto, placed his assignment of said mortgage on record.

FAWCETT, C.

This is a rehearing of an appeal from a decree of the district court for Madison county denying a foreclosure of the mortgage in controversy and dismissing plaintiff's suit. On the former hearing we affirmed the judgment of the lower court.

The facts, briefly stated, are as follows: In August, 1891, defendant Tiedgen borrowed from the Omaha Loan & Trust Company, of Omaha, $3,200, and as security therefor executed to said company the mortgage in controversy. The note which the mortgage was given to secure was payable five years after date. The Omaha Loan & Trust Company, which we will hereinafter designate as the Omaha company, sold the note and mortgage to some eastern investor, who carried the loan until its maturity, when, the note not being paid, the Omaha company, in compliance with its guaranty, repurchased the note and mortgage. No recorded assignment of either the sale or repurchase was made. Prior to the maturity of the note above referred to the defendant Reimers had commenced proceedings to foreclose a second mortgage upon the same property. Expecting that he would be compelled to purchase the property under his proceedings to foreclose his second mortgage, Mr. Reimers paid the last of the maturing interest coupons of the note secured by the first mortgage. After the maturity of the first mortgage note, and after it had repurchased the same, the Omaha company sent one of its employees, named Hayden, to see Mr. Reimers about their mortgage. Mr. Hayden requested Mr. Reimers to sign the necessary papers for an extension of the loan for another period of five years, but Mr. Reimers

was unwilling to sign any such papers, for the reason that he had not yet become the owner of the property, under his foreclosure proceedings, and might never become such owner. Hayden then stated to Reimers that he, Hayden, would execute the extension papers himself. To this Mr. Reimers made no objection, and upon his return to the office of the Omaha company Mr. Hayden did in fact execute the so-called extension agreement, extending the original Tiedgen note for a second period of five years from August, 1896. A number of years prior to the above dates, viz., on October 31, 1889, the Omaha company had entered into an agreement with the Boston Safe Deposit & Trust Company, of Boston, which we will hereinafter designate as the Boston company, in and by which agreement the Boston company agreed to act as trustee for the Omaha company to hold securities to be deposited with it by the Omaha company to secure the payment of debenture bonds or notes which might from time to time thereafter be issued by the Omaha company. By the terms of this trust agreement, before the Omaha company could issue debentures it was required to deposit with the Boston company real estate mortgages of a face value equal to the face value of the debentures to be issued by the Omaha company. On September 12, 1896, the Omaha company indorsed the original Tiedgen note as follows: "For value received, the Omaha Loan & Trust Company hereby assigns this note to ———————— or order, and guarantees, first, the collection of the within note, and, second, the prompt payment of the coupons attached thereto," and delivered the note so assigned, together with the mortgage and extension agreement, to the Boston company. On July 17, 1897, Mr. Reimers became the owner of the real estate in controversy, by sheriff's deed issued to him in his foreclosure suit, subject to the outstanding mortgage of $3,200; and from that time on until the maturity of the note according to the terms of the so-called extension agreement Mr. Reimers made the semi-

annual payments of interest on the note to the Omaha company, and received from that company the interest coupons. From September 12, 1896, to February 1, 1898, the Boston company seems to have been holding the note and mortgage in controversy without any formal assignment of the mortgage. For some reason, not disclosed in the record, the Omaha company, on the last mentioned date, executed a formal assignment of the mortgage to the Boston company, which assignment was on February 12, 1898, filed for record in the office of the register of deeds in Madison county. Some time during July, 1901, Mr. Reimers, who was still the owner of the real estate, received a notice from the Omaha company that the principal sum of the note and the last maturing semi-annual interest coupon of $96 would be due August 1. Mr. Reimers, having been called to the state of Pennsylvania on business during the latter part of July, instructed his banker at Grand Island to remit to the Omaha company, for his account, the sum of $3,296 to pay off the note and mortgage, which instruction his banker promptly obeyed, and sent the Omaha company a draft for that amount, which was received by the company on August 1, 1901. On his return home Mr. Reimers, under date of August 23, 1901, wrote the Omaha company as follows: "The canceled coupon No. 10 from my mortgage loan No. 6,986 is received, but I have not received release of mortgage and my note for $3,200 which I have paid in full by remittance of F. N. Bank of Grand Island. Please attend to this at once, as I have sold the farm, and will need the release soon. Yours truly, John Reimers."

On August 31 Mr. Reimers again wrote the Omaha company as follows: "I wrote you a week ago about release of my mortgage No. 6,986, which was paid August 1, 1901. I have not heard from you since, and you will please attend to it, or notify me what is the matter." To this letter Mr. Reimers received the following answer: "Omaha, Sept. 3, 1901. Dear Sir: Please pardon delay in sending forward papers in your loan. The causes have

been on account of the absence of two of our clerks on vacation, one of whom has charge of all loans held behind debentures with our trustees. It is necessary to substitute another loan for yours. This will be done within a week or ten days."

When the Omaha company received the money from Mr. Reimers' banker, it did not remit the same to the Boston company, but deposited it to the general credit of the Omaha company on its open account in the Omaha National Bank of Omaha. On December 11, 1901, the Omaha company became insolvent, and passed into the hands of a receiver, who at once took possession of all of the assets of the company. The Boston company then, under the terms of its trust agreement, sold all of the notes and mortgages of the Omaha company which it then held as security for the debenture holders, the plaintiffs being the purchasers of the note and mortgage in controversy at such sale. Defendant Reimers refusing to pay plaintiffs the amount of the mortgage, claiming that he had already paid it once to the Omaha company, and that the Omaha company was entitled to receive the payment, this suit was commenced.

The order granting this rehearing reads: "Rehearing allowed on the question as to whether payment to the original mortgagee discharged the debt." By this ruling on the motion for rehearing, the further consideration of the case is limited to that one proposition. On the original hearing defendant placed great reliance upon our statute, which reads: "The recording of an assignment of a mortgage shall not, in itself, be deemed notice of such an assignment to the mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee." Comp. St. 1905, ch. 73, sec. 39. Defendant argued that there was no evidence in the record of any actual notice of the assignment of the mortgage to Mr. Reimers, and that, under this section of the statute, constructive notice by the record of the assignment did not bind him. Our former opinion

decides this point adversely to the defendant. Plaintiffs insist that that holding, not having been vacated by the order granting a rehearing, has now become the law of the case; while defendant insists that "there can be no law of the case invoked on rehearing." Be that as it may, our decision of this point in our former opinion is not only in harmony with our holding in *Eggert v. Beyer,* 43 Neb. 711, but, also with well considered cases from other courts (*Robbins v. Larson,* 69 Minn. 436; *Schultz v. Sroelowitz,* 191 Ill. 249; *Woodward v. Brown,* 119 Cal. 283; *Brewster v. Carnes,* 103 N. Y. 556; *Larned v. Donoran,* 155 N. Y. 341), and must be adhered to.

On the question now under consideration the defendant contends that the payment by Mr. Reimers to the Omaha company discharged the debt, for the reason that, by the course of the dealings between the parties, the questions as to whether or not the Omaha company was the agent of the Boston company for the collection of the debt, or whether the Boston company had knowingly permitted the Omaha company to hold itself out to the defendant as its agent for the collection of the debt, are questions of fact for the determination of the court, and that, in the light of the record before us, we cannot disturb the finding of the district court in favor of the defendant on that question. The questions of agency or estoppel are not raised by defendant's answer, and are, therefore, not available to defendant under the pleadings as they now stand. For a proper understanding of the situation of the parties in this respect we again refer to the trust agreement between the Omaha company and the Boston company. By the terms of that agreement, so long as the Omaha company promptly, and without any default, paid all maturing debentures of any series, and all instalments of interest upon any of such debentures, it was to have the right to collect, retain and use the interest upon all the mortgages which it had deposited with the Boston company, in the same manner and with the same effect as if such agreement had never been entered into. It will be seen, there-

fore, that the fact that the Omaha company continued from time to time to collect the interest coupons from Mr. Reimers was not by sufferance of the Boston company, but by its own right; hence, no agency can be implied from that fact. The evidence shows that the Boston company at all times dealt with the Omaha company within the terms of the trust agreement. By the terms of that agreement the Omaha company had the right at any time within 60 days after the maturity of any note and mortgage which it had deposited with the Boston company to withdraw said note and mortgage, after having first substituted other notes and mortgages for an equal amount. The evidence shows that the Boston company never deviated from that condition of the agreement, but that, in every instance during the 12 years it continued to act as such trustee, before the Omaha company was permitted to withdraw a note and mortgage, it was required either to substitute with the Boston company other securities for an equal amount, or to make a cash deposit equal in amount to the amount of the securities withdrawn, and that the Boston company, in every such instance, held such cash deposit until the Omaha company made a proper substitution of securities as provided by the trust agreement. In the light of these facts, we are unable to see how the defense of agency could be claimed to have been established, even if it had been tendered by the answer.

Furthermore, we think the evidence shows that Mr. Reimers had received actual notice on numerous occasions that the Omaha Loan & Trust Company had parted with the principal note, and was no longer the owner and holder of the same. Exery six months there was mailed to Mr. Reimers a notice that the interest on the loan would be due on a certain date, which notice contained this clause: "Please send to the address given above the herein stated amount of interest, by draft on New York, Chicago, or Omaha, post office order or by registered letter. Personal checks not accepted. The remittance should be made at this office as much as ten days before the interest is

due, that it may reach the lender in the east on the day on which it is payable there. Prompt payment of interest is expected and required. Respectfully, W. T. Wyman, Treasurer. Return this notice with the funds. Coupons will be obtained and returned to you after payment. Notify this company of change of post office or of sale of land." Mr. Reimers testified that he never received these notices, but he admits that from the time of the execution of the so-called extension agreement, in 1896, down to the maturity of the note, in 1901, a period of five years, he paid the interest to the Omaha company every six months.

We come now to the main point which compels us, reluctantly we confess, to hold that, under the evidence now before us, the payment by Mr. Reimers to the Omaha company did not discharge the debt. The formal assignment of the mortgage on February 1, 1898, by the Omaha company to the Boston company was duly spread upon the records in the office of the register of deeds in Madison county on February 12, 1898. In the face of the notice thus given by the record of this assignment, Mr. Reimers could not, under the pleadings in this case, three and one-half years later, pay the principal sum of the note and mortgage in controversy to any but the Boston company. If he paid it to anyone else he did so at his peril. Having paid the money to the Omaha company we are compelled to hold that he thereby made the Omaha company his agent for the transmission of the money to the Boston company. The Omaha company having failed to do its duty in that regard, the loss must fall upon the one who was negligent in the matter. If, in the end, the defendant Reimers shall be compelled to pay this mortgage a second time, it will indeed be a great hardship. On the other hand, if the plaintiffs, who represent the holders of the debentures which were secured by this mortgage, and who took their debentures in good faith, relying upon the security deposited for their benefit, are defeated in this suit, then they will suffer a great hardship. It is a

deplorable situation from either point of view, but there is no way by which we can relieve the case of the injustice which must be suffered by one side or the other. Whichever way it is ultimately decided, the loser will be a victim of misplaced confidence.

After a full discussion, we are all agreed that we ought not to enter a final judgment on this hearing, but that the cause should be reversed and remanded to the district court for further proceedings according to law.

CALKINS and ROOT, CC., concur.

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

REVERSED.

W. F. CRITCHFIELD, APPELLEE, V. NANCE COUNTY, APPELLANT.

FILED DECEMBER 21, 1906. No. 14,529.

Taxation: ASSESSMENT. The expression "money deposited in bank," as used in section 4 of the revenue act of 1903, is intended to include money on general deposit in bank.

APPEAL from the district court for Nance county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

J. H. Kemp, for appellant.

W. F. Critchfield, pro se.

AMES, C.

On April 1, 1904, appellee was a depositor to the amount of $1,000 in the First National Bank of Fullerton, in this state. He was also at the same time a debtor of the

Union Stock Yards National Bank of South Omaha upon his promissory note for the same amount. The precinct assessor returned the amount of the deposit for taxation, refusing to set off against it the indebtedness upon the note. Appellee made an unsuccessful attempt to obtain such a set-off by the county board of equalization. He therefore appealed to the district court, by whom the set-off was allowed, and from the order of allowance this appeal is prosecuted by the county.

The first clause of section 28, art. I, ch. 77, Comp. St. 1903, requires of every person of full age and sound mind, being a resident of this state, that he shall list all his moneys for taxation, and section 4 of the same act enacts that "the word 'money' includes all kinds of coin, all kinds of paper issued by or under authority of the United States circulating as money whether in possession or deposited in bank or elsewhere." Money so deposited is expressly discriminated from a "credit," which is defined by section 5 to include "every demand for money, labor or other valuable thing, whether due or to become due." The first said clause of section 28 also expressly requires the listing specifically of all "moneys loaned or invested," and this court held in *Lancaster County v. McDonald,* 73 Neb. 453, that this latter mentioned requirement must be complied with, although the taxpayer may be indebted beyond the amount of such loans and investments. It seems to us quite clear, and it is also in harmony with the decision cited, that the legislature intended to require the listing of moneys in possession and on deposit, regardless of the indebtedness of the depositor.

We do not understand, indeed, that this proposition is controverted by counsel for the appellee, but he seeks to evade its force in the present instance by contending that, as this court has repeatedly held, one having a general deposit in a bank is a creditor of the bank, so he falls within the exception imported into the statute by construction in *Lancaster County v. McDonald, supra,* and that therefore the word "deposit," as used in section 4 of the statute,

should be held to mean a special, but not a general, deposit. But the distinction appears to us to be too subtle and far-fetched. A special depositary is merely a bailee, and his possession is the possession of his principal, so that the construction contended for would leave the word "deposited" in section 4 without any practical meaning whatever, for, of course, in the absence of special requirement, a taxpayer would be required to list all his money and property, whether in his own actual possession or in the custody of his agents and bailees. Besides, it is an elementary rule of construction that the words of a statute are to be understood in their ordinary and popular sense, unless the act itself discloses expressly, or by necessary implication, a different intent, and, by the expression of "money deposited in bank," without explicit qualification, is popularly and universally understood to be meant money on general deposit. The question is one solely of legislative intent, which does not appear to us to be in doubt or obscurely expressed, and we therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

OLDHAM and EPPERSON, 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.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. WILLIAM S. ELY.

FILED DECEMBER 21, 1906. No. 14,342.

1. **Railroads: DRAINS: DAMAGES.** Damages are recoverable by a landowner against a railway company for negligently maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by

plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner. *Chicago, R. I. & P. R. Co. v. Andrecsen*, 62 Neb. 456, followed and approved.

2. **Cases Distinguished.** *Gartner v. Chicago, R. I. & P. R. Co.*, 71 Neb. 444, and *Fremont, E. & M. V. R. Co. v. Gayton*, 67 Neb. 263, examined and distinguished.

ERROR to the district court for Sarpy county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

M. A. Low and Woolworth & McHugh, for plaintiff in error.

H. Z. Wedgwood, contra.

OLDHAM, C.

This was an action instituted by the plaintiff, as lessee of a farm situated in Sarpy county, Nebraska, for damages to his growing crops caused by the overflow of a running stream. The grounds of the action were that the defendant railway company negligently constructed its roadbed so that it obstructed the channel of a stream of running water, and that by virtue of this obstruction the waters of the stream were dammed up and caused to flow back and remain on the land where the crops were growing, thereby causing a partial loss of all the crops growing on the leased premises. The answer of the company was in the nature of a general denial and a plea of estoppel, by reason of the fact that the defendant company had purchased the right of way across the premises from plaintiff's lessor, who was the owner of the land. On issues thus joined there was a trial to the court and jury, and a verdict and judgment for the plaintiff. To reverse this judgment defendant brings error to this court.

The only contention urged by the defendant railway company is that an action for damages for the overflow of the crops cannot be maintained by the lessee of the prem-

ises, for the reason that the obstruction is a permanent one which, unless interfered with by the hand of man, would continue indefinitely, and for this reason all damages, both past and prospective, are recoverable in but one action which must be instituted by the owner of the freehold. In support of this contention we are cited to the case of *Gartner v. Chicago, R. I. & P. R. Co.*, 71 Neb. 444. In this case the question at issue was whether or not a judgment, rendered in favor of the owner of the land for damages to the land occasioned by the construction of a permanent embankment in the building of the railway, was a bar to a similar action for damages to the land instituted by a subsequent purchaser. It was held that the damages to the land were indivisible, and a judgment therefor was binding on the plaintiff and his privies, but the question of damages to growing crops because of insufficient drainage was not involved in the controversy. The other case relied on is that of *Fremont, E. & M. V. R. Co. v. Gayton*, 67 Neb. 263, which was an action for damages to growing crops. But in this case the insufficient drainage and borrow-pits were all constructed on the lands owned by the railway company, and afterwards certain of these lands were conveyed to plaintiff's grantor and the point determined was that the grantee took the land subject to the visible burdens attached thereto at the time of the purchase. It was held that, "where a railroad company constructs its road across its own land and in so doing erects embankments and bridges and digs ditches and borrow-pits, by reason whereof surface water is or may be collected and discharged upon a particular portion of the track, subsequent grantees of that portion cannot maintain an action against the company by reason of the maintenance of such embankments, bridges, ditches and borrow-pits in their original condtion."

It is clear neither of these cases is applicable to the facts in the case at bar, because this is not an action for injury to the land, but the rather for injuries to growing crops, which are admitted to be the property of the plain-

tiff, who paid a cash rent for the use of the premises. And, again, the crops were not raised on lands which had been purchased by plaintiff's lessor, or any one else, from the railway company after the construction of the bridge and culvert complained of. We think that the undisputed facts place this case clearly within the rule announced in *Chicago, R. I. & P. R. Co. v. Andreesen,* 62 Neb. 456, in which it was said: "Damages are recoverable by a landowner against a railway company for maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner." The doctrine here announced was adhered to in the later case of *Chicago, B. & Q. R. Co. v. Mitchell,* 74 Neb. 563.

We are therefore of opinion that the trial court was fully justified in overruling defendant's request for a peremptory instruction directing a verdict in its favor, and we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

FIRST NATIONAL BANK OF BLUE HILL, APPELLEE, V. WEBSTER COUNTY, APPELLANT.*

FILED DECEMBER 21, 1906. No. 14,520.

Taxation: EQUALIZATION: APPEAL. On appeal from an order of a board of equalization in the matter of assessment of property for taxation, the cause must be tried on the questions raised by the complaint before that tribunal. *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405, followed and approved.

APPEAL from the district court for Webster county: ED L. ADAMS, JUDGE. *Affirmed.*

A. M. Walters and *Bernard McNeny*, for appellant.

L. H. Blackledge, contra.

OLDHAM, C.

This was an appeal from the board of equalization of Webster county on the question of the amount of real estate otherwise assessed that should be deducted from the capital stock, surplus and undivided profits of the First National Bank of Blue Hill. The assessment list furnished by the bank showed a total book value of the capital stock, surplus and undivided profits to be $64,968.53. It also showed the value of the real estate assessed as such to be $34,380, and personalty $1,380, making a total of $35,760, which, deducted from the above amount, left $29,208.53. When the board of equalization met it was discovered that the bank's last statement on March 28, 1904, showed the following as to real estate:

Banking house, furniture and fixtures....	$1,000.00
Other real estate and mortgages owned..	10,934.12
Total	$11,934.12

The board thereupon directed the clerk to notify the bank to appear, which he did, and the bank appeared by its

* Rehearing allowed. See opinion, p. 815, *post.*

attorney and cashier. And the board, over the objections of the bank, changed the list as returned by deducting the amount of real estate shown in the last statement from the total valuation of the shares of stock, surplus and undivided profits, instead of the amount returned to the assessor. The bank thereupon prosecuted its appeal from the action of the board in reducing the valuation of the real estate deducted from the valuation of its capital stock. This issue, and this issue alone, was presented by the appeal.

At the hearing of the cause on appeal, the only evidence offered was the bank's statement of March 28, 1904, the list returned by the assessor, the testimony of Mr. Gund, cashier of the bank, and a description of the real estate returned for assessment and claimed as assets of the bank. Mr. Gund testified that all the tracts of land claimed were owned by the bank, but that, because the bank was carrying too much real estate in its capital stock, it had been requested by the national bank examiner to reduce the amount of real estate; that it had accordingly deeded some of the tracts of land in trust to the officers of the bank; that they in turn had given mortgages, accomodation notes and overdrafts thereon to the bank; and that in this form all of the real estate in dispute had been included in the capital stock of the bank. This testimony was not disputed. There was no issue raised on the valuation of the capital stock, nor was any effort made by the board to increase its valuation as returned by the assessor. In the case of *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405, an appeal arising under section 10523, Ann. St., we held that the language of the section "clearly limits the inquiry in the district court to the questions raised before the board of equalization." This was the view evidentally taken by the learned trial judge, who at the close of the testimony entered judgment in favor of the bank, and set aside the action of the board of equalization in changing the amount of the deduction made from the list returned on account of real estate otherwise as-

sessed, and directed the assessment to be made in conformity with the list as returned. To reverse this judgment the county has appealed to this court.

Aside from the one issue indicated, the other questions contended for in the brief of the county were not raised before the board of equalization. Consequently, in view of the undisputed testimony in the record, we are convinced that the judgment of the district court on the issue presented was right and should be affirmed, which we accordingly recommend.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed July 12, 1907. *Former judgment of affirmance vacated and judgment of district court reversed:*

1. **Taxation:** ASSESSMENT: APPEAL. The assessment of property for the purpose of taxation as ultimately fixed by the board of equalization is final, except upon appeal to the district court, and should not be disturbed on such appeal unless it appears from clear and convincing proof that it is erroneous.

2. ———: ASSESSMENT OF BANK STOCK. An assessor is required to assess the stock of a bank at its real value, and, where a bank owns real estate of a greater value than that at which it is carried on the bank books, such excess of value should be taken into consideration in fixing the value of the stock.

3. ———: ———. National banks are the agents of their stockholders for the purpose of listing their stock in such banks for taxation and paying the tax thereon.

JACKSON, C.

The plaintiff scheduled its property as of April 1, 1904, for the purpose of taxation, as follows:

Capital stock	$50,000.00
Surplus	10,000.00
Undivided profits	4,968.53
Total	$64,968.53
Real estate	$34,380
Personal property	1,380
Total	$35,760

Assessable value of shares at 20 per cent. of balance, $5,842.

This statement was adopted by the assessor as the basis of the valuation of the shares of stock of the bank. On April 2 of that year the plaintiff made a report to the comptroller of the currency of the affairs of the bank at the close of business on March 28. This report included the items of the banking house, furniture and fixtures, $1,000; other real estate and mortgages owned, $10,934.12; capital stock paid in, $50,000; surplus fund, $10,000; undivided profits, less expenses and taxes paid, $5,421.50. The county board of the defendant, while sitting as a board of equalization, having before it the bank's report to the comptroller of the currency and the return of the assessor, notified the bank to appear and show cause why the assessed valuation of its stock should not be increased. The bank appeared by its cashier and attorney and filed written objections to any increase in such valuation. The objections included a showing of the ownership of real estate of the value of $36,140. As a result of this proceeding the board added $23,445.88 to the assessed valuation of the stock of the bank, and thus increased its ultimate valuation for the purpose of taxation to $10,530.88. The bank appealed to the district court, where the action of the board was vacated, and the county brings the case to this court for review.

