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ANNA C. NELSON ET AL., APPELLANTS, V. MODERN BROTHERHOOD OF AMERICA, APPELLEE.

FILED FEBRUARY 21, 1907. No. 14,670.

1. **Insurance:** BENEFICIAL ASSOCIATIONS: BY-LAWS. A by-law of a fraternal benefit society, which provides for the suspension of a member for nonpayment of monthly dues without other notice than that imparted by the by-law, is reasonable in its nature and will be upheld.

2. **Pleading:** SUFFICIENCY. A pleading which is attacked for the first time in this court on the ground that it does not state a cause of action, will be liberally construed. *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, followed and approved.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Weaver & Giller, for appellants.

Isaac E. Congdon, *contra*.

OLDHAM, C.

This is an action on a benefit certificate issued by defendant on the life of John Nelson, deceased, and payable to the plaintiffs, who are his wife and children. The petition alleged in proper manner the execution and delivery of the certificate to the deceased and the conditions thereof, and further alleged that "on the 11th day of October, 1903, the said John Nelson died from an accident from being thrown from a street car, and while in perfect health," and that "all of the assessments and monthly dues which became due and payable from the said John Nelson upon said benefit certificate to the time of the decease of said John Nelson had been fully paid." The answer admitted the execution and delivery of the certificate, and the death of John Nelson, but denied that deceased had complied with the conditions of the certificate and laws of defendant, and denied generally

the allegations of the petition not specifically admitted. The answer then pleaded a forfeiture of the policy under the constitution and by-laws and rules of the order for the nonpayment of two mortuary assessments, of which, it was alleged, deceased had had requisite notice under the by-laws. Plaintiffs' reply was in the nature of a general denial. On issues thus joined there was a trial to the court and jury, and at the close of the testimony a verdict was directed for the defendant and judgment entered on the verdict. To reverse this judgment plaintiffs have appealed to this court.

There is no material question of fact in dispute in this case. Plaintiffs' right to recover depends on an interpretation of the terms of the certificate and the constitution and by-laws of the order, providing for the suspension of members for nonpayment of dues. It is without dispute that John Nelson, the deceased, had not paid any dues, *per capita* tax, or mortuary assessments for sixty days prior to his death. The policy provides: "Should said member fail to pay any assessment, dues, or charges upon him, as required by the laws, rules, and regulations of this society, promptly when due, his membership shall thereupon cease and this certificate shall be void." The by-laws with reference to the suspension of members for nonpayment of dues, applicable to the facts in controversy, are as follows: Section B of division XI: "There shall be paid monthly in advance by each member to his subordinate lodge secretary without notice to the member as a *per capita* tax the sum of 15 cents, which sum shall be paid to said secretary on or before the last day of the preceding month. The secretary shall forward said sum to the supreme lodge secretary on or before the last day of the month for which the payment is made. Payment of the *per capita* tax for the month of January, 1903, shall be made on or before December 31, 1902." A portion of section F of division X: "For the purpose of creating a reserve fund, each beneficiary member for the first five years of his membership shall pay

monthly in advance to his lodge the sum of 5 cents per $1,000 of his certificate, which sum shall be remitted to the supreme secretary on or before the last day of each succeeding month." Section C of division XI: "The secretary shall not accept either dues, *per capita* tax, reserve fund, or assessments alone, or in part, but all must be tendered in full. Each and every member so notified, through the official paper, that a benefit assessment has been levied, or ordered by the board of directors in manner and form hereinabove provided, failing to pay the same to his lodge secretary on or before the last day of the month, in which said notice is dated, or who shall fail to pay to his lodge secretary his *per capita* tax, and other dues on or before the last day of said month, or who shall engage in any of the prohibited occupations mentioned in division X, shall stand suspended, and during such suspension his benefit certificate shall be null and void." At the trial of the cause the defendant failed to prove an official notice on deceased of the mortuary or benefit assessments, as provided for in section C of division XI of the by-laws above quoted, and the proof offered of such notice was excluded by the trial court. The court, however, held that the benefit certificate had been forfeited for nonpayment of the *per capita* tax provided for by section B of division XI of the by-laws before set out.

Plaintiffs' contention is that by the provisions of section C of division XI, *supra,* the secretary cannot accept dues, *per capita* tax, reserve fund, or assessments alone, but all must be tendered in full, and, therefore, none of these various assessments are due and payable until official notice is served on the member of the mortuary assessment, if any has been made. While it is true, as claimed by plaintiffs, that the law does not favor forfeitures, and by-laws providing for them will be construed most strongly against the association, yet by-laws, consented to by the assured and incorporated into the conditions of his benefit certificate, will be fairly construed by this court and upheld, if reasonable. *Sovereign Camp,*

W. O. W., v. Ogden, 76 Neb. 643; *Chapple v. Sovereign Camp, W. O. W.,* 64 Neb. 55. To give section C, *supra,* the construction contended for would annul the plain provisions of section B, which provides in unequivocal language for the payment of a *per capita* tax monthly without notice to the member. While it is true that it is not the policy of the by-laws to suspend members for nonpayment of mortuary assessments without official notice thereof, the provision that the secretary shall not accept part of the dues is inserted for the purpose of giving the member additional notice of all assessments due from him when he comes to pay his *per capita* tax. The section thus fairly construed provides for the suspension of the member for nonpayment of the mortuary assessments after notice, and for nonpayment of the *per capita* tax on or before the last day of the month either with or without notice. If deceased had paid his *per capita* tax without notice of any mortuary assessments, his policy would have remained in force; but this he did not do. Consequently, the district court was right in holding that his policy was suspended for nonpayment of the *per capita* tax.

It is next contended that, as the nonpayment of the *per capita* tax by the deceased was not specially pleaded as a defense in the answer, the court erred in admitting testimony of such fact over the objection of the plaintiffs. This would present a serious question if the objection to the introduction of the testimony as to the nonpayment of the *per capita* tax had been based on the reason that such defense had not been affirmatively pleaded in the answer. But, when the question was propounded to the secretary of the lodge, "You may state whether or not he paid the *per capita* tax and the reserve fund tax," the following objection was interposed: "We object to that as incompetent, immaterial, irrelevant, and because the by-laws say he can't pay one without paying the other—wouldn't accept one without paying the other." This was the sole objection interposed, so that the question of the sufficiency of the answer is raised for the first

time in this court, and was never called to the attention of the lower court during the progress of the trial. The petition pleaded payment of all dues and assessments by the deceased. The answer denied a compliance with the by-laws and rules of the society specifically, and also denied generally the allegations of the plaintiffs' petition as to payments of all dues and assessments. We admit the accuracy of the rule, as announced in *Cornfield v. Order Brith Abraham,* 64 Minn. 261: "It being admitted that the certificate of membership had been duly issued, the presumption would be that it continued in force. If the deceased had been suspended or expelled from the order for nonpayment of dues, the burden was on the defendant to prove it." But evidence was admitted to support this defense under a defective plea without such matter being called to the attention of the trial court. Hence, the sufficiency of the pleading to support the testimony and to sustain the judgment is raised for the first time in this court. In *Omaha Nat. Bank v. Kiper,* 60 Neb. 33, it was said by this court: "The petition was not assailed in the trial court, and the rule is that it should now receive a liberal construction with the view of giving effect to the pleader's purpose. *Latenser v. Misner,* 56 Neb. 340. A party who fails to disclose in the trial court his objections to an adversary's pleading can not well complain if this court is 'to its faults a little blind and to its virtues very kind.' "

Under this rule, we think the objections to the sufficiency of the answer come too late, 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.

PETER LARSON, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 21, 1907. No. 14,680.

Appeal: BRIEFS, FAILURE TO FILE. Under section 1 of rule 2 of this court, whenever a cause is reached and the brief of the party having the affirmative is not on file, the judgment will be affirmed or the proceeding dismissed.

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

J. W. Deweese, F. E. Bishop, W. P. Hall and *W. S. Morlan,* for appellant.

C. J. Beedle and *Charles C. St. Clair, contra.*

OLDHAM, C.

This was an action for damages for property alleged to have been destroyed by fire negligently set out from one of the defendant's engines. There was a trial of the issues to the court and jury, and judgment for the plaintiff. To reverse this judgment defendant has appealed to this court.

When the cause was finally submitted, the appellant had failed to file a brief, as required by section 1 of rule 2 of this court. This section provides, among other things: "Whenever a cause is reached and the brief of the party having the affirmative is not on file, the judgment will be affirmed or the proceeding dismissed." This rule is in conformity with an established line of decisions of this court of long duration. *Kilpatrick-Koch Dry Goods Co. v. Cook,* 41 Neb. 737; *Edney v. Baum,* 59 Neb. 147.

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.

G. W. WOOD, APPELLANT, V. JAMES H. SPECK ET AL., APPELLEES.

FILED FEBRUARY 21, 1907. No. 14,425.

1. **Tax Sales:** REDEMPTION. Section 3, art. IX of the state constitution, providing for two years' time within which to redeem from tax sales, applies to judicial as well as to administrative sales. *Selby v. Pueppka*, 73 Neb. 179.
2. **Parties.** In an action to redeem from a judicial sale of real estate for taxes by a mortgagee from the purchaser, the mortgagor is not a necessary party.
3. **Mortgages:** FORECLOSURE: TRIAL: ADMISSIONS. In an action to foreclose a mortgage, an admission on the trial by defendant that plaintiff is the owner of the note and mortgage, though the admission is stated in the present tense, will be held to relate to the time of filing the petition, unless it appear that a different meaning was intended.
4. **Case Criticised.** *Weston v. Meyers*, 45 Neb. 95, criticised.

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

R. R. Dickson, for appellant.

M. F. Harrington, contra.

EPPERSON, C.

In 1899 Holt county instituted an action in the district court to foreclose an alleged tax lien upon the land here in controversy. The county claimed a lien for unpaid taxes assessed against the land for the years 1892 to 1897 inclusive, and alleged that there had been no prior administrative sale. The district court found the allegations of the petition true, and decreed a sale of the land

for the satisfaction of the taxes. Under the decree, the sheriff sold the land to the principal defendant herein, M. F. Harrington, for $312. This was sufficient to pay the amount of the decree, interest and costs, and left a surplus of $89.79, which upon confirmation was paid to one Covell, the owner of the fee title at the time that case was brought. Later, and within two years from the sheriff's sale, plaintiff herein instituted two actions. In one he seeks the foreclosure of a mortgage of which he was the assignee and which existed at the time the county instituted the foreclosure suit. In the other, plaintiff sought to enforce his right to redeem from the sheriff's sale. The two cases were consolidated in the district court, and from a judgment of dismissal plaintiff appeals to this court.

Plaintiff bases his action to redeem upon section 3, art. IX of the constitution, which provides that the right to redeem from all sales of real estate for the nonpayment of taxes shall exist for at least two years in favor of the owner or persons interested in such real estate. Plaintiff's mortgage was given to Pierce, Wright & Company, a nonresident firm, which was made a defendant in the case brought by the county, but made default therein. Service was had by publication. The assignment to plaintiff herein was not of record at that time.

Defendant contends that the order of the court confirming the sale was final, though erroneous, and that plaintiff's remedy was an appeal from the order of confirmation. It is unnecessary to enter into a full discussion of this issue. The section of the constitution above cited is self-executing. *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109; *Selby v. Pueppka,* 73 Neb. 179; *Logan County v. Carnahan,* 66 Neb. 685. In *Selby v. Pueppka, supra,* it was held: "Section 3, art. IX of the state constitution, providing for two years' time within which to redeem from tax sales, applies to judicial as well as to administrative sales." In the opinion, HASTINGS, C., further says: "The confirmation applied

only to the regularity of the proceeding. It held the sale valid and regular, but in no way adjudicated the right of redemption from it. The latter existed by virtue of a self-executing constitutional provision independent of the court. The court's action must be held to have all been taken with this right in view." Defendant attempts to apply a different rule to the case at bar, claiming that there was in fact an administrative sale of the land in controversy more than two years prior to the commencement of this action. There was introduced in evidence a certificate of tax sale to the county for the year 1895. But this is of no value, and, under the pleadings, incompetent evidence. The county claimed no rights under this certificate, and abandoned all rights thereunder, denied its existence, and brought about a judicial sale from which alone the plaintiff herein seeks to redeem.

The alleged administrative sale is no bar to this action. Covell was not made a party to this suit. He owned the equity of redemption when the county foreclosed. Defendant contends that, as he was not brought into court, the action must be dismissed. He was a proper, but not a necessary party. It is true that within two years from the sale Covell had a right to redeem, which was equal to plaintiff's rights. But, upon the judicial sale, the legal title vested in the purchaser subject to the constitutional right to redeem of Covell and the plaintiff herein. This action is brought to determine the rights of the plaintiff as against the defendants. As Covell remained silent, and the two years for redemption has expired, the defendants herein have succeeded to all of his interests and, of course, may yet redeem from the plaintiff's mortgage.

Defendant argues that the evidence fails to show that plaintiff's mortgage belonged to plaintiff when the suit was instituted. We find in the record an admission made during the trial that the plaintiff is the owner of the note and mortgage. No evidence was given that plaintiff was the owner thereof when the suit was brought, nor at any time before the expiration of the two years' limitation.

It appears that the admission of plaintiff's ownership was made to relieve plaintiff from proving title as alleged in his petition. The record does not indicate a different intention on the part of defendants, and, unless the admission by defendants of plaintiff's title to the note and mortgage sued on indicates a different intention, it should be construed to relate back to the filing of the petition, even though the admission is in the present tense.

Plaintiff contends that, under the provisions of section 10611, Ann. St., he is required to pay only the amount of the decree, interest and costs. This section is not applicable to judicial sales for taxes, but is a part of the revenue system of the state. It applies to administrative sales only. No statutory provision for such redemption exists, and the right thereto is found only in the section of the constitution cited. To avail himself of this right, it was incumbent upon the plaintiff to render full equity to the defendants. The maxim, "He who seeks equity must do equity," is applicable to the plaintiff herein.

The plaintiff alleges in his petition that the extent of his liability is the amount of interest, taxes and costs of the foreclosure proceeding. This sum was not tendered to the defendants, nor paid into court for their benefit. During the trial, however, plaintiff offered to pay into court the sum of $347.50, the amount of the original decree, costs and interest. This was $77 less than enough to reimburse the purchaser the amount of his bid, computing interest at 7 per cent. per annum. Equity demands that one redeeming from a judicial sale shall pay the full amount necessary to reimburse the party from whom he is redeeming. In *Loney v. Courtnay,* 24 Neb. 580, the court held the action to be an action to redeem from a judicial sale, and further said: "Ordinarily, where the action is between the mortgagor and mortgagee, the plaintiff must pay the amount of the decree, interest and costs. Where, however, * * * the action is between the mortgagor and the purchaser at the sale, the sum to be paid would be the purchase price, not exceed-

ing the amount of the decree, and interest thereon." The same reasoning would dictate that, where the action was instituted by an incumbrancer against the purchaser, as in the case at bar, the amount necessary to redeem would be the purchase price, with interest, though it exceeded the amount of the decree. Plaintiff, therefore, is not entitled to all the relief he seeks. In his petition he prays for specific relief, and also for "such other and further relief as may be just and equitable." Generally, under the rule of equity pleading, if a litigant is not entitled to the relief specifically asked for, he may, nevertheless, recover under the general prayer whatever the proof shows he is entitled to, if consistent with the allegations of his pleading. 16 Cyc. 487, and note. We find one decision of this court apparently holding contrary to the conclusion we have reached. In *Weston v. Meyers*, 45 Neb. 95, it was held: "He who asks equity must do equity; and as the appellant did not offer in his petition to pay the appellee whatever sum the court might find he had paid out for the purchase of the premises at the tax sale, nor for legal taxes subsequently paid on the premises, the petition did not state facts entitling the appellant to equitable relief." It does not appear in the opinion whether there was a general prayer for equitable relief. We must conclude that such was lacking. The rule there announced is not applicable to equity pleading containing a general prayer for such relief as the court may determine, on the case made, is equitable and just. The decree of the court below should have been for a dismissal of plaintiff's case, unless he, within a reasonable time fixed by the decree, pay into court the purchase price, with interest at 7 per cent. per annum to redeem from the sale, and, on such redemption, the plaintiff, by a further decree, should have been awarded a foreclosure of his mortgage.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings consistent herewith. As the plain-

tiff did not offer to do full equity, justice, we think, requires that he pay the costs of the district court.

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 proceedings consistent with this opinion. It is further ordered that plaintiff pay the costs of the proceedings in the district court, and the costs of this cause are adjudged against the defendant.

REVERSED.

ROBERT F. KEMP, APPELLEE, V. C. E. SLOCUM, APPELLANT.

FILED FEBRUARY 21, 1907. No. 14,672.

Rulings of the trial court in the admission of evidence and the giving of instructions examined, and *held* without error.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

F. O. McGirr and *A. Hardy,* for appellant.

L. W. Colby, contra.

EPPERSON, C.

Plaintiff sued on an open book account, and defendant pleaded a counterclaim. The defendant appeals from a judgment in favor of plaintiff.

No important question is presented. One instruction objected to is a statement of defendant's counterclaim. An examination of the record shows that the instruction and the allegations of the counterclaim are in substantially the same language. Another instruction complained of is as follows: "The jury are instructed that the testimony of one credible witness is entitled to more

weight than the testimony of many others, if, as to those other witnesses, the jury have reason to believe, and do believe, from the evidence and all the facts before them, that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by circumstances proved in the case. It is the duty of the jury to consider the whole of the evidence and to render their verdict in accordance with the weight of all the evidence in the case." The giving of a similar instruction was held error in *La Bonty v. Lundgren,* 31 Neb. 419, because it was inapplicable to the evidence. In the case at bar, there was a conflict in the testimony upon questions of fact of which the different witnesses had positive information. The instruction was, therefore applicable and proper. The other rulings objected to went to the admission of evidence, but upon examination of the record we find no reversible error.

The verdict was sustained by the evidence, 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.

CHARLES A. MILLER, APPELLEE, V. FARMERS MILLING & ELEVATOR COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 21, 1907. No. 14,599.

1. Corporations: TRANSFER OF STOCK. The regulation of stock transfers is a legitimate subject of corporate legislation, in the form of by-laws, to enable the corporation to know who are stockholders, to whom dividends are payable, who are entitled to vote, and, where the company has a lien on the stock for debts due to it from the stockholders, to enable it to prevent a transfer in derogation of its rights.

2. ———: ———. But such legislation will not be enforced beyond what is reasonably necessary to serve such purposes, where its enforcement would operate as an infringement on the property rights of others, or as an unreasonable restraint upon the transfer of property in the stock of the corporation.

3. ———: STATUTORY REGULATIONS. Section 124, ch. 16, Comp. St. 1905, is not only definitive of the general powers of a corporation, but is also expressive of certain corporate qualities or properties, or consequences which follow the act of incorporation.

4. ———: ———. The fifth clause of that section, which purports to give a corporation the power "to render the interest of the stockholders transferable," was not intended to make the transferability of stock dependent on some affirmative act of the corporation authorizing its transfer, but to impress the stock with that quality as a consequence of the act of incorporation.

5. ———: BY-LAWS: VALIDITY. A by-law of a corporation organized under the laws of this state, which limits the number of shares which a person may hold, or forbids a transfer of stock by a stockholder to a nonstockholder without the consent of the directors, is void as an unreasonable restriction upon the transfer of property.

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

Allen & Reed, for appellants.

Courtright & Sidner, contra.

ALBERT, C.

The Farmers Milling & Elevator Company of Newman Grove is a corporation which was organized under the laws of this state early in December, 1900, for the purpose of manufacturing flour and dealing in grain, lumber and coal. Afterwards the corporation adopted certain by-laws, among which are the following: "Sec. 4. No person shall be allowed to hold more than five (5) shares at any one time. Sec. 5. The stock of this association shall be assignable by indorsement; upon presentation to the secretary of any assigned shares of stock he shall issue to the indorsed (sic.) a new share of stock, making of

such transfer and issue a proper record upon the books of the company. Sec. 28. Stock of this corporation shall not be transferred by a stockholder to a nonstockholder only through the consent of the board of directors." After these by-laws had been adopted, Charles A. Miller, who was not one of the original stockholders, bought some 64 shares of the stock from the holders thereof, without the consent of the board of directors of the corporation. Some of this stock was registered and some not, but as the case does not turn on that distinction further reference to it is unnecessary. The officers and directors of the corporation, acting upon the provisions of the by-laws against any person holding more than five shares of stock at one time, and the transfer of stock to a nonstockholder, denied Miller the rights of a stockholder, his right to have his stock registered, or to transfer any portion thereof without consent of the directors. Miller took the position that those provisions of the by-laws were void, and brought this suit against the corporation, its officers and directors to enforce his rights as a stockholder. The trial court granted the relief prayed, and the defendants appeal.

The question presented by the appeal is whether a corporation organized under the laws of this state can, by its by-laws, limit the number of shares of its stock a person may hold at one time, and prevent a transfer of stock by a stockholder to a nonstockholder without the consent of the directors of the corporation? If it can, the decree of the district court is wrong and should be reversed, otherwise it should be affirmed. The power to make by-laws not inconsistent with the law of the land, is one of the common law incidents to a corporate existence (Angell and Ames, Corporations (11th ed.), sec 325), and is expressly conferred by statute. Section 124. ch. 16, Comp. St. 1905. The transfer of stock has been uniformly regarded as a legitimate subject of corporate legislation, to enable the company to know who are stockholders, to whom dividends are to be paid, who are

entitled to vote, and, where the company has a lien on the stock for debts due to it from the stockholders, to enable it to prevent a transfer in derogation of its own rights. But such legislation will not be enforced beyond what is necessary to serve those purposes, where its enforcement would operate as an infringement on the property rights of others, or as an unreasonable restraint upon the disposition of property in the stock of the corporation. *Farmers & Merchants Bank v. Wasson,* 48 Ia. 336. As is said in Boone, Corporations, sec. 122: "The right of transfer is incidental to the ownership of shares in the stock of joint-stock companies and corporations, formed in pursuance of legislative authority; and a by-law which unreasonably interferes with the free exercise of this right is void, as being in restraint of trade." See, also, 2 Thompson, Commentaries, Law of Corporations, sec. 2300; Angell and Ames, Corporations, (11th ed.), secs. 353, 354; 1 Cook, Stock and Stockholders, secs. 331, 332; 2 Cook, Corporations, sec. 621*a*. The correlative right to purchase rests on similar grounds. 2 Thompson, Commentaries, Law of Corporations, *supra*. In *In re Klaus,* 29 N. W. 582, 67 Wis. 401, the court said: "A by-law of a corporation which prohibits the transfer of stock by a stockholder without the consent of all the stockholders is against public policy and void. No exception can be made in the application of this rule on the ground that the stockholders of the corporation are few, and were originally copartners, and the one against whom the by-law is invoked consented to and voted for it." In *Herring v. Ruskin C. Ass'n,* 52 S. W. (Tenn. Ch.) 327, the court held that a by-law prohibiting the transfer of stock except to the corporation, though indorsed on the certificate of stock, was void. In *Chouteau Spring Co. v. Harris,* 20 Mo. 383, the court held that the power to regulate the transfer of stock did not include the power to restrain transfers or to prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them, and that the company could not

prevent a party from selling his stock, even to an insolvent person. In *Bloede v. Bloede,* 84 Md. 129, 34 Atl. 1127, the court held that a by-law, requiring a stockholder to give notice of his intention to sell, and that the other stockholders shall thereupon have the option to purchase the stock at the price named, was an invalid restraint of alienation. In *Ireland v. Globe Milling Co.,* 21 R. I. 9, 41 Atl. 258, the court held that a statute authorizing corporations to make by-laws consistent with the laws of the state did not authorize a by-law requiring stockholders, before selling their stock, to first offer it to the corporation, and that the assignee of shares was not bound by a corporate by-law passed without authority of statute, even though his assignor had assented thereto. See, also, *Morgan v. Struthers,* 131 U. S. 246; *McNulta v. Corn Belt Bank,* 164 Ill. 427, 45 N. E. 954; *Moore v. Bank of Commerce,* 52 Mo. 377. The by-laws under consideration, tested by the authorities cited, operate as an unreasonable restriction upon the transfer of stock and are void as an unlawful restraint upon the transfer of property.

The defendants cite authorities to the effect that a charter provision or a by-law giving the corporation a lien on the shares of a stockholder for any indebtedness due from him to the corporation, and making a transfer of stock contingent upon the satisfaction of such debt, is valid. Without going into those authorities at length, or expressing approval or disapproval of the doctrine there announced, it will suffice to say that we do not consider them in point. The nominal interest of a stockholder in a corporation is evidenced by his certificates of shares. His actual interest is the difference between his nominal interest and his indebtedness to the corporation. A charter provision or by-law which restricts his right of transfer to a transfer of his actual, instead of his nominal, interest in the corporation is radically different in principle from a provision limiting the number of

shares a person may hold or which forbids a transfer without the consent of the corporation.

But the proposition is advanced that stock issued by a corporation organized under the laws of this state does not possess the quality of transferability independently of affirmative action on the part of the corporation giving it that quality, and, consequently, when such affirmative action is taken by the adoption of by-laws, the transferability of the stock is to be measured by such by-laws. The argument in support of this proposition is based on the fifth clause of section 124, ch. 16, Comp. St. 1905. The entire section is as follows: "Every corporation, as such, has power: First—To have succession by its corporate name. Second—To sue and be sued, to complain and defend in courts of law and equity. Third—To make and use a common seal, and alter the same at pleasure. Fourth—To hold personal estate, and all such real estate as may be necessary for the legitimate business of the corporation. Fifth—To render the interest of the stockholders transferable. Sixth—To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation therefor. Seventh—To make by-laws, not inconsistent with any existing law, for the management of its affairs." Counsel's position is that the fifth clause impliedly negatives the right of a stockholder to transfer his stock in the absence of affirmative action on the part of the corporation to render it transferable. We do not think the clause will bear that construction. Generally speaking, stock was transferable at common law and at the time the statute in question was enacted. So radical a departure from that doctrine could not have been made without attracting wide attention, and it would have been followed by prompt action on the part of corporations and the holders of stock to adjust themselves to the change. No such result followed. On the contrary, although that section has stood on the books for almost half a century, corporate stock has been bought and sold,

during all that time, on the theory that its transferability is not dependent upon affirmative action authorizing its transfer. This amounts to a practical or comtemporaneous construction of the statute, which is not to be lightly set aside. Besides, if the legislature had contemplated an innovation of that character, it seems to us it would have expressed itself in more apt and unambiguous language. A careful reading of the entire section leads us to the conclusion that the legislature thereby undertook, not only to define the general powers of a corporation, but also to enumerate certain qualities or properties which it should possess, or certain consequences which should follow the act of incorporation. It is clear that the first clause, the clause relating to succession, is to be taken as expressive of a corporate quality or property, rather than grant of power. It attaches to a corporation the instant it comes into being, and, of necessity, antedates the first corporate act. The fifth clause is complementary to the first, because, unless there could be a change in the ownership of stock, the perpetual succession of the corporation, under its corporate name, would be impossible. The latter clause was intended, we think, not to make the transferability of corporate stock dependent on some affirmative act of the corporation, but to impress the stock with that quality as a consequence of the act of incorporation. We see no escape from the conclusion that the by-laws in question are void as an unreasonable restraint on the transfer of property in the stock of the corporation.

It is therefore 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.

OBED H. MYERS, APPELLANT, V. MILTON MOORE, APPELLEE.

FILED FEBRUARY 21, 1907. No. 14,619.

1. **Real Estate Agents:** CONTRACTS: SIGNATURE. The word "subscribed" as used in section 74, ch. 73, Comp. St., 1905, relating to contracts between real estate brokers and landowners, is synonymous with the word "signed."

2. ———: ———: ———. The requirement of said section that the contract be "subscribed" by both parties is met where the signatures of the parties are placed thereon, for the purpose of authenticating and giving force and effect to the contract, whether they be placed at the bottom, the top, or in the body of the instrument.

3. **Appeal:** PLEADING: AMENDMENT. The right of a plaintiff to amend his petition on appeal to the district court is governed by substantially the same rule as that governing the right of the plaintiff to amend his petition in an action originally brought in that court; in either case the test is whether the identity of the cause of action is preserved.

4. **Cause of Action.** By the phrase "cause of action," as above used, is meant, not the formal statement of facts set forth in the petition, but the subject matter upon which the plaintiff grounds his right of recovery.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Reversed.*

John Everson, for appellant.

R. L. Keester, contra.

ALBERT, C.

A real estate broker brought suit in the county court to recover commissions alleged to be due him under a contract in writing between himself and the owner of certain lands. In that court he alleged the making of such contract between himself and the defendant, and attached a copy of the contract to, and made the same a part of, his petition by reference. The petition contained no direct averment that the contract had been signed by the

plaintiff, and from the copy attached to the petition in that court it does not appear that the plaintiff's signature was attached to the contract in the usual way, if at all, but his name does appear at the top of one of the pages of the contract. Judgment went in favor of the plaintiff, and the defendant appealed to the district court. There the plaintiff filed a new petition, which was substantially the same as that filed in the county court, save that it contained an allegation to the effect that the plaintiff's name at the top of one page of the contract had been written there by himself and placed there as his signature to the contract. On motion of the defendant this allegation was stricken from the petition, whereupon the defendant interposed a general demurrer, which was sustained by the court. The plaintiff declined to plead over, and judgment went accordingly, and he now appeals to this court.

The contract comes within the provisions of section 74, ch. 73, Comp. St. 1905, which requires a contract for the sale of lands between a broker and the owner to be in writing and "subscribed" by both parties. The order of the district court striking the allegations with respect to plaintiff's signature to the contract is defended on two grounds, which we shall consider in their order: (1) That the allegations referred to were immaterial because, owing to the position of the plaintiff's signature to the contract, according to such allegation, it did not bring the contract within the statutory requirement that contracts of this character shall be "subscribed" by both parties. The literal meaning of the word "subscribed" is to write underneath, and the contention that the use of the word "subscribed" in the statute requires contracts of this character to be attested by the signatures of the parties written underneath the body of the contract is supported by many eminent authorities, among which are the following: *James v. Patten,* 6 N. Y. 9, 55 Am. Dec. 376; *Stone v. Marvel,* 45 N. H. 481; *Wildcat Branch v. Ball,*

45 Ind. 213. On the other hand, it has been held that "subscribed" means signed, without respect to whether the signature is at the bottom, in the middle, or at the beginning of the instrument. *Roberts v. Phillips,* 4 El. & Bl. (Eng.) 450; *In re Walker,* 110 Cal. 387, 42 Pac. 815, 52 Am. St. Rep. 104; *California Canneries Co. v. Scatena,* 117 Cal. 447, 49 Pac. 462. The latter class of cases, we think, are more in accord with the popular understanding of the word. In our statute of frauds (Comp. St., ch. 32) the word "subscribed" and "signed" are used interchangeably as verbal equivalents. Section 3, relating to the creation of an estate or interest in land, requires the conveyance "subscribed" by the party creating or granting the same. Section 5, relating to leases, requires the writing to be "signed" by the party making the lease. Section 8, relating to different kinds of agreements, requires the note or memorandum to be "subscribed." Section 9, relating to contracts for the sale of goods, chattels or things in action, requires the note or memorandum to be "subscribed." The only inference to be drawn from the indiscriminate use of the two words in the statute of frauds is that the word "subscribed" is not to be taken in its literal meaning, but in its popular sense as the equivalent of the word "signed." A signature placed at the top or in the body of an instrument for the purpose of authenticating it satisfies a statutory requirement that the instrument shall be signed. *Penniman v. Hartshorn,* 13 Mass. 87; *Anderson v. Wallace Lumber & Mfg. Co.,* 30 Wash. 147, 70 Pac. 247; *Wise v. Ray,* 3 G. Green (Ia.), 430; *New England D. M. & W. Co. v. Standard Worsted Co.,* 165 Mass. 328, 52 Am. St. Rep. 516; *Barry v. Coombe,* 1 Pet. (U. S.) 640; *McConnell v. Brillhart,* 17 Ill. 354; *Tingley v. Bellingham Bay Boom Co.,* 5 Wash. 644, 32 Pac. 737. Taking the word "subscribed," in the statute under consideration, in the sense of "signed," if the plaintiff's name was placed at the top of one page of the contract in question, by himself, and for the purpose of authenticating and giving force and

effect to the contract, he subscribed the contract within the meaning of the statute. That being true, the allegation to the effect that he had placed his name there for that purpose was a material allegation, and the order of the court striking that allegation cannot be defended on the ground that such allegation was immaterial.

The other ground upon which that order is defended is that the allegation tendered an issue that was not tendered in the county court. This ground is also untenable. The cases bearing on the question of practice involved have been so frequently reviewed by this court that to attempt to review them at length at this time would be unprofitable. The latest of these cases is *North v. Angelo,* 75 Neb. 381. The rule there deduced from the previous holdings of the court is thus stated in the first headnote: "A case must be tried in the district court upon appeal upon the issues tried in the lower court. This does not mean that no issuable fact can be pleaded in a petition in the district court that was not alleged in the bill of particulars in the lower court. If the identity of the cause of action is preserved in the petition it is sufficient." In the body of the opinion it is said: "To plead an issuable fact in the appellate court that was not pleaded in the lower court is not necessarily pleading a new cause of action, and a change in the issue presented in the petition is not subject to this objection, unless it is such a change as to amount to a new cause of action." The rule, as stated in that case, was clearly foreshadowed in *Citizens State Bank v. Pence,* 59 Neb. 579, where the court said in the body of the opinion: "The facts were pleaded with more particularity in the district court than in the court from which the appeal was prosecuted; nevertheless, the identity of the cause of action was fully preserved. The plaintiffs were not required to state their cause of action in the district court in the same language as it was set forth in the county court." The rule, as stated in the cases just cited, does not differ materially from that relating to the amendment of pleadings

in actions originally brought in the district court. With respect to the plaintiff's right to amend his petition in a case thus brought, it has been said: "So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed, and others added, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case." Maxwell, Code Pleading, p. 583. See, also, *McKeighan v. Hopkins,* 19 Neb. 33; *Carmichael v. Dolen,* 25 Neb. 335; *Stevens v. Sibbett,* 31 Neb. 612; *Mattis v. Connolly,* 45 Neb. 628.

It would seem, then, that, notwithstanding some cases which appear to hold to a stricter rule, the rule now recognized as governing the right to amend on appeal to the district court is substantially the same as that governing the right of the plaintiff to amend his petition in an action originally brought in the district court. In either case the test is whether the identity of the cause of action is preserved. And by the phrase "cause of action," as here used, is meant, not the formal statement of the facts set forth in the petition as a cause of action, but the subject matter upon which the plaintiff grounds his right of recovery. A less liberal rule would not be justified in view of the express provisions of section 1010 of the code, which require the parties, on appeal to the district court, to "proceed, in all respects, in the same manner as though the action had been originally instituted in the said court." In the case at bar, the plaintiff's cause of action in the county court was on a contract, which was incorporated into his petition as the groundwork of his action in that court. It was set forth in his petition filed in the district court, and was there made the basis of his action. The identity of the cause of action, therefore, was clearly preserved, and the motion to strike the added averments should have been overruled. As the demurrer was sustained on the theory that the lack of the averments stricken out on this motion rendered the petition vulnerable to defendant's general demurrer, it

follows that the judgment of the district court is erroneous.

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 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.

SAMUEL SMITH, APPELLANT, V. JOHN K. AULTZ, APPELLEE.

FILED FEBRUARY 21, 1907. No. 14,682.

Real Estate Agents: PLEADING: DEMURRER. In an action to recover compensation for services rendered as a real estate broker, a petition which discloses on its face that the contract of agency was not in writing is open to attack by demurrer.

APPEAL from the district court for Webster county: ED L. ADAMS, JUDGE. *Affirmed.*

John M. Chaffin and *James S. Gilham,* for appellant.

L. H. Blackledge, contra.

JACKSON, C.

It is alleged, in effect, in the plaintiff's petition that the parties waived a written contract and entered into a verbal agreement, by the terms of which the defendant agreed to accept the net sum of $2,200 for certain lands, and that the plaintiff was to accept in full payment for his services for the sale of the land all that the land might be sold for above the said sum of $2,200; that the plaintiff procured a purchaser, to whom the defendant sold the land for the sum of $2,500, of which sum the de-

fendant had paid to the plaintiff $100, and no more, and that he refused to pay the plaintiff any further or greater sum; that there was due the plaintiff on the contract the sum of $200, for which amount he prayed judgment. The defendant interposed a general demurrer to the petition, and from the judgment of the district court sustaining the demurrer the plaintiff appeals.

The judgment is fully justified by our holding in *Barney v. Lasbury,* 76 Neb. 701. We there held, substantially, that, in whatever language the cause of action might be couched, for all practical purposes it was an action for compensation for services rendered as real estate brokers, and is defeated by that section of our statute which provides that every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same shall be void unless the contract is in writing, subscribed by the owner of the land and the broker or agent. The conclusion in that case is in accord with the former holdings of this court cited in the body of the opinion.

The judgment 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 judgment of the district court is

AFFIRMED.

JOHN R. LUCAS V. STATE OF NEBRASKA.

FILED MARCH 7, 1907. No. 14,663.

1. **Homicide:** INSTRUCTION: MALICE: PRESUMPTION. The law implies malice in cases of homicide if the killing alone is shown, but, if the circumstances attending the homicide are fully testified to by eye-witnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing.

2. ———: EVIDENCE: MANSLAUGHTER. If the homicide is in self-defense, and there is no evidence that will warrant a finding beyond reasonable doubt that the accused purposely intended to kill the deceased unlawfully, he may still be convicted of manslaughter, if it sufficiently appears that with reasonable prudence and caution on the part of the defendant the killing might have been avoided.

3. Criminal Law: SECOND APPEAL: LAW OF CASE. If, upon a second appeal to this court, the same state of facts substantially is presented as upon the former appeal, the former decision upon the sufficiency of the evidence settles the law of the case and is conclusive.

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

H. M. Sinclair, F. G. Hamer and *S. A. Dravo,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

SEDGWICK, C. J.

Upon a former trial of this case the defendant was convicted of the crime of murder in the first degree. Upon petition in error to this court the judgment of the district court was reversed and the cause remanded. The reason of this reversal was that the court considered that the evidence was not sufficient to justify the conviction of murder in the first degree. In the opinion then written an attempt was made to analyze the evidence given upon that trial, and to show fully the reasons for the conclusion that the evidence was not sufficient to justify the conviction. Upon the trial now being reviewed the defendant was convicted of murder in the second degree. It is contended by the defendant's counsel that the evidence upon this second trial is essentially the same as upon the former trial. The state, on the other hand, contends that there is some additional substantial evidence bearing upon the question of malice. It appears to be substantially ad-

mitted that the evidence now before the court includes all evidence given upon the former trial, the state's contention being that it has produced some additional evidence. In this condition of the record it is deemed unnecessary to again state in full the substantial facts of the case as detailed in the former opinion, which may be found in 75 Neb. 11.

1. There are several important questions presented upon the record which we deem it our duty to consider, which have been thoroughly and ably presented by the respective parties, but we will first call attention to an error in the instructions of the court which has not been much discussed on the part of the state, but which seems beyond question to require a reversal of the judgment. The tenth instruction given by the court upon its own motion was as follows: "In a case of homicide, the law presumes malice from the unlawful use of a deadly weapon upon a fatal part, and when the fact of unlawful shooting or killing, causing death, is proved, and no evidence tends to show express malice on the one hand, or any justification, mitigation or excuse on the other, the law implies malice, and the offense is then murder in the second degree. You are instructed that in law a loaded gun is a deadly weapon, and if you believe from the evidence, beyond a reasonable doubt, that the defendant, John R. Lucas, wantonly, cruelly, and without justification or excuse, shot and caused the death of Clyde Lester, or that he unlawfully caused the death of said Clyde Lester, with a deadly weapon, then the law presumes that such shooting was done maliciously, unless you believe from the evidence that it was done without malice." It will be remembered that there were several witnesses present at the time the homicide was committed. These witnesses were examined upon the trial, and it appears to be admitted that they were generally disinterested and honest witnesses, so that "all of the circumstances connected with the killing" were shown by the testimony of eye-witnesses. The question is whether in

such cases the jury are authorized to presume the existence of legal malice from the fact that the defendant shot the deceased. Was the defendant actuated by a desire and purpose to kill the deceased unlawfully? If he was, he is guilty of murder in the second degree, even though there was no premeditation or deliberation. If he was not actuated by such desire and purpose to kill the deceased unlawfully, but killed the deceased under a mistaken notion that the circumstances were such as to justify the killing in self-defense, that is, if he acted unreasonably, rashly and unnecessarily, but with a belief at the time that the law would justify him in so acting, and without any purpose or intent to kill the defendant unlawfully, he is guilty of manslaughter. If in killing the defendant he acted reasonably under the circumstances, that is, if the circumstances and appearances were such as to cause a reasonably prudent and cautious man to believe that such action was necessary to defend his life, then he is not guilty, and such action would be justifiable in self-defense. The question, then, whether he acted with malice, that is, with a purpose to unlawfully kill the deceased, is the controlling distinction between the crime of murder in the second degree and the lower crime of manslaughter. If, then, the law does not presume malice from the fact of the killing when all the circumstances connected with the transaction are testified to by eye-witnesses, this instruction was wrong. If the jury are to determine the grade of the offense depending upon the question of malice from the evidence of the witnesses who saw the transaction, uninfluenced by any presumptions against the defendant, then the instruction cannot be sustained.

This question is by no means a new one. It has been considered by many courts, and this court is fully committed thereon. In *Vollmer v. State,* 24 Neb. 838, the first paragraph of the syllabus disposes of this question finally as follows: "On a trial for murder in the second degree, malice can be implied only in cases where the kill-

ing alone is shown. Where, in such a trial, the evidence showed all the circumstances connected with the killing by the testimony of the eye-witness, it was held to be error for the court to instruct the jury that, where the fact of killing was established, without any excuse or explanatory circumstances, malice was presumed and the crime would be murder in the second degree," and the court in the opinion said:

"The doctrine contained in the instructions, when applied to a case in which nothing further than the killing is shown, is recognized by this court in the case cited, and in some others, but we think it can have no application to cases like the one at bar. All the circumstances of the killing are shown by those who were eye-witnesses." The presumption as to the motive of the homicide which the law derives from the mere act of killing arises from the necessity of the case. It is a presumption of fact. If the fact of the killing is proved, and none of the circumstances surrounding the act are shown, the existence of a motive and purpose to kill unlawfully is presumed, until the contrary appears; but, if the circumstances of killing are shown, then no presumption obtains. The motives actuating the defendant are to be derived by the jury from the circumstances surrounding his act. The rule established in *Vollmer v. State, supra,* is well supported by reason and authority, and under that rule this conviction cannot stand.

2. On the question of justifiable self-defense, the state has furnished us with an able and convincing argument. We are entirely convinced that upon the evidence in this record, this question should have been submitted to the jury with proper instructions. There is much evidence tending to show that the defendant acted hastily. As pointed out in the former opinion, the defendant saw the deceased, when at a considerable distance, coming toward the defendant's place in company with another man. The defendant thereupon went into his house and procured the gun, which he had loaded with heavy buckshot, and

went out into his yard to repel the deceased. The deceased was at some distance from the defendant at the time of the shooting. If the defendant supposed that he was armed, as he said that he would be, he still would not have been justified in killing the deceased until the danger to the defendant was so imminent as to cause a reasonably prudent man under the circumstances to consider such killing necessary. The deceased manifestly had no deadly weapon in his hands. He wore heavy mittens at the time. The defendant himself testified that he discharged his gun directly at the breast of the deceased. He fired the second shot "through the smoke" without waiting to see the result of the first. Although the defendant had reason to believe that he was armed in fact, and the manner of his approach was threatening, still the jury might be justified in finding that a reasonably prudent man under all the circumstances would have hesitated longer before taking such extreme measures. There were many circumstances, as shown in the former opinion, tending to justify the conduct of the defendant, but, upon the whole evidence, the jury might have found that the defendant was unwarrantably mistaken as to the real danger, or that he misunderstood his duty and his rights, and so took measures that reasonable prudence and caution would not admit. One who takes the life of another cannot justify himself upon the ground of ignorance, nor upon the ground that he acted in good faith in the matter, when the evidence shows that a reasonable man would not under such circumstances have supposed such action to be necessary. *Housh v. State,* 43 Neb. 163. If the defendant did not act in justifiable self-defense, he is guilty of manslaughter.

3. It is insisted by the state that the evidence upon this last trial is sufficient to justify the conviction of murder either in the first or second degree. A necessary element common to both of those grades of murder is a malicious motive; that is, a purpose and intention to take the life of the deceased unlawfully. That element

is as necessary to a conviction of murder in the second degree as it is to a conviction of the higher grade of crime. Upon a review of the evidence taken upon the former trial, it was held that the evidence was not sufficient to justify a finding beyond reasonable doubt that the defendant at the time of the homicide had the purpose and intent to kill the deceased unlawfully. It was believed that the defendant had determined to defend himself, and had resolved, if necessary for that purpose, to take the life of the deceased, but that there was not sufficient evidence to show that the defendant had formed the purpose and intention of taking the life of the deceased unless it should become necessary to do so in self-defense. The general rule of law is everywhere recognized that, if upon a second appeal the same state of facts substantially is presented as upon the former appeal, the former decision settles the law of the case and is conclusive. This rule has been applied in this state in prosecutions for murder (*Marion v. State,* 20 Neb. 233), and in very many other cases. The rule is a necessary one and properly discourages bringing cases to this court the second time upon questions that have already been determined in the case. When, however, a judgment has been reversed because of the failure of evidence upon some vital point, and the case has been retried, if the evidence is substantially different upon the second trial, it may justify a different conclusion, and the rule does not obtain.

The new evidence produced upon the last hearing is very meagre and relates principally to matters of nonessential details. It is insisted in the brief that there is additional evidence tending to show malice; that the defendant was actuated by a purpose and intent to unlawfully kill the deceased. The coroner testifies that he held an inquest upon the body, and that he heard some conversation of the defendant at the time; that in the course of that conversation some one standing there called out to the defendant and asked him: "Now haven't you some-

thing to wash this man up with?" And that the defendant said: "You can take that slop pail," and that the defendant spoke in a contemptuous tone. This last statement was stricken out by the court, and the witness was asked to give the exact words used by the defendant, and he then said that he thought the defendant said: "That is good enough to wash up the dirty hog." This was some seven or eight hours after the tragedy occurred. The witness did not attempt to state positively the words that the defendant used, but his evidence will reasonably bear the construction that the defendant spoke disrespectfully and slightingly of the deceased. This witness testified upon the first trial, and says that he was not then asked to state this conversation of the defendant. If this evidence is to be given its full effect, in view of the fact that there were several other persons present at the time that the conversation is supposed to have taken place, and that none of them testified to such words by the defendant, and that the defendant denies having used such language, still we think this alone, occurring at the time it did, was not sufficient to justify the resubmission to the jury of the question whether the defendant at the time of the shooting purposely intended to kill the deceased unlawfully. In view of the former trial and the decision of this court, the defendant should have been put upon trial upon a charge of manslaughter. If found guilty of that crime, his punishment would not exceed imprisonment in the penitentiary for 10 years, and would not justify the sentence for a period of 21 years, which at his time of life is substantially equivalent to a sentence for life, a punishment which the law imposes for cold-blooded and deliberate murder, when there are no circumstances mitigating the offense.

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

REVERSED.

SARAH E. DAVIS ET AL., APPELLANTS, V. CHRISTIAN JENNINGS ET AL., APPELLEES.

111 NW 128

FILED MARCH 7, 1907. No. 14,622.

1. **Parties:** NAMES UNKNOWN. When the plaintiff in an action shall be ignorant of the names of the defendant or defendants, he may designate them in his petition and summons by such names as he supposes they possess, if in verifying his petition he shall state that he could not discover their true names.

2. **Process:** MISNOMER: QUASHING SERVICE. The fact that the defendants are designated in the summons by such supposed names, although it amounts to a misnomer, affords no ground for quashing the writ or the service thereof.

3. **Abatement:** MISNOMER. A defendant in such case may object, by a motion in the nature of a plea in abatement, to being designated by any other than his true name; and when such objection is made the court should require the pleading and process to be amended by inserting the true name of the defendant therein.

4. **Appeal:** FINAL ORDER. Where the service of summons is erroneously quashed, and the cause dismissed without prejudice for want of service, such order is a final judgment and appealable.

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

C. A. Robinson and *H. M. Sinclair,* for appellants.

L. C. Chapman and *M. F. Harrington, contra.*

BARNES, J.

Sarah E. Davis and others filed their petition (verified according to the provisions of section 148 of the code) in the district court for Holt county to foreclose a certain real estate mortgage, and designated the defendants therein as "Christ Jennings" and his wife, "Mrs. Christ Jennings" (first and real name unknown). The summons issued on this petition commanded the sheriff to notify Christ Jennings and Mrs. Christ Jennings (first full and real name unknown) that they had been sued

by the plaintiffs (naming them). In making service on the defendant, Christ Jennings, the sheriff delivered to him what purported to be a copy of the summons, but was not an exact copy, for the reason there was a clerical mistake in the names of some of the plaintiffs. Both defendants appeared specially for the purpose of objecting to the jurisdiction of the court. Christ's objection was based on two grounds: "First, that the copy of the summons delivered to him was not an exact copy of the summons issued in the case; second, that his true name was Christian Jennings and that he had not been sued by his true name." His wife's objection was based on the sole ground that her real name is "Louise Jennings" and that she had not been sued by that name. Affidavits in support of the special appearances, which were by motion, were filed, as well as affidavits in opposition thereto. The court sustained the special appearances. The plaintiff elected to stand on the service as made. The court thereafter quashed the service, dismissed the case without prejudice, and the plaintiff appealed.

The affidavits used at the hearing on the motions are presented by a bill of exceptions, from which it conclusively appears that the defendants are husband and wife; that the defendant designated by the name of Christ Jennings is, and for years past has been, better known by that name than by the name of Christian Jennings, which he claims is his true name, and that he owns land under a deed in which he is thus named as grantee. As to the alleged misnomer of the other defendant, she is described in the writ as the wife of her codefendant, and is designated by the name by which he is commonly known, with the title of "Mrs." prefixed; and so it may be said that this mistake in the names of the defendants amounts to a misnomer. This furnished no ground for quashing the service and dismissing the plaintiff's action. It has been held that an objection to the name by which the plaintiff designates himself can-

not be raised by an objection to the jurisdiction of the court. *Smelt v. Knapp,* 16 Neb. 530. And this rule necessarily applies with equal force where there is a mistake in the defendant's name. *Kronski v. Missouri P. R. Co.,* 77 Mo. 362; *Whitcomb v. Hooper,* 81 Fed. 946.

In many jurisdictions it is held that a mistake in the name of a plaintiff or a defendant can only be taken advantage of by a plea in abatement, and such was the holding of this court in *Smelt v. Knapp, supra;* but, as the code makes no provision for a plea in abatement, we are satisfied that the objection can be taken advantage of by a motion, which, of course, must have the same effect as such a plea. In the case at bar service was made upon the proper parties, its effect was to bring them into court, and there can be no doubt that, if they had failed to appear, judgment could have been taken against them by default, and a decree foreclosing the mortgage would have been binding upon them. They having appeared, however, by motion, and objected to the names by which they had been sued, it was the duty of the court to require the complaint and summons to be corrected or amended so as to state their true names, and such an order would have been no ground for a reversal of a judgment against them. *Kenyon v. Semon,* 43 Minn. 180; *Walgamood v. Randolph,* 22 Neb. 494. Under our practice the misnomer of parties is not a defect attended by grave consequences, for it is one that may be remedied by amendment. Indeed, it is provided by section 144 of the code that "the court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform, in any respect to the provis-

ions of this code, the court may permit the same to be made conformable thereto, by amendment."

So it seems clear that the defendants' motions to quash the service of summons should have been overruled, and the plaintiffs should have been required to amend the petition and summons so as to state the true names of the defendants as disclosed by their motions. It appears that, instead of pursuing that course, the court sustained the motions, quashed the service, and dismissed the action. That this was reversible error there can be no question. Again, the objection to the service, because of the mistake in the copy served on Christ Jennings, was without merit. The mistake was merely clerical in its nature, and did not affect a single substantial right of the defendant. It was one which calls for the application of the provisions of section 145 of the code, which provides: "The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

In conclusion, it is insisted that the order quashing the service was not a final order, and was therefore not appealable. Without stopping to inquire whether an order quashing service is a final order, it is sufficient to say that the judgment of dismissal was a final judgment. It enabled the plaintiff to appeal, and thus bring the case here for a review of the whole proceeding.

For the foregoing reasons, the judgment of the district court is reversed, and the cause remanded, with directions to the trial court to permit the plaintiffs to amend the petition and process as above suggested, and thereafter to take such other and further proceedings as may be required by law.

REVERSED.

WILLIAM CRAIG ET AL. V. STATE OF NEBRASKA.

FILED MARCH 7, 1907. No. 14,731.

1. **Criminal Law**: EVIDENCE: REVIEW. Where evidence is conflicting the jury are the judges of its weight, and their verdict will not be molested, in such a case, unless it appears to be clearly wrong.

2. ———: EVIDENCE OF CHARACTER. In a criminal prosecution, the state ordinarily will not be permitted to introduce evidence of the character of the accused, unless he has put his character in issue; but, where counsel for the defendant, by his cross-examination, has made it necessary for a prosecuting witness to give such evidence by way of explanation of his own conduct at the time the offense was alleged to have been committed, he may, under proper restriction, give such evidence on his redirect examination.

3. ———: INSTRUCTIONS. Where two persons charged with homicide, one as principal, and the other as accessory before the fact, admit the killing, but rely on necessary self-defense on the part of the principal as an excuse therefor, a statement in an instruction, otherwise correct, "that defendants set up necessary self-defense," does not amount to prejudicial error, if the issues as to both defendants are otherwise fully and correctly stated.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

F. M. Wolcott, A. M. Morrissey and *Hamer & Hamer,* for plaintiffs in error.

W. T. Thompson, Attorney General, W. B. Rose and *Grant G. Martin, contra.*

BARNES, J.

William Craig and William Rash, hereafter called the defendants, were convicted in the district court for Cherry county of murder in the second degree for the killing of one Elijah Custard. Craig was sentenced to life imprisonment, Rash was sentenced to serve ten years in the state penitentiary, and they have brought the case

here by separate petitions in error. The information on which they were tried charged Craig with the murder as principal, and Rash as accessory before the fact. Their petitions contain a great many assignments of error, but three of which appear to be relied on for a reversal of the judgment of the trial court.

1. It is contended that the evidence was insufficient to sustain the verdict, and to the determination of that question we will first address ourselves. It appears from the record that nine persons (including the defendants) witnessed the killing, which is not denied, and of these persons five, who were wholly disinterested, were called as witnesses, and testified for the state. They agreed practically in their statements, which were, in substance, that Craig was the keeper of a vile resort, known as the "Hog Ranch," near Valentine in said county, and that Rash was one of his bartenders at the time the murder was committed; that on the 17th day of September, 1905, the deceased, with others, were at the resort above mentioned, and Craig ordered the girls to come out into the dance hall, which was a room about 40 feet long by 30 feet wide, with a bar extending nearly across its east end; that Craig and the deceased had some words at or near the west end of the dance hall, and Craig called the deceased a vile name, and told him that he did not care anything for him, after which remark Craig started toward the bar, with Custard and one or two others following him. When he came near the east end of the hall Craig started on a run, went behind the bar and seized a revolver, called the "big white gun." By that time Custard had reached a point at the south end of the bar where Rash was sitting at a table. Rash arose, seized Custard around the waist with one arm, and drew a revolver, called the "blue steel gun," with his other hand. While they were struggling with each other, Craig reached over Rash and struck Custard a severe blow on the head with the "big white revolver." This partly stunned the deceased, and thereupon the witness Hunter grabbed hold

of the big gun by the barrel and attempted to wrest it from Craig, when Craig told Rash to shoot the s—— of a b———. Rash did not shoot, but handed the "blue steel gun" to Craig, who immediately shot the deceased in the forehead, killing him almost instantly. That during the altercation leading up to the shooting Custard did not lay hands upon Craig, and did not strike him or attempt to strike him or molest him in any manner whatever. That the deceased was unarmed, and had made no demonstrations indicating that he intended to assault or injure any one.

Opposed to this evidence was the testimony of William Pettitt, who corroborated the witnesses for the state in many particulars, but stated that Custard followed Craig, forced his way in behind the bar, and struck or was striking at him at the time Craig hit him with the "big white revolver"; that Rash was standing behind the bar with his arms on the counter, and took no part whatever in the affray. His testimony, however, was somewhat discredited by the evidence of other persons, to whom he had made a different statement of the transaction before he gave his testimony in court. One Winston, who was in the employ of the defendant Craig, as barkeeper, also testified for the defendants, and corroborated the evidence of Pettitt to some extent, although he did not claim to have been present when the affray first commenced. The defendant Craig testified, in substance, that the deceased followed him across the room and in behind the bar; that he assaulted him, struck him, and was striking at him when he struck the deceased with the "big white gun"; that the witness Hunter and the deceased wrested the "big white revolver" from him, and in order to protect his own life he reached under the counter, got the revolver called the "blue steel gun," and shot the deceased with it; that Rash took no part in the transaction whatever. Rash's evidence was practically the same as that of the defendant Craig.

With the evidence in this condition, it was for the jury

to say which of the witnesses they believed to be most worthy of credit. They resolved that question in favor of the state, and it seems clear that they were fully justified in doing so. It is urged, however, that the testimony is insufficient in any event to sustain the verdict of murder in the second degree as against Rash. If the testimony given by the witnesses on behalf of the state is true, and it was the province of the jury to say whether it is true or not, it is sufficient to sustain the conviction. It was testified that Rash was the first of the defendants who was guilty of any overt act amounting to an assault against the deceased. Prior to his participation in the trouble it had been simply a conflict of words. It was he who grabbed the deceased from behind, pinioned his arms to his body with one arm, while he held his revolver in the other hand. It was shown on behalf of the state that he responded to the call of his codefendant Craig to "shoot the s—— of a b———" by handing the "blue steel revolver" to him, from which the fatal shot was fired. So it seems clear that the jury were warranted in finding that he was an active participant in taking the life of the deceased.

2. It is next contended that the court erred in receiving the testimony of the witness Hunter on the question of the character of the defendant Craig. It is said in the defendants' brief that the state was permitted to show, over the objections of the defendants, that the defendant Craig on other occasions had made "gun plays"; that he had struck one fellow shortly before this, and that the men, with one or two exceptions, that run that sort of a place were in the habit of making "gun plays." It is claimed that this was prejudicial error, because the defendant had not elected to put his character in issue, and, therefore the state was not entitled to introduce evidence of that kind. If the state had offered this evidence in chief it is probable that its reception would have been prejudicial error. But an examination of the record discloses that this evidence was brought out on the redirect

examination of the witness, and was justified by the line of cross-examination adopted by the defendants' counsel. It therefore presents no ground for complaint on his part. Again, it appears from the record that the court, in effect, instructed the jury to disregard any such evidence, for in paragraph 19 of his instructions the jury were told, in substance, that the occupation or business of the defendants, or either of them, at the time of the killing, in no way tended to prove their guilt or innocence; that in arriving at their verdict they should disregard the matter of the occupation or business of the defendants. In other words, the jury were told not to permit themselves to be in any way prejudiced against the defendants by reason of their occupation or business. So it seems clear that reversible error cannot be predicated on this assignment.

3. The remaining assignment of error is that the court erred in giving paragraph No. 16 of the instructions. The alleged fault of this paragraph is that the court told the jury that the "defendants" set up the plea of necessary self-defense. It is claimed that this is a misstatement of the defense interposed by defendant Rash, since he absolutely denied having any connection with the killing. While it was not the contention of the state that Rash fired the fatal shot, but that his complicity in the murder was that of an aider and abbetter therein, yet, if his codefendant Craig was justified in killing the deceased on the ground of necessary self-defense, such justification would inure to the benefit of Rash and constitute in his behalf a perfect defense. So the statement complained of could not have been prejudicial to his interests. We find, however, that by certain other paragraphs of the instructions the jury were told that it was necessary that they should find from the evidence, beyond a reasonable doubt, that the defendant Rash unlawfully, feloniously, wilfully and purposely aided, abetted, comforted, procured, assisted and maintained Craig in the killing of the deceased, before they could find him guilty of any of the degrees of homicide with which his codefendant stood charged.

They were also correctly informed that, unless they found Craig guilty of some one of the degrees of homicide, as charged in the information, they could not find Rash guilty of any offense. By the latter part of instruction No. 16 the jury were informed that, if from the evidence they believed that at the time the defendant Craig was alleged to have shot Elijah Custard the circumstances surrounding the defendant were such as in sound reason would justify or produce in his mind an honest belief that he was in danger of receiving from the said deceased great bodily harm, and that the defendant Craig in doing what he then did was acting from an instinct of self-preservation, then he would not be guilty, although he was in fact in no real or actual danger. So, taking the instructions as a whole, it seems improbable that the jury were, or could have been, misled by the instruction complained of. It is insisted, however, that Rash was entitled to have the theory of his defense stated to the jury. We find that no separate request for any such instruction was tendered to the trial court, and, indeed, when we consider the charge as a whole, it appears that such an instruction was unnecessary. Again, in several paragraphs of the charge Rash's theory of the case was outlined and stated as follows: "If you find and believe from the evidence, beyond a reasonable doubt, that, at the time and place where the defendant William Craig shot and killed said Elijah Custard, the defendant William Rash was then and there present, and said defendant William Rash then and there unlawfully, feloniously, wilfully and purposely was aiding, comforting, abetting, assisting and maintaining the said William Craig in killing the said Elijah Custard, then you are instructed, as a matter of law, that the defendant William Rash would be equally guilty to the same extent and of the same crime as the defendant William Craig." The jury were also told that, unless the evidence established the above fact beyond a reasonable doubt, the defendant Rash would not be guilty of any

offense whatever. So we are of opinion that the giving of the instruction complained of was not reversible error.

In conclusion, it appears that the defendants were accorded a fair trial: that upon conflicting evidence the jury passed upon the facts, and in so doing have found and said that they were satisfied beyond a reasonable doubt of the guilt of both of the defendants, and we know of no rule which would authorize us to set aside their verdict.

For the foregoing reasons, the judgment of the district court is in all things

AFFIRMED.

NEBRASKA CENTRAL BUILDING AND LOAN ASSOCIATION, APPELLEE, V. BOARD OF EQUALIZATION OF LANCASTER COUNTY, APPELLANT.*

FILED MARCH 7, 1907. No. 14,736.

1. **Constitutional Law:** REVENUE ACT. Section 13, ch. 17, laws 1899, which provides the manner in which and by whom the shares of building and loan associations shall be listed for assessment, is not unconstitutional, and was not repealed by the provisions of the revenue law of 1903.

2. **Taxation:** BUILDING AND LOAN ASSOCIATIONS. Such associations should be assessed in the manner indicated by that section, and an assessment of the amount of the mortgages taken to the association, which the assessor assumes are unpaid, cannot be upheld.

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

J. L. Caldwell, F. M. Tyrrell and *C. E. Matson,* for appellant.

Field, Ricketts & Ricketts, contra.

* Rehearing denied. See opinion, p. 478, *post.*

BARNES, J.

The Nebraska Central Building and Loan Association, the appellee in this case, is a corporation organized under the provisions of chapter 17, laws 1899, having its principal office and place of business in Lancaster county. It appears that in the spring of 1905 the county assessor of that county found, from an examination of the records, that the association had real estate mortgages of record therein amounting, according to the face value, to $170,587. He also found from his assessment rolls that residents of that county had returned shares for assessment in some building and loan association, to the amount of $26,000. He thereupon assumed that such shares should be credited to said mortgages. He further found that a portion of these mortgages had been paid, leaving what he assumed to be an unpaid balance thereon of $100,000. He, thereupon, assessed the association the sum of $20,000 therefor. The association objected to the assessment so made, and filed its petition with the county board of equalization, praying that it be set aside. The board overruled the objections, and confirmed the assessment. The association, thereupon, appealed to the district court where, after a hearing, judgment was rendered in its favor, the assessment was held to be null and void, and the county clerk was ordered to strike the same from the assessment roll. From that judgment the board of equalization has appealed to this court.

It appears that the district court held that the association should have been assessed according to the provisions of section 13, ch. 17, laws 1899, and it is conceded that, if that section is valid, then the judgment of the trial court must be affirmed. The appellant contends, however, that the section above mentioned is unconstitutional, because the act is broader than its title. Section 11, art. III of the constitution, provides, among other things: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." This provision of

the constitution has usually been held to be mandatory; but it has also received a most liberal construction. Indeed, there has been a general disposition to so construe it, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted. Cooley, Constitutional Limitations (7th ed.), p. 209. The title to the chapter in question contains a general statement that it is "An act to provide for the organization, government, regulation, examination, reporting, and reorganizing or winding up of the business of * * * 'Building and Loan Associations'"; and the section under consideration provides: "Such associations shall not be subject to taxation on their capital stock, nor on their loans, advances on mortgages, but shares in said associations shall, for the purpose of taxation, be considered and held as credits, and members and holders of such shares shall list the same for taxation, and the same shall be taxed in such manner and subject to such deductions as may be provided by law for the taxation of other credits." By the adoption of this section the legislature has provided the manner in which and by whom the shares of such associations shall be listed for taxation. It appears that the act of 1899 was a reenactment of a similar law passed by the legislative assembly of 1891, with some unimportant amendments, and section 13 was a part of the act of 1891, and was known as section 8 of that act. It is an important fact that prior to the original act there were no building and loan associations in this state, and the general revenue law of 1879 contained no provision for the taxation of such associations. So, section 8 of the old act was a proper subject for legislative action, and was germane to the general subject of the organization and regulation of building and loan associations. It was held in *People v. Mahaney,* 13 Mich. 481, that the title of "An act to establish a police government for the city of Detroit," was not objectionable for its generality, and that the matters properly connected with the establishment

and efficiency of such a government, including taxation for its support, and courts for the examination and trial of offenders, might constitutionally be included in the bill under its general title. It was there said: "The police government of a city could not be organized without a distinct act for each specific duty to be devolved upon it, and these could not be passed until a multitude of other statutes had taken the same duties from other officers before performing them. And these several statutes, fragmentary as they must necessarily be, would often fail of the intended effect, from the inherent difficulty of expressing the legislative will when restricted to such narrow bounds." In *People v. McCallum,* 1 Neb. 182, the court expressed itself as follows: "It is not required that the title should contain an abstract of the bill, nor set out the particulars of the amendment. Whether this requirement of the constitution is designed as a rule for the government of the legislature, an observance of which is enjoined by a sense of duty and the official oath of each member, and not subject to any supervisory power of the courts, * * * it is unnecessary to stop to inquire. The constitution not having fixed the degree of particularity, with which a title is to express the subject, it is enough that the legislature, with this provision before them, have selected their own title, and although we might not agree upon it as the most suitable or comprehensive, the act for that reason is not to be declared void." In *State v. Bemis,* 45 Neb. 724, the constitutional provision here interposed was discussed, and it was there said: "The test is not whether the title chosen is the most appropriate, but whether it fairly indicates the scope and purpose of the act. * * * Authority to remove unfaithful officers is a proper if not a necessary incident of municipal government, and the provision therefor is obviously within the title of the act, 'defining, regulating and prescribing the duties and powers and government of cities of the metropolitan class.'" To the same effect are *Whiting & Whiting v. City of Mount Pleasant,*

11 Ia. 482, and *State v. County Judge of Davis County*, 2 Ia. 280. As before stated, section 13 merely provides how the funds of the association shall be regarded, and by whom its shares shall be listed and returned for the purpose of taxation; while it leaves the manner of such taxation to be further provided for by other laws upon that subject. So we are of opinion, in view of the fact that when this section was first enacted the general revenue law contained no provision for the taxation of building and loan associations, that subject was rightfully made a part of the act creating and governing them.

It is further contended that the section in question is class legislation, and is void for that reason. It has often been held that a law which applies to a particular class of persons or corporations, and operates generally and uniformly throughout the state, is not within the prohibition of section 15, art. III of the constitution. The act in question applies to all building and loan associations as a class, and operates generally and uniformly as to such associations. Such laws have uniformly been upheld by the courts. *State v. Berka*, 20 Neb. 375; *State v. Graham*, 16 Neb. 74; *Van Horn v. State*, 46 Neb. 62. It is said, however, that the legislature may not, arbitrarily and without reason, create a class to be affected by legislation, where the result would be an infringement upon the constitutional prohibition. This raises the question: Are corporations, known as building and loan associations, arbitrarily and without reason, placed in a class by themselves for the purpose of taxation by the act in question? To answer this question it is proper to point out some of the distinctive features of such associations. It appears that they may commence business upon the approval of their articles of incorporation, constitution and by-laws, without any capital. This privilege is not accorded to any other class of corporations. They are not required to have any fixed capital stock. Their stockholders may withdraw from the association after 90 days on 30 days' notice. In fact, such associations have no

capital stock, in the proper sense of the word. There is no uniformity in the face value of the shares of such an association. Members pay on their shares by monthly instalments, so that every share may represent a different actual value. The face value of shares issued by such an association will amount to many times the money paid to the association thereon. The foregoing illustration would seem to give such associations a distinctive character, and not only warrant, but require, them to be placed in a class by themselves for the purpose of listing their property for taxation. So, it seems clear that this contention cannot be sustained.