At the hearing in the district court the evidence related chiefly to the procedure before the board of equalization, although it was disclosed by the evidence of the cashier of the plaintiff that the bank was the beneficial owner of

several quarter sections of land, the title having been taken in the name of certain officers of the bank; that it was thus taken to prevent the real estate from appearing too bulky in their public statements. This real estate was represented on the books of the bank by a $2,000 real estate mortgage, an overdraft of $1,089.30, the cashier's note for $1,800, the note of the German National Bank for $2,600, and the real estate item of $10,934.12, which doubtless included the $2,000 mortgage, or a total of $16,423.42. The assessed valuation of the real estate claimed by the bank, after the process of equalization by the county board, was fixed at $31,805. Under this condition of the record the judgment of the district court was sustained in an opinion *ante,* p. 813. A rehearing has been allowed, and the case is before us for the second time.

It was stated in the former opinion that Mr. Gund (cashier) testified that all the tracts of land claimed were owned by the bank, but, because the bank was carrying too much real estate in its capital stock, it had been requested by the national bank examiner to reduce the real estate, and it had accordingly deeded some of the tracts of land in trust to the officers of the bank; that they in turn had given mortgages, accommodation notes and overdrafts thereon to the bank, and that in this form all of the real estate in dispute had been included in the capital stock of the bank. This statement is not complete. The items appearing on the books representing real estate amounted, as we have already shown, to but $16,423.42, while the value of the real estate as it was represented to be by the bank in its protest before the board of equalization was $36,140.

It is provided by our revenue law: "The president, cashier or other accounting officer of every bank or banking association, loan and trust or investment company, shall on the first day of April of each year make out a statement under oath, showing the number of shares comprising the

actual capital stock of such association, bank, or company, the name and residence of each stockholder, the number of shares owned by each and the value of said shares on the first day of April, and shall deliver such statement to the proper deputy assessor. Such capital stock shall thereupon be listed and assessed by him, and return made in all respects the same as similar property belonging to other corporations and individuals. Whenever any such bank, association or company shall have acquired real estate or other tangible property which is assessed separately, the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of such association or company. The assessor shall determine and settle the true value of each share of stock after an examination of such statement, and in case of a national bank an examination of the last report called for by the comptroller of the currency; if a state bank, the last report called for by the state banking board; and if the assessor deem it necessary, an examination of the officers of such bank, association or company, under oath, in determining and fixing the true value of such stock, and shall take into consideration the market value of such stock, if any, and the surplus and undivided profits. Such association, bank or company shall pay the taxes assessed upon its stock and shall have a lien thereon for the same." Comp. St. 1903, ch. 77, art. I, sec. 56. It will thus be seen that it is the province of the assessor to determine and settle the true value of the stock of a bank. For that purpose he should appraise each asset of the bank at its real value. The value thus ascertained becomes a charge against the item of value of stock and should be credited with the debts of the bank. The remainder is to be taken as the true value. From the true value of the stock the assessed valuation of the real estate and of such of the personal property as is locally assessed should be deducted, and the remainder is the amount to be apportioned among the shareholders, according to their holdings, as the value of their stock for the purpose of taxation.

One item of value is real estate, if any there be belonging to the bank, and if it appears to the assessor that the bank owns real estate of a value in excess of that at which it is carried on the books, it is clearly his duty to take such excess of value into consideration in determining the actual value of the stock. It appears from the record, on the showing made by the bank itself, that it owned real estate of the value of more than $19,000 in excess of its book value. That fact the assessor should have considered in valuing the capital stock, and, having failed to do so, the county board, when sitting as a board of equalization, not only had the right to consider this excess of value, but it was their duty to do so, and the district court should not have disregarded this important item in the disposition of the case. Furthermore, the valuation of the stock of the bank was reduced by the assessor to the extent of $34,380, assessed valuation of the real estate, whereas the assessed valuation of the real estate as ultimately fixed by the board of equalization was $31,805. The latter sum is the one that should have been deducted from the total valuation of the stock instead of the sum actually deducted.

The assessed valuation of the stock of the shareholders as ultimately fixed by the board of equalization becomes final, except upon appeal to the district court, under the provisions of the statute, and, where an appeal is taken, the assessment made by the board of equalization should not be disturbed, except upon clear and convincing proof that it is erroneous. The evidence taken at the trial in the district court was insufficient upon which to base a judgment setting aside the assessment as ultimately fixed by the board of equalization. No proof was offered of the value of the assets of the bank other than the real estate, and none whatever of the indebtedness.

The appellee insists that the entire proceeding is void, because the tax, in case of national banks, is a liability of the shareholder, and not of the banking corporation itself, and because the shareholders were not personally noti-

fied of the proceedings before the board; but that is an erroneous interpretation of the federal statute. Shares of stock in a national bank are assessed to the individual stockholder at the place where the bank is located, but the bank is liable in the first instance for the payment of the tax, and is given a lien on the stock to secure repayment from the shareholder. The bank is made the agent of the shareholder, not only for the payment of the tax, but for the purpose of listing the stock for taxation. No other course would be practical, because in many cases, as in this, stockholders in national banks reside in different states and all are not accessible to local assessors. Our statute was enacted with reference to these conditions and is in entire harmony with the federal law.

With reference to the procedure before the county board of equalization, such board is authorized by statute, when they have reason to believe that any person or corporation has not been fairly assessed, to call before it such person, agent or officer of the corporation, under oath to give such information as they may possess touching the valuation of the property sought to be listed and assessed. It is also provided that appeals may be taken from the action of the county board of equalization to the district court, where the appeal should be heard as in equity, without a jury, and the court is required to determine anew all questions raised before the board which relate to the liability of property to assessment. No formal written notice was given in this instance, but the bank appeared by its proper officer and an attorney, and the board was not without jurisdiction. In this procedure the board sought the same source of information which the assessor was required to seek. It was not necessary to notify or bring before the board each individual shareholder.

It is recommended that our former judgment be vacated, the judgment of the district court reversed and the cause remanded.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

JOHN C. TROUTON, ADMINISTRATOR, APPELLANT, V. NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY, APPELLEE.

FILED DECEMBER 21, 1906. No. 14,543.

Petition examined, and *held* obnoxious to a general demurrer under the former decision of this court in *New Omaha T.-H. E. L. Co. v. Anderson*, 73 Neb. 84, which is herein followed and approved.

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

F. T. Ransom and *Gurley & Woodrough*, for appellant.

W. W. Morsman, contra.

OLDHAM, C.

This is an action by the administrator of the estate of James Adams, deceased, for the benefit of the next of kin, in which the plaintiff seeks a recovery against the defendant because of its alleged negligent acts in connection with the management of its electric wires, by means of which a bolt of electricity is charged to have passed down a ladder, which was being removed from between the wires by the deceased and three other members of the fire department of the city of Omaha, and which occasioned the death of each of the firemen so engaged. Two cases involving this same injury have been before this court, and every question then at issue was examined and finally determined in the opinion delivered in *New Omaha T.-H.*

E. L. Co. v. Anderson, 73 Neb. 84. As every question then involved in the controversy is set forth and discussed in that opinion, we need only consider such new allegations in the present petition as seek to charge acts of negligence not considered in that opinion. During the pendency of the appellate proceedings in the two cases before mentioned, the case now at bar remained undisposed of on the docket of the district court for Douglas county, and after the opinions in the other two cases were delivered by this court plaintiff filed an amended petition, to which a demurrer was interposed. This demurrer was sustained by the trial court. Plaintiff then asked leave to file a second amended petition, which was not verified, and, this leave being denied, the court dismissed the amended petition. To reverse this judgment of dismissal plaintiff has appealed to this court.

As there was no showing of any abuse of discretion in the refusal of the trial court to permit the filing of the second amended petition, and as on such refusal plaintiff appears to have elected to stand on his first amended petition, we will review the judgment of the trial court in sustaining defendant's demurrer and dismissing this petition. In our opinion in *New Omaha T.-H. E. L. Co. v. Anderson, supra,* we held, in substance, that the members of the fire company, while engaged in ascending and descending their ladder and in entering buildings for the purpose of extinguishing fires, were not trespassers, but mere licensees, who must, so far as the liability of the defendant company is concerned, at their own risk enter the premises in the condition in which they found them, and that, while so engaged, the defendant company was liable only for injuries intentionally or wantonly inflicted by it. We also held that, under the provisions of the ordinance of the city of Omaha pleaded in the petition, the chief of the fire department and the city electrician had sole charge of the matter of cutting and removing the wires of the defendant company during the time of the fire, and that the lineman, who was furnished by the

company to attend at places of fire, acted, while performing such duty, under the sole charge of the fire chief and the city electrician, and not as the agent of the defendant. In the amended petition in the case at bar plaintiff, after alleging the death of his intestate from a bolt of electricity hurled down the fire ladder while it was being removed from between the wires of the defendant company, set up, in substance, the ordinance of the city of Omaha, which was reviewed in our former opinion, and alleged that the defendant company sent a lineman to the fire in conformity with the provisions of this ordinance, and that it was the duty of the chief of the fire department and the city electrician to cut the wires, when it was necessary for the safety of those engaged in extinguishing fires, and alleged that they (the officers and lineman) neglected to perform this duty. If the petition had gone no further, it would plainly have failed to state a cause of action against the defendant, under our former opinion; but it proceeds to charge that the defendant, for the purpose of protecting its property and restoring and repairing the wires that might be cut at the time of the fire, sent another employee, named Brinkman, to repair and restore wires and prevent its property from being unnecessarily destroyed, and "to speak and act for the defendant," and that this latter employee was present when the firemen attempted to lower the ladder, and that he knew of the danger to the firemen by reason of currents of electricity, which were, or might be, conducted by said wires, and that said wires might momentarily become charged with currents of electricity, and that, with such knowledge, Brinkman negligently and carelessly neglected to warn the firemen of the danger, but, on the contrary, carelessly, wantonly and negligently invited the firemen to proceed to lower the ladder by calling out to them: "All right, boys. Go ahead. Those wires are dead."

It is determined in the decision already rendered, with reference to this accident, that defendant light company owed no duty to the firemen to warn them of danger either

in ascending or descending the ladder or in removing it from between the wires after the fire was extinguished. This was a duty, if such duty existed, which, under the ordinance pleaded in the amended petition and under our former opinion, devolved upon the officers of the city, While the amended petition charges that Brinkman knew, or might have known, that the wires were, or might be, charged with dangerous currents of electricity, yet the petition simply shows a remark made by Brinkman, which amounted to an expression of his opinion that the wires were dead. Now, according to the allegations of the amended petition, Brinkman was not sent to cooperate with the officers of the fire company, but only to care for the property of the defendant, which might be injured at the fire, and there is nothing in the scope of the agency pleaded which would bind the company for an opinion he might express in the presence of the firemen as to whether the wires were dead or alive.

We are therefore of opinion that the judgment of the trial court in sustaining defendant's demurrer and dismissing plaintiff's petition was right, and we recommend that it be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAY C. SMITH ET AL., APPELLANTS.

FILED DECEMBER 21, 1906. No. 14,557.

1. Appeal: CHANGE OF VENUE. To warrant this court in overruling the action of a trial judge denying an application for a change of venue on the grounds of bias and prejudice of the trial judge against a litigant, the evidence offered in support of the fact of

such prejudice must be clear and convincing, and strong enough to overthrow the presumption of the impartiality of the court.

2. **Harmless Error.** Action of the trial court in the admission of evidence examined, and *held* not prejudicial.

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

Billingsley & Greene, for appellants.

James L. Caldwell, F. M. Tyrrell and *C. E. Matson, contra.*

OLDHAM, C.

This was an action instituted by the state of Nebraska to recover the obligation in a recognizance entered into by the defendants for the purpose of securing the appearance of Ray C. Smith at a term, therein named, of the district court for Lancaster county, the said Smith being charged, by proper information in said court, with the crime of bigamy. On a trial of the issues to the court and jury, a verdict was directed for the plaintiff, and judgment rendered on the verdict. To reverse this judgment defendants have appealed to this court.

The first alleged error called to our attention in the brief of the appellants is as to the action of the trial judge in proceeding with the hearing of the cause after defendants had filed an application for a change of venue, supported by the following affidavit: "Robert J. Greene, being first duly sworn, upon oath says that the defendants cannot safely proceed to trial in the above entitled cause before Hon. A. J. Cornish, Judge, or Hon. Lincoln Frost, Judge, because of the interest, bias and prejudice of said judges, and each of them, against this affiant. (Signed) Robert J. Greene." No other testimony than this affidavit was filed or offered in support of the application, which merely alleges in the general terms of the affidavit the prejudice of each of these judges against defendant Greene, without attempting to specify any connection that

either of the judges had with the question at issue that would tend to show any interest in the result of the trial, or any relationship, direct or remote, toward any one connected with the litigation. At common law the right to a change of venue because of prejudice of the trial judge did not exist. But a different rule with reference to such right now obtains in nearly all of the states of this Union. The rule, however, has its origin either in provisions in the constitutions or in statutory enactments of the various states. These provisions have been generally liberally construed in furtherance of the policy of granting to every litigant the right to a fair and impartial trial. And to this end it is generally held that, where a specific constitutional or statutory disqualification of a trial judge is alleged in the form prescribed by statute, the litigant is entitled as a matter of right to the change prayed for.

A specific disqualification for prejudice of a trial judge of a district court is not enumerated in any of our statutes, either civil or criminal, which apply to changes of venue. Section 37, ch. 19, Comp. St. 1905, provides that a judge is disqualified in any case wherein he is a party, or is interested, or is related to either party, or has been attorney for either party. Section 26 of the same chapter provides for interchanging judges where, on account of sickness, interest, absence from the district, "or from any other cause," a judge is unable to act. By section 61 of the code a change of venue is provided for when a fair and impartial trial cannot be had, or when the judge is interested, has been of counsel in the case, is related to either of the parties, "or is otherwise disqualified to sit." These various sections of the statute were examined by this court in the case of *Le Hane v. State*, 48 Neb. 105, and it was there held that, while the bias and prejudice of the trial judge was not specifically provided for in the statute as ground for a change of venue, yet an application for a change of venue on this ground, when made in the interest of a fair trial and supported by sufficient evidence, might be maintained. In the absence of an ex-

press statute providing for a change of venue for prejudice of the judge, and prescribing the means by which the fact of such prejudice may be established, it is generally held that a clear showing must be made of the cause of the disqualification to warrant a reviewing court in setting aside the order of the trial judge overruling such application.

We are cited by appellants to the holding in *Peyton's Appeal,* 12 Kan. 398, in which, in a disbarment proceeding before a district judge, the ruling of the court on a motion for a change of venue because of the prejudice of the judge was reversed by the supreme court of the state of Kansas, in an opinion by Judge Valentine. In this case, however, it was said: "The evidence introduced on the hearing of the alternative motion, for a change of venue or for the election of a judge *pro tem.,* was amply sufficient to show that the judge of the court below was prejudiced against the applicant." In the later case of *City of Emporia v. Volmer,* 12 Kan. 622, where an application for a change of venue because of prejudice of the judge was supported alone by the affidavit of the applicant, the supreme court refused to reverse the action of the trial court in overruling the motion, and Brewer, J., in rendering the opinion, said: "It seems to us therefore that this is the true rule: that such facts and circumstances must be proved by affidavits, or other extrinsic testimony, as *clearly* show that there exists a prejudice on the part of the judge toward the defendant, and unless this prejudice thus *clearly* appears, a reviewing court will sustain an overruling of the application, on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged. It is not sufficient that a *prima facie* case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial-judge's integrity, and of the clearness of his perceptions." While there are cases which hold that, in the absence of a

specific statute awarding a change of venue for prejudice of the judge, the action of the trial court on such an application is not subject to review, yet the reasoning in the case of *Le Hane v. State, supra,* seems to commit us to the doctrine announced in *City of Emporia v. Volmer, supra;* and, as this doctrine is supported by the current of modern authority, we see no good reason for departing from it. The application of the principle herein announced to the showing made in the record in the case at bar requires us to decline to interfere with the action of the trial court in overruling the defendant's application.

The next alleged error called to our attention is as to the action of the trial judge in overruling defendants' motion for a continuance in the case. An examination of the showing made for a continuance convinces us that it was insufficient and the trial judge did not abuse his discretion in overruling the same.

The action of the trial court in the admission of evidence is also alleged against in the brief of the appellants, but, from an examination of the record, the only conclusion that could have been reached from the pleadings and all the testimony admitted was that directed by the trial judge in his charge to the jury. While, in our view, some incompetent evidence was admitted, yet it was nothing that went to the prejudice of defendants' rights, and no evidence was excluded which tended to support any defense to the cause. It was clearly and indisputably established that the defendants entered into the recognizance alleged upon, which was given for the purpose of procuring the attendance of Ray C. Smith at the ensuing term of court to answer to the charge of bigamy, which had been preferred against him by information of the county attorney; and that Ray C. Smith had absconded from the state of Nebraska, and failed and neglected to appear at the term of court at which he was recognized; and that a proper default had been entered upon the bond. In this state of the record, but one conclusion could be reached, and that was that the conditions of the bond had been

forfeited, and the promise to pay of the sureties had become absolute.

We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

CHARLES MANAHAN ET AL., APPELLEES, V. ADAMS COUNTY ET AL., APPELLEES; KOUNTZE BROTHERS, INTERVENERS, APPELLANTS.*

FILED DECEMBER 21, 1906. No. 14,572.

1. **School Districts:** INDEBTEDNESS. Prior to the passage of the act of February 26, 1879 (laws 1879, p. 170), providing for the issuing and payment of school district bonds, territory detached from a school district, which was subject to an indebtedness, might be held equitably liable to such district for its proportionate share of the indebtedness.

2. ———: ENFORCEMENT OF LIBILITIES. But such liability could not be enforced at the suit of the judgment creditor, except on allegation and proof of the fact that there was not enough property remaining in the district originally liable to pay the existing indebtedness.

3. Intervening petition examined, and *held* not sufficient to state a cause of action.

APPEAL from the district court for Adams county: ED L. ADAMS, JUDGE. *Affirmed.*

Reavis & Reavis and *J. P. A. Black*, for appellants.

Tibbets, Morey & Fuller and *F. P. Olmstead, contra.*

*Rehearing denied. See opinion, p. 832, *post.*

OLDHAM, C.

In 1873 school district No. 34 of Adams county, Nebraska, for the purpose of raising money to erect a schoolhouse, executed its two written notes or bonds for $500 each. These obligations were purchased by Kountze Brothers. The district as then constituted included within its boundaries certain sections of land, which by subsequent change and readjustment of county boundaries now lies in Hall county, Nebraska, and is there known as school district No. 21 of Hall county. The fact of this particular change, however, is immaterial to any question involved in the present controversy. In addition to the territory subsequently transferred to Hall county there were other sections of land included in the boundaries of district No. 34, which in the year 1874, and after the bonds had been issued and negotiated, appear to have been legally detached from district No. 34 and organized, with other contiguous territory, into school district No. 52 of Adams county. In 1878 Kountze Brothers procured a judgment against district No. 34 for the principal and interest then due on their bonds. Since the rendition of this judgment there has been much litigation over its attempted collection between the judgment creditors and portions of the territory formerly constituting district No. 34. Nothing determined in these numerous controversies bears directly on the questions now at issue, except the decision in *School District No. 34 v. Kountze Bros.*, 3 Neb. (Unof.) 691, which affirmed a judgment of revivor of the judgment entered in favor of Kountze Brothers in 1878. After the judgment of revivor was entered a levy of a tax of 150 mills for the payment of the revived judgment was spread upon the tax books of Adams county, and extended over the property now embraced within the limits of district No. 34, and also over the detached property in Adams county formerly belonging to it, but separated from it before the judgment was rendered against this district. A number of owners of real estate in the detached territory joined

in a petition to enjoin the levy and collection of the 150-mill tax against the property situated in this territory. The petition was filed for the benefit of plaintiffs and all others similarly situated, and prayed for a perpetual injunction against the levy of the 150-mill tax on the property situated in the detached territory. To this suit Adams county and the treasurer of Adams county were made parties defendant, and each appeared and filed an answer. School district No. 34, as now constituted, was permitted to intervene, as were also Kountze Brothers, who filed a petition as judgment creditors of the district. At the hearing of the cause in the district court the injunction was made perpetual against the levy and collection of the 150-mill tax as prayed for in the petition. Neither county, the county treasurer, nor district No. 34 has appealed from this judgment, but an appeal has been taken by Kountze Brothers, interveners, as judgment creditors of district No. 34.

Prior to the passage of the act of February 26, 1879 (laws 1879, p. 170), providing "for the issuing and payment of school district bonds," there was no defined statutory liability upon detached territory of school districts for the indebtedness incurred during the time such territory was in the district. But in the unreported case of *People v. School District No. 9,* referred to in *State v. School District No. 9,* 8 Neb. 92, and in the case of *Clother v. Maher,* 15 Neb. 1, the equitable principle was recognized that, where a district which was in debt was subdivided and sufficient territory detached to impair the obligation by not leaving sufficient property liable for the payment thereof, the detached territory would be held liable for its share of such indebtedness. In *State v. School District No. 9, supra,* an application for a mandamus to extend the levy over the detached territory for an indebtedness accruing while such territory was included within the boundaries of the district was denied for the reason, as stated in the opinion, that the primary liability for the debt was against the district, and that it

was not made to appear that the amount of property remaining was inadequate for the payment of the debt and interest.

In the case at bar the intervening judgment creditors nowhere allege that the property remaining in district No. 34 is inadequate even under the levy made for the satisfaction of their judgment, nor did they introduce any proof at the trial of the cause to support such an averment. In this view of the case we think the petition insufficient to show a right of intervention, or that the rights of the interveners could in any manner have been affected by the judgment of the district court. The equitable right to a contribution as between district No. 34 and its detached territory for the payment of the debt created is not before us in this controversy, and, consequently, we express no opinion upon it. As none of the other parties have appealed, we recommend that the judgment of the district court dismissing appellant's petition of intervention be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed April 18, 1907. *Rehearing denied:*

AMES, C.

The brief continues to urge the point made in the original brief and urged at the oral argument that the act of 1879 (laws 1879, p. 170) applied to the contract under which the original indebtedness was created. As the indebtedness against the school district was created long before the passage of this act, we were of opinion that this act could not be given a retroactive interpretation, and, therefore, we determined the case on the laws in existence at the time the contract was entered into. The opin-

ion cited Nebraska decisions governing the liability of detached territory for the indebtedness of the school district from which it was detached at the time the indebtedness accrued. Appellants' contention depends on the application of the provisions of this act of 1879 to a contract entered into by a school district in 1873, from which territory was detached in 1874, or five years before the passage of the act. Our view was that the act of 1879 could not entail a different liability on territory detached before its passage than such as existed at the time it was detached. In other words, we thought that territory deached from a school district in 1874 carried with it the burden of liability for the indebtedness of the school district that was entailed by the law then in existence, and that this burden could not be increased by subsequent legislative enactment.

We are satisfied with our former conclusion, and recommend that the motion be overruled.

By the Court:

MOTION OVERRULED.

ARTHUR P. GUIOU ET AL., APPELLEES, V. DANIEL W. RYCKMAN ET AL., APPELLEES; MARY A. WALLACE, APPELLANT.

FILED DECEMBER 21, 1906. No. 14,581.