It is also contended that the section in question is void, because it amended the revenue law of 1879. As before stated, that law contained no provision for taxing building and loan associations, for the most excellent reason that no such association existed in this state at the time it was enacted. So the legislature, when it provided for the organization and government of building and loan associations, deemed it necessary to provide the manner of listing their property for taxation.

Lastly, it is contended that the revenue law of 1903 repealed section 13 of the law relating to building and loan associations, and that such associations should be assessed according to the provisions of section 56 of said revenue law (laws 1903, ch. 73). An examination of that section will show that building and loan associations are not specifically mentioned therein, and, indeed, it requires a great stretch of imagination to hold that they are included even by implication within its provisions. On the other hand, the record in this case discloses that, when the present revenue act was before the legislature for passage, section 56 originally contained the words "building and loan"; and, when the bill was under consideration in the committee of the whole, it was considered that the provisions of that section should not be applied to such associations. And, in view of the fact that section 13, ch. 17, laws 1899, contained a specific method for assessing the shares of

such associations, the words "building and loan" were stricken from the act, and, thus, the legislature evinced its approval of the method of assessment provided for as aforesaid, and its determination not to include such associations within the terms of the act then under consideration. Indeed, the section in question has been in force since 1891, a period of more than 15 years, and all departments of the state have acquiesced in its provisions. Such contemporaneous construction is entitled to great weight in the determination of this question. If this manner of assessment is unfair and lacks exact uniformity, as claimed by appellant, that is a matter to be addressed to the consideration of the legislature, and cannot be corrected by the courts.

Appellant further attempts to justify the assessment on the ground that the association failed to furnish the assessor a list of all of its members, their places of residence, and the number and value of the shares owned by each of them. The law does not seem to specifically require such information, and, even if it did, a failure to do so would hardly justify an assessment like the one in question herein. Indeed, we cannot understand how it can be upheld on any ground.

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

AFFIRMED.

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

SEDGWICK, C. J.

In the brief upon the motion for rehearing it is contended that the decision in this case will permit shareholders in building and loan associations to offset general indebtedness against the net values of their shares. This is not the intention of the opinion. The point decided is that building and loan associations are not to be assessed upon their mortgages, but that the assessment is to be

made upon the shares and against the owners thereof. We are satisfied that the holding upon this point is correct. It is true that section 13, ch. 17, laws 1899, which is referred to in the opinion, provides that the shares in such associations "shall, for the purpose of taxation, be considered and held as credits." But the revenue law of 1903 classifies credits for the purpose of taxation, and provides that credits that represent moneys in bank, loans, or moneys invested, are to be assessed without offset of indebtedness. If money paid upon stock in building and loan associations is to be considered as money invested, it would fall within the class of credits that are not subject to offset of general indebtedness. The net value of such shares of stock can be easily ascertained from the books of the association, and there is no reason for concluding that shareholders would necessarily evade taxation upon the values of their shares.

We think our former decision is right, and the motion for rehearing is

OVERRULED.

JANE P. CAMPBELL, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED MARCH 7, 1907. No. 14,531.

Carriers: LOSS OF BAGGAGE: NEGLIGENCE: PRESUMPTIONS. The Missouri Pacific Railway Company had been in the habit for some years of stopping all of its passenger trains to discharge passengers and their baggage at the station of the Union Pacific Railway Company in South Omaha, over a part of whose lines it operated its trains, and it had been the custom of the agent of the Union Pacific Railway Company to remove and care for the baggage coming from all Missouri Pacific passenger trains the same as for that coming from Union Pacific trains, except that all checks on baggage coming from the Missouri Pacific trains were taken off before the baggage was removed from the train. A portion of the baggage of a passenger reaching South Omaha on the Missouri Pacific train in the evening was placed in the baggage room at the Union Pacific station by the agent, accord-

ing to the usual practice. When it was called for in the morning it could not be found. *Held*, First, that the agent of the Union Pacific Railway Company was the agent of the Missouri Pacific Railway Company in the receipt and care of such baggage; second, that the liability of the Missouri Pacific Railway Company was that of warehouseman; and, third, that, since no explanation was given of the loss of the baggage, the presumption arises that the bailee was guilty of negligence.

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

John F. Stout, J. W. Orr and *B. P. Waggoner,* for appellant.

A. C. Pancoast, contra.

LETTON, J.

The defendant operates a line of railroad from Kansas City, Missouri, to Omaha, Nebraska. For a short distance before entering the city of Omaha it uses the tracks of the Union Pacific Railway Company, this portion of the line passing through South Omaha, and for several years prior to September, 1903, the defendant had been in the custom of using the passenger station of the Union Pacific Railway Company in South Omaha as a stopping place to receive and discharge passengers and their personal baggage. The plaintiff, at that time, desiring to travel to South Omaha from Kansas City, Missouri, went to the station of the defendant at that point and asked for a ticket to South Omaha. She was given a ticket to Omaha, but nothing was said with reference to the ticket being to that point. She then went to the baggage room and asked to have her baggage, consisting of a trunk and a valise, described by her as a "large telescope," checked to South Omaha. She was there told by the baggageman that he could not check her baggage to South Omaha, but would check it to Omaha, and that she could give her checks to the conductor upon the train, who would have it put off for her at South Omaha. She

followed these directions, and gave her checks to the conductor. When she alighted from the train at South Omaha she was met by her husband. Her baggage was taken off the train and placed upon a truck, where she saw it when she alighted and pointed it out to her husband, who asked the baggageman if he thought he could get an expressman to deliver the baggage that night, and was told there was none about the station; that they could get one up town, but would have to pay extra at that time of night. They pointed out to the baggageman the trunk and telescope, and called his attention to the fact that the name was on the end of the telescope. Mr. Campbell then said that they would get it Sunday morning, or send for it Sunday morning. The baggageman then said: "I will put it in the baggage room." Campbell said: "All right." The baggage was then placed in the baggage room. The next morning when it was sent for by Mrs. Campbell, the trunk was delivered, but the valise could not be found. It is for the value of this valise and its contents that this action is brought.

The defense to the action is in substance that, by the delivery of the checks to the conductor and the taking of the baggage from the train, it was delivered to the plaintiff, and that whatever was done with respect to it by the agent or baggageman at the South Omaha station was done at the request and for the benefit of the plaintiff, and without the knowledge, consent or privity of the Missouri Pacific Railway Company; that the station and baggage room at South Omaha are the property of the Union Pacific Railway Company and not of the defendant; and that that company is not the agent of the defendant. The plaintiff, in reply to this defense, alleges in substance a custom on the part of the conductor on the train and of the agent of the Union Pacific Railway Company at South Omaha to discharge baggage from the defendant's trains, and to care for, handle and take complete control of the same as the agents of the defendant.

It was shown by the testimony of Cook, the night agent of the Union Pacific Railway Company at South Omaha, that all passenger trains of the Missouri Pacific Railway Company stop at the Union Pacific station in South Omaha; that the baggageman at the station is generally in the habit of standing in the baggage room door, and "the baggageman in the train as it goes by puts up his fingers, indicating two or three or four pieces of baggage to be taken off," and the station baggageman then gets the truck and takes it up to the train for the baggage. Cook testifies that he took this baggage off the train; that there was more than one truck load at this time; that he always took a truck to get the baggage from the Missouri Pacific trains, the same as he did all other trains; that it was part of his duties to go out with the truck and get the baggage and wheel it back to the baggage room, unless the passenger that owned it came and took it away at once. He testified as follows: "Q. If they did not, about how long do you keep it when it comes in on the Missouri Pacific Railway? That is, how many hours would you keep it in storage there in the baggage room? A. Well, sir; the first 24 hours, except when the baggage comes in on Sunday, it is free. The first 24 hours after that it is 25 cents, and 10 cents for every 24 hours or fraction up to 30 days. Then it is sent to the general baggage master of the road." It appears, further, from this witness' testimony that this baggage was treated in the same manner as all other baggage coming in from the Missouri Pacific road under similar circumstances.

The court instructed the jury as follows: "You are instructed that under the evidence in this case the liability of the defendant, if any, is that of warehouseman only, and to entitle plaintiff to recover you must find by a preponderance of the evidence, first, that the baggage sued for was not delivered to plaintiff nor to anyone authorized by her to receive it; second, that the general and usual course of dealing on the part of the defendant company in the handling of baggage at the station of the

Union Pacific Railway Company, used by defendant at South Omaha, was such as to make the baggagemen and employees employed at said station the agents of the defendant company in retaining possession of plaintiff's baggage, if you find defendant did retain possession thereof, and in placing the same in the baggage room of said station; and, third, that the loss of said baggage was caused by the want of ordinary care on the part of such agent or agents of the defendant company." We think this instruction fairly submits the question at issue to the jury and is fully as favorable to the defendant as the circumstances warrant. *Mote v. Chicago & N. W. R. Co.*, 27 Ia. 22; *Chicago, R. I. & P. R. Co. v. Fairclough*, 52 Ill. 106. The evidence fully supports the verdict as to the nondelivery of the baggage and the custom of the defendant with reference to the handling of baggage at the station used by it at South Omaha. As to the third point in the instruction, when the plaintiff proved the receipt of the property by the defendant as warehouseman, her demand for it, and the neglect and refusal of the defendant to deliver the same, the presumption arises, in the absence of any explanation whatever, that the defendant was guilty of negligence, and the burden was upon the defendant to exonerate itself by showing that the goods were lost without the lack of ordinary care on its part. 3 Thompson, Commentaries, Law of Negligence, sec. 3453. It is neither pleaded nor proved that ordinary care was exercised in the preservation of the property, or that it was lost or taken from the defendant's possession without negligence on its part. In this respect the case is similar to *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295.

Mrs. Campbell had a right to rely upon the usual practice and custom as to the receipt and care of baggage at South Omaha coming from defendant's trains, and upon the appearance of authority which, either tacitly or by the acts of its agents upon the train, it had conferred upon the station agent to act for it in that behalf. When the agent offered to place the baggage in the baggage room

until the next morning, and the plaintiff accepted the offer, he was acting in behalf of the defendant, and its liability as warehouseman became fixed. *Farmers & Mechanics Bank v. Champlain T. Co.*, 23 Vt. 186; *Ouimit v. Henshaw*, 35 Vt. 605. In the latter case it is said: "A passenger, arriving with baggage by cars at a railroad station, is justified in regarding the man who handles and takes charge of the baggage on the arrival of the train, as the agent of the railroad company which has brought the passenger there." See, further, *Jordan v. Fall River R. Co.*, 59 Mass. 69; *Perkins v. Wright*, 37 Ind. 27.

The verdict of the jury seems to be fully supported by the evidence, and the judgment of the district court is therefore

AFFIRMED.

CHARLES R. WHEELER ET AL., APPELLEES, V. W. D. MOORE ET AL., APPELLANTS.

FILED MARCH 7, 1907. No. 14,700.

Parol Evidence. In the absence of ambiguity, and of fraud, accident or mistake, parol evidence is not admissible to assist in the interpretation of a written contract.

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

R. D. Sutherland and *S. W. Christy*, for appellants.

H. H. Mauck and *G. W. Stubbs*, *contra.*

AMES, C.

Plaintiffs were owners of a building constructed and used for hotel purposes in the village of Nelson in this state. Nearby and upon the same grounds was a well, from which water was pumped by a windmill into a

reservoir and distributed through a system of mains and pipes through the building. In January, 1903, plaintiffs demised the premises, "including the use of the heating plant and water system and plumbing, as all now connected up," for a term of years at an annual rental payable in monthly instalments. The lease contained no covenant or warranty that the premises or appurtenances were or would be sufficient or adapted to the uses intended, nor any covenant respecting repairs or maintenance, except the following: "And it is further covenanted and agreed between the parties aforesaid that the heating of the premises, and the supplying of water, is to be operated and maintained by the party of the second part at their expense; that party of the first part will keep up all outside repairs of building, roof, etc., but that party of the second part are to make all inside alterations, repairs, etc. including heating and plumbing subject to approval of the party of the first part. And party of the first part is hereby given the privilege to make connections to, and to extend, heating, water and sewer systems, not materially affecting their use for hotel purposes as above provided." For some reason not clearly set forth in the briefs or arguments of counsel, but, as we infer, from lack of capacity of the well, the water furnished by the well proved inadequate to the needs of the lessees in their business of hotel keepers carried on in the building, and they were compelled at great expense to themselvs to supply the deficiency from other sources. By mutual consent and agreement the lessors made an ineffectual attempt to remedy the evil by sinking another well elsewhere and connecting it with the existing system of pipes, which was for that purpose disconnected from the old well, but there was no covenant or stipulation in the lease by which they were bound so to do, nor is it complained that the attempt inflicted in any way any injury upon the lessees. This is an action to collect certain overdue instalments of rent and also for certain moneys expended by the lessors for repairs which the lessees had covenanted by the lease

to make at their own expense. The defendants pleaded by way of set-off or counterclaim that the water supply had proved wholly insufficient, and they had been obliged to supplement it at great expense, and that by reason of the deficiency, beyond what they had been able to make good, they had been deprived of the use of bath and lavatory rooms to their damage in a large sum. The court disallowed the defense and directed a verdict for the plaintiffs, from a judgment upon which the defendants appealed.

We quite agree with the trial court that there is no ambiguity in the above quoted clause of the lease, justifying its explanation by oral testimony; nor do counsel for appellants, if we understand them correctly, contend that, strictly speaking, there is such an ambiguity, but they seem to say that at the time they accepted the lease they understood and believed, as they supposed did also the plaintiffs, that the well and its connections would furnish a sufficiency of water for the needs of their business in the building, and that therefore the words in the lease, "a water system as now connected up," should be interpreted in the sense in which both parties, as they allege, understood it, to wit, as meaning "a water system of sufficient capacity connected up as now," and that whether the parties did so understand the matter or were justified in so understanding, is a question of fact which should have been left to the jury. Counsel have, however, cited to us no authority, and we know of none, for adopting such a means or method of construction in a case in which there is no apparent ambiguity in the language of the contract, nor any doubt raised by parol as to the subject matter to which an application of such language was intended by the parties to be made. It is not a case in which it is shown that there is more than one subject of which the language used is adequately descriptive, so as to call for parol evidence of identification, nor is there any accusation of fraud or misrepresentation. The mere fact, if it is a fact, that either or both parties fell

into a mistake as to the sufficiency of the well and water supply system does not justify the court in setting their contract aside and substituting another in its stead.

It is recommended, therefore, 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, the judgment of the district court is

AFFIRMED.

WHEELER, SPURCK & WHEELER, APPELLEES, V. W. D. MOORE ET AL., APPELLANTS.

FILED MARCH 7, 1907. No. 14,701.

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

R. D. Sutherland and *S. W. Christy,* for appellants.

H. H. Mauck and *G. W. Stubbs, contra.*

AMES, C.

This is an action in forcible detainer by lessors against lessees to recover possession of the demised premises as from tenants holding over their term after forfeiture for the nonpayment of rent. The facts are recited in full in the opinion in the preceding case between the same parties, *ante,* p. 484, and their repetition here is therefore uncalled for. The district court on appeal affirmed a judgment by a justice's court for the plaintiffs, and the defendants appealed to this court.

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

CHRISTIANA SOUCHEK, APPELLEE, V. ERNEST KARR, APPELLANT.

FILED MARCH 7, 1907. No. 14,954.

1. **Bastardy:** EVIDENCE. In a prosecution for bastardy, where the testimony of the complainant shows that the first act of intercourse with the defendant was less than 252 days before the birth of the illegitimate child, the burden is upon the complainant to establish by a preponderance of the evidence that the child alleged to have been begotten by such intercourse was of premature birth.

2. **Criminal Law:** PRACTICE. In such case, evidence tending to show the premature birth of the child should be offered in chief.

3. ———: EVIDENCE: WITNESSES: COMPETENCY. A professional nurse, having 15 years' experience in obstetrical cases, and who assisted at the birth of a child, is competent to testify as to her opinion whether or not the child was fully developed at the time of its birth.

APPEAL from the district court for Seward county: ARTHUR J. EVANS, JUDGE. *Reversed.*

R. D. Sutherland, S. A. Searle and *M. D. Carey,* for appellant.

R. S. Norval and *J. J. Thomas, contra.*

OLDHAM, C.

This was a proceeding in bastardy, wherein the complainant, Christiana Souchek, alleged that defendant, Ernest Karr, was the father of her illegitimate child. There was a trial of the issues to the court and jury, verdict of guilty, and judgment on the verdict. To re-

verse this judgment the defendant has appealed to this court.

The evidence introduced in chief in support of the prosecution was, in substance, that for several years prior to the acts of sexual intercourse, which preceded and occasioned the birth of her child, the prosecutrix had resided on a farm with her parents in Nuckolls county, Nebraska; that in the spring of 1904 she was employed as a domestic in the family of Mr. Weaver in the village of Deweese, Clay county, Nebraska; that on the 23d day of May, 1904, the defendant began to keep company with her and accompanied her home from a party, which had been held at the residence of one Mr. Titus in the village of Deweese; that in the early part of June following the defendant had intercourse with the complainant, and that acts of intercourse were repeated at five or six different times during the month of June; that on the 29th day of December, 1904, the prosecutrix was delivered of a living child at the industrial home in Milford, Seward county, Nebraska, as a result of her intercourse with the defendant; that after the birth of the child the complainant had remained in the home at Milford until the 27th day of April, 1905, when the present suit was instituted. While there was some testimony offered tending to show the association of defendant with complainant during the month of June, 1904, no evidence was introduced in any manner tending to show that the child, which was born on December 29, scarcely seven months after the first act of intercourse alleged to have been had with defendant, bore any evidence of having been of premature birth. There was some variance in the statements made by the prosecutrix at her examination before the justice of the peace and in her testimony at a former trial of the case in the district court for Seward county, as to the particular times and places at which her alleged intercourse with defendant occurred. This variance, however, was not so material as to absolutely discredit the testimony of the complainant.

Defendant, on his part, introduced testimony tending to show contradictory statements that complainant had made as to the paternity of her child, and also evidence tending to show her association with another young man in the months of April and May of the year 1904, and on his own behalf the defendant denied all acts of intercourse with complainant. The defendant also offered as a witness in his behalf Miss Margaret Kealy, who testified that she had been a nurse for about 18 years, principally in obstetrical cases; that during that period she had attended on 150 or more of such cases; that she was superintendent of the industrial home at Milford for three years, and attended the prosecutrix at the time of the birth of her child. She also testified that the delivery of the child was natural; that the child at the time of its birth appeared strong and healthy; that it weighed about six and one-half or seven pounds, and that it cried and looked like an ordinary child at birth. This witness on cross-examination, testified as to her years of experience in obstetrical cases and that she had read books on obstetrics, prepared and published for the use of professional nurses, but that she had never studied medicine and surgery and had never read any "standard works on obstetrics that the doctors read." With this foundation laid, defendant offered to prove by the witness that the ordinary period of gestation was about 280 days, and also offered to prove that in the opinion of the witness the child of the complainant was a fully developed nine-months' child at the time of its delivery. Both of these offers were denied by the trial court, and the complainant in rebuttal was permitted to introduce the evidence of Doctor Loughridge, who was the medical attendant of the Milford institution, and who testified that he had attended on complainant and her child a short time after its birth, and that at first he believed from the appearance of the child that it was a fully developed nine-months' child, but that perhaps a month afterwards, because of its slow growth, he became impressed with the idea that it

may have been of premature birth, probably of from seven and one-half to eight months' gestation. This testimony was admitted over defendant's objection that it was testimony in chief, and not proper rebuttal evidence.

Defendant requested the trial court to instruct the jury that, as the testimony of the complainant showed the birth of the child within seven months of the first alleged act of intercourse with defendant, the burden was upon the prosecutrix to establish the fact that the child was of premature birth. This instruction was refused, and in its stead the court gave the following direction: "The jury are instructed that one of the questions for the jury to determine in this case is whether the child was carried by its mother the usual time before its birth, or whether it was prematurely born. This question you must, of course, determine from the evidence, and if you find from the evidence that the child was carried by its mother for the full and usual period preceding its birth, instead of about seven months, as claimed by the plaintiff, then your verdict should be for the defendant. If, on the other hand, however, you find from the evidence that the child was not carried by its mother for the usual period preceding its birth, and only for the length of time testified to by the mother, and that the defendant is the father of said child, then your verdict should be for the plaintiff." We have stated all the objections called to our attention in defendant's brief collectively, because they are all closely related to each other, and all bear directly on the question as to whether or not the defendant has been properly adjudged guilty under the forms of law and established rules of practice governing this kind of proceedings. While it is true that a bastardy proceeding is civil rather than criminal in form, and that it is sufficient to establish the paternity of an illegitimate child by a preponderance of the evidence, or even by the uncorroborated testimony of the prosecutrix, yet this is a form of action fraught with serious consequences to the defendant, if he be adjudged guilty, because of the denial

of any substantial right vouchsafed to him in the statute fixing his liability, or because of an improper application of the rules of evidence under the issues.

It is indisputable from the record in this case that, if the defendant is the father of the complainant's child, as a result of the intercourse to which she testifies, the child must have been one of premature birth. In *Masters v. Marsh,* 19 Neb. 458, it was said by COBB, J., in delivering the opinion of the court: "The period of gestation may be safely stated as a general proposition at from two hundred and fifty-two to two hundred and eighty-five days. Allowing the greatest latitude of inquiry I think it should be confined to a period of time between the lowest number of days above stated and that of three hundred days before the birth of the child." This doctrine has been followed and quoted with approval in *Sang v. Beers,* 20 Neb. 365, and *Stoppert v. Nierle,* 45 Neb. 105.

Now under this rule established in these cases, the defendant in a bastardy proceeding is not permitted to show intercourse between complainant and other men outside of the period of gestation as above defined, unless such offer is coupled with proof of the premature birth of the child. Consequently, if complainant's testimony had tended to show intercourse with the defendant within the period of gestation, the court would have excluded any offer on the part of defendant to show her intercourse with other men during the month of June, 1904, because such period is less than 252 days before the birth of the child. Since this is a rule limiting the right of the defendant, we can see no reason why the reverse of the rule should not be applied to the complainant, and why, if she testifies to intercourse with defendant outside of the ordinary period of gestation, she should not be required to connect her own testimony with proof of the fact that the birth of the child was without the period. Under this view of the case, the testimony of Dr. Loughridge was evidence in chief, and the objection that it was not proper rebuttal evidence should have been sustained. In this

view of the case it seems to us that it was prejudicial error for the trial court to refuse an instruction, which clearly, unequivocally and emphatically placed the burden upon the complainant of showing that her child was of premature birth, because her right of recovery against the defendant depended absolutely on this fact. The instruction given by the trial court, as above set out, is equivocal in its terms and of doubtful phraseology in placing the burden of establishing the premature birth of complainant's child.

As, for the reasons just given, this case must be reversed and a new trial granted, we think it proper to dispose of the question of the admissibility of the testimony of Miss Kealy, which was offered and refused by the trial court. The evidence shows that this witness was the only person in attendance upon the complainant at the time of her accouchement. Consequently, if her experience as a nurse in obstetrical cases has sufficiently qualified her to give an opinion as to the period of gestation and as to the development of the child at its birth, her testimony would be of great importance to the defendant, if she should answer according to the offer. There is no hard and fast rule governing the particular qualifications of an expert, which will entitle such witness to give opinion evidence on a particular state of facts. The question of competency generally rests in the sound discretion of the trial judge. Much, however, depends upon the nature of the case in regard to which the opinion is asked. The rule is stated, perhaps as succinctly as possible, in Lawson, Expert and Opinion Evidence (1st ed.), 210, where it is said: "An expert may be qualified by study without practice, or by practice without study. but mere observation without either is insufficient." In Gillett, Indirect and Collateral Evidence, sec. 209, it is said, "The law does not fix any precise degree of knowledge which a witness must possess to give expert evidence, but, if he would so testify, he must have such a familiarity with the subject as qualifies him to express an

opinion." The logical conclusion drawn from these statements of the rule is that one offering an opinion as an expert on any particular fact must show a knowledge of the fact, gained either from practice or study, or both, which is beyond common information or mere observation. When such information is shown, the better practice is to admit the evidence, leaving its weight to be determined by the triers of the fact. Upon the foundation laid for the admission of the testimony of Miss Kealy, we think she shows herself clearly possessed of information in obstetrical cases, gleaned from a long practice as a nurse in attendance upon such cases, as well as from some reading of books written for the instruction of professional nurses, and that such information qualifies her to testify as to the probable period of gestation and as to whether or not, in her opinion, the child was a fully developed nine-months' child at the time of its birth. We think the weight of authority sustains this view. *Allen's Appeal*, 99 Pa. St. 196; *Evans v. People*, 12 Mich. 27; *Lund v. Masonic Life Ass'n*, 81 Hun (N. Y.), 287, 30 N. Y. Supp. 775; *Fairchild v. Bascomb*, 35 Vt. 398; *Pearson v. Zehr*, 138 Ill. 48.

For the reasons given, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES, C., concurs.

EPPERSON, C., not sitting.

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.

ALICE M. RHOADES, APPELLEE, V. GEORGE M. RHOADES, APPELLANT.

FILED MARCH 7, 1907. No. 14,563.

1. **Husband and Wife:** MAINTENANCE. A court of equity will entertain an action brought for alimony, and will grant the same, although no divorce or other relief is sought, where the wife is separated from the husband without her fault.

2. **Courts:** JURISDICTION. The district courts of this state are courts of general equity jurisdiction, and are not limited in the exercise of such jurisdiction by statute.

3. **Husband and Wife:** MAINTENANCE: PROCESS. Service by publication is authorized by section 77 of the code in an action by a wife for alimony and support of her child against the husband, who deserted his family and became a nonresident of the state, where the only relief sought is the appropriation of the real estate of the husband, situated in the county where the action is brought, to the payment of the amount that should be allowed for such alimony and support. Such an action is substantially one *in rem*, and the court has jurisdiction upon the completion of the service by publication to decree the relief sought.

4. ———: ———: JURISDICTION. Jurisdiction to subject property in such an action, within the territorial jurisdiction of the court, to its judgment may be acquired by the service of process by publication and the placing of the property in the hands of a receiver.

5. ———: ———: ———. In such an action, residence of the wife in the county where the property of the husband is situated is not required.

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

John C. Stevens, for appellant.

N. P. McDonald, contra.

EPPERSON, C.

The question presented by this appeal is one of some importance, and has not heretofore been passed upon by this court. The facts are substantially as follows: July

1, 1884, the plaintiff, Alice M. Rhoades, and the defendant George M. Rhoades, were married in Adams county, Nebraska, where they then resided. One child, born June 4, 1885, is the issue of their marriage. The parties moved to Hall county, this state, in 1886, and continued to live together as husband and wife until June, 1887, when Mrs. Rhoades left her husband because of his extreme cruelty, and has since justifiably lived apart from him. Shortly after the separation, defendant moved from Nebraska, and at all times since has been a nonresident of the state, and his whereabouts are unknown to plaintiff. Defendant is the owner of an undivided one-half interest in a certain quarter section of land in Hall county. In 1901 plaintiff instituted this action in the district court for that county upon notice by publication, alleging the above facts, and others, which would entitle her to a divorce, and prayed that the court determine a reasonable sum due from defendant for her maintenance and support without divorce, and that the interests of defendant in the Hall county land be subjected to the payment of such sum; that a receiver be appointed to take charge of the interests of the defendant in said premises and collect the rents and profits arising therefrom; and that plaintiff have such other and further relief as may be just and equitable. Defendant filed a special appearance, and objected to the jurisdiction of the court. His objections were overruled, and, upon his refusal to plead further, trial was had and a judgment entered for plaintiff. The court found the facts substantially as above stated, and, further, that plaintiff and her child were entitled to maintenance and support out of the rentals of defendant's said property in the sum of $500 a year; that the temporary receiver appointed at the commencement of the action had taken possession of the interests of defendant in said real estate, and the tenant in possession had attorned to said receiver and paid to him the share of defendant in the rents and profits therefrom. It was adjudged and decreed by the court that the undivided interest of defendant in the Hall

county land be impounded and the rents and profits devoted to the maintenance and support of the plaintiff; that N. S. Taylor be appointed receiver to take possession of said property and manage the same and collect the rents and profits arising therefrom, together with the rents and profits which have come into the hands of the temporary receiver from said premises, and that he distribute the same: (1) To the payment of the costs that may be adjudged against the plaintiff in this suit; (2) to the payment of such reasonable fees as the court may determine for his services as such receiver, and one-half of the taxes levied and assessed against said premises, and one-half of the necessary repairs and improvements thereon; (3) that the remainder be paid, as collected, to the plaintiff herein. Defendant appeals.

The sole question for determination is: Did the district court have jurisdiction, upon service by publication, to subject the interests of the nonresident husband in the Hall county land to the maintenance and support of his wife and child?

1. It has been held that a court of equity will entertain an action brought for alimony, and will grant the same, although no divorce or other relief is sought, where the wife is separated from her husband without her fault. *Earle v. Earle,* 27 Neb. 277; *Cochran v. Cochran,* 42 Neb. 612; *Price v. Price,* 75 Neb. 552. And it is clear that the district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute. *Cochran v. Cochran, supra.* However, the question presented by this record was not involved in the cases above cited. It is here sought, under the general equity powers of the court, to appropriate property of a nonresident, which is situated within the jurisdiction of the court, to the maintenance of his wife and child.

2. It is urged that service by publication is not authorized by statute in cases of this kind. Section 77 of the code provides that service may be made by publication "in

actions brought against a nonresident of this state, or a foreign corporation, having in this state property or debts owing to them, sought to be taken by any of the provisional remedies. or to be appropriated in any way." It is apparent that the legislature intended the clause, "to be appropriated in any way," to apply to actions similar to the case at bar. It cannot be claimed that the clause is limited to actions where an appropriation of property is sought by provisional remedies. The preceding language includes all cases where property is sought to be thus taken, and hence the expression, "to be appropriated in any way," could serve no useful purpose in the statute if construed to refer only to actions where an appropriation of property is sought to be taken by provisional remedies.

3. Neither can it be successfully contended that there was no "appropriation," or that the property was not brought within the control of the court. "Control of the property by the court before the rendition of the judgment is essential to the jurisdiction to render it; and if rendered without such jurisdiction, it cannot be made valid by the subsequent seizure of property of the defendant. But, we do not understand it is necessary, in order to bring the property under the control of the court, that it shall be actually taken on attachment or other writ. Any authorized act by which the court takes charge of property, or asserts its control over it, is sufficient within the meaning of the rule, for the purpose of jurisdiction." *Benner v. Benner,* 63 Ohio St. 220. In *Murray v. Murray,* 115 Cal. 266, 37 L. R. A. 626, it was said: "According to the common experience of mankind, the owner of property keeps some oversight of it, wherever situated, and will probably be apprised of the seizure thereof, and so warned of the purpose of the seizure. To accomplish this object the taking of property into the possession of a receiver is at least as well adapted as the similar taking by process of attachment, and it is common practice to apply property which has been attached in the course of an action

in personam against a nonresident to the satisfaction of the judgment obtained, although no personal service of summons has been effected. Attachment is not the only means by which the court may acquire control of the property of the absentee defendant, so as to impress the action, as to such property, with the jurisdictional characteristics of a proceeding *in rem.*" *Benner v. Benner* and *Murray v. Murray, supra,* are cases similar to the one at bar. See authorities cited in those decisions. A temporary receiver was appointed at the commencement of this action, who took possession of the land in controversy and collected the rents and profits therefrom. We are therefore of opinion that there was a sufficient seizure of the property to bring it within the control of the court when the judgment was rendered.

4. This court has held that service by publication is sufficient in proceedings substantially *in rem. Fowler v. Brown,* 51 Neb. 415; *Anheuser-Busch Brewing Ass'n v. Peterson,* 41 Neb. 897. But it is urged that this action is one *in personam,* and the court acquired no jurisdiction by constructive service. It is fairly well settled in this state that an action for alimony, in the strict sense of the term, is a proceeding *in personam,* and personal service must be had, or an appearance made, to authorize a personal judgment against the defendant. *Dillon v. Starin,* 44 Neb. 883, and cases cited. We concede the force of the rule above stated, but it is inapplicable to the facts of this case. Williams, J., answering a similar contention in *Benner v. Benner, supra,* said: "Cases are cited to sustain this contention which hold that, although *ex parte* divorce may be obtained on constructive service, alimony cannot be decreed unless the defendant appear, or has been served with process within the jurisdiction of the court. So far as we have examined them, these do not appear to be cases where the defendant had property within the jurisdiction of the court, which it was sought to reach, and have appropriated to the support of the wife, but those only where a general personal judgment for

alimony was rendered, or sought." No case has been called to our attention holding that an action cannot be maintained, on service by publication, by a wife against her nonresident husband to appropriate property, situated within the county where the action was brought, to the payment of the amount that should be allowed for alimony and support. Such action is substantially one *in rem*, and jurisdiction to subject property within the territorial jurisdiction of the court to its judgment may be acquired by due service of process by publication and the placing of the property in the hands of a receiver.

The supreme court of the United States, speaking through Mr. Justice Field, in *Pennoyer v. Neff*, 95 U. S. 714, said: "So the state, through its tribunals, may subject property situated within its limits owned by nonresidents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when nonresidents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the nonresidents situated within its limits that its tribunals can inquire into the nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresident have no property in the state there is nothing upon which the tribunals can adjudicate."

Benner v. Benner, supra, is a case in point. The facts in that case are quite similar to those in the case at bar, and the supreme court of Ohio use expressions therein which thoroughly fit the facts of the case in hand: "Service by publication is authorized by section 5048 of the Revised Statutes, in an action by a wife for alimony and support of her child against the husband who deserted his family and became a nonresident of the state, where

the only relief sought is the appropriation of real property of the husband situated in the county where the action is brought to the payment of the amount that should be allowed for such alimony and support. Such an action is substantially one *in rem;* and the court has jurisdiction at its commencement to grant a preliminary injunction preventing the disposition of the property by the defendant pending the suit, and on completion of the service by publication to decree the relief sought." The statute construed contains provisions similar to section 77 of the code, *supra.* In the opinion it was further said: "In suits for divorce, it is conceded, the court acquires jurisdiction by constructive service on a nonresident defendant, to inquire into the residence of the plaintiff, and the existence of the marriage relation, as well as the grounds of divorce, before proceeding to decree; and this is necessarily so, for residence of the plaintiff within the jurisdiction of the court is an essential fact, and the existence of marriage must be established before there can be a judgment for its dissolution. The jurisdiction in such cases is supposed to rest upon the ground that the proceeding relates to and determines the personal status of the parties. But that is equally so in cases like the one before us, and we can discover no sufficient reason why, in such a case, jurisdiction may not be conferred by a like mode of service to inquire into and determine the same facts. The plaintiff, in her action below, did not seek nor obtain, a personal judgment against the defendant. She and her child were residents of the county in which her suit was brought. The specific property which she asked to have subjected to her support was situated in that county, and she sought no other relief than its appropriation, or such part of it as might be necessary, for that purpose, in fulfilment of the defendant's obligation to her in that behalf. The action and judgment were substantially *in rem,* in the sense that their direct object was to reach and dispose of property within the jurisdiction of the court."

Another decision in point is *Murray v. Murray, supra,* wherein it was held: "A receiver may be appointed at the beginning of an action by a deserted wife to set aside a transfer by her husband of his property to defeat her rights to maintenance under the general equity power of the court under the same circumstances that the appointment would be made in a suit by a creditor to set aside a transfer fraudulent as to him. Jurisdiction to subject property within the territorial jurisdiction of the court to its judgment may be acquired by due service of process by publication and the placing of the property in the hands of a receiver." (37 L. R. A. 626.)

Hanscom v. Hanscom, 6 Colo. App. 97, 39 Pac. 885, holds to the same doctrine. This language is used in the opinion: "The plaintiff seeks to charge her husband's property with her alimony, and to set aside conveyances made in fraud of her rights. The suit is therefore a proceeding *in rem,* within the meaning of the statute; and the principal defendant being beyond the jurisdiction of the court, so that personal service of its process could not be had, it was proper to cause publication of the summons to be made, and by virtue of such publication the court became invested with jurisdiction to render such judgment against the property as the facts proved might warrant." See, also, *Osgood v. Osgood,* 153 Mass. 38; *Blackinton v. Blackinton,* 141 Mass. 432, 55 Am. Rep. 484.

It must be borne in mind that the object of the proceeding is to enforce a duty which the husband owes to his family, not by seeking a personal judgment to be enforced by execution, but by proceeding against his property after the defendant puts it beyond the power of the plaintiff to procure a personal judgment against him. It is not the judgment for alimony which creates the husband's liability. The judgment is but an adjudication determining the liability which arose by reason of the marital relation. In actions for divorce, jurisdiction upon a nonresident husband may be had by publication to determine the personal status of the parties and the right to

a divorce. This is also required in the case at bar, and no reason exists why jurisdiction might not likewise be had to inquire into the same facts, and, if found favorable to plaintiff, to grant her the relief sought. There is no remedy at law, and, were we to hold that jurisdiction could not be acquired by publication a husband with an abundance of property within the jurisdiction of the court could by absconding avoid his duty to support his family. This duty exists independently of statute, and should be enforced by the courts against his property within its jurisdiction. In *Eldred v. Eldred,* 62 Neb. 615, wherein the wife after divorce sought to subject the husband's property to her support, it was said, in reference to a judgment for alimony obtained by her in an Illinois court: "But the Illinois decree having been rendered upon constructive service and without any appearance on behalf of the defendant, the portion of the decree relating to alimony perhaps is of no validity save as to the property within the jurisdiction of the court pronouncing it." No authority has been cited to the effect that a wife cannot maintain an equitable action, on service by publication, to subject the property interests of a nonresident husband to her support and maintenance. As was said by the supreme court of Ohio in *Benner v. Benner, supra:* "There is a strong tendency on the part of the courts to uphold their jurisdiction in cases of this kind."

5. Defendant's final argument is that, at the time this action was commenced, plaintiff resided in Adams county, and was not a resident of Hall county, where the real estate of her husband is situated, and, hence, *Benner v. Benner, supra* (a case where the wife resided in and brought suit in the county where the property was located), is inapplicable. Were this an action for divorce, defendant's contention would be sound. The action being in equity and seeking to impound the defendant's property, jurisdiction does not depend upon the domicile of the plaintiff, but upon the location of the property within the jurisdiction of the court. We see no reason for holding

that residence of the plaintiff is required in the county where the suit is brought in actions of this nature more than in other actions wherein general equitable relief is sought. No other court had original jurisdiction. Section 51 of the code provides, in part: "All actions for the following causes must be brought in the county in which the subject of the action is situated. * * * First: For the recovery of real property or of an estate or interest therein." Section 59 provides that actions against a nonresident may be brought in any county in which there may be property or debts owing to the defendant. Under the provisions of our statute, *supra,* the only court having jurisdiction of this case was the court wherein the action was instituted, and defendant's contention is devoid of merit.

We are convinced that the district court did not err in overruling the special appearance, 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.

HENRY KLOKE, APPELLANT, V. THEODORE WOLFF, APPELLEE.

FILED MARCH 7, 1907. No. 14,675.

Homestead: LEASE. A lease of a homestead for a period of five years is a conveyance within the meaning of section 6203, Ann. St., and is void unless executed and acknowledged by both husband and wife.

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

T. M. Franse and *P. M. Moodie,* for appellant.

Hunker & Krake, contra.

EPPERSON, C.

On October 10, 1905, the plaintiff herein and his wife resided upon the land in controversy as their homestead. Plaintiff on that date entered into a written contract wherein he leased the premises to the defendant for a period of five years, beginning March 1, 1903. Plaintiff's wife did not join in the lease, neither was its execution acknowledged. About March 1, 1903, plaintiff and his family moved from the farm, and defendant took possession thereof. This is a forcible entry and detainer suit instituted by plaintiff to recover possession of the premises so leased to defendant. The district court's judgment was for defendant. The facts are undisputed, and the only question presented is as to the validity of the lease.

Section 6203, Ann. St., provides: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." It is a well-established rule that a conveyance of a homestead, unless executed and acknowledged by both husband and wife, is absolutely void. *Interstate Savings & Loan Ass'n v. Strine,* 58 Neb. 133; *France v. Bell,* 52 Neb. 57; *Horbach v. Tyrrell,* 48 Neb. 514; *Blumer v. Albright,* 64 Neb. 249; *Weatherington v. Smith,* 77 Neb. 363. A lease of the homestead is a conveyance within the meaning of section 6203, *supra.* The lease in question was therefore void in its inception, and defendant acquired no rights thereunder.

Defendant contends, however, that, as the plaintiff herein occupied the premises in controversy as a homestead prior to the enactment in 1877 of the provisions now contained in section 6203, *supra,* his right to convey without his wife joining became vested, and therefore the lease is valid, citing *Gladney v. Sydnor,* 172 Mo. 318, 60 L. R. A. 880. A discussion of this proposition is unnecessary here. Plaintiff married his present wife in

1883. By this marriage, and the occupancy of the land in controversy, his homestead rights were fixed under the present law.

The district court should have directed a verdict for plaintiff as requested; and we recommend that the judgment be reversed and the cause remanded for further proceedings.

AMES and OLDHAM, CC., concur.

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

REVERSED.

ANTON DREDLA, APPELLANT, V. THOMAS PATZ ET AL., APPELLEES.

FILED MARCH 7, 1907. No. 14,709.

1. **Pleading:** ESTOPPEL. The action was ejectment, the plaintiff claiming a legal estate in, and a right to, the possession of the premises. The answer alleged facts constituting adverse possession of the premises for more than ten years prior to the commencement of the action, but contained no express denial of plaintiff's title. The case was tried without objection made in any way to the sufficiency of the answer to put in issue the plaintiff's legal title. *Held*, That, if the facts set out in the answer were not in themselves a sufficient denial of the plaintiff's title, the further fact that the case was tried on its merits, without objection made by the plaintiff, and on the theory that his legal title was put in issue by the pleadings, should now estop him from raising the question.

2. **Adverse Possession:** EVIDENCE. The payment of taxes by the occupant for more than ten years, in connection with the actual use and cultivation of the premises, is a strong circumstance tending to show the adverse holding of such occupant, and sufficient to support a finding by the jury that the party was in possession under a claim of ownership.

3. **Evidence** examined, and *held* sufficient to establish title in the defendant by adverse possession.

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

Hastings & Ireland, for appellant.

Foss & Brown, contra.

DUFFIE, C.

Dredla, the plaintiff in error, commenced this action in ejectment to recover possession of lots Nos. 11, 12, block 109, in the city of Crete, Nebraska. The defendants filed separate answers, alleging in appropriate terms that Mrs. Patz had acquired the title to said lots by prescription, having been in the open, notorious and exclusive possession thereof for more than ten years prior to the commencement of the action, under a claim of ownership. The jury returned a verdict in favor of the defendants, upon which judgment was entered, and the plaintiff has brought the action to this court on appeal.

The evidence is undisputed that from 1884 up to the spring of 1888 Mrs. Patz pastured her cow upon the lots in question, which during that time were uninclosed and unimproved city lots. In the spring of 1888 the Patz family built a house in the same block in which the lots in question are located, and during the spring Mrs. Patz caused the lots in dispute to be broken up, and from that time down to the commencement of the action she has been in exclusive possession, cultivating the lots as a garden. In June, 1895, she paid the taxes then due upon the lots for 1893 and 1894 by purchase thereof at tax sale, and thereafter she continued to pay the taxes, except for one year, that of 1898, when the taxes were paid by some other party prior to her tender of taxes to the county treasurer. The district court instructed the jury that "the possession asserted by the defendant from 1884 to the spring of 1888 by pasturing her cow upon the premises without inclosure, and without improvement thereon, and without payment of taxes, did not constitute such possession as would entitle her to assert any right in

the premises based on such possession." The principal question therefore is: Was the open, exclusive and notorious possession and cultivation of the lots by Mrs. Patz, together with the payment of taxes, sufficient in law to constitute adverse possession giving her title by prescription? It is urged by the appellant that, as the defendants' answer contained no denial of his title, such title was admitted, and that he was entitled to an instructed verdict. To this we cannot agree. First, the action was tried upon the merits without objection and without any claim made in the trial court that the pleadings did not put in issue the plaintiff's title; and, second, we believe that the statement of facts in the defendant's answer showing adverse possession for more than ten years was in itself a denial of the plaintiff's title. It is further urged against the judgment appealed from that adverse possession can be established only by showing possession taken under color of title or claim of right, and that defendant in error has failed in her evidence in this respect.

In *Omaha & Florence L. & T. Co. v. Barrett,* 31 Neb. 803, it is said: "Color of title is not essential to adverse possession. It is the actual, continuous, open, notorious, exclusive, adverse possession that ripens into an absolute title. Payment of taxes by the occupant for a series of years is a strong circumstance, in connection with others, tending to show the adverse holding and the abandonment of the property by the holder of the title." This case has been followed and approved in numerous subsequent cases, and the rule is now firmly established in this state that neither color of title nor claim of right to the premises of which possession is taken is requisite in order to constitute an adverse possession. In *Knight v. Denman,* 64 Neb. 814, it is said: "Where such occupant enters originally without color of title or claim of right, and the acts relied on to show entry and occupation were consistent with a mere intention to trespass from time to time until interfered with by the true owner, his testi-

mony that he intended to take possession and hold and occupy as owner, uncorroborated by acts necessarily indicating such intention, is not sufficient to require a finding in his favor." With this rule we are in full accord, as shown by our subsequent holding in *Bush v. Griffin*, 76 Neb. 214.

In the instant case there was more than the testimony of the defendant in error that she occupied the lot as owner. From June 12, 1895, she asserted such ownership openly by the payment of taxes as they accrued from year to year, with the exception of the year 1898, when they were paid by another without her knowledge or consent, and prior to the time that she tendered payment to the treasurer. Such payment shown upon the public records of the county is, we believe, such corroboration of her claim of title and ownership as the rule in *Bush v. Griffin* and *Knight v. Denman, supra*, requires. Some claim is made that Mr. Patz, the husband, stated on cross-examination that his wife made no claim of title until after she had been in possession ten years, and further that he entered into negotiations with the appellant to discover the owner of the legal title and to purchase the same. As we understand the statement of Mr. Patz, it is to the effect that his wife did not claim to be possessed of full title to the lots until she had been in possession for ten years, and it is not shown that the wife authorized her husband to negotiate for the purchase of the legal title or that she was aware of his doing so. If unauthorized statements or acts made by the husband in derogation of his wife's title were admissible at all, we do not think the evidence sufficient to overcome the general finding of the jury, under instructions as favorable to plaintiff as the law requires, that for more than ten years prior to the commencement of this action the defendant, Mrs. Patz, held adversely to the plaintiff.

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.

MICHAEL ENDERS ET AL., APPELLANTS, V. JOHN FRIDAY, MAYOR, ET AL., APPELLEES.*

FILED MARCH 7, 1907. No. 14,906.

1. Cities: VACATION OF STREETS. Where a city council, acting under the provisions of section 8739, Ann. St., vacates a street or any part thereof, and by ordinance declares such vacation to be expedient for the public good, and all the provisions of the statute are observed, such action by the council has all the force and effect of a judgment, and irregularities not jurisdictional in their character will not invalidate the vacation. *Village of Bellevue v. Bellevue Improvement Co.*, 65 Neb. 52.

2. ———: ———: REVIEW. The courts will not ordinarily inquire into the motive of a city council in its exercise of a discretionary power conferred upon it by the legislature.

3. ———: ———: DAMAGES. Where part of a street is vacated, the general rule is that only those property owners whose property abuts upon the vacated part of the street, and who are thus cut off from access to their property, are entitled to damages on account of such vacation.

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

William V. Allen and *Isaac Powers,* for appellants.

M. D. Tyler, E. P. Weatherby, Mapes & Hazen and *W. M. Robertson, contra.*

DUFFIE, C.

The petition in this case is quite lengthy. The material facts are the following: The plaintiffs are the owners of real estate abutting on Philip avenue in the city of Nor-

* Pending on error in the supreme court of the United States.

folk, and brought this action to enjoin the defendants, as the mayor and council of said city, from passing an ordinance vacating a portion of said street for the purpose of allowing the Chicago & Northwestern Railway Company to construct a depot. After describing the property owned by the plaintiffs, and alleging "that all of said real estate borders upon and is adjacent to that part of Philip avenue in said city which lies west of the east line of the depot grounds of the Chicago & Northwestern Railway Company, more particularly described as a piece or parcel of land commencing 132 feet west of the west line of Sixth street, and east of the west line of the right of way of the Chicago & Northwestern Railway Company," the petition recites that in February, 1906, the defendants, constituting the common council of the city of Norfolk, made and entered into an unlawful agreement with the Chicago & Northwestern Railway Company, whereby it was agreed that they would, as speedily as possible, pass an ordinance to vacate so much of Philip avenue as lies west of the east line of the depot grounds of said Chicago & Northwestern Railway Company, commencing 132 feet west of the west line of Sixth street, and east to the west line of the right of way of said railway company, and surrender the exclusive possession and control thereof to said company, and close up and keep forever closed said street at said place, the company in consideration thereof to immediately construct on its land, adjacent to said part of Philip avenue thus to be vacated, a depot costing the sum of $15,000, and that the ordinance in question was introduced into the common council of the city in fulfilment of this agreement. It is further alleged that, unless the court interpose, the defendants will proceed to the passage of said ordinance and surrender the vacated portion of said street to the railway company for its exclusive use and benefit without paying, or causing to be paid, to the plaintiffs, or any of them, or to any persons damaged by such vacation, the damage caused thereby; that no provision whatever has

been made, nor do the defendants intend to make any provision, for the payment of such damages as may accrue to the plaintiffs or others. It is alleged that the vacation of that portion of Philip avenue above described will depreciate the value of the property owned by the plaintiffs to the extent of 20 per cent., and that defendants do not purpose or intend to make any provision for the payment of such damages. The petition further proceeds to show that valuable church, school and other buildings have been erected on said street, and that such vacation will incommode and endanger pupils attending such schools; that it will injure, inconvenience and discommode the people of the city; that the ground is not needed by the Chicago & Northwestern Railway Company for depot grounds or other purposes; that a large number of property owners of the city have remonstrated against the vacation; and that, unless restrained, the defendants will pass and approve the ordinance without its being read on three separate days, as required by law, and without giving the plaintiffs, or other property holders or taxpayers of said city, any warning or notice or affording them an opportunity to appear and oppose and contest the same. The plaintiffs further aver that they have no speedy and adequate remedy at law to prevent the damages and injuries about to be committed, and pray for an injunction restraining the defendants from passing the ordinance and turning the vacated portion of the street over to the railway company. A temporary injunction was allowed, and on April 2, 1906, defendants filed an answer, to which a reply was filed April 14. On the case being called for trial, a demurrer *ore tenus* was interposed to the petition and sustained by the district court, and an order entered dissolving the temporary injunction, and judgment for costs rendered against the plaintiffs.

While the petition alleges that all the real estate described in the petition "borders upon and is adjacent to that part of Philip avenue in said city which lies west of the east line of the depot grounds of the Chicago &

Northwestern Railway Company, more particularly described as a piece or parcel of land commencing 132 feet west of the west line of Sixth street, and east of the west line of the right of way of the Chicago & Northwestern Railway Company, there is nothing to indicate how far west of the vacated part of the street the lots of the plaintiff are located, and no statement whatever that any of the lots abut upon that part of the street proposed to be vacated, so as to obstruct access thereto or egress therefrom.

From this statement it will be seen that the only question presented to us for determination is the sufficiency of the statements in the petition to entitle the plaintiffs to any relief. It is conceded that the city of Norfolk is a city of the second class, having less than 5,000 inhabitants. Section 8739, Ann. St., defines the powers of the council over the streets of the city, and is in the following language: "To open, widen, or otherwise improve or vacate any street, avenue, alley, or lane within the limit of the city or village, and also to create, open and improve any new street, avenue, alley or lane; Provided, that all damages sustained by the citizens of the city or village, or of the owners of the property therein, shall be ascertained in such manner as shall be provided by ordinance; Provided further, that whenever any avenue, street, alley, or lane shall be vacated, the same shall revert to the owners of the adjacent real estate, one-half on each side thereof." By this section the city council is invested with discretionary powers relating to the opening, improving or vacation of streets and alleys within the city limits, and as a general rule, where the proceedings are regular and fraud is not shown, the courts are not authorized to interfere with such discretion. This court has gone to the extent of declaring that the action of a village board, under the provisions of the section above quoted, in vacating a street, where, as in the case under consideration, the ordinance declares such

vacation to be expedient and for the public good, and where all the provisions of the statute are observed, has all the force and effect of a judgment, and that only such irregularities as are jurisdictional in their nature will render the proceedings void. *Village of Bellevue v. Bellevue Improvement Co.*, 65 Neb. 52. It was further held in that case that, even if the vacation proceedings are had at the instance and request and primarily for the benefit of certain owners whose property would be benefited by such vacation, this would not affect the validity of the proceedings; that the motive of the board in vacating a street or alley would not ordinarily be inquired into by the courts.

The cited case is apparently decisive of every question relied on by the appellants to reverse the action of the district court, except only the question arising from the allegation in their petition that no steps had been taken to ascertain or pay them damages which would result to their property on account of the vacation. This requires us to determine what property owners in the city or village are entitled to damages on account of the vacation of a street, or part of a street, upon which their property abuts. The general rule is well stated in Elliott, Roads and Streets (2d ed.), sec. 878, in the following language: "Owners of lands abutting upon neighboring streets, or upon other parts of the same street, are not, however, entitled to damages, notwithstanding the value of their lands may be lessened by its vacation or discontinuance." To the same effect are *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625; *Kimball v. Homan*, 74 Mich. 699; *Castle v. County of Berkshire*, 11 Gray (Mass.), 26; *City of East St. Louis v. O'Flynn*, 119 Ill. 200; *Dantzer v. Indianapolis Union R. Co*, 141 Ind. 604; *State v. City of Elizabeth*, 54 N. J. Law, 462; *Meyer v. Richmond*, 172 U. S. 82. And the same rule, while not definitely announced, is recognized in the concluding part of the opinion in *Lindsay v. City of Omaha*, 30 Neb. 512. There is no allegation in plaintiffs' petition that

any of the property owned by the plaintiffs abuts upon that part of the street proposed to be vacated. It may be, as urged by the plaintiffs, that they are damaged in a greater degree than other property owners in the city; but the vacation would not deprive them of access to their property and occasion such special damages as entitles them to an action against the city or to restrain the proposed vacation. In *Davis v. County Commissioners,* 153 Mass. 218, it is said: "The general doctrine is familiar, that, ordinarily one cannot maintain a private action for a loss or damage which he suffers in common with the rest of the community, even though his loss may be greater in degree." In *Heller v. Atchison, T. & S. F. R. Co., supra,* it is said: "Where a party owns a lot which abuts upon that portion of the street vacated so that access to the lot is shut off, it is clear that the lot owner is directly injured and may challenge the action. The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to his lot, suffers an injury which is not common to the public; but, in the case at bar, access to plaintiff's lots is in no manner interfered with. The full width of the street in front and on the side is free and undisturbed, and the only real complaint is, that by the vacating of the street away from her lots the course of travel is changed. But this is only an indirect result." The case of *City of East St. Louis v. O'Flynn, supra,* is well considered and answers fully every contention made by the appellants in this case. After showing that the vacation of a street was not taking or damaging property for a public use, the court takes up a clause in the Illinois statute, similar to ours, providing for the payment of damages when such vacation is made. We quote from this part of the opinion: "It therefore seems plain, if plaintiff can recover at all, it must be under that provision of section 1 of the act in force July 1, 1874, in relation to 'vacation of streets, alleys and highways,' which provides, 'when property is damaged by the vaca-

tion or closing of any street or alley, the same shall be ascertained and paid as provided by law.' The rule of law on this subject was stated by this court in *City of Chicago v. Union Building Ass'n,* 102 Ill. 379, where it was said, for any act obstructing a public and common right no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree. Accordingly, on the authority of that case, it was held in *Littler v. City of Lincoln,* 106 Ill. 353, the rights or privileges of other proprietors in the plat, which the statute protects, are necessarily legal rights and privileges, and such parties cannot, therefore, be affected by the closing of streets not adjacent to their property, nor directly affording access thereto and egress therefrom. The facts of the case being considered bring it precisely within the principle of the cases cited. Here, plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. The access to and egress from his lot are not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of his property remain open as before, affording the same access to and egress from it."

The facts in the case we are considering are in all respects, if we understand the record, the same as the facts in the cases above quoted from, and the rule in this state, as clearly indicated in *Lindsay v. City of Omaha, supra,* is the same as that announced by the supreme court of Illinois and by the courts generally throughout the country. In our opinion, the plaintiff's petition fails to state a cause of action, and the district court did not err in sustaining the demurrer interposed thereto.

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.

OTOE COUNTY, APPELLANT, V. LANCASTER COUNTY, APPELLEE.

FILED MARCH 7, 1907. No. 14,585.

1. **Paupers:** LIABILITY BETWEEN COUNTIES. The liability of one county to another for relief furnished by the latter to a pauper chargeable in the former is purely statutory.

2. ———: ———. In an action to enforce such liability, one fact essential to a recovery is that the relief was furnished to a person chargeable as a pauper.

3. ———. A person is chargeable as a pauper under the statute, when he is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood, and has no kindred in the state liable under the statute for his support, or whose kindred within the state are of insufficient ability, or fail or refuse to maintain him.

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

A. A. Bischof and *T. F. Roddy,* for appellant.

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

ALBERT, C.

In this case the county of Otoe sought to recover of the county of Lancaster the amount of certain expenditures made by the former in caring for an alleged pauper, for whose support it is claimed the defendant county was primarily liable. The case was submitted to the court on an agreed statement of facts, and so much thereof as bears on the questions presented by the appeal is as follows: "It is admitted by both parties that the plaintiff and defendant are each municipal corporations existing under the laws of the state of Nebraska as organized counties of said state. It is further admitted on behalf of Lancaster county that on the 5th day of March, 1904, one Harry Wilcox, for the period of 30 days immediately preceding the said 5th day of March, 1904, was a resident of and re-

sided in said Lancaster county, but had not during the time of his residence in Lancaster county been a pauper in Lancaster county or a public charge; that on said day he was walking from the county of Lancaster into and across the county of Otoe, and was struck by a railroad train and badly injured; that the proper authorities of the county of Otoe took the wounded man into their care, and gave him proper care and provided for his medical attendance, for nurse, and that afterwards said Harry Wilcox died and was buried by the authorities of the county of Otoe, they furnishing his coffin and attending to his funeral." Judgment was given for the defendant and the plaintiff appeals.

It is conceded, as it must be, that the liability of one county to another for the support of a pauper is purely statutory, and is based on the following sections of chapter 67, Comp. St. 1905:

"Sec. 11. Any person becoming chargeable as a pauper, in this state, shall be chargeable as such pauper in the county in which he or she resided at the commencement of the thirty days immediately preceding such person becoming so chargeable.

"Sec. 12. If any person shall become chargeable in any county in which he or she did not reside at the commencement of the thirty days immediately preceding his or her becoming so chargeable, he or she shall be duly taken care of by the proper authority of the county where he or she may be found; and it shall be the duty of the clerk of the county commissioners to send a notice by mail to the clerk of the county commissioners of the county in which such pauper resided, as before stated, that such person has become chargeable as a pauper, and requesting the authorities of said county to remove the said pauper forthwith, and to pay the expense accrued in taking care of him or her.

"Sec. 13. If said pauper, by reason of sickness or disease, or by neglect of the authorities of the county in which he or she resides, or for any other sufficient cause, cannot

be removed, then the county taking charge of such individual may sue for, and recover from the county to which said individual belongs, the amount expended for and in behalf of such pauper, and in taking care of the same."

These sections provide for the relief of persons chargeable as paupers, and for no others. It is clear, therefore, that in order to fasten a liability upon the defendant it was incumbent upon the plaintiff to show, among other things, that the person to whom it furnished the relief was chargeable as a pauper. Section 1 of the chapter cited provides that every poor person, who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by certain designated relatives, if of sufficient ability to support him. Section 2 provides the order in which such relatives shall be liable. Section 3 is as follows: "When any such poor person shall not have any such relatives in any county in this state as are named in the preceding sections, or if such relatives shall not be of sufficient ability, or shall fail or refuse to maintain such pauper, then the said pauper shall receive such relief as his or her case may require, out of the county treasury, in the manner hereinafter provided." The term "poor person," as used in this section, is the equivalent of pauper, and includes all persons without means, who are unable on account of some bodily or mental infirmity, or other unavoidable cause, to provide for themselves. It may be said, therefore, that a person is chargeable as a pauper, under our statute, when he is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood, and has no kindred in the state liable under the statute for his support, or whose kindred within the state are of insufficient ability, or fail or refuse to maintain him. Tested by the definition just given the facts upon which the case was submitted are insufficient to show that the relief furnished by the plaintiff was furnished to a person chargeable as a pauper in the defendant county or in any other, for that matter,

because there is nothing to show that he was without means, or without relatives in the state, liable under the law for his support and able and willing to provide for him.

We do not wish to be understood as holding that our poor laws make provision for the relief of such persons only as fall within the above definition. Section 14 expressly provides for the relief of "any nonresident, or any other person not coming within the definition of pauper," who "shall fall sick in any county in this state, not having money or property to pay his or her board, nursing, and medical aid." Whether the county furnishing aid to such person would have recourse on the county of his residence is a question we are not called upon to decide, because the facts in this case do not bring it within that section, it not appearing that the person to whom the relief was furnished was without means to provide for his own wants. As already stated, the plaintiff is seeking to enforce a purely statutory liability, and, having failed to bring its case within the statute, a recovery was properly denied.

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

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

AFFIRMED.

WILLIAM FENIMORE, APPELLANT, V. EMERY WHITE, APPELLEE.

FILED MARCH 7, 1907. No. 14,667.

1. Landlord and Tenant: DECREE FOR POSSESSION: REMOVAL OF FIXTURES. In a proper proceeding it was found that the plaintiff was entitled to the immediate possession of certain premises held by the defendant; that the defendant held the same as tenant of the plaintiff; and that during his tenancy the defendant had erected certain fixtures on the premises of the

value of a certain sum. A decree was entered which provided that, in case the defendant should fail for 20 days to surrender possession, a writ of ouster should issue; that within that time the plaintiff should have the option to pay the defendant the value of the fixtures as found by the court, and that upon his failure to do so the defendant might remove them within 20 days thereafter, and within 40 days from the date of the decree. *Held:* (1) That the fixing of the time for the removal of the fixtures was not intended to abridge the right of the defendant to remove the fixtures at any time while he was in possession, but to extend his right to remove them in case he surrendered possession within the time fixed by the decree for the surrender thereof. (2) That the defendant's right to remove the fixtures continued so long as he remained in possession of the premises.

2. Attorney and Client: UNAUTHORIZED ACTS: RATIFICATION. Evidence examined, and *held* to show a ratification by the client of an alleged unauthorized agreement made by his attorney.

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

H. M. Sullivan, for appellant.

N. T. Gadd and *C. L. Gutterson, contra.*

ALBERT, C.

On the 16th day of January, 1896, Emery White, whom we shall call the defendant, was the owner of certain real estate in Custer county, and on the same day conveyed the same by warranty deed to Joseph Fenimore, the plaintiff. At the time of the conveyance the parties entered into a separate agreement in writing, whereby the defendant was given the privilege of redeeming from the said sale upon the payment of a specified sum within two years. The agreement further provided that the defendant should have free possession for the year 1896, but on the first day of March, 1897, was to surrender possession to the plaintiff, who should give the defendant the preference in case the premises were leased after that time. On the 8th day of March, 1897, the plaintiff leased the premises to the defendant for a term ending on the first day of March, 1898,

for a share rent. By subsequent leases the defendant held the premises until the first day of March, 1903. At that date a lease, made on the 23d day of January of the same year, went into effect, whereby the defendant was to hold the premises for another term of one year, rendering a share rent. The last lease contained a provision that at the expiration of the term the plaintiff would either pay the defendant the value for such improvements as he placed on the land or the defendant should have the privilege of removing the same. At the expiration of the last lease the defendant, although he had failed to pay any portion of the amount required to redeem, refused to surrender possession, claiming an equitable estate in the land under and by virtue of the agreement giving him the right to redeem from the sale. The plaintiff then brought suit to cancel and annul that agreement, to quiet his title, and recover possession of the premises. The court found generally in favor of the plaintiff, that he was entitled to the immediate possession of the premises, that the value of the improvements placed on the land by the defendant was $179.50, and on the 29th day of June, 1904, entered a decree requiring the defendant to surrender possession within 20 days from the date of the decree, and providing, upon his failure to do so, a writ should issue to place the plaintiff in possession of the premises. The decree further provided that the plaintiff might, within 20 days from the date thereof, pay the defendant the sum of $179.50, the value of the improvements as found by the court, and that in case he failed to do so the defendant, within 20 days thereafter or within 40 days from the date of the decree, might remove such improvements. Within 20 days from the date of the decree the defendant filed a supersedeas, intending, it is claimed, to appeal from the decree to this court. In December following the decree, the defendant, who was still in possession, commenced negotiations with the plaintiff's attorney looking toward an adjustment or settlement of the litigation. These negotiations resulted in an agreement between the defendant and the plaintiff's

attorney to the effect that the defendant should abandon his intention to appeal, and pay certain portions of the costs, and also pay the sum of $200 for the use of the premises subsequent to the decree. At the same time the attorney gave the defendant a writing to the effect that no writ for the enforcement of the decree should issue before the 1st day of February, 1905, and, in the event possession of the premises was not required for another tenant, before the first day of March, 1905, that the issuance of the writ should be withheld until that date. About the first day of March, 1905, the defendant commenced to remove his effects, intending also to remove the improvements in the nature of fixtures which he had placed upon the premises, whereupon the plaintiff brought the present suit against the defendant to recover for the use and occupation of the premises subsequent to the decree, and to restrain him from removing the improvements. A temporary injunction was allowed. A trial to the court resulted in a general finding for the defendant, and a dismissal of the complaint. The plaintiff appeals.

The plaintiff takes the position that the defendant, having failed to remove the improvements within the time fixed by the decree, has forfeited his right thereto. We do not think that position is tenable. In the first suit the court found that the defendant held as tenant of the plaintiff and was entitled to certain fixtures. The decree provided for a writ of ouster at the expiration of 20 days, but allowed the defendant an additional 20 days to remove the fixtures. Had no time been set for the removal of the fixtures, he would have been entitled to remove them at any time while he was in possession, as he would have been in the position of a tenant holding over the term. The rule in such case, according to the weight of authority, is that the tenant has the right to remove the fixtures at any time before he yields possession, even though he holds over without permission of the landlord. *Penton v. Robart,* 2 East (Eng), 88; *Watriss v. First Nat. Bank,* 124 Mass. 571; *Lewis v. Ocean Navigation & Pier*

Co., 125 N. Y. 341; *Brown v. Reno E. L. & P. Co.*, 55 Fed. 229. In the last case the court held that the tenant, on being evicted on summary proceedings on account of holding over, was entitled to take the fixtures with him. Cases to the contrary may be found, but we think those cited are better grounded on reason and justice. But he is not entitled to remove them after he has surrendered possession. *Free v. Stuart*, 39 Neb. 220. With the foregoing rules in mind, it is clear that it was not the purpose of the decree to abridge the defendant's right to remove the fixtures at any time before yielding possession, but to relieve him from the operation of the rule forbidding their removal after he had vacated the premises by extending the right to remove them 20 days after the time at which, by the terms of the decree, the defendant was required to vacate. That portion of the decree would have become operative, had the defendant vacated the premises within 40 days, but, as he did not, his right to remove the fixtures continued so long as he remained in possession. He was in possession when the temporary injunction restraining the removal of the fixtures issued. As his right to remove the fixtures was coextensive with his possession, he had not lost or forfeited it when this suit was commenced, and a permanent injunction forbidding the exercise of such right was properly denied.

The plaintiff further contends that he was entitled to a judgment in some amount for the use and occupancy of the land subsequent to the entry of the first decree. The answer to that is that the evidence is clear and unequivocal that before this suit was brought the defendant made a settlement with the plaintiff's attorney and paid him $200 in full satisfaction of the claim for use and occupation. It is now claimed that the attorney had no authority to make this settlement. What his authority may have been when he effected the settlement is not very clear, but it is conclusively established that he received the money, and that it was paid over to his client, the plaintiff in this case, who never made any objection to the settlement until

almost a month after he had received the money, and has never returned nor offered to return it. It seems to us that this is sufficient to show a ratification of the acts of his attorney.

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.

WILLIAM LEMKE, APPELLEE, V. JOHN LEMKE ET AL., APPELLANTS.

FILED MARCH 7, 1907. No. 14,702.