1. **Mechanics' Liens:** LIABILITY OF VENDOR. Where a vendor and vendee cooperate in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material which have been furnished for such improvements.

2. ———: STATEMENT OF ACCOUNT. Where a contract is entered into for a specific sum for labor or material, and is complete within itself, and is filed with the statement of the lien, a more detailed statement of the account is unnecessary.

3. ———: DESCRIPTION OF PROPERTY. In an affidavit for a mechanic's lien, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient. *White Lake Lumber Co., v. Russell*, 22 Neb. 126, followed and approved.

4. Evidence examined, and *held* sufficient to sustain the decree of the district court as to the liens filed herein.

5. Evidence examined, and *held* insufficient to show defendant Daniel W. Ryckman entitled to affirmative relief.

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

E. H. Westerfield, for appellant.

Francis A. Brogan, D. W. Merrow, Nelson C. Pratt, Byron G. Burbank, E. C. Hodder and *Baldrige & De Bord, contra.*

OLDHAM, C.

This action was instituted by the plaintiffs in the court below for the purpose of foreclosing mechanics' and material men's liens upon two lots situated in the city of Omaha, Nebraska. The record title to these lots was in defendant Mary A. Wallace, and Daniel W. Ryckman was in possession of the lots in controversy under an executory contract for the purchase thereof. A number of defendants were joined as holders of mechanics' and material men's liens, and they each filed answers and cross-petitions. Defendant Mary A. Wallace filed an answer, denying the validity of these various liens, and by way of cross-petition alleged that she was the owner of the lots in dispute, and that certain of the liens filed by plaintiffs and cross-petitioners were a cloud upon her title, which she asked to have canceled and removed from the record. Defendant Daniel W. Ryckman appeared, but does not seem to have asked for any affirmative relief in his answer. On issues thus joined there was a trial to the court, and judgment in favor of the plaintiffs and cross-petitioners,

in which the claims for work done and material furnished for the buildings on the lots by the plaintiffs and cross-petitioners were decreed to be a first lien on the premises, and the claim of defendant Mary A. Wallace for the purchase price of the premises under her contract with defendant Ryckman was decreed to be a second lien, and an order of sale was directed under this decree, which provided that, after the payment of the mechanics' and material men's liens and the payment of the amount due on the purchase price to defendant Mary A. Wallace, the remainder, if any, should be paid to defendant Daniel W. Ryckman. To reverse this judgment defendant Mary A. Wallace appeals to this court.

The facts underlying this controversy are that at and prior to the 28th day of July, 1904, the defendant Mary A. Wallace was the owner of the lots in dispute, which were described as lots 1 and 3, in Wallace's subdivision of Omaha, Nebraska. Prior to the day last mentioned defendant Ryckman negotiated through G. G. Wallace, a real estate agent in Omaha and son of the defendant Mary A. Wallace, for the purchase of the lots. As a result of these negotiations defendant Mary A. Wallace, who was not a resident of Omaha, came to Omaha, and entered into the following written agreement with defendant Ryckman: "It is hereby agreed, by and between the parties hereto that Mary A. Wallace, party of the first part, will convey by a good and sufficient warranty deed, with perfect title, all taxes due and payable at this date to be paid, lots 1 and 3, Wallace's subdivision, City of Omaha, Douglas county, Nebraska, to D. W. Ryckman, party of the second part, on completion, by said party of the second part, of a house of not less than five rooms, on each of said lots. Said houses to be constructed in a good and workmanlike manner, and to be completed on or before November 1, 1904. The consideration for said lots to be $700 to be paid on or before November 1, 1904, or on completion of said houses. The party of the first part further agrees that should the party of the second part not be

able to secure a loan sufficient to erect said houses, she will take a second mortgage on both houses and lots, not to exceed $200, payable $5 a month, with interest at 7 per cent., payable monthly from this date. The total indebtedness not to exceed $1,700, and all labor and material to be paid by the party of the second part. Permission is given to begin erection of said houses any time within 30 days. Signed this 28th day of July, 1904. M. A. Wallace, D. W. Ryckman. (Witness) G. G. Wallace." After the signing of this contract Mrs. Wallace left the city, and did not return before the present suit was instituted. Defendant Ryckman entered upon the premises in the month of October, and began the erection of a building on lot 1. It is to the claims for material furnished and labor performed on the building erected on this lot that our attention will be directed, since it is stated in appellant's brief, and conceded by counsel for the appellees, that the claims which were decreed liens on lot 3 have all been settled by the parties.

The first objection urged against the decree by the appellant is as to so much of it as grants affirmative relief to defendant Daniel W. Ryckman, by directing the payment to him of the surplus, if any, arising from the sale of the premises, after the liens have been satisfied. It is urged in support of this objection that defendant Ryckman did not ask for any affirmative relief from the court, and that there is no evidence in the record that shows that he did anything under the contract, except to take possession of the lot in controversy and proceed with the erection of the building, without paying or offering to pay for any of the labor performed or material furnished thereon, or paying or offering to pay any part of the purchase price agreed upon in the contract. The transcript of the pleadings and the bill of exceptions, containing the testimony introduced at the trial of the cause, fully sustain this contention. While the evidence shows that Ryckman moved into the house on lot 1 after it was partially completed, and was residing there at the time of the trial in the court

below, yet neither in his pleadings nor in his testimony taken at the trial did he claim any right to affirmative relief, but on the contrary his evidence was more in the nature of a disclaimer, for he says that he did not know that he had any interest in the contract for the property.

It is next urged that the title of the appellant Mary A. Wallace in the premises is not liable for the liens of either plaintiffs or cross-petitioners for material furnished to defendant Ryckman and labor performed at his instance in the erection of the building. This contention rests on the theory that the agreement before set out between Mrs. Wallace and Mr. Ryckman was not a contract binding on either party thereto, but was only an option agreement, and that the lienors were bound at their peril to know the terms of the agreement under which the contractor was operating. While the contract by its terms gives defendant Ryckman the right to enter upon the premises, which were at that time vacant lots, within 30 days and proceed with the construction of the buildings contemplated in the contract, time was nowhere made of the essence of the contract by its terms. And the evidence shows that G. G. Wallace, son and agent of the appellant, knew of the fact of the construction of the buildings and the purchase of material therefor at the time they were furnished Ryckman in the month of October, 1904. The contract was plainly entered into by the parties for the purpose of having buildings erected on the lots, and this places it within the line of decisions of this court that hold that, where the vendor and vendee cooperate together in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material which have been furnished for such improvements. *Bohn Mfg. Co., v. Kountze,* 30 Neb. 719; *Millsap v. Ball,* 30 Neb. 728; *Pickens v. Plattsmouth Investment Co.,* 37 Neb. 272; *Cummings v. Emslie,* 49 Neb. 485.

Objections are urged to the sufficiency of the proof of

the filing of certain of the liens on which judgments were rendered in the court below. One of these objected to is the lien of defendant and cross-petitioner George W. Jones. The evidence with reference to the filing of this lien is as follows: "Q. I hand you a mechanic's lien, and ask you if that is your signature attached to it, and you caused it to be filed in the register of deeds' office? A. Yes, sir. By Mr. Burbank: This may be marked 'Exhibit 9,' and I will offer it in evidence together with the indorsements thereon." The indorsements showed the filing mark of the register of deeds, and the date of filing and place of registry. This was clearly sufficient.

Similar objections are interposed to the sufficiency of the proof of filing of the liens of cross-petitioners S. F. Davis, Carl Smith, C. A. Kauffold, and J. B. Benjamin. Each of these lienors testified that they had paid the filing fee to the register of deeds, and that the liens bore their respective signatures, but the offer of the indorsements on the liens was not specifically tendered. While there was a technical inaccuracy in the proof of the registry of these liens, yet it was aided by the allegations of the answer and cross-petition of the appellant, who alleged in her cross-petition that these liens had been filed with the register of deeds of Douglas county, Nebraska, and that they constituted a cloud upon her title, which she asked to have removed by affirmative decree of the court.

Objection is urged to the sufficiency of the lien filed by cross-petitioner J. W. Robbins, in that it does not contain a sufficient description of the property which it seeks to charge, nor an itemized statement of the material furnished. The lien alleges an amount due on a contract, which is attached to and made a part of the affidavit. Where a contract is entered into for a specific sum for labor or material, and is complete within itself, and it is filed with the statement of the lien, a more detailed statement of the account is unnecessary. *Doolittle & Gordon v. Plenz,* 16 Neb. 153. The description of the lots contained in the lien is: "The southeast corner and third lot from

corner on the south, being lots 1 & 3 in Wallace's Sub., Mary A. Wallace being the owner." As there are no rights of third parties, who have purchased relying on the record, involved in this controversy, a liberal rule as to the sufficiency of description in the affidavit for a mechanic's lien should be applied, and, "if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient." *White Lake Lumber Co. v. Russell,* 22 Neb. 126. The description may also be aided by any extrinsic evidence furnished by the instrument which is filed as such notice of the lien. *Drexel v. Richards,* 50 Neb. 509. The notice filed bears the date, "Omaha, Neb., Dec. 1, 1904," and the venue of the affidavit is laid in Douglas county, Nebraska. We think that, thus aided, the description is sufficient.

We therefore recommend that so much of the judgment and decree of the district court as provides that the surplus, if any, arising from the sale of lot 1, be paid to defendant Ryckman be set aside, and that a judgment and decree be entered directing the payment of such surplus, if any, to defendant Mary A. Wallace, and that the judgment and decree so modified be affirmed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that so much of the judgment and decree of the district court as provides that the surplus, if any, arising from the sale of lot 1, after the payment of the liens thereon, be paid to defendant Ryckman be set aside, and that defendant Mary A. Wallace is the owner in fee of the lot in question, and that the surplus, if any, be paid to defendant Mary A. Wallace, and that the judgment and decree of the district court so modified be affirmed.

DECREE MODIFIED.

CORA ALLEN, APPELLEE, V. ARTHUR H. RUSHFORTH, APPELLANT.

FILED DECEMBER 21, 1906. No. 14,631.

1. **Sales.** The former opinion in this case, 72 Neb. 907, examined and adhered to.
2. **Trial:** REFUSAL TO INSTRUCT. In the trial of an action at law, it is reversible error to refuse to submit to the jury a legal defense properly pleaded and supported by competent evidence.
3. **Sales:** DAMAGES. Where the vendee, under a contract of purchase, refuses to receive the goods contracted for, the measure of the vendor's damage is the difference between the contract price of the goods and their reasonable market value at the time and place of delivery.

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

P. A. Wells and *Fawcett & Abbott,* for appellant.

Weaver & Giller, contra.

OLDHAM, C.

This cause is here a second time for review by this court. Our former opinion, in which the issues are fully stated, is reported in 72 Neb. 907. In this opinion it was held that, under the pleadings and proof, an action for the contract price of the hay was properly brought, and that the case should have been submitted to a jury. On a retrial of the cause in the district court in conformity with this opinion, the case was submitted to a jury and a verdict was returned in favor of the plaintiff for the contract price of the hay in dispute. To reverse the judgment on this verdict defendant has appealed to this court.

We are fully satisfied with the conclusion reached in our former opinion and adhere to it, not only as the law of the case, but also as a correct solution of the questions involved, so far as plaintiff's right to recover is concerned.

At the last trial of the cause defendant introduced testimony tending to show that he refused to take all the hay cut from the tract in dispute, because plaintiff insisted that the hay should be weighed on her scales and paid for according to such weights; that after he had baled part of the hay, and hauled six loads to the village of Valley for the purpose of shipping it, he found a gross discrepancy between the weights of the hay as made on the plaintiff's scales and as made on the scales at Valley, where the hay was loaded for shipment and sale; that after discovering this variance he notified plaintiff that there was something wrong with her weights, and refused to take any more hay from the place, unless he was permitted to pay for it when weighed at Valley, or when weighed by the railroad. He testified, and offered other evidence to corroborate him to some extent, that she refused to allow any hay to be taken from her land, unless weighed on her scales and paid for according to such weights. Plaintiff admits that there was a controversy about the correctness of the weights on her scales, but says that she offered to have the scales inspected and adjusted, and finally offered to let defendant have the hay weighed on the railroad scales at Valley and paid for according to such weights. Defendant also testified that after he refused to take any more hay, because plaintiff would not allow him to weigh it at Valley before paying for it, she asked him if he would make any further claim to the hay that was left in the field, and that he told her he would not.

This conflicting testimony raised an issue both on the right to rescind and on the measure of damages, if any, which plaintiff should receive. Both of these issues should have been fully and fairly presented to the jury in the instructions. Defendant requested an instruction on the right of rescission because of the alleged fraudulent weights of the hay by plaintiff on the Allen scales, and also one on the measure of damages. Each of these instructions were refused, and it appears that the court attempted to submit defendant's entire theory of the case

in paragraph 6 of instructions given on its own motion. This instruction is quite lengthy, and contains, among other things, the following direction on defendant's right to rescind for incorrect weights on the Allen scales: "The burden of proof is upon the defendant to establish that the Allen scales were incorrect, and that the plaintiff nevertheless insisted upon the hay being weighed thereon and payments made accordingly, and that the plaintiff declined to permit the removal of the hay except upon these conditions. If defendant has established these propositions by a preponderance of the evidence, then he had a right to refuse to take the remainder of the hay and would not be liable therefor in this action." It seems to us that this direction with reference to the right of rescission is too restricted in its phraseology, and might possibly have led the jury to believe that the only question involved in the right of rescission was the mechanical accuracy or inaccuracy of the scales on which the hay was weighed. While the scales in themselves might have been entirely accurate and of a modern and standard pattern, yet, if they were either carelessly or intentionally manipulated so as to register false weights of the hay to defendant's damage, he would have been fully justified in refusing to take the remainder of the hay according to such weights.

Another portion of this same instruction told the jury: "If you find from the evidence that the plaintiff was willing to permit the defendant to remove the hay and have it weighed at other scales and so notified defendant, then defendant is liable for the full purchase price of the hay, less any payments made thereon, and also less such portion, if any, of said hay at the contract price that the evidence shows has been disposed of or converted by the plaintiff." This portion of the instruction seems faulty on the measure of damages, in that it overlooks the duty which plaintiff owed, when she had notice of defendant's refusal to take the remainder of the hay, to mitigate the damage as far as possible by making reasonable efforts to dispose of the hay so as to prevent an accumulation of

damage. Under the instruction, as given, unless plaintiff actually took some of the hay into her possession and used or disposed of it after notice of defendant's refusal to comply with the contract, she was permitted to recover the contract price of the hay, less the payment made. On defendant's theory of the contract, the hay was not delivered to him until weighed on the Allen scales. And under this theory, if he refused to take the hay without just cause, plaintiff's measure of damages would have been the difference between the contract price of the hay and its market price at the time and place of delivery. If there was no market value of the hay at the time and place of agreed delivery, then such sum as plaintiff might have realized for the hay by reasonable effort on her part should be deducted from the contract price of the hay in estimating her damages.

We therefore conclude that the action of the trial court in giving this instruction over defendant's objection was prejudicial to his rights, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

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

REVERSED.

ROGER TATTERSALL ET AL., APPELLANTS, V. JAMES NEVELS, APPELLEE.

FILED DECEMBER 21, 1906. No. 14,828.

1. Cities: WARDS. Under the provisions of section 2, art. I, ch. 14, Comp. St. 1903, the mayor and council of a city of the second class may change the number and boundaries of its wards, subject to the limitation therein contained that it shall not have less than two nor more than six wards.

2. **Partnership: FREEHOLDERS.** Where a partnership firm is the owner in fee of real estate situated in this state, each member of such partnership firm is possessed of a freehold interest in such realty.

3. **Liquor License: EVIDENCE.** Evidence examined, and *held* sufficient to sustain the judgment of the trial court.

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

C. E. Spear and *H. C. Vail,* for appellants.

F. J. Mack, M. W. McGan and *J. S. Armstrong, contra.*

OLDHAM, C.

This is an appeal from a judgment of the district court for Boone county, Nebraska, sustaining the action of the mayor and council of the city of Albion in granting a license to sell liquors to James Nevels, the applicant therefor. The only allegations of error in the proceedings specifically called to our attention in the assignment of errors filed in this court by the remonstrators are with reference to the sufficiency of the testimony to sustain the finding that certain of the signers of the applicant's petition were resident freeholders of the first ward of Albion. Applicant's petition for a license was filed with the city council on the 19th day of June, 1906, and contained the names of 40 persons, who signed as resident freeholders of the first ward of Albion. A remonstrance was filed by the appellants herein, which alleged, among other things, that the petition was not signed by 30 resident freeholders. It also alleged that certain of the petitioners, naming them, were resident freeholders of the original third ward of Albion, and had been brought into the first ward by a change in the boundary lines of the ward, provided for by ordinance No. 127, which was passed by the mayor and council on the 28th day of May, 1906. The remonstrance also alleged the pendency of the injunction proceedings

against the enforcing of this ordinance, which we have set out and examined in the case of *Young v. City of Albion, ante,* p. 678. Of the 40 original signers to the petition 4 withdrew before the final hearing of the case on the petition and remonstrance. No evidence was introduced tending to show that 5 of the remaining 36 signers were resident freeholders. It was stipulated in the record that 27 of the remaining 31 signers were resident freeholders of the first ward of Albion, as constituted by ordinance No. 127.

It is urged by the remonstrators that there is no authority under the statutes given to cities of the second class to reduce the number of their wards, and that, as the city had been divided into three wards by ordinance No. 98, enacted in the year 1903, the attempted reduction of the number of wards by the passage of ordinance No. 127 was *ultra vires* and void. Section 2, art. I, ch. 14, Comp. St., provides that each city of the second class "shall be divided into not less than two nor more than six wards, as may be provided by ordinance." To our minds this section of the statute plainly and clearly invests the city council of cities of this class with authority to divide the city into wards, within the limitation prescribed; that is, they shall not make more than six nor less than two wards. There is no limitation in the statute as to the number of times that the city may be divided, nor as to the power to either increase or diminish the number of wards within the limits prescribed. We are therefore of opinion that the city council acted within the scope of its delegated powers when it changed the number of wards from three to two.

Under this view of the case we think that the evidence was sufficient to show that the eleven resident freeholders who were added to the first ward by the passage of ordinance No. 127 were competent signers on the petition. Under the stipulation in the record, these, with the others admitted to be resident freeholders, constituted 27 competent signers, and leave but 4 of the 31 in dispute. Of

these four it is urged against the sufficiency of the proof with reference to one, Charles Klever, that the evidence does not show that he is a freeholder in the first ward, and that he nowhere testifies that he is a resident of such ward. This objection would be fatal were it not for the fact that the remonstrance alleged that he (Charles Klever) was among those who were residents of the old third ward and had been brought into the first ward by ordinance No. 127. In view of this allegation of the remonstrance, we think the evidence was sufficient to show him a resident of the first ward. He testified that he was a freeholder and no objection was made to the competency of the evidence. The sufficiency of the proof as to Lester Waring is also challenged. He testified that he was a resident freeholder of the first ward, but on cross-examination it was shown that the property which he claimed to own stood in the name of Waring Brothers, a firm composed of Lester and Fred Waring. It is urged that, as the real estate was owned by the partnership, it should be treated as personal and not as real property. It is true that for certain purposes partnership real estate is treated by a doctine of equitable conversion as personalty in the settlement of the affairs of the partnership. We think the American rule with reference to partnership real estate is correctly stated in 22 Am. & Eng. Ency. Law (2d ed.), 106, in which it is said: "In the absence of any contrary agreement, express or implied, between the partners, firm realty retains its character as such, with all the incidents of that species of property, except that each share of the partnership realty is impressed with a trust implied by law in favor of the other partner or partners that so far as necessary it shall be first applied to the adjustment of partnership obligations and the payment of whatever balance may be found due between partners on winding up the firm's affairs; and, to the extent necessary for these purposes, the character of the property is in equity deemed to be changed into personalty." Under this view of the nature of partnership real property, we think the evidence sufficient to show

that the signer to the petition, Lester Waring, was a resident freeholder of the ward.

It is urged against another of the disputed signers, George W. Williams, that he was not a resident freeholder of the ward, because the evidence showed that at the time he signed the petition the deed to his real estate was held in escrow pending the completion of the title and the payment of part of the purchase money. The evidence, however, showed that before the hearing his title had been completed, and he had received the deed and had placed it on record. We think this showing sufficient. As these 3, added to the 27 already considered, constitute 30 resident freeholders of the ward, it is not necessary to examine the objection urged to the signature of Mary Brown.

Finding no reversible error in the action of the trial court, we recommend that the judgment of the district court be affirmed.

AMES, C., concurs.

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

AFFIRMED.

ORD HARDWARE COMPANY, APPELLANT, V. J. I. CASE THRESHING MACHINE COMPANY, APPELLEE.

FILED DECEMBER 21, 1906. No. 14,424.

1. **Foreign Corporations, Actions Against: PROCESS.** Under the provisions of sections 73, 75 of the code, a citizen of this state, who has a cause of action against a foreign corporation growing out of business transactions in this state, may have recourse to the courts of this state by the service of process upon the managing agent of such corporation.

2. ———: **MANAGING AGENT.** An agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in

the business matters of his principal, and who has charge of the business of his principal in the territory covered by his contract, is a managing agent within the meaning of sections 73, 75 of the code, providing for the service of summons upon the managing agent of a foreign corporation.

APPEAL from the district court for Valley county: JAMES R. HANNA, JUDGE. *Reversed.*

A. M. Robbins, for appellant.

O. A. Abbott and *H. E. Oleson, contra.*

EPPERSON, C.

Plaintiff sued defendant, a Wisconsin corporation, in the district court for Valley county to recover commissions alleged to be due plaintiff, as a former agent of defendant, for the sale of a threshing machine. Summons was issued, and the sheriff's return thereon shows service upon the defendant in Valley county "by delivering to Cornell Brothers, the managing agents of the defendant corporation, a true and certified copy of the summons, the chief officer of the defendant not being found in the county." The defendant filed an answer, and alleged as its first defense that Cornell Brothers were not the defendant's managing agents, and asked the judgment of the court whether it ought to be required to further answer or defend in this suit. The parties stipulated that the matters arising under the plea to the jurisdiction should be tried and determined before trial upon the merits. Upon the trial of this jurisdictional question, the court found that Cornell Brothers were not the managing agents of the defendant, and that the court had not acquired jurisdiction over the defendant. From a judgment of dismissal, the plaintiff appeals to this court.

Section 73 of the code provides: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the

county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or last usual place of business of such corporation." This section applies to foreign as well as domestic corporations. *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159.

Section 75 of the code provides: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent." If Cornell Brothers were the managing agents of the defendant within the meaning of either of the statutes above quoted, service upon them was sufficient, and the judgment of the trial court wrong.

The contract of agency between defendant and Cornell Brothers was introduced in evidence. It contains a statement that the agency thereby created was special, and not general. However, the provisions of the contract fixing the authority of Cornell Brothers as agents should govern, rather than this general statement. By the contract defendant appointed Cornell Brothers agents for the sale of its machinery and repairs in the city of Ord, Nebraska. It provided that such agents should diligently canvass for purchasers, and in all reasonable and proper ways to promote the trade and interest of the company, to sell only for cash, or to responsible purchasers who have given ample security for time payments. Such agents were required to satisfy themselves that all notes are signed by responsible men of known credit and good reputation for paying debts, were prohibited from representing any other company engaged in the same business as that of the defendant, were to store and care for and to insure the property of the defendant, to set up and start machinery sold, and to properly remedy all complaints as far as possible without calling upon the company for help, and to keep the company's account separate and apart from other accounts. The evidence shows that Cornell Brothers had the possession of one threshing machine belonging to the

defendant and exhibited it for advertising purposes, and that they carried a stock of repairs belonging to defendant. Defendant had no business in Ord other than that conducted through these agents.

It was evidently the intention of the legislature that a citizen of this state, who has a cause of action growing out of business with a foreign corporation through an agent in this state, should have recourse to the courts of this state, and not be required to carry their grievances to the courts of another state or country. In *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552, it is said:

"It is the policy of our law to afford redress through our courts to any person aggrieved, whether a natural person or a corporation, and to apply the remedy, as far as possible, at the place where the injury was sustained. If a foreign corporation has an office for business in this state, for the transaction of business, seeking thereby to promote its own interests, such office will also be its place of business where a summons may be served upon it, and a party aggrieved will not be required to go into another jurisdiction to enforce his rights against it. It must take the burden with the benefit."

In view of our statute (sections 73, 75, *supra*), all foreign corporations bringing their business into this state must be held to do so with the understanding that they will be subjected to the jurisdiction of our court by service upon their managing agents in actions brought by citizens of this state upon causes growing out of the business done here. Agents are employed in all kinds of business, and are given authority to represent their principals in such numerous and various matters that it is difficult to find a definition which would apply to any case which may arise. The authorities, we think, are unanimous that a mere sales agent, or one having authority to make sales of the products of his principal, with no additional privileges or duties, is not a general agent, nor one who holds a mere subordinate position, that is, acting under the immediate direction of his principal, without

being required to rely upon his own judgment and discretion in the affairs of his principal. In *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 15, it was held that "an agent invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent." The summons in that case was served upon an agent of a foreign corporation, whose duties were to visit occasionally for a few hours the ticket and freight office of the company in this state and confer, when necessary, with its agent. In *White Lake Lumber Co. v. Stone*, 19 Neb. 402, it was held that, "where an agent was entrusted with the business of carrying on a lumber yard, with authority to sell and deliver lumber for cash or on credit as he saw proper, to collect and receive the money of his principal, file and enforce mechanics' liens or not as he should deem best," this was considered sufficient to constitute him a general agent. The authority of the agent there in controversy is very similar to that of the agent upon whom summons was served in the case at bar. The court said in *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159: "A manager of an agency established in this state by a foreign railroad corporation for the purpose of soliciting traffic over its line of road, is a managing agent within the meaning of the statute with reference to the service of summons upon such corporation." The company whose agency was under consideration in that case had no line of road in this state, and the statutes governing the service of summons upon such companies is the same, so far as managing agents are concerned, as in the case of any foreign corporation. The rule there announced, in our opinion, is applicable to any foreign corporation. In *Persons v. Buffalo City Mills*, 51 N. Y. Supp. 645, it was held: "A managing agent must be some person vested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity, and under the direction and control of superior authority, both in re-

gard to the extent of his duty, and the manner of executing it." In *Palmer v. Chicago Herald Co.*, 70 Fed. 886, it is said: "An Illinois corporation, publishing a newspaper in Chicago, had continuously in New York an agent who solicited advertisements for such newspaper and had authority to contract for the publication thereof at regular rates, * * * such agent was a 'managing agent' within the meaning of Code Civ. Proc. N. Y., sec. 432," providing that service may be had under certain circumstances on the managing agent of a foreign corporation. It was held in *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. Dak. 61: "An agent who is invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent within the meaning of the code, which authorizes service of summons on a managing agent of a foreign corporation." To the same effect are *United States v. American Bell T. Co.*, 29 Fed. 17; *Hat-Sweat Mfg. Co. v. Davis Sewing Machine Co.*, 31 Fed. 294; *Great West Mining Co. v. Woodmas*, 12 Colo. 46, 20 Pac. 771; *Foster v. Charles Betcher Lumber Co.*, 5 S. Dak. 57, 58 N. W. 9.

On the other hand, there are cases holding that a managing agent is one who has full and complete authority in all branches of the corporation's business. For instance, in Wisconsin the following appears to be the rule: "The managing agent of a corporation is an agent having a general supervision over the affairs of the corporation, and must be an officer of the corporation; and hence a person who is only managing agent in a county, state, or other defined district is not a 'managing agent of a corporation,' having supervision over all its affairs, since the term implies a general supervision of the affairs of the corporation in all its departments, perhaps to a greater extent than is implied by any other single officer, so called, as a president, cashier, secretary, or treasurer. It is usually understood to designate the person who has the most general control over the affairs of the corporation, and who has knowledge of all of its business and property,

and who can act in emergencies on his own responsibility. *Upper Mississippi Transp. Co. v. Whittaker,* 16 Wis. *220; *Farmers Loan & Trust Co. v. Warring,* 20 Wis. *290; *Wheeler & Wilson Mfg. Co. v. Lawson,* 15 N. W. 398, 400, 57 Wis. 400." 5 Words & Phrases, 4321.

After a careful consideration of the authorities, including the decisions of this court, *supra,* we are convinced that the weight of authority and the better rule is to the effect that an agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in the business affairs of his principal, and who has charge of all of the business of his principal in the territory covered by his contract, is a managing agent within the meaning of the statutes above quoted.

In applying that rule to this case, we have not lost sight of the fact that defendant herein had an agent in this state, with headquarters in Lincoln, who may or may not be a managing agent. The function of the Lincoln agency seems to be to make contracts with other agents throughout the state, such as the contract here in evidence, and, further, to collect the notes of the company, and to distribute the machinery of the company to the different agencies. The so-called state agent did not supervise the Ord agency nor control their conduct. Cornell Brothers derived their authority from the contract alone, and conducted themselves according to its provisions; and by its terms, and their conduct in pursuance thereof, the nature of the agency must be determined. It was not intended by sections 73, 75, *supra,* that such agent should be the only managing agent in the state; but, if the management of the foreign corporation's business in the district or sphere of the activity for which the agency was created is general in its nature, summons may be served upon such managing agent. Cornell Brothers were not mere subordinates. It is true they were required to take only cash or amply secured notes from purchasers; but it is not shown that any other agent or officer of the company had greater authority, nor is it shown that any other agent

or officer managed the business at Ord. The maintaining of the agency was but a part of an extensive system which the defendant had in furthering its own interests. The contract introduced in evidence confers upon the agent the duty of promoting the trade and interests of the company, and to see that customers, to whom credit was extended, are responsible parties, and, in case of complaint, to remedy the same as far as possible without calling upon the company for help. This demanded of the agents the exercise of their own judgment in business matters, and thereby to direct and control, or, in other words, to manage, the defendant's affairs. Cornell Brothers, and none other, managed the business at Ord.

We therefore recommend that the judgment of the district court be reversed and the cause remanded.

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.

REVERSED.

EDWARD W. SIMERAL, APPELLEE, V. EDWARD ROSEWATER ET AL., APPELLANTS.

FILED DECEMBER 21, 1906. No. 14,561.

Appeal: MOTION FOR NEW TRIAL. A motion for a new trial on the ground of an abuse of discretion on the part of the trial court in proceeding with the trial in the absence of defendants and their counsel is itself addressed to the sound discretion of the court, and the judgment will not be reversed by the reviewing court unless an abuse of discretion is shown.

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

W. J. Connell, for appellants.

William F. Gurley and *J. W. West, contra.*

EPPERSON, C.

The defendants seek a reversal of the judgment of the district court for Douglas county on the ground of an abuse of discretion in proceeding to trial in the absence of defendants or their attorney. The case was tried before Judge Kennedy, and judgment rendered for plaintiff: A motion for a new trial was overruled, and defendants appeal.

The only question discussed in the briefs is an abuse of discretion on the part of the trial court in proceeding with the trial in the absence of defendants and their counsel. It appears from the evidence that the rules of the district court for Douglas county provide that, when an attorney is actually engaged before one of the judges of the district court, he is never required to appear in a case before another judge until the first case is disposed of, and that, when a case is announced for trial before one of the judges, to be taken up as soon as a case on trial before the other is disposed of, and, where one of the attorneys is engaged in both cases, it is the duty of the attorney to appear for the trial of the case so called when the case pending before the other judge is disposed of. Such a rule is necessary in counties having two or more judges sitting at the same time. It also appears from the record that the case at bar was first announced for trial May 23, 1905, and was passed until June 16, 1905, on account of defendants' counsel being engaged in the trial of other cases. On the morning of June 16, defendants' counsel was engaged in the trial of a cause, referred to in the record as the *Mort* case, before Judge Redick, but appeared before Judge Kennedy and announced that the *Mort* case probably soon would be settled. Judge Kennedy then announced that the trial of the case at bar would proceed

upon the termination of the *Mort* case. When the *Mort* case was disposed of, counsel for defendants herein participated in the trial of another case, referred to as the *Pierce* case, immediately called before Judge Redick, without informing the latter, until the jury was called, that the case at bar had been called, and had been announced for trial and was awaiting his presence before Judge Kennedy. He did, however, appear before Judge Kennedy, and announced that he was engaged in the *Pierce* case, and that counsel and the court could go ahead, if they liked, he would not be there. Counsel for defendants is very active in the legal profession, representing many litigants and trying many cases in the district court for Douglas county, and in other courts. On the call for June 16, 1905, there were 34 cases in which he was employed. All this shows the necessity of the rule above referred to. It appears from the affidavit of defendants' counsel that, after the jury had been called in the *Pierce* case, his dilemma was explained to Judge Redick, and affiant asked that the *Pierce* case be delayed until this case was disposed of, and that Judge Redick refused because the jury had been called. It also appears that Honorable John L. Webster was employed in the *Pierce* case, but that he expected to leave Omaha Monday evening, June 16, before the conclusion of the trial. It was not shown that Judge Redick was informed that the case at bar was set for trial before the *Pierce* case was called, but that defendants' counsel or his associate announced that they were ready for the trial of the *Pierce* case. In this it seems that defendants' counsel was in error, for the rules required his attendance before Judge Kennedy immediately upon the disposition of the *Mort* case.

The motion herein was addressed to the sound discretion of the trial court. It involved a consideration of the rules of practice, and, unless there was an abuse of discretion, the ruling upon the motion should not be disturbed by this court. It does not appear that ordinary prudence was used by defendants' counsel to extricate himself from

his dilemma, which, it appears from the court's findings, was of his own making. It being a matter of discretion, no abuse of which is shown, either in the trial or in the overruling of the motion for a new trial, it would be contrary to the rules of practice to disturb the judgment complained of. See *Zimmerer v. Fremont Nat. Bank*, 59 Neb. 665.

We therefore recommend that the judgment of the district 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.

EDWARD A. MCCORMACK, APPELLANT, V. FRANK TINCHER ET AL., APPELLEES.

FILED DECEMBER 21, 1906. No. 14,547.

Garnishment: EXEMPT WAGES: NONRESIDENTS. A nonresident of this state is not entitled to the benefits of, and cannot maintain an action based on, the act entitled "An act to provide for the better protection of the earnings of laborers, servants and other employees of corporations, firms, or individuals engaged in interstate business," being sections 531c-531f of the code.

APPEAL from the district court for Jefferson county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Heasty & Barnes, for appellant.

J. C. Hartigan, contra.

DUFFIE, C.

The facts in this case, as they appear from the pleadings and from the admission of the parties on the oral argument, are as follows: Edward McCormack, the appel-

lant, is the head of a family, resides at McFarland, Kansas, and is in the employ of the Chicago, Rock Island & Pacific Railway Company. Tincher & Dickenson Brothers, the appellees, are merchants doing business in Fairbury, Nebraska. Sometime prior to the commencement of this action, McCormack being indebted to the appellees, they commenced a suit against him at Fairbury, and caused the Chicago, Rock Island & Pacific Railway Company to be garnished. At that time the company was indebted to him in the sum of $50 for wages earned within the preceding 60 days. Immediately upon being garnished, the railroad company discharged him, and in order to be reinstated he executed the bond provided by section 949 of the code, and obtained a discharge of the attachment. Thereafter he commenced an action in county court against Tincher & Dickenson Brothers under the provisions of sections 531*c*-531*f* of the code, where judgment was given him for the damages claimed. Tincher & Dickenson Brothers appealed to the district court, where a demurrer to the petition of the plaintiff was sustained, and the case dismissed. From this judgment the case has been brought here for review.

The demurrer raised the sufficiency of the petition to constitute a cause of action, it not being alleged that McCormack was a resident of this state, and this raises the question whether a nonresident of the state is entitled to the relief awarded by the sections of the statute above referred to, or whether that statute, and the remedy afforded the employees whose wages have been garnished, was intended only for the residents of the state. Section 531*c* is in the following language: "That it be and is hereby declared unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employee, of any corporation, firm or individual, in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person

or persons, firm, corporation or institution, or to institute, in this state or elsewhere, or prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk, or employee by any process seeking to seize, attach, or garnish the wages of such person or persons earned within sixty days prior to the commencement of such proceeding, for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions." That the statute is not plain and unambiguous clearly appears from a first reading thereof, and the point under consideration turns upon the question whether the phrase "in this state" following the word "individual" refers to the employer or the employee. That it was intended to define and locate the residence of one or the other of these parties is manifest. That it was not intended to refer to the residence of the employer is also quite apparent from the title of the act, which is: "An act to provide for the better protection of the earnings of laborers, servants and other employees of corporations, firms, or individuals engaged in interstate business." This title contemplates that the residence of the employer may be in this state or in a sister state, the qualification as to him being that he shall be engaged in interstate commerce and be subject to garnishment in some sister state. Again, it could not have been the intention of the legislature to prohibit a resident of this state from sending a claim held by him against a resident of an adjoining state, the employee of a railway operated through both states, to be sued there, and the rights of the parties determined by the laws of the state where the debtor resides.

By the holding of this court in *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb. 175, the nonresident debtor was amply protected prior to the passage of this act, the holding being that he could claim his exemption of 60 days' wages in a suit brought against him in this state, although a nonresident. The state of Iowa refused to extend the exemption of workmen's wages to nonresidents of the state, and,

prior to the enactment of this law, the practice had grown into a custom for creditors here, holding claims against residents in the employ of the Union Pacific and other roads doing an interstate business, to sell or assign their claim to some party in Iowa, who brought suit upon it there, and in that manner evaded the provisions of our exemption laws. It was to protect our own citizens from this practice, and not nonresidents who were not subject to this abuse, that the statute was passed, and, in the light of the circumstances calling for its passage, there is no doubt that it was the intention of the legislature to confine its benefits to residents of the state, and the phrase "in this state," before referred to, was undoubtedly used to define the residence of the employee. While the question was never before squarely presented to the court, our former decisions all indicate that this was the construction which should be given the law. In *Bishop v. Middleton*, 43 Neb. 10, it is said: "The act should be construed with reference to its object. Its object was to prevent the evasion of our exemption law by garnishment of a corporation employing a man in this state, but having such a *situs* in another state as to permit of its being reached by legal process there." In *Singer Mfg. Co. v. Fleming*, 39 Neb. 691, it is said: "The wrong was in seizing the debt situated in Nebraska, payable in Nebraska to a citizen of Nebraska." We hold, therefore, that a nonresident cannot maintain an action under this statute, and that the demurrer was properly sustained.

We recommend an affirmance of the judgment of the district court.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

HARRY H. BURLING V. ESTATE OF GEORGE ALLVORD.

FILED DECEMBER 21, 1906. No. 14,047.

1. Decedent's Estate: CLAIMS: LIMITATIONS. A claim against the estate of a decedent, which had accrued or become absolute before the expiration of the time fixed by the court for filing claims, is barred if not filed within that time. Section 226, ch. 23, Comp. St.
2. Fraud: ACTION: LIMITATIONS. The claim of a vendee against the vendor of real estate for damages for false and fraudulent representations with respect to the title accrues immediately upon the perpetration of the fraud, and is not postponed to such time as he sustains actual loss.
3. Decedent's Estate: CLAIMS: LIMITATIONS. The fact that the claimant did not discover the fraud until after the expiration of the time fixed for filing claims against his vendor's estate does not extend the time for filing his claim, the nonclaim statute making no exception in favor of cases of that character.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

M. B. Davis, Samuel Rinaker and *R. S. Bibb*, for plaintiff in error.

E. O. Kretsinger, contra.

ALBERT, C.

At the date of his decease, which occurred some time previous to January 25, 1897, Coke A. Collett held a contract of sale for 80 acres of school land in Gage county, Nebraska. He was living on this land with his wife and an only child, Lulu May Collett, at the time of his death, the same being their homestead. January 25, 1897, his widow, who had again married and whose name was then Mary Connor, sold and assigned this school land contract to George Allvord, and in August, 1898, he sold and assigned the same to Harry H. Burling, the plaintiff herein, for $2,000, subject to the amount still due the state. Mrs. Connor, the former wife of Coke A. Collett, died

on March 25, 1897, previous to the assignment by Allvord to the plaintiff. Some time after this assignment Allvord died, an administrator of his estate was duly appointed, and the probate court entered an order, in accordance with the provisions of section 217, ch. 23, Comp. St. 1903, requiring all claims against his estate to be filed within six months from May 4, 1900, of which due notice was given. It is conceded that Collett died intestate, and that his widow never obtained any order of court for the sale and transfer of the school land contract made to Allvord. From this statement it will be seen that on Collett's death his widow became possessed of a life estate in the 80 acres of school land covered by the land contract, and that the remainder descended to his daughter and only heir. Section 17, ch. 36, Comp. St. Her assignment to Allvord conveyed, therefore, only her life estate, and this was extinguished by her death March 25, 1897, and previous to the assignment made by Allvord to the plaintiff. Such assignment, therefore, conveyed no title to the plaintiff, but, as we understand from the record, he took and held possession up to February, 1902. Some time previous to February 7, 1902, Lulu May Collett, who had then attained her majority, asserted title to the land and employed an attorney to bring proceedings to recover possession. On being notified of this claim, the plaintiff, accompanied by his attorney, went to Fairbury, where Miss Collett was then residing, and purchased her title, paying therefor the sum of $1,400. April 17, 1902, the plaintiff filed his claim against the estate of George Allvord for the sum of $1,400 paid to Miss Collett, and for a further sum of expenses incurred in and about securing her title. It will be seen that this claim was filed some 18 months after the expiration of the time fixed by the probate court for filing claims. The probate court refused to allow the claim, and the plaintiff appealed to the district court, alleging in his petition that at the time he took an assignment of this contract Allvord falsely and fraudulently stated and represented that he had good title to the con-

tract; that he possessed all the right, title and interest in and to the land described in and conveyed by said contract, and had good right and lawful authority to sell the same and the premises conveyed therein, subject only to the interest of the state of Nebraska which, it is conceded, was the sum remaining unpaid thereon, being about $500; that plaintiff relied on said representations, knew nothing to the contrary, and had no knowledge of the outstanding title until January, 1902. The district court held that the claim was barred, and on that theory directed a verdict for the estate. After perfecting an appeal, the plaintiff died, and the cause was revived in the name of his administratrix.

Is the claim barred? To find the answer to this question we must look, not to the general statute of limitations fixing the time within which actions may be brought, but to the specific provisions of the decedent act limiting the time for filing claims against estates of deceased persons. Section 226, ch. 23, Comp. St., as it stood prior to its amendment in 1901, is as follows: "Every person having a claim against a deceased person proper to be allowed by the judge or commissioners, who shall not, after the giving of notice as required in the two hundred and fourteenth section of this chapter, exhibit his claim to the judge or commissioners, within the time limited by the court for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever." This section was amended in 1901 so as to include claims of every character, "whether due or to grow due, whether absolute or contingent." From our recital of the facts it will be seen that the claim was filed long after the expiration of the time fixed by the probate court for the filing of claims, and is unquestionably barred by the provisions of section 226, *supra*, unless there be some other provision of the statute governing the case.

It is contended, however, that Burling's claim did not accrue or become absolute until he bought the outstanding title of Lulu May Collett in order to avoid eviction, and,

consequently, that the claim falls within the provisions of section 262, ch. 23, Comp. St., which is as follows: "If the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims, the person having such claim may present it to the probate court, and prove the same at any time within one year after it shall accrue or become absolute; and if established in the manner provided in this subdivision, the executor or administrator shall be required to pay it, if he shall have sufficient assets for that purpose, and shall be required to pay such part as he shall have assets to pay, and if real or personal estate shall afterwards come to his possession, he shall be required to pay such claim, or such part as he may have assets sufficient to pay, not exceeding the proportion of the other creditors, in such time as the probate court may prescribe." Whether the amendment of sec. 226, *supra*, in 1901, operates as a repeal by implication of sec. 262, and, if so, whether plaintiff's claim, growing out of a transaction antedating such repeal, is affected thereby, are questions admitting of some doubt, but we do not deem it necessary to go into them, because we are satisfied that the claim is not one that accrued or became absolute after the expiration of the time limited for creditors to file their claims. It should be kept in mind that the claim is not for a breach of covenant of title or seisin, but for damages for alleged false and fraudulent representations. If it were the former, then the authorities holding that no right of action accrues until an eviction, actual or constructive, would be in point. But the claim is founded on alleged false and fraudulent representations made by Allvord with respect to his title. The alleged wrong was fully perpetrated when Burling parted with his money on the strength of such representations. The authorities are nearly uniform that in cases of this character a cause of action arises at once upon the perpetration of the fraud. In the well-considered case of *Northrop v. Hill*, 57 N. Y. 351, it was said:

"When a party to a contract is guilty of fraud, he com-

mits a wrong for which he is liable to the defrauded party, to pay, at least, nominal damages. The act of entering into contract relations implies that the parties are to deal in good faith with each other. On no other basis can the minds of the parties be expected to meet. If one of them, professing in this way to act in good faith, in fact, commits a fraud, he breaks the implied obligation he is under, and should be made to respond in damages. It is no answer to say that the defrauded party may rescind the contract. That course is at his option. He may elect to affirm it, and have his action for such damages as he may prove, whether substantial or otherwise. If he proves no special damage, he should, at least, recover nominal damages for the breach of the implied promise to act in good faith. It is familiar law that a party may have an action for breach of duty, though he sustains no positive damage and there is no intention to do wrong."

In support of this rule the court quotes from the case of *Allaire v. Whitney*, 1 Hill (N. Y.), 848, as follows: "Once established, therefore, that in all matters of pecuniary dealings, in all matters of contract, a man has a *legal right to demand that his neighbor shall be honest*, and the consequence follows, viz., if he be drawn into a contract by fraud, this is an injury actionable *per se*. Indeed it would not be difficult, in all such cases, to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing, and time is money. * * * Fraud is a thing grievously amiss, and, above all, odious to the law; and fraud in a contract can hardly be conceived without being attended with damage in fact."