1. **Pleading:** NEGATIVE PREGNANT. A negative pregnant is such a form of negative expression as may imply or carry within it an affirmative.
2. **Mortgages.** In order to constitute a mortgage the relation of debtor and creditor must exist.
3. **Evidence** examined, and *held* to negative the claim that a certain deed, absolute in form, was intended as a mortgage.

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

Talbot & Allen and *Hainer & Smith,* for appellants.

F. A. Boehmer and *I. P. Hewitt, contra.*

ALBERT, C.

This suit was brought by William Lemke against John and Mary Lemke to quiet the title to 100 acres of land in Lancaster county. The defendants are husband and wife, their marriage antedating the several conveyances hereinafter mentioned. The plaintiff and the defendant John

are brothers. Their father died while they were quite young, and their mother, who is referred to in the record as "Mother Lemke," afterwards intermarried with their uncle, Charles Lemke. On and prior to the 22d day of January, 1887, the defendant John held the legal title to a 200-acre tract of land, which he resided upon with his wife and children, and cultivated as one farm. The 100 acres in dispute is a part of that tract. He was improvident and addicted to the excessive use of intoxicants. The 200 acre tract was incumbered by mortgages, aggregating about $2,700, and proceedings for the foreclosure thereof were pending. In addition to the mortgage indebtedness, he owed unsecured debts, aggregating some $3,500, which were being pressed for payment. At this juncture a family council was held, in which the parties to this suit, mother Lemke and her husband, Charles Lemke, the stepfather of the plaintiff and the defendant John, participated. It was there decided that the defendants should convey the 200 acres to Charles Lemke, who should pay off the debts. In pursuance of this arrangement the defendants executed and delivered a warranty deed to the land to Charles Lemke, who thereupon paid off the mortgage indebtedness, and subsequently paid the unsecured debts. Whether the family arrangement, when it was made, contemplated that he should also pay off the unsecured debts is not quite clear, but such appears to have been the construction placed upon it by the parties interested. The defendants continued in possession of the 200-acre tract after the conveyance to Charles Lemke without any change, save that they delivered a portion of the crops to him from time to time. Mother Lemke owned a small amount of land in her own right. It would seem that she also insisted that her children by her former husband were entitled, through her, to some provision out of the estate of her second husband, who owned considerable real estate besides the 200 acres just mentioned. This gave rise to some dispute between them, and presented what to them appeared to be an intricate problem.

In 1894 they learned of the enactment of the Baker law, changing the law of descent (since declared unconstitutional), which added to their perplexities. Another family council was held, at which all present at the one held in 1887, except the defendant Mary, participated. In pursuance of a decision there reached, in March, 1894, mother Lemke released her right of dower in the lands of her husband; he conveyed the 200-acre tract, and an additional 40 acres, to the plaintiff, who executed a mortgage on 100 acres of the 200-acre tract for $1,250, and another for $1,750 on the remaining 140 acres, in favor of his mother, mother Lemke, for the benefit of his two sisters, and thereupon conveyed the 140 acres to certain minor children of the defendants, retaining the remaining 100 acres—the land in dispute—as his share under the division agreed upon. The 140 acres was in fact the share allotted to the defendant John in the division, but the title was conveyed to his children instead of to him on account of his debts and improvident habits. Ever since the date last mentioned the defendants have occupied the 140-acre tract conveyed to their minor children. For two years after that date the defendant John had possession of the 100-acre tract allotted to the plaintiff under the family arrangement, but during that time held it as plaintiff's tenant. Since that time the plaintiff has either cultivated the 100-acre tract himself or leased it to strangers. In March, 1905, the plaintiff was negotiating a sale of the 100-acre tract, and the defendants made and filed with the register of deeds a notice to the effect that their conveyance to Charles Lemke in 1887 was made to secure the repayment of a loan, and for no other purpose, and that they were the owners of the land in dispute. In May following the plaintiff commenced this suit to quiet his title as against the claim thus made and asserted by the defendants. The trial court found generally for the plaintiff and granted the relief prayed. The defendants appeal.

The decisive question in this case is whether the con-

veyance of the 200-acre tract, which includes the land in dispute, from the defendants to Charles Lemke in 1887 was intended as an absolute conveyance or merely as security for the money to be advanced by him in payment of John's debts. The defendants contend that it stands admitted that their conveyance of that date was intended merely as a mortgage. This contention is based on certain features of the pleadings, which we shall proceed to examine. The petition, after tracing plaintiff's title to the land in dispute and referring to the defendant's claim that their conveyance of the 200-acre tract to Charles Lemke in 1887 was merely intended as a mortgage, alleges: "Plaintiff alleges that the defendants in reality, truth and fact have no interest, claim or demand of any kind in said land, and that if it were true that the title to the same was in fact transferred to Charles Lemke in trust to secure him upon a loan made, which fact this plaintiff specifically denies, then this plaintiff had no notice of said fact, and he relied on the records and then paid the purchase price for said land in good faith, and that the defendants cannot at this time have any valid claim against said premises." The answer reiterates the defendants' claim that such conveyance was intended merely as a mortgage, and charges that the conveyance by Charles Lemke to the plaintiff in 1894 was a conveyance of the bare legal title; that the plaintiff had participated in the several family meetings, where the conveyance from the defendants to Charles Lemke, as well as that from Charles Lemke to the plaintiff, was discussed, and had full knowledge of all the facts and the defendants' equitable title to the land, and took title subject thereto. In his reply the plaintiff, after entering a general denial, denies "that he had any knowledge or information of any kind that the warranty deed given by these defendants to Charles Lemke for the land in controversy was given to secure said Lemke for moneys advanced by him for these defendants. He denies being present at any conversation or at any time when these matters were agreed to by

said parties, and denies that he ever agreed to or was a party to any agreement made between Charles Lemke and the defendant, John Lemke, excepting the one hereinafter set forth."

It is claimed that the denial in that portion of the petition quoted of defendants' claim that the conveyance to Charles Lemke was intended merely as security for a debt, as well as those in the reply, is in the nature of a negative pregnant. "A negative pregnant is such a form of negative expression as may imply or carry within it an affirmative." Stephen, Pleading (2d. ed.), sec. 232. It arises when a denial is so worded as to imply an affirmative of the allegation intended to be denied. Bliss, Code Pleading (2d ed.), sec. 315. We do not think the plaintiff's denials, on a reasonable construction of his pleadings, come within the definition of a negative pregnant. The language used, taken in its ordinary sense, clearly shows an intention on the part of the plaintiff, not only to negative the claim of the defendants that the conveyance was intended merely as a mortgage, but also to allege certain facts relied upon to show that he would not be bound by such intention, even had it existed. The intention of the pleader, when clear, as in this case, rather than technical rules must govern in the construction of pleadings.

We come now to the evidence, which covers some 300 pages of closely written typewriting. We cannot review it at length. In our opinion it negatives the defendants' claim that their conveyance to Charles Lemke was intended merely as security for the money to be advanced by him to pay John's debts. Mother Lemke died before the litigation commenced. Charles Lemke was a witness in the case. He appears to be just and fair, and to stand indifferent between the parties. From his testimony it is quite clear that mother Lemke considered that whatever she had, might accumulate or receive from her second husband as her share of their joint accumulations was for

the benefit of her children and to be divided among them either in her lifetime or after her death. She was a German with the instinct of that race against any part of the family possessions passing into other hands strongly developed. She regarded herself and husband and her children by her former husband as one family, and their accumulations, to some extent apparently, as community property. When the foreclosure proceedings were instituted against the defendants in 1887 it was mother Lemke that insisted that steps be taken to prevent the loss of the 200-acre tract to the family, that is, the entire Lemke family. With that end in view she brought about the family arrangement whereby the land was conveyed to her husband and he discharged the mortgage indebtedness and paid off the other debts which John owed. The evidence satisfies us that this was done without any agreement that her husband Charles should hold the land as security for the money advanced by him, but rather with a view to holding it as a part of the estate, which at some time was to be apportioned among the members of the entire family, and that such was the understanding of all the parties. The family arrangements were consummated by that made in 1894, when what mother Lemke regarded as her share of the family estate was divided among her children; John's children, for the reasons already stated taking his share. We find nothing in the record to lead us to believe that it was the intention or understanding of any of the parties to the several transactions that the defendants, or either of them, became liable to Charles Lemke for the amount of the indebtedness he undertook to discharge for John when the conveyance was made. The intention of the parties governs. Unless they intended that the relation of debtor and creditor should arise as a result of the transaction, they certainly could not have intended that the conveyance was to operate merely as security for a debt. To constitute a mortgage the relation of debtor and creditor must exist. *Budd v. Van Orden*, 33 N. J. Eq. 143; *Westlake v. Horton*, 85 Ill. 228; *Sam-*

uelson v. Mickey, 73 Neb. 852. In this case we are satisfied there was no intention to create a debt, and consequently that there was no intention that the conveyance should operate as a mortgage.

It is true that defendant John gave Charles Lemke a portion of the crop raised on the land from time to time until the division was made in 1894, but it is clear that he did so, not in recognition of any liability on account of the debts paid for him by Charles Lemke, but rather in recognition of an obligation to pay something for the use of the land. The family adjustment made in 1894 appears to have been just and equitable. It stood without complaint more than ten years. We have been shown no good reason why it should be set aside.

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.

JAMES WARDROBE, APPELLANT, V. JAMES LEONARD ET AL., APPELLEES.

FILED MARCH 7, 1907. No. 14,671.

1. **Judgment:** COLLATERAL ATTACK. A decree in a foreclosure proceeding entered after the death of the plaintiff, occurring subsequently to the time that the jurisdiction of the court had attached, is an irregularity not open to collateral attack.

2. ———: ———. The failure of the defendant in such proceeding to procure the decree to be vacated within three years after notice of the decree renders the decree unassailable.

3. **Mortgages:** FORECLOSURE: ACTION TO REDEEM. Where the assignee of record of a decree of foreclosure procures the mortgaged property to be sold on the decree after the death of the plaintiff, and without revivor, the confirmation of the sale cures any irregularity in that respect as against an action to redeem.

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

H. M. Sullivan, for appellant.

Alpha Morgan and *Roscoe Pound, contra.*

JACKSON, C.

Fannie A. Turner, assignee of a mortgage on real estate in Custer county, instituted an action for the purpose of foreclosing the mortgage. Personal service was had on the defendants and decree entered by default on the 30th day of November, 1897. The defendants filed a request for, and procured a stay of, order of sale. On January 18, 1904, an assignment of the decree to James Leonard was filed in the office of the clerk of the court. It was executed by the executor of the estate of Fannie A. Turner, deceased. Thereafter Leonard, without revivor proceedings, procured an order of sale to issue on the decree, pursuant to which the land was sold and bid in by him, the sale was confirmed and sheriff's deed issued. The order of confirmation was entered on the 18th day of November, 1904. The amount of Leonard's bid was $60.30 in excess of the decree and costs. That sum he paid into the hands of the sheriff, who, after confirmation, paid the same to the mortgagor as owner of the title. On March 13, 1905, this action was instituted by the mortgagor to be permitted to redeem the property from the decree of foreclosure, on the ground that the procedure after the death of Fannie A. Turner, which it is charged in the petition occurred prior to the decree, was void. The defendant tenders the issue that the plaintiff is estopped from questioning the regularity and validity of the proceedings by reason of his request for a stay of execution and the acceptance of the surplus after the sale and confirmation, and that the proceedings, at most, were voidable only, and not open to collateral attack. The decree was for the defendant, from which the plaintiff appeals.

The date of the death of Fannie A. Turner is not disclosed by the evidence, but for the purpose of the discussion it will be assumed, as charged, that it was prior to the date of the decree. Where the cause of action survives, an action, under our code, does not abate by the death of a party, but the court may allow the action to continue by or against his representative or successor in interest. Code, sec. 45. The legislature has made ample provision for the revivor of actions in such cases, and the suggestion of the death of a party to an action will operate to stay further proceedings until the action is revived in the name of the proper party. A failure to take that course would render the proceedings open to direct attack, but the authorities seem to be quite uniform that in actions which do not abate by the death of a party, and where the action has proceeded to decree without objections after the death of the plaintiff and after the jurisdiction of the court has attached, it is a mere irregularity and the decree is not open to collateral attack.

It is unnecessary, however, to rest our conclusion upon that ground alone. It is provided by our code that the district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made for the death of one of the parties before the judgment in the action. The procedure to vacate a judgment for that reason is by petition, duly verified, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant, and on such petition a summons shall issue and be served as in the commencement of an action. Such proceedings, however, must be instituted within three years after the defendant has notice of the judgment. The remedy having been provided it must be exercised within the time limited by statute, otherwise the judgment becomes as valid and binding as any other judgment. *Gilman v. Donovan,* 53 Ia. 362. Furthermore, the stay of execution which the mortgagor obtained after decree was a waiver of all errors

prior to the obtaining of such stay. *Ecklund v. Willis,* 42 Neb. 737; *Banks v. Hitchcock,* 20 Neb. 315.

It remains, then, to be determined whether the sale on an order issued after assignment of the decree to Leonard, and without revivor, is so far void as to be open to the character of attack here made. In *Vogt v. Daily,* 70 Neb. 812, it was held that, if the plaintiff in an action died after judgment but before satisfaction thereof, no valid execution can be had upon the property of the judgment defendant until the judgment has been revived in the manner provided for in the code. The ruling was put upon the ground that actions should be prosecuted in the name of the real party in interest, and that this party should be a living, breathing entity, a person of legal responsibility. The case of *Seeley v. Johnson,* 61 Kan. 337, is cited in support of that conclusion. In the opinion in the Kansas case it is said: "A defendant whose property is levied upon under an order of sale or general execution ought to be able to ascertain from an inspection of the record in the case to whom payment of the debt may be made, and when the death of the owner of the judgment occcurs, all proceedings for its enforcement ought to be held in abeyance until some person in being is substituted with whom the debtor may treat regarding the satisfaction of the judgment." In an earlier case, *Harris v. Frank,* 29 Kan. 200, where the reason for the rule did not obtain because of an assignment of record on the margin of the journal of the court where the judgment was recorded, it was held that no revivor was necessary, and that notwithstanding the death of the plaintiff in the proceedings where the judgment was obtained his assignee might proceed by execution as though the plaintiff were still living. In *Vogt v. Daily, supra,* it appears that one Fritz claimed to be the assignee of the judgments upon which execution had issued, but from the language employed in the opinion it is evident that the assignments were not of record, otherwise the reasoning would have failed. In *Street v. Smith,* 75 Neb. 434, we held that,

where the sole plaintiff in an action dies, the effect is to suspend further proceedings until the action has been revived in the name of the legal representative of the deceased. In that case, like the present one, the procedure was for the foreclosure of a mortgage. The plaintiff died after decree, but before sale of the premises. There was no assignment of the decree. The order of sale was issued and the property sold as though the plaintiff were still living. The appeal to this court was from the confirmation of the sale. It was a direct attack, and not decisive of the question here involved, a question that is not free from doubt. We think, however, under the facts and circumstances as they are shown to exist, the sale and confirmation were not void to the extent that they may be assailed by the means employed. We do not determine that the court should not have ordered a revivor, had the death of the plaintiff been suggested before the sale or the confirmation. That question is not involved.

What we do hold is that the sale was not void, and we recommend that the decree of the district court 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.

LEWIS C. PARKER, APPELLEE, V. FRANK H. PARKER, APPELLANT.

FILED MARCH 7, 1907. No. 14,704.

Witnesses: CONFIDENTIAL COMMUNICATIONS. The provisions of the code against the disclosure of confidential communications may be waived by the party in whose favor they were enacted, and the privilege of waiver extends to the personal representative of a deceased person.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

J. E. Cobbey, G. M. Johnston and *Rinaker & Bibb,* for appellant.

E. O. Kretsinger, F. M. Davis and *T. J. Doyle, contra.*

JACKSON, C.

The contestant appeals from the judgment of the district court confirming the probate of a will. The principal contention is as to the sufficiency of the evidence to sustain the verdict and judgment.

The testator left two sons surviving her. She bequeathed her estate to an infant daughter of one son, the proponent. The contest is put upon the ground of undue influence and fraud of the proponent, and that the testator was incompetent. The evidence is voluminous, and includes the testimony of 60 or more witnesses, and it would be idle to review the testimony of each witness at length. The will was executed on the 22d day of September, 1900. The testimony of Dr. W. Frank Lee, a witness on behalf of the proponent, fairly reflects the evidence offered in support of the will: He had known the testator for about ten years. He was treating her at about the time the will was executed and until near the time of her death, which occurred in February following, and as to her condition said that she complained of neuralgia in her arm and shoulder, and connected with that slight spasms at times in the muscles of her neck and throat, which somewhat affected her articulation. Other than those local physical ailments she was as well physically as any old lady of her age; was able to converse and carry on an intelligent conversation, and mentally could direct her household affairs and make her wants known; that she was able to transact business and to make a will disposing of her estate on September 22, 1900.

In that respect he was corroborated by two other physicians, who saw and treated her at about that time, household servants, neighbors and friends who frequently were at her home. On the other hand, the evidence on behalf of the contestant seems to be fully as positive that at the time of the execution of the will the testator was suffering from a disordered mind and weakened physical condition, which incapacitated her for the transaction of any business and rendered her entirely incompetent to make an intelligent disposition of her property. The records of this court disclose this to be the second trial in the district court, the verdict and judgment on both occasions sustaining the will. It was stated in the oral argument that the proceedings in the probabte court resulted in a similar judgment. Prominent counsel on either side have tried the case with the zeal and earnestness usually occompanying litigation of this character.

We have carefully examined the 900 pages of evidence contained in the record and are not prepared to say that the judgment is not supported by the weight of the evidence or that a different conclusion would be justified. Nor do we think that the will, under the circumstances, was an unnatural one. The estate descended originally from the father of the contesting parties and had been, to a very large extent, divided between the two sons. That portion received by the contestant is estimated to have been of the value of $40,000, misfortune had resulted in the loss of the share of the proponent, and it is quite natural that the mother should have a desire to provide for the family of her less fortunate son. There were cogent reasons why she could not do so by leaving the residue of the estate to him direct. The course pursued by her was, perhaps, the most feasible one to accomplish that purpose.

Some expert evidence on behalf of the contestant tends to prove that the signature to the will is not the genuine signature of the testator. On the other hand, four witnesses present at the time the will was executed testified

that the testator procured the will to be read in their presence; that she stated that it was her last will and testament and was just as she desired it to be; that she went to her desk, took the pen in her own hand and affixed her signature. The original will is attached to the bill of exceptions, and signatures admitted to be the genuine signatures of the testator were admitted in evidence. All of the evidence as to the genuineness of the signature was taken in open court before the judge and jury, the finding necessarily includes the genuineness of the signature and with that finding we are content.

On behalf of the proponent there was offered in evidence and received the testimony of the physicians who attended the testator in her last sickness, and the attorney who prepared the will. This testimony, it is insisted on behalf of the contestant, was a disclosure of privileged communications, and was incompetent. We have heretofore held that the provisions of our statute with reference to the disclosures of privileged communications were for the benefit of the one who called the professional man, and might by him be waived. *Brown v. Brown,* 77 Neb. 125. This waiver may be by the representative of the deceased. *Sovereign Camp W. O. W. v. Grandon,* 64 Neb. 39.

It is charged in the objections to the probate of the will that it was obtained by undue and improper influence on the part of Lewis C. Parker (proponent), and that said pretended will was obtained by the said Lewis C. Parker by false and fraudulent representations. In submitting the case to the jury they were advised that there were three questions for them to determine: First, was the will properly executed; second, was Mrs. Parker competent; third, was the will procured by fraud and undue influence upon the part of Lewis C. Parker exercised over and upon Mrs. Parker at the time of its date and signature. Objections are made to the third question on the ground that fraud and undue influence are connected together in the conjunctive, and that it required the jury

to find that the fraud and undue influence were exercised by the proponent at the time the will was executed, whereas the charge rested upon a series of events occurring prior to the time of the execution of the will. It is probable that the interrogatory would have been in better form had the terms "fraud and undue influence" been marked by an alternative or the use of the word or, but we do not think the jury were misled. As to the contention that the jury must find that the fraud and undue influence were exercised by the proponent at the time the will was executed, we think the language employed entirely proper; certainly the testator must have been influenced at the time the will was executed to make the objection effective.

We find no reversible error in the record, and 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.

LETTON, J., not sitting.

MERRICK COUNTY, APPELLEE, V. F. M. STRATTON ET AL., APPELLANTS.

FILED MARCH 7, 1907. No. 14,710.

Judicial Sales: APPRAISAL: ESTOPPEL. Where in a judicial sale the appraisement returned by the sheriff shows a lien apparently prior to the lien under which the premises are to be sold, and that such lien was treated as prior and valid by the appraisers in determining the interest of the defendant, and where the status of such apparent lien has not been judicially determined, one who purchases at the sale without questioning the validity or priority of such apparent lien is thereafter estopped from so doing. *State v. Several Parcels of Land*, 75 Neb. 497, followed.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Patterson & Patterson and *W. T. Thompson,* for appellants.

J. C. Martin, contra.

JACKSON, C.

The county of Merrick had a decree foreclosing a lien for taxes on real estate in Central City. A defendant, Arthur Lindley, also procured a decree foreclosing a tax lien on a tax sale certificate held by him. The defendants Stratton and Kerr appeal.

The property involved is the whole of lot 9, block 2, Reynolds addition to Central City. The defense is grounded upon an allegation that the greater portion of the lot and improvements involved in the assessed valuation upon which the taxes were levied is covered by the right of way of the Union Pacific Railway Company. There are two answers to this claim. The allegation of the answer that the property is largely within the right of way of the Union Pacific Railway Company is denied by reply, and we find no competent evidence in the record to sustain that allegation. The defendant F. M. Stratton purchased the entire property at a judicial sale based upon a decree foreclosing a mortgage. The taxes involved were certified by the county treasurer as being a lien on the real estate prior to the mortgage, and they were so treated by the appraisers who deducted the amount of taxes from the gross value of the real estate as found by them. The validity of the taxes had not been judicially determined at that time and was not questioned in that proceeding. Under our holding in *State v. Several Parcels of Land,* 75 Neb. 497, the defendant Stratton is estopped from questioning the validity of the tax. The defendants Kerr have filed no

assignments of error or brief. Their rights, however, are fully determined by the decree. They claimed the right of possession under a lease which had already terminated, and a quitclaim deed procured from the mortgagor pending the proceeding to foreclose the mortgage.

There is no merit in the appeal, and it is recommended that the decree of the district court 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.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY v. GUSTAVE A. MANN.

FILED MARCH 21, 1907. No. 14,248.

1. **Carriers:** SPECIAL PERMIT. A railroad company may make suitable and reasonable conditions and regulations for carrying passengers on its freight trains from which they are excluded except by special permission; and an agreement on the part of one holding a special permit, by which he assumes the risks incident to boarding the caboose of such trains at any place where it may be stopped for the purpose of conducting the freight business of the company, does not amount to a limitation of the carrier's liability for its own negligence.

2. ———: PASSENGER. One holding such a permit, while on his way through the station grounds and yards of the company to board the caboose of a freight train which does not carry passengers except by special permission, is not a passenger being transported over the company's road, within the meaning of section 10,039, Ann. St., and the duty which the company owes to him is only that of ordinary care.

3. ———: INJURY TO PASSENGER: EVIDENCE. Such a passenger cannot recover for injuries sustained by him while on his way to board the caboose of a freight train without proof of negligence on the part of the company in the construction or maintenance of its station, station grounds or yards, which is the proximate cause of such injuries.

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

John C. Stevens, J. W. Deweese and *F. E. Bishop,* for plaintiff in error.

Tibbets, Morey & Fuller, contra.

BARNES, J.

On the night of February 18, 1904, Gustave A. Mann, plaintiff below, fell into an ash pit between the rails of the railroad track of the defendant company while passing from the depot to the caboose of a freight train in which he was about to take passage from the city of Minden to his home in the city of Hastings. The result was a broken leg, to recover for which he brought this action against the company. Judgment being entered in his favor, the railroad company has taken error to this court.

The material facts from which the question of the liability of the railroad company must be determined are the following: Mann, with four companions had been attending a shooting tournament at Minden, and went to the station in the evening in order to take a freight train to his home in Hastings. He was traveling agent for a brewing company, and had occasion in the course of his business to make use of the freight trains of the defendant company. For this purpose he procured a permit from the railroad officials authorizing him to ride upon trains which did not carry passengers, except by special permission. The permit is in the following language: "Burlington & Missouri River R. R. Co. in Neb. (Chicago, Burlington & Quincy Ry. Co. Lessee.) Freight Train Permit. No. A 1027. 1904. Conductors, Freight Trains: When presented with regular transportation this will be your authority to carry Mr. G. A. Mann, Representing Dick Bros., between points where your train stops for other business. This permit is subject to conditions printed on back, which must be signed in ink by the per-

son named, but does not authorize agents to flag freight trains. Good until December 31, 1904, unless revoked. G. W. Holdrege, General Manager. A. B. Smith, Countersigned. 1904. Nontransferable. This permit is granted at the special request of, and accepted by, the undersigned upon the following conditions, it being understood that greater danger attaches to riding on freight trains than on a passenger train: I hereby agree to assume all risk of accident to my person and loss or damage to my personal effects, and also to board and alight from freight trains only at points where such trains may be stopped for the convenience of the railway company. It is understood that freight trains do not as a rule start from or stop at stations with the caboose or coach at the station platform. Baggage will only be accepted for transportation, under check, on freight trains when there is room in the ordinary equipment of such trains, when baggage may be loaded or unloaded from or to platform without requiring special stop, and when passenger with proper ticket travels on same train. G. A. Mann. (Sign in ink.)"

From the fact that the freight train which the parties were to take was late, they had to remain some time at the defendant's station. The train, on its arrival, stopped upon the first track north of the main track of defendant's road, the space between the two lines of track being about eight feet. The engine of the freight train was east of the depot, and the caboose several hundred yards to the west thereof. The train arrived in Minden about 9 o'clock P. M., the night being very dark. Some time after its arrival it was suggested by a Mr. Barnhardt, one of Mann's companions, that it would be well to go down in the yard and board the caboose, as it might not stop at the depot. The entire party then started for the caboose, going along the south side of the freight train, which consisted of about sixty cars. They traveled in the space between the north and south tracks until they came to a pile of cinders. They

then turned to the south between the rails of the main track, and three of the parties, including Mann, fell or stepped into the ash pit above mentioned. This pit was situated between the rails of the main track, was about ten feet long and twelve or fourteen inches in depth, and was used for receiving the cinders dumped from the company's engines while taking water at the tank, which stood near the excavation. It is conceded that the train which Mann was attempting to board was a freight train which carried passengers only by special permission of the company, and that the four persons accompanying him had to obtain special permits to ride thereon.

At the request of the plaintiff below, the court instructed the jury as follows: "The jury are instructed that when the carrier of passengers by railroad does not receive passengers into the car at the platform erected for that purpose, but suffers passengers to enter at out of way places, it is its duty to use its utmost care in preventing accidents to passengers while so entering, and to provide for them a safe and convenient way and manner of access to the train, and to prevent, so far as possible, the interposition of any obstacles which would necessarily impede or expose them to harm while proceeding to take seats in the cars. And if you find in this case that defendant's agents were negligent, within the meaning of this instruction, and that the plaintiff was injured thereby, and you should find that the plaintiff did not, on his own part, contribute by his negligence to such injury, then your verdict should be for the plaintiff." The court further instructed the jury, in substance, that Mann on the way from the depot to the car was a passenger, and was not required to exercise that degree of care that is imposed on other persons, but had a right to assume and rely upon it that the company would make his way safe so that he might neglect precautions which are ordinarily imposed upon a person not a passenger, and that the company was required to exercise the strictest vigilance for his safety.

The giving of these instructions is assigned as error. This requires us to determine the legal effect of the contract above quoted, and the duty which a railroad company owes to one holding such permit, and who is about to take passage on one of its freight trains upon which passengers are carried only by such company's permission. It is contended by the plaintiff below that the contract limits the liability of the defendant company for its own negligence and is therefore unconstitutional and void. If this contention is sound the contract cannot be upheld. But we do not so construe the language of the permit. By it the company did not attempt to limit its liability to the plaintiff for its own negligence. It amounts simply to an agreement on the part of the plaintiff that, if permitted to ride on defendant's freight trains, from which passengers were excluded, by its proper and necessary regulations, he would board the same at such places as the caboose might be stopped for the convenience of the company in carrying on its freight business; that he would assume the ordinary risks incident thereto, and to the nature of such service when properly conducted. This was not a limitation of the liability of the company for its own negligence, but was a reasonable regulation which it might adopt for the purpose of carrying on its freight business. The rule is well settled that a railroad company as a common carrier may make and enforce such a regulation. 2 Rorer, Railroads, pp. 946-985; Hale, Bailments and Carriers, 491; *Burlington & M. R. R. Co. v. Rose,* 11 Neb. 177; *Illinois C. R. Co. v. Nelson,* 59 Ill. 110; *Chicago, St. P., M. & O. R. Co. v. Schuldt,* 66 Neb. 43; *Miller Grain & Elevator Co. v. Union P. R. Co.,* 138 Mo. 658; *Schaller v. Chicago & N. W. R. Co.,* 97 Wis. 31; *Hicks v. Union P. R. Co.,* 76 Neb. 496.

This brings us to the question of the defendant's duty to the plaintiff at the time the accident occurred. While Mann and the defendant company may have sustained, in a limited way, the relation of carrier and passenger,

yet he was not at that time a passenger being transported over the defendant's road, within the meaning of section 10039, Ann. St., and the duty which the company owed to him was only that of ordinary care. It is a well-settled rule that in the construction and maintenance of its depot grounds and yards, necessary, convenient and proper for the purpose of conducting its business, the company was only required to exercise ordinary care; and this was the extent of the duty it owed to the plaintiff while he was attempting to board its freight train. 2 Shearman and Redfield, Law of Negligence (5th ed.), sec. 501; *Fremont, E. & M. V. R. Co. v. Hagblad,* 72 Neb. 773; *Pennsylvania Co. v. Marion,* 104 Ind. 239, 3 N. E. 874. The plaintiff by his contract assumed the risk of walking through the yard in order to board the train in question, and it was not the duty of the defendant company to furnish him an absolutely safe pathway to any place where its caboose might be stopped for the purpose of conducting its business. He could not shut his eyes to the nature of the business, and when he accepted that mode of transportation he assumed the risks incident to the ordinary and proper method of carrying it on. It was said in *Murch v. Concord R. Co.,* 29 N. H. 9: "The party who makes an arrangement to be carried on a baggage wagon or a freight car impliedly agrees to accept and be satisfied with such accommodations, as regards carriages and seats and places of entering and leaving the carriages, as may be found in the usual course of the business. * * * The company, considered as owners of the road or as carriers, are not, in either case, bound to make landings, or any provision whatever for the reception or discharge of passengers where none are expected to be. The duties and obligations of parties are construed reasonably, with reference to the nature of their business." See *Oviatt v. Dakota C. R. Co.,* 43 Minn. 300; *Chicago, B. & Q. R. Co. v. Troyer,* 70 Neb. 287. Applying the foregoing rules to the facts of this case, it seems clear that the giving of the instructions complained of, was

reversible error. Indeed, we find no evidence in the record showing, or tending to show, that the defendant company was guilty of negligence in constructing and maintaining the ash or cinder pit in question, or that its maintenance was not proper and necessary to enable the defendant to conduct its business at the station where the accident occurred. Without proof of negligence in that respect on the part of the defendant, the plaintiff was not entitled to recover.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

GEORGE E. EMERY V. STATE OF NEBRASKA.

FILED MARCH 21, 1907. No. 14,760.

1. Contempt: INFORMATION: VERIFICATION. Where the charge of contempt of court is set forth in an information in positive and direct terms, the statement by the public prosecutor in his verification thereto "that the allegations and charges in the within information are true, as he verily believes," does not render such information void.

2. ———: ———: OBJECTION TO VERIFICATION. One cannot object to a verification of a complaint or information after he has been arraigned and pleaded not guilty, unless such plea has been withdrawn, and an objection of that kind made for the first time in a motion for a new trial comes too late.

3. ———: CORRUPTING JURORS. All wilful attempts of whatever nature, seeking to improperly influence jurors in the impartial discharge of their duties, whether it be by conversations or discussions, or attempts to bribe, constitute contempts.

4. ———: PLEA. In a prosecution for contempt where the act complained of is in itself a contempt of court, a denial on oath of its commission raises an issue of fact for trial, and does not entitle the accused to an acquittance.

ERROR to the district court for Gage county: JOHN B. RAPER, JUDGE. *Affirmed.*

R. W. Sabin, Hazlett & Jack and *S. Rinaker,* for plaintiff in error.

W. T. Thompson, Attorney General, contra.

BARNES, J.

George E. Emery, hereafter called the accused, prosecutes error from a judgment of the district court for Gage county, by which he was found guilty of a contempt of that court, and adjudged to pay a fine of $25 and the costs of the prosecution. The complaint or information on which he was prosecuted charged him with an attempt to influence a member of the jury in a certain civil action which was being tried in the district court for that county on the 13th day of December, 1905. His plea or answer to the charge was: First, not guilty; and, second, a general denial.

His first contention is that the complaint or information is void, because the charge contained therein was made upon information and belief only. An examination of the record discloses that in the charging part of the complaint the facts are stated positively, directly and without equivocation, and the verification reads as follows: "S. D. Killen, being first duly sworn, upon his oath says that he is the county attorney in and for Gage county, in the first judicial district of the state of Nebraska, and that the allegations and charges against George E. Emery in the within information are true as he verily believes." It appears that this is the usual manner of verifying criminal informations in this jurisdiction. The accused, however, cites a number of authorities in support of his contention, but they seem to be beside the mark, and apply to cases where the charge in the body of the complaint was made on information

and belief only. It appears that the complaint in this case is sufficiently positive and certain in its charging part, and the fault, if any, lies in the verification. But this defect, if it be such, was waived, for we find that the accused made no objection to the complaint, but filed his answer of not guilty, together with a general denial, and immediately announced his readiness to proceed to trial. In fact the record shows that this question was raised for the first time by him in his motion for a new trial. The objection, therefore, comes too late, for one cannot object to the verification of a complaint after he has been arraigned and pleaded not guilty, unless such plea has been withdrawn. *Johnson v. State*, 53 Neb. 103.

It is next contended that no offense is charged in the information. The acts of the accused set forth in the complaint are, in substance, as follows: That on the evening of the 13th day of December, 1905, as one of said jurors, namely, Christian Miller, was leaving the court house, George E. Emery approached said juror, and told him that he wanted to see him down town that evening; that the juror, supposing Emery wanted to see him about some trade, asked him where he should see him; and Emery said: "Down town at the hotel"; that about 8 o'clock that evening the juror went to the Paddock hotel, which is in the city of Beatrice, Gage county, Nebraska, and there met the accused, and after talking some time with him about other matters said: "What was it you wanted to see me about?" That Emery, thereupon, said: "Come on, and I will show you." That they left the hotel, went south to Court street, then west on Court street about a block and a half, until they came to a saloon, which they entered, proceeded to the back end of the room, and seated themselves at a table; that Emery called for beer, and two glasses were furnished, one for the juror and one for Emery; that after being seated at the table Emery said to the juror: "It is about the case; some of the parties want a verdict." That Miller said: "What case?" Emery answered: "The case you are juror on." That thereupon

the juror refused to hear anything further on the subject, and told the accused to "Cut it out"; that Emery then replied that he liked to see a fellow that way; that he had been told to see another fellow on the jury, but he was not going to say anything to him.

That the foregoing facts, if true, are sufficient to constitute contempt of court seems quite clear. It is a matter of common knowledge that jurors are charged by the trial court, after having been sworn, that they shall not talk with any one in regard to the case on trial, nor suffer any one to talk to them in regard to it, while serving as jurors. The foregoing facts clearly show that the accused was violating such instruction of the court and the law. To be in contempt of court in such a matter, it is not necessary that the party accomplish his purpose. It is sufficient if he makes the attempt, for he thereby violates the instruction of the court and the law of the state in relation thereto. It appears from the allegations of the information that the accused desired to talk with the juror about the case upon which he was then serving. This conduct in itself was highly improper and constituted contempt. It has been held to be contempt to attempt to induce an officer of a court to summon certain persons in a case to be tried by a jury, thus seeking to influence the action of the officer, though the attempt was not made in the courtroom, nor in the actual presence of the court. *Sinnott v. State,* 79 Tenn. 281; *Little v. State,* 90 Ind. 338; *Baker v. State,* 82 Ga. 776. "All wilful attempts of whatever nature, seeking to improperly influence jurors in the impartial discharge of their duties, whether it be by conversations or discussions, or attempts to bribe, * * * constitute contempts." 9 Cyc. 15. In *United States v. Kilpatrick,* 16 Fed. 765, it was held that an individual who approaches or communicates with the grand jury in reference to any matter which is, or may come, before them is guilty of contempt. Telling one whose son is on trial for murder, that for a specified sum of money he will bribe a juryman is contempt,

notwithstanding the offender does not intend or expect to bribe, but merely intends to swindle defendant's father out of the money. *Little v. State,* 90 Ind. 338; 46 Am. Rep. 224. It was held in *State v. Doty,* 32 N. J. Law, 403, 90 Am. Dec. 671, that soliciting a juror to give a signal after the jury has retired, to indicate whether an agreement is likely, and thereby enable an outsider to make a bet on the matter of agreement to better advantage is contempt, although nothing is said by the person making the attempt as to how he wishes the jury to decide. In *In re Summerhayes,* 70 Fed. 769, it was held that a federal grand juror who deliberately secures an interview with one interested in procuring an indictment respecting what occurred in the jury-room is guilty of contempt, where the jury were instructed to keep its deliberations secret. So it would seem clear that the facts alleged in the information are sufficient to constitute a contempt of court.

It is further contended that the evidence is not sufficient to sustain the judgment. The testimony of the juror, Miller, fully sustains the charge contained in the complaint, and, while the accused denied that he spoke to him about the case on trial, yet in all other essential particulars his evidence corroborates that given by the prosecuting witness. The trial judge, who heard the witnesses testify, and had an opportunity to observe them and their demeanor while giving their evidence, was better qualified to determine the truth of the matter than a reviewing court which has nothing before it but the record; and where, as in the case at bar, the evidence is conflicting the judgment of the trial court will not be disturbed unless it is shown to be clearly wrong.

Lastly, it is claimed that upon the filing of his answer, under oath, denying the allegations of the complaint, the accused should have been immediately discharged, and the state remitted to a prosecution for perjury. While authorities may be found which seem to support this theory, yet in cases where the act complained of is in itself

a contempt of court, a denial of its commission raises an issue of fact for trial, and does not entitle the accused to an acquittance. Indeed, the practice is well established in this jurisdiction that in a proceeding to punish one for a constructive contempt a complaint, under oath, must be filed against him, an attachment must be issued thereon, and on the return thereof the defendant may answer the complaint, and, if his answer be a denial of the acts charged, the issue thus raised must be tried and determined upon evidence, as in other cases. Indeed, to hold that a mere denial, by which such an issue is raised, of itself amounts to an acquittance would render every contempt proceeding, no matter how well founded, absolutely nugatory. *Drady v. District Court of Polk County*, 126 Ia. 345; *People v. Wilson*, 64 Ill. 195.

In conclusion, it appears from the record that the accused had a fair and impartial trial, and, finding no reversible error therein, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, V. GEORGE L. SHELDON, DEFENDANT.

FILED MARCH 21, 1907. No. 15,080.

1. **Constitution**: LEGISLATIVE INTERPRETATION: COURTS. When the legislature has construed a provision of the constitution in an administrative matter in one of two equally reasonable ways, the court will not take the opposite view, but will adopt and follow the legislative construction.

2. ———: USE OF EXECUTIVE MANSION. The occupancy by the governor during his term of office of the executive mansion provided by the state, in which he is required by law to maintain his residence, is not a "perquisite of office or other compensation" and is not prohibited by the constitution.

ORIGINAL action to determine the right of defendant, as governor, to use the executive mansion without payment

of rent. Defendant demurred to the petition. *Demurrer sustained.*

W. T. Thompson, Attorney General, and *W. B. Rose*, for plaintiff.

Norris Brown and *Jesse L. Root, contra.*

LETTON, J.

This is an original action in this court. The petition alleges that the suit is brought by the attorney general in behalf of the state by the direction and at the request of the governor. The purpose of the action is to recover the sum of $100 for one month's use by the defendant of the dwelling house in Lincoln known as the "Executive Mansion." A general demurrer has been filed to the petition and the cause submitted.

The house known as the executive mansion was purchased by the board of public lands and buildings in 1899 by the direction of the legislature, and the act authorizing and directing the purchase provides that, "after said property has been purchased and paid for, the board of public lands and buildings shall furnish said premises suitable for an executive mansion and the same shall be occupied by the governor." Since its purchase it has been continuously occupied as an official residence by the several chief executives of the state up to this time, and is now occupied by the defendant, Honorable George L. Sheldon, in his official capacity as governor of the state of Nebraska.

By the provisions of section 19, art. V of the constitution, the general supervision and control of all buildings and grounds belonging to the state, except for educational purposes, is vested in the board of public lands and buildings, and the legislature by the provisions of article VII, ch. 83, Comp. St. has more fully defined the powers and duties of that body, and given the entire control of the sale or lease of the public grounds or buildings to the board

or by its warrant to the commissioner of public lands and buildings. By section 3 of this article the board is given general custody and charge of all buildings and institutions, and the grounds thereto, and is made responsible for their proper keeping and repair, and the commissioner of public lands and buildings is made the direct custodian of the same. Under these constitutional and statutory provisions the entire responsibility for the use of the buildings of the state is vested in the board of public lands and buildings, and, since that board has not authorized this action, it may be doubted whether the plaintiff has shown sufficient capacity to sue or whether the court is justified in passing upon the question submitted. However, this objection has not been raised by the defendant, and we will waive it and proceed to determine the case upon its merits.

The occupancy of the premises being admitted, the attorney general bases the state's right to recover rent upon section 24, art. V of the constitution, relating to the salaries of state officers: "The salaries of the governor, auditor of public accounts and treasurer, shall be two thousand five hundred dollars each per annum, and of the secretary of state, attorney general, superintendent of public instruction, and commissioner of public lands and buildings shall be two thousand dollars each per annum. The lieutenant governor shall receive twice the compensation of a senator, and after the adoption of this constitution they shall not receive to their own use any fees, costs, interest upon public moneys in their hands, or under their control, perquisites of office or other compensation, and all fees that may hereafter be payable by law for services performed by an officer, provided for in this article of the constitution, shall be paid in advance into the state treasury. There shall be no allowance for clerk hire in the offices of the superintendent of public instruction and attorney general." His argument is that, since the governor may not receive to his own use any "perquisites of office or other compensation," he is bound to

pay rent for his occupancy of the executive mansion as an official residence. If his occupancy is not a "perquisite of office or other compensation" he concedes that the state is not entitled to recover. The Standard dictionary defines a perquisite as "(1) any profit or pecuniary gain from service beyond the amount fixed as salary or wages; hence, any privilege or benefit claimed as due. (2) In law. A fee that a person in office may legally receive beyond the requirements of his official duties." Worcester defines a perquisite as "something obtained in addition or in lieu of regular wages or salary." By the Century dictionary the word, as used here, is defined as "an incidental emolument, profit, gain, or fee, over and above the fixed or settled income, salary, or wages; something received incidentally and in addition to regular wages, salary, fees," etc. The phrase used is "perquisites of office or other compensation." To compensate is to make suitable return for services. It is evident then that the word, as used by the makers of the constitution, means a compensation or reward paid in return for the performance of an official duty. The question then is whether the direction given by the legislature to occupy the executive mansion is something conferred upon the governor as a reward or return for official services. It is no doubt true, as urged by the attorney general, that the rental value of the property is at least $100 a month. He therefore contends that the use of the dwelling is an additional fee or salary of $1,200 a year paid to the governor in excess of the salary provided by the constitution.

In the construction of a governmental system upon the American plan, the broad outlines are furnished by the constitution, but all the details necessary to carry the powers of government into effect are provided by the action of the legislature. The provisions of the constitution, while in one sense creative, also limit and define the powers to be exercised by the various departments of the government; but, except so far as its authority is limited or defined by the constitution, the legislature of

the state is as fully vested with governmental powers as the British parliament. See a discussion of this subject in *State v. Nelson,* 34 Neb. 169. The constitution must be read in connection with the facts of history and the development of a representative form of government, and this is what is done every day. There is nothing in the constitution which provides that the legislature shall furnish a state capitol building or furniture therefor, or that it shall furnish any office for the proper transaction of the executive affairs of the state, but there is no limitation upon its power to do so, and the creation of the office implies the power and the duty to provide means, accessories and instrumentalities for the purpose of carrying into effect the purpose for which the office was created. The custom of furnishing an official residence for the chief executive officer of the government has been in force for very many years in representative governments such as ours. It is a matter of common knowledge that Great Britain provides an official residence for its prime minister, and in fact the practice is so well established and has been continued for so long a time that the name of the street in which the official residence is situated is often used as synonomous with the administration, and "Downing Street" conveys an idea to a British subject as clear and well defined as the name of the "White House" does to an American citizen. This practice was followed upon the formation of the United States, and many of the states of the Union, recognizing the added dignity given to the office and other advantages to be derived from the residence of the chief executive officer being certain in location and convenient of access at all times, have provided official residences for the use of the governor of the state. Some of the states so providing a residence have similar restrictions in their constitution as exist in that of this state with regard to the acceptance of perquisites. Of course, this goes merely to show the meaning applied to such provisions by the respective legislatures. It cannot be questioned that the legislature had the

power, the right and the authority to purchase the property and to provide for its occupancy by the governor. This was done in the exercise of its proper powers exercised in behalf of what it deemed to be the public welfare, and its acts in that regard are not subject to review by any other department of the state government. There is no question then of legislative power involved.

The legislature has construed the provisions of the constitution to the effect that it had the right to provide an official mansion for the governor, and that he had the right to occupy it without contravening the constitutional provisions as to his compensation. That body has the right to construe the constitution, and if the language of that instrument is subject to two equally reasonable interpretations, if the legislature adopt one, the courts will not adopt the other. The legislature of 1899 did not believe that furnishing an official residence for the chief executive officer and requiring him to occupy the same conferred upon him any additional compensation for his services as governor, nor has any succeeding legislature so construed the constitution. The executive officers charged with the care, control and custody of the property of the state have followed the legislative construction, and at this time are making no complaint nor are they seeking to collect any rent or to take from the governor the possession of the property. It may be doubted whether the occupancy of this mansion does not impose upon the governor larger expenditures than those which would be exacted from him by the occupancy of a more humble abode for which he paid the usual rent, and, in place of being an additional reward or compensation, it may in fact be and probably is an additional drain upon his resources. We agree with the legislature that it is entirely in keeping with the proper administration of the government of the state with due regard to the dignity of that high office that the governor be provided with an official residence, and that his occupancy of the same, required by law, is in no sense a perquisite of office or of

the nature of additional compensation. We think the defendant is no more liable for rent of the official residence than any executive officer of a state institution is who is required for the proper conduct of his official duties to reside in the institution, the supervision of which is committed to his care or in which the services he renders are required to be performed. We are of the opinion that a contrary holding would be a strained construction of the constitution, and that, since the legislature has taken this view, which is supported by sound reason, we are not justified in adopting a contrary one, even if the language of the constitution might possibly be susceptible of other interpretation.

The petition fails to state a cause of action and the action is therefore

DISMISSED.

B. F. MOORE, COUNTY TREASURER, APPELLEE, V. FURNAS COUNTY LIVE STOCK COMPANY, APPELLANT.

FILED MARCH 21, 1907. No. 14,716.

1. **Taxation**: ACTION: WAIVER. A statutory requirement that an action by a county treasurer to recover personal taxes shall only be brought by the direction or authority of the county board is waived by filing an answer and proceeding to trial without objection.

2. ———: ESTOPPEL. One who lists and returns his personal property in the assumed name of another is estopped to complain of any irregularity or insufficiency of the tax proceedings arising solely from that cause.

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

W. S. Morlan, for appellant.

J. F. Fultz, H. W. Keyes and *E. C. Strode, contra.*

AMES, C.

The Furnas County Live Stock Company was in the possession and custody of a herd of cattle on its ranch in Furnas county. The only dispute of fact in the case is whether it was the owner of them, concerning which there is no positive evidence other than that already mentioned. But exclusive possession of personal property is presumptive evidence of ownership even as against an adverse claimant, and certainly ought to be such in a proceeding such as is now about to be described.

The company was incorporated, and one McPherson, who was its president and principal owner of its shares of capital stock, resided in Omaha. The ranch and cattle were in the immedate custody and control of a man named Murray, who was general manager and agent of the company. In April, 1903, Murray was called upon by the precinct assessor of the precinct in which the cattle were situated to make and return a list of them for taxation, which he did, describing them, as he had been directed to do by the president, as being the property of one Ryan. Ryan was a nonresident of the state, and not the owner of or interested in the cattle or any other property therein. The list was duly returned by the assessor, and the property was entered upon the tax lists of the county as belonging to Ryan, and state and local taxes levied thereon as in other cases. The taxes remaining unpaid after delinquency, a distress warrant was issued against Ryan and returned unsatisfied for want of property whereof to levy it. The cattle had in the meantime been sold and removed from the county and state. Thereupon the county treasurer began this action against the company to recover the amount of the tax. The plaintiff by a peremptory instruction of the court recovered a verdict and judgment, from which the defendant appealed.

It is first objected that the petition does not allege, and it was not proved, that the action was brought by the

direction or express authority of the board of county commissioners, as is required by statute, and that such direction is jurisdictional, and the omission to plead and prove it fatal. It is not, however, jurisdictional in the sense that it affects the power or authority of the court, but it goes only to the right of the treasurer to begin and prosecute the action, and it may therefore undoubtedly be waived. It was not called to the attention of the court by motion, demurrer or answer; the last being a general denial challenging an investigation of the facts alleged as constituting the plaintiff's cause of action. We think it is too late now to dispute his right to engage in the litigation.

The cattle belonged to the defendant and were in its possession. It was its duty to list and return them for taxation. If it saw fit to make the return in the assumed name of another, and for the purposes of the transaction adopted that name as its own, it is estopped to complain of any irregularity or insufficiency in the tax proceedings occasioned solely by its own negligence or wrongful conduct. If the treasurer omitted to issue a distress warrant against the defendant, which it is complained is a condition precedent to the right of bringing the action, it is sufficient excuse that the officer did issue a warrant against the defendant in the name which it had deliberately adopted as another name. But whether the defendant had property in the county, which it now claims to have had, upon which the writ might have been levied, is immaterial. It was not the duty of the sheriff to determine at his peril whether the name written in the warrant was that of the real owner of the property or whether the defendant was such owner. In short, if a man enters into a written contract for the sale of his property in the assumed name of another, it is not doubted that he is equally bound as though he had used his own name. It seems to us that it would be somewhat scandalous to hold that similar consequences do not follow like conduct in his dealings with the public.

We discover no error in the record, and recommend that the judgment 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.

J. E. MOORE, CORONER, APPELLANT, V. BOX BUTTE COUNTY, APPELLEE.

FILED MARCH 21, 1907. No. 14,739.

1. **Coroners:** INQUESTS: JURISDICTION. Jurisdiction to hold an inquest is conferred upon a coroner by his finding and custody in his county of the body of a person who has apparently come to his death by violent, mysterious or unknown means, and such jurisdiction is not defeated by the mere fact that the violence was inflicted or the death occurred in another county.

2. ———: ———: FEES. Whether, in any case, the circumstances are such as to require an inquest into the cause of the death of a person whose body is found within the county is a matter left very largely to the discretion of the coroner, and he will not be denied compensation for his services in holding such an inquest in the absence of a showing that he has acted in bad faith.

3. ———: ———: JURY AND WITNESS FEES. Jurors and witnesses have no discretion justifying their disobedience to a summons by a coroner to attend upon an inquest held by him, and cannot be denied their fees, solely because it may afterwards appear to have been unnecessary.

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

L. A. Berry, for appellant.

William Mitchell, contra.

AMES, C.

Section 9164, Ann. St., reads as follows: "The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means. When he has notice of the dead body of a person, supposed to have died by unlawful means, found or being in his county, he is required to issue his warrant to a constable of his county, requiring him to summon forthwith six lawful men of the county to appear before the coroner, at a time and place named in the warrant." In May, 1905, a man named Pepernot was run over and killed by one of the trains of the Chicago, Burlington & Quincy Railway Company. His body was put upon the train and carried to the town of Alliance, in Box Butte county, where it was left. The fact came to the knowledge of the appellant, who was coroner of the county, and who thereupon impaneled a jury and summoned witnesses for the making of an inquest. The jury, after hearing testimony and inquiring into the matter, returned a verdict to the effect that the man had come to his death by accidental means, and without the fault or negligence of any one other than himself. He was a stranger, and, so far as is known, wholly destitute of money or property. The statute provides that in such cases the fees of the coroner, witnesses and jurors shall be paid by the county. Pursuant to this statute the coroner filed a claim with the county board for his own fees, and by some arrangement, which is not impeached or questioned, for those also of the witnesses and jurors. The board rejected the claim, and, upon appeal, the district court affirmed the order. From the judgment of affirmance the coroner appealed to this court.

The sole ground of objection by the county is that the accident causing the death of Pepernot occurred in Cheyenne county, at a distance of a few miles from the boundary line between it and Box Butte county, and that that fact was known to the coroner at or before the time

he impaneled the jury, and was proved upon the inquest. Counsel contends, therefore, that the coroner was without jurisdiction or duty in the premises, and that an inquest, if one was required at all, should have been held in and at the expense of Cheyenne county, but that, as it appeared that the death was caused by accidental means, no inquest was required anywhere. As to the latter contention, it seems to us sufficient to say that whether a death, caused by the conduct of another or of others, in this case the railway trainmen, is due to innocent accident, or to wrongful and unlawful negligence or malice, can only be ascertained, if at all, by inquiry more or less thorough, and that it is the principal function of coroners to make inquests for the purpose of discovering the facts in such cases. As respects the former of these objections, we think that, doubtless, when a coroner finds in his county the body of a person who has evidently come to his death by violent means, although he may have reason to suspect, or even may know, that the violence was inflicted outside his own county, he has a very wide discretion in determining whether the circumstances are such as to require an official investigation at his hands, and that, at least so far as jurors and witnesses are concerned, his determination of that question is final. They certainly have no discretion justifying disobedience to his summons. This precise point, under an almost exactly similar statute, was so decided by the supreme court of Iowa in *Finarty v. Marion County,* 127 Ia. 543. Whether the coroner would be denied compensation in a case in which "the facts presented to him were such that his own mind rejected the supposition that death had been caused by unlawful means," or in which he is charged "with bad faith which would amount to official corruption," that court leaves undecided, and so do we. That charge is not made in the case before us. As respects jurisdiction, pure and simple, we think that the finding and custody by the coroner within his county of the body of a person who has apparently come to his death by violence or mys-

terious or unknown means is sufficient to confer it. The place where the violence was committed or the death occurred may be the most significant fact to be ascertained, and for the purpose of discovering it an immediate inquiry may be in the highest degree important. Interminable delays might result from a practice which should require a preliminary determination of these facts before an inquest could be set on foot, or which should require the body to be transported to another and perhaps distant county before one could be begun.

For these reasons, we think the judgment of the district court is erroneous, and recommend that it be reversed and a new trial granted.

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 a new trial granted.

REVERSED.

GEORGE D. DARLING, APPELLANT, V. BOX BUTTE COUNTY, APPELLEE.

FILED MARCH 21, 1907. No. 14,738.

Counties: FUNERAL EXPENSES: LIABILITY. An undertaker who, acting in good faith pursuant to a direction by a coroner, causes the decent burial of a dead body found and being in the county, upon which the latter had held an inquest, will not be denied reasonable compensation for his services and expenses for the sole reason that it may afterwards be shown that the inquest was unnecessary.

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

L. A. Berry, for appellant.

William Mitchell, contra.

AMES, C.

For a recital of the circumstances out of which this case arose, reference is made to the opinion of this court in *Moore v. Box Butte County, ante,* p. 561, submitted in connection herewith. Section 9178, Ann. St., is as follows: "The coroner shall cause the dead body of each deceased person which he is caused to view to be delivered to the friends of the deceased, if there be any, but if there be none, he shall cause the body to be decently buried and the expenses shall be paid from any property belonging to the deceased, or if there be none, from the county treasury, by warrant drawn thereon." It is not disputed that the circumstances of the deceased were such as described in the foregoing section of the statute, nor that the appellant, at the direction of the coroner, caused the body to be decently buried, nor that a claim which he presented to the county board for compensation for his services and expenses in the premises is reasonable in amount; but the claim was rejected by the board, and, upon appeal, by the district court, solely upon the ground that the coroner was without jurisdiction to make the inquest, or, at least, that the latter was unnecessary. We have stated in the opinion mentioned why we think that such a defense, even if in any case it should be upheld as against the coroner, would not be available to defeat the claims of jurors and witnesses for their fees, and we are of opinion that, for substantially the same reasons, an undertaker will be protected to the amount of his reasonable compensation for his services and expenses, at least when he is not shown to have acted in conscious bad faith.

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

OLDHAM and EPPERSON, CC., concur.

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

REVERSED.

J. C. STADING, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED MARCH 21, 1907. No. 14,691.

1. **Railroads:** INJURY TO CATTLE: NEGLIGENCE. It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and, if such a precaution would have revealed the presence of stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them, and although they were not within the protection of the statute requiring tracks to be fenced. *Omaha & R. V. R. Co. v. Wright*, 47 Neb. 886, followed and approved.

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

3. **Instructions** examined, and *held* not prejudicial.

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

B. T. White, C. C. Wright and *B. H. Dunham,* for appellant.

J. J. McAllister and *C. A. Kingsbury, contra.*

OLDHAM, C.

This was an action for damages for the killing of 13 head of cattle on defendant's right of way within the depot grounds and switch limits of the village of Hubbard, Dakota county, Nebraska. There was a trial of the issues to the court and jury, and a verdict and judgment for the plaintiff. To reverse this judgment defendant appeals to this court.

The facts underlying the controversy are that on the morning of July 10, 1903, between the hours of 4 and 5 o'clock, two of defendant's freight trains passed through the village of Hubbard going eastward at a rapid rate of

speed. The first train was a regular through freight, which, from the evidence, killed four or five head of cattle, none of which, however, were shown to have been plaintiff's cattle. The special, which followed the regular train in 10 or 20 minutes, ran onto and killed 13 head of plaintiff's cattle at a bridge which crossed a running stream about 500 yards east of the depot within the corporate limits of the village. The negligence relied upon as a ground for recovery was the careless and reckless operation of the train, and a failure to keep a proper lookout for animals which might have strayed upon the right of way within the switch limits. The evidence shows that the track extends in a straight line for about one mile west of the point of the injury. It also shows that from the depot to the bridge the track is ditched on each side for drainage purposes, and that these ditches increased in width and depth as they approached the banks of the stream at the bridge; that wing-fences connected the bridge with the right of way fences which extended west from the bridge, so that when the stock went down the track to the bridge they were prevented from escaping by the bridge, ditches and wing-fences. There is an allegation in the petition that the train was running at a rate of speed in violation of an ordinance of the village of Hubbard, but this allegation was denied, and, on objection of defendant, the purported ordinance of the village regulating the speed of trains within its corporate limits was excluded from the jury, and the cause was submitted on the allegations of negligence in running the train at a high rate of speed without keeping a proper lookout for trespassing animals at the place of injury.

There was a conflict in the testimony as to the exact time at which the train passed through the village. Two of plaintiff's witnesses testified that it was about 5 o'clock in the morning; that it was daylight, and that it would have been possible to have seen the cattle from a point a mile west of the bridge. Defendant's engineer and fireman, on the contrary, testified that the train passed the

station at about 4:25 A. M.; that it was foggy and misty and that, although keeping a careful lookout, they were unable to discover the presence of the cattle on the track until they had passed the depot and were within about 500 feet of the cattle. They also testified that, after discovering the stock on the track, they whistled, turned on the air brakes and took all proper precautions to stop the train, that the cattle ran along the track to the bridge, where they were overtaken and some of them carried across by the engine; and that two freight cars were derailed by the accident. Plaintiff offered in his behalf the testimony of one Fred Bliss, who claimed that he was a fireman on the train at the time the cattle were killed, and that no effort was made to check the speed of the train when the cattle were discovered. This witness was flatly contradicted by both the engineer and fireman, who testified that he was not on the train at all. Other evidence was introduced tending to show that he had never been employed as a fireman by the defendant company until the month of August following the accident. If plaintiff's right of recovery depended on the uncorroborated statements of this witness, we would agree with the contention of defendant that his testimony was so improbable, so flatly contradicted, and so fully impeached, that, standing alone, it would not support a verdict for the plaintiff. The evidence showed that the cattle escaped from a fenced pasture, in which they had been kept for some time, on the night or morning of the injury, without the knowledge of the plaintiff. There is no dispute as to the fact that the train was on a down grade and running at a high rate of speed when the injury occurred.

The degree of care which should be used to avoid injury to trespassers upon the right of way of a railway company was well defined by this court in the case of *Omaha & R. V. R. Co. v. Wright*, 47 Neb. 886, wherein it was said: "The second argument is based on those cases—respectable in number, if in nothing else—which hold that a railway company's duty to a trespasser is merely to avoid

wantonly or recklessly injuring him after becoming aware of his presence. This is supported by the argument that the cattle were trespassers and that the rules are the same as to liability for property unlawfully upon the track as for persons. We think the same general principle does apply; but the rule in this state is that it is the duty of the railway company not merely to avoid injuring a trespasser after his presence has been discovered, but that those in charge of trains must exercise reasonable care to avoid injuring all persons who are known or who may be anticipated to be upon the track; and the company is liable if the engineer, by keeping such a lookout as is consistent with his other duties, would have observed the trespasser in time to avoid the injury. *Chicago, B. & Q. R. Co. v. Grablin,* 38 Neb. 90; *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645; *Chicago, B. & Q. R. Co. v. Wilgus,* 40 Neb. 660." Now the unimpeached testimony offered by plaintiff tended to show that it was daylight when the injury took place, and that the track was straight for a mile west from the point of the injury, and that there were 13 head of cattle on the track, and that it would have been possible to have discovered their presence a mile away. In *Omaha & R. V. R. Co. v. Wright, supra,* it was said: "If, as plaintiff's evidence tends to show, it was a clear morning, daylight, the track unobstructed for half a mile, and 340 head of cattle on the right of way, and the engineer failed to see these cattle in time to stop, or, having seen them, to stop, if he could, then the inference of negligence would be reasonable." Under this rule we think the testimony offered by the plaintiff was sufficient to raise a reasonable inference of negligence, which it was proper to submit to the jury as a question of fact.

There is no complaint lodged against the action of the trial court in the admission and rejection of testimony, or in the failure to give any instructions requested by the defendant. There is a general criticism on the first instruction, given by the court on its own motion, that it

was of unnecessary length and copied too much *in extenso* the allegations of both the petition and the answer. While we think that a more abbreviated statement of the issues would have fully sufficed, yet we are unable to find anything in the instruction in any way prejudicial to the defendant. It quoted as freely and fully from the allegations of the answer as it did from those of the petition. The instructions as a whole were rather favorable than otherwise to the defendant's contention. As the sole ground of recovery they required plaintiff to prove by a preponderance of the evidence negligence of the defendant's employees in the management of the train, and in not keeping a proper lookout to discover trespassing stock at the place of the injury. The court took away from the consideration of the jury the surroundings of the track and bridge at the place of the accident, and directed that it only consider the speed of the train in determining whether or not the employees had used diligence in trying to stop the train after discovering the cattle.

Objection is urged against the action of the trial court in giving so much of the sixth paragraph of instructions as told the jury "that it is the duty of the engineer in charge of the engine to keep a vigilant lookout for obstructions upon the track ahead of the engine, and, when he finds the track is obstructed and there is apparent danger either of injury to trespassing animals or to the train in his charge, it becomes his duty to use every effort at his command to avoid injury." The objection to this instruction is that it places a higher duty upon the engineer than is required by law in regard to keeping a lookout for trespassing stock, and using every effort at his command in avoiding an injury when such stock is discovered. It is true, as contended by defendant, that the engineer is only required to keep such a lookout as is consistent with his other duties, and we think, by paragraph 3 of instructions given at defendant's request, the jury were so directed. This instruction is as follows: "The jury are instructed that the undisputed evidence

in this case shows that the cattle of the plaintiff killed in this case were trespassers on the defendant's right of way at the time they were killed, and that the only requirement of the law is that the defendant keep such lookout as is consistent with the other duties of the engineer to discover trespassing stock, and, after discovering that stock is in danger, that the defendant shall exercise reasonable care not to run into them, in other words, that the defendant use reasonable means to stop." While the instruction complained of, if it stood alone, might have suggested an extraordinary degree of care which the law does not require, yet, when read in connection with paragraph 3, as above set out, we think the jury would not have understood from it that the engineer's whole duty was to keep a vigilant lookout for trespassing animals on the track.

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.

JAMES M. RUNKLE, APPELLEE, V. DANIEL T. WELTY, APPELLANT.*

FILED MARCH 21, 1907. No. 14,714.

Ejectment: TITLE: EVIDENCE. In an action of ejectment, when the plaintiff's testimony shows defendant in possession of the disputed lands under a claim of ownership, plaintiff must then recover on the superiority of his title, and, if he relies on a record or paper title, he must show a regular chain of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims.

*Rehearing allowed. See opinion, p. 574, *post.*

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

W. S. Morlan, for appellant.

E. B. Perry, contra.

OLDHAM, C.

This was an action in ejectment instituted by the plaintiff against the defendant for the purpose of determining the title and right of possession to a strip of land in Furnas county, Nebraska, on the boundary line between the lands of the plaintiff and of the defendant. The answer filed was a general denial. There was a trial of the issues to the court and jury, and at the close of plaintiff's testimony defendant rested, and moved for a verdict in his favor. This motion was denied, and, the value of the rents and profits having been stipulated between the parties, the court directed a verdict in favor of the plaintiff, and defendant appeals.

Plaintiff claimed the land in dispute as part of a quarter section of land owned by him, and, in proving title to his quarter section, he merely introduced the deed of his immediate grantor, without attempting to connect his title to a grant of the land from the United States government, or to a common source from which each of the parties claims. Plaintiff's testimony showed that in 1894 the disputed boundary was surveyed by one Phoebus, then the county surveyor of Furnas county, and that after this survey the defendant erected a fence along the line of this survey, and had held possession under claim of ownership of the tract for between eight and nine years prior to the institution of this suit. There was no evidence in the record that either plaintiff or his immediate grantor had ever been in actual adverse possession of the disputed tract. There was evidence, however, tending to impeach the accuracy of the Phoebus survey, which started from a disputed corner as located by one Hill, while county sur-

veyor in 1884. Plaintiff based his claim of title on surveys made from the disputed corner as located by county surveyor Hasty in the year 1880. He also offered proof tending to show the accuracy of the Hasty survey.

Now, the question arises as to whether, in this state of the record, the trial court was justified in directing a verdict in favor of the plaintiff, when the value of the rents and profits of the land was not in dispute. In an action of ejectment, when the plaintiff's testimony shows defendant in possession of the disputed lands under a claim of ownership, plaintiff must then recover on the superiority of his title, and, if he relies on a record or paper title, he must show a regular chain of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims. No chain of title, which does not reach back to the sovereignty of the soil, is sufficient of itself to constitute *prima facie* evidence of title, and, where the chain does not reach the sovereignty, there must be proof that some one of the grantors in the line of title was in possession before the defendant in possession can be required to justify his holding. 10 Am. & Eng. Ency. Law (2d ed.), 484. If, instead of relying on his record title, plaintiff claims title by adverse possession of the tract of land in dispute, and merely relies on the deed to show color of title, he cannot recover under the proof offered, because it fails to show that either plaintiff or his grantor has been in possession of the disputed tract for the statutory period.

It is contended by appellee, however, that, "where defendant offers no evidence of title, the prior possession of the plaintiff is of itself sufficient to entitle him to recover." The only correction on this statement of the rule is that, where *no* evidence is offered by either party tending to show title or right of possession in the defendant. then plaintiff's prior possession under a claim of ownership is sufficient to entitle him to recover. But, if evidence is offered, no matter whether by defendant or plain-

tiff, which tends to show that defendant is in possession under a claim of ownership, then this rule does not apply. We have no quarrel with the rule, that proof of possession under claim of ownership is sufficient to entitle plaintiff to recover in an action of ejectment against a mere trespasser, who enters without right, but this rule has no application to the facts shown by the plaintiff's testimony in this case. We think that plaintiff, having failed to trace his record title to the general government, or to a grantor in possession, or to a common source from which both parties claim, was not entitled to a directed verdict. *Omaha Real Estate & Trust Co. v. Reiter,* 47 Neb. 592.

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.

The following opinion on rehearing was filed July 12, 1907. *Former judgment of reversal adhered to:*

Ejectment: EVIDENCE. Where, in an action in ejectment, the plaintiff's chain of paper title does not reach back to the sovereign, or to a common source from which both parties claim, he must prove that he, or at least one of the grantors in his chain of title, had at some time been in possession of the premises before he can recover.