The plaintiff undoubtedly had an action for damages when the fraud was perpetrated. That he did not and could not know the full damages he might sustain at the time does not alone toll the statute until the full consequences are known. In the leading case of *Betts v. Norris*, 21 Me. 314, 38 Am. Dec. 264, this question was thoroughly

examined, and the courts of this country have followed that decision with great unanimity. The action was one against a deputy sheriff for nonfeasance in not attaching sufficient property in favor of the plaintiff to satisfy a judgment afterwards recovered thereon. It was there argued, as here, that the cause of action did not accrue until it was ascertained what damage had been sustained. In answer to this the court said:

"In the case at bar, whether the defendant, by not attaching more property, did the plaintiff a wrong, depended upon the amount of his debt. That amount did not depend on any subsequent proceeding. It was the same at the time he commenced his suit for it, that it was at the rendition of judgment; with the exception of the damage for the detention of the debt. The wrong done to the plaintiff, therefore, occurred when the nonfeasance took place, and not when it came to be ascertained, by subsequent events, what the precise amount of the injury turned out to be."

If we are right in supposing that the plaintiff had a cause of action when the contract was closed and the money paid, there can be no doubt that the bar of the statute then commenced to run in favor of the defendant, unless saved by the exception relating to a nondiscovery of the fraud. In Wood, Limitations (3d ed.), sec. 177, it is said: "In the case of torts arising *quasi ex contractu*, the statute usually commences to run from the date of the tort, not from the occurrence of actual damage." And at sec. 178, he further states the rule as follows: "Although, as has been seen, time commences usually to run in defendant's favor from the time of his wrongdoing, and not from the time of the occurrence to the plaintiff of any consequential damage, yet in order to produce this result it is necessary that the wrongdoing should be such that nominal damages may be immediately recovered." In his brief the plaintiff has cited cases to the effect that, on a sale of personal property where possession was delivered, it is no defense to an action for the price that the vendor

had no title to the property sold, as long as the vendee is not disturbed in his possession of the property. *Linton v. Porter,* 31 Ill. 107; *Webster v. Laws,* 89 N. Car. 224; *Gross v. Kierski,* 41 Cal. 111, and *Close v. Crossland,* 47 Minn. 500. Those cases, we think, have no application here. In every sale of personal property there is an implied warranty on the part of the vendor that he has good title to the same. Until breach of warranty by the assertion and enforcement of a superior title the vendee has no cause of action. His action, then, is upon contract, upon the warranty of his vendor, and no cause of action can, in the nature of things, accrue until a breach of the warranty. Here the action is for a tort, for the fraud committed. The distinction between the cases is radical and obvious.

But it is contended on behalf of the plaintiff that the claim should not be held to have accrued or become absolute until the discovery of the fraud. The general statute of limitations expressly provides that actions for relief on the ground of fraud shall not be held to have accrued until the discovery of the fraud. But, as we have seen, this action is governed by the statute of nonclaim, and not by the general statute of limitations. The statute of nonclaim makes no exception in favor of claims grounded on fraud. The general rule, supported by an almost unbroken line of authorities, is that the statute of nonclaim runs in all cases and under all circumstances, unless otherwise provided. 8 Am. & Eng. Ency. Law. 1079; 18 Cyc. 471. There are exceptions to this rule, but none covering plaintiff's claim. The plaintiff's claim accrued and became absolute, within the meaning of the statute, during the lifetime of Allvord and does not, therefore, come within the provision of section 262 of the decedent act, but within the provisions of section 226, whereby all claims not filed against the estate within the time fixed by the probate court for the filing of claims are forever barred. We see no escape from the conclusion reached by the learned district court. We reach this conclusion with less reluctance, because of grave doubts

in our minds whether the plaintiff would be entitled to recover were the bar of the statute removed.

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

SCHLITZ BREWING COMPANY, APPELLEE, V. HANS NIELSEN, APPELLANT.

FILED DECEMBER 21, 1906. No. 14,574.

1. **Landlord and Tenant:** RESTRICTIONS IN LEASE. Where a lease provides that no beer, save of a particular manufacture, shall be sold on the premises, the fact that the excepted beer cannot be lawfully obtained does not annul the restrictive clause of the lease, when the fact that such beer could not be lawfully obtained was known to both parties when the lease was made.

2. **Lease:** ENFORCEMENT. Where such lease in itself is lawful and contravenes no requirement of public policy, and is supported by an independent consideration, the fact that the lessor is a member of a combination formed for the purpose of controlling the trade in some product is no defense to a suit to enforce the restrictive clause.

3. **Injunction.** Ordinarily, in a suit brought for that purpose, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause.

4. **Lease:** ENFORCEMENT. Although the lease provides that in case of a violation of the restrictive clause the rights of the lessee thereunder shall be forfeited, and although upon such violation plaintiff declares a forfeiture, yet, so long as the defendant refuses to recognize the forfeiture and remains in possession under the lease, his right to the use of the premises is to be measured by the lease, and the restrictive clause is enforceable against him.

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

I. J. Dunn, for appellant.

Rich, Searle & Clapp, contra.

ALBERT, C.

On the first day of January, 1905, the Joseph Schlitz Brewing Company, plaintiff, and Hans Nielsen, defendant, entered into the following contract in writing: "This memorandum of agreement made and entered into this first day of January, 1905, by and between Hans Nielsen of Omaha, Nebraska, party of the first part, and the Joseph Schlitz Brewing Company of Milwaukee, Wisconsin, party of the second part: Witnesseth, that, whereas the said Joseph Schlitz Brewing Company has this day loaned to the said party of the first part the sum of $1,000, it is agreed and understood by and between the said parties hereto that the said sum of money is to be repaid by the said party of the first part to the said party of the second part in instalments of $24.50 each, due and payable weekly hereafter, the first of said instalments falling due on the second day of January, 1905; said sum so advanced to draw interest at the rate of — per cent. per annum from the —— day of —— 190—. And whereas the Joseph Schlitz Brewing Company has rented to the above party of the first part the saloon store and the storeroom adjoining the saloon now used as a baker shop and the south upstairs flat, the rent to be included in the above payment of $24.50. The rent to be payable in advance and said party of the first part to pay all expense for water and light. Adv. license and bond expense included. And in further consideration of the fact, the said party of the first part agrees, for the space of one year, to use no other beer than that manufactured and furnished by the said Joseph Schlitz Brewing Company. And in case the

said party of the first part shall use at his place of business any other beer than that manufactured or furnished by the said Joseph Schlitz Brewing Company, without the written consent of the said Joseph Schlitz Brewing Company, then, in that case, the entire sum above advanced shall at once become due and payable, and all rights under this contract shall by the party of the first part be forfeited. It is further agreed that the said party of the first part shall pay for all beer sold and delivered to him at the following rates: Keg beer, $7 per bbl.; bottled beer, export quarts or pints, $3.75, with a rebate of $1.25 for each case of empty bottles returned subject to any rise in the general market price of said beer. The said party of the first part further agrees to pay for beer delivered to him during any one week upon the first Monday following the said delivery, and the failure of the party of the first part to pay any sum of money so due for beer delivered theretofore to him, shall at once forfeit all his rights under this contract, and all sums of money as above set forth shall at once become due and payable from the said party of the first part to the said Joseph Schlitz Brewing Company. In witness whereof, the said parties have hereunto set their hands and seals this 1 day of Jan., A. D. 1904. (sic.) Hans Nielsen, Jos. Schlitz Brg. Co., Otto Siemsen. Witness: D. Jensen."

At the time the contract was made the defendant was already in possession of the premises as tenant of the plaintiff and thereafter continued in possession by virtue of the foregoing contract. In May or June, following the making of the contract, he began to buy beer from other parties and to retail it on the premises in question. Whereupon the plaintiff, claiming a forfeiture of the lease, gave the defendant three days' notice to vacate the premises, declared the remainder of the instalments due, and brought a suit at law for the recovery of the entire amount. Afterwards the plaintiff brought this suit to restrain the defendant from selling any beer, other than that manufactured and furnished by the plaintiff, on the prem-

ises in question. The trial court found for the plaintiff, and granted the relief prayed. The defendant appeals.

It is admitted that the plaintiff is a corporation organized under the laws of the state of Wisconsin, and that it has become domesticated by the filing of its articles of incorporation with our secretary of state and complying with the requirments in that behalf. It is also admitted that on the first day of January, 1905, a license was issued to the plaintiff by the authorities of the city of Omaha authorizing it to sell beer at its warehouse in that city, and that at the time of making the contract in question it was contemplated by the parties thereto that the sales of beer from the plaintiff to the defendant should be made in the city of Omaha.

One position taken by the defendant is that a license for the sale of intoxicating liquors cannot lawfully issue to a corporation, whether domestic or foreign, and, consequently, that the contract between the plaintiff and the defendant, so far as it contemplates a sale of beer from the former to the latter, is legally impossible of performance. If this were a suit to compel the defendant to buy beer of the plaintiff in the city of Omaha, whether the plaintiff could lawfully sell beer there would be a pertinent question. But this suit was not brought for this purpose. In fact, the contract itself contains no clause expressly requiring the plaintiff to furnish beer to the defendant. It merely fixes the price which the defendant shall pay for such beer as the plaintiff may furnish to him. If, as the defendant contends, the plaintiff cannot lawfully make a sale of beer in the city of Omaha, and cannot be lawfully licensed to make such sale, both parties must be presumed to have been aware of that fact when the contract was made, and to have contracted with reference to it. In other words, if the defendant's construction of the license law be correct, he knowingly bound himself to sell no beer on the premises, save such beer as he could not lawfully obtain. The suit is not to compel him to buy beer contrary to law, but to restrain him from selling

beer contrary to the terms of his lease. It would have been perfectly competent for the parties to stipulate that no beer whatever should be sold on the premises. It was equally competent for them to provide that no beer except of a particular kind or quality should be sold thereon. And if it turns out that the beer exempted from the restrictive clause cannot be obtained, especially where the parties at the time they made the contract knew that it could not be lawfully obtained, that fact would not operate to annul the restrictive clause.

Another position taken by the defendant is that the plaintiff at the time of making the contract was a member of a trust, as defined by section 1, ch. 91*a*, Comp. St. 1903, which was formed for the purpose of controlling the trade in brewery products in the city of Omaha, and that the contract therefore is not enforceable. In the first place, this is not a suit to enforce the entire contract, but merely to restrain the defendant from a continued violation of a restrictive covenant of his lease. The contract itself is not unlawful and contravenes no requirement of public policy. It is supported by an independent consideration. That being true, if, as claimed by the defendant, the plaintiff was a member of a trust, the agreement between the members thereof was only incidentally or indirectly connected with the contract in suit, and does not taint the latter with illegality or make it contrary to public policy. *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352; *Fearnley v. De Mainville*, 5 Colo. App. 441; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253; *McDearmott v. Sedgwick*, 140 Mo. 172, 39 S. W. 776.

It is insisted that the plaintiff has failed to show that it has no adequate remedy at law or that irreparable damage would result from a continued violation of the restrictive covenant, and therefore that it is not entitled to the writ. In 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1432, referring to the enforcement of covenants of this character, the author says: "The injunction in this class of cases is

granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained *any* pecuniary damages, are wholly immaterial. In the words of one of the ablest of modern equity judges: 'It is clearly established by authority that there is sufficient to justify the court interfering, if there has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described,' namely an injunction." In 2 High, Injunctions (4th ed.), sec. 1142, it is said: "And where a lessee is, by the terms of his lease, restricted to a particular use of the demised premises, equity will restrain him from other use of them, even though no irreparable injury be shown to result from such breach of covenant. The interference in such case is based upon the ground that, while there is a remedy at law for breach of the covenant on the part of the lessee, a new suit would have to be brought daily for each daily repetition of the offense, and an injunction is therefore necessary to prevent a multiplicity of suits, as well as on the ground of the great difficulty in estimating damages at law for such a grievance." In this case the plaintiff has established the terms of the contract or lease, and the violation of the restrictive clause is admitted. Those facts, in the light of the authorities just quoted, entitle it to relief by injunction.

It is contended that, as the contract contains no express agreement on the part of the plaintiff to furnish the defendant with beer of its own manufacture, the contract lacks mutuality and is not enforceable. The contract as a whole is supported by a sufficient consideration. The covenant in question is a mere restriction on the use of the premises by the defendant. He took the lease subject to

that restriction. The parties had a right to make a contract to suit themselves. The plaintiff had a right to provide that premises owned by it, whether used for the sale of its own products or not, should not be used to extend the trade of its competitors. If, then, the contract does not obligate the plaintiff to furnish the defendant with beer, it is still the contract of the parties, and its enforcement requires the defendant to do or abstain from nothing which he did not voluntarily undertake to do or abstain from doing.

Another contention of the defendant is that the plaintiff, having declared a forfeiture and brought an action at law for the recovery of the whole amount of the deferred instalments, cannot maintain this suit to enforce the restrictive covenant of the lease. That this contention may be understood, we take the following from the defendant's brief: "The contract provided the penalty which the defendant would be subjected to if he failed to perform the contract; that plaintiff should have the right to recover all of the unpaid portion of the $1,000 advanced by it, at once, and to recover possession of the premises from the defendant. It pursued both remedies by commencing suit for the remainder of the $1,000 and giving the defendant notice to quit the premises. Furthermore, the contract did not leave it to plaintiff's option, but provided absolutely that all of the defendant's rights under the contract should be forfeited and immediately cease upon his failure to live up to its terms. He violated the contract; therefore, according to its terms, the contract immediately came to an end, so far as defendant's rights were concerned. Plaintiff, in addition, elected to pursue its remedy at law. * * * It would be a strange rule of law that would permit one party to declare the contract at an end and to claim the penalty named in the contract in a court of law, and then permit him to pursue the remedy of requiring specific performance in a court of equity." There would be great force in this contention, if the contract would admit of the construction that the exaction of

the penalty there imposed for the doing of the forbidden act was intended by the parties as an equivalent for the privilege of doing that act. 2 High, Injunctions (4th ed.), sec. 1139. But manifestly such was not the intention of the parties, because by the very language of the covenant the exaction of the penalty would not only prevent the doing of the forbidden act, but would terminate the defendant's right to use the premises for any purpose. The rule is that, where the covenant is absolute in its terms, and a penalty is attached to insure the faithful performance of the obligations thereby imposed, the exaction of the penalty will not deprive equity of its jurisdiction to restrain the commission of the forbidden act. Section 1139, *supra*. *A fortiori* a mere attempt, as in this case, to exact the penalty would not deprive it of such jurisdiction.

Nor does the doctrine of an election of remedies apply. That doctrine cannot be successfully invoked against a party, unless it appear that he has pursued one of two coexisting remedies, so inconsistent that the choice of one necessarily amounts to an abandonment of the other. *State v. Bank of Commerce,* 61 Neb. 22. Here, although the plaintiff declared a forfeiture and commenced its action at law for the recovery of its debt, the defendant ignored the notice to vacate the premises and retained the possession which it had obtained under and by virtue of the lease. So long as he thus retains possession, his rights with respect to the use of the premises are to be measured by the terms of that instrument. It would be a remarkable rule that would give a tenant in possession under a lease which he had forfeited greater rights than he would have had, had he kept his covenants. It does not seem to us that an attempt to enforce a forfeiture is in any way inconsistent with a suit to compel the tenant to observe the restrictive covenants, so long as he resists the forfeiture and retains possession under the lease.

In our opinion, the record shows that the plaintiff was

entitled to the relief granted, and we recommend that the decree be affirmed.

JACKSON, C., concurs.

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

AFFIRMED.

JOPHES H. MALONE, APPELLANT, V. AMERICAN SMELTING & REFINING COMPANY, APPELLEE.

FILED DECEMBER 21, 1906. No. 14,586.

Master and Servant: ACTION FOR DAMAGES: DIRECTING VERDICT. It is error to hold, as a matter of law, that an employee 24 years old, of average intelligence and fair education, is chargeable with knowledge that to throw a bucket of water into the fire box of a smelting furnace, containing a bed of highly heated coals, about 9 feet long, 3 or 4 feet wide and 3 feet deep, is liable to result in a dangerous explosion, where the evidence warrants the inference that he did the act in obedience to an order from the foreman under whom he worked.

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

Weaver & Giller, for appellant.

John C. Cowin, contra.

ALBERT, C.

Jophes H. Malone brought an action against the American Smelting and Refining Company to recover damages for personal injuries sustained by him while in the employ of the defendant. It is alleged in the petition that, while he was in the employ of the defendant, the defendant's foreman, under whom he worked, ordered and directed the plaintiff to draw the fire from the furnaces; that in the

performance of that work a rubber hose was ordinarily used to throw water on the fire, but on this occasion when the plaintiff proceeded to obey the said order of the foreman the hose could not be found; that the plaintiff thereupon reported to the foreman that he was unable to find the hose, whereupon the foreman ordered and directed the plaintiff to take a bucket and use it instead of the hose for throwing water on the fire; that the plaintiff was not familiar with the work of drawing the fires, which was usually performed by the foreman himself, and that the same was outside the scope of the usual duties devolving upon the plaintiff; that in obedience to the order and direction of the foreman plaintiff took the bucket and threw water therefrom on the fires, and that, in consequence, a large amount of steam was generated, which caused an explosion whereby the plaintiff sustained serious physicial injuries; that said plaintiff's said injuries are the proximate result of the defendant's negligence in directing the plaintiff to undertake said work, its omission to provide proper appliances for the performance thereof and to warn or instruct the plaintiff with respect to the danger incident thereto. The answer admits that, while the plaintiff was in defendant's employ, he was injured by an explosion caused by his throwing water on the fires with a bucket, but denies that he was ordered to use the bucket for that purpose. It alleges, in substance, that the work of drawing the fires was in the line of plaintiff's duty; that he was familiar with said work; that he voluntarily assumed the risks incident thereto, and that his injuries, to the extent that he sustained any, were wholly due to his own negligence. The reply consists of a general denial. At the conclusion of the evidence adduced by the plaintiff, the defendant interposed a motion for the direction of a verdict in its favor, which the court sustained, and judgment went accordingly. The plaintiff appeals, insisting that the evidence was sufficient to warrant a submission of the cause to the jury.

That the plaintiff was injured while in the employ of

the defendant is admitted by the pleadings; the nature and extent of such injuries, and the other elements constituting a basis for the computation of damages, if any are recoverable, are conclusively established by the evidence. Hence, if the judgment of the trial court be sustained, it must be because the evidence fails to establish the charge of negligence against the defendant, or, if such charge be established, because the evidence conclusively shows that the defendant assumed the risk, or that his own negligence contributed to the injury to such an extent as to preclude a recovery. This brings us at once to a consideration of the evidence, which shows substantially the following state of facts: On the 28th day of October, 1903, the plaintiff, then a man of 24 years of age, was and for about three months prior thereto had been employed in the refining department of the defendant's smelting works. His principal duties consisted in assisting to remove the scum from the kettles, to mix the various metals therein, and to carry away the refuse. In the performance of his duties he was at all times subject to the orders and under the direction and control of another employee of the defendant, who is designated as the kettle boss, who had charge of this particular department of the work. On that date the kettle boss ordered the plaintiff to go to the floor below and draw the fires from the furnaces. This work was usually performed by the kettle boss himself, and was outside the scope of the plaintiff's employment. The plaintiff was entirely without experience in drawing the fires from the furnaces, save that on a former occasion he had assisted the kettle boss in that work, on which occasion the fires in the furnaces, as well as the hot coals after they were drawn therefrom, were sprinkled with water by means of a rubber hose. When he was directed on the date mentioned to draw the fires from the furnaces, he proceeded at once to the lower floor for that purpose, but was unable to find the hose with which to deaden the fires. He came back, and reported that fact to the kettle boss, who directed him to an ordinary water bucket, hold-

ing about four gallons, and directed him to use that instead of the hose, but gave him no instructions as to how it should be used nor any warning of danger. The plaintiff took the bucket, filled it with water, and threw the water on the hot coals in the furnace. This caused an explosion, which threw the steam and red-hot coals out of the furnace and upon the plaintiff, resulting in the injuries complained of. The fire box was about 9 feet long, between 3 or 4 feet wide and about 3 feet deep, and was full of highly heated coals.

The testimony of the plaintiff is to the effect that he threw the water on the coals to cool them so he could remove them from the furnace; that, while he knew something of the explosive power of steam, yet he did not know, and would not have known had he stopped to consider, that the throwing of a bucket full of water upon the coals in the furnace was attended with any danger. The evidence also shows that the plaintiff is a man of ordinary intelligence and of fair education. The only evidence throwing any light on why water was used in drawing the fires is that of the plaintiff, who, as we have seen, testified that he threw the water on the coals to deaden them to enable him to remove them, and that, on the occasion when he assisted the foreman to draw the fires, he turned the hose both on the coals in the furnace and those that had been drawn out. On the latter occasion, however, he was not called to assist until part of the coals had been withdrawn, but he did not know what had taken place before he got there. A reasonable inference from his evidence on this point, taken in connection with the order of the foreman to use the bucket instead of the hose, is that the usual way of proceeding to draw the fires was to throw water from the hose on the coals both before and after they had been drawn from the furnace, and that, when the hose could not be found, the foreman directed him to use the bucket for that purpose. That it was dangerous to use the bucket for that purpose is shown by the result. The danger was heightened by the

fact that, in order to use it, the plaintiff was compelled to stand within three or four feet of the furnace door. The plaintiff, therefore, was injured while carrying out the orders of the defendant's foreman, and in consequence of the unsuitability of the instrumentality furnished for that purpose, and is entitled to recover, unless the only reasonable inference from the evidence is that he knew of the danger, or was chargeable with knowledge thereof, and assumed the risk, or was guilty of contributory negligence.

The defendant takes the position, that the act which resulted in the injury was so obviously dangerous that a person of plaintiff's age, experience and education must be presumed to have known that it was dangerous. The plaintiff was practically without experience in that kind of work. While something of the expansive power and other properties of steam is quite generally known, the particular circumstances in which the sudden conversion of water into steam is attended with danger is by no means a matter of common knowledge. In *Swift & Co. v. Creasy,* 9 Kan. App. 303, it was held that a man employed as an ash wheeler in an engine house is not chargeable with knowledge that the consequence of suddenly turning a stream of water on a burning building, in which there is a large amount of grease, will probably be a dangerous explosion. In *La Fortune v. Jolly,* 167 Mass. 170, it was held that it could not be said, as a matter of law, that an inexperienced servant was chargeable with knowledge that an explosion of gas formed by combustion was among the probable consequences of thrusting too many shavings into a furnace, thereby stopping the draft and preventing the escape of the gas. In *McGowan v. La Plata Mining & Smelting Co.,* 9 Fed. 861, it was held that the explosive power of hot slag, when thrown into water, is not presumed to be known by an ordinary workman without special training or experience. See, also, *Ribich v. Lake Superior Smelting Co.,* 123 Mich. 401. In *Smith v. Peninsular Car Works,* 60 Mich.

501, it was held that there was no presumption that an employee in an iron foundry had knowledge of the effect of molten iron being thrown upon ice.

In the case at bar, the plaintiff testifies that he did not know that the act which resulted in his injury was attended with any danger. It is not an unreasonable inference from the evidence that the plaintiff, in throwing the water on the fire, was acting in obedience to an order of defendant's foreman under whom he worked. He had a right to rely, to some extent, on the superior skill and knowledge of the foreman in whose charge defendant had placed him. 1 Labatt, Master and Servant, sec. 440. We do not wish to be understood to hold that his testimony in that respect is conclusive, or that the evidence adduced, taken as a whole, entitled him to a verdict. But we do hold that the evidence does not warrant the court in holding, as a matter of law, either that the defendant was free from negligence, or that the plaintiff assumed the risk or was injured as a proximate result of his own negligence. It discloses a state of facts from which reasonable minds might reach wholly different conclusions with respect to the ultimate facts essential to a recovery, and therefore should have been submitted to the jury under proper instructions from the court.

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

JACKSON, C., concurs.

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

REVERSED.

FRED C. COULTON, APPELLANT, V. LYDIA E. POPE, APPELLEE.

FILED DECEMBER 21, 1906. No. 14,568.

Wills: APPEAL: RETAXING COSTS. The power of the court to act under the provisions of section 14, ch. 20, Comp. St. 1903, relating to appeals in probate matters, may be invoked by motion to correct the judgment, made at the same term.

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

W. T. Thompson and *John C. Martin,* for appellant.

J. J. Sullivan, F. Dolezal and *Patterson & Patterson, contra.*

JACKSON, C.

The appellee, as proponent, had judgment in the district court in an action appealed from the county court admitting to probate the will of J. H. Pope, deceased. By the terms of the judgment, as it was first entered, the costs were taxed to the estate. At the same term the court, on motion of the proponent, retaxed the costs and taxed all of the costs of the appeal, including an attorney's fee of $100, to the contestant. This action was taken under the provisions of section 44, ch. 20, Comp. St. 1903, relating to appeals in probate matters, where it is provided: "If it shall appear to the court that such appeal was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the costs thereof, including an attorney's fee, to the adverse party, the court to fix the amount thereof." The contestant appeals.

The evidence taken in support of the motion has not been preserved in a bill of exceptions, and the question presented is one of practice. The appellant contends that the original journal entry shows an adjudication of the question of costs, and that, being an adjudication thereof,

it could only be attacked by a motion for a new trial within three days after the rendition of the judgment, and could not be reached by a motion to retax costs, which is a proceeding to reach mere clerical errors in the entry of costs by the clerk of the court. This contention cannot be sustained. Courts of general jurisdiction have authority to change, correct, revise and vacate their own judgments at any time during the term at which they were rendered and before rights have become vested thereunder. *Harris v. State,* 24 Neb. 803; *Bradley v. Slater,* 55 Neb. 334. No motion for a new trial was necessary to procure an adjudication of the rights of the proponent to have the costs taxed to the contestant. That question was properly presented by motion at the same term at which the judgment was rendered and the judgment is amply supported by the record. It is complained that no notice of the motion was given to the appellant. That, however, was without prejudice, as the appellant appeared by his counsel and resisted the motion.

We find no error in the record, and recommend that the judgment of the district court be affirmed.

ALBERT, C., concurs.

DUFFIE, C., took no part in the decision.

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

AFFIRMED.

IDA R. LYONS ET AL., APPELLANTS, V. SAMANTHA CARR ET AL., APPELLEES.

FILED DECEMBER 21, 1906. No. 14,579.

1. **Quieting Title: LIMITATIONS.** The statute of limitations commences to run against an action brought under the provisions of section 57, ch. 73, Comp. St., from the time the adverse claim attaches.

2. ———: ———. The fact that certain of the plaintiffs in such an action are minors, who claim title through descent, does not toll the statute, where it appears that the statute had commenced to run during the lifetime of their ancestors.

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

H. D. Rhea and *Billingsley & Greene,* for appellants.

Warrington & Stewart and *H. M. Sinclair, contra.*

JACKSON, C.

Joshua Emanuel died intestate in Dawson county on April 6, 1887. He owned and occupied with his wife as a homestead the land in controversy, which was of less value than $2,000. The widow moved to the state of Michigan, where she remarried, and is still living. The personal property was insufficient to pay the debts and charges allowed against the estate, and the administrator sold the homestead under a license obtained in the district court to George W. Benedict for the sum of $400, subject to a mortgage indebtedness of $300. The sale was confirmed September 23, 1890. Benedict deeded the land to R. D. V. Carr, who paid the $400 purchase money bid by Benedict at the administrator's sale. Both the administrator's deed and the deed from Benedict were executed under date of October 20, 1891, but the deed from Benedict to Carr was not recorded until February 13, 1904, and the administrator's deed until February 16, 1905. The premises have, since the sale to Carr, been occupied and controlled by tenants of Carr and his grantees. Emanuel left six children surviving him, two of whom were minors, Samuel R., aged 18, and Catherine L., aged 17. Samuel R. Carr died a bachelor in 1890, his mother and the five remaining children of Joshua Emanuel inherited his interest in the estate. A daughter, Sarah A. Crawford, died April 6, 1896, leaving five minor children, who are of

the plaintiffs in this action. The homestead being of less value than $2,000, the sale by the administrator was void. *Tindall v. Peterson,* 71 Neb. 160. On April 24, 1905, the widow and surviving children of Joshua Emanuel, joining with the minor children of Sarah A. Crawford, instituted this action in the district court for Dawson county to quiet the title as against those claiming under the administrator's sale, and for an accounting of the rents and profits. The defense is the statute of limitations. The finding of the district court was for the defendants, and the plaintiffs appeal.

On behalf of the appellants it is insisted, first, that the case is to be governed by section 117, ch. 23, Comp. St., and the exceptions noted in the following section. That section of the statute, however, applies to irregular administrators' sales, but not to sales that are absolutely void. *Brandon v. Jensen,* 74 Neb. 569.

It is next contended that the statute of limitations against the action to quiet the title could not run against the children of Joshua Emanuel until the death of the widow, who held the life estate. The rule, however, under our statute is that an action to quiet the title to real estate may be maintained by the remainderman during the continuance of the particular estate. *Hall v. Hooper,* 47 Neb. 111. And the statute of limitations commences to run at the time the adverse claim attaches. *First Nat. Bank v. Pilger,* 78 Neb. 168. But it is said that, in any event, the statute could not run against the plaintiffs who are minors. They claim title, however, by inheritance from their mother, Sarah A. Crawford, and the statute of limitations had commenced to run against her during her lifetime, and neither her death nor the minority of her children could toll the statute. *Ballou v. Sherwood,* 32 Neb. 666.

In addition to the facts already recited, it appears from the record that R. D. V. Carr conveyed the premises by warranty deed to Lot G. Carr January 30, 1894, the deed having been recorded on February 9, 1894. It also ap-

pears that at least two of the children of Joshua Emanuel were residents of the county at the time the proceedings were instituted by the administrator to sell the land, and one of the children made an ineffectual effort to prevent the sale. These facts, together with the court proceedings, coupled with the possession of the real estate and the deed executed by R. D. V. Carr to Lot G. Carr, constituted notice of the adverse claim which attached more than ten years prior to the commencement of this action.

It follows that the decree of the district court was right, and we recommend that it be affirmed.

ALBERT, C., concurs.

DUFFIE, C., took no part in the decision.

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

AFFIRMED.

JAMES M. WECKERLY, APPELLEE, V. CADET TAYLOR ET AL., APPELLANTS.

FILED DECEMBER 21, 1906. No. 14,905.

Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities.

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

George W. Shields, for appellants.

E. Wakeley, A. C. Wakeley and *Greene, Breckenridge & Matters, contra.*

JACKSON, C.

On March 9, 1901, plaintiff obtained judgment against Cadet Taylor and others, the judgment being in part un-

satisfied, and on February 20, 1904, this action was instituted by the plaintiff against Cadet Taylor, Emma L. Taylor, his wife, and the Employers' Liability Assurance Corporation, Limited. The action is in the nature of a creditor's bill, and seeks to subject money, which it is claimed is due the defendant Cadet Taylor from the assurance corporation on an accident policy, to the satisfaction of the judgment against Taylor. The defendant Emma L. Taylor answered, claiming, in substance, that she was the beneficiary named in the accident policy, which was issued at her instance and request and the premium paid out of her own funds; that she applied for a policy wherein she was to be named as the beneficiary; that after the policy was issued her husband made a formal assignment thereof for the purpose of curing any defects or ambiguities in the policy from which it might appear that any part of the moneys payable under its terms might be payable to the defendant Cadet Taylor; that it was originally intended by all the parties that she should be the sole beneficiary named in the policy. She also asked that the policy might be reformed, if it should be determined that any part of the moneys that might be payable under the provisions of the policy were payable to Cadet Taylor.

The assurance corporation answered, denying that it made any agreement with the defendant Emma L. Taylor to pay her any moneys under the provisions of the policy, except in case of the accidental death of Cadet Taylor, and admitting a liability of $1,250, which it offered to pay to the person entitled thereto. The decree was for the plaintiff, requiring the assurance corporation to pay the plaintiff $1,250, admitted liability. The defendant Emma L. Taylor appeals.

The facts with reference to the issuance of the policy are: That Cadet Taylor had left his home in Omaha for the purpose of a journey. His wife, Emma L. Taylor, requested her brother-in-law, W. B. Taylor, to procure an accident policy payable to her. W. B. Taylor applied to Frank S. Brownlee, district manager of the Preferred

Accident Insurance Company of Omaha, for such a policy. Brownlee came to Taylor's office with a printed application with blanks where the necessary information was to be written in. The application was filled out by Brownlee, and signed: "Cadet Taylor, by W. B. Taylor." The only reference to the beneficiary in the application is in this language: "Policy to be payable, in case of death by accident under its provisions, to (beneficiary's name in full) Emma L. Taylor. Residence—Omaha, Neb. Relationship—wife." It appears that the Preferred Accident Insurance Company would not issue a policy except upon the written application of the person whose life or safety was thereby insured, and Brownlee applied to Webster, Howard & Company, agents for the defendant assurance corporation, for a policy, furnishing the necessary and required information for that purpose. The defendant assurance corporation issued its policy, called a "combined accident policy." It provided for the payment of $5,000 to Emma L. Taylor, wife of Cadet Taylor, if death resulted from accident, and also contained provisions for the payment of weekly benefits in case of disability arising from accident. The premium was paid by Emma L. Taylor from her own private funds. The policy was delivered by Brownlee to W. B. Taylor, and he, in turn, delivered it to Emma L. Taylor. W. B. Taylor testified that, when he applied to Brownlee for the policy, he stated that Mrs. Taylor desired a policy in which she should be named as the sole beneficiary, and that Brownlee agreed to procure such a policy. The only conflict in the evidence is as to what occurred at that time. Brownlee testified that he had no recollection of making any such agreement, and, in effect, denied that such an agreement was made. The policy was issued under date of May 16, 1903, to take effect on May 15. On the 17th of October, 1903, Cadet Taylor made a formal assignment of all sums of money then accrued, or that might accrue and be payable to him under the provisions of the policy, to Emma L. Taylor, his wife. It is claimed that this assignment was fraud-

ulent as to his creditors, and it is upon that theory, doubtless, that the district court entered a decree favorable to the plaintiff..

Elaborate arguments are made on behalf of the appellee Weckerly and the assurance corporation to show that all benefits provided for by the policy, except for death loss, were payable to Cadet Taylor, and it is as strenuously insisted by appellant that all benefits were payable to her; but, in view of the conclusion that we have reached, it is not important to determine that question. We entertain no doubt but that the appellant applied and paid for an accident policy, in which she was to be named as the beneficiary, and the fact that the policy, as it was issued, might be construed as contended for by the assurance corporation and Weckerly, should not, in an equitable action where the court looks to the substance rather than to the form, deprive her of the benefits of the transaction. Such benefits as have accrued were produced by the investment of her own funds, and were the result of the prudential course pursued by her for her own protection and the protection of the family, a benefit fund to which the creditors have no legal, moral or equitable claim. No reformation of the contract was necessary. If any part of the benefits accruing under the provisions of the policy were, by the terms of the policy, payable to Cadet Taylor, that infirmity was remedied by the assignment executed by him prior to the commencement of this action. Nor can it be said that the assignment was without consideration. No consideration was necessary except the original consideration paid as a premium for the policy. It served to perform the purpose originally intended when the premium was paid by Mrs. Taylor. The amount of the premium is lightly referred to by counsel in the brief on behalf of the assurance corporation as being insignificant. It is sufficient to say that the company issuing the policy fixed a price with which the court is not concerned.

The decree of the district court was erroneous, and it is recommended that it be reversed and the cause remanded, with instructions to enter decree in conformity with the conclusion here reached.

ALBERT, C., concurs.

DUFFIE, C., took no part in the decision.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with instructions to enter decree in conformity with the conclusion here reached.

REVERSED.

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5. If a mortgagee having a right of selection assigns his mortgage and takes a second mortgage he takes subject to the first mortgage, and an assignee of the second mortgage will take no greater right than his assignor had. *South Omaha Nat. Bank v. McGillin*..... 6

Colleges and Universities.

The money donated by the United States to the university of Nebraska, known as the "Experimental Station" fund, may be expended without more specific appropriation than that implied by sec. 2, art. VIII of the constitution, and contained in sec. 19, ch. 87, Comp. St. *State v. Searle*..... 155

Constitutional Law.

1. Sec. 66, ch. 73, laws 1903, classifying every person, company or corporation engaged in the business of buying and selling grain for profit as a grain broker, and providing for the assessment of the average capital of grain brokers, is not unconstitutional. *Central Granaries Co. v. Lancaster County* 319
2. Secs. 531c-531f of the code, relating to garnishment of exempt wages, *held* constitutional. *Gordon Bros. v. Wageman* 185
3. Sec. 5775, Ann. St., authorizing county courts and judges of the district and supreme courts at chambers to determine an objection to a certificate of nomination, *held* constitutional. *State v. Hallowell*..... 610

Contempt.

1. Where a habeas corpus proceeding has proceeded to final judgment, the institution by one of the parties of another action of the same kind to determine the same question in another court, before complying with the judgment, *held* contempt. *Terry v. State* 612

2. Under the facts, disclaimer of intent, disrespect, or design to embarrass the due administration of justice, *held* no defense. *Terry v. State*..... 612

3. Where an action in habeas corpus is brought to evade a judgment in a similar action, one who has not counseled or abetted such a proceeding and whose name as a petitioner was used without authority, cannot be convicted of contempt. *Terry v. State* 612

Contracts.

1. The doing of that which the creditor of a corporation is required by law to do before he could maintain an action against the stockholders of the corporation is not a sufficient consideration to support a promise. *First Nat. Bank v. Estate of Lehnhoff*..... 303

2. Mutual promises, not for a common object or purpose, and not mutually advantageous or detrimental, are without consideration and not enforceable. *First Nat. Bank v. Estate of Lehnhoff* 307

3. An agreement without benefit or detriment to either party is without consideration and not enforceable. *First Nat. Bank v. Estate of Lehnhoff*..... 307

4. In an action on an express contract defendant may show under a general denial that the contract differed from that pleaded, or that no contract was made. *Sorenson v. Townsend* 499

5. A promise in consideration of an agreement not to resist the probate of a will is not void as against public policy. *Grochowski v. Grochowski* 506

6. Such a promise is not without consideration, and will be enforced. *Grochowski v. Grochowski*..... 506

7. A contract by an interested party not to resist probate of a will *held* not void as against public policy, unless made collusively and in fraud of the rights of others. *Grochowski v. Grochowski*..... 510

8. Withdrawal of opposition to the probate of a will is a valid consideration for a promise. *Grochowski v. Grochowski*... 510

9. To recover damages for breach of contract, one must show

Contracts—*Concluded.*

that they are the natural and proximate consequence of the wrongful act complained of. *Bahr v. Manke*..... 552

10. Where the literary matter intrusted to defendant to enable it to perform its contract to manufacture the supreme court reports was not copyrighted, and had been given to the public, the law will not imply an agreement by defendant not to manufacture and sell volumes containing such literary matter on its own account, there being no such limitation in the contract. *State v. State Journal Co*..... 752

11. A clause of a contract of an irrigation corporation which, if enforced, would prevent its serving the public without unjust discrimination, is void. *Sammons v. Kearney P. & I. Co.* 580

12. A contract should be construed to give effect to the intent of the parties. *Grothe v. Lane* 605

13. Where a party who claimed he had been fraudulently induced to enter into a contract employs counsel, and after full investigation ratifies it and accepts benefits under it, he is bound by such ratification. *Kertson v. Kertson*..... 688

14. Evidence *held* to show ratification of a contract. *Kertson v. Kertson* 688

15. Under a contract for the manufacture of supreme court reports the law will imply an agreement by defendant not to use the property of the state for any other purpose than that contemplated in the contract. *State v. State Journal Co*..... 752

Conversion. See TROVER.

Copyrights.

The word "copyright," under the act of congress and the common law, defined. *State v. State Journal Co*..... 752

Corporations.

1. In an action to recover an assessment made by consent of the directors, defendant being one of them, evidence *held to* sustain judgment for plaintiff. *Mirage Irrigation Co. v. Sturgeon* 175

2. A corporation formed to supply water or water power is a *quasi* public corporation, and is bound to serve the public without unjust discrimination. *Sammons v. Kearney P. & I. Co.* 580

3. Under secs. 73, 75 of the code, a citizen may sue a foreign corporation by service of process on its managing agent. *Ord Hardware Co. v. Case Threshing M. Co*..... 847

Corporations—*Concluded.*

4. Agent of foreign corporation *held* a managing agent under sec. 75 of the code, providing for service of summons on the managing agent of a foreign corporation. *Ord Hardware Co. v. Case Threshing M. Co*..... 847

Costs.

1. Attorney's fees cannot be taxed as costs against a successful litigant. *Hering v. Simon*..... 60
2. Trial court has a sound discretion in taxing costs in equity suits, subject to review when arbitrarily exercised. *Hering v. Simon* 60
3. Nothing can be taxed as costs except items prescribed by statute or authorized by agreement of the parties. *Langan v. Whalen* 658
4. The county from which a change of venue in a criminal case is taken is not liable to the county in which the trial is had for fees of jurors of the regular panel who did not sit on the trial of that case. *Dawes County v. Sioux County* 567

Counties and County Officers. See TAXATION, 4-6.

One injured by reason of a defective bridge while in a private vehicle may recover from a county, notwithstanding the negligence of the driver, the injured party being free from negligence and having no control over the driver. *Loso v. Lancaster County* 466

Courts.

1. The judge of the district court has power to adjourn a regular term of court by an order sent to the clerk before the time for holding the term. *Russell v. State*..... 519
2. The judge of the district court may call a special term for the transaction of the general business of the court if he deem it necessary. *Russell v. State*..... 519
3. Where two courts have concurrent jurisdiction, that which first takes cognizance may retain it to the exclusion of the other. *Terry v. State*..... 612

Criminal Law. See ASSAULT AND BATTERY. INCEST. INDICTMENT AND INFORMATION.

1. Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine them. *Stetter v. State*..... 777
2. A county court or county judge may entertain a complaint, issue a warrant and conduct the preliminary hearing, where the offense is beyond his jurisdiction, and may hold the defendant to bail for his appearance in the district court. *Stetter v. State*..... 777

Criminal Law—*Concluded.*

3. Former jeopardy defined. *Steinkuhler v. State*..... 331
4. Evidence in prosecution for unlawfully keeping liquor for sale *held* to sustain verdict. *Steinkuhler v. State*..... 331
5. Evidence of physicians, as experts, *held* competent. *McConnell v. State*..... 773
6. *Held*, not error to refuse an instruction as to a crime for which the defendant is not on trial. *Steinkuhler v. State*.. 331
7. Where the court has instructed that the state must prove all the material averments beyond a reasonable doubt, *held* not error to afterwards instruct that the burden of proof to establish one of them is on the state, without qualifying such statement by the words "beyond a reasonable doubt." *Steinkuhler v. State*..... 331
8. If a defendant is a witness in his own behalf, it is error to instruct that, if he has not denied any material fact proved in the case within his personal knowledge, such testimony is admitted by him. *Russell v. State*..... 519
9. On the trial of one charged with crime, where the charge in the information embraces all the ingredients of a lesser offense, failure to define the lesser offense and instruct the jury that they may convict of such offense, *held* not reversible error. *McConnell v. State*..... 773
10. An instruction in a prosecution for assault with intent to commit rape that it is not essential to a conviction that the prosecutrix be corroborated should not be given. *McConnell v. State*..... 773

Damages.

1. $27,500 as damages for loss of both legs, *held* not excessive. *Union P. R. Co. v. Connolly*..... 254
2. Where goods were sold on condition that a salesman would assist in their resale, and the salesman gave no assistance, *held* that the measure of damage is the value of the services to be rendered. *Myers Royal Spice Co. v. Griswold*..... 487
3. In an action for damages to growing trees, evidence showing the effect the destruction of the trees had on the value of the land is admissible. *Alberts v. Husenetter*..... 699
4. Evidence examined, and *held* that the damages awarded for destruction of trees were not excessive. *Alberts v. Husenetter* 699

Deeds.

1. Where a grantor records a deed with the intent of passing title to his grantee pursuant to a valid agrement between them, the conveyance is valid. *Fryer v. Fryer*..... 298

Deeds—*Concluded.*

2. A deed purporting to convey a half of a government quarter section of land that has not been subdivided is operative as a conveyance of a quantitative half of the tract. *Kirkpatrick v. Schaal*..... 661

Depositions.

1. A deposition to be admitted in evidence must be reduced to writing by the officer taking it, or by the witness, or by a disinterested person, in the presence of the officer. *American Bonding Co. v. Pulver*..... 211

2. A certificate to a deposition, which fails to show that the deposition was reduced to writing by the officer, or by the witness, or by a disinterested person, in the presence of the officer, and that it was taken at the time and place named in the notice, is fatally defective. *American Bonding Co. v. Pulver*..... 211

Descent and Distribution. See WILLS.

Divorce.

1. Evidence in a suit for divorce *held* to sustain the decree for defendant. *Russell v. Russell*..... 136

2. Continued threats of personal violence and accusations of crime and the use of profane language, *held* to support decree of divorce for cruelty. *Griffith v. Griffith*..... 180

3. Condonation of a wife's wrongs will bar a divorce therefor. *Griffith v. Griffith*..... 180

Dower.

Where B. and wife conveyed land by warranty deed as security for a debt which was paid, and by mesne conveyances the title vested in one having notice, *held* that the widow of B. was entitled to dower. *Wild v. Storz Brewing Co*.... 94

Electricity.

In an action against an electric light company for damages for death caused by an electric shock while employed by a city as a fireman, petition *held* insufficient. *Trouton v. New Omaha T.-H. E. L. Co*..... 821

Eminent Domain.

1. Under sec. 21, art. I of the constitution, where there is a disturbance of a right of the owner of real estate which gives it additional value, whereby he sustains specal damages, he may recover therefor. *Stehr v. Mason City & Ft. D. R. Co*..... 641

2. The damages recoverable for the use of a street by a railroad company include all damages which cause diminution

Eminent Domain—*Concluded.*

in the value of the property. *Stehr v. Mason City & Ft. D. R. Co*..... 641

3. An abutting owner cannot be prevented from recovering damages to his property by the construction of a railroad in the street by the city's vacating the street. *Stehr v. Mason City & Ft. D. R. Co*..... 641

Equity.

Equity seeks the real and substantial rights of the parties, and applies the remedy so as to relieve those having the controlling equities. *Weckerly v. Taylor*..... 886

Escrows.

The depositary of funds in escrow is entitled to prove any facts which would defeat plaintiff's claim thereto. *Brockway v. Reynolds*..... 225

Estoppel. See APPEAL AND ERROR, 2. ASSIGNMENTS FOR BENEFIT OF CREDITORS. ATTORNEY AND CLIENT, 9. INSURANCE, 15. MUNICIPAL CORPORATIONS, 2. PRINCIPAL AND SURETY, 1.