BARNES, J.

This is an action in ejectment. The real question in dispute, however, is the location of a boundary line. By our former judgment, *ante,* p. 571, it was held: "In an action of ejectment, where the plaintiff's testimony shows defendant in possession of the disputed lands under a

claim of ownership, plaintiff must then recover on the superiority of his title, and, if he relies on a record or paper title, he must show a regular chain of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims." In his brief and motion for a rehearing, counsel for the plaintiff challenged the correctness of the statement of facts contained in our opinion, and positively asserted that the evidence showed that before the time the action was commenced the plaintiff had been in actual possession of the strip of land in dispute, and had prior to 1892 been in possession of it as a tenant of his immediate grantor. A rehearing was therefore granted, and during the reargument of the case it was disclosed, that about nine years before the action was commenced the defendant placed a fence on what he claimed to be the boundary line, and took possession of the strip of land in dispute. This was plaintiff's testimony. To maintain his action he further testified that he had claimed to own the quarter section, of which he says the land in question is a part, ever since 1892. He also produced a deed, correctly describing a part of that quarter section, from his immediate grantor, which was introduced in evidence; and, after proof of several surveys made for the purpose of establishing the boundary line in question, plaintiff rested his case. The defendant introduced no evidence whatever, and the court thereupon directed a verdict for the plaintiff.

The plaintiff now invokes the rule that "proof of prior possession is sufficient to maintain ejectment as against a mere naked trespasser." This rule has no application to the facts in this case, for, as above stated, the plaintiff testified that at the commencement of the action the defendant was in the possession of the land in dispute claiming to be the owner thereof, and we find no evidence in the record to the contrary. It is also insisted that "possession coupled with color of title must prevail in ejectment, except where a better title is shown in the

defendant." It is sufficient to say that the facts disclosed by the record do not warrant the application of this rule. As we have correctly stated in our former opinion, the plaintiff failed to prove a paper title to the land in controversy either from the sovereign or a common source. It is true he introduced a deed in evidence, describing the quarter section of which he claims the strip of land in dispute is a part, from one C. M. Brown and wife to himself; but failed to show that Brown had ever been in possession of the land, that he was ever the owner thereof, or that the plaintiff was ever in possession of the premises. The plaintiff having failed to prove title and right of possession of the land in question, the district court erred in directing a judgment in his favor.

Our former judgment was therefore right, and is adhered to.

REVERSED.

DELPHINA SHOLES ET AL., APPELLANTS, V. CITY OF OMAHA, APPELLEE.

FILED MARCH 21, 1907. No. 14,721.

1. **Taxation:** INJUNCTION: PARTIES. After the purchase of mortgaged premises at foreclosure sale by the mortgagee, the mortgagor cannot maintain an action to restrain the collection of illegal taxes levied after the execution of the mortgage, unless bound by a special covenant therein to pay such future assessments.

2. **Petition** examined, and *held* obnoxious to a general demurrer.

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

Frank Heller and *John D. Ware,* for appellants.

J. P. Breen, W. H. Herdman, Harry E. Burnam and *I. J. Dunn, contra.*

OLDHAM, C.

Plaintiffs below filed their amended petition in the district court for Douglas county, praying for the can-

celation of certain special assessments of grading and curbing taxes levied against certain lots in the city of Omaha therein described. The defendant city demurred to the petition. The demurrer was sustained, the petition dismissed, and plaintiffs appeal.

The material allegations of the petition are that on and prior to October 2, 1893, plaintiffs were owners of the lots in controversy; that on said day, for the purpose of securing certain promissory notes set out in the petition, they executed and delivered a mortgage on the said premises to one Henry F. Cady; that the mortgage contained, among others, the following covenants and conditions: "We covenant * * * that we are lawfully seized of said premises; that they are free from incumbrances; and we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever. * * * Now if the said Delphina Sholes and DeVere Sholes shall well and truly pay, or cause to be paid, the said sums of money in said notes mentioned, with interest thereon according to the tenor and effect of said notes, then these presents to be null and void; but if the said sums of money, or any part thereof, or any interest thereon, are not paid when the same is due, then, in that case, the whole of said sums and interest shall become due by the terms of this indenture, or if the taxes and assessments of every nature which are or may be assessed or levied against said premises are not paid when the same are by law made due and payable, then, in like manner, the whole of said sums shall immediately become due and payable." The petition then alleges that in January, 1894, the special assessments for grading and curbing purposes complained of were levied against the property in dispute, and that in 1897 the legal holder of the notes and mortgage began an action of foreclosure in the district court for Douglas county, which action proceeded to judgment and sale of the mortgaged premises; that plaintiffs were made parties to this action, and

appeared therein, but did not answer; that on the appraisement of the property at the judicial sale certain incumbrances, among them the special assessments alleged against, were deducted from the appraised value of the property as incumbrances prior to the mortgage; that the plaintiff in the foreclosure proceeding was the purchaser at the sale; that the proceeds of the sale, when applied to the indebtedness and costs, left a deficiency due from plaintiffs of about $5,000, which remains wholly unpaid. There is no allegation in the petition that any deficiency judgment was either prayed for in the petition or entered against them in the foreclosure proceedings. The petition then sets out the grounds of the alleged invalidity of the special assessment, and that it has not yet been paid, and prays for the cancelation of the special tax, and for general equitable relief.

The brief of the appellants is exceedingly brief, and merely alleges that the only question to be determined in the case is whether appellants can maintain this cause of action, and that the appellants brought the action relying on the holdings of the supreme court of Wisconsin in *Pier v. Fond du Lac County,* 53 Wis. 421, and *Spear v. Door County,* 65 Wis. 298. We are asked to examine these cases and determine the appellants' rights from the light they shed on the controversy. In compliance with this request we have examined the cases relied upon, and find that in *Pier v. Fond du Lac County, supra,* the supreme court of Wisconsin, in an able and forceful opinion by Cassoday, J., determined that the grantor of a deed of warranty, who warrants against incumbrances, may, without joining the grantee, maintain an action to restrain the collection of illegal taxes for which he would be liable on his covenant of warranty. The opinion holds that a grantee, while a proper party, is not a necessary party, and especially so when the lands against which the tax is levied have been conveyed to numerous grantees. This case only goes to the right of the war-

rantor to maintain the action against incumbrances existing at the time of the warranty, and has no reference to future taxes or subsequent incumbrances. It is also confined to a case in which the grantee in the deed, as well as the grantor, had a right to maintain the action. In the case at bar, by the allegations of the petition, it is made to appear that the mortgagee and purchaser at the sale had estopped himself from denying the legality of the special assessment, by having it deducted from the appraised value of the real estate as a prior legal incumbrance, so that he could not have maintained this action in his own behalf. In *Spear v. Door County, supra,* the facts underlying the controversy, as stated in the opinion by Taylor, J., were that the plaintiff in the action was, in the year 1875, the owner of certain lands on which the illegal tax, which he sought to restrain, had been levied; that prior to the attempted levy of the tax he had executed a mortgage upon a portion of these lands; that he covenanted in said mortgage to pay all taxes subsequently levied on the said mortgaged premises; that after the attempted levy of the illegal tax he conveyed other portions of the property by deeds of warranty to different parties, in which deeds he had covenanted against all existing incumbrances; that shortly after the taxes were first levied the plaintiff brought an action to restrain their collection, which action never came to trial, but was dismissed in the year 1882; that after the dismissal of this injunction suit the taxes were again entered on the tax rolls as delinquent for the year 1875, and sold at the tax sale in the year 1883. The action was begun within nine months after this tax sale, and it was alleged that the mortgaged lands had been sold under the mortgage in 1880, and had been purchased at the foreclosure sale by Anson, Seth, and Thomas Piper, strangers to the mortgage. It was also admitted on the trial "that said Pipers purchased such mortgage and said premises by the procurement of said respondent, and that one consideration for said purchase, and of the price paid

by said Pipers was a verbal understanding between them and the respondent, and his promise to them that he would protect said premises from all prior taxes." In sustaining plaintiff's right to maintain the action, it was said in the opinion: "It is true, some of the lands in the case at bar were not conveyed by warranty deed, but those which were not were mortgaged, and the title of the plaintiff was sold upon a foreclosure of such mortgage to the present owners. * * * At the date of the plaintiff's mortgage, had he conveyed the lands by warranty deed, he would not have been liable for the payment of the taxes for the current year, unless upon special agreement. We think, therefore, the covenant in the mortgage to pay the taxes subsequently levied on the lands mortgaged, covered the taxes thereafter charged against them upon the tax rolls of 1875."

Now, the only covenant in the mortgage in the case at bar is against incumbrances existing at the time of the execution of the mortgage, and, on the authority of the case just cited, there would be no liability for subsequent taxes, unless created by special covenant. The only thing in the mortgage with reference to future taxes is the provision that, "if the taxes and assessments of every nature which are or may be assessed or levied against said premises are not paid when the same are by law made due and payable, then, in like manner, the whole of said sums shall immediately become due and payable." This provision, to our minds, falls far short of a special covenant to pay future taxes, on which an action could be maintained against the mortgagor by the mortgagee or his privies. The failure to pay the taxes under this condition of the mortgage simply gives the mortgagee the right to declare the whole indebtedness due, and to proceed with a suit of foreclosure. Now, if, as before pointed out, the mortgagee, who was the purchaser at the foreclosure sale, could not maintain this action against the defendant, because estopped by his conduct at the judicial sale, plaintiffs cannot maintain

it, unless liable to the mortgagee and purchaser on a special covenant to pay future taxes.

Finding no such special covenant in the mortgage relied upon, we conclude that neither of the cases cited support plaintiff's contention, and 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.

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

FILED MARCH 21, 1907. No. 14,732.

Taxation: SUIT UNDER SCAVENGER ACT: PETITION AS EVIDENCE. In an action to enforce the collection of all delinquent taxes and assessments on real estate under the provisions of chapter 77, art. IX, Comp. St. 1905, commonly known as the "Scavenger Act," the petition shall be deemed and taken to be *prima facie* evidence of the legality of all the taxes and assessments set forth therein, and of the several amounts levied on behalf of the state, county, or city, in which the lands are located, and that such taxes and assessments are unpaid and delinquent.

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

F. A. Boehmer and *I. P. Hewitt*, for appellant.

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

OLDHAM, C.

This was an action instituted in the name of the state of Nebraska, under the provisions of chapter 77, art. IX, Comp. St. 1905, commonly known as the "Scavenger Act," to enforce the collection of all back taxes on real estate

situated in Lancaster county, Nebraska, including all general and special assessments levied within the corporate limits of the city of Lincoln. Sarah M. Englehart, as owner of lots 1 and 2, in block 42, Dawson's addition to the city of Lincoln, contested the legality of a special assessment levied on the lots owned by her for the purpose of laying a pipe to drain these lots. On the hearing of the contest, the validity of the assessment was sustained by the trial court, and defendant appeals.

The chief contention urged is that the burden of proving the validity of a special tax is upon the party seeking to recover for the same, and that, consequently, the court erred in admitting the petition as *prima facie* proof of the validity of the special assessment. In support of this contention we are cited to the holdings of this court in *Smith v. City of Omaha,* 49 Neb. 883; *Leavitt v. Bell,* 55 Neb. 57; *Merrill v. Shields,* 57 Neb. 78, and *Hartsuff v. Hall,* 58 Neb. 417. Without a particular discussion of each of these cases, it is sufficient to say that the opinions in them were all rendered prior to the passage of the so-called scavenger act in 1903, and that this act is complete in itself and provides a new and independent method of procedure to enforce the payment and collection in one suit of all delinquent taxes and special assessments on real property situated in the county.

The first section of the act provides that "it shall be the duty of the county treasurer of each county, on or before the 15th day of May of each year, to prepare a complete statement of all the lands and lots in his county, on which the taxes for one or more years are delinquent, or on which any special assessment of any city in the county is delinquent." The remainder of the section points out the manner in which the statement shall be prepared. Section 2 of the act provides that "it shall be the duty of the treasurer of each city within the state to prepare and furnish the county treasurer of the county in which such city, or part thereof, is located, on or before the first day of May of each year, a complete list of

all lands and city lots within the limits of such city, on which there are unpaid taxes or assessments delinquent on the first day of May of the current year." The remainder of the section points out the manner in which the statement shall be prepared and certified by the city treasurer. Section 3 of the act provides that "the county treasurer shall, in compiling his complete statement of delinquent taxes and assessments in the county, combine with the statement of the state and county taxes, the list of taxes and assessments furnished by the city treasurer and shall incorporate the latter statement and list into the complete statement, so that all taxes and assessments of every nature within the county, delinquent on the first day of May of the current year shall be included in the statement provided for in section one." Section 4 provides the manner in which such complete statement shall be bound in one or more permanent volumes, and provides a form for such statement. Section 5 provides the form of the petition for the foreclosure of tax liens under this act. Section 8 of the act provides, among other things, that "the petition shall be deemed and taken to be *prima facie* evidence of the legality of all the taxes and assessments set forth therein and of the several amounts levied on behalf of the state, county, or city, in which the lands are located, and that such taxes and assessments are unpaid and delinquent." The provisions of this act plainly place the statements of the delinquent taxes certified to by the city treasurer and county treasurer on a parity with tax certificates so far as the presumption of legality of assessments is concerned. In the recent case of *Ure v. Reichenberg,* 63 Neb. 899, it is said: "in an action of foreclosure upon a tax-sale certificate, and for prior and subsequent taxes and special assessments paid by the holder of the certificate, the certificate and receipts of the proper officer for prior and subsequent taxes and special assessments are *prima facie evidence* of the validity of the taxes which they represent."

It is further contended by the appellant that the special

tax for drainage was illegal because the city, in grading the street adjacent to the lots in dispute, obstructed the natural drainage so as to create the nuisance which necessitated the laying of the drainage pipe for which the special assessment was levied. It is sufficient to say of this objection that the evidence offered in support of it was, to our minds, wholly insufficient to sustain this allegation.

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.

JOHN E. HANSON, APPELLANT, V. HANS E. HANSON, APPELLEE.

FILED MARCH 21, 1907. No. 14,937.

1. **Cases Followed.** *Hanson v. Hanson*, 64 Neb. 506, and *Hanson v. Hanson*, 4 Neb. (Unof.) 880, examined, approved and followed.

2. **Quieting Title:** DISMISSAL WITHOUT PREJUDICE. Action of the trial court in permitting plaintiff to dismiss his petition to quiet title without prejudice to the right of the defendant to file a supplemental answer and cross-petition examined, and *held* not prejudicial.

3. ———: REFERENCE. When, in an action to quiet title to partnership lands, it appears that no final accounting has ever been had of the effects of the partnership, the district court may, with propriety, appoint a referee to state the account of the partnership as a preliminary step in determining the interests of the partners in the lands in dispute.

4. **Statute of Limitations:** TRUSTS. The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the time of the discovery of the wrong or fraud, for the prevention of which the trust is imposed; but the statute does not begin to run in favor of the trustee of a resulting trust until such trustee, by some act or declaration, clearly repudiates his trust.

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

Ira D. Marston, A. M. Post and *J. D. Stires,* for appellant.

A. A. Welch and *Milchrist & Scott, contra.*

OLDHAM, C.

This opinion, we trust, will prove to be the concluding chapter of the history of a controversy that has engaged the attention of the district court for Wayne county for a period of ten years, and branches of which have been twice reviewed in this court. For the former opinions, see *Hanson v. Hanson,* 64 Neb. 506, and 4 Neb. (Unof.) 880. We can, perhaps, simplify and condense a discussion of the issues, urged on our attention by able and learned counsel for each of the contestants, by an abbreviated review of the facts underlying the controversy.

In 1880 John E. Hanson, plaintiff in this cause of action, and his brother, Hans E. Hanson, the defendant, entered into a copartnership in the mercantile and live stock business in Stanton, Iowa. In the following year they came together to the state of Nebraska for the purpose of investing in lands and continuing the stock business in this state. After visiting different portions of the state, defendant, Hans E. Hanson, returned to Iowa, and the plaintiff procured contracts for the purchase of the lands now in controversy, after which he also returned to Iowa. In the following summer they again came to Nebraska, and examined the lands and made payments thereon, the title being taken in the name of John E. Hanson. In the fall of 1882 the mercantile establishment was disposed of and its affiairs wound up, but the stock business was contined by the brothers in partnership. In the spring of 1883 the plaintiff, John E. Hanson, came to Nebraska to improve and cultivate the lands in controversy, and notice of the dissolution of

the firm in Iowa was published. The evidence shows, however, that it was agreed between the partners that the stock business was to be conducted in the name of Hans E. Hanson, in Iowa, and that John was to remain a silent partner in the firm, and that John was to likewise engage in the stock business in his own name in Nebraska for the benefit of the partnership. In 1887 defendant, Hans E. Hanson, disposed of his effects in Iowa, and also removed to Nebraska, and with his brother entered into possession of the lands in controversy. There are 600 acres of these lands, all in Wayne county, in two tracts, which, for convenience of distinction, we shall speak of as the lands in section 32 and the lands in section 14. Defendant, Hans E. Hanson, remained on the lands in section 32 and aided in their cultivation until the year 1890, when, by the request and at the suggestion of his brother, he removed to a quarter section of the land in section 14. It appears that soon after his arrival in Nebraska Hans E. Hanson began to talk with his brother about a division of the lands; that the brother discouraged the proposition, claiming that the lands were safer in his hands because the defendant was addicted to gambling and might squander his estate if turned over to him; that the final result of these conversations was an agreement by the plaintiff that, if defendant would remain on the lands for five years and aid in their cultivation and in paying off the incumbrances, then plaintiff would either sell the lands and divide the proceeds, or convey defendant's portion to him. It appears that there was a further talk between the parties on this question in the year 1894, in which the plaintiff insisted that the defendant had little or no interest in the lands.

In 1897 plaintiff in this cause of action brought a suit in ejectment against the defendant for the possession of the quarter section of land on which the defendant resided in section 14. In this action the defendant admitted that the legal title to the lands was in the plaintiff, but alleged that the lands were held by plaintiff

in trust for the partnership, and that they had been purchased with partnership funds. There was a trial of these issues to a jury, and a verdict and judgment for the defendant, which was never appealed from. In 1898 plaintiff instituted a suit against defendant in the district court for Wayne county for an accounting of the affairs of the partnership. This suit was subsequently dismissed, and in 1899 plaintiff instituted a suit for the purpose of quieting the title in him to both tracts of land in controversy. In the petition he alleged, among other things, that he was informed and believed "that the defendant claimed that said lands were purchased with the assets of an alleged partnership, claimed to have existed between the plaintiff and the defendant prior to the year 1883." Defendant answered this petition, admitting that the legal title to the lands was in the plaintiff, and alleging that the lands were purchased with the funds of the partnership, setting out fully the continuation of the partnership up to the time of the institution of the suit. He also pleaded, by way of estoppel as to the fact that the lands were purchased with partnership funds, the judgment of the district court in the ejectment suit above referred to. The answer, however, did not contain any prayer for equitable relief. This action, which for distinction from the one following we shall term the "title suit," proceeded to a judgment in the district court, in which plaintiff's title was quieted in all the lands except the quarter section in section 14 on which defendant resided, and as to this tract the bill was dismissed. This cause was taken by appeal to this court, as we shall presently point out. While the "title suit" was pending on appeal, plaintiff instituted another action against the defendant in the district court for Wayne county for the partition of the quarter section of land situated in section 14 occupied by the defendant. In this action defendant answered, setting up his claim to an undivided one-half interest in this particular quarter section, as well as in all the partnership lands, and also

setting up the pendency of the "title suit" on appeal, pleading anew all the issues therein involved, and prayed that this suit be held in abeyance until the determination of the "title suit," and until a final accounting of the partnership affairs was had. This partition suit proceeded to judgment in the district court and was likewise appealed to this court.

On the 17th day of April, 1902, an opinion was rendered in this court in the "title suit" by ALBERT, C., reversing and remanding the cause, in which it was determined that it is conclusively established by the judgment in the ejectment case "that the title to the lands in controversy was acquired by the plaintiff while he and the defendant were in partnership, with partnership funds and as a partnership venture, and that he holds the legal title thereto in trust for the copartnership." *Hanson v. Hanson,* 64 Neb. 506. On the first day of the term following the return of this mandate, defendant by leave of court filed an amended answer, in which he prayed for affirmative equitable relief. Issue was joined on this amended answer and cross-petition by an answer to the cross-petition, filed by the plaintiff on March 7, 1903. On May 11 following the defendant asked leave to file a second amended and supplemental answer to the cross-petition. This leave was objected to by the plaintiff, who in his turn asked leave to dismiss his petition. The court permitted plaintiff to dismiss his petition without prejudice to the defendant's right to file his second amended and supplemental answer and cross-petition. This supplemental answer and cross-petition contained all the allegations of the original answer, and set up the judgment and mandate of the supreme court, and asked that an accounting be had of the affairs of the partnership and that, on the statement of such account, partition be made of the lands in conformity with the interest of each of the partners therein. The plaintiff subsequently filed an answer to this supplemental answer and cross-petition, and defendant filed a reply.

The opinion of this court in the partition suit was delivered by AMES, C., on October 7, 1903, and the mandate of reversal on this opinion was returned to the district court for Wayne county on November 2, following. The opinion is reported in 4 Neb. (Unof.) 880. Afterwards, on November 10, defendant filed a motion for leave to file a supplemental reply and also a motion to consolidate the two cases. On April 25, 1904, Honorable N. D. Jackson was appointed by the court as referee to report his findings on all questions of law and fact involved in the controversy and to state the account of the partnership, if necessary. The referee reported his conclusions of law, which were, in substance, that the two causes of action should be consolidated, that plaintiff, John E. Hanson, held all the lands in trust for the partnership firm, and that the action was not barred by the statute of limitations. He thereupon stated the account between the partners, finding that there was about $2,500 due the plaintiff from the defendant and about $5,000 from the partnership. The report also found the amount of the mortgage indebtedness existing against the lands, and recommended a partition thereof in conformity with these findings. This report, with slight corrections, was approved by the district court, and judgment was entered thereon. To reverse this judgment plaintiff has again appealed to this court.

No objection is urged against the partnership account as stated by the district court, except such objection as is involved in the plea of the statute of limitations, and it is especially urged that one item charged against the plaintiff for the proceeds of the sale of a quarter section of partnership lands was, in any event, subject to the bar of the statute. In the opinion in the partition suit between these parties it was said with reference to the plea of the statute of limitations as against a partnership accounting: "The defendant seeks the repose of the statute of limitations, but we think it ought to be denied to him. The transactions between the parties

with respect to this land have extended over a long term of years and appear not yet to have terminated. Neither party should be heard to complain that the other has not sooner called for an accounting and settlement." 4 Neb. (Unof.) 880. Counsel for plaintiff seek to avoid the effect of this holding, as being the established law of the case, by urging that the question of the title to the lands by adverse possession was not raised in the suit for partition, but that, on the contrary, it was admitted that, as far as this one quarter section was concerned, the title was held in trust for the partnership. This contention, as far as it goes, is well founded, and there was no claim of title by adverse occupancy urged in the partition case, but it is urged in the partition case that the title to all the lands was held by plaintiff as trustee for the partnership, and that all the lands were purchased with partnership assets, and that an accounting of the entire transaction was essential to the determination of the rights of the parties in the partnership lands. Consequently, the effect of the holding of the opinion is that the statute of limitations has not run against the partnership accounting, and that such an accounting is a necessary incident to a judgment of partition of the lands. Independently of the holding of this court on this question, we would say that the finding of the referee that the partnership in the lands of live stock business continued without interruption down to the year 1897 is fully and, we think, conclusively established by the testimony. It is further established that plaintiff recognized the fact that there had been no settlement of the partnership when he filed his suit for a partnership accounting in the year 1898. This conclusion disposes of the plea of the statute of limitations as to the charge against plaintiff for the proceeds of a quarter section of these partnership lands, which he had sold before any litigation had begun between the parties.

This, then, brings us to the next contention urged by the plaintiff that the statute of limitations has quieted

his title to all the lands, except the quarter section in section 14 occupied by the defendant, and that, for the purpose of the running of the statute, the second amended and supplemental answer filed by defendant in the "title suit" in 1903 should be regarded as a new cause of action, as far, at least, as the request for a partnership accounting is concerned. When the "title suit" was instituted, plaintiff's petition alleged, as before set out, on information and belief, that defendant claimed an undivided one-half interest in all the lands and that the lands had been purchased with partnership funds. The answer first filed by the defendant reaffirmed this allegation of the petition, and set out with particularity the continuance of the partnership up to the institution of the suit, and also alleged that the affairs of the partnership had not been wound up nor any accounting had, but, as before stated, it had no prayer for equitable relief. But, before plaintiff made any effort to dismiss his bill to quiet title, defendant had filed without objection his first amended answer and cross-petition, in which he did pray for equitable relief and asked for a partition in conformity with the interests of the partners in the lands. This answer and cross-petition had been answered by the plaintiff and issues joined on it before the plaintiff attempted to dismiss his petition. In this state of the record, the trial court was clearly right in permitting plaintiff to dismiss his petition without prejudice to defendant's right to equitable relief on his answer and cross-petition.

The original petition filed by plaintiff in the "title suit" was for the purpose of quieting all conflicting claims of title in the lands between plaintiff and defendant. It was instituted under the code, which, for the purpose of preventing a multiplicity of suits, has enlarged and expanded the general equity jurisdiction of the district courts, so as to permit an action of this nature at the suit of a plaintiff, whether in possession of the disputed lands or not. The plain intent of the statute is to determine in one cause of action all conflicting claims of all parties to

the suit to all the lands in dispute between them. And, when the district court takes jurisdiction of such a cause of action, it takes it with power to do whatever is necessary to a full exercise of its jurisdiction, and, whenever an accounting is essential to a determination of the rights of the parties in the lands in controversy, the court may direct such an accounting as a preliminary step to its final conclusion, and, when such an accounting is necessary, it may, with propriety, be the subject of reference. *Foree v. Stubbs,* 41 Neb. 271; *Dolen v. Black,* 48 Neb. 688; *Lavender v. Holmes,* 23 Neb. 345; *St. James Orphan Asylum v. Shelby,* 75 Neb. 591; *Mills v. Miller,* 3 Neb. 87. If we are correct in the view we have expressed as to the nature and extent of an action to quiet title under the statute, it would follow that the referee was right in his conclusion of law that the two actions have a common object, the settlement of the dispute between the same parties, as to two tracts of land, growing out of one venture, purchased at the same time from a common fund; and the two actions were, therefore, properly consolidated that an end might be reached of this vexatious and long continued dispute.

It having been determined, as before set out, that plaintiff holds the legal title to the lands in controversy in trust for the partnership, the final question arises as to when the statute of limitations began to run in his favor as against the defendant. It is true, as contended by plaintiff, that his trust in the lands was an implied, as distinguished from an express, trust. Implied trusts are of two species, one denominated a "resulting trust," and the other a "constructive trust." In the first class are those trusts which attach to a legal estate acquired by consent of the parties, not in violation of any fiduciary duty or trust relation, for the common benefit of both trustee and *cestui que trust.* This trust arises out of, and is declared in favor of, the intent of the parties creating it. Its inception is in good faith and in furtherance of fair and honest dealing. The other species of implied trusts,

which is called "constructive trusts," is one imposed by a court of equity for the purpose of enforcing an equitable right as against the fraudulent intent of the trustee *ex maleficio*. This latter class of implied trusts have their origin in the bad faith of the trustee, and are imposed by a court of conscience to defeat his wrongful ends. 3 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1155. Where a constructive trust is imposed, the statute begins to run against the *cestui que trust* at least from the time of the discovery of the wrong, because the trust is held against his interest and without his consent. But with reference to the former class of trusts, which are created for the benefit of both the trustee and the *cestui que trust*, the statute of limitations is not put in operation by any act of the trustee in furtherance of his trust, but only by some act which is equivalent to a repudiation of it. *Edwards v. University*, 1 Dev. & Bat. Eq. (N. Car.) 325, 30 Am. Dec. 170; *O'Toole v. Hurley*, 115 Mich. 517; *Fawcett v. Fawcett*, 85 Wis. 332; 1 Perry, Trusts (5th ed.), sec. 139.

In the case at bar, it is clear that plaintiff held the lands in trust for the partnership, not by his own wrong, but by consent of the partnership, and that the statute did not begin to run in his favor against his *cestui que trust* until he had done some act tending to repudiate his trust. His occupancy of the land for most of the time was concurrent with that of the defendant. The proceeds of the land were invested for a common purpose, the raising of stock and discharging the obligations against the trust estate; and no act was committed by the trustee tending to show a repudiation of the trust, until he instituted his suit in ejectment against the defendant in the year 1897.

It therefore follows that the plea of the statute of limitations is unavailing, and we are of opinion that the judgment of the district court rendered on the report of

the referee is right, just and equitable, and we 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.

CHARLOTTE S. FLINT, ADMINISTRATRIX, APPELLANT, V. FRANK J. CHALOUPKA, SR., ET AL., APPELLEES.

FILED MARCH 21, 1907. No. 14,524.

1. **Creditor's Suit:** BURDEN OF PROOF. In a creditor's suit to set aside a conveyance by a debtor to a near relative, alleged to have been made in consideration of a past due indebtedness, the burden is upon the grantee to show that the debt is genuine, that his purpose was honest, and that he acted in good faith in obtaining the title.

2. ———: ABATEMENT. A creditor's suit is an action *in rem* and not against the debtor personally, and a discharge by a court of bankruptcy is no bar thereto.

3. ———: DEFENSES. A fraudulent grantee cannot plead the subsequent discharge in bankruptcy of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceeding, where the land involved was never brought within the jurisdiction of the bankruptcy court.

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

J. H. Grimm & Son and *A. R. Scott,* for appellant.

Foss & Brown and *A. S. Sands, contra.*

EPPERSON, C.

The plaintiff, Charlotte S. Flint, as administratrix of the estate of James Flint, deceased, brought this action, a creditor's suit, against the defendants to set aside sev-

eral conveyances of land. All conveyances assailed in the petition were abandoned by plaintiff, except those hereinafter referred to.

On the 11th day of August, 1896, Frank J. Chaloupka, Sr., transferred to his son, Frank J. Chaloupka, Jr., 385 acres of land in Saline county, Nebraska, for the expressed consideration of $17,050. No cash was paid, but a mortgage indebtedness of $7,050 was assumed by the grantee. On the same day (August 11, 1896) Frank J. Chaloupka, Jr., executed and delivered to his mother a note for $10,000, and a mortgage on the land securing the same. A short time thereafter there was indorsed on the note $3,600, which represented an alleged indebtedness owing to Frank J. Chaloupka, Jr., by his father and Joseph Chaloupka, another son. The reason this sum was later indorsed on the note is explained by defendants, who say that at the time of the transfer the actual amount of this indebtedness was not known, and could not be ascertained until Joseph Chaloupka, who was absent, should return to Wilber, the home of the defendants. In January, 1897, Frank J. Chaloupka, Jr., transferred 160 acres of the same land to his mother in consideration of her releasing the $10,000 mortgage. A year later the mother sold the 160 acres to a stranger, whose title is not assailed herein. At the time of the transfer plaintiff was urging the payment of her note and threatening suit thereon. Afterwards she obtained judgment for $1,451.40, and alleges that the several transfers of land were made to defraud the creditors of Frank J. Chaloupka, Sr.

It is contended by defendants that, at the time of the transfer of the land by the father to the son, the father was indebted to his wife Anna Chaloupka in the sum of $6,400, and to settle this indebtedness the father caused the son to execute the $10,000 note, payable to the wife, as above set out. Plaintiff claims that this transaction did not amount to a *bona fide* transfer between husband and wife. The indebtedness claimed by the wife repre-

sented alleged advancements to her by her father between 1862 and 1874, and an inheritance from her father, which, it is alleged, was loaned by her to her husband. The total amount of the indebtedness between the husband and wife in 1891, with interest, was $5,400, for which a note was given by the husband to the wife. The principal and interest due on this note in 1896 was $6,400. The evidence, however, is not clear that such advancements were made to the wife. From the testimony of the husband it appears that the money was given to him by his father-in-law for the purpose of buying land and paying debts, and was intended for him and his wife. We cannot say, as a matter of law, that the relationship of debtor and creditor existed between husband and wife when the note was executed and delivered to her. This fact, however, does not have the importance claimed for it by the plaintiff, for this indebtedness was extinguished by a transfer to the wife of 160 acres of land, which was in turn sold to a stranger whose title is not assailed. When this suit was commenced, the 225 acres in controversy had been mortgaged by Frank J. Chaloupka, Jr., to his mother for $2,600 to indemnify her against a mortgage for that amount on the 160 acres deeded to her, the intention being to give her a clear title to the 160 acres for the release of the $10,000 mortgage. The $2,600 mortgage is not questioned in this case, and the money or property realized by the wife, Anna Chaloupka, through these transactions with her son cannot be assailed under the pleading herein. The only bearing which these transactions have upon the case is their value as evidence tending to show fraud in the transfer of the land to the son. For this purpose it is not, standing alone, very convincing. The son could reasonably have believed that the father was indebted to his mother in the sum of $6,400, which he (the son) was willing to assume as a part of the purchase price of the land. We must, therefore, look to other facts in the case in determining the good faith of the transfer assailed.

Frank J. Chaloupka paid no cash consideration for the

land deeded to him. The sum and substance of the entire transaction relative to the farm land was the cancelation by him of the indebtedness of $3,600 held against his father and brother, Joseph Chaloupka, which was the consideration given by him for his father's equity in 225 acres of land. Upon the *bona fides* of this consideration the result of this suit depends.

It is a well established rule that, where a transfer of land is made by a debtor to a near relative in consideration of a past due indebtedness, the burden rests upon the grantee in a creditor's suit to show that the debt was genuine, that his purpose was honest, and that he acted in good faith in obtaining title. Such transactions are looked upon with suspicion, and the suspicion continues until the grantee shows the good faith of the transfer by clear and satisfactory evidence. Generally, when the transaction is in fraud of creditors, knowledge thereof rests only with the near relatives, or others in privity with the debtor. When the testimony relied upon to show good faith is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion.

In the case at bar, the consideration in the first instance was represented by the $10,000 note and mortgage given to the grantor's wife whose note only called for $6,400. The alleged indebtedness, which, it is claimed, was due to the son (the grantee), was represented by a note of $1,000 against his father and brother Joseph, an item of $125 which he had paid for his father, and the remainder was for wheat sold to the father and brother at different times from 1893 to 1896. The only evidence of this indebtedness was the testimony of the father and his two sons. From 1893 to 1896 the father and Joseph were engaged in the milling business in Wilber. The amount and value of the wheat delivered cannot be ascertained from the evidence of the parties. We are required to consider only their statements as to the gross amount due upon all these claims. They expect the court to find that Frank

J. Chaloupka, Jr., delivered to his father and brother wheat raised in 1892 and 1893 for which he received no consideration until the deed in controversy was executed, and that credit was extended to them on an open account, no agreement or contract for credit being shown. When the wheat was sold, the mill was a going concern, and, for aught that appears in the record, they could have paid cash for grain bought. In 1894 and 1895 the crops of Frank J. Chaloupka, Jr., were not good, and in all reason it would seem that he would collect money due him on crops of previous years. The defense may be true, but it is not shown by clear and satisfactory evidence. The evidence disclosed that a bookkeeper was employed in the mill, yet no books were introduced showing the indebtedness to the grantee, nor is the absence of such record proof accounted for. There were introduced in evidence certain figures made by the bookkeeper at the mill in a memorandum book belonging to Frank J. Chaloupka, Jr., purporting to show a delivery of part of the wheat delivered to the mill. This, however, does not prove a sale of the wheat on credit. At the time of the transfer, the only writing or memoranda referred to in the evidence showing the indebtedness owing to Frank, Jr., was in his possession, yet the parties found it necessary to await the return of Joseph to ascertain the amount of that indebtedness. Upon his return, the amount thereof was estimated and indorsed upon the $10,000 note to Anna Chaloupka, apparently without asking her consent. The transfer of the 160 acres to the debtor's wife so soon after the conveyance to the son raises a strong suspicion that it was contemplated at the time of the first transfer for the purpose of securing at least 160 acres from creditors. This suspicion is not removed by the testimony of the Chaloupkas, who said that on account of the two years' crop failure the son considered that he could not raise the funds to pay the remainder of the $10,000 mortgage, and for this reason conveyed the 160 acres in satisfaction thereof. The two years' crop failure was known

when the mortgage was given. These are circumstances which the law of evidence requires the defendants to explain by clear and satisfactory proof showing them consistent with good faith. If the record contained any written evidence, or testimony of disinterested witnesses corroborating the testimony of the Chaloupkas, we would not hesitate in affirming the judgment. As it is, the *bona fides* of the transaction remains in doubt, and we are required to resolve that doubt against the parties upon whom the law has placed the burden of proof. We cannot say that the defendants successfully carried the burden of proving the good faith of the conveyance to Frank J. Chaloupka, Jr.

Another transfer assailed was the conveyance of certain city property used in the livery stable business. The title to this property never stood in the name of the father, and the evidence fails to show that it was purchased with his money. As to this, the judgment of the district court was for defendants, and we think rightly so. The lower court found for plaintiff as to certain lots in the city of Wilber, but they were not of sufficient value to afford full relief.

Plaintiff's judgment was obtained May 12, 1897, upon a promissory note dated November 27, 1894. On September 2, 1897, plaintiff caused an execution to be issued upon said judgment, which was on the same day returned *nulla bona*. This action was instituted on September 7, 1898. In September, 1899, Frank J. Chaloupka, Sr., upon his voluntary petition, was declared a bankrupt under the federal bankruptcy act of 1898. Plaintiff herein filed proof of her claim with the referee in bankruptcy and participated in the election of a trustee. She did not disclose to the court of bankruptcy that she had or claimed a lien upon the land here in controversy by virtue of the institution of this suit. Defendants contend that, by the filing of the claim with the bankruptcy court without reference to the security claimed, plaintiff abandoned such security, and the subsequent discharge of the elder

Chaloupka operates as a bar to this suit. Had plaintiff remained out of the bankruptcy court, no doubt would arise as to her right to prosecute her creditor's bill. Had the bankrupt listed with the trustee the land in controversy and a disposition thereof been made by the trustee, no doubt would exist but that the plaintiff, not having disclosed nor claimed under her lien, would have been estopped from the prosecution of this suit. And, further, in an action properly brought by the trustee in bankruptcy against the plaintiff herein, we think that under the existing facts the trustee would have prevailed and the land in controversy would have been subjected to the payment of all claims against the bankrupt. But none of these propositions exist here. Can the bankrupt, or his fraudulent grantee of the land which was never in the jurisdiction of the bankruptcy court, plead a discharge in bankruptcy as a bar to a creditor's suit against a creditor who wrongfully failed to disclose his security to the bankruptcy court? In *White v. Crawford,* 9 Fed. 371, cited by defendants, it was held: "A creditor waives any lien he may have upon the property of his debtor, by proving up his debt as an unsecured claim." The rule was therein applied in favor of a grantee in a deed containing an erroneous description which was corrected after the creditor obtained a judgment. In *Shorten v. Booth,* 32 La. Ann. 397, it was held: "A creditor who proves his whole debt, as one without security, against a bankrupt's estate, thereby releases any mortgage he may have." The land there involved was within the jurisdiction of the bankruptcy court, and was sold free from incumbrance by order of that court upon notice to creditors. The contesting creditor had previously filed his claim, with an affirmative representation that he had no security. In *Heard v. Jones,* 56 Ga. 271, it appears that the bankrupt, after turning over to the trustee the property there in controversy, which was in fact exempt from the claims of general creditors, sold the same. His grantee successfully pleaded the bankrupt's discharge. Other cases cited

by defendants support the general rule that the filing of a secured debt as a general claim is a waiver of the security. *Hoadley v. Caywood,* 40 Ind. 239; *Spilman v. Johnson,* 27 Grat. (Va.) 33 (where creditor sought to reach property sold by trustee); *Bowley v. Bowley,* 41 Me. 542; *Haxtun v. Corse,* 4 Edw. Ch. (N. Y.) 600.

On the other hand, we find authorities supporting the plaintiff's right to maintain this action. In *Taylor v. Taylor,* 59 N. J. Eq. 86, it is held: "The bankruptcy act of 1898, sec. 67, par. *b,* providing that whenever a creditor is prevented from enforcing his rights as against a lien created by the debtor, who afterwards becomes a bankrupt, the trustee shall be subrogated to and may enforce such rights for the benefit of the estate, does not transfer to the trustee the right of a judgment creditor to enforce an equitable lien acquired by the filing of a creditor's bill before bankruptcy proceedings were begun, or abate such creditor's right to prosecute such suit." To the same effect are: *Storm v. Waddell,* 2 Sandf. Ch. (N. Y.) 544; *Macy v. Jordan,* 2 Denio (N. Y.), 570. In *Lowry v. Morrison,* 11 Paige Ch. (N. Y.) 327, it is held: "Where a judgment creditor's suit is commenced before a decree in bankruptcy against the defendant therein, so as to obtain a lien upon his property, and the defendant subsequently obtains his discharge under the bankruptcy act, he cannot plead such discharge in bar of the suit generally; as the discharge is only a bar to a personal decree against the bankrupt." In *Cook v. Farrington,* 104 Mass. 212, a case wherein a subsequent mortgagee pleaded the discharge in bankruptcy of the mortgagor of personal property, it is said: "A mortgagee of personal property who has proved his debt against the estate of the mortgagor in bankruptcy without disclosing his security, is not thereby estopped to claim the property against a subsequent mortgagee who has not proved his debt. The proof by Willard (the first mortgagee) without such relief or conveyance was contrary to law; but it did not of itself operate to discharge the mortgage. It might prevent his setting up the mort-

gage against the assignee claiming to hold the property as a part of the assets of the estate. Equity might hold the creditor to do what he ought to have done, and subrogate the assignee to his rights in the security if a release or discharge would not work the same advantage to the estate. But only the assignee can avail himself of the rights which these provisions of the bankrupt law are intended to secure. The plaintiff can derive no right or advantage therefrom. Neither can the plaintiff set up those proceedings as an estoppel. There is want of mutuality as well as of privity. He has acquired no title from the assignee; he is not interested in the estate as a creditor having proved his debt in bankruptcy; he is in no way affected by the bankruptcy proceedings either in his relations to the defendant or to the property." In *Bassett & Brown v. Baird,* 85 Pa. St. 384, the holder of a mechanic's lien, who had previously proved the secured debt against the bankrupt, his debtor, without disclosing the fact of his lien, was permitted to foreclose after the discharge of his debtor, the land then belonging to the debtor's grantee who purchased prior to the bankruptcy proceedings. In *Moyer v. Dewey,* 103 U. S. 301, a case wherein a creditor, after the discharge in bankruptcy of his debtor, sought to reach property fraudulently conveyed before, it was held that, so far as the discharge was concerned, its only effect was personal to the bankrupt, and did not avail to release the fraudulent grantees from liability for the fraud committed by them. In reference to that decision the same court, in *Upshur v. Briscoe,* 138 U. S. 365, said: "It is manifest that the discharge would not have availed the bankrupt if he had pleaded it, and that it could not avail his fraudulent grantees." Cases directly in point are few, but the weight of authority, we believe, and the rule more in harmony with justice, will not permit a fraudulent grantee to plead the subsequent discharge of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceeding, and which

pertains to land which was never brought within the jurisdiction of the bankruptcy court.

Defendants with great confidence cite *Kohout v. Chaloupka,* 69 Neb. 677, a case where the bankruptcy proceeding here considered was before the court, and wherein the trustee attempted to intervene in this litigation. That case was disposed of upon a demurrer to the petition for intervention which was held insufficient. It appears from that case that the plaintiff herein did not resist the attempted intervention of the trustee, at least she was not a party to the appeal, and the only question there determined was that the petition was insufficient, in that it failed to allege that the plaintiff herein waived her security. In the opinion it is said: "For all that appears from the trustee's petition she may have appeared in the bankruptcy proceedings, as she had a right to do, only for the purpose of participating to the extent that her claim was greater than her security. The allegation that by filing her claim she waived her security was a material one, and the only presumption that may be indulged from its absence is that she did not waive her security." Had the trustee alleged the facts as the evidence herein discloses them, there can be no doubt but that he would have been permitted to intervene. However, the case is now here upon an issue between the creditor and the bankrupt's alleged fraudulent grantee, who in no way succeeded to the rights of the trustee. Neither may the defendants invoke the rule, which the trustee by proper pleading and showing could have invoked, namely, "that a creditor of a bankrupt may either directly or indirectly waive his security and prove his claim as unsecured; as where a creditor, by judgment, execution, attachment, or creditor's suit, proves his claim without disclosing his lien, in which event he will not subsequently be permitted to enforce it, but will be deemed to have waived it." *Kohout v. Chaloupka, supra.*

We therefore recommend that the judgment of the district court be reversed and the cause remanded to the

district court, with instructions to modify the judgment by an order setting aside the conveyance of the farm land from Frank J. Chaloupka, Sr., and wife to Frank J. Chaloupka, Jr., and subject the same to the payment of the plaintiff's judgment.

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 to the district court, with instructions to modify the judgment by an order setting aside the conveyance of the farm land from Frank J. Chaloupka, Sr., and wife to Frank J. Chaloupka, Jr., and subjecting the same to the payment of plaintiff's judgment.

REVERSED.

WILLIAM L. KELLER, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLEE.

FILED MARCH 21, 1907. No. 14,647.

1. **Depositions:** ADMISSIBILITY. A deposition, and exhibit thereto attached, when properly identified by the deponent, may, when material to the case, be given in evidence by the party not taking the deposition.

2. **Instructions of the court and rulings upon evidence examined, and** *held* without error.

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

Frank E. Beeman, for appellant.

J. W. Deweese, Frank E. Bishop and *H. M. Sinclair, contra.*

EPPERSON, C.

On September 8, 1900, plaintiff Keller shipped a car of celery over the Union Pacific railway from Kearney to Omaha. The car was there refused by the consignee, and,

acting under instructions from plaintiff, the Union Pacific Railway Company shipped the car over defendant's road to a commission firm in Kansas City. When the car reached Kansas City, it was discovered that the celery was spoiled. Plaintiff brought this action to recover its value, alleging negligence on the part of the defendant company as a common carrier for failure to supply the car with ice and for delay in transportation. Defendant recovered a small judgment in the district court for freight charges pleaded as a counterclaim, and plaintiff appeals.

The burden was upon plaintiff to show that the goods were in good condition when delivered to defendant for shipment; at least, to show facts raising a presumption to that effect. The question is: Did the celery spoil while in the custody of the defendant company? The evidence is equally as strong in proving that it spoiled while in the custody of the initial carrier, and, hence, no presumption may be indulged that the celery was in good condition when delivered to the defendant. The instructions of the court excepted to embodied these principles, and, when read together, charged the jury as to what facts, if established, would constitute negligence on the part of the defendant.

Objections were made to three instructions requested by defendant and given, because the court repeated the statement that it was the duty of the plaintiff and the Union Pacific Railway Company to properly ice the car between Kearney and Omaha. The statement was used as an introduction to the real charge given, and of itself was not an issue, and therefore plaintiff was not prejudiced.

Plaintiff objected to the introduction in evidence of a letter attached as an exhibit to a deposition taken by plaintiff. Defendant introduced the entire deposition; and the letter, which was properly identified by deponent on cross-examination, in no way impeached his evidence as contended by plaintiff. Under section 383 of the code, the admission of the deposition and exhibit was proper. *Ulrich v. McConaughey,* 63 Neb. 11.

Plaintiff complains of the court's rejection of a telegram from his consignee in Omaha, in which the latter stated that the celery was too short for the Omaha market. This assignment requires no discussion. He also assigns as error the court's refusal to admit in evidence an ice ticket showing the amount of ice placed in the car by the Union Pacific Railway Company. The amount shown by the ticket was testified to by the witness identifying it. Its admission would have added no weight to the facts stated, and the testimony of the witness on this point being undisputed, we discover no prejudice in the exclusion of the offered ice ticket.

There is no reversible error in the 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.

FIRST NATIONAL BANK OF WEST POINT, APPELLANT, V. WILLIAM E. KRAUSE, APPELLEE.

FILED MARCH 21, 1907. No. 14,705.

Account: EVIDENCE. In this, an action for an accounting between joint owners of real estate, evidence examined, and *held* sufficient to sustain the finding of the trial court.

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

E. K. Valentine and *M. McLaughlin,* for appellant.

T. M. Franse and *Anderson & Keefe, contra.*

EPPERSON, C.

In 1894, the defendants Krause and Sonnenschein became the joint owners of several city lots in West Point,

Nebraska. Title thereto was taken in the name of the defendant Krause. Afterwards some of the lots were transferred as a part of the consideration for 320 acres of land in Pierce county. The title to this land was also taken in the name of Krause, but Sonnenschein was the owner of one-half thereof. Later Sonnenschein conveyed to the First National Bank of West Point, the plaintiff herein, all his interest in the remaining lots, and to the rents and profits thereof, and to the rents and profits collected by Krause from the land in Pierce county, which had been sold July 13, 1903. During the joint ownership Krause had the management of the property, collected the rents and paid the taxes and interest, and most of the expenditure for repairs and improvements. Plaintiff brought this action for an accounting with defendant Krause, and also made Sonnenschein a party defendant.

The principal contention pertains to the land, plaintiff claiming $2,411 as one-half the net profits, Krause contending that the expenditures exceeded the receipts by $2,300. Briefly stated, the transactions regarding the land are as follows. The consideration given for the land was the city lots, valued at $800, a mortgage indebtedness of $1,850 assumed, cash $1,000, and a note of $1,150 given to the grantor by Krause and indorsed by Sonnenschein. The $1,000 cash payment was borrowed from a bank upon the joint note of the defendants, and Krause herein seeks to charge plaintiff with one-half thereof, claiming to have paid all of it; but it is conclusively established by the testimony of Sonnenschein, fortified by the written acknowledgment of Krause, that Sonnenschein paid one-half of this indebtedness. Much controversy arises over the $1,150 note given to the grantor. Sonnenschein testified that the note was given, not as a part of the consideration for the land, but as a special favor to Krause. In view, however, of a written contract in his own handwriting, which provided for the giving of the note as a part of the consideration, we are led to the conclusion that he is mistaken, and that the note was a just charge against the

joint funds. On March 6, 1895, Krause paid $450 on the $1,150 note and gave his own note for $700 in renewal of the remainder. Later he paid $100 on the principal, and for some time thereafter paid interest upon the remaining $600, finally extinguishing the same. On March 6, 1895, he also executed a $2,500 mortgage upon the land in controversy, thereby renewing the original mortgage, then amounting to $1,897. He attempts to charge against the joint funds all the interest and principal paid upon the $2,500 mortgage. Plaintiff concedes that $1,897 thereof is a just charge, and we add $450, being the amount paid on the $1,150 note. No rents had been received prior to the date of this payment and the indebtedness was in no way diminished by changing the evidence thereof from one payee to another. As the mortgage called for only 7 per cent. interest, no prejudice results by changing this indebtedness from an unsecured to a secured claim. As to the $153 of the $2,500 mortgage, we find no competent evidence showing that this was used for the joint undertaking.

On December 9, 1896, Sonnenschein paid Krause one-half of all moneys expended prior thereto for repairs and improvements. This settlement did not include interest payments or taxes. It is disclosed by the record that the amount then paid by Sonnenschein represented one-half of all expenditures other than interest and taxes, less $84.43 rents received. Plaintiff admits the expenditure of $407.06 in the aggregate for improvements, repairs and taxes subsequent to December 9, 1896. It is undisputed that $844.75 was the aggregate rental received since December 9, 1896, and $4,665, the selling price of the land, defendant Sonnenschein expending $82.05, which the evidence clearly shows should be set off against the expenditure of defendant Krause, and $35, regarding which the evidence is not so clear. Computing interest at the rate of 7 per cent. on each payment of principal and interest on the indebtedness, taxes and repairs subsequent to December 9, 1896, from its date to the date of the sale, we find that

Krause's expenditures, with interest, amount to $5,902, and the receipts, with interest, $5,673, showing a loss of $229. Sonnenschein lost $155.90. From this it is apparent that on the date of sale Krause owed nothing to Sonnenschein nor the plaintiff on account of the farm land. The district court found a greater difference in the amounts of the expenditures of the parties, but such error was without prejudice, as defendant did not seek to recover from plaintiff or his codefendant.

As to the city lots, the district court found that the defendant Krause had expended $137.62 in the payment of taxes assessed thereon, and had received $10 rent, and decreed that Krause convey a one-half interest therein to plaintiff upon the payment to him of $63.81, one-half the net loss upon the lots alone. By his answer Krause admitted having received $36 rent. Were we to consider the lots alone, we would have to modify the judgment by decreasing the amount to be paid by the plaintiff accordingly. But considering the greater amount lost by Krause in the land transaction, he is not, by the judgment of the district court, reimbursed even one-half of the net loss on the joint undertakings of the parties. And as the defendant filed no cross-appeal, but expressed himself as satisfied with the decree rendered, it is unnecessary to modify the judgment of the lower court.

Plaintiff attacks a book account and other exhibits introduced in evidence by defendant Krause. The book account was identified as a correct statement of entries made by Krause concerning the real estate in controversy. Several of the entries therein were shown to be improper as charges against his co-owner, and we have not taken the book account as evidence, but have made our computation from expenditures admitted by plaintiff and those proved by evidence other than the book account, such as canceled notes and receipts. Other items in the account between the parties have been called to our attention. We have carefully examined this voluminous record, and

noted every contention of counsel, and our conclusion coincides with that of the district court. Many other payments were made by Krause, which we have not reviewed in this opinion, because the evidence shows that they were settled for by Sonnenschein, and their consideration here would not change the result.

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.

W. R. STAR, APPELLEE, v. R. A. WATKINS, APPELLANT.

FILED MARCH 21, 1907. No. 14,718.

Infants: CONTRACTS: DISAFFIRMANCE. An infant who seeks to disaffirm a contract must return so much of the consideration received by him as remains in his possession at the time of such election. However, a formal and actual tender of the property by the infant is not required as a condition precedent when it is known in advance that such tender will be refused, but restoration should be made on the trial as a condition of the judgment.

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

W. S. Morlan, for appellant.

Starr & Reeder, contra.

EPPERSON, C.

Watkins, a minor, purchased a mare and gave his note therefor. Afterwards the note was sold to plaintiff, who instituted this suit and recovered judgment for $80. Watkins appeals.

The principal defense to the note is infancy. It appears that, on different occasions before appellant became of age, he refused to pay the note, and made known to his vendor his willingness to return the mare before the paper was transferred to plaintiff. It is undisputed that at such times appellant was informed by his vendor that the mare would not be received.

It has been held that an infant may avoid his personal contracts during his minority. 22 Cyc. 611-613; *Hoyt v. Wilkinson,* 57 Vt. 404. And it is equally well settled that an infant who seeks to disaffirm a contract must return so much of the consideration received by him as remains in his possession at the time of such election. *Bloomer v. Nolan,* 36 Neb. 51; 22 Cyc. 614. But is the minor required to make an actual tender of the property when it is known in advance that such tender will be refused? We think not. "A formal tender of money is never required where it is disclosed, if it had been made, it would have been fruitless." *Graham v. Frazier,* 49 Neb. 90; *Guthman v. Kearn,* 8 Neb. 502. The supreme court of Wisconsin in *Jones v. Valentines' School of Telegraphy,* 99 N. W. 1043 (122 Wis. 318), held: "Where an infant paid defendant a sum of money as compensation for the privilege of taking a course of study in defendant's school, and he was given a receipt, called a 'scholarship,' and thereafter he demanded a return of his money, making known his willingness to return the scholarship, but the attitude of defendant indicated that he intended to retain the money, it was not necessary for the infant to make any formal tender of the paper, as a condition precedent to a suit by him to recover the money, but restoration should be made on the trial as a condition of the judgment." See also *Potter v. Taggart,* 54 Wis. 395, 11 N. W. 678. We are therefore of opinion that a formal and actual tender of the property by the infant, when it is known in advance that such tender will be refused, is not required as a condition precedent to take advantage of the plea of infancy, especially when restoration may be made on the

trial as a condition of the judgment. It seems clear to us that the minor in this case rescinded his contract before he became of age, and before the note was transferred to the plaintiff, and, hence, the judgment is contrary to law and should be reversed.

We therefore 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.

REVERSED.

P. A. WELLS, EXECUTOR, APPELLANT, V. HERMAN E. COCHRAN, APPELLEE.*

FILED MARCH 21, 1907. No. 14,727.

1. **Directing Verdict.** A verdict should not be directed for one party when the competent evidence adduced is sufficient to support a verdict for the adverse party.
2. **Petition** examined, and *held* sufficient to state a cause of action.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Fawcett & Abbott, for appellant.

A. S. Churchill, contra.

EPPERSON, C.

Plaintiff, as executor, sued to recover $500 alleged to have been paid to defendant, as the agent of plaintiff's decedent, as a part of the consideration for certain lands conveyed by deceased. Defendant admitted receiving the

* Rehearing denied. See opinion, p. 614, *post.*

$500, but claimed the same as commission under a written contract. The disposition of this case in the court below depended in a great measure upon the genuineness of the alleged written contract for compensation. At the conclusion of the evidence a verdict was directed for defendant, and plaintiff appeals.

It is unnecessary to review the case at length. The alleged contract for compensation and decedent's signature thereto were identified only by defendant. The plaintiff denied its execution, and, to disprove it, introduced in evidence several genuine signatures of the deceased. Section 344 of the code provides: "Evidence respecting handwriting may be given by comparison made, by experts or by the jury, with writings of the same person which are proved to be genuine." See *First Nat. Bank of Madison v. Carson,* 48 Neb. 763; *Capital Nat. Bank v. Williams* 35 Neb. 410; *Grand Island Banking Co. v. Shoemaker,* 31 Neb. 124; *Huff v. Nims,* 11 Neb. 363. Under the evidence in this case, we are satisfied that, had the issue been submitted to the jury and a verdict returned for plaintiff we would not be justified in setting it aside on the ground of the insufficiency of the evidence. Applying this test, we must conclude that the court erred in directing a verdict for defendant.

But defendant contends that under the pleadings he was not required to prove the execution of the contract under which he claimed the right to retain the $500. In the petition plaintiff alleged that a contract of employment was entered into between defendant and deceased, and, thereupon, defendant entered into a contract, as agent of deceased, to exchange land in Frontier county for certain lots in South Omaha and one lot in Omaha belonging to one Hawver, with a difference of $500 to be paid by Hawver to plaintiff's decedent. It was further alleged that defendant fraudulently withheld from his principal the fact that he was to receive the $500. Defendant in his answer admitted that there was a contract of employment in which he was employed to bring about an ex-

change of the Frontier county land for the South Omaha lots, and pleaded a supplemental written agreement, whereby he was to receive "as his sole compensation only and all of what he might obtain * * * in excess of what is provided in said contract (referring to the contract of employment)." That part of the answer referred to was traversed by a general denial in the reply. That a contract was alleged by plaintiff and the relation of principal and agent thereby established is shown by the pleadings. That fact established, we may presume the parties intended that the agent should receive compensation, but the amount of the compensation constitutes no part of the presumption. And the plaintiff, by alleging the contract of agency, did not bar himself from denying the particular contract for compensation which the defendant pleaded in his answer.

The petition sets forth, in substance, that defendant, as agent, fraudulently and with the intention of cheating his principal, concealed from the latter all facts relative to the $500 received by the defendant as a part of the consideration for the decedent's land. The petition stated a cause of action, 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.

The following opinion on motion for rehearing was filed June 22, 1907. *Rehearing denied.*

EPPERSON, C.

The opinion in this case is reported *ante,* p. 612. Defendant urges in a motion for rehearing that the execution of the contract for compensation is established with

out question, and without any conflict in the testimony. If this is true, our opinion was wrong and a rehearing should be allowed.

It is true the defendant testified that the deceased signed the contract, and, further, that in a trial of the former action before a justice of the peace the contract was submitted to the deceased, who stated that "the name John P. Johnson attached to this contract was his signature." Defendant contends that his evidence was corroborated by the justice of the peace, who testified as to this matter, in substance, that at the trial referred to in defendant's testimony the deceased was present, and the contract was introduced in evidence without objection. This evidence cannot be considered as corroborative. It was not shown by any disinterested witness that the attention of the deceased was called to his alleged signature, or that he ever acknowledged the same as his handwriting. It is also true that no witness testified that the handwriting of the signature in question was not that of the deceased, but genuine signatures of the deceased were introduced in evidence. The original exhibits have been preserved in the record presented to us. These we have examined. From their appearance we are convinced that the genuineness of the contract in controversy is questionable, and that the plaintiff is entitled to a submission of the issue to a jury, notwithstanding the positive evidence of the defendant that the signature of the deceased is genuine.

Defendant urges other reasons for a rehearing, all of which we have carefully considered and find insufficient to require the granting of the motion.

We recommend that the motion for rehearing be overruled.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the motion for rehearing is

OVERRULED.

ROCK COUNTY, APPELLANT, V. HOLT COUNTY, APPELLEE.

FILED MARCH 21, 1907. No. 14,740.

Paupers: COUNTIES: LIABILITY. Sections 9360-9362, Ann. St., providing for the care of nonresident paupers by the county wherein they are found, and reimbursement therefor by the county of such pauper's residence, apply to all counties in the state, including counties under township organization which have not established a poorhouse.

APPEAL from the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

J. A. Douglas, for appellant.

A. F. Mullen and *E. H. Whelan, contra.*

EPPERSON, C.

Plaintiff herein filed its claim before the board of supervisors of the defendant county for expenses in caring for an alleged pauper, who became such in plaintiff county, but who was a resident of defendant county. The claim was rejected, and an appeal taken to the district court. In answer to the petition therein filed, the defendant admitted the facts set forth in the petition, and alleged as a defense that since 1887 defendant county has been under township organization, that it has never established, and at the time in controversy did not maintain, a poorhouse, and that it had not made a levy of taxes for the support of paupers. To this answer plaintiff filed a demurrer, which was overruled. Plaintiff, not desiring to plead further, stood upon the demurrer, and appeals from a judgment dismissing the case.

In counties under township organization, which have not established a poorhouse, each township shall care for its own poor found therein. Ann. St., secs. 4543, 4567. This gives the poor of such counties the right to look to the township for necessary aid. But these statutes do not

govern cases such as the one before us. A poor person becoming disabled in a county other than his residence must also have protection. Provisions therefor are adequate. Section 9360, Ann. St., provides: "Any person becoming chargeable as a pauper in this state, shall be chargeable as such pauper in the county in which he or she resided at the commencement of the thirty days immediately preceding such person becoming so chargeable." Section 9361 provides: "If any person shall become chargeable in any county in which he or she did not reside at the commencement of the thirty days immediately preceding his or her becoming so chargeable, he or she shall be duly taken care of by the proper authority of the county where he or she may be found; and it shall be the duty of the clerk of the county commissioners to send a notice by mail to the clerk of the county commissioners of the county in which such pauper resided, as before stated, that such person has become chargeable as a pauper, and requesting the authorities of said county to remove the said pauper forthwith, and to pay the expense accrued in taking care of him or her." Section 9362 provides: "If said pauper, by reason of sickness or disease, or by neglect of the authorities of the county in which he or she resides, or for any other sufficient cause, cannot be removed, then the county taking charge of such individual may sue for, and recover from the county to which said individual belongs, the amount expended for and in behalf of such pauper, and in taking care of the same."

The defendant contends that the above provisions do not apply to it; that defendant county, being under township organization, and having never established a poorhouse, and not having made a levy of taxes for the care of the poor, is not liable to plaintiff for its expenditure in the support of the pauper in question; that, being under township organization, the township, and not the county, is liable. There is no statute in this state providing that a township shall be liable for its poor, who become needy in a county other than their residence, or that the county

may recover from the township for expenses thus incurred. It has been held in this state that "a township is only liable for the support of paupers when made so by statute." *Gilligan v. Town of Grattan,* 63 Neb. 242. It follows that, if defendant is not liable, plaintiff had no redress, and the laws intended to supply assistance to the poor residents of a county while absent therefrom are rendered practically inoperative. The law providing for township organization and the protection by the township of the poor found therein did not repeal section 9360 *et sequitur,* and such provisions apply to all counties in the state, whether under township organization or not. We are of opinion that the officers of plaintiff county had the right to rely upon the provisions of this statute, and that defendant county is liable for the reasonable expense incurred and should pay the same from their general fund.

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

AMES and OLDHAM, CC., concur.

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

REVERSED.

STATE OF NEBRASKA V. ULYSSES GRANT HOON.

FILED MARCH 21, 1907. No. 14,661.

Husband and Wife: DESERTION. In order to warrant a conviction under section 212*a* of our criminal code, both the "abandonment" and "failure to support" must occur since the taking effect of the statute.

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

James L. Caldwell, Charles E. Matson and *Tibbets & Anderson,* for plaintiff in error.

Billingsley & Greene, contra.

DUFFIE, C.

February 17, 1905, the county attorney filed an information in the office of the clerk of the district court for Lancaster county, Nebraska, charging Ulysses Grant Hoon with the crime of desertion, for that on the 1st day of April, 1904, in said county of Lancaster, and state of Nebraska, the said defendant did unlawfully, and without good cause, abandon Mary E. Hoon, his lawful wife; that defendant now, and ever since said date has, unlawfully, and without good cause, wilfully and purposely neglected and refused to maintain or provide for her support. A second count in the information charged the defendant with abandoning and refusing to support his three legitimate children, each being under the age of sixteen years. A trial was had to a jury, and, after the state had introduced its evidence and rested, the court directed a verdict of not guilty and the defendant was discharged. The state has brought the case to this court on error, and our opinion on the legal questions submitted is desired.

The facts established by the evidence are undisputed and are to the following effect: In April, 1900, the defendant, with his wife and three minor children, were living in the city of Lincoln, Lancaster county, Nebraska. At that date the defendant refused to longer live with his wife, to pay rent for the house in which they were residing, or to make provision for her support. She notified her father, a minister living at Sioux City, Iowa, of this condition of affairs, and he came immediately to Lincoln and had a conference with the defendant. The defendant made no complaint of the conduct of his wife, but said that he did not love her and would not continue to live with her; that he wanted a divorce. Mr. Stouffer, the wife's father, then said to him: "Well, Grant, I shall have

to have you do something for your family; I cannot support your family alone. I will be willing to take the responsibility for a time to see that these children are fairly educated as much as I can, but I cannot do everything." A second conversation was had the next day in the office of Judge Tibbets. In that conversation, defendant said he had no complaint whatever to make against his wife, and suggested that she get a divorce. Hoon was told that his wife did not want a divorce and would not apply for one, and it was finally arranged that, if Mr. Stouffer would take the family to Sioux City and do what he could with them there, Hoon would furnish $15 a month toward their support. Shortly thereafter the family was taken to Sioux City, where they have since resided. The defendant continued to pay $15 a month toward their support until sometime in 1904, when he refused to further contribute any amount whatever.

That the defendant abandoned his wife in 1900, and that since 1904 he has refused to provide for her support, is conclusively established by the evidence. That he was able to at least contribute to her support is shown by the evidence of his employer, who testified that he is now in receipt of $50 a month. Do these facts constitute a crime within the meaning of section 212*a* of our criminal code, under which the information was filed? The section in question reads as follows: "That every person who shall without good cause, abandon his wife and wilfully neglect or refuse to maintain or provide for her, or who shall abandon his or her legitimate or illegitimate child or children under the age of sixteen years, and wilfully neglect or refuse to provide for such child or children, shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six (6) months." (This statute went into effect April 8, 1903.) It will be seen from the above provisions of the statute that two elements are necessary to complete the offense: First, an abandonment of wife or child without

reasonable cause; and, second, a refusal to provide. The evidence makes it clear that the abandonment in this case occurred in 1900, three years and more before any criminality could attach to the act. It is true that the second element entering into the crime—the failure to support—did not take place until 1904. But the question arises: Can one be convicted of a felony by showing an act committed by him, innocent when done, but by a later statute made an essential element of the crime charged against him?

Section 16, art. I of our constitution, as well, also, as section 10, art. I, of the constitution of the United States, is prohibitive of *ex post facto* laws, and if we give this statute a retroactive effect by allowing acts of a defendant, not criminal when done, to be shown against him as a necessary element entering into the crime, then we are clear that the statute is unconstitutional and clearly forbidden by the provisions above referred to. The familiar definition of an *ex post facto* law is, "a criminal law retrospective in its operation." In *Marion v. State,* 16 Neb. 349, an *ex post facto* law is defined in the following words: "A law which makes an action done before its passage, which was innocent when done, criminal, and punishes such action, or that aggravates a crime or makes it greater than when it was committed, or which, in relation to that offense or its consequences alters the situation of the party to his disadvantage, or that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed." In the body of the opinion it is said: "In *Calder v. Bull,* 3 Dall. (Pa.) 386, the supreme court of the United States have decided that the plain and obvious meaning and intention of this prohibition in the constitution is, that the legislatures of the several states shall not pass laws after a fact done by a citizen or subject which shall have relation to such fact." It is suggested that the offense defined is a continuing one, and, although the abandonment may have occurred long prior to the enactment of the statute,

still, if the crime was completed by a failure to support after the statute went into effect, the claim made by the defendant that it is an *ex post facto* law cannot be maintained. We do not think the legislature contemplated or intended to provide a continuing offense, nor do we think a proper construction of the language used would give the statute that effect. The same question under a similar statute was before the supreme court of Georgia, and it was there held: "If, after a completed act of desertion, a father has been convicted under a statute making it a misdemeanor for 'any father to wilfully and voluntarily abandon his child, leaving it in a dependent and destitute condition,' there can be no new act of abandonment until a return to the discharge of the parental obligation, and no new offense of abandonment until such a return, followed by another act of desertion, and this although the original abandonment is wilfully and voluntarily continued and the child remains dependent and destitute." *Gay v. State,* 70 Am. St. Rep. 68 (105 Ga. 599). The case is a well-reasoned one, and the holding appeals to our mind as a correct construction of the law.