Estoppel will not supply the want of power, or make valid an act prohibited by statute. *Weatherington v. Smith*.... 363

Evidence. See APPEAL AND ERROR, 6-8. CONTRACTS, 4. CRIMINAL LAW. TRIAL.

1. A transcript of a justice's docket of another state is receivable in evidence if it conforms to sec. 415 of the code relating to judgments of justices of the peace of another state. *Gordon Bros. v. Wageman*..... 185

2. Oral testimony is admissible to supply omitted covenants not inconsistent with written memorandum. *De Laval Separator Co. v. Jelinek*..... 192

3. In an action for injury at a railroad crossing certain evidence *held* properly excluded. *Union P. R. Co. v. Connolly*.. 254

4. In an action for the killing of an employee as the result of a defective condition in an engine, evidence of a declaration of the engineer regarding such defective condition, made at the time, is admissible as a part of the *res gestæ*. *Union P. R. Co. v. Edmondson*..... 682

Execution. See JUDGMENT, 7.

Executors and Administrators. See APPEAL AND ERROR, 1.

1. Where a contract for legal services, reasonable and beneficial to the estate, has been entered into by an administrator, it may be enforced. *Estate of Rapp v. Elgutter*..... 674

2. A claim against the estate of a decedent, which became absolute before the expiration of the time fixed for filing

Executors and Administrators—*Concluded.*
claims, is barred if not filed within that time. ***Burling v. Allvord*** 861

3. That claimant did not discover fraud of decedent until after the time fixed for filing claims against his vendor's estate does not extend the time for filing his claim. *Burling v. Allvord* 861

Exemptions.

1. An account against an employee is an account or claim under secs. 531c-531*f* of the code relating to garnishment of exempt wages. *Gordon Bros. v. Wageman*..... 185
2. Pleading and proof *held* sufficient to make a *prima facie* case under sec. 531*e* of the code, relating to garnishment of exempt wages, though the process under which the wages were garnished was irregularly issued and served. *Gordon Bros. v. Wageman*..... 185
3. A nonresident is not entitled to the benefits of secs. 531*c-f* of the code, protecting earnings of laborers and other employees from being garnished as exempt. *McCormack v. Tincher* 857

Fraud. See ACTION, 2. SALES, 6.

Evidence in an action for false representations in an exchange of properties *held* to support judgment for defendant. *Morrow v. Laverty*..... 245

Fraudulent Conveyances. See SALES, 9-11.

1. A contract for the sale of personalty, the title to remain in the vendor until the price is paid, is invalid as against purchasers in good faith, judgment and attaching creditors without notice, unless a copy of the contract is filed under sec. 26, ch. 32, Comp. St. *Starr v. Dow*..... 172
2. Gift from husband to wife *held* not fraudulent as to creditors. *Harvey v. Godding*..... 289
3. Evidence *held* to establish the *bona fides* of a conveyance from a husband to his wife. *Harvey v. Godding*..... 289
4. Under the facts, deed to wife *held* not fraudulent as to creditors. *Farmers & Merchants I. Co. v. Brumbaugh*..... 702
5. Transfers between husband and wife upheld. *Weis v. Farley* 729

Gaming.

Evidence *held* sufficient to sustain a conviction for keeping gaming tables in violation of sec. 215 of the criminal code. *Stetter v. State*..... 777

Habeas Corpus.

1. Procedure for review in habeas corpus is as in civil actions. *State v. Decker*..... 33
2. A habeas corpus proceeding involving the custody of a minor child is a proceeding *in rem*, in which the *res* is the child and its custody. *Terry v. State*..... 612

Highways.

1. The statutory provision that a petition for the establishment or vacation of a public road shall be signed by at least ten electors residing within five miles of the road is jurisdictional. *Letherman v. Hauser*..... 731
2. The facts essential to the jurisdiction of a county board to establish or vacate a public road must affirmatively appear in the record. *Letherman v. Hauser*..... 731
3. An elector residing within five miles of a public road has such special interest therein as will enable him to restrain its unlawful closing. *Letherman v. Hauser*..... 731
4. Evidence *held* insufficient to prove an abandonment, or adverse occupancy, of a public road. *Perry v. Staple*..... 656

Homestead.

1. Under sec. 4, ch. 36, Comp. St., the homestead of a married person cannot be conveyed or incumbered unless the instrument is executed and acknowledged by both husband and wife. *Weatherington v. Smith*..... 363
2. A departure from the homestead for pleasure, business or health, is not an abandonment thereof. *Weatherington v. Smith* 363
3. Neither spouse can abandon the homestead for the other without his or her free consent. *Weatherington v. Smith*.. 363
4. Neither husband nor wife can abandon the homestead and thereafter convey it to the exclusion of the homestead right of an insane spouse. *Weatherington v. Smith*..... 369

Incest.

Sec. 204 of the criminal code, defining incest, and providing punishment therefor, is valid and is sufficient in form and substance to create the offense. *Cordson v. State*..... 416

Indians.

The widow of an allottee of Indian lands has a life estate in the equitable fee, with remainder over. *Reese v. Harlan*.. 485

Indictment and Information.

Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. *Cordson v. State*.... 416

Injunction. See HIGHWAYS, 3.

1. In a suit to enjoin the closing of a public road, *held* that plaintiff had no adequate remedy at law. *Letherman v. Hauser* 731
2. In a suit to enforce a restrictive clause in a lease, plaintiff is entitled to an injunction without a showing of actual damages or irreparable injury. *Schlitz Brewing Co. v. Nielsen* 868

Insane Persons.

1. In proceedings for the appointment of a guardian for an insane person, his next of kin are proper parties and may oppose the granting of the petition. *Prante v. Lompe*..... 377
2. It is error to hear a petition for the appointment of a guardian for an insane person prior to the hour set for the hearing upon the stipulation of such insane person. *Prante v. Lompe* 377

Insurance.

1. Where assessments are increased, *held* that a beneficial society may deduct from a certificate the difference between the rate of the monthly assessments when the certificate was issued and the increased rate, from the time when the new rate went into effect to date of death of a member, but not for the remainder of the life expectancy. *Shepperd v. Bankers Union of the World*..... 85
2. Assessments of members of a beneficial society may be increased, when necessary to meet the needs of its business. *Shepperd v. Bankers Union of the World*..... 85
3. A policy of insurance in a mutual fire insurance company cannot be avoided for the nonpayment of an assessment, not made for the payment of a loss, unless it affirmatively appears that the statute has been complied with. *Wolcott v. State Farmers M. Ins. Co*..... 742
4. Mutual fire insurance companies cannot make assessments on their members under sec. 12, ch. 33, laws 1891, until loss has occurred, unless authorized by a two-thirds vote of their directors. *Wolcott v. State Farmers M. Ins. Co*..... 742
5. A by-law of a mutual fire insurance company which provides "that assessments shall be made by order of the directors, and shall be prorated according to the time the insurance has been in force," is not authority for making assessments at stated intervals. *Wolcott v. State Farmers M. Ins. Co*..... 746
6. An assessment levied on part of the membership of a mutual fire insurance company is invalid. *Wolcott v. State Farmers M. Ins. Co*..... 746

Insurance—*Continued.*

7. Verbal demands for an appraisement and for examination of the insured under oath are merged in a subsequent written demand therefor. *Citizens Ins. Co. v. Herpolsheimer*, 232

8. A written demand for examination of the insured under oath, *held* insufficient. *Citizens Ins. Co. v. Herpolsheimer*.. 232

9. One to whom goods are consigned for sale on commission and who accounts to the owner therefor, has an insurable interest therein. *Citizens Ins. Co. v. Herpolsheimer*..... 232

10. False swearing in the proof of loss cannot be predicated on a claim made under advice of an attorney for the price of goods, and for freight, drayage, washing, setting up, etc. *Citizens Ins. Co. v. Herpolsheimer*..... 232

11. To constitute suicide by one not insane, there must be intentional self-destruction. *Sebesta v. Supreme Court of Honor* 249

12. A waiver of a condition will not be implied from an act not consistent with an intention to insist upon performance. *Driscoll v. Modern Brotherhood of America*..... 282

13. Acts relied on as a waiver must be those of the person whose rights are affected by it, or of one authorized to act for him. *Driscoll v. Modern Brotherhood of America*.. 282

14. The unauthorized delivery of a certificate to an applicant for membership in a beneficial association by a subordinate officer before initiation *held* not a waiver of conditions precedent to membership. *Driscoll v. Modern Brotherhood of America* 282

15. Unauthorized receipt of payments from nonmembers, *held* not to estop a beneficial association to deny that the persons thus making payment are members. *Driscoll v. Modern Brotherhood of America*..... 282

16. It is not false representation for a married woman who is pregnant to sign an insurance certificate that she is in sound bodily health. *Merriman v. Grand Lodge D. of H*... 544

17. Where a married woman is an applicant for life insurance, she is not required to inform the company of evidence of pregnancy after her physical examination and application. *Merriman v. Grand Lodge D. of H*..... 544

18. Both husband and wife have an insurable interest in all household furniture. *Lenagh v. Commercial U. A. Co*..... 649

19. Where an insurance company consents in writing to an assignment of a policy, and after loss, but before payment, the interests of the insured are made known to the company, they cannot be defeated by a settlement between the

Insurance—*Concluded.*

company and the assignee without the consent of the insured. *Lenagh v. Commercial U. A. Co*..... 649

20. When there is no fraud, accident or mistake as to the description or ownership of property insured it is immaterial by what name the insured is designated in the policy. *Lenagh v. Commercial U. A. Co*..... 649

Intoxicating Liquors.

1. The burden is on an applicant for liquor license to prove that he is a man of respectable character, when by remonstrance such fact is denied. *Brinkworth v. Shembeck*..... 71

2. In a prosecution under sec. 20, ch. 50, Comp. St., for keeping intoxicating liquors for sale, possession of such liquors by the accused is presumptive evidence of guilt. *Steinkuhler v. State*..... 331

3. A board of village trustees may provide by ordinance for a trial before themselves of a complaint against a saloonkeeper for violation of the statute and ordinances, and on conviction revoke his license. *Langan v. Village of Wood River* 444

4. Application for liquor license *held* signed by required number of freeholders. *Tattersall v. Nevels*..... 843

Judgment.

1. The return to the service of a summons in the original action may be impeached in a proceeding to revive the judgment. *Johnson v. Carpenter*..... 49

2. Under sec. 370 of the code, affidavits are admissible to impeach the return to the service of summons in proceedings for revivor. *Johnson v. Carpenter*..... 49

3. The successor of a deceased judgment creditor may, after the expiration of a year, revive a judgment by a bill or a supplemental petition. *Keith v. Bruder*..... 215

4. Petition to revive judgment *held* sufficient. *Keith v. Bruder* 215

5. An appeal without a superseadeas does not prolong the life of the judgment lien. *Harvey v. Godding*..... 289

6. The provision of sec. 509 of the code, relative to a judgment lien dating from the filing of a mandate, has reference to the special mandate required by sec. 594, where the supreme court renders such a judgment as the lower court should have rendered. *Harvey v. Godding*..... 289

7. A sale of realty under an execution issued on a dormant judgment is void as to one who acquired title from the

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judgment debtor during the life of the judgment lien. *Harvey v. Godding*..... 289

8. An attachment lien is merged in that of the judgment, and ceases to exist when the judgment becomes dormant. *Harvey v. Godding*..... 289

9. The district court cannot, after the term, amend a judgment as to costs, except under sec. 602 of the code providing for vacating or modifying a judgment. *Meade P. H. & L. Co. v. Irwin*..... 385

10. An interlocutory order may be vacated at a subsequent term without compliance with sec. 602 *et sequitur* of the code. *Godfrey v. Cunningham*..... 462

11. Where there is an answer setting up a valid defense, that defendant fails to appear when a cause is reached does not entitle plaintiff to judgment without proof, unless the facts admitted make out a case in his favor. *First Nat. Bank v. Sutton M. Co*..... 596

12. The provisions of sec. 602-609 of the code apply to original actions in the supreme court, and it has no power to set aside a judgment and allow the amendment of a petition, in its discretion, after the term. *State v. State Journal Co*.. 771

13. Although separate decrees are entered after consolidation of suits to quiet title, they are, in effect, one decree, and an order vacating one vacates both. *Schallenberg v. Kroeger*.. 738

14. Error cannot be predicated on an order correcting a record of a decree, making it show expressly what it shows by necessary implication. *Schallenberg v. Kroeger*..... 738

Judicial Sales.

1. Where a judicial sale is fairly conducted in conformity with the decree it will be ratified. *Omaha L. & B. Ass'n v. Hendee*..... 12

2. Where a judicial sale is so conducted that one of the parties is prejudiced without fault on his part, the court may deny confirmation and set aside the sale. *Omaha L. & B. Ass'n v. Hendee*..... 12

3. A motion to set aside confirmation of a judicial sale is not waived by filing a motion to set aside interlocutory orders. *Godfrey v. Cunningham*..... 462

4. A purchaser at a judicial sale, at which certain apparent liens have been deducted in the appraisement, is estopped, after confirmation without objection, to dispute their validity. *State v. Several Parcels of Land*..... 647

5. Lands used as a single tract may for judicial sale be appraised together. *Moore v. Neece*..... 95

Jury.

When the regular panel of petit jurors is quashed the district court may order jurors to be summoned under sec. 664 of the code. *Russell v. State*..... 519

Justice of the Peace.

1. Defective notice of a conditional order vacating a default judgment does not deprive a justice of jurisdiction over the subject matter. *Brainard & Chamberlain v. Butler, Ryan & Co*..... 515

2. An objection to jurisdiction over the subject matter is a waiver of objection to jurisdiction over the person. *Brainard & Chamberlain v. Butler, Ryan & Co*..... 515

3. An informal entry of a judgment by a justice, *held* sufficient as against a collateral attack. *Nelson v. Schmoller*..... 717

Landlord and Tenant.

1. The measure of damages for wrongfully withholding possession of leased premises is the rental value less the rent reserved by the lease. *Shutt v. Lockner*..... 397

2. For wrongfully withholding possession of leased premises, special damages may be awarded, where they are certain and the natural result of the wrong complained of. *Shutt v. Lockner*..... 397

3. A vendee of land in the possession of a tenant takes subject to the unexpired term. *Stone v. Snell*..... 441

4. Where a lease provides that the lessor may sell any part of the land by making a corresponding reduction in the rent, he may dedicate a part thereof to the public for a highway. *Segear v. Westcott*..... 550

5. Although a lease provides that a violation of a restrictive clause shall work a forfeiture, and although upon violation plaintiff declares a forfeiture, yet, so long as defendant refuses to recognize the forfeiture and remains in possession under the lease, the restrictive clause is enforceable against him. *Schlitz Brewing Co. v. Nielsen*..... 868

6. Where a lease provides that no beer save that of particular manufacture shall be sold on the premises, that the excepted beer cannot lawfully be obtained does not annul the restrictive clause of the lease. *Schlitz Brewing Co. v. Nielsen*..... 868

7. Where a lease providing that no beer except of a certain manufacture be sold on the premises is lawful, that the lessor is a member of a combination formed to control trade in some product is no defense to a suit to enforce the restrictive clause. *Schlitz Brewing Co. v. Nielsen*..... 868

Libel and Slander.

1. To charge a woman with being a lewd character and with keeping a gambling room is actionable *per se*. *Battles v. Tyson*..... 563
2. Unless words on which a charge of slander is based are plain and unambiguous, the meaning intended by defendant and the understanding of those hearing him should be left to the jury. *Battles v. Tyson*..... 563

Limitation of Actions. See QUIETING TITLE, 2. TAXATION, 12.

That certain plaintiffs in an action to quiet title are minors, who claim title through descent, does not toll the statute of limitations where it had commenced to run during the lifetime of their ancestors. *Lyons v. Carr*..... 883

Malicious Prosecution.

1. An action for malicious prosecution of a civil suit cannot be maintained if there was probable cause. *Cobbey v. State Journal Co*..... 626
2. Both malice and probable cause must exist to justify an action for malicious prosecution. *Cobbey v. State Journal Co*..... 626
3. A judgment in a civil suit or a conviction in a criminal suit is *prima facie* evidence of probable cause. *Cobbey v. State Journal Co*..... 626
4. A suit attacking the constitutionality of an act authorizing the purchase of statutes, *held* not without probable cause. *Cobbey v. State Journal Co*..... 626

Mandamus.

Mandamus will not lie to compel a county to repair a bridge on a county line without notice to both counties under sec. 116, ch. 78, Comp. St., and the counties must be joined in the action. *State v. Smith*..... 1

Marriage.

Evidence *held* insufficient to show a common law marriage. *Moore v. Flack*..... 52

Master and Servant.

1. A servant engaged in a hazardous occupation assumes the risk of injury from all its obvious dangers. *Anderson v. Union Stock Yards Co*..... 196
2. Evidence in action for injuries *held* insufficient to support verdict for plaintiff. *Anderson v. Union Stock Yards Co*.... 196
3. In an action for damages caused by alleged defective machinery, evidence of the defective condition immediately before and after the accident is admissible. *Union P. R. Co, v. Edmondson*..... 682

Master and Servant—*Concluded.*

4. It is error to hold, as a matter of law, that an employee 24 years old, of average intelligence, is chargeable with knowledge that to throw a bucket of water into the fire box of a smelting furnace, is liable to result in a dangerous explosion, where there is evidence that he acted in obedience to an order from the foreman. *Malone v. American S. & R. Co.* 876

Mechanics' Liens.

1. A materialman, to be entitled to a mechanic's lien, must contract with the owner or his authorized agent. *Meade P. H. & L. Co. v. Irwin* 385
2. Where a vendor and vendee cooperate in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material. *Guiou v. Ryckman* 833
3. Where a contract is complete and for a specific sum, and is filed with the statement of the lien, a more detailed statement of the account is unnecessary. *Guiou v. Ryckman* 833
4. In an affidavit for a mechanic's lien, if there is enough in the description to enable a party familiar with the locality to identify the premises with reasonable certainty, it is sufficient. *Guiou v. Ryckman* 833
5. Evidence *held* sufficient to show the filing of certain liens. *Guiou v. Ryckman* 833

Mortgages.

1. In foreclosure plaintiff must allege and prove, as against the owner of the equity of redemption, that no proceedings at law have been had to recover the debt secured by the mortgage. *McDowell v. Markey* 141
2. Though by stipulations in a trust deed the legal title and right of possession may be conveyed to the trustee, the equity of redemption can be extinguished only by judicial foreclosure. *Kirkendall v. Weatherley* 421
3. When by stipulations the legal title and right of possession of land are conveyed to a trustee in a trust mortgage, the trustee may, with the acquiescence of the mortgagor, without fraud, convey such legal title and right of possession to the mortgagee in discharge of the debt, and a conveyance by the mortgagor to the mortgagee with intent to extinguish the equity of redemption will have that effect. *Kirkendall v. Weatherley* 421
4. The right of redemption and the right to extinguish that

Mortgages—*Concluded.*

right by judicial foreclosure are reciprocal. *McCague v. Eller* 531

5. Under a foreclosure and sale, where an equity of redemption in a part of the premises is not extinguished, the plaintiff, being the purchaser at the sale, or his grantee, may foreclose the unextinguished equity of redemption for an unpaid residue of the debt. *McCague v. Eller*..... 531

6. Where a mortgage authorizes the mortgagor to make sales or leases for the benefit of the mortgagee, a sale or lease under such authority is binding on the mortgagee and those claiming under him. *Sammons v. Kearney P. & I. Co*..... 580

7. In a suit to foreclose a mortgage authorizing the mortgagor to make leases for the benefit of the mortgagee, where the lessee is a party asserting the priority of his lease, the validity of the lease is a legitimate subject of adjudication. *Sammons v. Kearney P. & I. Co*..... 580

8. A mere purchaser of the equity of redemption of mortgaged lands is given all the protection intended by sec. 16, ch. 73, Comp. St., if he is permitted to deal with safety with one who appears by the record to be the owner of a mortgage securing a nonnegotiable debt. *Bettle v. Tiedgen*.....795, 799

9. Answer in a foreclosure suit *held* insufficient to entitle defendant to prove that the original mortgagee, to whom payment was made, was acting as agent of an assignee of the original mortgagee whose assignment was recorded. *Bettle v. Tiedgen*..... 799

10. Where a purchaser of the equity of redemption makes payment to the original mortgagee, after assignment of a mortgage duly recorded, and the original mortgagee fails to pay over to the assignee, such payment to the original mortgagee will not discharge the debt. *Bettle v. Tiedgen*.. 799

Municipal Corporations.

1. A judgment in a proceeding under sec. 101, art. I, ch. 14, Comp. St., to detach territory from a municipality will not be reversed in the absence of a showing of mistake of fact or law. *Gregory v. Village of Franklin*..... 62

2. That the owner of unplatted agricultural land tacitly submitted to its inclusion in the incorporated limits of a village does not estop him from proceeding under the statute to have it disconnected. *Barber v. Village of Franklin* 91

3. A city is not liable for damages from a defective crossing

Municipal Corporations—*Concluded.*

from private property into a public street. *City of McCook v. Parsons*..... 132

4. In an action for damages for a personal injury, an instruction that a city is liable for negligently permitting a walk in general use by the public over property not shown to be within the corporate limits to be in a dangerous condition, *held* erroneous. *City of McCook v. Parsons*..... 132
5. Sec. 107, ch. 17, laws 1903, does not require the presentation to the city council of a claim for damages for a personal injury, and an appeal, but an original action may be maintained therefor. *Nicholson v. City of South Omaha*..... 710
6. It is not knowledge of a defect in a walk that precludes recovery, but want of care. *Nicholson v. City of South Omaha* 710
7. Notice to city of assignment of salary of a city official must, under sec. 7453, Ann. St., be in writing and be served on the mayor, or acting mayor, or in the absence of both on the city clerk. *Gordon v. City of Omaha*..... 556
8. Evidence *held* insufficient to support finding that appellant was paid a consideration for signing a petition for local improvements, and thereby estopped from questioning the assessment therefor. *State v. Several Parcels of Land*.... 707
9. Under sec. 2, art. I, ch. 14, Comp. St. 1903, the mayor and council of a city of the second class may change the number and boundaries of its wards, subject to the limitation therein contained. *Tattersall v. Nevels*..... 843

Negligence.

1. The doctrine of imputed negligence does not apply to one injured while in a private vehicle, where no privity exists between the injured person and the owner or driver of the vehicle. *Loso v. Lancaster County*..... 466
2. Contributory negligence is usually a question for the jury. *Nicholson v. City of South Omaha*..... 710

New Trial.

1. Newly discovered cumulative evidence, *held* sufficient ground for a new trial, where it is highly probable that it will change the result. *St. Paul Harvester Co. v. Faulhaber*.... 477
2. Secs. 316-318 of the code relating to a motion for a new trial are mandatory. *Carmack v. Erdenberger*..... 592
3. A court has no authority to rule on a motion for a new trial not filed, in anticipation that such motion may be subsequently filed. *Carmack v. Erdenberger*..... 592
4. Where two defendants made separate answers, the court

New Trial—*Concluded.*

directing a verdict for one and against the other, a joint motion for a new trial, the verdict being good as to one defendant, *held* properly overruled. *Fredrickson v. Schmittroth.* 722

Notice.

"Omaha Daily Record" *held* a newspaper, within the meaning of section 497 of the code. *Merrill v. Conroy*..... 228

Nuisance.

A party complaining of a public nuisance is not entitled to relief by injunction, unless he shows special injury to himself. *Letherman v. Hauser*..... 731

Obstructing Justice.

1. An information for attempting to corrupt a witness must allege that the person sought to be corrupted was a witness; that the defendant knew such person to be a witness, or must state such facts as show conclusively that the defendant had such knowledge. *Gandy v. State*..... 782
2. One not summoned or recognized as a witness in a pending suit, and who is not acquainted with either of the parties thereto, and has no knowledge of any of the facts, is not a witness within sec. 164 of the criminal code. *Gandy v. State*..... 782
3. On the trial of one charged with attempting to corrupt a witness, *held* reversible error to allow evidence tending to show that defendant offered a person money to steal a written instrument called a power of attorney, where the information contains no such charge. *Gandy v. State*.... 782

Partition.

1. After filing a stipulation that an order of sale in partition be vacated, a confirmation without a disposition of the stipulation is an irregularity under sec. 602 of the code. *Godfrey v. Cunningham*..... 462
2. Motion to vacate confirmation of a sale in partition for irregularities under sec. 602 of the code *held* sufficient. *Godfrey v. Cunningham*..... 462

Partnership.

Where a partnership is the owner in fee of real estate, each member has a freehold interest. *Tattersall v. Nevels*..... 843

Pleading. See TRUSTS, 2.

1. A petition alleging a verbal building contract and partial performance, and claiming damages for defendant's failure to perform is not subject to demurrer because it fails to

Pleading—*Concluded.*

allege the time within which the contract was to be performed. *Stansbury v. Storer*..... 67

2. Petition *held* to state a cause of action for relief against an order of the probate court alleged to have been procured by fraud and imposition. *Weeke v. Wortman*..... 407
3. Petition in an action for damages for sale of horses infected with glanders, *held* not demurrable. *Canham v. Brueggman* 436
4. Petition *held* not to state a cause of action for maliciously conspiring to injure plaintiff's business. *Cobbey v. State Journal Co*..... 626
5. Answer in a personal injury case against a street railway company *held* to tender the issue of contributory negligence. *Lincoln Traction Co. v. Brookover*..... 221
6. The orders or judgments of a court of general jurisdiction may be pleaded in general terms without alleging jurisdictional facts. *Lear v. Brown County*..... 230
7. Permitting amendment of defective pleadings during the progress of the trial *held* not prejudicial. *Rusho v. Richardson* 360
8. Demurrer for misjoiner of causes of action *held* properly sustained. *Strawn v. First Nat. Bank*..... 414
9. Objection to admission of evidence on the ground that the petition does not state a cause of action may be taken at any time during the trial, and is not waived by answer or failure to demur. *Gordon v. City of Omaha*.....556
10. Where objection to evidence on ground that the petition does not state a cause of action is sustained, and plaintiff elects to stand on his petition, judgment should be entered for defendant. *Gordon v. City of Omaha*..... 556

Principal and Agent.

1. Evidence *held* to sustain finding of agency. *Howard v. Omaha Wholesale Grocery Co*..... 116
2. An agent cannot ratify his own unauthorized acts. *Driscoll v. Modern Brotherhood of America*..... 282
3. An agent is not liable on a contract made for his principal where the other contracting party contracts intending to hold the principal. *Meade P. H. & L. Co. v. Irwin*..... 385
4. When defendant is sued for an accounting for goods under a contract of agency, he may, under a general denial, show the goods were received under another contract. *Acme Harvester Co. v. Curlee*..... 666
5. An agent cannot avail himself of any advantage his agency

Principal and Agent—*Concluded.*

may give him to profit out of the subject of the agency. *State v. State Journal Co*..... 752

6. A contract of the state with defendant to manufacture the supreme court reports, the plates to become the property of the state, did not constitute defendant the agent of the state. *State v. State Journal Co*..... 752

Principal and Surety.

1. Where a bonding company, with knowledge of an informality in the execution of a bond by its agent, retains the premium, it is estopped in an action on the bond from urging such informality as a defense. *Farmers & Merchants I. Co. v. United States F. & G. Co*..... 144

2. To determine the rights of a surety on the bond of a building contractor, *held* that the building contract and the bond should be construed together. *First Nat. Bank v. School District* 570

3. Where a contractor defaults and the surety completes the building, he is not an assignee as to the reserve in the hands of the owner, but an original party to the trilateral contract. *First Nat. Bank v. School District*..... 570

Process. See JUDGMENT, 2.

Under sec. 65 of the code, if an action is rightly brought in one county, summons may be issued to another county for service on a corporation. *Cobbey v. State Journal Co*.. 619

Public Lands.

1. The title of the United States is divested by grant *in præsenti* of all lands within the place limits of a railroad aid grant, and subsequent proceedings affecting the patent in the interior department do not suspend the statute of limitations. *Wiese v. Union P. R. Co*..... 40

2. The acts of congress granting lands to the Union Pacific and Sioux City & Pacific railroads transfer a present legal title, when the terms of the grant are complied with, and a patent to such land, when issued, relates back to the date of the grant. *Wiese v. Union P. R. Co*..... 40

3. A lessee of school lands or his assignee under ch. 74, laws 1883, may redeem from a forfeiture at any time before the lands are resold or released. *Hile v. Troup*..... 199

4. An assignment of a lease of school lands executed prior to the act of March 5, 1885 (laws 1885, ch. 85), is not affected by the provisions of that act requiring assignments to be recorded. *Hile v. Troup*..... 199

Quieting Title. See LIMITATION OF ACTIONS.

1. Evidence in suit to quiet title against mechanics' liens *held* to sustain decree for plaintiffs. *McMaster v. Douthit*.. 734
2. The statute commences to run against an action to quiet title under sec. 57, ch. 73, Comp. St., from the time the adverse claim attaches. *Lyons v. Carr*..... 883

Railroads.

1. Where a railroad corporation succeeds to the property and rights of another by foreclosure sale, it is not answerable for its general debts. *Lincoln Township v. Kansas City & O. R. Co*..... 79
2. Where a railroad company for many years has permitted the public without objection to cross its tracks at a certain point, not a public crossing, it owes the duty of reasonable care toward those using the crossing. *Union P. R. Co. v. Connolly*..... 254
3. Warning of the approach of a train at a crossing by ringing the bell and sounding the whistle *held* not of itself to show due care on the part of a railroad company. *Union P. R. Co. v. Connolly*..... 254
4. Facts stated *held* to warrant inference of negligence. *Union P. R. Co. v. Connolly*..... 254
5. An instruction as to the duty of a person at a railway crossing to look and listen for approaching trains *held* proper. *Union P. R. Co. v. Connolly*..... 254
6. Evidence *held* to sustain finding that plaintiff was injured by reason of defendant's negligence, and that plaintiff was not guilty of contributory negligence. *Union P. R. Co. v. Connolly* 254
7. Evidence in an action for personal injuries *held* insufficient to sustain judgment for plaintiff. *Clinebell v. Chicago, B. & Q. R. Co*..... 538
8. A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train. *Clinebell v. Chicago, B. & Q. R. Co*..... 538
9. Whether a railroad company was excused for not fencing its track at an unincorporated station *held* a question for the jury. *Rosenberg v. Chicago, B. & Q. R. Co*..... 663
10. A landowner may recover damages against a railway company for negligently maintaining an insufficient culvert, whereby his lands are flooded, although he may have recovered damages for the location of the road. *Chicago, R. I. & P. R. Co. v. Ely*..... 809

Rape. See CRIMINAL LAW, 10.

Real Estate Agents. See BROKERS.

Replevin.

1. In an action of replevin, where defendant pleaded breach of warranty, evidence *held* to sustain judgment for defendant. *Port Huron Machinery Co. v. Bragg*..... 357
2. Evidence in replevin action *held* sufficient to show purchaser had knowledge of fraudulent intent of sale. *Rusho v. Richardson* 360

Reports. See CONTRACTS, 10, 15.

Sales.

1. Under defense of fraud, negotiations may be traced to their inception, where the evidence thereof tends to establish such defense. *Hauptman v. Pike*..... 105
2. Where the defense to an action on a note is false representations in the sale of personalty, that such representations were made two days before the sale will not justify exclusion of evidence thereof. *Hauptman v. Pike*..... 105
3. Repudiation by the vendor of a substantial condition of a contract of sale on his part to be performed will justify rescission by the vendee. *Rownd v. Hollenbeck*..... 120
4. Evidence *held* to sustain findings. *Rownd v. Hollenbeck*.. 120
5. A bill of sale in payment of an antecedent debt, if taken in good faith, is valid. *Starr v. Dow*..... 172
6. Relief for fraud will not be granted by rescission or damages, where complainant has sustained no pecuniary damages, nor been put in any worse position. *Marquis v. Tri-State Land Co*..... 353
7. Petition in a suit to rescind a sale for fraud *held* demurrable. *Marquis v. Tri-State Land Co*..... 353
8. Where a purchaser has advanced money in part performance of a contract, and refuses to proceed, the seller being ready and willing, he cannot recover the money advanced; but to subject the purchaser to the forfeiture it should clearly appear that he has abandoned the contract. *Trauerman v. Nebraska L. & F. Co*..... 403
9. The creditors of a vendor who has made an illegal sale of his property cannot seize the same unless they can show that its transfer was prejudicial to their rights. *Johns & Sandy v. Reed*..... 492
10. Where the illegal use of property is not in contemplation at the time of sale, a subsequent unlawful use does not render the sale illegal. *Johns & Sandy v. Reed*..... 492
11. A condition in a contract of sale, whereby the title is to

Sales—*Concluded.*

remain in the vendor until the price is paid, is void as against purchasers and judgment creditors of the vendee in actual possession, unless in writing, signed by the vendee, and recorded. *Johns & Sandy v. Reed*..... 492

12. Where plaintiff gave his note for a horse, which was taken on a chattel mortgage, and his note had been transferred to a good-faith purchaser, *held* that he might recover from defendant the amount of his note and interest. *Caproon v. Mitchell* 562

13. A vendor, by suing on a note given for a machine, by the terms of which title is not to pass until full payment, *held* to have waived his title. *Fredrickson v. Schmittroth*.. 724

14. Where, after commencement of suit on a note given for a machine, the vendor takes possession by consent to repair it and deliver it to the surety on the note under a contract with the surety only, and fails to redeliver it, the vendee is discharged. *Fredrickson v. Schmittroth*..... 724

15. Where vendee refuses to receive goods contracted for, the measure of damage is the difference between the contract price and their reasonable market value at the time and place of delivery. *Allen v. Rushforth*..... 840

Schools and School Districts.

Prior to the act of February 26, 1879 (laws 1879, p. 170), providing for the issuing and payment of school district bonds, territory detached from a school district, which was subject to an indebtedness, could not be held liable at the suit of a creditor, except on allegation and proof that there was not enough property in the district originally liable to pay the indebtedness. *Manahan v. Adams County*, 829

Seduction.

1. In a prosecution for seduction, evidence of specific acts of lewdness of the prosecuting witness is incompetent. *Russell v. State*..... 519

2. Evidence of repute for chastity should be confined to general reputation for chastity. *Russell v. State*..... 519

3. A teacher's certificate held by the prosecutrix at the time of an alleged seduction is not competent evidence of reputation for chastity. *Russell v. State*..... 519

4. The crime of seduction is not complete unless the illicit intercourse is had under promise of marriage and the promise must be an unconditional one. *Russell v. State*... 519

5. The requirement of the statute that the evidence of the

Seduction—*Concluded.*

prosecutrix must be corroborated relates both to the illicit intercourse and the promise of marriage. *Russell v. State*.. 519

6. The circumstances relied on as corroborating the prosecuting witness as to the promise of marriage must be of such probative force as to equal the testimony of a disinterested witness. *Russell v. State*..... 519

Specific Performance.

1. In a suit for specific performance, an express repudiation of and refusal to perform a contract by one party, *held* to excuse the other from any subsequent formal tender. *Johnson v. Higgins*..... 35
2. It is not indispensable in a suit for specific performance that plaintiff should have been capable of performance when the contract was entered into, if he was able and offered to perform as stipulated in the agreement. *Johnson v. Higgins* 35
4. Evidence in a suit for specific performance *held* to sustain decree. *Nealon v. McGargill*..... 109
5. Evidence in a suit for specific performance *held* not to support decree. *Steger v. Kosch*..... 147
6. Evidence *held* to support decree for specific performance. *Beam v. Beam*..... 480

Statute of Frauds.

1. Continued possession by a tenant is not such part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. *Steger v. Kosch*..... 147
2. Under sec. 5, ch. 32, Comp. St., as amended in 1903, an oral contract for the leasing of lands for more than one year is void. *Thostesen v. Doxsee*..... 536

Statutes.

1. Sec. 3171, Ann. St., enacting a penalty for selling glandered horses, *held* not superseded by secs. 3174-3177, an act to prevent the importation or selling of any domestic animal afflicted with a contagious disease. *Canham v. Bruegman*.. 436
2. An enrolled bill, as found on file in the office of the secretary of state, bearing the signature of the legislative officers and approved by the governor, is *prima facie* evidence of its passage. *Stetter v. State*..... 777

Taxation. See CONSTITUTIONAL LAW, 1.

1. A fraternal beneficial association *held* not a charitable association, whose funds are exempt from taxation. *Royal Highlanders v. State*..... 18
2. Where the legislature has passed a new revenue act chang-

Taxation—*Continued.*
ing methods of procedure, the courts in construing its provisions are not bound by any administrative construction of the former revenue law. *Royal Highlanders v. State*... 18

3. In taxation of credits, a fraternal beneficiary association is entitled to set off the amount of its outstanding beneficiary certificates against securities devoted exclusively to the payment of such certificates. *Royal Highlanders v. State*.. 18

4. Where a county board has levied the full amount of tax allowed by law for a county general fund, and designedly levies an excessive bridge tax and transfers a large part thereof to said general fund, the tax transferred is illegal. *Lincoln County v. Chicago, B. & Q. R. Co*..... 99

5. In an action to recover an illegal tax paid under protest, the county must show what portion of the tax was legal. *Lincoln County v. Chicago, B. & Q. R. Co*..... 99

6. A county must levy taxes required for certain purposes each year, and that its funds have been illegally diverted in the past does not relieve it of such duty. *Lincoln County v. Chicago, B. & Q. R. Co*..... 99

7. Under sec. 66, ch. 73, laws 1903, providing that grain brokers shall be assessed on the average amount of capital invested for the preceding year, *held* that taxing a grain company on its real estate and other tangible property, on its average capital, and also on the grain in its elevators on the first day of April, is, to the extent of the grain so assessed, double taxation. *Central Granaries Co. v. Lancaster County* 311

8. Under sec. 66, ch. 73, laws 1903, the average capital of grain dealers is to be assessed in addition to the tangible property. *Central Granaries Co. v. Lancaster County*..... 319

9. Under sec. 66, ch. 73, laws 1903, the average capital of grain dealers is the excess of such capital over real estate and other tangible property. *Central Granaries Co. v. Lancaster County* 327

10. Average capital of grain brokers cannot be found by adding the amount of purchases or sales and dividing the sum by an arbitrary divisor. *Central Granaries Co. v. Lancaster County* 327

11. Average capital of grain brokers is the average of cash and all other property; and excess of average capital over real estate and other tangible property is to be added for assessment. *Central Granaries Co. v. Lancaster County*..... 327

12. A suit to foreclose a tax sale certificate may be commenced

Taxation—*Concluded.*

at any time within five years from the date when redemption from the sale may be made by the owner. *Mead v. Brewer* 400

13. Where the holder of a tax sale certificate purchases from the owner the patent title, his tax lien is merged in the legal title, and he cannot assert it in hostility to another tax lien. *Mead v. Brewer*..... 400

14. Where a suit by a county to foreclose a tax lien has proceeded to decree and sale, the taxpayer's right to pay the tax to the county treasurer is superseded by his right to redeem. *Squire v. McCarthy*..... 429

15. Where a county foreclosed a tax lien without a tax sale, *held* that the acceptance of the taxes before confirmation of sale under the decree is a satisfaction of the decree so far as plaintiff is concerned, and that he may have the sheriff's deed set aside, the land being still in the hands of the original purchaser. *Squire v. McCarthy*..... 431

16. In such case, the loss, if any, is attributable to the negligence of the county treasurer, and the wrongful act of the county in prematurely foreclosing its lien. *Squire v. McCarthy* 431

17. The expression "money deposited in bank," as used in sec. 4 of the revenue act of 1903, includes money on general deposit in bank. *Critchfield v. Nance County*..... 807

18. On appeal from a board of equalization, the cause must be tried on the questions raised by the complaint before that tribunal. *First Nat. Bank v. Webster County*..... 813

19. An assessment of property as ultimately fixed by the board of equalization should not be disturbed on appeal unless clearly erroneous. *First Nat. Bank v. Webster County*..... 815

20. Where a bank owns real estate of a greater value than shown by its books, such excess should be considered in fixing the value of the stock for assessment. *First Nat. Bank v. Webster County* 815

21. National banks are the agents of their stockholders for the purpose of listing their stock in such banks for taxation and paying the tax thereon. *First Nat. Bank v. Webster County*, 815

Trespass.

Several owners of animals who have constituted of them a joint herd are jointly liable for trespasses committed by such herd. *Wilson v. White*..... 351

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. In a case tried to the court, the presumption obtains that the court considered only competent and relevant evidence. *Citizens Ins. Co. v. Herpolsheimer* 232

2. Request that the issues made by the answers of certain defendants and those made by the answer and cross-bill of another be tried separately *held* properly denied. *Citizens Ins. Co. v. Herpholsheimer* 232

3. Where an order allowing an amendment at the trial recited that it would be considered as denied by the plaintiffs, *held* that a motion for judgment on the pleadings as amended was properly overruled. *Citizens Ins. Co. v. Herpolsheimer*, 232

4. Where an answer to a question is excluded, but substantially the same matter is received in answer to a subsequent question, the error, if any, is cured. *Union P. R. Co. v. Connolly* 254
Flanagan v. Fabens 705

5. A mere statement by the foreman of a jury in open court that the jury have agreed is not a verdict. *Union P. R. Co. v. Connolly* 254

6. Error in refusing to receive verdict, *held* waived. *Union P. R. Co. v. Connolly* 254

7. Under the facts, *held* that the trial court properly refused to treat a certain paper as the verdict of the jury. *Union P. R. Co. v. Connolly* 254

8. A verdict is the unanimous decision of a jury, reported to the court, on matters lawfully submitted to them. *Union P. R. Co. v. Connolly* 254

9. The district court may permit a party to withdraw his rest when no undue advantage is thereby acquired. *Union P. R. Co. v. Edmondson* 682

10. It is discretionary with the trial court to permit the jury to view property which is the subject of litigation. *Alberts v. Husenetter* 699

11. The meaning of instructions is determined by considering all that is said on each branch of the case. *Lincoln Traction Co. v. Brookover* 221

12. An instruction which, if standing alone, might be erroneous, may not be so when considered with other instructions on the same subject. *Lincoln Traction Co. v. Brookover* 221

13. The court should instruct the jury upon all the issues presented in the pleadings and evidence. *Lincoln Traction Co. v. Brookover* 221

Trial—*Concluded.*

14. Where the defendant's evidence tends to establish a particular theory, which constitutes a defense, such theory should be submitted to the jury. *Sorenson v. Townsend*..... 499

15. Where there is no evidence to sustain a material allegation of the petition, *held* proper to direct a verdict for defendant. *Keckler v. Modern Brotherhood of America*..... 301

16. Where there is competent testimony tending to support a defense, *held* error to direct a verdict for plaintiff. *Continental Lumber Co. v. Munshaw & Co*..... 456

17. Where the intention of a party is to be ascertained from disputed circumstances, the inferences to be drawn are for the jury. *Continental Lumber Co. v. Munshaw & Co*..... 456

18. Where the evidence on a material issue is conflicting, *held* error to direct a verdict. *Gillis v. Paddock*..... 504

19. In an action against a surety on his agreement to take and pay for an automobile where the defense is breach of the agreement, if the evidence is conflicting, *held* error to direct verdict for plaintiff for nominal damages only. *Fredrickson v. Schmittroth* 724

20. Where from the undisputed evidence it appears that plaintiff should not recover, *held* proper to direct a verdict for defendant. *Baker v. Swift & Co*.....749

21. In the trial of an action at law, it is reversible error to refuse to submit to the jury a legal defense properly pleaded and supported by competent evidence. *Allen v. Rushforth*.. 840

Trover.

Plaintiff in replevin cannot be held for conversion pending trial unless he has appropriated the property, nor after judgment of special ownership in him unless he has done some act inconsistent with the right conferred by the judgment. *Nelson v. Schmoller* 717

Trusts.

1. Where a parent divided his property among his sons, one of whom agreed to pay a certain sum to one of the daughters and he died without having made payment, *held*, that a constructive trust arose which could be enforced against the estate of the deceased by the *cestui que trust* in her own name, though the parent was still living. *Fox v. Fox*.. 601

2. Petition to subject a trust fund to the payment of legal services *held* insufficient. *Leyda v. Reavis*..... 695

Vendor and Purchaser.

1. An executory contract for the sale of land which includes the homestead, not signed by the wife, is not wholly void,

Vendor and Purchaser—*Concluded.*

but is obligatory upon the husband, except with respect to the homestead tract. *Johnson v. Higgins*..... 35

2. A mere option for the purchase of land, indeterminate as to time and accompanied by a deed deposited in escrow, is terminable on notice by the vendor. *Stone v. Snell*..... 441

3. Where a party relies on a record to establish his title and to relieve him of knowledge of secret liens the record must show a perfect title in the grantor. *Weatherington v. Smith*, 363

Waters. See CORPORATIONS, 2.

1. The overflow waters of a stream, which run in a well-defined course and again unite with the stream, *held* part of the watercourse and not surface water. *Brinegar v. Copass*... 241

2. Evidencee in a suit to prevent diversion of water of a stream, *held* not to establish defense of adverse user. *Burson v. Percy* 654

Wills.

1. Evidence *held* to sustain finding that claimants were intentionally omitted from a will. *Brown v. Brown*..... 125

2. The burden of proof is on a pretermitted child to show that omission to make provision for him in a will was unintentional. *Brown v. Brown*..... 125

3. When there is an irreconcilable repugnancy between clauses of a will, the later will prevail over the earlier. *Martley v. Martley* 163

4. In construing a will effect will be given to all its provisions. *Martley v. Martley* 163

5. A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will. *Holyoke v. Sipp*.....394

6. The power of the court to act under sec. 14, ch. 20, Comp. St. 1903, relating to appeals in probate matters, may be invoked by motion to correct the judgment, made at the same term. *Coulton v. Pope*..... 882

Witnesses.

1. An objection to evidence as incompetent does not go to the competency of the witness. *Brown v. Brown*..... 125

2. The provisions of sec. 333 of the code against the disclosure of confidential communications may be waived, and a party calling the attorney who has prepared a will as a witness thereto thereby consents that he may disclose the facts attending its execution. *Brown v. Brown*..... 125

Witnesses—*Concluded.*

3. Where a parent divides his property among his sons, one of whom agrees to pay his sister a certain sum, *held*, in a suit by the daughter against the estate of the brother, that the father was a competent witness for her. ***Fox v. Fox*..... 601

Work and Labor.

Evidence in an action for work and labor, *held* to sustain verdict for defendant. ***Flora v. Chapman*..... 741**