There are other questions raised by the appellant, but, as the judgment of the district court will have to be sustained, for the reasons that the statute has no application where both abandonment and failure to support did not occur since it went into effect, we recommend an affirmance of the judgment appealed from.

ALBERT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the exceptions taken to the judgment appealed from are overruled.

AFFIRMED.

LEANDER R. BROWN, APPELLANT, V. VILLAGE OF PIERCE, APPELLEE.

FILED MARCH 21, 1907. No. 14,733.

Cities: INJURIES: EVIDENCE. An instruction which requires the plaintiff, in an action brought against a village for injuries sustained by an accident arising from a defective sidewalk, to prove that the walk was in an "unreasonably dangerous condition," is erroneous.

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

Fred H. Free, for appellant.

W. W. Quivey, Douglas Cones and *H. F. Barnhart, contra.*

DUFFIE, C.

Brown, the plaintiff and appellant, brought this action against the village of Pierce to recover damages for injuries sustained by falling upon one of the sidewalks of the village. He alleges that the walk was out of repair, and that his fall and injury was caused by being tripped by a loose board in the walk. The jury returned a verdict for the defendant and the plaintiff has appealed.

The principal error alleged is the seventh instruction given by the court on its own motion. The instruction is as follows: "The jury are instructed that, before they can find for the plaintiff, they must find that the plaintiff has suffered injury; that the injury was caused by a defect in the sidewalk; that said defect left the sidewalk in an unreasonably dangerous condition; that the plaintiff did not contribute to the said injury by any negligence on his part; that the city authorities had actual knowledge of said defect in time to have repaired same before the accident happened, or that the defect had been notorious and continued for a length of time within which the city

authorities, in the exercise of reasonable care and diligence, could have known of the same." The particular objection urged to this instruction is that it requires the jury to find that the walk was in an unreasonably dangerous condition, before the plaintiff could recover. We think the instruction erroneous. If the sidewalk was in a dangerous condition prior to the accident, and the village authorities had knowledge of that fact, or, if such condition had existed for such length of time that reasonable diligence on the part of the village authorities would have discovered it, that is all that the plaintiff would be required to show in addition to his own care and freedom from negligence. To require the plaintiff to show that the walk was unreasonably dangerous is going further than the law requires, and places upon him a greater burden than he was required to assume.

Because of this error in the instruction, we recommend a reversal of the judgment and remanding the cause for a new trial.

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 for a new trial.

REVERSED.

HOME SAVINGS BANK, APPELLANT, V. W. A. STEWART ET AL., APPELLEES.

FILED MARCH 21, 1907. No. 14,717.

1. Notes: POSSESSION: PRESUMPTION. The original payee of a negotiable note in possession thereof is presumed to be the owner, and has ostensible authority to accept money or property in discharge thereof, although the note bears the blank indorsement of such payee.

2. ———: ESTOPPEL. Where the owner of a note clothes another with

the indicia of ownership and ostensible authority to contract with the maker of the note for the discharge thereof, and the maker, relying upon such ostensible ownership and authority, delivers to such person certain property, which the latter accepts in payment and discharge of the note, the owner is estopped to deny the authority of such person to act in the premises.

3. Trial: INSTRUCTIONS. The practice of setting out the pleadings at length in the charge to the jury, instead of a concise statement of the issues tried, disapproved.

4. Appeal: INSTRUCTIONS: HARMLESS ERROR. A complaint that the instructions covering a particular theory of one of the defendants are erroneous will not be considered where the record shows that the result of the trial would have been the same whatever the finding as to that particular theory.

5. Appeal: REVIEW. An objection at the close of an argument, "to the manner and style" of the argument, without a ruling of the court thereon, presents nothing for review in this court.

6. Evidence examined, and *held* sufficient to sustain the verdict.

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

W. S. Morlan, for appellant.

Starr & Reeder, contra.

ALBERT, C.

On the 17th day of December, 1901, W. A. Stewart bought some cattle from H. T. Church to feed for the market. The money to pay for them was advanced by Shelly-Rogers Company, on a note of that date, payable to itself on the 14th day of July, 1902, signed by Stewart and indorsed by Church. The note was secured by mortgage on the cattle. Before the maturity of the note the company indorsed it in blank and discounted it to the Home Savings Bank of Fremont. Afterwards, on the 15th day of July, 1902, Stewart delivered the cattle included in the mortgage, with some others, to the company, who disposed of them and remitted the proceeds to the savings bank, who on receipt of such proceeds credited them on the

note. The Savings Bank afterwards brought this action against Stewart and Church to recover the remainder due on the note. The defendants answered separately, each admitting the execution and indorsement of the note by them, respectively, and its delivery to said company, and alleging, in substance, that Stewart's delivery of the cattle to the payee company on the 15th day of July, 1902, was in pursuance of an agreement between him and the said company to the effect that, in consideration thereof, the company would receive and accept the same in full payment and discharge of the amount due on the note; that at the time of making said agreement, and of the delivery of the cattle in pursuance thereof, the said company, with the knowledge and consent of the plaintiff herein, was in possession and control of the note in suit, claiming to be the owner and holder thereof, with authority to receive payment thereon and to contract with reference to the discharge thereof; that said Stewart, relying upon such ostensible ownership and authority of said company, entered into the said agreement, and fully kept and performed his part thereof; that the said company at the time was in fact the agent of the plaintiff for the collection of the said note, with full authority to receive payment thereon, and to make contracts for the discharge thereof, and that the plaintiff is estopped to deny that said company was the owner of the note at the date of the delivery of said cattle, or that it was without power and authority to enter into said agreement for the discharge of the said note. Church, proceeding on the theory that his liability was secondary, interposed an additional defense, available only to himself; but, for reasons which will hereafter appear, an extended notice of that defense is not required. The facts relied on as a defense were put in issue by the reply. The case was submitted on the theory that Church's liability was secondary. The jury found generally for the defendants, and judgment went accordingly. The plaintiff appeals.

Plaintiff contends that the verdict is not sustained by

sufficient evidence. As the case was submitted on the theory that Church's liability was secondary to that of Stewart's and the jury found in favor of both defendants, it is clear that they must have found in favor of the defendants on the defense available to both, which we have heretofore set out in substance. That being true, the question presented is whether the evidence is sufficient to sustain that defense.

Stewart testified, in substance, that about the time the note matured he wrote the company with the view to turning in some cattle in discharge of the debt; that afterwards their agent called on him and produced the note and mortgage; that, after talking the matter over, it was agreed between them that he should turn over to the company the cattle covered by the mortgage, and four head of other cattle, in full satisfaction of the amount due on the note; that the cattle were to be delivered at a neighboring town the next day but one, and that it was understood that the agent would not be there to receive them in person, but that they were to be left at a certain livery barn. It was also understood, according to his testimony, that the note, and certain other papers of which it was a renewal, should be subsequently forwarded to him. He further testified that he delivered the cattle at the time and place agreed upon, and that he made the settlement with the agent, and delivered the cattle in pursuance thereof, without notice or knowledge that the plaintiff owned or claimed to own the note. That the company got the cattle covered by the agreement, or a portion of them at least, sold them and remitted the proceeds to the plaintiff, who indorsed it on the note, is conclusively established. From the verdict of the jury it is quite clear that they gave full credit to Stewart's testimony with respect to his settlement with the company's agent. While that testimony does not stand uncontradicted, it is not inherently improbable. In fact it is corroborated to a certain extent by other circumstances appearing of record. Such being the case, we are not at liberty to disregard it, but, under the finding of the

jury, must regard the fact of the settlement, and the circumstances under which it was made, as conclusively established.

Proceeding, then, on the hypothesis that the company's agent was in possession of the note at the time of the settlement with Stewart, there is no claim or pretense that his possession was wrongful. On the contrary, it was as agent of the company, which must have been in possession with the knowledge and consent of the plaintiff. The plaintiff, then, must be held to have clothed the company with the indicia of ownership, and allowed it to hold itself out to Stewart as the owner and holder of the note, and, as such, having full power and authority to enter into an agreement for its discharge. Acting upon such ostensible ownership and authority Stewart entered into the agreement for the discharge of the note, and fully kept and performed his part of it. These facts, we think, estop the plaintiff to deny the authority of the company to make the agreement or to receive the property agreed upon in discharge of the note. *Paulman v. Claycomb,* 75 Ind. 64; *Cothran v. Collins,* 29 How. Pr. (N. Y.) 113. See, also, *Thomson v. Shelton,* 49 Neb. 644; *Phœnix Ins. Co. v. Walter,* 51 Neb. 182; *Holt v. Schneider,* 57 Neb. 523.

It is next claimed that the court erred in an instruction to the jury to the effect that the burden was upon the plaintiff to prove every material allegation of its petition by a preponderance of the evidence. One ground upon which this instruction is assailed is that neither by it nor by any other portion of the charge were the jury instructed what allegations of the petition were material. The petition was set out at length in one of the instructions. Our attention has not been called to any immaterial allegation which it contains, nor have we discovered any. Therefore, if the jury disregarded any of the allegations, the error would inure to the plaintiff's rather than to the defendants' advantage. It further appears that the court was not asked to supply the omission now complained of. On this state of the record it would seem

that the plaintiff is not in a position to complain of this feature of the instruction. It may be said in passing that the practice of copying the pleadings into the instructions is not to be commended. A better practice is to make a concise statement of the issues to the jury, and not leave it to them to sift the pleadings to find them.

Another objection to these instructions is that, while the execution of the note and the indorsement of the payment thereon stood admitted by the pleadings, they were included among the questions to be determined by the jury according to this instruction. These matters stood admitted throughout the whole trial. The jury were instructed that they stood admitted. In such circumstances, the possibility that the jury, by the instruction in question, were led to believe that such matters were still in dispute, and that they were at liberty to find against the plaintiff thereon, is too remote to be seriously considered.

The plaintiff complains of an instruction to the effect that the possession of a promissory note is presumptive of ownership. One criticism urged against this instruction is that there was no evidence to warrant it. This criticism is unfounded. According to Stewart's testimony, an agent of the payee company, with the note in his possession, called on him in response to a letter to the company looking to a settlement of the debt; the cattle were delivered to this agent, who, in turn, delivered them to the company, whose agent he was at the time. His possession, therefore, was the possession of the company, which could only act through agents. The evidence was ample, we think, to warrant the instruction.

Another criticism of this instruction is that it ignores the fact that the note was indorsed by the company. The indorsement was in blank. A negotiable note indorsed by the payee is payable to bearer. Selover, Negotiable Instruments Law, sec. 152; 1 Daniel, Negotiable Instruments (5th ed.), sec. 693. The possession of a negotiable note indorsed by the payee in blank is presumptive of ownership. See 1 Daniel, Negotiable Instruments (5th ed.), secs.

573, 812, and 2 Daniel, Negotiable Instruments (5th ed.), sec. 1191. An indorsement by the payee in blank will not affect his right to sue on a note payable to his order, while it remains in his hands. 2 Daniel, Negotiable Instruments (5th ed.), sec. 1192*a*. From the authorities cited, it would follow that the presumption of ownership arising from possession was not affected by the blank indorsement of the payee, under the evidence in this case.

The plaintiff tendered certain instructions, to the effect that a settlement in discharge of the note would not be binding unless authorized by it. These instructions wholly ignored the theory of ostensible authority, and, for that reason, were properly refused.

The plaintiff also complains of certain instructions given touching the defense urged by Church, going merely to his own liability on the note. As we have seen, the case was submitted on the theory that his liability on the note was secondary to Stewart's. That being true, while the jury might have found in his favor on the separate defense urged by him, and at the same time against Stewart, a finding in favor of Stewart necessitated a finding in favor of Church. As they found in favor of Stewart, thereby necessitating a finding in favor of Church, error in the submission of the issues raised by the special defense urged by the latter would be error without prejudice.

Lastly, it is insisted that the record shows misconduct on the part of counsel for the defendants in his closing argument to the jury. At least the closing portion of this argument was taken down and is made a part of the bill of exceptions. It covers between 12 and 15 pages. No objection was interposed until the close, when counsel for the plaintiff interposed an objection to the effect that he "objected to the manner and style of the foregoing argument, and then and there duly excepted to the same." No ruling of the trial court was asked and none made. As was said in *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 127: "This court, in a proceeding of this kind, does not

review the conduct or actions of counsel in the case, but reviews the rulings, orders, and judgment of the district court, and since it did not make an order, nor refuse to make an order, in reference to the conduct of counsel, we cannot make one." We might add that a party to a suit cannot sit quietly throughout an argument, without raising an objection to any statement made therein, and then obtain a review of the argument on a general objection to the effect that he objects to its manner and style.

The record fails to disclose any error that would warrant a reversal of the judgment in this case, and we therefore recommend that it 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.

EDWARD J. MCLAUGHLIN, APPELLEE, V. SOLOMON SENNE ET AL., APPELLEES; KATE E. PETTIS, APPELLANT.

FILED MARCH 21, 1907. No. 14,726.

1. **Limitation of Actions:** PARTIAL PAYMENTS. Part payment on a debt secured by real estate mortgage, when made by one having authority to bind the property, tolls the statute limiting the time within which suit for foreclosure of the mortgage may be brought.

2. ———: MORTGAGES. Ordinarily the owner of the equity of redemption has authority to bind the property by such payment, and a payment by him on the mortgage debt before the statute has run is binding on the property, and tolls the statute as against a subsequent mortgagee with notice of the prior mortgage.

3. **Mortgages:** PRIORITIES. Findings examined, and *held* insufficient to sustain a decree giving plaintiff's mortgage priority.

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

Fawcett & Abbott, for appellant.

Walsh Bros., Baldrige & De Bord and *Charles H. von Mansfelde, contra.*

ALBERT, C.

In a suit brought by Edward J. McLaughlin for the foreclosure of a real estate mortgage, there was a contest between him and Mrs. Kate E. Pettis as to the priority of the mortgages respectively held by them. The Pettis mortgage is prior in point of time, but the trial court held that, as to McLaughlin, it was barred by the statute of limitations, and gave priority to the McLaughlin mortgage. Mrs. Pettis appeals.

No bill of exceptions was preserved, the appellant's theory being that on the facts found by the trial court her mortgage is entitled to priority. The findings are unnecessarily voluminous, and not restricted to the ultimate facts upon which the rights of the parties depend, but include much that is purely evidentiary. So far as seems necessary to an understanding of the grounds upon which our conclusion rests, the findings are, in effect, as follows: (1) On the first day of October, 1888, one Walker executed and delivered to the appellant, Mrs. Pettis, a certain note, due and payable three years after date, and to secure the payment thereof executed and delivered to her a certain mortgage (The Pettis mortgage) on the premises in question, which on the same day was duly filed for record. (2) On the 6th day of December, 1889, Walker conveyed the premises to Tukey and Allen by quitclaim deed, which was duly recorded on the 14th day of that month. (3) On the second day of October, 1890, Tukey and Allen conveyed the property to one Senne, who on the same day executed and delivered to Tukey and Allen a mortgage thereon to secure a note given for a part of the purchase price. (It stands admitted that this mortgage was duly recorded on the 18th day of October, 1890, and on the following day was duly assigned to one Thompson, who in January,

1891, duly assigned the same to the plaintiff in this case.) (4) On the 3d day of July, 1896, Senne reconveyed the premises to Tukey and Allen by warranty deed, wherein the grantees assumed and agreed to pay the McLaughlin mortgage, which deed was recorded on the 14th day of March, 1898. (5) On the 1st day of April, 1899, Tukey and Allen conveyed the property to John P. Lampman by warranty deed, which was recorded April 3, 1899. (6) In 1896, and subsequently to June 3, of said year, Tukey and Allen paid Mrs. Pettis the interest on her mortgage debt to October 1, 1897. In the year 1897 they paid her the instalment of interest due thereon on the 1st day of April of that year. In 1898 they paid her the instalment of interest due on the 1st days of April and of October of that year.

From the foregoing facts found it will be seen that the right to enforce the Pettis mortgage debt against the property became barred on the 1st day of October, 1901, unless it was interrupted by the payments, or some of the payments, made by Tukey and Allen. It is contended that such payments were ineffective to prevent the running of the statute in favor of the holder of the McLaughlin mortgage, and that contention presents what we regard as the decisive question in this case. That question, we think, must be resolved in favor of Mrs. Pettis. Our statute of limitations makes a distinction between an action *in personam* and one *in rem* for the enforcement of a debt secured by mortgage. The former, if founded on a written instrument, must be brought within five years (code, sec. 10), otherwise in four years after its accrual; the latter within ten years (code, sec. 6). Section 22 of the code provides: "In any cause founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise." The effect of part

payment is to toll the statute, not only with respect to an action *in personam* for the enforcement of the debt, but also with respect to a proceeding *in rem* for that purpose. *Teegarden v. Burton,* 62 Neb. 639. Where the action is *in personam,* it is quite clear, both on reason and authority, that to toll the statute the payment must have been made by the debtor himself, or by some one acting by his authority. *Mizer v. Emigh,* 63 Neb. 245; *Moffitt v. Carr,* 48 Neb. 403; *Whitney, Clark & Co. v. Chambers,* 17 Neb. 90; *Stevenson v. Craig,* 12 Neb. 464.

But that rule has no application where the proceeding is *in rem,* as it is in this case so far as the mortgages contesting for priority are concerned. In such case, the question is not whether the payment was made by some one having authority to bind another, but whether it was made by some one having power or authority to bind the property. One of the legal incidents of a mortgage is the right of the holder of the legal title to redeem from the mortgage, and this carries with it the right to make payments on the mortgage debt from time to time to protect the equity of redemption. This right of itself is authority to bind the property by payments on the debt. The notice imparted by the record of a mortgage carries with it notice of this right, and, ordinarily, subsequent mortgagees take subject to it, when thus charged with notice. The rule is thus stated in *Hollister v. York,* 9 Atl. 2, 59 Vt. 1: "A payment upon a mortgage debt of interest, or any portion of the principal, by any person interested in the equity of redemption, and having constructive notice of the mortgage, repels the presumption that the mortgage has been paid, and takes the case out of the operation of the statute of limitations, not only as to the payer, but as to all the owners of the equity." See, also, 2 Jones, Mortgages (6th ed.), sec. 1198; *Richmond v. Aiken,* 25 Vt. 324; *Kerndt v. Porterfield,* 56 Ia. 412; *Hughes v. Edwards,* 9 Wheat. (U. S.) 489; *Waterson v. Kirkwood,* 17 Kan. 9. Whether a payment on a mortgage debt after its enforcement *in rem* has become barred would revive it as

against a subsequent mortgage in existence at any time after the statute had run and before such payment was made, is a question not necessarily involved in this case and not decided. Neither do we undertake to enumerate the exceptions to the general rule, founded on estoppel and other equitable grounds, because the facts in this case do not bring it within any such exceptions.

Tukey and Allen, by Senne's conveyance to them in 1896, were reinvested with the legal title to the premises, and consequently the right to redeem from the Pettis mortgage. They held the title from that date to April 1, 1899, during which time they made several payments on the mortgage debt, all of which were made while the mortgage was in full force and effect as a charge against the premises. As holders of the equity of redemption, they had power to bind the property by such payments, and thereby interrupt the running of the statute in favor of the McLaughlin mortgage. The statute would run against proceedings *in rem* to enforce the Pettis mortgage ten years from the date of the last of such payments, and beyond the date of the commencement of the present proceedings.

It follows that the decree of the district court giving priority of the McLaughlin mortgage is erroneous, and we recommend that it be reversed and the cause remanded with directions to enter a decree in accordance with this 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 this opinion.

REVERSED.

EMMETT H. GILBERT V. STATE OF NEBRASKA.*

FILED MARCH 21, 1907. No. 14,737.

Highways: UNLAWFUL FENCING: INFORMATION. An information, based on section 108, ch. 78, Comp. St. 1905, making it unlawful to "build a barbed wire fence across or in any plain traveled road or track in common use," which omits to charge that the road or track was in "common use," will not support a conviction.

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

John Everson, for plaintiff in error.

William T. Thompson, Attorney General, and *Grant G. Martin, contra.*

ALBERT, C.

The plaintiff in error was prosecuted and convicted on an information charging that he "in said county unlawfully and wilfully did on or about the 21st day of December, 1905, build a barbed wire fence across and in a certain plain traveled road in Republican City township in said county, to wit, the road between sections 8 and 17 of said township, without first putting up sufficient guards to prevent man or beast from running into said fence, contrary," etc. The charge is based on section 108, ch. 78, Comp. St. 1905, which is as follows: "That from and after the passage of this act it shall be unlawful for any person to build a barbed wire fence across or in any plain traveled road or track in common use, either public or private, in this state, without first putting up sufficient guards to prevent either man or beast from running into said fence."

One contention of the plaintiff in error is that the information does not charge the offense denounced by the section quoted. It would seem that this contention must be sustained. In a prosecution for a statutory offense, the

*Rehearing denied. See opinion, p. 637, *post.*

information must charge and the evidence show every statutory element of the crime. *Chandler v. State,* 141 Ind. 106; *Conyers v. State,* 50 Ga. 103, 15 Am. Rep. 686; *United States v. Dickey,* 1 Morris (Ia.), *412; *State v. Decker,* 52 Kan. 193; *Kearney v. State,* 48 Md. 16; *Koster v. People,* 8 Mich. 431. One statutory element of the offense of which the defendant was convicted is that the road obstructed was not only a plain traveled road, but also that it was "in common use." It is obvious that a road may be a plain traveled road, and even on a section line, and, at the same time, not "in common use." In that case its obstruction would not be an offense under the statute. The legislature having made the common use of the road an essential element of the offense, to sustain a conviction on an information which ignores that element would be an unwarranted extension of the statute by the court.

As the information is insufficient to support the conviction, it is recommended that the judgment of the district court be reversed and the cause remanded.

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.

REVERSED.

The following opinion on motion for rehearing was filed May 24, 1907. *Rehearing denied:*

SEDGWICK, C. J.

The statute construed in this case provides that "it shall be unlawful for any person to build a barbed wire fence across or in any plain traveled road or track in common use." Comp. St., ch. 78, sec. 108. This clause is plainly susceptible of at least two distinct meanings, and which of these meanings shall be given to the clause depends upon the manner of reading it. Do the words

"in common use" limit the word "track" only, or do they limit the words "road or track"? By the intonation of the voice of the reader it may be made to mean one thing or another. In the brief upon the motion for rehearing it is contended that it should be construed as though it read "across or in any plain traveled road, or across or in any track in common use." In the meaning given the clause in our former opinion it is considered that the word "or," which occurs twice in the clause, in each instance relates only to the two words between which it stands, and if the clause is read with a short pause after the word traveled, and again after the word track, that is if the three words "road or track" are pronounced more rapidly than the other words of the clause, such an intonation in reading it would convey to the hearer the meaning given it in the opinion; so that the contention virtually is that the guilt or innocence of the accused would depend upon the emphasis or intonation used in reading the clause, and the correct emphasis or intonation is to be determined from the probable intention of the legislature. Of course, this is not a safe rule for the construction of criminal statutes. If the language used by the legislature is as readily capable of one construction as the other, it should not be so construed as to make that criminal which would otherwise be innocent. It is unlawful to build a barbed wire fence across either a "road or track" if that "road or track" is plain traveled and in common use, without putting up guards, etc.

The motion for rehearing is

OVERRULED.

TRIMBLE & BLACKMAN, APPELLANTS, v. M. V. COREY & SON ET AL., APPELLEES.

FILED MARCH 21, 1907. No. 14,712.

1. **Judgments, Vacating:** JURISDICTION. The power of the district court to vacate or modify its own judgment or order after the term at which such judgment or order was entered should be exercised in the court where the judgment or order was entered, regardless of the residence of the parties.

2. ———: PLEADING: EVIDENCE. Where the allegations of a petition for a new trial under the provisions of sections 602, 603 of the code are traversed by general denial, it is error to vacate the judgment assailed by the petition without evidence to sustain the allegations of the petition.

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

T. H. Matters, for appellant.

J. C. Stevens, contra.

JACKSON, C.

At a special term of the district court for Clay county the plaintiffs had a judgment by default on a lost note. Subsequently, and apparently after the adjournment of the special term, the defendants answered without leave of court. The answers were, in effect, general denials and the plea of the statute of limitations. At the next regular term the case came on for hearing upon a petition of the defendants for a new trial. The petition was entitled as in the original action, summons had been issued and served upon the plaintiffs, as well as upon their attorney of record, in a county other than the one where the action was pending. The petition was grounded upon the allegations that the judge of the district court had fixed terms for the county in February, April and November of the year in which the judgment was rendered; that after the commencement of the original action they employed coun-

sel to prepare and conduct their defense; that neither they nor their counsel were informed of the calling of a special term of court, and had no knowledge of the fact that such term had been convened or that proceedings were had at the special term until after the adjournment thereof; that because of the absence of one of the defendants their answers were not prepared and filed within the time fixed by the summons, and because of a custom and practice, recognized and indulged in by the members of the bar practicing at that court, that when pleadings were filed out of time the court granted leave, as a matter of course, to have them refiled; that the special term was called for the purpose of trying certain cases in which the judge of the district court was disqualified, and the judge of another district presided at the special term, and that the action against the defendants was not one of the cases assigned for trial at that time; that counsel for the plaintiffs represented to the court at the special term that the case was one of those to be disposed of at that time and thereby procured the judgment to be obtained. To the petition for a new trial the plaintiffs and their attorney entered a special appearance, urging that no petition to vacate the judgment had been filed as required by law, no summons had been issued as required by law, and that the plaintiffs and their counsel were all nonresidents of Clay county and were served in a county other than the county of Clay. They also filed a general denial to the allegations of the petition. The special appearance was overruled, and the defendants had a final order vacating the judgment rendered at the special term. The plaintiffs appeal.

It is urged, first, that the district court for Clay county had no jurisdiction over the subject matter; that the proceeding to vacate the judgment was an original action, and could only be brought in the county where the plaintiffs, or some of them, resided or were summoned. We do not think this position can be sustained. The proceeding is had under the provisions of sections 602 and 603 of the

code, where the district court is vested with power to vacate or modify its own judgments or orders after the term at which such judgment or order was made for fraud practiced by the successful party in obtaining the judgment or order. Manifestly the power of the district court to vacate or modify its own judgments or orders can only be exercised by the court in which the judgment or order was entered.

A more serious question, however, is presented by the record. The general denial put in issue every material allegation of the petition for a new trial. It is disclosed that no evidence was offered in behalf of the defendants to support the allegations of the petition. By section 605 of the code it is provided that the court may first try and decide upon the grounds to vacate or modify the judgment or order before trying or deciding upon the validity of the defense or cause of action. We are of the opinion that the court erred in vacating its judgment without evidence to support the petition. Submitted with the case, however, is a suggestion of a diminution of the record and an application to supply the record by filing an affidavit of one of the defendants, which from the application appears to have been on file in the district court in the action at the time the order vacating the judgment was entered, and which, it is said, would supply the necessary proof to support the order. If the affidavit were in the record it would not aid the appellees, because it could not be considered here unless it were incorporated into and preserved as a part of the bill of exceptions.

It is recommended, therefore, that the application to supply the record be denied, that the order appealed from be reversed, and the cause remanded for further proceedings.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the application to supply the record is denied,

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

REVERSED.

IN RE ESTATE OF DANIEL ERICKSON.

LEVI ERICKSON, APPELLANT, V. MINNIE NYBLOM, APPELLEE.

FILED MARCH 21, 1907. No. 14,728.

Administrators: ALLOWANCES: CONCLUSIVENESS. The rule that the allowance of claims by the probate court is tantamount to a judgment applies only to such claims as were debts against the decedent himself, and not to expenses or disbursements of the administration. The latter are not conclusively determined until final settlement by the administrator and judgment thereon by the probate court.

APPEAL from the district court for Saunders county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

V. L. Hawthorne and *J. L. Sundean,* for appellant.

Simpson & Good and *John Tongue, contra.*

JACKSON, C.

Daniel Erickson died intestate in January, 1902. His heirs were Mary Erickson, widow, Levi Erickson, a son, Minnie Nyblom and Emma Jorgenson, daughters. No administration of the estate was had until September 24, 1904, when the son, Levi, was appointed administrator. By the terms of a notice limiting the time for the presentation of claims against the estate, April 21, 1905, was fixed as the last day for filing and the day following for hearing and action on claims. On April 22, 1905, Levi Erickson, without notice and without first procuring an order for leave, filed a claim for managing farm and labor from January 22, 1902, to April 22, 1905, at $35 a month—$1,365. On April 24 this claim was allowed by the county judge to the amount of $800. On May 22, 1905, Minnie

Nyblom and Frank Nyblom filed an application for a rehearing of the claim, on the theory, apparently, that it was allowed on the 22d day of April, charging that that day was a legal holiday and that the court was without jurisdiction to act; that Levi Erickson had had the use and occupation and income from the real estate of Daniel Erickson, deceased, without agreement of parties, and that no commission had been appointed by the probate court to act upon claims against the estate. The hearing on the application seems to have been set for the 29th day of September, 1905. On September 26 Minnie Nyblom filed an objection to the allowance of the claim, for the reason that the claim was not filed within the time allowed by the court within which to file claims against the estate; that the claim was exorbitant and unjust; that Levi Erickson was a member of the family at the time of the death of his father, and continued to be a member, living with his mother during the entire period for which the claim was made, and that the estate was not liable for the services rendered by him. On the same day she filed another motion to set aside the order allowing the claim, embracing substantially the same grounds. On the day set for hearing the motion and objection the county court vacated the order allowing the claim, permitted the filing of the objection, and disallowed the claim *in toto*. Levi Erickson prosecuted error to the district court, where the order of the county court was affirmed, and from the judgment of the district court he has appealed.

It will be observed that Levi Erickson is administrator of the estate; that his claim for services commenced with the death of his parent and continued to the date of the filing of the claim; that it was filed after the time had expired for the filing and allowance of general claims against the estate. It seems to be the contention of the appellant that the order allowing his claim was a final judgment; that the several appearances of Minnie Nyblom, one of the heirs, by way of application to set the order aside and objections thereto, amounted to a waiver of any irregu-

larity in obtaining the order; and that the administrator of the estate, having notice of the claim, his acts were binding on the estate. We do not regard the procedure of the county court in allowance of claims of this character as being governed by the general rules controlling litigation between private parties. The claim was not one in existence at the death of the decedent, and was not of that character contemplated by the general order fixing the time for filing claims against the estate. It was a claim covering two elements: First, for services as administrator *de son tort;* and, second, for services as administrator *de jure.* The rule that the allowance of claims by the probate court is tantamount to a judgment applies only to such claims as were debts against the decedent himself, and not to expenses or disbursements of the administrator. The latter are not conclusively determined until final settlement by the administrator and judgment thereon by the probate court. 2 Black, Judgments (2d ed.), sec. 641. The rule there announced has been followed by this court and is the recognized law of the state. *Bachelor v. Schmela,* 49 Neb. 37; *Boales v. Ferguson,* 55 Neb. 565. Objection to the claim might have been deferred until the final settlement of the accounts of the administrator, and then been as effective as an objection to the claims as though such objection had been filed prior to the order of allowance on April 24, 1905.

Whatever may be said of the several motions and objections of Minnie Nyblom, they were not binding upon the estate, nor sufficient, in our judgment, to estop her from insisting that the order should be set aside and the claim disallowed, if found to be without merit. It is urged with considerable persistence that the knowledge of the administrator of the filing and allowance of the claim is binding on the estate. What has already been said effectively disposes of this contention.

We find no reversible error in the record, and 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.

AUGUST H. MILLER V. STATE OF NEBRASKA.

FILED APRIL 4, 1907. No. 14,752.

1. **Indictment:** JOINDER OF COUNTS: ELECTION. It is permissible to allow several high grade offenses to be joined in an indictment or information, but in such cases only a single issue will be permitted to go to the jury; and, where such offenses are distinct and separate, the court should require the prosecutor to elect upon which of the different counts he will rely for a conviction.
2. ———: ———: ———. This rule, however, does not apply to misdemeanors and felony cases where, by a single act, the accused may be guilty of two criminal offenses, or where the same transaction amounts to several offenses of the same grade and class and subject to the same punishment. *Pointer v. United States*, 151 U. S. 396.
3. **Witnesses:** HUSBAND AND WIFE. A wife may testify as to a crime committed against her by her husband, and it is proper for her to state all of the facts relating to the commission of such crime, notwithstanding her evidence may tend to convict him of another and different offense committed at the same time and in the same transaction.

ERROR to the district court for Stanton county: GUY T. GRAVES, JUDGE. *Affirmed as modified.*

John A. Ehrhardt and *A. R. Oleson,* for plaintiff in error.

William T. Thompson, Attorney General, and *Grant G. Martin, contra.*

BARNES, J.

August H. Miller, hereafter called the defendant, was tried in the district court for Stanton county on an in-

formation containing five counts. The first of said counts charged him with a violation of section 48 of the criminal code, by wilfully, maliciously and forcibly breaking and entering into the dwelling house of one Frederick Hoheneke, with intent to kill said Hoheneke, Annie Hoheneke and Mary Miller, then and there being. By the second count he was charged with a violation of the same section and in the same manner, with the additional allegation of a felonious assault on the persons above named. By the third count he was charged with violating section 16 of the criminal code, by maliciously shooting Frederick Hoheneke, with intent to kill. By the fourth count he was charged with shooting Mary Miller; and by the fifth count he was charged with shooting one Annie Hoheneke, with a like intent. At the first seasonable opportunity, the defendant filed a motion to quash the information, because five separate and different crimes were charged against him therein, and that said offenses were improperly joined. This motion was overruled, to which the defendant excepted. A motion was then filed to require the state to elect on which count of the information it would proceed to trial. The court overruled this motion, and the defendant again noted an exception. He thereupon demanded a separate trial upon each of the several counts, which demand was refused. He then entered his plea of not guilty, and was placed on trial upon all of the counts contained in the information. It appears that after the state had produced its evidence the court withdrew the first two counts from the consideration of the jury, and at the close of all the evidence the defendant moved the court to require the prosecutor to elect upon which one of the three remaining counts he would rely for a conviction. His motion was overruled, his exception noted, and thereafter the jury returned a verdict of guilty of the charge contained in the fourth count of the information. On this verdict the defendant was sentenced to the state penitentiary for a term of fifteen years, and to reverse that judgment he prosecutes error.

By his first two assignments the defendant alleges that the district court erred in overruling his motion to quash the information, and in refusing to require the state to elect as to which count it would rely on for a conviction. Counsel have presented these questions with much force, and for convenience they will be considered together. We think the rule is well established, and quite universal, that, where the indictment or information charges the defendant with the commission of several distinct and separate crimes, it should be quashed, or the state should be required to elect upon which count or charge it will rely for a conviction. In offenses of a high grade, but a single issue will be permitted to go to the jury, and the court will require the prosecutor to elect, except in those cases where the offenses are so blended that it is for the jury to determine which count, if any, the evidence applies to, as in cases of murder to determine the degree of the crime. Maxwell, Criminal Procedure (2d ed.), 54. In *Kane v. People,* 8 Wend. (N. Y.) 203, the court said: "In cases of felony, where two or more distinct and separate offenses are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect upon which charge he will proceed; but such election will not be required to be made where several counts are inserted in an indictment solely for the purpose of meeting the evidence as it may transpire on the trial, the charges being substantially for the same offense." The tendency of modern criminal procedure is to simplify matters of practice as much as possible, consistent with preserving to the accused all of his substantial rights; and so it is quite universally held that it is a matter for the exercise of a sound discretion by the trial court as to whether the prosecutor should be allowed to join several different offenses in different counts in the information; but, if such joinder is permitted, it then becomes the duty of the court, where called upon to do so, to require the prosecutor to elect upon which one of the several charges or counts he will rely for a conviction. *State v. Lawrence,* 19 Neb. 307; *Wendell*

v. State, 46 Neb. 823; *People v. Rohrer,* 100 Mich. 126. In a note to *Ben v. State,* 58 Am. Dec. 234 (22 Ala. 9), it is said there is no reason why any number of counts for any number or kind of offenses may not be joined in the same indictment, where not otherwise provided by statute; but the practice of uniting several counts in an indictment would obviously lead to great oppression, if not controlled by a wise judicial discretion. And this discretion is universally conceded to the court before which a crimnial cause is tried, since it is clear that if the prosecution were permitted to heap up charges against a prisoner in the same indictment, and try all before the same jury, it might not only overwhelm him with confusion in his defense, but break him down with a weight of obloquy before he had an opportunity to defend. Again, the attention of the jury might be so distracted by the multiplicity of charges, and by an imposing array of suspicious circumstances applying to the different counts, as to convict upon all, although, if the accusations were tried singly, there could be no conviction upon any. For these reasons, therefore, the common law has vested in criminal courts a discretion to be exercised under an enlightened sense of justice and humanity, by means of which the judge, if he sees that the prisoner is likely to be embarrassed in his defense by the several counts of an indictment which charge different offenses, may either quash the indictment or compel the prosecutor to elect upon which of the different counts he will proceed.

So it appears that there is no objection in point of law to the joinder of distinct offenses growing out of different transactions in one indictment, but, if this is done, the court should exercise its discretion to compel the prosecution to elect, and, if such joinder tends to embarrass the prisoner and confound him in his defense, the court ought to require an election. *Engleman v. State,* 2 Ind. 91; *State v. Abrahams,* 6 Ia. 117; *State v. McPherson,* 9 Ia. 53; *State v. Cazeau,* 8 La. 109; *State v. Porter,* 26 Mo. 201; *State v. Lincoln,* 49 N. H. 464; *Kane v. People, supra.* The

rule as to joinder and election is stated in *People v. Aikin*, 66 Mich. 460, as follows: "The true and only just rule as regards the joinder of counts in an information or indictment seems to be, if the different counts are drawn and used with a view to one and the same transaction, so that one of them, upon the trial, may be found to meet the evidence, the court will not interfere with the proceeding, as such an object is a legitimate one. * * * But where the object and purpose is apparent to prosecute the respondent, and such is the logical effect, for *separate* felonies by means of *one* information or indictment, the court will not permit it to be done. * * * The injustice and prejudice to the accused overbalance all possible benefits to be derived to the public from such a practice." It is insisted on the part of the state, however, that this case furnishes an exception to the general rule, and the joinder was properly permitted; that the refusal to require the state to elect was not error, because the several crimes charged arose out of the same transaction. It is true that the shooting described in the information was shown by the evidence to have occurred at the same place and practically at the same time, and was in effect one transaction.

Again, an examination of the record discloses that the jury promptly acquitted the defendant on all of the charges except the one accusing him of shooting his wife, Mary Miller, and there was sufficient evidence in support of this charge to sustain the verdict. So we are of the opinion that the district court was not guilty of an abuse of discretion in refusing to require the prosecutor to elect upon which charge of the information he would rely for conviction. *State v. Shores*, 31 W. Va. 491; *State v. Fitzsimon*, 18 R. I. 236, 49 Am. St. Rep. 766; *Andrews v. People*, 117 Ill. 195; *Pointer v. United States*, 151 U. S. 396.

The defendant also contends that the court erred in allowing Mary Miller, who was his wife at the time the alleged shooting occurred, to testify against him and several cases are cited to support this contention. By

section 331 of the code it is provided: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other. Provided, however, that the wife shall be a competent witness against the husband in all prosecutions arising under section 212*a* of the criminal code." This statute permitted Mary Miller to testify as to the crime committed against her, and it appears that the shots fired by the defendant at her father and mother, as well as the one fired at her, were so closely connected in point of time as to be a part of the *res gestæ*. Hence, all of her testimony was properly received.

Defendant has presented several other assignments of error, but we are satisfied that none of such exceptions are well taken, and the judgment of the district court should be affirmed. A careful perusal of the evidence satisfies us that there are many mitigating circumstances in this case, and we believe the sentence to be grossly excessive. The injury inflicted was slight, and, although, as stated, there is sufficient evidence in the record to sustain a conviction, yet the jury might well have found that the shot which caused such injury was not directed at the wife. Again, the evidence shows that defendant had no quarrel with or enmity against his wife, and had no desire to injure her; that the shooting occurred during a quarrel with her parents and in the heat of such conflict. While we are unable to set aside the verdict without violating our well-established rules, yet we are of opinion that the sentence should be materially reduced. It is therefore ordered that the sentence be reduced to the period of three years, and the judgment as thus modified is

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, V. TABITHA HOME ET AL., DEFENDANTS.

FILED APRIL 4, 1907. No. 14,766.

Courts: JURISDICTION. The supreme court will not entertain original jurisdiction in an action to compel a former manager of a private charitable corporation to account.

ORIGINAL action for an accounting. Defendants object to the jurisdiction of the court. *Objection sustained and action dismissed.*

Norris Brown, Attorney General, and *W. T. Thompson,* for plaintiff.

Walter J. Lamb, contra.

LETTON, J.

This is an original action in this court, in which the state of Nebraska appears as plaintiff and Tabitha Home, a corporation, and Henry Heiner and Emma Heiner are defendants. The petition alleges, in substance, that Tabitha Home is a corporation existing under the statutes of Nebraska providing for the incorporation of charitable societies; that until about three months ago the defendants Henry Heiner and Emma Heiner have been trustees and general managers of the corporation; that the attorney general made a demand in writing upon the defendants to make a full report and statement of the affairs of the corporation and that two incomplete and unsatisfactory reports were furnished; that an examination was made of the books of the corporation by an expert accountant, who reported that it was impossible to discover therefrom the true condition of its affairs. It is further alleged that the affairs of the corporation have been grossly mismanaged and are in such a confused and uncertain condition that the present trustees, "who are wholly without fault in the matter," as well as the de-

fendants Heiner, are unable to make a true report of its financial condi'ion, and that there are numerous notes and obligations outstanding, the validity of which is questioned; that the corporation has entered into certain contracts to maintain for life certain aged persons, for which large sums of money have been paid to the defendants Heiner, and that the management is unable to raise funds to pay the debts or properly to care for the inmates of the institution. The prayer is that the court will ascertain and adjudicate the true condition of affairs of the corporation, and if it shall be found that the defendants have abused the franchise by mismanagement or incompetency, or that the corporation is insolvent, that the franchise of the corporation may be forfeited and a receiver appointed to wind up its affairs. No service was had upon the defendant corporation. The defendants Heiner have entered a special appearance objecting to the jurisdiction of the court over the subject matter.

Assuming, but not deciding, that the allegations of the petition are sufficient to constitute a cause of action in equity for an accounting by the defendants Heiner of the affairs of the corporation, the question presented is whether this court is vested by the constitution with jurisdiction to entertain such an action. Section 2, art. VI of the constitution, provides that the supreme court "shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, *quo warranto,* habeas corpus and such appellate jurisdiction as may be provided by law." The petition does not state a cause of action in *quo warranto* against the Heiners. The position of the attorney general is that the action may be maintained by reason of the provisions of section 154, ch. 16, Comp. St. 1905, which are as follows: "Any corporation formed under this act shall, whenever required by the attorney general or by the legislature, report a full statement of its affairs under the oath of at least two of its trustees, and for any neglect to furnish such report when required all the trustees so neglecting

shall be liable to a penalty of fifty dollars each, to be recovered by action of debt in the name of the people of Nebraska." He further contends that the state is an interested party in the affairs of the corporation, that it possesses general control over charitable corporations, and that it is a proper party plaintiff to prevent misapplication of the funds of corporations of this nature. The provisions of section 154 only go to the extent of making trustees in default of a report liable to a personal penalty, the object of the statute being to furnish the public, from whom the money is derived, with the knowledge that it is being properly expended in furtherance of the charity.

The state has no interest, except as *parens patriæ*, in the control and management of private charitable corporations. If the funds of this institution were derived by taxation or from other sources provided by the state, in the proper disbursement of which the state had a direct interest, it is possible that an action of this kind might be entertained by this court, but the jurisdiction which is sought to be called into operation in this case against the Heiners is of like nature to an original action in equity by a person interested in the fund to compel the officers of a corporation or the trustees of a trust, who are charged with misappropriating or diverting its funds or violating the purposes of its creation, to make a full accounting of all their acts and doings in the exercise of their trust. While the state is indirectly interested as being concerned with the general welfare of all its citizens, still it has no direct legal interest in the matter, and the proper forum for such questions is provided by the district court, which is vested with full chancery powers.

The purpose of this action, so far as concerns the Heiners, is to compel an accounting. The state is not a proper party to such an action, and hence the objection of the defendants Heiner to jurisdiction is sustained, and the cause dismissed as to them.

DISMISSED.

CHARLES J. HARRISON, APPELLEE, V. HIRAM RICE, APPELLANT. *

FILED APRIL 4, 1907. No. 14,687.

1. **Principal and Agent:** AUTHORITY OF AGENT: EVIDENCE. Letters written by the holder of the title of a tract of land, and partially copied in the opinion, *held*, under the circumstances in which they were written, to have satisfied the requirements of the statute of frauds, and to have authorized the person to whom they were addressed to obligate the writer by a contract for the sale of the land.

2. **Powers:** REVOCATION. A power coupled with an interest is not arbitrarily revocable without the consent of the donee.

3. **Specific Performance:** LACHES. Mere forbearance to begin an action for specific performance, not extending beyond the period of the statute of limitations, and not accompanied by any conduct misleading or tending to mislead the defendant to his damage, or to lull him into a belief that his repudiation of the contract has been acquiesced in, will not bar the plaintiff of his right.

APPEAL from the district court for Boone county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Charles Riley, H. M. Sinclair and *H. C. Vail,* for appellant.

J. A. Price, J. J. Sullivan and *I. L. Albert, contra.*

AMES, C.

This is an action to compel the specific performance of an alleged contract for the sale of a tract of land. The plaintiff succeeded in the lower court and the defendant appealed. The contract purports to have been executed by the defendant Rice by the defendant Parrott as his agent, and there is no question about its form or sufficiency, provided he had the power or authority to make it. The petition alleges that the land had been purchased and was owned by the defendants as partners, and

* Rehearing allowed. See opinion, p. 659, *post.*

that Parrott as the active and business member of the firm had authority to make sale of it, but that the nominal or legal title to it was in Rice, and the defendants falsely and fradulently held out and represented to the public, and especially to the plaintiff, that Rice was the real as well as the ostensible sole owner of it, and that the powers and authority of Parrott over and concerning it were those of an agent only, and that the plaintiff had entered into the contract under a delusion that such was the case; but it was further alleged that Parrott, in addition to his powers growing out of and incident to his partnership relation, had specific authority to make the contract and sale, which was evidenced by certain letters written to him by Rice, copies of which were set out in the petition, and to which reference will be made further on. There were the usual allegations of tender and refusal of performance, and the customary prayer.

The petition alleges that at or shortly after the time of the purchase of the land by the defendants, a brief memorandum of the terms upon which it was acquired and was to be held, and according to which it was to be sold within a reasonable time, and the profits accruing from the transaction divided equally between the parties, was contained in a letter written by Rice to Parrott, and signed by the former, and containing the following expression: "Yes, Parrott, I always keep my word. You are to have one-half of the profits in the above farm and the same in the Copsom farm. Of course, this is after the expenses are deducted, provided the income do not meet the expenses." The property, called the "Copsom farm," is the land now in controversy. The answer does not deny the authenticity of the letter or the interpretation put upon it by the plaintiff, except that it avers "that said memorandum but partially and very imperfectly sets forth said pretended contract, the chief imperfection being that it was understood and agreed between this defendant and his codefendant, Stephen V. Parrott, that said Parrott would procure a purchaser for said land at a

profit within a limited time, and it was not understood and agreed that the time within which he was to procure a purchaser was to be extended indefinitely; that the said Parrott did not procure a purchaser in the said length of time, and that the agreement that once subsisted between this defendant and the said Parrott had expired long before the pretended sale of said land by the said Parrott to the plaintiff."

This answer is subscribed by Rice in his own hand and sworn to by him, and it is as explicit an admission of the contract between the defendants, and of the power and authority of Parrott to make a sale of the land, as the plaintiff could have desired. It can be said to fall short of a confession of judgment in two particulars only, viz.: First, an admission that the power of sale was in writing subscribed by Rice, and, second, the averment that there was an unexpressed, indefinite limit of the time within which such power was to have been exercised. As to the second of these supposed restrictions, it is difficult for us to understand any difference between a time or duration indefinitely limited and one of indefinite continuance. Both mean, we suppose, the same thing, namely, what is called in legal phrase "a reasonable time," and so we think that the averment itself is too indefinite to require further consideration. There does not appear to have been unreasonable delay, and Parrott cannot be charged with any lack of diligence, so that Rice is without cause for complaint on that score. As to the first above mentioned of the supposed deficiencies in the written memorandum, we think that it is sufficiently supplied by two other letters admittedly written by Rice to Parrott, one dated at Wamego, Kansas, on the 11th day of November, 1899, in which the writer says, having reference to the land in suit: "I hope, Parrott, we can sell it soon or by spring and you and I realize a nice thing on our venture," and another written in January, 1900, in which he says: "We must make all we can out of the place until a good price is given for it." The letters

should, we think, be interpreted in the light of the circumstances in which they were written, and with reference to which the parties must be presumed to have understood them. Rice was absent from the state, mostly in California with an invalid wife, where it was known that he expected to remain for a considerable time. Parrott resided and remained in the vicinity of the land, which he was charged with looking after and obtaining an income from until it should be sold at a profit, which both parties hoped would occur soon, and the letters can be given no other reasonable meaning than that he should find a purchaser and obligate him by contract as soon as a favorable opportunity should present itself. A case in some respects very similar and one involving the same principle of construction is *Lyon v. Pollock,* 99 U. S. 668.

The contract with the plaintiff was made on the 24th of February, 1901, after all these letters had been written, but before that time, to wit, in December, 1900, Rice had entered into a lease of the premises with one De Camp for a term of five years beginning on the first of the following March, and he contends that such lease was a revocation of any previous powers he had conferred upon Parrott, of which both the latter and the plaintiff had knowledge at the time the contract in suit was executed. But whether the admitted partnership was limited to the profits of the venture or extended to the land itself, Parrott had a power coupled with an interest, and such a power is not arbitrarily revocable without the consent of the donee. *Bergen v. Bennett,* 1 Caines' Cas. (N. Y.) 1; *Denson v. Thurmond,* 11 Ark. 586; *Raymond v. Squire,* 11 Johns. (N. Y.) 47; *Knapp v. Alvord,* 10 Paige (N. Y.), 205; *Smyth v. Craig,* 3 Watts & Serg. (Pa.) 14; *Marziou v. Pioche,* 8 Cal. 536. There is no important dispute of facts, and we think it quite unnecessary to decide, upon the issues and record in this case, whether Parrott has an undivided interest or title in the land itself as a partner, or whether Rice holds an undivided interest or

title upon a constructive or resulting trust in favor of Parrott, or whether Parrott has a mere chattel interest, as a partner, in the proceeds and profits of the transaction. In either or any view of the case, he had, upon unquestionable principles both of law and equity, ample and indisputable power and authority to make the contract in question, which authority is sufficiently evidenced in writing to satisfy the requirements of the statute of frauds.

Rice became aware of the contract in suit on or about March 1, 1901, and at once notified the plaintiff that he regarded it as having been made without right or authority, and as being therefore void. Immediately thereupon he proceeded to erect, and did erect, upon the premises a house and barn at an expense and of a value, as found by the trial court, of $1,200. These improvements were not made in reliance upon any inducement or representation by the plaintiff, or because of any conduct of the latter indicating acquiescence in a repudiation or rescission of the contract, or an intention on his part to abandon it, but, on the contrary, were made in conscious and open hostility to and defiance of the plaintiff's right. Since that time Rice by himself or his tenant has remained in undisturbed possession of the farm and in receipt of its rents, issues and profits, amounting to several hundreds of dollars a year. The contract price of the land is $7,300, which counsel agree was about its fair value at the time the agreement of sale was made. This action was begun on the 5th day of January, 1905, three years and ten months afterwards, after the land had risen in value, as counsel also practically agree, to about $16,000. It is insisted now by the defendant that the equity of the plaintiff, if he ever had any, has been lost by laches and delay. The trial court so far admitted the plea as to allow the defendant a lien upon the premises for the amount of the value of the improvements. This decree does not appear to us to be inequitable to the defendant. The authorities are unanimous that there is no definite or certain rule by

which to determine when a decree for a specific performance will be denied because of laches, but by general consent the matter is held to be within the sound judicial discretion of the court. We have not been cited to any authority holding that a mere forbearance to sue, not extending beyond the period of the statute of limitations, and not accompanied by any conduct misleading or tending to mislead the defendant to his damage, or to lull him with a belief that his repudiation of the contract has been acquiesced in, will bar the plaintiff of his right. Mere increase in the value by the lapse of time, not due to any expenditure or effort on the part of the defendant, for which he cannot be fully compensated, ought not, in our opinion, to have that effect. And so we think are the authorities. *Falls v. Carpenter,* 1 Dev. & B. Eq. (N. Car.) 237, 28 Am. Dec. 592; *Willard v. Tayloe,* 8 Wall. (U. S.), 557; *Hale v. Wilkinson,* 21 Grat. (Va.) 75; *King v. Raab,* 123 Ia. 632; *Hawley v. Von Lanken,* 75 Neb. 597. To hold otherwise in circumstances like those in the case at bar would, as it seems to us, be to permit the defendant to found his defense upon his own wrong and misconduct, instead of upon that of the plaintiff. He has had the net revenues of the property, which exceed the prevalent rate of interest on the purchase price during the interval of delay. The delay was due solely to his own conduct, and he is reimbursed the value of the improvements that he put upon the premises in defiance of the plaintiff's right. The decree appears to us adequately to adjust the equities of the parties, and we recommend that it be affirmed.

OLDHAM and EPPERSON, 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 December 5, 1907. *Former judgment of affirmance adhered to:*

1. **Equity:** LACHES. No arbitrary rule exists for determining when a demand becomes stale, or what delay will be excused, and the question of laches is to be decided upon the particular circumstances of each case.

2. ———: ———: STATUTE OF LIMITATIONS. Unreasonable delay alone, independently of any statute of limitations, may operate as a bar to equitable relief. Generally, however, when a statute of limitations is applicable, lapse of time alone, short of the period of limitation, will not operate as a bar.

3. ———: ———: ———: BURDEN OF PROOF. When the suit is brought within the time fixed by the analogous statute of limitations, the burden is on defendant to show the existence of circumstances amounting to laches. When the suit is brought after the statutory time, plaintiff must plead and prove that laches does not exist.

4. ———: ———. "In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action, and whether a reasonable excuse is offered for the delay." *Hawley v. Von Lanken*, 75 Neb. 597.

5. **Specific Performance:** LACHES. A delay of three years and ten months, pending litigation in the courts to establish the validity of the contract for the sale of real estate sought to be specifically enforced, is not an unreasonable or unexplained delay under the circumstances, and does not render the vendee guilty of laches barring equitable relief, even though the land has increased in value during such period.

EPPERSON, C.

This case is before us on rehearing, a judgment of affirmance having been entered at a former term. *Ante*, p. 654. Generally, a motion for rehearing should be limited to the propositions relied on at the original presentation of the case, and we do not feel required to pass upon the point now argued as to the sufficiency of the petition, which is called to our attention for the first time in the brief on rehearing. However, disregarding surplusage, and applying the rule that a petition will be liberally construed when attacked for the first time in this court, we think the pleading assailed states a cause of action. In substance, it alleges a contract between defendants under which they engaged in buying and sell-

ing real estate; that the capital was to be furnished by Rice, in whose name the legal title to the land purchased was to be taken; that the skill, judgment and labor required in the purchase and sale of the real estate should be furnished by defendant Parrott; and that upon a sale the profits were to be equally divided between the defendants. A letter from Rice to Parrott is pleaded, in which the former recognized the interests of the latter in the land in controversy, the legal title to which then stood in the name of Rice. Then follows the written agreement set forth in the petition signed by "Hiram Rice, by S. V. Parrott, Agt.," and also signed by the plaintiff, Harrison. This agreement provides for the conveyance of the land by Rice to the plaintiff upon the payment of the purchase price. It is further alleged that the defendants held themselves out to the public as principal and agent, and that Rice now denies that Parrott has any interest in the land or the profits arising from the sale thereof; and that defendants refuse to comply with the terms of said written agreement. Plaintiff prayed for a decree requiring defendants to specifically perform the contract.

It is evident that a clear, definite and complete contract is alleged, and that the defendant Rice refused to comply with its terms. If Parrott were not a necessary party, the fact that he was named as a party, and the fact that nothing remained for him to do in the full execution of the contract, does not render the petition insufficient as to Rice. The evidence is sufficient to sustain the decree. It is unnecessary to say anything further here, as the former opinion sufficiently reviews the evidence.

The remaing point for our consideration is whether plaintiff's laches barred the equitable relief sought in this action. The writer was in doubt concerning the correctness of the conclusion first announced on this branch of the case, and was inclined to think that plaintiff, having slumbered on his rights for three years and ten months, was apparently aroused into activity by the discovery

that the property had materially increased in value, and hence should be denied a decree for specific performance. Further examination of the record and the authorities, however, removes all question concerning the correctness of our former opinion and requires the reaffirmance of the judgment. No arbitrary rule exists for determining when a demand becomes stale, or what delay will be excused, and the question of laches is to be determined upon the particular circumstances of each case. Unreasonable delay alone, independently of any statute of limitations, will often operate as a bar to relief. *Hawley v. Von Lanken*, 75 Neb. 597. But, when a statute of limitations is applicable, it is quite generally held that lapse of time alone, short of the period of limitation, will not operate as a bar. When the suit is brought within the time fixed by the analogous statute of limitations, the burden is on the defendant to show the existence of circumstances amounting to laches. When the suit is brought after the statutory time, plaintiff must plead and prove that laches does not exist. *Kelley v. Boettcher*, 85 Fed. 55; *Boynton v. Haggart*, 120 Fed. 819; *Wyman v. Bowman*, 127 Fed. 257; 16 Cyc. 180. The present suit was instituted within the time prescribed by the statute, and, therefore, the inquiry is: Did defendant successfully carry the burden of proving the existence of circumstances amounting to laches? "In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action, and whether a reasonable excuse is offered for the delay." *Hawley v. Von Lanken, supra.* Defendant in the case before us contends that he was prejudiced by plaintiff's delay in bringing the action, and our attention is called to the fact that valuable improvements were placed on the premises by defendant Rice before suit was instituted. The former opinion, *ante*, p. 654, answers this contention It is there said: "These improvements were not made in reliance upon any inducement or representation by the plaintiff, or because of any conduct of the latter indicat-

ing acquiescence in a repudiation or rescission of the contract, or an intention on his part to abandon it, but, on the contrary, were made in conscious and open hostility to and defiance of the plaintiff's rights."

It is further argued that defendant was prejudiced to the extent of the increase in the value of the land, and that it was inequitable to permit plaintiff to withhold his claim for specific performance awaiting the rise or fall in the value of real estate, and then assert or renounce his interest in accordance with the result. It has been held that "the unexplained delay of the vendee to sue for the specific performance of a contract for the sale of a town lot for 3½ years after the vendor refused to comply with the contract, and took possession of the lot, renders him guilty of laches which bars his right to such relief." *Wolf v. Great Falls Water Power & Townsite Co.,* 38 Pac. 115, 15 Mont. 49. See *Gentry v. Rogers,* 40 Ala. 442; *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532, and the authorities collected by Judge IRVINE (formerly a commissioner of this court) in his excellent article on "Equity." 16 Cyc. 150-181. In all the cases we have examined, however, the delay barring equitable relief is qualified, as in *Wolf v. Great Falls Water Power & Townsite Co., supra,* by such expressions as "unexplained," "without excuse," "unaccounted for," and this leads us to inquire if the delay relied on in the case at bar was without excuse or was unexplained, otherwise, under the rule announced in the decisions above cited, the claim of plaintiff might be barred by laches. Lapse of time short of the statutory period will not bar relief where circumstances exist excusing the delay and rendering it inequitable to interpose the bar. The excuse offered by plaintiff in the instant case is found in the record and is as follows: "Q. Mr. Harrison, why didn't you commence an action to enforce this contract for the sale of this land before? A. I was waiting to see what the outcome was in the other suit. I thought it was no use commencing the suit until it was determined whether Mr. Parrot had authority to deed me

that land or not." The pleadings and judgment in "the other suit" referred to were introduced in evidence (see *Parrott v. Rice,* 76 Neb. 501, 505), and it appears that the validity of the contract herein sought to be specifically enforced and the authority of the agent to execute it were questioned in *Parrott v. Rice, supra.* In view of this fact, was plaintiff justified in waiting the termination of that suit before instituting the present action? We think he was. He knew that Parrott claimed the property as partnership property, and had sued Rice to establish his claim, and that the case would probably be determined soon. The subject matter of that litigation went to the very foundation of this action. It involved the right of Parrott to bind Rice by the contract here sought to be specifically enforced. In *Parrott v. Rice* the latter contested the former's authority to bind him in the sale of the land here in controversy. In the event that Rice prevailed in that litigation, plaintiff herein could not reasonably expect an enforcement of his contract. We are of opinion that defendant failed to prove that plaintiff's delay was prejudicial, or that he was without reasonable excuse for postponing the present litigation until the case of *Parrott v. Rice* was heard. Under the circumstances of this case plaintiff was not guilty of such laches as disentitled him to the aid of a court of equity, and the trial judge, in the exercise of the discretion reposed in him, was justified in awarding a decree of specific performance.

Our former opinion should be adhered to, and we so recommend.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

FIRST NATIONAL BANK OF WEST POINT, APPELLANT, V. KATE CRAWFORD, APPELLEE.

FILED APRIL 4, 1907. No. 14,764.

1. **Appeal:** VERDICTS. The act of 1903 (laws 1903, ch. 125), section 681*a* of the code, relative to the mode of review in this court of judgments in suits of equity, does not disturb the conclusiveness of decisions of fact by juries, or by trial judges sitting in their stead, in law cases.

2. **Evidence** examined, and found to uphold the judgment of the district court.

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

E. K. Valentine and *M. McLaughlin,* for appellant.

Anderson & Keefe, contra.

AMES, C.

In 1889, J. C. Crawford borrowed upon his note from one Lyon the sum of $3,000, and assigned to the payee, as collateral security, 30 shares of capital stock, belonging to him, of the plaintiff bank. The note, after its maturity, was indorsed and delivered, together with the collateral, to the bank for collection. Crawford was unable to pay, and no satisfactory disposition could then be made of the collateral, and it was so arranged that the defendant and appellee herein, Kate Crawford the wife of the debtor, became surety on her husband's note for $1,500, and half the collateral was assigned to her for her protection. The amount of the new note was renewed in the sum of $1,200, and repeated renewals of the latter have been made until shortly before the beginning of this action upon this last of them. In January, 1902, the Crawfords borrowed from the Nebraska State Bank, another institution, the sum of $1,500, with which they paid off and discharged the unpaid residue of the Lyon note. At that time the plaintiff delivered to them the certificate of the bank shares, which

seems up to that time to have remained in its possession, and they deposited it with the State bank as collateral security for their indebtedness to the latter. Mrs. Crawford, however, did not relinquish, but subordinated, her interest in the collateral for the security of the latter mentioned bank. This last mentioned note was also renewed from time to time until January, 1903, when Hunker and Wilde loaned to J. C. Crawford upon his note, secured by the bank shares as collateral, the sum of $1,500, with which amount the obligation to the State bank was paid off, and the certificate returned to the plaintiff. Hunker and Wilde were directors of the plaintiff bank, and this last loan was made by them out of its funds. Subsequently the plaintiff converted all the bank shares, which counsel on both sides treat, as by common consent, as having been at all times worth at least their par or face value, to its own use, and applied a sufficient amount thereof to the payment of the Hunker and Wilde note, and the residue toward the satisfaction of an undescribed general indebtedness by J. C. Crawford to itself. There is no question about the existence of this indebtedness, or that it was other than and additional to the note signed by the appellee as surety.

Thus far there is no dispute about the facts, except that the plaintiff denies any arrangement or agreement between itself and Mrs. Crawford by which she was awarded any part of the shares of bank stock as security for her signature to her husband's note, and denies any knowledge of any arrangement between her and the Nebraska State bank by which she was to retain a lien upon the shares in subordination to the lien of the latter. But a young lady, now deceased, a daughter of the Crawfords, who transacted all the business in their behalf, testified unequivocally to both arrangements, and she is fully corroborated as to the former of them by Mr. Anderson, her counsel, who was present when the negotiations were in progress for obtaining the signature of the wife, and we think she is corroborated also by the fact that at the

time the loan was made from the State bank, with the proceeds of which the Lyon note was paid off, the plaintiff delivered the certificate to the Crawfords unconditionally. What took place between the latter and the State bank at the time the latter made its loan was testified to by the young lady, and is undisputed and rather probable than otherwise. We think that her version of both transactions is established by a preponderance of the evidence, although it is, as to the first of them, contradicted by the testimony of the president of the plaintiff bank who conducted the affair on its behalf.

There is a sharp conflict with reference to one other matter of fact. The president testified that at the time that the $1,500 loan was made through Hunker and Wilde, and used to pay off the State bank note, he had a conversation with the daughter, who represented her parents in the business, and she agreed that the stock certificate should be returned to the bank, and that the proceeds of the shares when they should be disposed of should be used first for the payment of the Hunker and Wilde note, and that the residue should be appropriated toward the payment of her father's general indebtedness to the plaintiff, and he says that he did not know that Mrs. Crawford had or claimed, or had ever done so, that she had a lien on any of the shares for her own security. We are persuaded, however, that he had known it, though the fact may have slipped from his memory, and the daughter testified that the conversation she had and the agreement she made with him, as she understood the matter, was that the plaintiff might retain and apply toward her father's general indebtedness so much as the 150 shares were worth, or as should be realized from them, in excess of their par or face amount; that amount to be used to satisfy the note of her mother for $1,200, and one given by herself, upon the same consideration, for the sum of $300. Her interpretation of the circumstances seems to us to be rather the more reasonable of the two, because it is hardly to be presumed that she would have, voluntarily

and without consideration, given away or released her mother's indemnity. Two other persons, officers of the bank, were present and heard the conversation, or a part of it, and understood it in the same sense as the president, but they did not know of the existence of the $1,200 note or learn of it until afterwards, so that it is easy to understand how they may have fallen into a misapprehension. The most that can be said on behalf of the bank is that the evidence upon this point was very evenly balanced, and the trial judge, who heard the oral testimony, decided the issue against it. A jury was waived, and the cause was tried to the court, who entered a finding and judgment for the defendant from which the plaintiff appealed. We do not understand that the act of 1903 (laws 1903, ch. 125), section 681*a* of the code, relative to the mode of review in this court of judgments in suits in equity, disturbs the conclusiveness of decisions of fact by juries, or by trial judges sitting in their stead, in law cases.

The court permitted the filing of an amended answer, setting up new matter in defense, after the trial had begun, but the cause was thereupon continued, and the plaintiff was afforded an opportunity to meet the new matter by pleading and evidence, so that the proceeding was somewhat analogous to that of allowing the withdrawal of a juror and permitting an amendment afterwards, and appears not to have wrought the plaintiff any prejudice.

We conclude that the judgment is supported by the evidence, 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.

H E. COCHRAN, APPELLEE, v. F. J. MORIARTY, APPELLANT.

FILED APRIL 4, 1907. No. 14,955.

1. Petition examined, and *held* to state a good cause of action.
2. Trial: PRACTICE. In a case tried to the court, after the plaintiff has submitted his case and at the time of the announcement of the judgment, the court may, in the exercise of a sound discretion and in furtherance of justice, set aside the judgment, allow the plaintiff to withdraw his rest, and introduce further evidence.

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

Fawcett & Abbott and *P. A. Wells,* for appellant.

A. S. Churchill, contra.

OLDHAM, C.

This was an action by plaintiff in the court below upon an appeal undertaking, signed by the defendant as surety in the court of a justice of the peace of Douglas county, Nebraska. Judgment was rendered in the district court against the appellant, and this action was begun to recover the amount of the judgment and costs against the surety on the undertaking. There was a trial to the court, without the intervention of a jury, and judgment for the plaintiff, and defendant appeals to this court.

The first alleged error called to our attention in the brief of the defendant is that the petition fails to state a cause of action, because it simply alleges that a final judgment was rendered on the appeal in the district court for Douglas county, without alleging the fact that such judgment was never appealed from, modified, or reversed. The petition set up the conditions of the bond and alleged their breach by a final judgment of the district court. This was all that was necessary in stating a good cause of action. If the judgment of the district court had been subsequently reversed, modified or set aside, such fact

should have been pleaded by defendant in avoidance of his liability.

The next alleged error called to our attention is as to the action of the trial court in the conduct of the case. The case proceeded to a hearing before the court on the 12th day of October, 1906. When the hearing was completed, the judge of the court announced its findings and judgment in favor of the appellee for $83.95, being the face of the judgment and the interest thereon. After this judgment was announced, the appellant filed a motion for a new trial, and appellee asked leave of the court to withdraw his rest for the purpose of offering proof as to the amount of costs prayed for in his petition. The court, over appellant's protest, granted the leave to withdraw the rest, and continued the hearing of the cause to the 23d day of October following, when plaintiff was permitted to introduce the journal entry of the court, showing the costs taxed in the appeal proceedings from the justice of the peace. At the conclusion of the hearing the court entered judgment for the plaintiff for $116.68, the amount of the judgment, interest and costs taxed in the appeal proceedings. While the practice of allowing a rest to be withdrawn, after a final submission of a cause and an announcement of the judgment of the court thereon, may be unusual, yet the court has a sound discretion in dealing with its own judgments at the term at which they are entered, and when, as in the case at bar, the final judgment entered is the only one that could have been properly rendered under the law and the evidence, we do not think we would be justified in ordering a retrial of the issues.

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.

ANDREW M. GALLAGHER, APPELLANT, V. THOMAS J. O'NEILL ET AL., APPELLEES.

FILED APRIL 4, 1907. No. 14,711.

Conveyances: RESCISSION. The grantor of real estate who seeks to set aside a conveyance on the ground of fraud must act promptly upon the discovery of the fraud and tender back the purchase price, and, if after such discovery, he remains silent and uses negotiable paper given as a part of the consideration, or retains the purchase price, he will be held to have waived his right to rescind and to have affirmed his contract.

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

Smyth & Smith, for appellant

F. A. Brogan, contra.

EPPERSON, C.

On July 21, 1903, plaintiff Gallagher was the owner of a certain lot in South Omaha. At that time defendant O'Neill was engaged in the real estate business, and, for the purposes of this decision, we assume that he became plaintiff's agent to effect the sale of the lot in question, that he purchased the property himself and did not disclose to his principal a material increase in its value, and that plaintiff, upon the discovery that defendant was the purchaser, had the right to rescind. This suit was brought for that purpose. The district court found "that the plaintiff, with full knowledge of the fact that the real estate in question was in fact purchased by the defendant O'Neill for his own use, elected to retain and use the consideration received by the plaintiff for the said conveyance, and delayed for an unreasonable length of time, without lawful excuse therefor, to demand a rescission of the said sale and a reconveyance of the said real estate, and that thereby the said plaintiff has waived and lost his

right to rescind the said conveyance," and dismissed the action. Plaintiff appeals.

The facts, as we understand them, are as follows: In September, 1903, plaintiff Gallagher conveyed the lot to Miss Tylee, who held the legal title in trust for her brother-in-law, the defendant O'Neill. Four or five months after the deed was executed, plaintiff was informed that defendant was the real owner of the property. About six weeks after receiving this information, Gallagher placed the secured notes given by Miss Tylee as part of the purchase price with the Packers National Bank as collateral security. In his letter to the bank is the following: "I enclose herein two notes No. 1 and No. 2 for ($450.00) each covered by mortgage on the west 40 ft. of the east 90 ft. lot 8, block 80, the property sold by me to Genevieve Tylee. This paper I wish to put up with you as collateral. I have recently purchased a lot at the corner of 25th and A Sts., South Omaha, at a very reasonable figure, and I think I will be able to make some money on it this summer. I have made a deposit of $50 on it, and balance of $600 will be payable when the abstract is brought down to date, which will probably be within the next three or four days. I do not desire to sell these notes, because I wish to retain them, so if property along O street takes a spurt I can commence action against O'Nelll for what I think he beat me out of. If the paper was to be passed from my hands I could not very readily do what I want. I want to deposit this paper with you as collateral, and when I make the final payment on this lot I want you to make me a note for $600 for six months, which will carry it over the date of the payment of the first Tylee note." The bank accepted the collateral, made the loan requested, and held the Tylee notes until the trial of this case in the court below. In May, 1904, Gallagher consulted attorneys as to his rights in the premises, but no steps were taken until June, 1905, when plaintiff's attorneys wrote O'Neill of plaintiff's contention that defendant was the real purchaser, and demanded a reconveyance or the payment of

damages. This was O'Neill's first intimation that Gallagher was dissatisfied with the deal, although Gallagher had many opportunities to make known to O'Neill his dissatisfaction, if any. Gallagher had actual knowledge that O'Neill was the purchaser and owner of the property for nearly a year and a half, yet during that time he not only remained silent and made no effort to rescind the contract, but actually used the consideration received, and deposited the notes as collateral. After the property raised in value, and prior to November, 1903, plaintiff decided to sue for damages, and admits that thereafter he used the consideration received for the deed. He did not conclude to rescind the conveyance until May, 1904, and did not inform defendant of his intention to rescind until June, 1905. He contends that he did not know until a very short time before this suit was instituted that in fact the defendant was the purchaser. But the evidence above referred to, we think, refutes this contention. It appears that, when defendant responded to the letter written to him by plaintiff's attorneys and acknowledged that he was the purchaser, plaintiff did not learn that fact for the first time, but was surprised that defendant should admit it.

Was the district court justified in holding that plaintiff had waived and lost his right to rescind the conveyance? In *American B. & L. Ass'n v. Rainbolt,* 48 Neb. 434, POST, C. J., says: "There is no rule more firmly established, or resting upon more just and equitable principles, than that the right of rescission on account of fraud must be promptly exercised on discovery of the ground therefor, and that the continued use or employment of property will, in such case, be construed as an election to affirm the contract under which it is received. The party defrauded has his election of remedies, viz., compensation in damage, or to be restored to the position in which he stood before the consummation of the contract. Such remedies are, however, not concurrent, but inconsistent, and one who has, with a knowledge of the facts, made his

election, must abide it"—citing 1 Addison, Contracts, sec. 312; Pollock, Contracts (3d ed.), p. 537; Bishop, Contracts (2d ed.), sec. 204 *et seq.; Brown v. Waters,* 7 Neb. 424; *Building and Loan Ass'n v. Cameron,* 48 Neb. 124; *Schiffer v. Dietz,* 83 N. Y. 300; *Strong v. Strong,* 102 N. Y. 69; *Grymes v. Sanders,* 93 U. S. 55. In *Grymes v. Sanders, supra,* it is said: "Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted." In *Booth v. Ryan,* 31 Wis. 45: "It is a principle which has been too long and too thoroughly established in our law to admit of any doubt or discussion, either as to the principle itself or the reasons upon which it is founded, that a party claiming to rescind a contract on the ground of fraud must do so promptly upon discovery of the facts, and that if he delays, or takes any further steps in the execution of a contract, or does any act recognizing its validity, after discovery, he loses all right to this particular form of relief." See, also, *McLean v. Clapp,* 141 U. S. 429; *Naugle v. Yerkes,* 187 Ill. 358; *Bedier v. Reaume,* 95 Mich. 518; *Merrill v. Wilson,* 66 Mich. 232; *Whitcomb v. Hardy,* 73 Minn. 285; *Thomas v. McCue,* 19 Wash. 287; *Francis v. Kerker,* 85 Ill. 191; *Bassett v. Brown,* 105 Mass. 551; *Kelley v. Newburyport & A. H. R. Co.,* 141 Mass. 496; *Raymond v. Palmer,* 41 La. Ann. 425. It seems clear from the foregoing authorities that plaintiff waived his right to rescind, or, in other words, acquiesced in or affirmed the conveyance, after learning that defendant was the purchaser.

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.

PETER E. ILER, APPELLEE, V. ROME MILLER, APPELLANT.

FILED APRIL 4, 1907. No. 14,753.

Evidence. In an action of forcible entry and detention, a question asked of a witness as to who was in possession of the property was not objectionable as calling for the conclusion of the witness on legal possession, in the absence of anything in the form of the question or previous questions put to witnesses indicating that the word was used in its technical sense as synonymous with seizin.

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

Hall & Stout, for appellant.

Lake, Hamilton & Maxwell, contra.

EPPERSON, C.

Plaintiff Iler brought this action of forcible entry and detention in the county court of Douglas county against defendant Miller to obtain possession of the Iler Grand Hotel. Plaintiff had judgment of restitution, and defendant appealed to the district court, where plaintiff was again successful, and defendant brings the case to this court for review.

A witness testified: "Q. What did Rome Miller, the defendant in this case, do with reference to the property described in Exhibit 1, after it had been executed? A. He took possession of the property. Q. Has Mr. Miller been there in possession since the time this instrument was made? A. Yes, sir. Q. How has this property been occupied? To what use has it been put by Mr. Miller?

A. In connection with a hotel. He occupies the whole of it. Q. You may state whether Mr. Miller has been in this property continuously from the time that he entered under this Exhibit 1? A. He has been in continuous possession." Defendant contends that this testimony was merely the conclusion of the witness as to the legal possession of the property, and this assignment presents the only question in the case. As a general rule a witness will not be permitted to intrude upon both the function of the judge and that of the jury by stating a conclusion of law. 17 Cyc. 219; *Cropsey v. Averill,* 8 Neb. 151. But it is equally well settled that where the conclusion offered, although to a certain extent resting upon the application of legal principles, is in the main a mere statement of fact, a witness will be permitted to state it. 17 Cyc. 223, 224. In *Child v. Kingsbury,* 46 Vt. 47, it is said: "Occupation of land is a fact. The effect of it, when its nature and extent are shown, is a matter of law. A witness may testify to the fact of occupation, and its extent as to time and space, without stating the particular acts of which it consists." In *Sweeney v. Sweeney,* 48 S. E. 984, 119 Ga. 76: "When it is material to an issue on trial, a witness may testify who was in the actual possession of designated realty at a given time." In *Wright v. State,* 136 Ala. 139, 30 So. 233. "Possession is a collective fact, and not an opinion or conclusion, and it was competent for the witness to state that he was in possession." The supreme court of California in *Nathan v. Dierssen,* 146 Cal. 63, 79 Pac. 739, said: "It is true that there have been some intimations in some decisions that a question in this form calls for a conclusion of law, and if the word is to be taken as synonymous with seizin, it may be that the answer would involve a conclusion. But witnesses are not supposed to be testifying with the technical accuracy of a lawyer, nor do they usually understand language with such precision. The ordinary meaning of the word 'possession' is the same as 'occupancy.' It is defined as 'the act of possessing; a having and holding or retaining

of property in one's power or control.' (Century Dictionary.) Unless there is something in the form of a question or of the previous questions put to witnesses indicating that the word is used in the narrow sense of seizin, the question is unobjectionable." 1 Wigmore, Evidence, sec. 1960: "If there is a real dispute as to the net effect of the facts, these may be brought out in detail on cross-examination." See *Webb v. Rhodes,* 28 Ind. App. 393; *State v. Brundige,* 118 Ia. 92; *Jackson v. Sill,* 11 Johns. (N. Y.) 201; *Knight v. Knight,* 178 Ill. 553; *Jacob Tome Institute v. Crothers,* 87 Md. 569.

We believe the weight of authority sustains the rule that a question asked of a witness as to who was in possession of property is not objectionable as calling for the conclusion of the witness on legal possession, in the absence of anything in the form of the question or previous questions indicating that the word was used in its technical sense as synonymous with seizin.

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.

PETER E. ILER, APPELLEE, V. ROME MILLER, APPELLANT.

FILED APRIL 4, 1907. No. 14,754.

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

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

Hall & Stout, for appellant.

Lake, Hamilton & Maxwell, contra.

EPPERSON, C.

This case is submitted with *Iler v. Miller, ante,* p. 675. Plaintiff had judgment awarding restitution of certain property leased in connection with the Iler Grand Hotel, and defendant appeals, contending that the verdict is not sustained by the evidence, because (1) there was no proof of the service of the notice to quit, and (2) it was not shown that the notice was served three days prior to the commencement of the action. An examination of the record discloses that defendant's contention is devoid of merit. It was established by competent evidence that the notice to quit was served upon defendant by the agent of plaintiff, who handed a copy personally to defendant more than three days before the suit was instituted.

The verdict was sustained by the evidence, and we recommended 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 V. FRANK IAMS.

FILED APRIL 4, 1907. No. 14,677.

Municipal Corporations: NUISANCES. The exhibition of a stallion on the public streets of a city or village may be declared a nuisance by the municipal authorities and punished as such.

ERROR to the district court for Howard county: JAMES N. PAUL, JUDGE. *Exceptions sustained.*

Norris Brown, Attorney General, and *W. T. Thompson,* for the state.

W. H. Thompson, contra.

DUFFIE, C.

Defendant in error, Frank Iams, was arrested and brought before the police court of St. Paul on the charge of displaying two stallions on Farnam street on the 2d day of March, 1905, north of and adjoining block 5, in Military addition to the city of St. Paul, the street being immediately north of the residence of A. E. Cady. The charge was that displaying said stallions was wrongful and unlawful, and to the great annoyance of the family of A. E. Cady, and in violation of the provisions of section 2 of the ordinance of the city of St. Paul, Nebraska, passed and approved April 4, 1904. Iams was found guilty by the police judge, and sentenced to pay a fine of $5 and costs. He appealed to the district court, and after the state had produced its evidence Iams moved the court to direct the jury to return a verdict of "not guilty," which motion was sustained, and the defendant discharged. The state excepted, and the case is submitted to this court on these exceptions.

Section 2 of the ordinance is as follows: "That the displaying, hitching or keeping of any stallion or jack on any street or alley in the city of St. Paul, to the damage or annoyance of any resident upon any property adjoining any such street or alley, is hereby declared to be a nuisance." We do not understand that the state contends that under our statutes relating to municipalities the municipal authorities can, by ordinance, declare any act a nuisance which is not so in fact, nor can any cases be found in support of such a proposition. *Yates v. Milwaukee,* 10 Wall. (U. S.) 497. This raises the question whether the city council had authority to declare the acts mentioned in the ordinance a nuisance and provide a punishment therefor. Section 77, art. I, ch. 14, Comp. St. 1905, being the charter of cities of the second class and villages, devolves upon the city council or board of trustees the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons

within the city or village, and requires such council or board of trustees to keep the same open and in repair and free from nuisances. In our opinion the authorities vested with the care and control of the streets of a city or village may, in their discretion, prohibit their use for any purpose, except that for which streets or highways are commonly and necessarily used. The keeping of jacks and stallions and standing them for mares in view of a dwelling house has been declared a public nuisance. *Farrell v. Cook,* 16 Neb. 483. Fast driving upon the streets, the running of animals at large, the regulation of traffic and sales thereon, and the erection of signs, telegraph poles, racks, and the posting of handbills and advertisements may be prohibited by the city or village authorities by express provisions of the statute. Many acts taking place on the public streets of a city may be classed as nuisances which would be perfectly proper and unobjectionable on private property and not open to public view. The use of the streets for the exhibition of stallions is not the ordinary use which the public can demand. It is not one of the purposes for which streets are opened and kept in repair, and anyone having a family domicile upon a street used for such purpose may justly complain of such use. In *Nolan v. Mayor & Aldermen,* 4 Yerg. (Tenn.) 163, the precise question was before the supreme court of Tennessee, and it was held that where the charter of a corporation authorizes it to pass laws to prevent and remove nuisances, a law prohibiting the showing or exhibition of stud horses in the town is within the power.

We conclude, therefore, that the ordinance is a valid exercise of the powers conferred upon the council of the city of St. Paul by its charter, and we recommend such holding to the court.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons above stated, the conclusion arrived at by the commissioner is approved, and the exceptions

SUSTAINED.

WALLACE HARRIS, APPELLANT, V. LINCOLN TRACTION COMPANY, APPELLEE.

FILED APRIL 4, 1907. No. 14,699.

1. **Trial:** DIRECTING VERDICT. A motion to direct a verdict is in effect a demurrer to the evidence of the opposing party, and in passing on the same the court should consider as established all the facts proved and all inferences which can be logically and reasonably drawn from the evidence.

2. **Street Railways:** INJURIES: NEGLIGENCE. One who negligently attempts to cross a street railway track in front of an approaching car cannot recover for injuries sustained by being thrown from his wagon by impact with the car, unless those in charge thereof wilfully or wantonly produce the collision.

3. ———: ———: ORDINANCES. The mere fact that the car was running at a rate of speed prohibited by an ordinance of the city does not of itself entitle the plaintiff to recover.

4. **Evidence** examined, and *held* insufficient to require its submission to the jury.

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

Halleck F. Rose and *W. B. Comstock,* for appellant.

Clark & Allen, contra.

DUFFIE, C.

This action was brought by appellant against the Lincoln Traction Company to recover for injuries received by being thrown from his wagon. His petition alleges that, while endeavoring to cross the defendant's tracks, it carelessly and negligently ran its car at the rate of 15 miles an hour, in violation of the ordinance of the city, and without using reasonable diligence in watching for teams and carriages on the track, and without stopping the car as promptly as possible; that, without giving any warning or signal of the approach, it ran its car against the vehicle

in which plaintiff was riding, causing him to be thrown violently onto the brick pavement on the street. It is further alleged that defendant, after seeing the perilous situation of the plaintiff, negligently and carelessly failed to stop the car or slacken the speed. The answer is a general denial, coupled with a plea of negligence on the part of the plaintiff.

After the plaintiff had introduced his proof and rested, the court, on motion of the defendant, directed a verdict of "no cause of action," based upon the theory that by the plaintiff's own showing he was guilty of contributory negligence. A motion to direct a verdict for the defendant is in effect a demurrer to the plaintiff's evidence. It is a familiar rule that, on demurrer to the evidence, the party demurring must be treated as admitting all facts proved and all the jury might infer from the evidence of his adversary. Bearing in mind this rule, we are required to determine whether any fact which plaintiff's evidence tends to prove disclosed a case which should have been submitted to the jury. The evidence in brief is to the following effect: The plaintiff was driving two horses to a covered wagon west on O street, on the south side of defendant's double tracks. When between Fifteenth and Sixteenth streets, he crossed diagonally from south to north in a slow trot, and, while so crossing, the electric car ran into the rear left wheel of the wagon from behind, causing him to be thrown from the wagon to the brick pavement. Before attempting to cross defendant's tracks, he did not look or listen for the approach of the car, and he could not, while crossing, see a car approaching from the east, on account of the wagon being covered. On cross-examination he stated that he could not remember that he thought of any danger from an approaching car, although he was well acquainted in the city, and knew that cars were run frequently east and west upon O street. The witnesses testified that the gong of the car was not sounded before the collision; that the car was running from 12 to 15 miles an hour; that the attention of one witness was

directed to the car when distant about 40 or 50 feet from the wagon, and that the car was stopped within a distance of from 10 to 15 feet after the collision occurred. It is also shown that the street railway tracks are in plain sight from the point where the injury occurred for nearly a mile east, so that the plaintiff could have seen a car approaching from that distance, and the motorman could have observed a wagon upon the track for the same distance. Under these circumstances was there any case to go to the jury?

The plaintiff was negligent in attempting to cross the defendant's tracks without looking or listening for an approaching car, and this is especially true where, as in this case, he crossed the tracks in the middle of a block. Having contributed to the accident by his own negligence, there is no principle of law which will allow him to recover, unless he shows that he was wilfully and wantonly run down by those in charge of defendant's car. On this theory, and because of the claim that an ordinance of the city relating to the speed at which cars could be run was being violated, he seeks a reversal of this case. There is no evidence tending to show that the motorman wilfully or wantonly inflicted the injury complained of. It is common knowledge that horses in a trot move at the rate of about 7 miles to the hour or 10 feet to the second. It is also common knowledge that 14 to 15 feet is the distance between outside rails of a double track street railway. The evidence shows that the plaintiff's wagon from the end of the tongue to the rear wheels was 16 feet, making 30 or 31 feet that plaintiff would have to travel in crossing defendant's tracks at right angles. If, as shown by the testimony, the car was running at the rate of 12 to 15 miles an hour, it would be moving at a rate of speed double that of the plaintiff in crossing the track. In other words, this evidence clearly demonstrates that, when the plaintiff turned to cross the tracks, the car was only about 60 or 70 feet distant, and, as it was brought to a stop within 10 or 15 feet of the place where the accident occurred, it

is clearly evident that the motorman, instead of wilfully or wantonly running into the defendant's wagon, brought his car to a halt within a reasonable time, as the distance traveled after plaintiff turned to cross the tracks could not have occupied to exceed three to five seconds. The fact that the car was moving at a rate of speed prohibited by an ordinance of the city will not of itself entitle the plaintiff to recover. The mere fact that a street car is running at a higher rate of speed than any municipal ordinance allows does not give one injured by his own carelessness by impact with such car a right of action. *Ames v. Waterloo & C. F. R. T. Co.*, 120 Ia. 640; *Weber v. Kansas City C. R. Co.*, 100 Mo. 194, 7 L. R. A. 819. The rule that a traveler on a city street about to cross a railroad track has a right to assume that a train will not be running at a greater rate of speed than that limited by municipal ordinance does not absolve him from making use of his senses to avoid danger. *Collins v. New York, C. & St. L. R. Co.*, 36 N. Y. Supp. 942. In *Union P. R. Co. v. Ruzicka*, 65 Neb. 621, it is said at page 625: "Nor does it seem that there was error in the trial court's refusing to instruct the jury that it is contributory negligence to voluntarily attempt to cross in front of a train on the assumption that its speed was not greater than the ordinance permitted. There was nothing to show that such an assumption was in the mind of plaintiff's driver or in any way affected his action. His knowledge of such an ordinance, in any event, would merely go to affect the question of what would be ordinary care, under the circumstances, on his part." The above quotation may be well applied to the case we are considering.

Because of the admitted negligence of the plaintiff in crossing the defendant's tracks in front of an approaching car in plain view of the plaintiff, had he used common and ordinary caution in looking for the same, 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 appealed from is

AFFIRMED.

J. I. CASE THRESHING MACHINE COMPANY, APPELLANT, V. HARI MEYERS ET AL., APPELLEES.

FILED APRIL 4, 1907. No. 14,715.

1. **Contracts:** VALIDITY. To avoid a contract on the ground of drunkenness, it is not sufficient that the party was under undue excitement from liquor. It must arise to that degree which may be called excessive drunkenness, where a party is so far deprived of his reason and understanding as to render him incapable of understanding the character and consequence of his act. *Johnson v. Phifer*, 6 Neb. 401, modified.

2. ———: RESCISSION. To avoid a contract on the ground of excessive intoxication, one must rescind the contract within a reasonable time after recovering his senses, or, if he has received no money or property as a consideration therefor, he must, within a reasonable time, disclaim liability thereon.

3. **Appeal:** JUDICIAL NOTICE: RECORD. Rules of the district court cannot be judicially noticed by this court, and, where any right is claimed under such rules, they must be called to our attention by being embodied in the bill of exceptions.

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

W. S. Morlan, for appellant.

Starr & Reeder, contra.

DUFFIE, C.

The appellant brought this action against Hari Meyers and F. H. Bonger upon two promissory notes given in part payment of a threshing machine outfit. The defendants filed separate answers, alleging, as a first defense, that there was misrepresentation on the part of the plaintiff on

the sale of the machine; second, that a chattel mortgage securing these notes was foreclosed, the proceeds of which should have been applied in satisfaction thereof; third, damages for taking the outfit by the plaintiff. Meyers' answer contained a fourth defense—that he was intoxicated when he signed the notes in question. The jury found against the defendant Bonger, and in favor of the defendant Meyers. This is conclusive that all issues in the case were found in favor of the plaintiff, except that Meyers was not liable upon the notes by reason of his intoxication at the time of signing them. The record shows that the threshing machine outfit was sold to the defendant Bonger for the sum of $2,550, for which six notes were given. Meyers signed three of these notes, aggregating $1,200, the remaining notes being signed by Bonger alone, and all secured by chattel mortgage on the threshing outfit. On the failure of Bonger to pay the second and third notes when they matured, the plaintiff elected to treat the entire debt as due. It took possession of the machine under a writ of replevin, foreclosed its mortgage, and the proceeds, being insufficient to satisfy the entire debt, was applied as a partial payment on the notes signed by Bonger. No objection to this application of the proceeds of the foreclosure sale was made by either defendant.

It being settled by the verdict of the jury that there was no defense to the notes, except that of the intoxication of Meyers at the time of signing them, the only question we are called on to determine is the sufficiency of that defense under the evidence and the instruction of the court relating thereto, and its refusal to give instruction No. 1 asked by the plaintiff. This instruction is as follows: "The court instructs the jury that defendant Hari Meyers, among other things, claims he is not liable on the notes sued on in this action, for the reason that he was intoxicated at the time he signed the same. In order to release the defendant Hari Meyers on account of being drunk, you must first find that at the time said Hari Meyers signed the notes sued on he was so drunk as to be deprived of his reason and

understanding. It is not sufficient that he was under the undue excitement of liquor, but such drunkenness, in order to release him in this case, must have been so excessive as to utterly deprive him of his reason and understanding; and, in order to avoid liability on said notes on account of such drunkenness, it was incumbent upon the said Hari Meyers to disclaim within a reasonable time his liability thereon, and to notify the plaintiff of his intention not to pay such notes." The rule of the instruction relating to the degree of drunkenness necessary to release Meyers is the same as announced in *Johnson v. Phifer,* 6 Neb. 401; but, after serious consideration, we have concluded that the rule there approved should be modified, and our law made to conform to the more recent decision of the supreme court of the United States and of many of our sister states. An extended note to *Wright v. Waller,* 127 Ala. 557, 54 L. R. A. 440, shows that the old rule, first established in England, that drunkenness, in order to avoid a contract, must be of such character as to utterly deprive the party of his reason and understanding has, by the modern decisions, been greatly modified, and the more reasonable one adopted that, if a party is so far deprived of his reason and understanding as to render him incapable of comprehending the character and consequence of his act, it is sufficient. *Hawkins v. Bone,* 4 Fost. & Fin. (Eng.) 311; *Bursinger v. Bank of Watertown,* 67 Wis. 75; 58 Am. Rep. 848; *Reynolds v. Waller,* 1 Wash. (Va.) 164; *Birdsong v. Birdsong,* 2 Head. (Tenn.) 289; *Barrett v. Buxton,* 2 Aik. (Vt.) 167, 16 Am. Dec. 691; *Harmon v. Johnston,* 1 MacArth. (D. C.) 139. A contract is an agreement between competent parties, supported by a legal consideration, and there can be no contract in its true sense without a meeting of minds. The parties must have a distinct intention common to both, in order to constitute a contract or agreement. It is evident, therefore, that the minds of the contracting parties must meet, and, if one of them is so weak, unsound or diseased that the party is incapable of understanding the nature and quality

of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the agreement, whether that state of his mind was produced by mental or physical disease or whether it results from intoxication. It seems to us that the true rule is contained in the instructions given by the trial court and approved by the supreme court of the United States in *Johnson v. Harmon,* 94 U. S. 371, to the effect that the defendant must be incapable of understanding the terms and conditions of the contract in order to avoid it, and that to make a deed valid it is not sufficient for the party to know that he was signing a deed of trust on his property, but he must have been in such a condition of mind as to be able to know and understand the terms and conditions of the deed; that it was not necessary, in order to render the deed invalid, that at the time of its execution and acknowledgment he was entirely demented by intoxicating drink, but his act will be rendered invalid if he was in such a condition of mind that he could not comprehend what were the terms and conditions of the instrument. *Johnson v. Phifer, supra,* is modified to conform to these views. That part of the instruction asked by the plaintiff and appellant which required Meyers to disclaim within a reasonable time his liability upon the note and to notify the plaintiff of his intention not to pay it correctly states the law, and, as the court nowhere in its own instructions touched upon that subject, his attention having been called to the matter, he should have formulated an instruction upon that material phase of the case and presented it to the jury.

The record shows that the instruction was "refused because not presented in time," and in the brief and oral argument of the appellee it is claimed that there is a rule of court existing in the district where the case was tried to the effect that "instructions to the jury asked by either party must be submitted to the court as soon after the commencement of the trial as possible, and not later than the beginning of the argument to the jury; provided, that

either party may submit instructions during the argument, or after the close, upon points relating solely to the argument of events happening after its commencement." The bill of exceptions makes no reference to this rule or to any rules of the trial court, and we cannot take judicial notice of rules established by the different district courts of this state. In order to bring them to our attention, they must be embodied in the bill of exceptions certified to this court by the trial judge.

The evidence is clear that Bonger, who is a son-in-law of Meyers, procured him to sign the notes on the afternoon of July 31, 1903. They were signed in the store of W. T. Coleman, who says he noticed no indication of Meyers being intoxicated at that time. Meyers himself testifies that Bonger told him the next day he had signed the notes and wished him to advance the money to pay freight upon the machine, the plaintiff refusing to unload it from the car on which it was shipped until the freight was paid. This Meyers refused to do, and Bonger got other parties to advance the money. Myers' own evidence makes it clear that he had knowledge the next day after the notes were signed, and before the machine had been delivered to Bonger, that he had become liable upon these notes. Notwithstanding this, he took no action to claim exemption from liability, and to give the plaintiff an opportunity to protect itself before delivering the machine. The general rule appears to be that a contract, invalid by reason of the intoxication of one of the parties, may be ratified by him when sober, and, if so ratified, it will be enforced. In *Williams v. Inabnet,* 1 Bail. (S. Car.) 343, it is said: "It is, perhaps, one of the most difficult questions which can be presented to a jury to decide how far the capacity to contract has been destroyed by the too free use of ardent spirits. But too ready an ear should not be lent to such a defense; and, in all cases where the subsequent conduct of the party making it is such as to have the appearance of his having confirmed the contract, the de-

fense should not be allowed; for, even if a man be so much intoxicated as not to know what he is doing, yet he may afterwards confirm the contract by his acts. If he does not intend to be bound by it, he should go the instant he is restored to his senses, and return all that he received as a consideration." To the same effect is 1 Daniels, Negotiable Instruments (5th ed.), sec. 215; *Joest v. Williams*, 42 Ind. 565; *Carpenter v. Rodgers*, 61 Mich. 384; *Strickland v. Parlin & Orendorf Co.*, 118 Ga. 213, 44 S. E. 997. If the defendant was so intoxicated as not to understand what he was doing when the notes were signed, he should have disclaimed liability thereon within a reasonable time after recovering his senses, and especially is this true when he had knowledge that the machine had not been delivered to his son-in-law, and while the plaintiff was in position to protect itself by a refusal to make delivery.

Complaint is further made of misconduct of defendants' attorney in his argument to the jury, to which plaintiff excepted. We do not care to quote in this opinion the language used by defendants' attorney, which was manifestly prejudicial, and can only say that the district court should have sustained plaintiff's objections to the argument and should have prevented such a breach of professional conduct. Were it not that the refusal of the court to instruct upon the duty of the defendant to disclaim liability upon the note upon regaining his reason calls for a reversal of the case, we would have no hesitation in reversing it on account of misconduct of defendants' attorney.

We recommend a reversal of the judgment.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the case remanded.

REVERSED.

STANLEY G. SATTERLEE, APPELLANT, V. FIRST NATIONAL BANK OF COLUMBUS, APPELLEE.

FILED APRIL 4, 1907. No. 14,722.

1. **Exemptions, Evasion of.** The institution of a suit in another state against the employee of a railroad company is only *prima facie* evidence of evasion of the exemption laws of this state.
2. **Agents, Unauthorized Acts of.** The owner of a note already in judgment, who places it in the hands of a collection agency with a distinct agreement that no suit is to be brought thereon, is not bound by the unauthorized action of the agent in bringing suit.

APPEAL from the district court for Platte county: JAMES G. REEDER, JUDGE. *Affirmed.*

E. P. Weatherby, for appellant.

August Wagner, contra.

DUFFIE, C.

In November, 1900, the First National Bank of Columbus, Nebraska, delivered to an agent of the Sprague Collection Agency of Chicago, Illinois, a number of notes, one for $150, made to the bank by the plaintiff, Stanley G. Satterlee, being among the number. The Satterlee note had been put in judgment in Platte county prior to its delivery to the Sprague Collection Agency, and that fact is shown by a memorandum made on a receipted list of the notes given the bank by the Sprague company. Notwithstanding this, the Sprague Collection Agency commenced attachment proceedings against Satterlee in justice court of Cook county, Illinois, in 1903, and, while it is doubtful whether regular proceedings to that end were taken, a pretense, at least, of garnishing the Chicago & N. W. R. Co., by whom Satterlee was employed at Norfolk, Nebraska, was made. Satterlee, being informed of these proceedings, went to Chicago, and made settlement of the case, and then brought this action against the defendant bank to recover his damages under sections 531*c*-531*f* of the code. The evidence shows that he is the head of a

family, a resident of this state, and within the class of persons designed to be protected by the statute above referred to. The case was tried to the court without a jury, and judgment entered dismissing the plaintiff's petition, and he has appealed from that judgment.

As before stated, the record does not make it plain that any garnishment proceedings were had against the Chicago & N. W. R. Co. A writ of attachment was obtained from the justice court in Cook county, Illinois, against the plaintiff, but no affidavit in garnishment is shown to have issued, nor is it shown that notice of garnishment was served upon the railroad company. Aside from this, the evidence is undisputed that, when the agent of the Sprague Collection Agency visited the First National Bank of Columbus for the purpose of securing collections, it was understood and agreed that all payments made on the collections should be made directly to the bank; that the only service to be performed by the collection agency was to see the debtors and induce them to make payment to the bank, in consideration of which it was to receive 20 per cent. on all collections that it could induce the debtors to make. Apparently the agency was not authorized to commence suit in the name of the bank, and the bank had no notice or knowledge that suit against Satterlee had been commenced until some days after the proceedings had been instituted. On the whole, we are satisfied that the bank never authorized this suit upon a note against which the statute of limitation had run, and which was already in judgment in Platte county. If we are to take the undisputed testimony of the cashier of the bank, no suit was authorized or contemplated at the time the note was turned over to the collection agency, and the fact that the note was already in judgment is strongly corroborative of his testimony.

We recommend an affirmance of the judgment.

JACKSON, C., concurs.

ALBERT, C., having been of counsel, not sitting.

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

AFFIRMED.

BANKING HOUSE OF A. CASTETTER, APPELLEE, V. C. C. ROSE, APPELLANT.

FILED APRIL 4, 1907. No. 14,742.

Release: JOINT DEBTORS: PLEADING. The voluntary release of one of two joint makers of a promissory note will release the other. But when an action has been brought against both jointly, and a successful defense has been made by one defendant supported by the evidence of both, and judgment has been entered against the other defendant, upon appeal by such defendant to the district court the action may proceed against him alone, and the petition which alleges all the facts above stated is not subject to demurrer for nonjoinder of defendants.

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

John Lothrop, for appellant.

Jefferis & Howell and *Herman Aye, contra.*

DUFFIE, C.

The Banking House of A. Castetter, appellee, commenced an action against C. C. Rose and Mrs. Cora Rose, his wife, in the county court of Washington county on a note signed by both defendants. They filed separate answers, the wife in her answer alleging, among other matters of defense, that she was a married woman; that she received no consideration for the note, and did not intend to bind her separate property or estate thereby. On the trial both husband and wife testified to facts fully supporting these allegations of her answer, and thereupon the plaintiff voluntarily dismissed the action as against the wife, and the court gave judgment against C. C. Rose, the husband. C.

C. Rose appealed to the district court, and in his petition in the district court the plaintiff alleges the foregoing facts as a reason for dismissing Mrs. Rose from the action in the county court and taking judgment against the husband alone. To this petition a demurrer was interposed by the defendant upon the ground, first, that there was a defect of parties defendant, and, second, that the petition did not state facts sufficient to constitute a cause of action against the defendant. This demurrer was overruled, and, defendant electing to stand thereon, judgment was entered against him for the amount due upon the note, and from this judgment he has appealed.

It is insisted by the defendant that, the note being the joint note of himself and wife, the voluntary dismissal of his wife from the action in the county court releases him from liability. It is conceded that the voluntary release of one joint debtor operates as a release of the other. *Lamb v. Gregory,* 12 Neb. 506; *Scofield v. Clark,* 48 Neb. 711. The petition in this case alleges that Mrs. Rose never received any consideratioin for the note in question, and that it was not her intention to bind her separate property or estate; that both she and her husband so testified on the trial in the county court. The demurrer admits that these allegations are true, and, if true, Mrs. Rose was not a joint debtor upon the note. It is conceded by the defendant that, under the pleadings and proof in the case in county court, judgment would have to be rendered in favor of Mrs. Cora Rose; and that, if judgment had been so rendered, the action might have proceeded to judgment against the present defendant. But it is insisted that, until the fact of Mrs Rose's nonliability upon the note was adjudicated and found by the court, her voluntary dismissal from the action by the plaintiff released the defendant. We cannot concur in this contention. We can see no difference between a finding made by the court that Mrs. Rose was not liable on the note, and the admission made of record on the trial in the district court that such was the fact. The solemn admission in his pleadings made

by the defendant is, to our mind, as conclusive of the admitted facts as would be the judgment of the court. The court did not err in overruling defendant's demurrer to the plaintiff's petition and entering judgment for the plaintiff.

We recommend an affirmance of the judgment.

ALBERT, C., concurs.

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

AFFIRMED.

BENJAMIN F. WILLIAMS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.*

FILED APRIL 4, 1907. No. 14,706.

1. Railroads: LIABILITY FOR INJURIES. Ordinarily a railroad company is not liable for injuries caused by a team taking fright at the noises incident to the ordinary operation of a train on its road.

2. ———: ———. But, where the conditions are such that noises thus made would endanger a person at a public crossing, which result could be avoided by temporarily staying or suspending the noise without materially interfering with the due operation of the train, ordinary care and prudence require that it be thus stayed or suspended until the danger is past.

3. ———: ———. To turn on the steam of a locomotive standing at a public street crossing, without warning and without taking due precautions to discover whether there is any person on or near the crossing liable to be injured in consequence of such act, constitutes actionable negligence, in the absence of special circumstances justifying the act.

4. ———: ———. A train standing at a public crossing has no precedence over an ordinary traveler, their rights being equal. Each is bound to act with due regard to the other, and has a right to assume that the other will be controlled by such considerations as would influence the conduct of a man of ordinary care and prudence.

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* Rehearing denied. See opinion, p. 701, *post.*

APPEAL from the district court for York county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

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

Gilbert Bros., contra.

ALBERT, C.

This is an appeal from a judgment in favor of the plaintiff in an action brought to recover for injuries received by him in consequence of the team, drawing the wagon in which he was riding, taking fright at the escape of steam from one of the defendant's locomotives standing at a street crossing. At the close of the testimony, the defendant moved for the direction of a verdict in its favor. The motion was overruled, and the ruling on that motion is the basis of the only assignment argued in the brief filed on behalf of the defendant company. The question raised by the assignment relied upon is whether the evidence, tested by the rules of law applicable thereto, is sufficient to sustain the verdict.

The crossing in question is on one of the principal streets in the city of York. Six railroad tracks of the defendant company cross the street at this point. The street is 100 feet wide, runs north and south, and the tracks cross it nearly at right angles. From the center of the street the crossing is planked for a distance of about 15 or 16 feet each way. There is an ordinary sidewalk at each side of the street. The rest of the crossing is neither planked nor filled in, the rails projecting above the surface of the street about four inches. On the date of the accident the plaintiff and his brother approached the crossing from the south, in a wagon drawn by a team of mules. One of the defendant's locomotives, to which was attached four or five freight cars, stood near the east line of the street, facing west. There is some conflict in the evidence as to whether the locomotive, or any part of it

stood on the street, the plaintiff and one other witness testifying that the pilot was even with the east line of the planking on the crossing, and witnesses produced by the defendant testifying that the locomotive stood east and entirely clear of the street. There is also some conflict as to the time it had stood at the crossing, but the evidence would warrant a finding that it was at least five minutes. The plaintiff and his brother, as they approached the crossing, and at a distance of about six blocks from it, saw the locomotive standing on the track, and it was in plain sight all the time. At a short distance from the track they "slowed up," or stopped for an instant, to consider whether it would be safe to cross in front of the locomotive. They saw or heard nothing to indicate that the locomotive was about to move, and received no warning that it was about to do so. They saw others crossing, and started to drive across the tracks. The engineer could not see them from his side of the cab, but the fireman, from the other side of the cab, might have seen them, if he had been looking. His testimony was not taken. When the mules had got about in front of the engine, the engineer turned on the steam to back the train. This caused considerable noise, and the team took fright and started in a northwesterly direction, which brought the wagon wheels in contact with the rails of the unplanked portion of the crossing. What followed is shown by the following, taken from the plaintiff's testimony: "The team started with us. My brother was driving, and I took hold of the lines too, and the team ran out over those unprotected rails, and the wagon was just bouncing up and down, and we came to the sewer that goes under the railroad and the team would not go over that hole. They turned and ran over a kind of guard they have there by the sidewalk,—old ties with planks spiked on top of these ties. When we struck these planks, about 18 inches high, it just shot us into the air 15 or 20 feet, and we came over on our heads. At that time the wagon was gone from where we were."

That the accident resulted in more or less injury to the

plaintiff is not disputed. The evidence also shows that the engineer turned on the steam in response to a signal from one of the train men to back the train, and that the escape of the steam with the consequent noise was merely incidental to the usual and ordinary operation of the engine. The evidence, however, is sufficient to sustain a finding that, while the plaintiff was crossing the track in front of the defendant's engine, which was occupying a portion of the public street, the defendant's employees, without any warning and without any precaution to guard against consequent injury to those using the street, turned on the steam, thereby causing a noise, which, by common experience, is known to be highly calculated to frighten teams passing in front of an engine, and, in consequence, the plaintiff sustained serious bodily injury. This, in our opinion, sustains the charge of negligence.

We have not overlooked the general rule applied in *Hendricks v. Fremont, E. & M. V. R. Co.*, 67 Neb. 120, to the effect that a railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train on its road. While that rule is generally recognized by the courts, we know of no case where any court has shown a disposition to depart from the humane doctrine that a person must conduct his business with due regard for the safety of others. Noise is an unavoidable incident to the operation of railroad trains. But, where the conditions are such that the noise incident to the movement of a train or engine would endanger those lawfully near the track, and could be temporarily stayed or suspended without materially interfering with the due operation of the road, ordinary prudence and a due regard for the rights and safety of other people demand that the noise be prevented or suspended until the danger is past. This is clearly implied in *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27. In that case, as in this, a team took fright at the escape of steam from an engine, and in the body of the opinion the court said: "If the facts, circumstances, and situation of the parties had been such at the time this

steam escaped as to make it the duty of the engineer to be aware of Brady's presence, then the engineer's act of opening the valves would have been evidence of negligence for the jury's consideration." In *Omaha & R. V. R. Co. v. Clark*, 39 Neb. 65, the same question was under consideration, and the court, in the course of its discussion, said: "In the legitimate conduct of its business it had a right to discharge steam from its locomotive even within the limits of a city and near traveled thoroughfares, provided in so doing it acted as a person of prudence would act under similar circumstances." In *Louisville & N. R. Co. v. Penrods*, 66 S. W. (Ky.) 1013, the court held that it was negligence to make the customary noises incident to the movement of a train, when the employees in charge had reason to fear injury therefrom to the driver of a team. *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298.

In the last two cases it would seem that the engineer had seen the perilous position of the occupants of the wagon, whereas in the case at bar the evidence is that he did not. We lay no stress on that distinction between the cases. The defendant's liability does not depend alone on what its employees saw, but on what, under the circumstances, they might have seen and should have seen. The fireman at least might have seen the plaintiff's peril, and, in view of all the circumstances, it was certainly the duty of some one engaged in operating the train to see. The engine was occupying a portion of a public street, where teams were passing and repassing within a few feet of the pilot. Those in charge of it knew, or ought to have known, as a matter of common experience, the effect of escaping steam on an ordinary team passing near an engine. They knew the condition of the crossing and that only a portion of it was planked. The accident is one which might have been easily foreseen by ordinary forecast as a natural and probable result of turning on the steam, and one which could have been prevented by the exercise of slight care on the part of the defendant's employees, without substantial interference with the due operation of

the road. We are satisfied that, in view of the situation of the parties and the attendant facts and circumstances, the turning on of the steam, without taking any precaution to guard against injury therefrom to those using the crossing, was actionable negligence.

But the defendant contends that the evidence shows contributory negligence on the part of the plaintiff. We do not think so. The facts relied upon to show contributory negligence are that the plaintiff and his companion might have taken a different route after they saw the engine on the street, and that they attempted to cross the track without taking any precaution to find out whether the train or engine was about to move. Their direct route lay across these tracks. The other route meant going out of their way a total distance of about five blocks. They saw other teams passing in front of the engine. They had no warning that it was about to move. Ordinary care does not demand that one in lawful use of a highway and driving a team should dismount and make inquiries in regard to the intentions of those in charge of a locomotive standing at a crossing, or to abandon his route in apprehension that those in charge of the engine will operate it in reckless disregard of his safety. He has a right to assume that they will act with ordinary care and with due regard for the safety of those using the crossing. A train standing at a crossing has no precedence over an ordinary traveler, their rights being equal. Each is bound to act with due regard to the other. *Allen v. Boston & M. R. Co.*, 94 Me. 402, 47 Atl. 917. Each has a right to assume that the other will act as a man of ordinary care and prudence would act in like circumstances. A person attempting to cross the tracks at a railroad crossing is put upon his judgment. The act is generally attended with more or less risk, and he has a right to act upon conditions as they would appear to a man of ordinary intelligence and prudence, and on the assumption that those engaged in operating the road will not needlessly enhance his danger.

In our opinion, the evidence is amply sufficient to sustain the verdict of the jury, and we therefore recommend 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 is

AFFIRMED.

The following opinion on motion for rehearing was filed November 9, 1907. *Rehearing denied:*

Railroads: NEGLIGENCE: QUESTION FOR JURY. When an engine is standing at a street crossing in a city, and teams are continually passing and repassing near thereto, and the engine is suddenly started without warning when a team is crossing on the public highway and is in close proximity to the engine, it is a question of fact for the determination of the jury whether the engineer is guilty of negligence in failing to ring the bell or give other warning of the starting of the engine.

SEDGWICK, C. J.

The strong and exhaustive brief which is filed in support of the motion for rehearing is devoted mainly to the application of the well-established principle, which is also recognized in the former opinion, that a railroad company is not liable to damages because horses are frightened by the prudent and necessary operations of the road. This case we think, however, is rather within the other principle suggested in the opinion, a principle declared in *Toledo, W. & W. R. Co. v. Harmon,* 47 Ill. 298, and in many other cases. The case last cited was an action for damages caused by a horse becoming frightened by the escape of steam from an engine, and Mr. Justice Walker in the opinion of the court said: "Both parties have the right to pass and repass over the roads in the modes adapted to their construction; and each is under equal and reciprocal obligations to observe the rights of the other; and neither can wilfully, wantonly or negligently, endanger, obstruct or delay the other in the enjoyment of his rights without incurring liability for the injury; and each party, in the exercise of his right, must observe the

highest degree of prudence, circumspection and skill, to avoid the infliction of injury to others." It seems to be conceded that in the case at bar the team in question was not a gentle, well-trained team, and the plaintiff might reasonably have supposed that, if the engine were started while his team was immediately in front of it, it would result in the injury complained of. But was the plaintiff bound to take notice that the engine might start without any warning being given to the public? Other teams were passing and repassing in front of this engine at the time the plaintiff arrived at the crossing. The plaintiff and his brother, who was driving the team, stopped at the crossing to consider whether it would be safe to pass. They considered that the engine might stand for some length of time. Of course, it was impossible for them to know how long the engine might remain where it then was. It might, for all they knew, remain for half an hour, or even longer. The engineer must have known that teams were passing in front of and close to his engine. He might reasonably have supposed that, if the drivers knew that the engine was about to start and would commence operations when the team was in close conjunction with the engine, they would hesitate to drive their teams into such danger. What was the reasonable course for the engineer to pursue in view of the principle of law above quoted from the Illinois court? If he had caused the engine bell to ring a short time before he started the engine, this plaintiff would have known the danger, and in all probability this accident would not have occurred. It seems very clear that under the circumstances it was a question for the jury whether it was negligence on the part of the engineer to fail to give any warning of the starting of the engine. The railroad company, then, was not entitled to a peremptory instruction taking this question away from the jury; and, as the failure to give such instruction is their only cause of complaint, we think that the opinion is right, and the motion for rehearing is

OVERRULED.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND ET AL., APPELLANTS.*

FILED APRIL 4, 1907. No. 14,747.

1. Statutes: VALIDITY. In legal contemplation an unconstitutional statute is as inoperative as though never passed, conferring no right, imposing no duty, and affording no protection.

2. ———: CITIES: BOUNDARIES. An annexation ordinance, adopted in pursuance of an unconstitutional statute, and without lawful authority, is ineffectual to extend the corporate limits of a municipality.

3. ———: IMPEACHMENT. Ordinarily the validity of such ordinance may be collaterally impeached in a proceeding brought to enforce a city tax levied against real estate in the annexed territory.

4. ———: UNAUTHORIZED TAX. Such tax is one levied for an "unauthorized purpose," within the meaning of section 15 of the scavenger act (Comp. St. 1905, ch. 77, art. IX, sec. 15), and may be adjudged void in a proceeding brought under the act.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Reversed with directions.*

Samuel M. Chapman, A. L. Tidd and *Matthew Gering*, for appellants.

C. A. Rawls and *H. D. Travis, contra.*

ALBERT, C.

Since 1882, Heman Burgess, whom we shall call the defendant, has been the owner of a tract of land containing about 12 acres, lying near the original corporate limits of the city of Plattsmouth. It has never been platted or subdivided into lots, and has been used exclusively for agricultural purposes. In 1888 the city in pursuance of the provisions of chapter 14, laws of 1885, entitled "An act to amend the title and sections 1, 2, 3, and 4 of an act entitled 'An act to provide for the organization, government, and powers of cities of the second class having more

* Rehearing allowed. See opinion, 80 Neb. ——.

than ten thousand inhabitants,' approved March 1, 1883," undertook merely by the passage of an ordinance to extend its corporate limits to include the defendant's land. Ever since the adoption of said ordinance, down to and including the year 1903, taxes for general city purposes were levied against this land. The taxes thus levied were paid by the defendant from year to year until 1894, but, according to his uncontradicted testimony, such payments were made under protest, and since that year he has paid no taxes levied against the property for city purposes. A proceeding under what is commonly known as the "Scavenger" act, instituted in 1904 to enforce the payment of the unpaid city tax levied against the defendant's property, was resisted by the defendant, on the ground that the annexation ordinance was invalid and ineffectual to bring the land within the corporate limits of the city, and, consequently, that the taxes levied against the land for city purposes were levied without authority and void. The court entered a decree for the enforcement of the taxes against the land, and the defendant appealed.

The amendatory act of 1885 was declared unconstitutional in *Webster v. City of Hastings,* 59 Neb. 563. The general rule is that an unconstitutional statute is invalid from its inception, and as ineffectual as though it had never passed. *Boales v. Ferguson,* 55 Neb. 565; *Finders v. Bodle,* 58 Neb. 57. As was said in *Norton v. Shelby County,* 118 U. S. 425: "It confers no rights; it imposes no duties; it affords no protection; * * * it is, in legal contemplation, as inoperative as though it had never been passed." It would follow, then, that the amendatory act of 1885, under which the city attempted to extend its limits by ordinance so as to include defendant's land, conferred no authority to annex adjacent territory by ordinance, and, as there was no valid law then in force conferring such authority, that the attempted annexation was unauthorized. As was said in *Chicago, B. & Q. R. Co. v. City of Nebraska City,* 53 Neb. 453: "It is a familiar doctrine that municipal corporations can exercise only

such powers as are conferred by law, either express or implied. Where the statute points out the mode of procedure for the extension of the boundaries of a city, the same must be substantially followed, else it will be of no validity." There, as in this case, the validity of a city tax levied against certain property over which the city had attempted to extend its jurisdiction was assailed on the ground that the annexation proceedings were unauthorized. The court held that, the annexation proceedings being unauthorized, the taxes were void, and allowed an injunction to restrain their collection.

But it is contended that the validity of the annexation proceedings cannot be impeached collaterally by a private individual. This contention seems to be met and disposed of by the case just cited, but authorities are not wanting to sustain it. Such authorities, however, so far as we have been able to examine them, are cases where the city had authority to annex the territory, but exercised it irregularly, or where the annexation proceedings had been acquiesced in for so long a time that public and private rights had intervened, which would be injuriously affected by an annulment of the proceedings. But this is a case, not of an irregular exercise of lawful authority, but of a want of lawful authority, and the annexation proceedings, therefore, were not merely defective and voidable, but *ultra vires* and void. Neither have any public or private rights intervened which would be prejudiced by a refusal to recognize the jurisdiction of the city over the property in question. So far as the record discloses, the city has laid out no streets, made no improvements, and expended no money on this property, and has made no attempt to exercise jurisdiction over it, save by levying taxes against it. Neither does it appear that the city has expended any money, incurred any liability, or changed its position to its prejudice in any way on the assumption that the defendant's land was subject to taxation for city purposes. What taxes were paid by the defendant for that

purpose were paid under protest. The record, therefore, discloses no reason for a departure from the general rule that a void proceeding may be assailed at any time and by any person.

Another contention of counsel for the state is that the validity of the annexation ordinance cannot be assailed in this proceeding, because the jurisdiction of the court to declare a tax void in proceedings under the scavenger act is expressly limited to cases where the property was exempt from taxation, or the levy made for an illegal or unauthorized purpose, or the tax was based on fraud, gross injustice, or mistake. See Comp. St. 1905, ch. 77, art. IX, sec. 15. We do not deem it necessary to undertake to define the jurisdiction of the court in a proceeding of this character, nor to determine whether the grounds upon which it can relieve against void taxes are limited to those just enumerated, because this case easily falls within those limitations. If the taxes were levied in the belief that the property was subject to city taxation, they were based upon mistake; if they were levied by the city authorities with knowledge that the property was outside the city limits, and not subject to city taxation, they were based on fraud. Besides, it was held in *Thatcher v. County of Adams,* 19 Neb. 485, that school district taxes levied upon real estate outside the district were levied for an unauthorized purpose, within the meaning of the revenue act. On the authority of that case, the taxes in question may be said to have been levied for an unauthorized purpose within the meaning of the scavenger act.

The equities are with the defendant. His land is unplatted. It is used exclusively for agricultural purposes. It derives no benefit from the city government. No fact or circumstance is shown justifying an application of the hard doctrine of necessity or estoppel. The taxes are void, and the district court erred in decreeing their enforcement.

It is therefore recommended that the decree of the district court be reversed and the cause remanded, with di-

rections to enter a decree in accordance with the views herein expressed.

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 conformity herewith.

REVERSED.

CITIZENS INSURANCE COMPANY, APPELLANT, V. HERPOLSHEIMER IMPLEMENT COMPANY, APPELLEE.

PHENIX INSURANCE COMPANY, APPELLANT, V. HERPOLSHEIMER IMPLEMENT COMPANY, APPELLEE.

RELIANCE INSURANCE COMPANY, APPELLANT, V. HERPOLSHEIMER IMPLEMENT COMPANY, APPELLEE.

FILED APRIL 4, 1907. Nos. 14,984, 14,985, 14,986.

1. **Judgment:** VACATION: EVIDENCE. Evidence examined, and *held* sufficient to sustain a finding, made by the court in an application by petition to vacate certain judgments, that such judgments had not been procured by wilfully false testimony given by the judgment plaintiffs.

2. ———: ———: DILIGENCE. In an action to vacate a judgment on the ground that it was obtained by fraud, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision was not attributable to his own fault or negligence. *Secord v. Powers*, 61 Neb. 615.

3. ———: ———: ———. Where a party applying by petition for a new trial, after the term at which the verdict or decision was rendered, fails to show that he could not have discovered the evidence before, by the exercise of reasonable diligence, the application is properly denied.

4. **Review:** HARMLESS ERROR. In an application for a vacation of certain judgments, under the provisions of section 602 of the code, several defenses were interposed; a demurrer to one of these defenses was overruled, but such ruling in nowise interfered with a full and complete hearing on the merits; the evidence adduced

would have necessitated a denial of the application, had the demurrer been sustained; the court denied the application. *Held*, That the error, if any, in overruling the demurrer was error without prejudice.

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

Greene, Breckenridge & Matters and *Hall, Woods & Pound,* for appellants.

Field, Ricketts & Ricketts, contra.

ALBERT, C.

These appeals are a continuation of the litigation involved in *Citizens Ins. Co. v. Herpolsheimer,* 77 Neb. 232. There a judgment against each of the insurance companies was affirmed. The opinion referred to will assist to an understanding of the questions involved at this time. The judgments reviewed in those proceedings were rendered by the district court on the 8th day of April, 1905. On the 12th of April, 1906, the insurance companies each filed a petition for a vacation of the respective judgments, and for new trials, under the provisions of section 602 of the code. The petitions charge that the judgments were procured by wilfully false testimony given on the trial of the three cases by the judgment plaintiffs, whom we shall hereafter refer to as the Herpolsheimers. It is also alleged in the petitions that the insurance companies had no knowledge of any witness by whom such testimony could be contradicted and shown to be false, until long after the term at which the judgments were rendered, and about two months before filing their petitions. The answers are voluminous, and it will suffice for present purposes to say that they put in issue the charge of perjury, and state a legal conclusion, to the effect that the delay of two months on the part of the insurance companies in filing their petitions after the discovery of the witness by whom they could show the alleged falsity of the testimony of the Herpolsheimers constitutes laches. The insurance

companies demurred to the so-called plea of laches, but their demurrers were overruled. They then filed replies, amounting in each case to a general denial. The issues in the three cases were tried at the same time, and submitted on the same evidence. The trial court found generally for the Herpolsheimers, and dismissed the petitions. The insurance companies prosecute separate appeals, which were submitted at the same time and on the same briefs, and may be disposed of in one opinion.

The testimony given by the Herpolsheimers at the original trial, and now relied upon by the insurance companies as a basis for the charge of perjury, was with respect to two items: (1) The number of buggies totally destroyed by fire; and (2) the extent of the damage to certain binding twine.

As to the first item, two of the Herpolsheimers at the original trial testified that 31 buggies were totally destroyed. Their testimony on that point shows that they arrived at that number by taking the whole number of buggies shown by their last inventory, taken some nine months before the fire, adding thereto such additions to their stock as were shown by subsequent invoices, deducting therefrom the number shown by their account of sales to have been sold subsequently to the taking of the invoice, and subtracting from the result the number of buggies which were only partially destroyed by the fire. On the trial of these applications, the insurance companies produced a witness, who had been employed by the Herpolsheimers in and about the building where the buggies were destroyed for a period of about four months preceding the fire, and who had continued in their employ for about four weeks thereafter. He testified that about three months previous to the fire he had counted the whole number of buggies in stock for the purpose of listing them for assessment, and that the whole number then on hand was 64; that he knew the number of buggies sold between that time and the date of the fire, the number added to the stock between those dates, and the number that were only

partially destroyed by fire. From this data he placed the total number of buggies totally destroyed at 25. He further testified that within two days after the fire he counted the iron running gears in the ruins of the building where the buggies had been kept, and found the remains of only 25 buggies that had been totally destroyed; that he assisted in removing a portion of the debris, and, while doing so, again recounted the running gears of such buggies as were totally destroyed, and found the number to be 25. The testimony of this witness, so far as it relates to the so-called inventory taken by him for the purpose of listing the property for assessment, is entitled to little weight. He took no inventory. He merely counted the buggies and made no book entry, and preserved no memorandum of the number on hand at that time; neither did he keep any record of new buggies bought and added to the stock, or of the sales made therefrom. He depended entirely on his memory. On the other hand the Herpolsheimers based their estimate on an inventory regularly taken and reduced to writing about nine months before the fire, and their invoices, sales books, and other written memoranda. As to the count made by this witness of the running gears of the buggies regarded as totally destroyed, there are certain facts and circumstances that tell against its credibility. In the first place, both the Herpolsheimers and the adjuster for the insurance companies, almost a week after the fire, found it impracticable to count the running gears, or to ascertain with certainty, by an examination of the debris, the number of buggies which had been totally destroyed by fire. In short, the Herpolsheimers, testifying to the result of their computation from certain data, placed the number of buggies totally destroyed at 31; the witness produced by the insurance companies on the hearing of these applications, basing his computations on entirely different data, placed the number at 25. It will hardly be claimed that this state of the record does not sustain a finding against the insurance companies on the charge of per-

jury with respect to the number of buggies totally destroyed.

As to the second item—the damage to the binding twine—that was a subject of expert testimony on the trial of the cases on their merits. The twine was not consumed by the fire, but was damaged by the water used to extinguish the fire. A considerable amount of testimony was adduced at that time to the effect that binding twine is of no value after it has been wet. Two of the Herpolsheimers testified to that effect, and that all of the twine got wet by the water used to extinguish the fire and was thereby rendered worthless. On the trial of these applications, the insurance companies produced a witness—the one who testified on their behalf with respect to the buggies—who testified, in effect, that a considerable portion of the twine had not been damaged, and it is conceded that after the judgment sought to be vacated by these proceedings the Herpolsheimers sold the twine in question for $308, or a trifle more than one-third of what they claimed was its value before the fire. So far as the testimony of this witness, to the effect that a portion of the twine was not damaged, is concerned, it will not be seriously claimed that it is so convincng that it necessitated a finding that the testimony of the Herpolsheimers was false, or that a finding contrary thereto is not supported by sufficient evidence. But counsel lay great stress on the fact that the twine was afterwards sold for a substantial sum, and seem to regard that fact as a demonstration of the falsity of the testimony of the Herpolsheimers. We think it falls far short of demonstrating anything of the kind. At the original trial, all the parties proceeded on the theory that the damage to the twine was a matter calling for the opinion of experts. They submitted the cases on that theory. There is nothing to indicate that the Herpolsheimers, or any of the witnesses for that matter, gave any other than their honest opinions. It does not even demonstrate that the Herpolsheimers were mistaken in their opinions, because the record does not inform us as to the amount of

the expenses incurred for storage, drayage, treatment, and the sale of the damaged twine. Neither is there anything in the record to show that the judgment of the man who bought the damaged twine was any better with respect to its value than that of the Herpolsheimers and other witnesses, who testified that at the time of the hearing on the merits it was of no value. It is not often that the charge of perjury rests upon a less substantial foundation than in this instance.

With the question of perjury eliminated from the case, the only question presented by the evidence is whether the insurance companies made such a showing as would entitle them to new trials on the ground of newly discovered evidence. The evidence shows that they, or their attorneys, first learned that the witness, who testified on the hearing of these applications with respect to the number of buggies destroyed and the damage to the binding twine, knew certain facts material to the case near the close of the trial of the cases on their merits, which lasted about a week. But the time they discovered this particular witness is immaterial. The question presented by an application of this kind is whether they used due diligence to ascertain the facts disclosed by his testimony. The record shows that the second day after the fire the adjuster of the insurance companies went to the city where the loss occurred and, in company with two of the Herpolsheimers, examined the ruins. Within four days he made a second visit to the city, and again, in company with the Herpolsheimers, visited the ruins, and looked over such portions of the stock as could be examined at that time. On that occasion they submitted to him an inventory of the property destroyed and damaged by the fire. This inventory shows 32 buggies totally destroyed. (It was afterwards discovered that there was a mistake of one buggy, and at the trial the Herpolsheimers only claimed a total loss of 31 buggies.) On his second visit there was some controversy between him and the Herpolsheimers with respect to the number of buggies totally

destroyed. They allowed him to examine their books, their invoices and their documents upon which they based their estimates. He had the same opportunity to count the running gears of the buggies in the ruins of the building that they had. No obstacle was thrown in his way. When their petitions were filed in the district court, the insurance companies were again appraised of the amount of damages they claimed for the buggies totally destroyed. With the knowledge of that fact and with ample opportunity at all times to make inquiries, or to have the ruins examined with a view to discovering the number of buggies actually destroyed, the companies went to trial on this branch of the case, relying entirely on a cross-examination of the Herpolsheimers to show that the number of buggies totally destroyed was less than the number claimed. The opportunities for obtaining evidence with respect to the damage to the twine were equally ample. But the record fails to show that the companies, or any one acting in their behalf, ever set on foot a single inquiry to ascertain the name of any person who knew the condition of the twine after the fire. The slightest inquiry in that direction could not have failed to disclose the name of the identical witness on whose evidence they now rely for a new trial. The only reason we can find in the record for their failure to discover this witness before the trial on the merits is that they made no effort to do so.

In an application for a new trial on the ground of newly discovered evidence, the statute requires that the application should show that the newly discovered evidence could not, with reasonable diligence, have been discovered and produced at the trial. Code, sec. 318. A litigant cannot expect to discover evidence without effort or inquiry. Due diligence requires that he should make some effort to obtain it, and not wait for those having knowledge of the facts to give information unasked. As was said in *Secord v. Powers*, 61 Neb. 615: "It is not the policy of the law to encourage actions of this kind. There must be an

end to litigation. A party cannot be permitted to experiment with his case at the expense of the public. He is not justified in assuming that his adversary will not produce evidence to make good the averments of his pleading." We do not overlook the fact that the twine was sold for a substantial sum after the judgments were rendered, but that cannot be regarded as newly discovered evidence entitling the companies to a new trial. We have already commented, to some extent, on this feature of the case. It may be said further that the valuation placed on many other articles at the trials was based on the opinions of the witnesses. In the future those articles may be sold for more or less than the valuation thus placed upon them. But it will hardly be claimed that, whenever one of those articles is sold above or below that valuation, the companies on the one hand, or the Herpolsheimers on the other, will be entitled to a new trial on the ground of newly discovered evidence.

Complaint is made of the ruling on the demurrer to the so-called plea of laches. That ruling excluded no evidence, and interfered in no way with a full and complete showing on the part of the companies. Their failure to show due diligence was signal and complete, and of itself necessitated a finding and judgment against each of them. In other words, the judgments rendered on the applications are the only ones that would have been warranted by the evidence had the demurrer been sustained. Hence, whatever technical error there may have been in overruling the demurrer was error without prejudice.

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

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgments of the district court are

AFFIRMED.

GERMAN NATIONAL BANK OF BEATRICE, APPELLANT, V. REGINALD W. LAFLIN ET AL., APPELLEES.

FILED APRIL 4, 1907. No. 14,719.

Appeal: INSTRUCTIONS: EVIDENCE. Instructions *held* not to be prejudicial error, and evidence examined, and *held* to be sufficient to sustain the judgment.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

E. O. Kretsinger and *L. M. Pemberton,* for appellant.

Rinaker & Bibb and *Hazlett & Jack, contra.*

JACKSON, C.

The action is against a former clerk of the district court on his official bond, and is grounded on an alleged failure to index certain judgments, by reason of which the judgment defendants were enabled to and did transfer real estate possessed by them and thus defeated the collection of the judgments. The answer alleges negligence of the plaintiff in not causing execution to sooner issue upon the judgments, and charges that one of the judgment debtors owned real estate of sufficient value to satisfy the judgments at the time they were obtained; that he afterwards transferred the same by deed to the Schlitz Brewing Company, and that more than five years after the rendition of the judgments the plaintiff had execution issue thereon and caused the same to be levied on the real estate so transferred; that the property was then of the actual value of $10,000, and was appraised for the purpose of sale at $8,000, more than sufficient, at two-thirds of the appraised value, to satisfy the judgments involved; that the brewing company thereupon obtained in the federal court a temporary injunction restraining the sale, and that pending the hearing on the temporary order the plain-

tiff and the brewing company entered into a collusive and, as to the defendants herein, fraudulent agreement that the plaintiff should recall the executions under which the levy had been made, that the temporary injunction should be dissolved, subject to the right of the brewing company to revive the same, if necessary, the action in the federal court to remain pending for that purpose, and that alias executions should then issue, and a new levy be made; that the plaintiff should procure a new appraisement of the property, sufficiently low to enable the brewing company to bid the same in for $1,250, and would undertake that the property should not sell for a sum in excess of that amount; that the collusive agreement was carried into effect and the property bid in by a representative of the brewing company for $1,250; that the proceeding pending in the federal court created a cloud upon the title and prevented other persons from bidding at the sale; that the sale to the brewing company was confirmed and deed issued pursuant thereto. The reply tendered the issue that the brewing company had contracted for the property prior to the term of district court at which the judgments were procured, and paid $150 of the purchase money, and that the value of the judgment debtor's interest therein did not exceed the sum of $1,700 at the time the judgments were entered. The trial was to a jury, resulting in a verdict and judgment for the defendants. The plaintiff appeals.

The judgments were entered at a term of court commencing February 6, 1893, and were liens on the real estate of the debtor defendants from the first day of the term. It is the claim of the plaintiff that the evidence discloses the property, the date of the sale of which is the principal matter in controversy, to have been the subject of an oral contract of sale between the owner and the brewing company prior to February 6, and $150 of the purchase money paid; that the contract was thereafter fully executed, and that the judgment lien attached only to the debtor's interest in the property, represented by a

remainder of unpaid purchase money amounting to $1,700, and that the increased value at the time of the levy was due to a valuable building erected by the purchaser after the title was acquired, and the discharge of prior incumbrances; that its agreement with the Schlitz Brewing Company at the time of the first levy contemplated deducting from the actual value of the property the value of the improvements made by the brewing company, and prior incumbrances paid by that company at the time of the purchase, and resulted in an appraisement of the actual interest of the judgment debtor at the time the lien attached.

The trial court instructed the jury on this branch of the case as follows: "The court instructs the jury that under the law of this state a verbal contract for the sale of real estate is void, and a payment of the part of the purchase price alone does not make it valid or bind the bargain. If from the evidence in this case you believe that there was no contract, or, if any, only an oral contract, without any payment in behalf of the Schlitz Brewing Company, without delivery of possession of the real estate in question, before February 7, 1893, between the Joseph Schlitz Brewing Company and Dr. Brumback, then the judgments described in plaintiff's amended petition became, were, and continued to be a lien upon the real estate which has been referred to by the witnesses herein as the 'Schlitz property' and upon all the improvements thereon at any time thereafter during the life of said judgments until the sale of said property under said judgments or one of them." Whether the instruction, if erroneous, was prejudicial to the plaintiff depends upon the facts. Byron Bradt conducted the negotiations on behalf of the brewing company for the purchase of the property. He was a saloon-keeper residing in Beatrice, and was desirous of purchasing the property on his own behalf; with that object in view he went to Milwaukee, Wisconsin, and interviewed the proprietors of the Schlitz Brewing Company for the purpose of borrowing money to purchase the prop-

erty. The brewing company offered to purchase the property in their own name, if satisfactory arrangements could be made, erect a suitable building thereon, and lease it to Bradt.

He was called as a witness on behalf of the plaintiff, and from his testimony the date of the contract must be determined. On the direct examination he testified to having had the first conversation with the owner, one Brumback, and after his visit to the brewing company they sent their agent from Omaha to inspect the property, who determined the value to be $4,500 and that the company would pay that price. His testimony in part is as follows: "Q. Now, at the time you and he agreed with Brumback on the price, was there any consideration paid to Brumback? A. I think I paid him $150 when the thing was settled, myself. Q. What was that for? A. It was the custom; I don't remember the price. He wanted something to bind the contract someway. I suppose that was it. I don't remember now; it is so long ago; my memory is not very good anyway, I guess. * * * Q. When was this $150 paid with reference to the time the deed was made? A. I couldn't tell you; probably as soon as we could get an understanding with the people; I couldn't tell you about the time, or how long. Q. Was it paid before or after the deed was made? A. It must have been made before. Q. How long before would you say? A. That is something you can't—— Q. Your best judgment is all I am asking? A. I wouldn't think 30 days, probably not 20 days. Q. Several days before the deed was made? A. Yes, sir; a few days, but how long I don't remember."

On cross-examination, after having testified that the first negotiations with Brumback were with a view of purchasing the property for himself, and of his attempt to borrow the money from the brewing company, that he went to Milwaukee about January 20, 1893, for that purpose, and that some time after his return a representative of the company visited Beatrice for the purpose of inspect-

ing the property and fixing a price which the company would be willing to give, he testified to having received a letter from the Schlitz Brewing Company authorizing the purchase; the examination being in part as follows: "Q. Do you remember of getting a letter from the Schlitz Brewing Company telling you that they would accept the lot and buy the same for the price of $4,500, and the lettter was dated at Milwaukee, February 3, 1893? A. I remember such a letter as that. Q. Now, that is the first time that they notified you that they would buy the lot for that price, on February 3, 1893? A. Yes, sir; to the best of my recollection. Q. Now then, if that letter was dated in Milwaukee on February 3, 1893, you would not receive that letter for a couple of days, or at least a day and a half thereafter? A. I know about how long it does take. Q. How long? A. It generally takes two days, a day and a half or two days to the time it comes. Q. Now, that letter you received from them was the first time that you had any authority from the Schlitz Brewing Company to pay Brumback $4,500 for that lot, is that not true? A. That is my recollection, yes, sir. Q. Now, then, you had no other authority except that letter dated at Milwaukee, February 3, 1893, to act for them to pay $4,500 for that lot until you received that letter? A. No, sir. Q. Then you didn't receive the letter until about the 5th or 6th of February, did you? A. That I can't recollect now. Q. You received it about that time? A. I judge so; that's generally the way they come; I can't recollect the date I receive them. Q. If you had paid $150 down on that lot, it was paid for yourself, prior, if paid prior to the 3d, 4th or 5th of February, 1893, was it not? A. That I don't remember, it must have been. Q. You had no authority to pay any money out on that lot for the Schlitz Brewing Company until the 5th of February, 1893? I don't think I had; if I had I have forgotten it. Q. I understood you to say your only authority to pay any money for the Schlitz Brewing Company for that lot was through that letter dated—— A. Yes, sir. Q. February 3 in Milwau-

kee? A. Yes, sir; that was definite; that settled the whole thing. Q. Do you remember when you next saw Mr. Brumback for the Schlitz Brewing Company after you received that letter? A. I don't remember, it must have been mighty soon. Q. Now, then, Mr. Bradt, when you saw him, you had him make the deed for that property and place it in escrow until the trade was finally determined—is that not true—and the purchase price finally paid to him for that lot? A. I can tell you my recollection of it. We had the papers, my recollection is, put in Mr. Cook's bank, and were to be held there until the money was received, which came later on. That is my recollection, my best recollection. It might have been some other place, but I think it was put there. Q. Now, then, the day that the deed was made and delivered to Mr. Cook's bank, as you have testified to—— A. Yes, sir. Q. Was the day you finally consummated the trade with Brumback and agreed to pay him the $4,500 for that lot. A. That is my recollection; not positive; my best recollection, as near as I can recollect it." The deed from Brumback to the brewing company was dated February 7, 1893, and was acknowledged on that date. The checks of the brewing company to pay the full amount of the purchase price were drawn six days later.

The only reasonable inference to be drawn from this testimony is that the contract for the purchase of the property between the brewing company and Brumback was made on February 7, 1893, the day following the one on which the judgment liens attached; that any negotiations which Bradt may have had with Brumback prior to that time were on his own behalf and constituted no part of the transaction between the brewing company and the owner of the title. That being true, it follows that whatever else may be said of the instruction complained of it was not prejudicial to the plaintiff.

Another objection urged against this instruction is that it fails to take into account the prior incumbrance on the property at the time the judgment was rendered. That

objection is untenable. The instruction does not purport to advise the jury that the judgment would be a first lien. Furthermore, in an instruction given by the court on its own motion, the jury were advised with reference to the prior incumbrance according to the contention of the plaintiff.

It appears that in the proceedings in the federal court the deposition of the witness Bradt was taken on behalf of the Schlitz Brewing Company, and the plaintiff in this case offered to prove at the trial what this witness testified to when his deposition was taken. Objections were sustained by the trial court, and this ruling is assigned as error. The ruling in that respect does not appear to be prejudicial to the plaintiff. The witness was called for the plaintiff, and on his direct examination testified substantially as it is claimed he testified in the proceedings in the federal court, and to show that he testified to the same facts at another time would not strengthen his testimony now.

Finally, it is contended that the judgment is contrary to the evidence in any event. This contention is based upon the statement that the judgments amounted to the sum of $6,104.59 at the time the execution was levied on the property claimed by the Schlitz Brewing Company, and that the value of the property at that time did not exceed $8,000, as shown by the evidence, and that after deducting the prior incumbrance there remained a valuation of but $5,385 to apply on the judgment indebtedness. The computation, however, omits certain payments admitted by the president of the plaintiff bank to have been paid on the judgments. Furthermore, there is evidence in the record from which the jury might have found, and probably did find, that the value of the property was as much as $9,000, more than sufficient to satisfy the indebtedness.

It follows that the judgment of the district court should 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.

THOMAS C. MARSHALL, APPELLANT, V. ROBERT A. PIGGOTT, APPELLEE.

FILED APRIL 4, 1907. No. 14,749.

Evidence examined, and *held* sufficient to sustain the judgment.

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

T. C. Marshall, M. H. Weiss and *Berge, Morning & Ledwith,* for appellant.

C. L. Richards, contra.

JACKSON, C.

The plaintiff is an attorney at law and succeeded to the business and assets of the firm of Marshall & Capron, of which firm he was the senior member. The professional services involved in this action were performed by the firm, and the use of the word plaintiff in connection with such services will relate to the firm. The action against the defendant is for services alleged to have been performed for the defendant personally. The defendant denied personal employment, and alleged the plaintiff was employed as attorney for an estate, of which the defendant was administrator, and was paid for all services performed in that behalf. It is not disputed that the defendant was first appointed special administrator and afterwards general administrator of the estate of Jabez J. Piggott, deceased; that the plaintiff took the necessary steps to secure both appointments and continued as counsel for the administrator during the entire administration

of the estate, advising and assisting him in that behalf in all matters before the county court; conducting litigation to secure possession of a portion of the personal estate; entering an appearance in an action brought in the federal court for the district of Nebraska by one of the heirs for the partition of the real estate, in which the defendant was made a party, both as administrator and personally, and procuring a stipulation whereby that action was dismissed; appearing in a similar proceeding brought in the district court for Thayer county, where final order of partition was entered; and also in a similar action in the state of Kansas involving real estate in that state; and also in the district and supreme courts of this state, where the final account of the administrator, involving the fees of the plaintiff, was taken by appeal; that the expenses and fees of the plaintiff in that behalf, amounting to several thousand dollars, were finally allowed and paid out of the estate of the decedent. The present action involves a claim for fees for services performed in the settlement of the estate in behalf of the defendant as an heir. The services are described in the petition as representing the defendant in handling his interest and settlement of the estate, consisting of a large amount of real estate scattered over Kansas and Nebraska, which was sold by partition proceedings in the district court for Chase county, Kansas, and in the district court for Thayer county, Nebraska, and representing the defendant in the partition action commenced in the United States district court, and in an action for specific performance brought in the district court for Thayer county, to which the defendant was a party defendant therein. A jury trial resulted in a verdict and judgment for the defendant, from which the plaintiff appeals.

The testimony is conflicting as to whether the plaintiff was employed by the defendant in a personal capacity. The plaintiff himself testified that the defendant came to the firm before the decedent, his uncle, died, and informed them that he was an heir, and consulted them because

the plaintiff had a personal knowledge regarding the affairs of the decedent; that he wanted their firm to represent him in the matter as, if the doctor should die, he wanted his interest looked after. They were consulted as to the advisibility of his taking the appointment as administrator, and they figured in what way he could get the most money out of the estate. It was a question of how much he could get, and they were guided by that all the time. That a reasonable retainer for that service would be $500. That the plaintiff also represented the defendant personally in the various partition proceedings, and represented his interests during the entire process of administration; that the defendant's interest in the estate amounted to about $3,500, and that the reasonable value of the whole of the services performed in that behalf was $800.

The defendant testified in effect that there was no personal employment of the plaintiff, that he had some general conversation with plaintiff prior to the death of his uncle with reference to the estate, but none with a view of personal employment. The defendant's testimony is strengthened by the fact that no charge was ever made against him by the plaintiff on the books, and that pending the setttlement of the estate the plaintiff wrote the defendant as follows: "1-5-01. R. A. Piggot, Bruning, Nebr. Dear Sir: We are in receipt of your favor of this date and herewith inclose you receipt for $310. This includes the amount of the piano and carpet, and we will see that you are protected. Of course, you understand the other attorneys get their pay from their clients, but we, representing the administrator, are paid out of the estate. Very truly yours, Marshall & Capron."

On the trial of the appeal from the final settlement of the administrator's accounts, including the charges of plaintiff for attorney's fees for services performed on behalf of the estate, the plaintiff was a witness, and testified, with reference to his employment and the services performed on behalf of the estate, that he was employed by

R. A. Piggott for the purpose of advising him and assisting in looking after the duties of special administrator immediately upon his appointment as such; that he was not consulted by the defendant with reference to the appointment, in fact he thought the defendant knew nothing about it until the appointment was made; that his employment was first by a brother of the deceased who resided in Illinois, and was the nearest relative; that he made application for the appointment of R. A. Piggott at the request of this brother, either by a telegram or letter. Asked as to whether he was employed by R. A. Piggott or by R. A. Piggott, special administrator, he answered: "R. Piggott employed me as special administrator." With reference to the partition proceedings pending in the federal court, he was asked whether he did anything except for the protection of the estate, whether or not the work was done for the administrator, and answered that it was. Concerning the fees claimed for the partition proceedings in Kansas he was asked: "Q. How much is the expense in connection with the Kansas land that you charged to your client and other heirs that you represented in that suit? A. I never charged them anything. Q. You did not charge them any expense? A. They never paid me anything for that service in connection with the Kansas land. Q. Why did you not charge them anything? A. I had no charge to make. I worked for the estate generally. There was not one of them that paid me anything. I had to go there for the estate generally; they never paid me a cent. I never made any charge for it in that connection."

It appears that in the various partition proceedings the interest of the defendant in the estate was always correctly stated and never questioned. It is also in evidence that the plaintiff charged the estate $400 and expenses for services performed in the matter of procuring the appointment of the administrator; $500 in the partition proceedings in Kansas; $300 for services in the partition proceedings in the federal court, and at least $300 for services in the partition proceedings in Thayer county, besides

$3,000 for advice and assistance rendered the administrator in making reports, etc. Under this state of the facts it can hardly be said that the verdict and judgment do not find support in the evidence.

Complaint is made, however, that the court permitted the testimony of the plaintiff taken at the trial in the district court upon appeal from the settlement of the administrator's accounts. This evidence, however, was properly admitted as containing the declarations of the plaintiff against his own interest in the present litigation. It is urged, however, that no sufficient foundation was laid for the introduction of the evidence. We think the bill of exceptions containing the testimony was sufficiently identified. The plaintiff himself was asked: "Q. You testified, did you not, in the district court for Thayer county in the trial of a suit over the question of your attorney's fees as against the estate of Jabez J. Piggott? A. Yes, sir. Q. I will offer you this bill of exceptions, Mr. Marshall, and ask you to state whose signature appears upon said bill of exceptions in signing the same as attorney for Marshall & Capron and for the administrator? A. Well, that is my handwriting. Q. This bill of exceptions contains your testimony had in the court below, does it? A. I suppose it does, if it contains the whole record it is there. Q. It did? A. I think so." The objection to reading the testimony of plaintiff is couched in the following language: "To which plaintiff objects as incompetent, immaterial, and improper, not bearing upon the issue in this case, and not being proper for the purpose for which it is offered as impeaching testimony." We think this objection was properly overruled and the testimony rightfully received.

Complaint is also made that the court erred in receiving in evidence plaintiff's statement of his account against the estate. As we view it, the evidence had a direct bearing upon the issue and was properly received. Instruction No. 8, given by the court, is as follows: "The plaintiff is conceded to have been of counsel for the administrator

from the inception to the close of the administration. And you are instructed that he could not properly render services adverse to the administrator or against the interests of the estate as a whole, while such employment continued, and, if he had done so, could not lawfully recover compensation therefor. And if you find the plaintiff's claim herein is based on any such services, then, as to such items as you find to be of that nature, no compensation should be included in your verdict." It is urged against this instruction that no issue of inconsistency is tendered by the pleadings, and that no evidence is to be found in the record upon which this instruction could be based. We think the testimony of the plaintiff himself justified the giving of this instruction. If, as he says, the personal employment was for the purpose of aiding the defendant in getting all the money he could out of the estate of which he was administrator, such employment was not consistent with the duties of counsel who represented the estate as a whole.

The court admitted in evidence a letter from the plaintiff to the defendant, containing a statement of an account of expenses apparently incurred while the appeal in the probate matter was pending in the supreme court. In this action the plaintiff makes no claim for such items of expense, but he testified to having sent this statement to the defendant and receiving no response, and because of the failure to respond this action was brought. We think the evidence was properly admitted, as it tends to show that the demand for fees earned as personal counsel for the defendant was an afterthought, and perhaps by way of retaliation for the failure of the defendant to respond personally for the expense of counsel in the probate matter. It is a well-settled rule that every trust should bear the expense of its administration, and it is evident that the defendant was personally under no obligation to pay any part of the expense of the counsel in representing the estate.

We find no reversible error in the record, 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.

MOLINE, MILBURN & STODDARD COMPANY, APPELLEE, V. JOHN R. VAN BOSKIRK, APPELLANT.

FILED APRIL 4, 1907. No. 14,756.

1. **Judgment:** REVIVOR: PARTIES. A proceeding to revive a dormant judgment is a continuation of an action previously commenced, and in case of an assignment of the judgment such proceeding may be had in the name of the judgment creditor, if living, or in the name of the assignee as the real party in interest.
2. **Limitation of Actions.** The general law as to the statute of limitations does not apply to the proceeding to revive a dormant judgment.

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

R. C. Noleman and *Eugene Burton,* for appellant.

L. A. Berry, contra.

JACKSON, C.

The Kingman Implement Company, as successor to the Moline, Milburn & Stoddard Company, had an order reviving a dormant judgment against the defendant, from which the defendant appeals.

The case was submitted on briefs, and, as we understand the contention of the appellant, it is that the Kingman Implement Company is the assignee of the judgment, and, as such is not authorized, under the statute,

to procure the revivor; and that, having taken the assignment more than five years prior to the application to revive, the action is barred by the statute of limitations. The action, however, is not an original one, nor does it rest on an assignment. It is a continuation of an action previously commenced. *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170; *Vogt v. Binder*, 76 Neb. 361. And the assignee might, under the code, proceed to procure the revivor in the name of the original judgment creditor. *Vogt v. Binder, supra.* Or it might, as the real party in interest, proceed in its own name.

That the general law as to the statute of limitations does not apply to the proceeding to revive dormant judgments has been too often determined in this court to require a further discussion.

It is recommended 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.

CHARLES E. ABBOTT, APPELLEE, V. HAYES COUNTY, APPELLANT.

FILED APRIL 18, 1907. No. 14,783.

Contract: VALIDITY. An agreement, express or implied, by a public officer to serve for less than the compensation fixed by law is contrary to public policy and void.

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

W. S. Morlan and *C. A. Ready*, for appellant.

Starr & Reeder, contra.

AMES, C.

In the fall of 1889, M. J. Abbott was a candidate for the office of county attorney for Hayes county for the then ensuing term of two years. The statute fixed the salary for that office at $500 a year, but Abbott, in support of his candidacy, represented to the public that, if he should be elected, he would not demand or accept compensation exceeding $300 a year. He was elected and served throughout the term, during which he presented quarterly salary claims of $75 each, which were allowed as being in full of his compensation, but there was no specific stipulation between him and the board that they were such, and there was never at any time any agreement that his salary should be other or different than the sum fixed by statute. After the expiration of his term of office the plaintiff, as his assignee, presented to the county board a claim for $400, as for an unpaid residue of his salary. The board rejected the claim, and the plaintiff appealed to the district court, where he recovered a judgment for the amount of his demand, with interest. From the judgment the county appealed to this court.

There is no dispute about the facts. The case is ruled by *Gallaher v. City of Lincoln,* 63 Neb. 339. Counsel for the defendant seek to distinguish between the two cases because of the single circumstance that in the case cited there was a pretended contract by the terms of which the plaintiff undertook to serve for less than the statutory salary, while in the present instance there was no such agreement. We think the distinction is without a difference in principle. Indeed, it does not appear to us that the distinction itself exists. In the case cited there was a formal agreement which, but for considerations of public policy, would have been valid, and which, but for such consideraion, would have been ratified and renewed at every pay day. In this case there was no formal agreement, but there was a transaction every three months which, but for such considerations, would have amounted

to an implied agreement to the same effect, and from such implication, and from it alone, counsel argues that there was on each such occasion a donation by the officer to the county of the undemanded residue of his salary. But, if so, there was in similar circumstances a series of successive donations by the police matron to the city, for the void formal agreement cannot be assumed to have influenced her conduct or that of the city council, or to have restrained or prevented the exercise of her benevolent impulses. It is not worth while to repeat the argument contained in the former case, with which we are well satisfied, and which expresses the deliberate judgment of this court.

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.

WILLIAM A. BOLTON, APPELLANT, V. D. D. COBURN ET AL., APPELLEES.

FILED APRIL 18, 1907. No. 14,744.

1. **Brokers: SALE OF REALTY: COMMISSIONS.** To entitle a recovery on a contract of brokerage for the purchase of real estate, it is essential that the broker establish that he procured a valid conveyance of the real estate, or an enforceable contract of sale of the same, before he is entitled to the commission stipulated in his contract with the purchaser.

2. **Evidence** examined, and *held* insufficient to show a right of recovery in the plaintiff.

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

J. V. Pearson, for appellant.

M. H. Dodge, C. A. Irwin, C. A. Kingsbury and *Charles A. Dickson, contra.*

OLDHAM, C.

This was an action for damages on a contract for the sale of real estate. There was a trial of the issues to the court and jury, and at the close of plaintiff's testimony a verdict was directed for the defendants, and judgment entered upon the verdict. To reverse this judgment the plaintiff has appealed to this court.

The involved issues in this controversy can be simplified by a statement of the facts on which plaintiff relied for a recovery in the court below. It appears from the testimony that in the month of October, 1904, plaintiff entered into an oral agreement with one Carl Schweichler for the purchase of 73 acres of land situated in Cedar county, Nebraska, for the agreed price of $35 an acre. That the land was to be conveyed subject to a lease upon a small portion thereof, on which $36 of rent reserved was to be assigned to the purchaser. This option was reserved to the plaintiff for the period of two weeks, and, not having availed himself of the purchase of the land, he approached the defendants, Coburn and Simpson, who were engaged in selling agricultural implements in the village of Laurel, and offered to sell them the land, called the "Schweichler 80," for $45 and acre. That, after some conversation with defendants, they asked him how much money it would take to swing the deal, and he informed them that it would take about $1,500 in cash and the remainder in trade. In further conversation between the parties, the defendants offered to trade for the land farm machinery and implements of the value of about $750, and to turn over notes owing to them, without recourse, of the value of about $1,000, and to assume the mortgage on the premises, and to pay the remainder in cash. At this time plaintiff, Bol-

ton, was indebted to the defendants on two notes, secured by a chattel mortgage on a corn sheller, and it was agreed between the parties that these notes would be returned as a part of the purchase price of the land. Plaintiff thereupon communicated with Schweichler, and, as he alleges, through his efforts induced Schweichler to enter into a written contract for the sale of the premises with the defendants on the 27th day of October, 1904. The contract provided for the sale of the real estate for $2,555, $200 of which was paid in cash by the defendants at the time the contract was signed. It further provided that the defendants should assign and deliver to Schweichler, without recourse, certain promissory notes held by them in the sum of $1,169, which notes were to be approved by W. T. Graham, a banker in the village of Laurel, and defendants were also to assume the mortgage on the premises in payment of the remainder due on the purchase price, and that on the first day of December Schweichler was to deliver to the defendants a warranty deed for the premises, subject to the mortgage assumed, and an abstract showing title perfect in the grantor. At the time the contract was entered into, defendants turned over to plaintiff, Bolton, a buggy of the value of $75 as part of the purchase price of the land. Before the deal was consummated, Mr. Graham, the banker, refused to approve the notes offered by the defendants to Schweichler, who thereupon returned to the defendants the $200 advanced on the contract, and paid them for the buggy delivered to plaintiff, Bolton, and rescinded the contract, and sold the land to another party. When the contract was rescinded, plaintiff demanded of the defendants his notes and the agricultural implements and live stock, which would have been delivered if the land deal had gone through. Thereafter the defendants began an action against the plaintiff to foreclose their chattel mortgage on the corn sheller, and plaintiff instituted this action for damages on his contract for the purchase of the Schweichler land.

Plaintiff urges two theories on which he predicates a

right of recovery against the defendants. The first theory is that he was the holder of an oral option for the purchase of the Schweichler land for $35 an acre, which he sold and assigned to the defendants for the agreed price of $766 in trade, being the difference between $35 an acre and $45 an acre, with the $36 rent reserved, and that, when he procured the signature of Schweichler to the contract of sale above set forth, defendants' obligation to plaintiff for the amount sued for became absolute. There are two formidable objections to plaintiff's right of recovery on this theory. The first is that an oral option, or contract of sale of real estate, is void under the statute of frauds; and the other objection is that plaintiff's own testimony shows that he never offered to assign any oral contract of purchase of the land to the defendants. In his examination on the witness stand, plaintiff testified as follows: "Q. Did you tell Coburn and Simpson, at any time before this contract was made, that you had a contract with Schweichler to buy this land? A. No, sir. Not a word." On redirect examination, answering questions propounded by his own counsel, he said: "Q. In your talk with Coburn and Simpson, before going after Mr. Schweichler to sign that contract, was anything said in regard to whether you owned this land or merely had the land to deal? A. No. Q. Do you know whether or not they knew at that time that you owned the land? A. I do not. Q. Did you tell them what land it was? A. I told them that it was the Schweichler 80."

The next theory on which plaintiff claims a right of recovery is that the evidence shows that plaintiff acted as the agent of the defendants in procuring the contract for the purchase of the land, and not as the agent of Schweichler in procuring the sale of the land. It is urged that section 10258, Ann. St. 1903, which provides that "every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent," applies

only to agents or brokers who sell land for another, and not to those who are employed in such capacity for the purchase of land for another. Without determining the effect of this section of the statute upon a contract of brokerage for the purchase of lands, rather than for their sale, it is sufficient to say that, conceding that the contract for the purchase of the land for the defendants is not within the ban of the statute of frauds, the evidence offered by plaintiff is still insufficient to support a recovery on this theory of the case. The contract, which plaintiff procured Schweichler to sign was not enforceable at the instance of the defendants, but, on the contrary, it was a mere conditional offer to sell on the terms named, if the notes delivered to Schweichler by defendants were approved by Mr. Graham, the banker. It is plain that, when, as shown by the testimony, Mr. Graham refused to approve the notes offered, defendants could not have maintained an action for the specific performance of this contract against Schweichler. To entitle a recovery on a contract of brokerage for the purchase of real estate, it is essential that the broker establish that he procured a valid conveyance of the real estate, or an enforceable contract of sale of the same, before he is entitled to the commission stipulated in his contract with the purchaser. *Barber v. Hildebrand,* 42 Neb. 400; *Snyder v. Fidler,* 125 Ia. 378; *Hammond v. Crawford,* 66 Fed. 425. We therefore conclude that on neither theory offered was the plaintiff entitled to a recovery against the defendants, and that the district court was fully warranted in directing a verdict for the defendants at the close of plaintiff's testimony.

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.

D. D. COBURN ET AL., APPELLEES, V. WILLIAM A. BOLTON, APPELLANT.

FILED APRIL 18, 1907. No. 14,743.

Trial: DIRECTING VERDICT. Action of the trial court in directing a verdict for the plaintiffs sustained for the reasons set forth in *Bolton v. Coburn, ante*, p. 731.

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

J. V. Pearson, for appellant.

M. H. Dodge, C. A. Irwin, C. A. Kingsbury and *Charles A. Dickson, contra.*

OLDHAM, C.

This was an action of replevin, in which plaintiffs claimed a special ownership in the goods replevied under a chattel mortgage. The execution of the notes and mortgage was admitted. It was also admitted that there was due on the notes and mortgage the sum of $128. The defense relied on was a claim of payment of the notes and mortgage under a contract for the purchase of the Schweichler land. The evidence in support of this defense was identically the same as that reviewed and passed upon in the case of *Bolton v. Coburn, ante*, p. 731. At the close of the testimony the court directed a verdict for the plaintiffs for the amount due on their notes and mortgage, and from the judgment entered on the verdict the defendant appeals.

For the reasons stated in the opinion in the case of *Bolton v. Coburn, supra*, 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.

GAGE BROTHERS & COMPANY, APPELLEE, V. MALINDA J. BURNS ET AL., APPELLANTS.

FILED APRIL 18, 1907. No. 14,758.

1. **Fraudulent Conveyances:** EVIDENCE. The court will carefully scrutinize a transfer of property between near relatives, which has the ultimate effect of hindering and delaying the creditors of the grantor; but, if, on an examination of the evidence concerning the transfer, it appears that the grantee purchased the property and paid full value therefor in good faith, and without any intent to aid the grantor in cheating and defrauding his creditors, it will be upheld.

2. ———: ———. Mere suspicions of fraud will not prevail against positive and unimpeached testimony showing the good faith of the transfer.

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

J. E. Philpott, for appellants.

Wilson & Brown, contra.

OLDHAM, C.

This was an action in the nature of a creditor's bill for the purpose of setting aside a conveyance of certain town lots situated in the city of Lincoln, Nebraska, made by the defendant Malinda J. Burns to the defendant William A. Watson, on the ground that such conveyance was made for the purpose of hindering, delaying and defrauding the creditors of defendant, Mrs. Burns. There was a trial of the issues to the court, and judgment for the plaintiff. To reverse this judgment the defendants have appealed to this court.

The facts underlying this controversy are that at and prior to the year 1900 the defendant Malinda J. Burns was the owner of the lots in controversy; that Mrs. Burns was an aged lady who resided with and was supported by her

daughter, Mrs. Sadie Puckett, who was engaged in the millinery business in the city of Lincoln; that in the year 1900 a judgment was procured by the plaintiff in this action against Mrs. Puckett in the county court of Lancaster county; that this judgment was appealed from, and Mrs. Burns signed the appeal bond as surety for her daughter. After the appeal was taken to the district court, judgment was rendered in that court in favor of the appellee in the year 1904, and in the same year a judgment was procured against the defendant, Mrs. Burns, as surety on the appeal bond. In 1902, and while the appeal was pending in the district court, Mrs. Burns sold and conveyed the premises in controversy to the defendant William A. Watson by a deed of warranty for the express consideration of $1,500 in cash. After the judgment was procured against Mrs. Burns in the district court for Lancaster county in the year 1904, and an execution had been issued and returned *nulla bona,* the instant suit was instituted for the purpose of subjecting the lots conveyed to Watson to the lien of plaintiff's judgment.

As the case is here for a trial *de novo,* we will supplement out judgment and findings by a brief review of the evidence offered in the court below. But four witnesses testified. One of these, defendant William A. Watson, said that he was the nephew of the defendant, Mrs. Malinda J. Burns; that he resided in the city of Omaha, Nebraska, and was engaged in the business of horseshoeing; that he came to Lincoln once or twice a year, generally on political errands; and that when in Lincoln he ordinarily visited his aunt and his cousin, Mrs. Puckett; that he called on his aunt, Mrs. Burns, a short time before the purchase of the property in dispute, and she told him that she was in need of money to live on, and wanted to sell her lots; that he suggested borrowing money on the lots, but she objected, because she had no means to pay the mortgage, and wanted him to purchase them from her; that he inquired of attorney Cochran as to the title

of the lots and their probable value, and, finding that the title was clear, he agreed to take them; that he went to Omaha, and took some money that he had from his business and borrowed $1,150 more from a friend of his, Thomas Dennison, and returned to Lincoln, and paid the money in cash to Mrs. Burns in the presence of her daughter, Mrs. Puckett, and received the deed and placed it on record, and had since that time paid the taxes on the real estate in dispute. He denied positively that he had any information that Mrs. Burns was surety on the appeal bond of Mrs. Puckett at the time of the transfer, or that he knew that she was indebted to anyone for anything at that time.

Defendant, Mrs. Burns, testified and admitted that she signed the appeal bond for her daughter, but says that she did not know that she was indebted to anyone when she made the transfer. She further testified that she was about 73 years old at the time of the trial; that she lived with her daughter, Mrs. Puckett, and had been in poor health for several years, and relied upon her daughter for support; that her daughter had been engaged in the millinery business until her business had been closed by a bankruptcy proceeding; and that she sold the lots to defendant Watson for the purpose of getting money for her support and the support of her daughter. She testified that Watson paid her 1,500 in cash for the property at the time the deed was delivered, and that she did not tell Watson that she was on the appeal bond of her daughter. Mrs. Puckett testified that she learned of the purchase of the property by Mr. Watson at the time that it was agreed upon, and that she was present when the deed was delivered, and that she counted the money and took it into her possession and kept it for the support of herself and her mother after the transfer was made. Thomas Dennison testified that he loaned Watson $1,150 just before the purchase of the property, that he made a memorandum of the loan on a little memorandum book which he carried at that time, and that Watson returned

the loan from time to time in sums ranging from $50 to $200, until it was finally all paid.

This was all the testimony offered at the trial of the cause in the court below. No witness was impeached either by contradictory statement or by affirmative evidence tending to show his want of credibility. Appellee relies on the fact that the transfer, having been between near relatives, was presumptively fraudulent as against creditors, and that the testimony offered in support of the transfer is so improbable on its face as to warrant the court in absolutely ignoring and disbelieving it. With reference to the first proposition, we would say that it is true that the court will carefully scrutinize a transfer of property between near relatives, which has the ultimate effect of hindering and delaying the creditors of the grantor in the conveyance, but yet, if, on an examination of all the evidence in the record, it appears to have been taken by the grantee for a valuable consideration and without participating in any intent of the grantor to cheat or defraud creditors, it will be upheld. *Blair State Bank v. Bunn,* 61 Neb. 464; *Farrington v. Stone,* 35 Neb. 457.

Now, it is plain from an examination of the testimony that there is no evidence in any manner tending to show that defendant Watson knew of Mrs. Burns' contingent liability on the appeal bond of Mrs. Puckett at the time of the purchase of the lots, so that, if the transfer be set aside, it must be on our disbelief of the testimony of the witnesses, who swear that he paid $1,500, which is conceded to have been a fair consideration for the lots in controversy. It is urged by the appellee that we should discredit the testimony, because it is improbable that Watson borrowed $1,150 from Thomas Dennison without giving a note or any security for the loan. Against this suggested doubt, however, is the positive testimony of Dennison himself that he did make this loan, made it without security, made it without asking or desiring interest, made it as a favor to a friend who shod his blooded horses, and at whose place of business he called almost every day to

see other horses that were shod there. In the face of positive and unimpeached testimony showing the good faith of the transfer, mere suspicions of fraud will not prevail. This court has said, in *Bank of Commerce v. Schlotfeldt*, 40 Neb. 212; "Fraud is never to be presumed. It must be proved. A creditor of a vendor seeking to invalidate a sale upon the grounds of fraud must prove facts from which a legitimate inference of fraudulent intent can be drawn. Evidence simply justifying a suspicion is not sufficient."

We therefore conclude that the uncontradicted testimony in the record is sufficient to sustain the *bona fides* of the transfer of the lots in controversy, and that the judgment of the district court should be reversed and the cause remanded, with directions to the court below to dismiss the plaintiff's bill and to render judgment in favor of the defendants, and this 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 reversed and the cause remanded, with directions to the court below to render judgment in favor of the defendants, dismissing plaintiff's bill.

REVERSED.

MAMIE L. WASHINGTON, APPELLANT, V. NAPOLEON B. WASHINGTON, APPELLEE.

FILED APRIL 18, 1907. No. 14,767.

1. **Divorce:** ALIMONY. In a suit for divorce and alimony, a district court has jurisdiction to award to the wife specific articles of personal property from the estate of the husband in addition to alimony.

2. **Case Distinguished.** *Cizek v. Cizek*, 69 Neb. 800, examined, approved, and distinguished.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Jefferis & Howell and *Shotwell & Shotwell,* for appellant.

D. J. Riley, contra.

OLDHAM, C.

This was an action in replevin to recover certain household chattels described in the petition and affidavit. There was a trial of the issues to the court and jury, and at the close of the testimony the court directed a verdict for the defendant. From the judgment entered on the verdict the plaintiff appeals.

The facts underlying the controversy are that, prior to the 16th day of December, 1903, plaintiff and defendant had been wife and husband, but on that day the district court for Douglas county granted plaintiff a divorce from the bonds of matrimony from the defendant, and awarded her the specific articles of personal property in controversy in addition to a small allowance for alimony. The evidence showed that plaintiff relied on this decree as the source of her title to the household furniture in litigation. The case was submitted in this court without oral argument, but it is suggested in the briefs that the court below relied on the case of *Cizek v. Cizek,* 69 Neb. 800, as conclusive of the question that specific articles of property cannot be awarded as alimony. If this suggestion is well founded, the learned trial court has a mistaken view of the extent of the holding in the case just cited. All that was held in this case was that the district court has no jurisdiction to award real estate of the husband to the wife in fee as alimony, and that a decree attempting to do so is void and subject to collateral attack. It is true, as held in this opinion, that the jurisdiction of the district court in awarding alimony and maintenance in divorce proceedings arises solely from the provisions of the statute.

Section 22, ch. 25, Comp. St. 1905, provides: "Upon every divorce from the bonds of matrimony for any cause, excepting that of adultery, committed by the wife, and also upon every divorce from bed and board, from any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." This section plainly authorizes a decree of a part of the personal estate of the husband in addition to such alimony as the court shall deem just. This provision was recognized in the opinion in *Cizek v. Cizek, supra,* for it is said therein: "The court is empowered to decree to the wife 'such part of the personal estate of the husband, and such alimony out of his estate.' Thus the power to give in kind seems to be restricted to personal property, and alimony is made payable *out of his estate.*" In the recent case of *Hays v. Hays,* 75 Neb. 728, it was held, among other things, that in a divorce proceeding the court, in addition to alimony, might decree to the wife specific articles of household furniture. As the evidence in this case tends to show that many of the articles of household furniture described in plaintiff's petition had been awarded to her in kind in her decree of divorce and alimony, we conclude that the learned trial court erred in directing a verdict for the defendant, and that the issues should have been submitted to the jury under proper instructions.

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.

IN RE ESTATE OF CORNELIUS VAN AUKEN.
JOSHUA PALMER, EXECUTOR, APPELLANT, V. NORMAN VAN AUKEN, APPELLEE.

FILED APRIL 18, 1907. No. 14,772.

Evidence examined, and *held* sufficient to sustain the judgment.

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

R. D. Brown, W. M. Brown and *Joshua Palmer,* for appellant.

W. L. Newby and *W. G. Hastings, contra.*

OLDHAM, C.

This was an action which originated in the county court of Saline county, Nebraska, on the approval of the final settlement of the executor of the estate of Cornelius Van Auken, deceased. An appeal was taken from the judgment of the county court on the allowance of certain claims in favor of the executor. The items in contest were a claim for $200 for caring for the property, and a claim for $500 for extraordinary services in examining briefs and attending court, etc., during the litigation of causes in which the estate was a party. There was also a claim allowed against the executor for $100 received on rents of a portion of the demised premises during the settlement of the estate. The district court allowed this claim against the executor, reduced his claim for caring for the estate from $200 to $100, and disallowed his claim of $500

for extraordinary services. The court allowed the attorney's fees of counsel who represented the executor in the contest, also the costs expended in litigation and other items of expense, about which there is no dispute. To reverse this judgment the executor has appealed to this court.

A very imperfect and a very unsatisfactory transcript and bill of exceptions have been filed in the cause. The transcript fails to show that any motion for a new trial was ever filed in the court below, and it is contended by counsel for the appellee that no such motion was in fact filed at the term of court at which the judgment was rendered. This omission would properly excuse us from a further examination of the record. The bill of exceptions contains no copy of the last will and testament of the deceased, Van Auken; but from such evidence as is before us we are fully satisfied that the judgment of the trial court is right and fully sustained by the evidence.

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 E. SMITH, APPELLEE, V. SAMUEL NELSON, APPELLANT.

FILED APRIL 18, 1907. No. 14,775.

Evidence examined, and *held* sufficient to sustain the judgment.

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

Charles W. Haller, for appellant.

H. Z. Wedgewood, contra.

OLDHAM, C.

This was an action in ejectment for the recovery of a strip of land in Sarpy county, Nebraska, along the division line separating the lands of the plaintiff and those of the defendant. There was a trial of the issues below to the court and jury, and verdict and judgment for the plaintiff. To reverse this judgment defendant appeals to this court.

The facts underlying the controversy are that in 1855 the lands now in dispute were owned in partnership by the plaintiff in this cause of action and his brother, William H. Smith. In 1862 the brothers dissolved their partnership and conveyed different parcels of land to each other in severalty in settlement of their affairs. By this arrangement plaintiff became the owner of two tracts of land situated in section 24, township 14, range 13, in Sarpy county, which were designated on the official survey of the section as "Tax Lots 7 and 11." The defendant, through mesne conveyances from William H. Smith, became the owner of certain parcels of land in this same section and adjoining plaintiff's land on the south, which were described on the plat of the section as "Tax Lots 8, 12, 13, and 14." There is no dispute as to the ownership of these several tracts of land, the controversy depending on the location of the boundary line between them. In plaintiff's petition the disputed tract is described by metes and bounds, beginning as follows: "Commencing at the southeast corner of tax lot 11, in section 24, township 14, range 13, being the original corner made for the division of the timber lands of William H. Smith and Charles E. Smith, and running thence west on the 'old division line between lands of William H. Smith and Charles E. Smith,'" etc. In support of the allegations of the petition, plaintiff introduced testimony tending to show that, when the lands were divided between him and defendant's original grantor, one Hamilton, then county surveyor of Sarpy county, by request of both parties es-

tablished a division line between these adjoining tracts and blazed trees along the line so established; that this line was recognized by each of the respective owners of the lands for much more than ten years before this action was instituted. The evidence shows that the lands along the disputed strip were rough and broken, and covered with timber and underbrush; that they had never been cultivated, but the respective owners had cut firewood and timber upon them; that each of the original owners had recognized the line called the "Old division line" for many years, plaintiff cutting timber on the north side of the line and defendant's grantor on the south side; that shortly before the institution of the present suit the defendant employed the present county surveyor to establish the division line between these lots, and that he erected a fence near the line so established. It is the strip of land between this fence and the old division line, alleged to have been established by agreement between plaintiff and defendant's grantor, that is now in dispute.

The case was submitted to the jury under very clear and concise directions, none of which are complained of in the brief of the appellant. The contention mainly urged by appellant is that the evidence is insufficient to sustain the judgment. It is claimed in support of this proposition that the description of the lands in plaintiff's petition depends on the corner of tax lot 11, and that this corner was correctly established by the survey last made, and that the evidence shows that defendant's north fence is rather south than north of the true corner of the tax lot. This contention begs the question by assuming the truth of the fact to be proved, that is, that the last survey of the boundary line was the correct survey. Again, plaintiff's right to recover does not depend alone on the accuracy of the original survey of the boundary line, but rather on proof of the acquiescence by adjacent owners in the survey so made for more than ten years before the institution of this suit. There was competent testimony introduced by the plaintiff tending to show that this line was

established as a division line between the several lots in dispute, and that it was treated as such by the adjacent owners for twenty years or more before defendant erected his fence near the line of the new survey. Some evidence was introduced tending to dispute plaintiff's claim, and this conflict raised an issue of fact peculiarly within the province of a jury for determination under proper directions.

Some objections are urged against the action of the trial court in the admission of testimony, but none of these objections point out anything tending to show prejudice in this matter. From a careful examination of the record we are satisfied that it discloses no prejudicial error, 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.

STEPHEN D. RILEY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED APRIL 18, 1907. No. 14,679.

Carriers: INJURY TO SHIPPER. One who under contract with a railroad company accompanies a shipment of live stock is not a passenger within the meaning of section 10039, Ann. St. 1903; and, in an action for personal injuries received by such person, the common law and not the statutory rule of liability applies.

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

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

Berge, Morning & Ledwith, contra.

EPPERSON, C.

On March, 16, 1905, plaintiff Riley shipped a stallion over defendant's railway from Corning, Iowa, to a station in Nebraska, under contract whereby plaintiff was to accompany the stock. When the train was half way between Havelock and Lincoln, in this state, plaintiff, believing that a collision or wreck was about to occur, jumped from the car and was injured. He brought this suit for personal injury and recovered judgment for a small sum. The railway company appeals, urging the insufficiency of the evidence as the sole ground of reversal.

It seems to be the theory of the plaintiff that he was a passenger, within the meaning of section 10039, Ann. St. 1903, which provides: "Every railroad company as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." "'Criminal negligence,' as used in the statute, which will defeat a recovery for an injury received by a passenger is defined to mean gross negligence, such as amounts to a reckless disregard of one's own safety, and a wilful indifference to the consequence liable to follow." *Chicago, B. & Q. R. Co. v. Winfrey,* 67 Neb. 13; *Union P. R. Co. v. Porter,* 38 Neb. 226; *Omaha & R. V. R. Co. v. Chollette,* 33 Neb. 143. Even were we to adopt this theory, it is not clear that plaintiff was free from negligence as above defined.

Plaintiff has not favored us with a brief. His account of the accident, as we gather it from the record, is about as follows: "I was riding in there with my horse; had hold of the halter, standing there, leaning again the rope there by the horse to keep him quiet; and all at once the engineer he reversed his steam and began to slow down, and slowed down, and began to run back and set the car

back as fast as he could, and it excited me, and I opened the door and looked out and thought another train was coming down, and that excited me, and I jumped off. * * * Q. And you say they sounded the whistle? * * * A. They began to whistle as fast and loud as they could, and of course that is what alarmed me. * * * Q. How long did they continue to blow the whistle? A. I could not tell you. After I opened the door quite a bit. * * * Q. And, while you opened your car door, what did you see in front of your train? A. Why I looked out ahead and I thought I could see another train coming down onto us. Q. Did you see another train? A. Yes, I think I did. * * * I thought I could see the light of another engine. * * * Q. You say the train you were on at the time you jumped off was going at considerable speed? A. Yes, sir. * * * Q. Now, your train came right on into Lincoln, you say? A. Yes, sir. Q. There wasn't any collision was there? A. No, sir."

A carrier cannot be held liable for an injury received by one who attends a shipment of live stock, except in the event that the carelessness of the carrier was the proximate cause of the injury. In *Omaha & R. V. R. Co. v. Crow,* 54 Neb. 747, IRVINE, C., says, in reference to persons accompanying stock: "The statute fixing the liability of carriers to ordinary passengers is, from the nature of the case, not applicable; but, subject to the different conditions reasonably arising from the special arrangements and duties created by such a contract, the common law as to carriers of passengers applies. The carrier, subject to such modifications is still bound to the exercise of the highest degree of care of which human foresight is capable; and contributory negligence is a defense." To the same effect are *Chicago, B. & Q. R. Co. v. Troyer,* 70 Neb. 287; *Missouri P. R. Co. v. Tietken,* 49 Neb. 130. In each of the above cited cases, a drover's or free pass had been issued to the person in charge of the stock, for whose injuries action had been instituted. In the case at bar,

plaintiff bought a ticket and entered into a contract with the company whereby he was to accompany the stallion in the car. We can see no difference in principle. The mere fact that a ticket was purchased can in no way change the liability of the company by virtue of the contract establishing the relationship of the parties. It is immaterial what form the contract may assume. The substance of it was that for a stipulated sum the carrier transported the stallion, with the plaintiff in charge. It is the fact that a party is in charge of stock traveling upon a freight train, and not the fact that such person has a free pass or a drover's pass, which fixes the liability of the railroad company in such cases as that of a common law carrier only.

The train was not in danger of collision or wreck, and the injury was not caused in any way or contributed to by the defendant company. Had there been apparent danger caused by the negligence of the defendant, then the plaintiff's act, which resulted in his injury, would have been no bar to his recovery. No act of negligence of the defendant is relied upon, other than the placing of the plaintiff in a position of apparent danger. The evidence tending to support this contention was nothing more than the plaintiff's testimony that he thought another train was bearing down upon them. He does not say, as we understand him, that he saw such a train, but that he saw lights ahead and heard what he calls the danger signal or whistle, whereupon, thinking a collision or wreck was about to occur, he jumped from the car and was injured. Plaintiff was not a passenger within the meaning of the statute, and the facts, viewing them in the light most favorable to plaintiff, raised but a presumption of negligence, and required the defendant company, at most, to prove that it was free from negligence. This was done by the testimony of the engineer, who said that no collision or wreck was apparent. This being undisputed, the trial court should have directed a verdict for defendant, as requested. The sole cause of the injury was the act of the plaintiff, prompted by an unjustifiable be-

lief that he was in danger, and this, we consider, must be held such negligence on his part as will relieve the railway company.

We therefore 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.

CARY F. FORDYCE, APPELLANT, V. GALEN J. RICHMOND ET AL., APPELLEES.

FILED APRIL 18, 1907. No. 14,788.

1. **Libel:** INSTRUCTIONS: HARMLESS ERROR. The soundness of the doctrine that in actions to recover damages for libel the truth alone is not a sufficient defense, but it must appear that the publication was made with good motives and for justifiable ends, is not determined; but an instruction submitting that question to the jury is without prejudice to the plaintiff when supported by the evidence.

2. ———: ———: DAMAGES. In an action to recover damages for an alleged libel, it is not error for the trial court to instruct the jury that under the law of this state punitive damages cannot be recovered, when the instruction sufficiently defines the meaning of such term, and the jury are further instructed as to the true measure of damages.

3. **Rulings** of the trial court upon the rejection of evidence examined, and *held* without error.

APPEAL from the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

L. W. Hague and *J. L. McPheely*, for appellant.

M. D. King and *C. P. Anderbery*, *contra.*

EPPERSON, C.

Plaintiff from 1903 to 1905 was the secretary of a local lodge at Minden, Nebraska. Henry R. Piper and wife were members of the order, and were required to pay certain assessments to the plaintff as the agent of the association. Defendants are the owners and publishers of a newspaper published in Minden, Nebraska, and in the issue of their paper of January 26, 1905, published a statement charging plaintiff with the embezzlement of money sent by the Pipers for the payment of their assessments. The charge was repeated in several subsequent issues of defendants' paper. Plaintiff sets forth the publications in full, alleges that the same were libelous, and seeks to recover damages therefor. Defendants admit the publications, allege that the same were true and published with good and proper motives. A verdict was returned for lefendants, and plaintiff appeals.

It is unnecessary to review the evidence at length. Suffice it to say that the evidence fully supports the truthfulness of the publications. Plaintiff contends, however, that the evidence does not support the verdict, because it was not shown that the publication was made with good motives and for justifiable ends. By section 5, art. I of our constitution, it is provided: "The truth, when published with good motives, and for justifiable ends, shall be a sufficient defense." This court has held that the truth alone is not a sufficient defense, but the publication, though true, must have been made with good motives and for justifiable ends. *Pokrok Zapadu Publishing Co. v. Zizkovsky,* 42 Neb. 64; *Neilson v. Jensen,* 56 Neb. 430. A doubt was cast upon the soundness of these decisions in *Larson v. Cox,* 68 Neb. 44, where it is said that they "seem to have been decided on the assumption that the constitutional provision above quoted, so far as it relates to libels which are the subjects of civil actions, was intended as a restraint upon the freedom of the press, and

that it operated as a partial repeal of the statute. (Code, sec. 132.) It is not necessary at this time to either affirm or deny the doctrine of these cases, as the constitutional provision with which they deal has no reference to actions for slander." It is said in the first paragraph of the syllabus of *Larson v. Cox, supra:* "Section 132, code of civil procedure, in effect declares that in an action for a libel or slander the truth of the defamatory matter is *per se* a complete defense." It is unnecessary here either to reaffirm or disapprove the doctrine announced in *Pokrok Zapadu Publishing Co. v. Zizkovsky, supra,* and *Neilson v. Jensen, supra,* because in the case at bar the jury were instructed, in effect, that their verdict should be for the plaintiff, unless they found that the publication was made with good motives and for justifiable ends. Plaintiff does not and cannot complain of this instruction. It was not prejudicial to plaintiff. The evidence, we consider, justified the finding that the publication was made with good motives and for justifiable ends. It appears from the record that the Pipers resided at Pullman, Washington, and for the purpose of paying assessments remitted through the mail to plaintiff checks payable to him and drawn on a bank at Minden. There were four checks in controversy, aggregating $37, sufficient in amount to have paid the assessments of the Pipers when due. The checks were made payable to plaintiff, and the indorsement of his name appears upon the back of each. Each check was paid by the bank upon which it was drawn soon after its date. The evidence further disclosed that defendants made investigation of the facts before the first publication. In a conversation with one of the defendants plaintiff stated that the indorsements upon the back of the checks were forgeries, and that he did not receive the proceeds therefrom. There is evidence that the plaintiff did receive the money represented by the checks. The original checks were introduced in evidence, and plaintiff's indorsement thereon was proved by witnesses acquainted with his signature and by comparison with writings acknowledged

to be genuine. The jury resolved this issue of fact in defendants' favor, and the evidence is sufficient to support the jury's finding that the publications were true, and made with good motives and for justifiable ends.

Exception was taken to an instruction of the court that under the law punitive damages cannot be recovered. In the same paragraph the court defined the meaning of punitive damages. This was not error. Taken with other instructions and parts of the same instruction, the portion objected to was necessary to a clear statement of the measure of the damages plaintiff would be entitled to recover if the jury found in his favor.

Plaintiff attempted to prove that defendants at one time prior to the first publication disagreed between themselves as to the closing lines of that publication. Under the defense pleaded, it was not error to reject the offered testimony.

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.

ANNA VANCURA, APPELLEE, V. ZAPADNI CESKO BRATRSKA ZEDNOTA, APPELLANT.

FILED APRIL 18, 1907. No. 14,791.

Insurance: ASSESSMENTS: PAYMENT. When it is the custom of a collecting agent or officer of a fraternal beneficiary association to receive by mail remittances from its members at a certain post office, and the official stationery of such agent designated that post office as his address, a remittance of an assessment, addressed to such agent, reaching the designated post office on the day it became due, is a payment of the assessment, where there is no provision in the contract of insurance to the contrary, although

the money was not delivered until later to the agent, who, unknown to the insured or his beneficiary, had changed his place of receiving mail from the designated post office to a rural delivery route.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Brome & Burnett, for appellant.

F. Dolezal, contra.

EPPERSON, C.

January 21, 1900, appellant, a beneficiary association, issued a certificate to Voclav Vancura, a member of the order, and agreed in the event of his death in good standing to pay a stated sum to his wife, who instituted this suit after her husband's demise and secured a directed verdict for $1,112.58, and costs. Appellant defended on the ground that the insured was suspended for nonpayment of assessments and his certificate therefore not in force at the time of his death. It appears that one Urban was financial secretary of the local lodge of which Vancura was a member, and, under the constitution and by-laws, all dues and assessments of the members of that lodge were to be paid to him. Urban lived in the country, seven miles from Clarkson, Nebraska, and obtained his mail by means of a rural delivery route from that village. Vancura resided at Howells, Nebraska. Under the rules of the association it was his duty to pay to Urban an assessment on or before the 28th day of each month, in default of which he was subject to suspension, and his insurance forfeited, unless afterwards reinstated according to the laws of the association. It was Vancura's custom to remit assessments by mail, addressed to Urban at Clarkson, Nebraska. Urban's official stationery designated "Clarkson, Nebraska," as his post office address, and it does not appear that insured or his beneficiary knew of any other address or were informed that the secretary had changed his post office and received his mail by rural delivery.

December 28, 1903, Vancura mailed a draft for his December assessment at the post office in Howells, addressed to Urban at Clarkson, Nebraska. This letter arrived in Clarkson on the evening of the 28th, and, through the usual mail service, was delivered to Urban's residence in the country by the rural mail carrier at 2 P. M. on December 29. Urban, prior to receiving the draft on the 29th, made out and forwarded his monthly report, stating therein that Vancura was suspended for nonpayment of December assessment. Insured was not reinstated and died April 7, 1904.

Under the facts in this case, was Vancura wrongfully suspended? We think he was. The by-laws and regulations did not prescribe the method of payment, and the secretary having received prior assessments by mail, the use of the mail in making payment of the assessment in controversy cannot now be questioned as the proper method. *Hartford L. & A. Ins. Co. v. Eastman,* 54 Neb. 90. It seems clear from the undisputed evidence that, as far as the insured and his beneficiary were concerned, "Clarkson, Nebraska" was the post office address of the secretary of the lodge. The secretary by his conduct designated "Clarkson, Nebraska," as the place of payment, and an assessment mailed so as to reach the secretary on the 28th day of December at the place designated for payment was sufficient, and prevented the suspension of the member and the cancelation of his certificate, and it is immaterial that the draft was not actually received by the officer at another post office address not designated as the place of payment. See *Hartford L. & A. Ins. Co. v. Eastman, supra; Primeau v. National Life Ass'n,* 28 N. Y. Supp. 794; *Whitley v. Piedmont & A. L. Ins. Co.,* 71 N. Car. 480.

We do not think appellant should be permitted to avoid its liability on the ground urged, 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.

IN RE ESTATE OF ELLEN WILSON.
CARRIE MOLLERING, APPELLANT, V. JAMES KINNEBURG ET AL., APPELLEES.

FILED APRIL 18, 1907. No. 14,723.

1. **Trial:** INSTRUCTIONS: HARMLESS ERROR. The court, at the request of the proponent, gave several instructions relating to the mental qualifications of the testatrix, each of which omitted one or more of the elements generally recognized as necessary to testamentary capacity. The omitted elements were clearly and plainly stated in an instruction given by the court on its own motion. *Held*, That any error arising from giving the instructions asked by the proponent was rendered harmless by the instructions of the court.

2. **Wills:** PROBATE: INSTRUCTIONS. Instructions requested by the contestant in an action to probate a will examined, and the action of the court in refusing the same upheld.

3. **Evidence:** TESTAMENTARY CAPACITY. One who shows an intimate acquaintance with a person whose mental capacity is in question, and who is familiar with his general conduct, who had occasion to and did observe the party and his condition at the time when his state of mind is in dispute, may testify affirmatively that in his opinion such person was of sound mind and possessed of his normal faculties, while the opinion that such person was of unsound mind must be based on facts consisting of particular acts or conduct indicating unsoundness.

APPEAL from the district court for Johnson county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Billingsley & Greene, Philip F. Greene and *L. C. Chapman*, for appellant.

S. P. Davidson and *J. C. Moore, contra.*

DUFFIE, C.

Some 30 years ago John Wilson, Jr., a son of John and Ellen Wilson of Tecumseh, Nebraska, left the home of his parents on account of some misunderstanding between them. Since then, as we understand, no communication has taken place between himself and his family, and it is not known whether he is now living or dead. In 1903 John Wilson and his wife, Ellen, then nearly 80 years of age, made a trip to Dawson City, Alaska, for the purpose of finding their son. Prior to their departure they executed a joint will, by the terms of which Carrie Mollering, their granddaughter and appellant herein, James Kinneburg, their nephew, and Susan K. Sullivan, an intimate friend, were bequeathed $1,000 each. An annuity of $200 was provided for Margaret Kinneburg, a sister of Mrs. Wilson, $300 was set apart to be placed at interest for keeping the family burial ground in good condition, and the residue of the estate, consisting of about $20,000, was to be kept at interest for ten years for John Wilson, Jr., or his heirs, and, in the event of their failure to appear within that time, the executor was to convert the property into money, and, after paying himself "all the law allows in the most liberal terms," to divide it, share and share alike, between Carrie Mollering, James Kinneburg, Susan K. Sullivan, Duncan Kinneburg and Donald Black, a nephew of Mrs Wilson. The search for the lost son proved unavailing, and the parents returned home, where John Wilson, the father, died February 26, 1905. Ellen Wilson, his wife, lived at her home in Tecumseh until her death on July 22, 1905. On July 13, 1905, she suffered a stroke of paralysis, and on the evening of that day she executed the will in controversy in this case. The facts concerning the making of the will are these: The then county judge was in possession of the joint will made by the husband and wife before starting on their trip to Alaska. Mrs. Wilson sent for him to draw her will, but on account of his official position he refused to act in the matter, and she then re-

quested him to send for J. C. Moore, who drafted and was present at the execution of the will. Mrs. Wilson could not write, and her name was attached to the will by Moore at her express request, and she, with her own hand, attested it by her mark. Moore had received from the county judge the joint will, which Mrs. Wilson wished followed, except in some details which she imparted to Mr. Moore. The will bequeaths to Margaret Kinneburg $12 a month during her life; to Carrie Mollering $1,000, and no more; to James Kinneburg $1,000 and all notes held by the testatrix against him for incidental debts; to Susan K. Sullivan $500, and no more; $300 was to be placed at interest for the purpose of keeping the family grave lots in good condition. The residue of her property was to be kept at interest for five years from the date of her death, at the end of which time, if her son John Wilson, Jr., or his heirs, did not appear, the executor was directed to sell and convey all her property, and, after paying himself "all the law allows in the most liberal terms," the residue thereof was to be divided, share and share alike, between James Kinneburg, Duncan Kinneburg and Donald Black, her nephews. The words "and no more" were inserted in the will after each specific bequest wherever they occurred at her express request and direction, given while the will was being read to her, article by article, previous to its execution. The probate of this will was resisted in county court by the appellant upon the grounds of mental incapacity of the testatrix and undue influence exercised over her by James Kinneburg. The county court, after a full hearing, entered an order admitting the will to probate, and, upon appeal to the district court by the contestant, the jury found in favor of the proponent, and the contestant has appealed from a judgment entered on the verdict.

The four errors first assigned relate to instructions 1, 2, 4 and 6, given by the court on request of the proponent. The objections urged against these instructions are that they failed to inform the jury that it was necessary for the

testatrix to understand the nature of the act she was performing in making the will, to know and retain in mind the amount and character of her property, and who were or naturally should be the objects of her bounty, and to have a full understanding as to who and the purposes for which her bequests were made. It is true that these instructions were faulty in the respect named, but the court, in its seventh instruction, fully covered the subject, and informed the jury in explicit terms that, "if Mrs. Wilson had sufficient mental capacity to know what property she possessed, where it was, and know its value, and know and understand her obligations to her relatives, and know what she wished to do with the property, and could keep these several matters in her mind until a will was prepared to carry into effect her intended disposition of her property, then she was competent to make a will."

Exception was also taken to the refusal of the court to give the fifth instruction requested by the contestant, to the effect that, if the will in this case makes no devise or bequest of the property to the son of the testatrix, and if you believe from the evidence that it was the intention of the testatrix to will all, or a portion, of her property to her son, your verdict should be for the contestant." If we understand the position of the appellant it is this: The testatrix, by providing that the residue of her estate, after the specific bequests had been paid to the legatees, should remain at interest for five years to await the return of her son or his heirs, intended to make some provision for them in case of their return, and that, because the will did not in terms provide for the disposition of the residue in case her son or the heirs did return within the five years, it fails to fully express her intentions. It will be noticed, however, that by the terms of the will the residuary bequests are made conditional. They are to go to the residuary legatees only on condition that the lost son or his heirs do not return to Tecumseh within five years. In case of their return within the time limited, the residuary bequests become inoperative and the

son or his heirs will receive their full share of the estate under the terms of the will.

The sixth instruction requested by the contestant is to the effect that, if the jury find that the will does not make provision for Carrie Mollering or for any other person that was intended by the testatrix, they should find for the contestant. This instruction was properly refused, as the will does make provision for Carrie Mollering, and a careful examination of the evidence does not disclose a failure on the part of the testatrix to provide for any party whom the testatrix had in mind or whom she wished to share in her estate. The seventh instruction, requested by the contestant and refused, is open to the same objection, there being nothing in the testimony to indicate that the testatrix had not made provision for every one whom she wished benefited.

The court admitted evidence of old friends and acquaintances of the testatrix to the effect that at the time of making the will she was in her normal condition, in full possession of her faculties, and had mental capacity sufficient to understand and transact her business. Objection to this testimony is made on the ground that no sufficient foundation was laid, in that no facts were related by the witnesses upon which their opinions were based. The rule is well established that where nonexperts are called to establish the insanity or want of mental capacity of a party, the facts upon which they base their opinions must be first stated, in order that the court and jury may determine whether, from the facts given by the witness as the basis of his opinion, it is well founded. When the witness is called to establish a normal condition of the mind and mental capacity to transact business, the rule supported by the greater number of authorities is that those well acquainted with the party whose mental capacity is the subject of inquiry may testify affirmatively that in his opinion such person was of sound mind. The supreme court of Iowa, speaking of the question, uses the following language: "There seems to be no controversy

about the general rule that one who shows an acquaintance with the person whose mental capacity is in question and is familiar with his general conduct may testify affirmatively that in his opinion such person was of sound mind, while the opinion that such person was of unsound mind must be based on facts consisting of particular acts or conduct indicating unsoundness." *Hull v. Hull,* 117 Ia. 738. The following authorities are all to the same effect: *Lamb v. Lippincott,* 115 Mich. 611; *People v. Borgetto,* 99 Mich. 336; 2 Jones, Evidence, sec. 366.

Appellant insists that this court, by its former holdings, is committed to the rule that a nonexpert witness will not be allowed to give an opinion on the sanity or insanity of a party, without first laying the foundation for such opinion by stating the particular facts and circumstances upon which it is based, and it is contended that an intimate acquaintance, extending over a long period of time, with opportunities to observe his conduct, is not a sufficient qualification upon which to base an opinion of the party's sanity. There may be some misunderstanding by the profession concerning the rule applicable to the qualification of a nonexpert witness to give an opinion relating to the sanity or insanity of a party whose mental condition is a subject of inquiry; but an examination of the cases will, we think, show little disagreement as to the true rule, and the one which this court has almost universally followed. The question was first before the court in *Schlencker v. State,* 9 Neb. 241. In that case the defense was insanity, and the state called several nonexpert witnesses to controvert the testimony offered by the defense. In the opinion it is said: "The opinions of these witnesses as to the prisoner's mental condition, based upon what they had personally observed, and then detailed to the jury, were admitted in evidence under the objection that they were incompetent evidence." It will be observed that the state laid the foundation for the introduction of the opinion of these witnesses. What facts constituted that foundation is not disclosed in the opinion, and the question

of whether a long and intimate acquaintance with a party whose mental capacity is in question, with opportunities to observe his acts from time to time, is a sufficient foundation was not apparently in question and not determined, and the case is, therefore, of little weight as an authority on the question which we are now considering. In *Snider v. State,* 56 Neb. 309, it appears that the rule contended for by appellant was applied to witnesses called to prove the insanity of a party. This is quite apparent from the language of the court, as follows: "Counsel were endeavoring to elicit from them (the witnesses) facts throwing light on the question of defendant's sanity. The answers stricken out were in the nature of opinions or inferences from observed facts not previously narrated; for instance, 'he appeared not to understand things.' In each instance the court struck out such answers, but permitted further questions to be asked calling out the facts which gave rise to such opinions, and finally, after the facts were so narrated, permitted answers to categorical questions eliciting the opinion of witnesses, derived from those facts, as to defendant's sanity." As this case deals only with witnesses called to prove insanity it does not enlighten us on the question we are dealing with. *Lamb v. Lynch,* 56 Neb. 135, *Hay v. Miller,* 48 Neb. 156, and *Hoover v. State,* 48 Neb. 185, are cases of the same character, and the question of the qualification of a nonexpert witness to prove soundness of mind was not discussed. In *Shults v. State,* 37 Neb. 481, the trial court allowed the opinion of nonexpert witnesses to be given on the question of whether the person knew the difference between right and wrong of an act at that time committed by him, and the case was reversed, the opinion holding that the court erred in allowing the question to be answered. This holding was, however, overruled in *Pflueger v. State,* 46 Neb. 493, Judge POST reviewing that case in the following language: "In that case nonexpert witnesses were by the district court permitted to testify that the prisoner did in fact know the difference between right and wrong at the time

of the homicide charged, and on review upon petition in error to this court it was held that for obvious reasons the testimony should have been confined to the opinions of the witnesses, leaving the jurors to draw their own inferences therefrom. The killing being conceded, the vital question is whether the accused is accountable for his act, and which depends for its solution upon whether he was, or was not, at the time he took the life of the deceased, able to distinguish between right and wrong with respect to the particular act involved. Tested by that rule it would seem that the evidence complained of was rightfully admitted. * * * *Shults v. State,* so far as it asserts a different view, is modified to conform to the rule asserted by the authorities above cited."

In *Pflueger v. State, supra,* the rule is distinctly announced that "the opinions of nonexpert witnesses who have known the accused for fifteen years and who met and observed him almost daily for six weeks or more immediately preceding the commission by him of a homicide, their attention being particularly directed to his mental condition, are admissible as bearing upon the question of his sanity." This seems to us to be the common sense view. Sanity is the rule and insanity the exception. What acts or circumstances are there that an acquaintance can relate as a foundation for his opinion that a party is of sound mind, except that he has known him for years, has had a close personal acquaintance, and has never observed anything in his speech or conduct denoting insanity or mental incapacity? On the other hand, the insanity or mental incapacity of a party is indicated by many acts and circumstances which are observed and which can be narrated by those whose opinions are desired, and it is those acts and circumstances alone upon which the nonexpert must rely for his opinion. We believe, therefore that the true rule, and the one which this court has approved in *Pflueger v. State, supra,* and which it has never disapproved, so far as our examination has gone, is that it is a sufficient qualification for a nonexpert

witness called to testify to the sanity and mental capacity of a party to show an intimate personal acquaintance with him, and opportunities and occasions to observe his actions and demeanor in relation to his sanity at the time it is called in question.

We have carefully gone through the whole record and examined the evidence with more than ordinary care. While it is true that the testatrix suffered from a slight stroke of paralysis shortly before the execution of the will, the physicians in charge, and her neighbors and acquaintances, are emphatic in their testimony that at the time the will was executed she had recovered so as to be fully conscious and capable of transacting business with a full understanding of its import. It is true that her speech was not as distinct as prior to the stroke, but her mind was clear, and, when the will was read to her, article by article, by the draftsman, she made corrections and directed alterations in several respects. When the paragraph bequeathing $1,000 to Carrie Mollering was read, she directed that the words "and no more" should be added, as she did also to some other of her bequests. There is evidence strongly tending to show that she was not possessed of the most friendly feeling toward the contestant; that she had expressed herself to one or more of her neighbors to the effect that, when Mrs. Mollering was living with her and had been offered a daughter's place in the home and all a daughter's part, she had not been grateful. We are convinced from the testimony that she fully understood the terms of her will, that she understood her obligations to her relatives, and knew the value of her property and how she wished to dispose of it. The county court, after a full hearing, took the same view, and this is reinforced by the verdict of a jury, which received the approval of the judge of the district court who saw and heard the witnesses. Under these circumstances, it would be a gross wrong to set aside the will of a party to whom the law awards the right to dispose of her property in any manner that she sees fit, and under the circumstances tech-

nical errors or objections not going to the merits of the case should not stand in the way of carrying out the solemnly expressed wish of the deceased person.

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 appealed from is

AFFIRMED.

DANA B. OLNEY, APPELLANT, V. OMAHA AND COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED APRIL 18, 1907. No. 14,757.

1. **Street Railways**: USE OF STREETS. The right to use the streets of a city by the driver of a horse and the manager of a street car are equal, and each must use it with reasonable regard for the safety and convenience of the other.

2. ———: INJURY. Where the motorman in charge of a car sees, or by the use of reasonable care may see, that a horse is unduly frightened by his car, he must do what he reasonably can to prevent danger and damage; but, if the horse shows no signs of fright which are observable to him until too late to stop, he is not negligent in running into a horse which rears and alights immediately in front of the car.

3. Evidence examined, and *held* insufficient to submit to the jury.

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

P. A. Wells, for appellant.

John L. Webster and *W. J. Connell, contra.*

DUFFIE, C.

On or about May 29, 1903, a horse and buggy, belonging to the appellant, was being driven north on Twenty-Fourth street in South Omaha, on the west side of the

double tracks of the Omaha & Council Bluffs Street Railway Company, appellee. At a point between H and I streets there was a pile of lumber and a carpenter's bench, at which one Ruffner was at work on or near the sidewalk. The horse reached this point at or near the time a street car coming from the north on the west track was about to pass. The horse reared on his hind legs, and came down with his front feet in front of the car, and was so injured —one of its legs being broken—that he was shortly thereafter shot by a policeman on the street. The buggy and harness were also injured, and this action is brought against the appellee to recover the value of the horse and the damage suffered by the buggy and harness. In his petition the plaintiff alleges that the street railway company was negligent in the following particulars: (1) In running the car at a dangerous and high rate of speed, causing plaintiff's horse to become frightened and uncontrollable, and, although in full view of the motorman, he made no effort to slacken the speed of the car, but continued such speed until the horse was injured and the damage to the buggy and harness sustained; (2) that the motorman, seeing and knowing the danger in which the horse and buggy were placed by defendant's negligence, failed to diminish the speed of the car, and continued to run it at the high speed mentioned for a distance of one-half block after striking the said horse and buggy. Ruffner, the carpenter working at the bench, was a witness and testified that the car was running at the rate of 30 miles an hour. He did not observe the horse and buggy until the horse had reared in the air, and, consequently, cannot tell us of any indications of fright given by the horse prior to that time.

Mr. McIntire, the driver, is the only witness throwing any light on this question. In describing the accident, on his direct examination, he said: "Just before I got to H street, the horse became scared, watching the car. I was very careful to have him well in hand. When I saw he was scared, and just as the car got almost opposite, he

lunged across in front, and there was a general mix-up. I went up in the air. I sprang just as the car struck the horse and buggy together. I won't attempt to tell the way I went. The bystanders said I went some 10 or 15 feet in the air. I lit on my feet and stumbled and fell." He further testified that the car dragged the horse and buggy in the neighborhood of 50 feet after the collision occurred. "Q. How were you driving the horse at the time just before the accident occurred. A. On a walk. Q. How was the horse acting at that time? A. As I stated before, he was watching the car closely and showed signs of being scared, and I was extra careful in holding a good rein on him." On cross examination he testified as follows: "Q. Your horse was coming along quietly? A. Yes, sir. Q. You had no trouble with the horse until the car came right down opposite the horse, as you say, or it got nearly to the horse? A. Nearly so. Q. And then the horse suddenly reared up, did it not? A. Yes, sir. Q. And it reared and came down toward the east? A. Yes, sir. Q. That would bring the horse, which had previously been on the west side of the street, over on the track portion? A. Yes, sir. Q. And just at the instant that the horse got there, that instant the car struck him? A. It struck him and the buggy together, the fore part of the front wheel. * * * Q. You did not anticipate that the horse was going to rear and go over on the track just in front of that motor, did you, until he did it? A. If I had I would have jumped from the buggy and turned him loose. Q. So you did not anticipate the horse would do as ridiculous a thing as that, did you? A. No, sir; I didn't. Q. And so far as you know the motorman did not? A. I presume not. Q. Because you were driving quietly along toward him and he was coming toward you? A. Yes, sir. * * * Q. He was moving quietly and all right until he made this lunge? A. I stated he showed signs of being scared. Q. That is, appeared a little nervous and working his ears? A. His ears were standing forward directly, I

think, he was not looking back. Q. Well, then, that was his position, he was a little nervous and his ears were forward. Did he move along all right? You held this tight rein on him until he made this lunge? A. Yes, sir." After stating that he had driven horses ever since being old enough, that he was a strong man, about 42 years old, and sober, the following question was asked him. "Q. So there was not anything about you to attract the attention of the motorman, there was nothing wrong? A. No, sir."

The foregoing is all the material evidence relating to the situation just previous to the accident. On this evidence the trial court ruled that there was no showing of negligence on the part of the defendant company, and directed the jury to return a verdict for the defendant. Keeping in mind the rule that, where a verdict is directed for the defendant, the court should consider as established every fact which the evidence tends to prove, we are required to determine whether there was error in the direction of the court. There is no allegation in the petition that the motorman did, or by the use of diligence could have, observed that the horse was frightened in time to have brought his car to a stop prior to the collision. The only allegation relating to the negligence of the motorman is to the effect that, "after the car struck the horse and buggy, the motorman, both seeing and knowing the imminent danger in which the plaintiff's horse and buggy, as well as the occupant of said buggy, were placed by the negligence of the defendant, and having the power to stop said car, in absolute disregard of defendant's duty to stop said car, negligently failed even to diminish the speed of said car, but, on the contrary, said motorman continued to run said car at a great rate of speed for about the total distance of one-half block after striking and running into said horse and buggy." There is no evidence showing that the car could be stopped in a less distance than that alleged, or that the damage was occasioned by the failure to stop within a less distance. It is a well-established rule

that travelers upon the street have equal rights there with the street car company, and that each must so use the street as to avoid danger and damage to the other, and that either being negligent in that respect is liable for the damage occasioned. As stated in *Ellis v. Lynn & B. R. Co.*, 160 Mass, 341: "The rights of the driver of a horse and the manager of an electric car under such circumstances are equal. Each must use the street, and each must use it with a reasonable regard for the safety and convenience of the other. The motorman is supposed to know that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles, while most horses are easily taught after a time to pass it without fear. It is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other person in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse, and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. In this way the convenience and safety of everybody can be promoted without serious detriment to anybody."

If it had been alleged and shown that the motorman saw, or by reasonable diligence could have seen, that the horse was greatly frightened, in time to have brought the car to a halt before the accident, and that he failed to do so, that would have established negligence on the part of the company. There is no allegation to that effect in the petition, and the record is entirely barren of any evidence tending to show that the motorman had or could have had knowledge that the horse was unduly frightened until he got opposite, or nearly opposite. That the horse showed signs of nervousness could hardly be observed by the motorman at some distance away, unless it was of such a character as to attract the attention of those at a distance, and of this there is no evidence. A careful examination of the record convinces us that there was no case for

the jury, and that the court was right in directing a verdict.

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 appealed from is

AFFIRMED.

JOHN M. TANNER, APPELLANT, V. GUS HEDGREEN, APPELLEE.

FILED APRIL 18, 1907. No. 14,759.

Intoxicating Liquors: STATUTES: ENFORCEMENT. Where two statutes relating to the same subject are not repugnant, both should be given force and must be complied with by the parties affected thereby.

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

E. W. Simeral, for appellant.

W. J. Connell, contra.

DUFFIE, C.

John M. Tanner, the appellant, is owner and publisher of a daily newspaper published and issued in the city of South Omaha. Gus Hedgreen, the appellee, is a saloonkeeper in South Omaha. He was granted a license to sell liquors in that city from May 1, 1906, to May 1, 1907. He published his notice in the Omaha Evening Bee. Tanner protested against the issue of his license, for the reason that the applicant had not published his notice in a daily newspaper published in the city of South Omaha, and alleging that his paper had been issued and published in said city for 52 consecutive weeks prior to the first of April, 1906, and had a *bona fide* circulation in said city of not less than 200 subscribers, as provided by section

132, ch. 17, laws 1903, known as the charter of cities of less than 40,000 and more than 25,000 inhabitants. The board of fire and police commissioners of the city of South Omaha overruled Tanner's protest, and, upon appeal to the district court, the order of the board was affirmed and the license ordered to issue. From this order the protestant has appealed.

That part of section 132 relating to the publication of applications for liquor licenses is in the following language: "Provided, that the application for a license issued under the provisions of this act, shall have been published for two weeks in a daily newspaper, that has been issued in said city for 52 consecutive weeks prior to the publication of said notice and has a *bona fide* circulation of not less than 200 subscribers." This act took effect April 6, 1903, and, appellant insists, is the law governing publication of notices of application for a license to sell intoxicating liquors. By a later act (laws 1903, ch. 57), taking effect April 8, 1903, the legislature amended section 25, ch. 50, Comp. St. 1901, generally known as the "Slocumb Liquor Law," placing the power to issue liquor licenses in the board of fire and police commissioners in cities of the metropolitan class, and in cities of the first class having more than 25,000 and less than 40,000 inhabitants, and said amended section provides: "That in granting licenses or permits such corporate authorities in cities and villages and the board of fire and police commissioners in such other cities shall comply with and be governed by all the provisions of this act in regard to granting of licenses and all the provisions and penalties contained in this act shall be applicable to such licenses and permits, and the persons to whom they are granted." Section 2 of the Slocumb law provides for the publication of the notice of the application for a license for two weeks in a newspaper published in said county having the largest circulation therein, or, if no newspaper is published in said county, by posting written or printed notices of said application in five of the most public places in the town, precinct,

village or city in which the business is to be conducted. Here, then, are two acts of the legislature relating to publishing notice of application for a liquor license, one in a local paper in cities of the first class having more than 25,000 and less than 40,000 inhabitants, and the general law requiring publication of such notice in the paper having the largest circulation in the county. These acts are not repugnant, and the general rule is that, where two acts are not repugnant, both acts shall stand. In such case, there must be an unmistakable intent manifested on the part of the legislature to make the new act a substitute for the old and to contain all the law on the subject. A mere similarity in the provisions of the two statutes is not enough to effect a repeal, even though the similarity may be such as to cause confusion or inconvenience. 23 Am. & Eng. Ency. Law (1st ed.), pp. 483, 484, and cases cited. Our conclusion therefore is that in cities of the first class, containing more than 25,000 and less than 40,000 inhabitants, the notice must be published in the paper provided by section 132, as well as in the paper having the greatest circulation in the county. This gives effect to both acts, and, there being no repugnancy between them, we think that both should be enforced.

We recommend a reversal of the judgment and remanding the cause for further proceedings not inconsistent with this opinion.

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 for further proceedings in accordance with the foregoing opinion.

REVERSED.

HENRY E. FREDRICKSON, APPELLEE, V. LOCOMOBILE COMPANY OF AMERICA, APPELLANT.

FILED APRIL 18, 1907. No. 14,781.

Principal and Agent: CONTRACT: CONSTRUCTION. Where one party requests another to perform valuable services in effecting the sale of an article, agreeing "to protect" him if such sale is made, and the influence and solicitations of the party so engaged are the efficient cause in effecting the sale, such contract should be construed in the light of the surrounding circumstances.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

R. S. Horton and *B. D. Webber,* for appellant.

Fawcett & Abbott, contra.

DUFFIE, C.

Fredrickson, the appellee, is a dealer in automobiles, located at Omaha, Nebraska. During the fall of 1903 and the succeeding winter, negotiations were pending between him and one Bradford for the sale of a machine. During the negotiations Bradford expressed his preference for a locomobile manufactured by the appellant. Thereupon Fredrickson entered into correspondence with the locomobile company and applied for an agency for the sale of their machine. His letter was referred to their western agency at Chicago, in charge of one Sykes. Sykes, under date of October 8, 1903, wrote Fredrickson that "at the present time we are not in shape to talk agency with any one on our gasoline line. * * * In the meantime any orders which you can send us will receive prompt attention, and we will be only too glad to protect you in case you place any orders with us. We will close no agency in your city at the present time, and will be glad to take up the matter with you a little later, when we know just what we can do." Under date of October 12, Fredrickson wrote

Sykes that he had a prospective purchaser, and in reply, under date of October 14, Sykes again wrote Fredrickson to work up any business that he could, and in the event of his making any sales he would be glad to protect him. In the same letter he indicated his intention of visiting Omaha about the first of the year. October 17, Fredrickson wrote the Chicago agency asking Sykes to visit Omaha as soon as possible, and stating that they might be able to close a trade with a prosective buyer. Sykes called on Fredrickson in Omaha about October 24, on which occasion Bradford was called in, and a general talk took place between the parties relating to his purchase of a machine. Fredrickson testified that after Bradford left his office Sykes told him "to continue on Bradford," and if he bought a locomobile he should have the full agent's commission. Sykes, who was a witness for the defendant below, referred to this same conversation in the following language: "I told Mr. Fredrickson we would—he wanted to work up some business here with the locomobile until he had an agency placed here; that he could work up such customers as he desired to, and in the event of his closing any sales or sending us any orders we would protect him in it up to such time as we placed a local agency here in Omaha." Finally, Fredrickson, thinking that he had about concluded a sale to Bradford, ordered a machine and advanced $100 toward the purchase price. The machine, however, was not delivered, and sometime in April, 1904, while Bradford was visiting the manufactory at Bridgeport, Connecticut, he concluded to make the purchase, and the parties in charge at that place made out an order which they directed him to place with the Powell Company at Omaha, which had, in the meantime, been appointed agent for the company at that place. This action was brought by Fredrickson to recover the amount of his commission, under the claim that it was through his efforts that the machine was sold. The evidence is uncontradicted that the commission or discount allowed an agent on a sale of these machines is 20 per cent. of the

list price, and the order for this machine states the list price to be $3,700. The jury returned a verdict for the plaintiff and appellee in the sum of $740, and the defendant has appealed from the judgment rendered thereon.

The evidence discloses that an agency, within the meaning of the automobile trade, consists in giving to the agent the exclusive right to purchase for cash from the manufacturer machines at a discount from the list price, and to retail them to customers within specified territory at the full list price. In other words, no commission, as such, is paid to an agent on the sale of a machine, but he has the exclusive right to certain territory, and purchases on his own account for cash at a discount of 20 per cent. from the retail or list price. It is insisted by the appellant that Fredrickson, in his dealings with the company, occupied the position of any other merchant; that the only right which he could claim was that of purchasing a machine of the company at the regular discount rate, and then to sell it to his customer for such advance over the price paid as might be agreed upon between them; that his business was to sell automobiles for the profit he could make, and that he was not an employee of the locomobile company, and had no expectation, during the time he was dealing with Bradford, of receiving any compensation for the time consumed. There is no substantial disagreement between Fredrickson and Sykes as to the conversation had between them in their interview at Omaha. Fredrickson says that Sykes told him "to continue on Bradford," and if he bought a locomobile he should have the full agent's commission, and Sykes admits that in that conversation he agreed "to protect" Fredrickson on any sales that he made. Under these circumstances it was for the jury to construe the language used in the light of the conditions surrounding the transaction. The jury, by their verdict, found not only that the sale to Bradford was brought about through the efforts of Fredrickson, but also that an agreement existed that he was to receive a commission therefor equal to the discount allowed regularly appointed agents.

We think these findings are based upon sufficient evidence, and we therefore recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is

AFFIRMED.

MAT SIREN V. STATE OF NEBRASKA.

FILED APRIL 18, 1907. No. 14,787.

1. **Statutes:** CONSTRUCTION. The court will not read into a statute exceptions not made by the legislature.
2. **Criminal Law:** PENALTY. It is no objection to a criminal statute that it does not provide the minimum penalty which may be imposed for its violation.

ERROR to the district court for Hamilton county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

John C. Stevens, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

DUFFIE, C.

The plaintiff in error, a licensed saloon-keeper in the village of Giltner, Hamilton county, was informed against for unlawfully keeping the windows of his saloon obstructed by screens, window curtains, blinds, etc., on the 29th day of July, 1905, and at other and different times. On the trial he was convicted and sentenced to pay a fine of $25 and the costs of prosecution. We do not care to spend time in examining the errors assigned by the plaintiff in error. It clearly appears from his own evidence that he was a licensed saloon-keeper; that the front win-

dows of his saloon were provided with window shades which were drawn down so as to obstruct a view through the windows into his saloon in the forenoon of each day while the sun was shining. His saloon fronted to the east, and his excuse is that his cigar case is in the front part of the saloon and that it was necessary to pull the shades in order to protect his goods. This is no legal excuse. We cannot read into the statute an exception not made by the legislature. The judgment was right according to the defendant's own showing. The fact that the statute does not provide a minimum punishment for the offense is not an objection.

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 appealed from is

AFFIRMED.

GEORGE STELLING, APPELLEE, V. WILLIAM N. PEDDICORD ET AL., APPELLEES; MCBRAYER BROTHERS, APPELLANTS.

FILED APRIL 18, 1907. No. 14,654.

1. **Appearance: JURISDICTION: WAIVER.** If a defendant claims that the court has acquired no jurisdiction over his person by reason of defects or irregularities in the process or service thereof, his course is by special appearance and objections to the jurisdiction; and, if he goes further and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process or service thereof, the defects are waived. *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801.

2. **Want of Jurisdiction: ANSWER.** But where for some reason the defendant is privileged from suit in the county where, or at the time when he is sued, he may set up want of jurisdiction of his person by answer, along with any other defenses he may have, without first making a special appearance or preliminary objections.

3. **Process: PARTNERSHIP: SERVICE.** Where the members of a copartnership reside in another state and are not within this state, service of summons upon the firm, as a firm, cannot be made in a county where it has no usual place of doing business.

APPEAL from the district court for Franklin county: ED L. ADAMS, JUDGE. *Reversed.*

Hairgrove & Stubbs and *F. H. Stubbs,* for appellants.

G. M. Caster, contra.

ALBERT, C.

George Stelling brought an action against McBrayer Brothers, a copartnership, whose members reside and whose principal place of business is in another state, to recover the price paid for a horse, on the ground of a failure of warranty. There were other parties defendant, but as they are now out of the case we shall use the word defendant to designate the copartnership. The return of the sheriff shows that the summons was served on the partnership "by delivering to W. H. Chaney, their authorized agent in buying horses and mules, at W. H. Chaney's place of residence in Franklin county, Nebraska, a true and certified copy of the summons." The defendant entered a special appearance, objecting to the jurisdiction of the court on two grounds: (1) That the return of the sheriff did not show that service of summons was made upon the clerk or general agent of the defendant at its usual place of doing business in said county; (2) that the defendant is a nonresident of the state of Nebraska, and had no office or place of business in said county. A hearing was had on the special appearance, and a large amount of testimony was taken on the question whether the defendant had an agent and place of doing business in Franklin county. The special appearance was overruled, whereupon the defendant filed an answer which, in addition to a plea to the merits, included a plea to the jurisdiction of the court, based on the objections urged in its special appearance.

A trial was had, wherein not only the issues raised by the plea to the merits, but those raised by the plea to the jurisdiction of the court, were litigated. A general verdict was returned in favor of the plaintiff, and from a judgment rendered thereon the defendant appeals.

The first objection to the jurisdiction of the court relates merely to a defect or irregularity in the service of the summons, and was properly brought to the attention of the court by the defendant's special appearance. *Baker v. Union Stock Yards Nat. Bank,* 63 Neb. 801. But if the defendant intended to rely on that objection it should have got out of court when the special appearance was overruled, because by filing an answer and asking an adjudication on the merits it waived the defect in the service shown by the return of the sheriff. *Baker v. Union Stock Yards Nat. Bank, supra.* Nothing was gained by including this objection with a plea to the merits, because it is well settled that, where an objection of this kind is brought to the attention of the court by special appearance, and the defendant goes further and enters a general appearance, or invokes the powers of the court for any other purpose, such defects in the service are waived. *Baker v. Union Stock Yards Nat. Bank, supra.* This rule is reasonable. The only object of the service of original process is to give the defendant an opportunity to make a defense, and after a defendant has appeared in a cause, and made his defense on the merits, it would be absurd to withhold an adjudication on the ground that the notice giving him an opportunity to make his defense, and of which he had availed himself, had been irregularly served.

But the second objection is of a different character. It goes more to the venue. It amounts to a claim of immunity from the lawful service of summons in the county where the action was brought. In such case, where the ground of the objection does not appear on the face of the record, the proper practice is to plead to the jurisdiction, and this plea may be joined with a plea to the

merits. *Baker v. Union Stock Yards Nat. Bank, supra.* It is not necessary that an objection of this kind should be first urged on special appearance. It would follow, then, that, while the first objection was waived by defendant's general appearance and plea to the merits, the second was available as the basis of a plea to the jurisdiction, and one of the questions now presented is whether the evidence is sufficient to sustain a finding against the defendant on the issues tendered by that plea.

From the evidence that went to the jury on that issue it conclusively appears that when this suit was instituted the defendant's principal place of business was in the state of Missouri, and that its members resided in that state, and were not in Franklin county. The evidence allows the inference that Chaney, the alleged agent upon whom service was made according to the officer's return, was acting as the defendant's agent in buying horses and mules and shipping them to the defendant in Missouri. His agency, however, was in the nature of a roving commission. He bought whenever he could, and shipped from the most convenient point. He was in charge of no office or place of business owned or kept by the defendant, nor did the defendant own or maintain any place of business in the county in which the venue was laid. In short, there was no place in that county that could be called the defendant's "usual place of doing business." Section 24 of the code provides that a copartnership may sue and be sued by the firm name. Section 25 provides that process against any such company or firm shall be served by a copy left at their usual place of doing business within the county, with one of the members of such company or firm, or with a clerk or general agent thereof. In this case, as both members of the firm were outside the state, service could only be made by a copy left with a clerk or general agent of the defendant at its "usual place of doing business within the county," and, as there was no such place, it is clear that service of summons could not be made. The defendant, then, was privileged from suit in that

county because it was out of reach of the process of the court. Its plea to the jurisdiction is not a mere technical objection, but is in the nature of a protest against being dragged into a foreign jurisdiction to defend against a suit, and should have been sustained. *Baker v. Union Stock Yards Nat. Bank, supra,* and citations.

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.

PETER JOHN POELS ET AL., APPELLANTS, V. JOSEPH BROWN ET AL., APPELLEES.

FILED APRIL 18, 1907. No. 14,771.

1. **Evidence:** DAMAGES. The amount of damages awarded by a jury must be sustained by ascertained and established facts, or it will be set aside.

2. **Factors:** SALES. A factor is not required to depart from his usual and established custom in the sale of goods consigned to him, and especially is this so when he has made large advances on the goods and a different course might subject him to loss.

APPEAL from the district court for Seward county: ARTHUR J. EVANS, JUDGE. *Reversed.*

McGilton & Gaines and *M. D. Carey,* for appellants.

Norval Bros., contra.

ALBERT, C.

In June, 1903, the appellees shipped to London 250 head of fat cattle. The cattle were consigned to the ap-

pellants, a commission firm engaged in selling cattle and other animals for slaughter at Deptford, which, as we understand from the evidence, is one of the principal cattle markets supplying meat for the city of London. Through arrangements with plaintiff's agent in New York, appellants advanced £17 a head upon the cattle before shipment. On the arrival of the cattle at the Deptford market they were sold by appellants, the proceeds realized being insufficient to pay the advance made upon the cattle prior to their shipment, the deficiency being £165 10d. Appellee accompanied the shipment, and after the sale of the cattle, being apparently without sufficient funds to pay the expense of his return trip, the sum of £25 was loaned him by appellants, who shortly thereafter drew upon him for the money so loaned, together with the £165 10d., the amount of the deficiency arising on a sale of the cattle above referred to. Appellees failing to pay the draft, this action was commenced by the appellants in the district court for Seward county to recover the amount. The answer admits that the appellants advanced to Brown £25 as a loan, and they admit that the amount realized from a sale of the cattle was £165 10d. less than the advance made thereon. Their answer contains a counterclaim in which it is alleged that prior to the sale of the cattle they instructed the appellants to sell them by dressed weight; that the plaintiffs disregarded these instructions and sold on the hoof; that by reason thereof defendants were damaged to the amount of about $5,000, for which sum judgment was prayed. A trial resulted in a verdict for the defendants and appellees for $2,346.

Appellants contend that this verdict is not supported by the evidence, and they urge in support of this contention that there was no sufficient proof offered by the appellees to show the measure of damages. They further urge that the appellants were live stock factors, that being their exclusive business; that they had no means for slaughtering cattle, and that the market at Deptford was devoted exclusively to the sale of live stock and was not a dressed

meat market. Relating to the measure of damages, the evidence shows that the cattle were weighed at Seward just previous to their shipment. Their total live weight is given. Evidence was further produced to show that cattle in their condition would, after being slaughtered, yield about 60 per cent. of their live weight in dressed beef; that what is known as the "offal," consisting of the head, tongue, etc., was worth $15 a head; that prior to the sale appellants had stated to the appellees that dressed beef was worth from 11½ to 12 cents a pound in London. It is further shown that a crippled steer belonging to one Wilson, who accompanied the Browns with something over 200 head of his own cattle, and which were sold by appellants at the same time, was slaughtered at Deptford, and that appellants accounted to Wilson for the proceeds in the sum of £18 7s. 2d., being as much as the highest price brought by any of the appellees' cattle, and nearly $10 more a head than some of them were sold for. It is further claimed that all of the animals sold were of a better grade and weighed more than the crippled steer. It is also shown that just prior to the sale, and while the cattle were tied to the stalls in the market, Mr. Poels, who conducted the sale, stated that they were a fine lot; that he pointed out certain bunches or strings of the animals saying, "this lot will bring £22," another £19, and a third £18 a head; and on the showing of these facts it is attempted to sustain a verdict.

As to the proof of damages, we cannot do better than to quote from the opinion in *Poels v. Wilson,* 77 Neb. 73, which might be called a companion case with the one we are considering. As in that case, there is here no claim of fraud: "Nowhere does it appear what would have been the cost of slaughtering and dressing the cattle. There is considerable evidence tending to show the relative value of the isolated crippled steer and the other cattle, and to the effect generally that the isolated steer was worth $25 less than the others. Plaintiff accounted to defendant for

the crippled steer in the sum of $89.16. Defendant's evidence shows that this particular steer was inferior to at least 140 head of the cattle sold on foot. In the account returned by plaintiff to defendant, no charge was made for slaughtering and marketing this steer, and defendant contends that the sum received for this one animal was a sufficient guide for the jury in measuring the damages. Such a conclusion, however, can be drawn only by an unreasonable inference. While it appears from the account rendered to the defendant that $89.16 was the net proceeds of the crippled steer, yet, when we consider that that was only a small part of a very large transaction between the parties wherein numerous items of expense were charged, we cannot conclude that all of the 223 head of cattle could have been disposed of and a return made to the defendant herein at that rate." All of the objections made in the above quotation from the opinion of Mr. Commissioner EPPERSON appear in the case we are now considering.

It further appears from the undisputed evidence of appellants' witnesses that appellants had no facilities for slaughtering cattle; that, while there were slaughter pens at the Deptford market, they were rented by butchers who resorted to that market for the purpose of purchasing cattle on the hoof, slaughtering them at pens and taking the dressed beef to their own market place. George Philcox testified that he was superintendent of the foreign cattle market at Deptford; that he had occupied that position for 33 years and ever since the formation of the market. He says the market was opened for public use in 1871 for the sale and slaughter of live cattle, sheep, etc; that "there is no dead market there. The animals are sold alive to wholesale butchers who kill them in slaughter houses which they rent from the corporation, and the carcasses are taken pricipally to the London Central market at Smithfield and the Aldgate market, also in the city of London, or to the shops of the buyers. Unless special instructions are given to the contrary by the consignors,

animals are, and always have been, sold alive by the consignee. The purchasers of these live animals have to slaughter them within ten days, exclusive of the day of landing, under the order of the board of agriculture." Other witnesses testified that the market was exclusively for the sale of live animals, except in the case of crippled and diseased animals which were killed under the direction of the board of agriculture, and one purchaser of a portion of the animals in question testified that the practice at the Deptford market was to sell the animals alive. "If we found Mr. Poels killing bullocks, we should not go near him. We would have boycotted him."

There is no competent evidence in the record that Poels & Company, the appellants, conducted the business of selling slaughtered animals. The testimony of those having personal knowledge of the fact is that their exclusive business was to sell on the hoof, and, if this be so, it would be unreasonable to ask them to sell animals as dressed meat as it would to demand of a grain broker that he should procure the grain consigned to him to be ground and sold as flour. There is some evidence relating to the manner of the sale tending to support the theory that Mr. Poels, the salesman, was careful to keep from the appellees the price bid for the animals until after the sale was concluded; but there was no claim made that they were sold for less than the market price. If the sale was not conducted in the usual manner, if there was a market for dressed beef at Deptford, if a part of the business of Poels & Company was to sell animals in the manner requested by the Browns, that proof can be produced and ought to be brought before the court. It cannot be expected, and the law does not demand, that Poels & Company should depart from their usual and customary method of conducting their business unless some good reason be shown therefor, and especially is this so when advances to the value of the cattle have been made. The law presumes that these cattle were consigned to Poels & Company to be sold in the usual manner in which their

business was conducted. If that method was not satisfactory to the appellees they should have consigned to other parties who conducted the business along lines conforming to their wishes. If, as testified by defendants' witnesses, the cattle would have brought less as dressed beef than as live cattle, the defendants had their own interest to protect and might exercise their discretion in making the sale to secure themselves against loss on account of the advancement made. *Feild v. Farrington*, 10 Wall. (U. S.) 141; *Brown v. McGran*, 14 Pet. (U. S.) 479.

We do not think that the verdict of the jury can be supported from the evidence in the record, and we recommend a reversal of the judgment and remanding the cause for another trial.

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 another trial.

REVERSED.

JOSHUA PALMER, APPELLANT, V. ALEXANDER MCFARLANE, APPELLEE.

FILED APRIL 18, 1907. No. 14,773.

1. **Appeal:** PRESUMPTIONS. Where a cause is tried to the court without a jury, it will be presumed that the court considered only competent evidence.
2. ———: HARMLESS ERROR. In such case, where there is sufficient competent evidence to sustain the finding, the fact that incompetent evidence was received will not constitute reversible error.
3. **Evidence:** SUFFICIENCY. In this case, the competent evidence adduced is *held* amply sufficient to sustain the finding of the trial court.

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

F. I. Foss, R. D. Brown and *Joshua Palmer,* for appellant.

Roe & Maggi, A. S. Sands and *S. J. Coonradt, contra.*

ALBERT, C.

As a defense to an action by the indorsee against one of the makers of a promissory note, the defendant charged, in effect, that the note was given for a horse sold and delivered by the payee to the defendant's comaker, that the horse had been stolen, was not the property of the payee, and after the execution and delivery of the note had been claimed and taken from the possession of the purchaser by the real owner, and consequently that the note was without consideration and illegal in its inception. The reply is a general denial. A trial to the court resulted in a general finding and judgment for the defendant. The plaintiff appeals.

The principal question presented by the appeal is whether there is sufficient competent evidence to sustain the finding of the trial court. It conclusively appears that on the 5th day of April, 1902, one calling himself C. W. Mitchell, the payee of the note, was in the city of Friend with seven horses, claiming to have shipped them from Bird, Kansas. He offered the horses for sale at public auction. Previous to the opening of the sale, he had arranged with the local bank to pass upon and discount the notes taken at the sale. It is a fair inference from the evidence that he had also arranged that such notes should be made out and executed at the bank, and left there for him pending the sale. The defendant's comaker bought one of the horses and went to the bank, where the note in suit for the price of the horse was made out. He signed the note, procured the signature of the defendant thereto as surety, left it with the bank and took possession of the horse he had bought. A short time afterwards, and before the close of the sale, a constable of the city received a telegram from Bird, Kansas, as follows:

"Stop sale of seven head of horses shipped there last week and hold party. Horses are stolen. Will be there tomorrow. (Signed) Jas. A. Burnett." As a result of this telegram, the sale was stopped, leaving five of the seven horses unsold. Within a short time after the receipt of this telegram it was shown to the plaintiff, who is an attorney at law, and was consulted by Mitchell and remained in consultation with him until late in the evening of that day. The constable, having taken advice, declined to arrest Mitchell on the telegram, but wired the sender thereof for authority from some officer to make the arrest. The authority was not forthcoming, and late in the evening the plaintiff and Mitchell called on one of the officers of the bank, which had refused to discount the paper, and made a demand for the note, which was surrendered to them. They then called on the defendant, who showed a disposition to discount the note himself. According to the plaintiff's own evidence, he requested a third party to advise the defendant against discounting the note, in view of the circumstances under which it was taken, and the defendant refused to take it up. The note was then indorsed and transferred to the plaintiff. On the following day a party claiming to be the owner of the horse arrived at Friend from Kansas, and subsequently recovered possession of the horse in a replevin suit instituted against the purchaser from Mitchell. His testimony was taken at the trial in this suit, and shows that the horse had been stolen from him. Mitchell was afterwards arrested but broke jail and escaped. On this state of the record it is hardly necessary to add that the evidence is amply sufficient to sustain a finding that the plaintiff is not a *bona fide* holder. That the horse was stolen is conclusively established. Before taking the note the plaintiff was put in possession of facts which, to say the least, would have put a man of ordinary prudence upon inquiry. That he considered the note of doubtful validity is shown by the fact that he advised the defendant himself against discounting it.

It is urged, however, that the defendant is estopped to interpose that defense, because the note was delivered to the payee by the bank after facts sufficient to put all parties upon inquiry had become known. There are two answers to this: The first is that no estoppel is pleaded; the second is that it is a fair inference from the evidence that the bank acted, not as an agent of the makers of the note, but as the agent of the payee. Hence, the delivery of the note to the bank, which was before the makers had been apprised of any fact charging them with notice that the horse had been stolen, was a delivery to the payee. The delivery of the note, therefore, dates from its delivery to the bank, and not from its delivery by the bank to the payee.

Several assignments are based on the reception of what is claimed to have been incompetent evidence. The case was tried to the court without a jury. It will be presumed that the court considered only competent evidence. *Chicago, B. & Q. R. Co. v. First Nat. Bank,* 58 Neb. 548, 59 Neb. 348; *Schmelling v. State,* 57 Neb. 562. As there is an abundance of competent evidence to sustain the finding of the trial court, the admission of incompetent evidence, if any such was received, is not reversible error.

It is recommended that the judgment 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.

EDWARD E. GOOD ET AL., APPELLEES, V. THOMAS BONACUM, APPELLANT.

FILED APRIL 18, 1907. No. 14,786.

1. **Continuance:** SHOWING. Where a case is set down for trial on a day certain, an application for a continuance over the term, supported by an affidavit showing the inability of the defendant to be in attendance on that day, but failing to show that he could not be in attendance at some subsequent day of the same term, is properly overruled.

2. ———: ———. In such case, where the necessity for the continuance is placed on the ground that the defendant is a material witness in his own behalf as to the facts relied upon as a defense, the affidavit is defective if it fails to show that he would testify to such facts if present at the trial.

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

C. E. Holland, for appellant.

J. J. Thomas, M. D. Cary, R. S. Norval and *Simpson & Good, contra.*

ALBERT, C.

This is an appeal from a judgment in favor of the plaintiffs in an action on a *quantum meruit* for services rendered. The answer alleges that the services were rendered in pursuance to an oral contract, whereby the compensation therefor was fixed at a specific amount, namely $25, and that a tender of that amount had been made to the plaintiffs for the said services. The reply is a general denial. The case was set down for the first jury trial at the January term, 1906, of the district court, and under such assignment stood for trial on the 5th day of February of that year. On the day set for the trial of the case, a motion for a continuance over the term was filed on behalf of the defendant on the ground that he was a material witness in his own behalf, and it was impossible

for him to attend the trial "at this (that) time." The motion was supported by the affidavit of his attorney, which shows that on the day preceding that set for the trial of the case he received a letter from the defendant, expressing regret that he would be unable to attend court "at this time," for the reason that he had been called to Concordia, Kansas, by telegram, on important business connected with the diocese of which he is bishop. The telegram was attached to the affidavit, and is as follows: "Concordia, Kansas, Feb. 3, 1906. Reverend Bishop Bonacum, Lincoln, Neb. I wish to see you next Monday without fail. Bishop Cunningham." The affidavit also refers to the nature of the defense interposed to the action, and avers that the oral contract relied upon by the defendant, and the terms and conditions thereof, were known only to the plaintiffs and the defendant, and that the defendant was the only witness in his own behalf by whom the same could be proved. The court overruled the motion, but to its order in that behalf attached the proviso that, in case the defendant should within three days from that date make and file a sufficient showing for a continuance, then any verdict that might be returned in the meantime should be set aside, and a new trial awarded. A trial to a jury was then had, which resulted in a verdict in favor of the plaintiffs for $264.88. On the 6th day of February, 1906, the defendant filed a motion for a new trial, the ground relied upon being that the court had erred in overruling his motion for a continuance. This motion was supported by an affidavit of the defendant, wherein reference is made to the telegram hereinbefore mentioned. The affidavit also avers, in effect, that the defendant went to Concordia, Kansas, in response to said telegram on important business, in which his diocese was interested, and which could not with safety be postponed. The affidavit also refers to the nature of the defense interposed to the suit that the defendant was the "principal and material witness" in his own behalf in said cause, and that without his testimony he could not obtain justice.

This motion was also overruled. The defendant now contends that the district court erred in overruling these two motions. Considerable stress is laid on the fact that the case was assigned for trial out of its order, but it appears from the record that this was done before any of the jury cases had been set for trial. It does not appear that any objection was made to the order of assignment when it was made. It would seem from the record that all parties had acquiesced in the order and expected to go to trial on the 5th day of February, 1907, until the defendant received a telegram calling him to Concordia, Kansas. For these reasons, to say nothing of others which readily suggest themselves, the defendant is not in a position to complain that his case was called for trial out of the regular order.

The motion for a continuance was properly overruled. It was for a continuance over the term. While either affidavit shows a state of facts which would have warranted the court postponing the trial to a later day of the term, neither of them shows a state of facts which would have warranted the court in continuing the case over the term, because neither shows that there was anything which would have prevented the defendant from being in attendance at a later day. In his own letter, which is incorporated into the affidavit filed in support of his motion for a continuance, he does not say that he cannot attend at any time during the term, but merely that he is unable to attend "at this time." The affidavits are defective at least in one respect. While they both refer to the express oral contract relied upon as a defense to the action, and both aver that the defendant is the only witness in his own behalf, except the plaintiffs, by whom the said contract could be proved, neither of them contain any averment to the effect that, if present in court, the defendant would testify to the facts necessary to establish such contract. In fact, such averment seems to have been studiously omitted. As the presence of the defendant, according to these affidavits, was required only for the

purpose of establishing such oral contract, an affidavit for a continuance on the ground that he could not be present at the trial should have shown that, if present, he would testify that such contract had been actually made, and that the services were rendered in pursuance of it.

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.

SHARPLES COMPANY, APPELLANT, V. HARDING CREAMERY COMPANY ET AL., APPELLEES.

FILED APRIL 18, 1907. No. 14,555.

1. **Corporations:** TRANSFER OF ASSETS: LIABILITY. Where an insolvent corporation, in fraud of its creditors, transfers its assets to a new corporation, not the successor of the old, without consideration other than the issuance of stock to the stockholders of the old corporation, the corporation receiving such assets is liable to the creditors of the old corporation only to the extent of the value of the property received.

2. ———: ———: ACTION. In such case, an action at law will not lie against the receiving corporation.

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

Jefferis & Howell, for appellant.

Brome & Burnett, contra.

JACKSON, C.

The plaintiff sued the Harding Creamery Company and the appellee, the Nebraska-Iowa Creamery Company,

upon two promissory notes executed by the Harding Creamery Company. Issues were joined and a jury impaneled, when the Nebraska-Iowa Creamery Company demurred to the petition *ore tenus,* which was sustained, and thereupon the court directed a verdict for the plaintiff against the Harding Creamery Company, and in favor of the Nebraska-Iowa Creamery Company. Judgment was entered on the verdict. The plaintiff appeals.

The questions presented by the appeal are all involved in the action of the trial court in sustaining the demurrer of the Nebraska-Iowa Creamery Company to the plaintiff's petition. The allegations of the petition are, in substance: That the Harding Creamery Company made, executed and delivered to the plaintiff two certain promissory notes, which were unpaid. At the time the indebtedness was contracted and the notes given, Robert A. Stewart was a stockholder, director and president of the Harding company; that he owned and controlled more than one-half of the stock of that company; that he knew of the indebtedness to the plaintiff; that when the notes became due the Harding company was insolvent; that it owned certain real estate in the city of Norfolk of the value of $20,000; that the property was equipped with machinery and appliances for conducting a creamery business, and was occupied and used for that purpose by the Harding company. That Stewart, being president of the company and owning a controlling interest, became a promoter and participant in the formation of the Nebraska-Iowa Creamery Company for the purpose of taking and continuing the property, both real and personal, assets and business of the Harding company, and other similar corporations and copartnerships located in Nebraska and Iowa, thereafter conducting the business previously conducted by the Harding company and other companies, and with the further purpose of thereby hindering and delaying the creditors of the Harding company, including the plaintiff, in the collection of their demands against the Harding company; that, pursuant to the plan, the Harding company

conveyed to Stewart its property, including the real estate, for a purported consideration of $10,500; that in fact no consideration was paid, and on the same day Stewart conveyed the property to the Nebraska-Iowa company for the purported consideration of $10,500, but that in fact no consideration was paid for the transfer, except that the Nebraska-Iowa company issued to Stewart its stock to the amount of $35,000; that the Harding company thereupon ceased doing business, and Stewart became an officer and director in the Nebraska-Iowa company, which continued in the conduct of the business formerly carried on by the Harding company.

It is urged that the facts stated show the consolidation of several corporations and copartnerships, thereby constituting a new corporation, the successor of the old and liable for its debts, and that the facts stated show a fraud as against the creditors of the Harding company, such as to render the Nebraska-Iowa company liable in an action at law. If the Nebraska-Iowa company is shown by the petition to be a mere successor to the Harding company, then doubtless the plaintiff might maintain an action at law for the collection of the debt due from the Harding company, but we do not think the allegations of the petition sufficient to show that condition. The stockholders are not shown to be the same, in fact none of the stockholders of any of the old corporations or partnerships, other than Stewart, are shown to be stockholders in the new corporation, and we think it clearly apparent from the facts stated in the petition that it is an independent and distinct corporation, and should in no sense be treated as the successor of the Harding company, or the same corporation in fact.

Where a new corporation acquires all of the assets of an old corporation, without other consideration than the issuance of stock to the stockholders of the old corporation, and the new corporation is in fact a mere continuance of the old, it would be liable to the creditors of the old corporation in an action at law; but where, as in this

case, the new corporation is not a mere continuance of the old, and the property has been paid for in full by stock in the new company, although the old corporation is insolvent, the subject matter is one that can only be dealt with in an adequate manner in a court of equity where an accounting should be had of the assets and liabilities of the old corporation, and of the character, identity and value of the property received. *Ewing v. Composite Brake Shoe Co.*, 169 Mass. 72. The record discloses that the plaintiff has already obtained a judgment upon his claim against the old company in this action. It should now proceed in the manner indicated.

The case is to be distinguished from *Douglas Printing Co. v. Over*, 69 Neb. 320. In that case a recovery was permitted in an action at law because it was held that the new corporation was in fact a continuance of the old.

It is recommended 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.

WILLIAM BELCHER ET AL., APPELLEES, V. J. I. CASE THRESHING MACHINE COMPANY, APPELLANT.

FILED APRIL 18, 1907. No. 14,776.

Principal and Agent: COMMISSIONS: APPLICATION OF PAYMENTS. Where an agent receives compensation for services in behalf of his principal in commissions on sales, such commissions to be payable in instalments as notes given for wares are paid by purchasers, the law will, as between the principal and agent, apply payments by the debtor to the satisfaction of the notes in the order of their maturity, and not permit the principal to indorse funds received as partial payments on a series of notes, where the effect is to deprive the agent of his commission.

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

O. A. Abbott and *C. F. Stroman,* for appellant.

Power & Meeker, contra.

JACKSON, C.

The plaintiffs are implement dealers at York. They entered into a written contract with the defendant, by the terms of which they were appointed the defendant's agent for the sale of threshing outfits at an agreed compensation of 10 per cent., except for wind stackers, upon which a commission of $25 each was allowed, and 25 per cent. for castings and repairs. The contract provided that a nonnegotiable certificate, or equivalent instrument, should be issued by the company, representing the commission to accrue upon each instalment or time sale, payable upon full payment in money of the note or instalment represented by such certificate, with its due proportion of interest collected, and less its due proportion of all expenses attending the collecting and allowances made in the discounting or compromising said note or instalment. The agents negotiated a time sale of one of the defendant's engines and separators to H. B. Brown for $2,439, taking notes payable August 15, September 15 and October 15, 1902, August 15 and October 15, 1903, and October 15, 1904. The company issued a commission certificate to the agents for each note. They were all in the same form, one of which is as follows: "Territory No. 19, Racine, Wis., Dec. 4, 1904. There will be due to Belcher & Belcher, agents at York, Neb., twenty-four & 65-100 dollars ($24.65) on surrender of this certificate, any time after full payment in money of note No. 5,850 given by H. B. Brown, for $250, due August 15, 1902, subject to the terms of our contract with said agent in force at the time of the sale of the machinery for which said note was

given, and subject to our right to renew, extend or compromise said note. This certificate is not assignable or transferable, except as permitted by the terms of said agency contract, and any sum becoming due and payable upon this certificate shall be first applied by this company according to the terms of said agency contract (reference to which is especially made for greater certainty) toward the satisfaction of all liabilities of said agent to this company." The commission certificate representing the first note was paid, and thereafter the plaintiffs instituted this action for the recovery of the amount due on the second and third certificates, alleging that the notes representing the instalments for which these certificates were issued had been fully paid. The answer denied payment of the notes, and contains a counterclaim for $49.98, which, it is alleged, was paid to the plaintiffs for the benefit of the defendant, and which the plaintiffs had failed to account for. The trial was to the court, and the plaintiffs had judgment for the amount claimed. The defendant appeals.

It is not disputed but what the purchaser has paid to the defendant more than enough to satisfy the notes represented by the commission certificates in suit, in addition to the payment of the first note, but it appears that, instead of applying these payments on the notes first maturing, the defendant divided the payments by indorsing partial payments on each note given on account of the sale, leaving a small remainder unpaid on the notes involved in this inquiry. The maker of the notes testified, in substance, that as he made the payments he requested a return of his notes, but that the collector told him that for good reasons he had indorsed a portion of the payments on the other notes, and that it would not make any difference to him. The defendant offered to prove by the collector that the maker made no objection to the payments being distributed, as they were, on the several notes. The court, on objection, refused to permit the witness to testify to his conclusions from the conversation, but offered

to permit the witness to testify to what the conversation actually was. We do not regard this dispute of any importance between the company and its agent, while as between the maker and holder of the notes they might agree to a distribution of the payments, or, in the absence of an agreement or express directions by the maker, the holder might apply the payments on any past due paper, a different rule prevails where the rights of third parties intervene. *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 685. A similar question was involved in *Clark v. Gaar, Scott & Co.*, 78 Minn. 492, 81 N. W. 530. In that case, as in this, there was both a contract and commission certificates. The contract provided that the commission should be paid as the notes were paid, but the payments were indorsed on the several notes, leaving no note paid in full. There was no evidence that the maker of the notes gave any directions as to the application of the payments, and it was the contention of the company in that case that no part of the commission was due until one or more of the notes given for the purchase price of the machinery was paid in full. As to this contention the court said: "Whatever may be the rights of the defendant, as between itself and the maker of the notes, as to the application of payments, it was bound, as to the plaintiff, to make an equitable application of them, and not an unreasonable and arbitrary one, in order to defeat the plaintiff's right to commission; otherwise, it might so apply payments that no more than six cents remained unpaid on any note, and still claim that the plaintiff was not entitled to anything. As between the parties hereto, the law will apply the payments to the extinguishment of the notes as they became due, for the reason that such is the natural and equitable application. If the payments be so applied, all of the notes save the last one would be paid in full. Hence, upon the defendant's interpretation of the contract, and even conceding that the certificates were substituted for the original contract, the plaintiff is en-

titled to a commission." The defendant seeks to distinguish that case from the one in hand because the action was there brought on the contract, but the commission certificates refer to the contract for the terms of payment, and the contract is as much involved as the certificates themselves.

Objection is made, however, to the form of the petition in view of the facts already stated, that is, that, while the petition charges the notes to be paid in full, the evidence discloses, as between the maker and holder, that they are not paid in full. The objection is more technical than substantial. As between the parties to this litigation the notes are paid, and the pleading is not open to the objection urged.

As to the defendant's counterclaim, it appears that Brown was indebted to the plaintiffs in the sum of $49.98; that Richard Piper was indebted to Brown in the sum of $61.45; Brown gave the defendant an order on Piper for that sum. Piper arranged with his brother to pay this debt. The brother saw Brown about the payment, and as to what occurred there is a conflict in the evidence between Brown and Piper. Brown claims that he directed Piper to pay to the bank holding his notes for collection the sum of $61.45, to be applied on his indebtedness to the defendant, or if the bank should be closed to pay the money to the plaintiffs for the Case company. Piper testified that Brown directed him to pay the money to Belcher; that he went to Bradshaw, where a son of one of the plaintiffs resided, for the purpose of making payment. It appears that the son called up the elder Belcher at York by phone, ascertained the amount of Brown's indebtedness to the plaintiffs, and received the $49.98 in satisfaction of that indebtedness. The money was transmitted to the plaintiffs, who executed and forwarded to Brown a receipt for that amount to be applied on book account. Brown afterwards settled other business transactions with the plaintiffs on the strength of this payment having been made. Under this state of the record, we do not

feel justified in disturbing the finding of the trial court dismissing the defendant's counterclaim.

On motion of the plaintiffs the court struck out the eighth paragraph of the defendant's answer, which was as follows: "Defendant further alleges that at the time said threshing outfit was sold to said Brown the security taken was wholly insufficient, and said Brown was irresponsible, as said agent well knew, and that the security has since greatly depreciated, and bears no proper relation to the debt covered thereby, and must result in serious loss to both plaintiffs and defendant; that a foreclosure under the terms of said agency contract would have resulted in a loss to said plaintiffs of all commission, and that this defendant is seeking to avoid such action, and to protect the rights of the parties thereto and both of them." The order striking this paragraph from the answer is assigned as error, and it is said in the brief that this paragraph stated a reason for applying payments on other notes, but we fail to see how such a conclusion is justified from the language employed in the paragraph stricken. It does not appear that any loss could possibly result to either party from that application of the funds which we have concluded was the proper one.

We find no reversible error in the record, 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.

MABEL P. OGDEN, APPELLEE, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.*

FILED APRIL 18, 1907. No. 15,008.

1. **Insurance:** RIGHTS OF BENEFICIARIES. Where the members of a fraternal beneficiary association have the right to designate and change the beneficiary, the beneficiary is not a party to the contract and acquires no vested right therein during the life of the assured.

2. **Evidence:** DECLARATIONS AGAINST INTEREST. In an action against such association for the amount of a beneficiary certificate, where the issue is as to the good standing of the assured at the time of his death, the statements of the deceased tending to show his understanding of his standing in the order are admissible in evidence in favor of the association.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Brome & Burnett, for appellant.

Joel W. West, contra.

JACKSON, C.

The plaintiff had judgment for the amount of a beneficiary certificate covering the life of her deceased husband. The society, a fraternal beneficiary association, defended on the ground that at the time of the death of the assured he was not in good standing, having been suspended for nonpayment of assessments. It appears without dispute that in 1902 the deceased had been suspended, but was reinstated under the laws of the association upon a certificate of good health and payment of certain assessments and dues. The controversy over the good standing of the assured arises over a dispute as to whether the reinstatement occurred in the month of December or in November, 1902. If he was in fact rein-

* Rehearing allowed. See opinion, p. 806, *post.*

stated in the month of December, then, by a proper application of the amount paid by him at that time, and subsequent payments, he was in good standing at the time of his death. If the reinstatement occurred in the month of November he was in arrears, and the beneficiary could not recover. The payment made by the deceased at the time of his reinstatement was credited on the books of the local camp on the 25th day of November. The clerk of the camp identified a statement of the amount required of the insured to secure his reinstatement, which he says was given to the insured by his authority. It is headed "December, 1902. Reminder to pay within the month, Sovereign Jurisdiction, Woodmen of the World. Assessment No. 147. To Chas. Ogden: You are hereby reminded that there is due on the first day of December, 1902, and payable to the clerk of your camp, assessment No. 147, emergency fund, dues and Sovereign Camp and camp dues, as stated below, which must be paid on or before January 1, 1903." He testified that the reminder was on a regular form provided by the Sovereign Camp, and was sent out on the 1st of the month, or soon after the 1st of the month, during which payment would be required, and that the reminder was probably sent after December 1. The contention of the society that the payment and reinstatement occurred in November is supported by the health certificate dated November 25. The defendant undertook to supplement this evidence by an offer to prove by the assistant in the camp clerk's office that in the month of January, 1904, a few days prior to the death of the insured, he called at his office and advised him that he had become suspended on the 1st of January for the nonpayment of the December assessment, and informed him of the amount necessary for him to pay to reinstate; that the insured told him at that time he did not have the money to make the payment, and thought possibly he would drop the insurance. This offer, on objection, was denied by the trial court, and is assigned as error on appeal.

In the rejection of this evidence we think the court

erred. We do not overlook the rule that in ordinary life insurance, where a vested interest passes to the beneficiary and the assured ceases to be a party in interest, it is generally held that the admissions or statements of the assured are not admissible as against the beneficiary; but where, as in this case, the contract is between the society and a member, and where the naming of the beneficiary is always under the control of the assured up to the time of his death, a contrary rule prevails. *Van Frank v. United States M. B. Ass'n*, 158 Ill. 560; *Hansen v. Supreme Lodge*, 140 Ill. 301; *Life Association v. Winn*, 96 Tenn. 224. The facts which the defendant sought to prove were important as tending to show the understanding of the deceased as to his standing in the order.

For the error of the trial court in rejecting the evidence offered, it is recommended that the judgment be reversed and the cause remanded for further proceedings.

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.

REVERSED.

The following opinion on rehearing was filed October 16, 1907. *Former judgment of reversal adhered to:*

1. **Trial:** QUESTION FOR JURY. Where the facts are disputed, it is solely the province of the jury to determine the same; and, whether the facts be disputed or undisputed, if different minds might honestly draw different conclusions from them, the case is properly left to the jury.

2. **Evidence:** STATEMENTS: RELEVANCY. A statement made by a party or his privy, suggesting any inference as to any fact in issue, or relevant fact unfavorable to the conclusion contended for by such party, is relevant, and should be permitted to go to the jury.

3. ———: CUMULATIVE EVIDENCE. Testimony tending to establish a relevant fact may not be excluded as cumulative because similar, but independent, facts are already in evidence.

CALKINS, C.

The former opinion in this case is reported *ante*, p. 804. It contains a sufficient statement of the facts, and will be referred to without recapitulating them here. The former decision reversed the judgment of the district court for error in excluding testimony offered as to the admission made by the assured shortly before his death. A rehearing having been ordered, the case has again been argued and submitted. Upon the rehearing the defendant very earnestly renews its contention that the trial court erred in refusing to direct a verdict for the defendant upon the ground that the evidence received at the trial was such that the court should have determined as a matter of law that the assured was suspended for the nonpayment of the December assessment at the time of his death, and consequently that no recovery could be had upon the certificate in suit, and complains that this question was not discussed nor determined in the original opinion. The plaintiff now concedes the correctness of the opinion in so far as it determines that admissions which would be relevant against the personal representative of the assured are admissible against the beneficiary, where the naming of the beneficiary is under the control of the assured up to the time of his death, but contends that the testimony offered by the defendant, and excluded upon the plaintiff's objection, does not suggest any inference as to any fact in issue inconsistent with the claim of the plaintiff.

1. Where the facts are disputed, it is solely the province of the jury to determine the same: And whether the facts be disputed or undisputed, if different minds might honestly draw different conclusions from them, the case is properly left to the jury. *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332; *Rosewater v. Hoffman*, 24 Neb. 222; *Habig*

& Spiler v. Layne, 38 Neb. 743; *Brownell & Co. v. Fuller,* 60 Neb. 558. It is conceded by both parties that the sole controversy in this case is whether the payment of $12.50 by the assured for reinstatement was made in November or in December, 1902. We think it fair to say that the testimony of Mr. Crawford and the physician's certificate would have been sufficient to establish the fact that the payment was made on the 25th day of November, if there had been no other or further evidence. We think it equally fair to say that, if there had been no other testimony upon this question than the reminder dated December 1, 1902, and found in the effects of the assured, that paper would have been sufficient to establish the fact that this payment was not made until after the 1st day of December, 1902. The reminder made by the clerk of the camp is inconsistent with the dates in his books, upon which his testimony was based, and he does not attempt to explain or reconcile the discrepancy. It is suggested by the counsel for the defendant that this reminder might have been made in November, at the time of the payment, as a convenient method of making a statement of the amount necessary to reinstate. It has also been suggested that the payment might have been made in December, and entered upon the books of the clerk of the camp under the date of November 25 in order to conform to the date of the physician's certificate. But there is no proof to support either of these theories. They are merely conjecture. We have already seen that where contradictions must be reconciled, or where conflicting inferences may be drawn from facts proved, this duty devolves upon the jury, and not upon the court, and it follows that the court below properly submitted the question as to the date of this payment to the jury for its determination.

2. Whether the court erred in the rejection of the offer to prove the admission of the assured, made a few days before his death, was at the first hearing argued, and by the court determined, as a question of whether the admis-

sions of the assured were relevant as against the beneficiary. It is not now contended by the plaintiff that the statements of the assured should have been excluded on the ground that his admissions would not be binding upon the beneficiary; but it is now argued that the facts embodied in the defendant's offer were not material. The testimony offered, if relevant, must be so under the rules relating to admissions of parties. An admission is defined as a statement, oral or written, suggesting any inference as to any fact in issue, or relevant fact unfavorable to the conclusion contended for by the person by whom or on whose behalf the statement is made. Stephen, Digest of Law of Evidence, art. XV, ch. IV, pt. I. It will be observed that the statement or act should be self-disserving, or of such a character that from it some inference may be fairly drawn to the party's prejudice. 1 Jones, Evidence, sec. 237. The offer to prove was that the witness, in the month of January, 1904, and some days preceding the death of the assured, called on him at his office and informed him that he had become suspended the 1st day of January, 1904, for the nonpayment of the December, 1903, assessment, and of the amount necessary for him to pay to be reinstated; that the assured told the witness that at that time he did not have the money to make the payment, and thought possibly he would drop the insurance. There is, therefore, presented the question whether there was anything in the statement or act of the assured that suggested any inference unfavorable to the conclusion contended for by the plaintiff. The claim of the plaintiff was that the assured made the payment to be reinstated in December, 1902, and that there was included in that payment one back assessment more than was chargeable under the rules of the organization. It is not anywhere contended that the assured ever paid the December, 1903, assessment as such, but that it was to be treated as being paid by the over-collection of this one assessment, in 1902. If it were conclusively established that the assured made the payment in December

instead of November, 1902, his state of mind upon that subject, or any admission he might make, would be immaterial; but, since the date of the payment to reinstate is itself in dispute, does not the failure of the assured to claim credit to which he would be entitled if the payment was made in December have some bearing upon the fact of whether it was actually made at that time? Might it not be argued that, if the assured had made the payment in December, he would naturally have known that he had the amount of this one assessment to his credit? We are aware that it might be said that the assured, careless in financial matters, would be likely to pay what was demanded, and remain ignorant of any overcharge; but it is not a question of whether the inference which might be drawn from a fact withheld from the jury could be overcome by other circumstances, or by inferences drawn from other facts. The weight of the testimony is not to be considered in determining its relevancy. We cannot escape the conviction that the evidence offered suggested an inference unfavorable to the conclusion contended for by the plaintiff, and therefore that it was admissible under the rule we have quoted.

3. The plaintiff argues that the payment of the assessments made by the assured after his reinstatement in 1902, and prior to the December, 1903, assessment, was proof that he did not know or understand that he had the amount of this one assessment to his credit, and that the evidence offered was therefore cumulative, and its rejection not reversible error. We do not understand this evidence to have been cumulative within the meaning of the rule which permits a trial judge to limit the introduction of such testimony. If the fact offered had already been testified to by other witnesses, then the testimony offered would have been cumulative, and the court might, in the exercise of its discretion to limit the number of witnesses, have excluded the evidence upon that ground. We do not understand the rule to be that evidence of a relevant fact can be excluded upon the ground that other

similar, but independent, facts are already before the court, and the plaintiff cites neither principle nor authority to sustain her contention upon this point.

We therefore recommend that the former judgment of this court be adhered to, the judgment of the district court reversed, and the cause remanded for further proceedings.

AMES and JACKSON, CC., concur.

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

REVERSED.

STATE, EX REL. WILLIAM H. THOMPSON ET AL., APPELLEES, V. WALLACE PORTER, APPELLANT.

FILED MAY 10, 1907. No. 14,830.

1. **Habeas Corpus:** WRIT: ISSUANCE. The district court, or a judge thereof at chambers, may in the exercise of a sound legal discretion, when the right of personal liberty makes it necessary, issue a writ of habeas corpus to another county of the state outside of his judicial district.

2. ———: CUSTODY OF CHILD. In a controversy for the custody and control of a minor child between the grandparents and the father of the child, there is a strong presumption that the interests of the child require that it be confided to the care of its father; but, when the circumstances and condition of the parties, and their character and purposes in regard to the child, show that it will probably be for its best interest to remain temporarily with its grandparents, who have for some time, with its father's consent, cared for the child and furnished it with a suitable home, the rights of the father must yield to the welfare of the child.

APPEAL from the district court for Hall county: JAMES R. HANNA and JAMES N. PAUL, JUDGES. *Affirmed as modified.*

Harrison & Prince, for appellant.

John R. Thompson, R. R. Horth, Charles G. Ryan and *O. A. Abbott, contra.*

SEDGWICK, C. J.

These relators applied to one of the judges of the district court for Hall county for a writ of habeas corpus to regain the custody of a little boy then about three and one-half years old. Upon the application the court made an order, which recited that the boy, "a resident of said Hall county, has been unlawfully taken by force and strong hands from the county of Hall, and is now unlawfully detained in the county of Douglas, in said (state), by the said Wallace Porter," and continued: "It is therefore ordered that a writ of habeas corpus issue to the sheriff of Hall county, commanding him to bring the body of said Eugene Thompson Porter forthwith before me or some other judge of the Eleventh judicial district, at Grand Island," etc. Pursuant to this order the writ was issued and delivered to the sheriff of Hall county, who took possession of the boy in Douglas county, and conveyed him to Hall county, and returned his writ as follows: "I do hereby certify that I received this writ on the 8th day of February, A. D. 1906, at the hour of 8 o'clock P. M., and according to the command thereof I did on the 9th day of February, A. D. 1906, take the body of Eugene Thompson Porter into my custody in Douglas county, Nebraska, and at the same time and place delivered a copy of this writ to E. J. Porter, the person then having the custody of the said Eugene Thompson Porter, and afterwards to wit, on the 9th day of February, A. D. 1906, I served the within writ on the defendant, Wallace Porter, by delivering to him a true and certified copy of this writ, with all indorsements thereon, in Hall county, Nebraska, and now have the body of said Eugene Thompson Porter before this court as commanded by said writ. M. Dunkel, Sheriff,

Hall county." The respondent, Wallace Porter, is the father of the boy, and it appears from the evidence that, when the boy was taken by the sheriff in Douglas county, the respondent returned with the sheriff who had the boy in custody to Hall county, and was there served with a copy of the writ.

1. The respondent objected to the jurisdiction of the court. This objection was overruled, and the first assignment of error in the proceedings is based upon this ruling. The objection is that the judge of the district court has no jurisdiction to issue a writ of habeas corpus to another county outside of his judicial district. This theory seems to be sanctioned by the practice of the federal courts. 21 Cyc. 309, and cases cited. From the same authority it would seem also to be the rule in most of the states; but it is manifest, as said in the text on page 311, that "the extent of the territorial jurisdiction of the different courts and judges is of course dependent largely upon statutory provisions." The provisions of our statute bearing upon this question are unfortunately somewhat uncertain in their character. The supreme court of Kansas, in *In re Jewett,* 69 Kan. 830, 77 Pac. 567, appears to consider that under the provisions of their constitution and statutes the district courts of that state have no jurisdiction beyond their respective districts. The proceedings are civil in their nature. This is the general doctrine and has frequently been approved by this court. The constitution of Kansas provides: "The district court shall have such jurisdiction in their respective districts as may be provided by law." Article 3, sec. 6. We have no such provision in our constitution. Our district courts are given general chancery and common law jurisdiction. The constitution created six judicial districts, and provided that there should be elected a judge in each district "who shall be judge of the district court therein," and it provided that the legislature might redistrict the state. The provision of the constitution of Kansas in regard to the powers of the judges of the several courts at chambers appears to be

the same as our own. "The several justices and judges of the courts of record in this state, shall have such jurisdiction at chambers as may be provided by law." Article 3, sec. 16. It may be that the decision of that court above cited was necessary under the provisions of their constitution and their legislation, but their discussion of the reason and necessity for such legislation does not seem entirely satisfactory. The court said: "For under such holding (that the district court might send the writ to another county outside of the district) the probate judge of the remotest county in the state might require the production before him of every one confined, not only in the state penitentiary, but in all of the county jails and various houses of detention within the state—a result which would serve much to deter us from reaching such a conclusion, if deterrent were necessary." This evil, great as it may seem, is not more apparent than the counter evil resulting from a converse rule. As is well said in the brief of relators: "The kidnaper or child stealer could select his own venue, his own place of trial, and compel parties and their witnesses to go there, and possibly change his place of confinement as necessity of avoiding the writ might require." It seems that very serious results might follow from an indiscreet application of either rule contended for. Some of the courts have intimated that it should rest in a measure in the sound legal discretion of the court to which the application is made. It may be that this thought accounts for the condition of our legislation upon the subject.

The boy was a resident of Hall county. He had been living with the relators for some time. The respondent came to visit him, and with the consent of the relators took the boy from the house, where he lived several times. Before this consent was given, the question was discussed whether the respondent was entitled to the custody of the boy, and, the parties not having been able to agree upon that point, the relators requested some assurance that the respondent would not take the boy away from their cus-

tody without some prior understanding in regard to the matter. They say that they understood the respondent to agree that he would not do so. However that may be, when an opporunity offered, the respondent took the boy and departed at once for Douglas county. There is no doubt, under any construction of the statute, that if the respondent had so taken the boy, and while he was still in Hall county, the district court of that county had jurisdiction to issue the writ, so that the question seems to be whether the respondent could himself deprive the court of that jurisdiction, and we have no hesitancy in holding that the application was properly made in Hall county. Section 368 of the criminal code provides: "Such writ may be served in any county by any sheriff of the same or any other county," and section 355 provides that a subpœna may be issued "to the sheriff of the county where said person shall be confined." We are not aware that this court has directly passed upon this question, but it has several times impliedly approved of the practice of sending the writ to another county outside of the district in which it was issued. In *Buchanan v. Mallalieu,* 25 Neb. 201, a writ of habeas corpus was issued by the district court for Gage county, directed to the superintendent of the state industrial school for juvenile offenders in Buffalo county. No question was raised in the case of the propriety of so doing, and the point is not mentioned in the opinion of the then Chief Justice REESE. Also, in *McCarty v. Hopkins,* 61 Neb. 550, the writ was issued by the district court for Douglas county, directed to the warden of the penitentiary in Lancaster county, and again Mr. Justice SULLIVAN discusses the questions raised in the case without suggesting any impropriety in the practice pursued. In *In re White,* 33 Neb. 812, the court said: "As a general rule, therefore, the proceeding should be instituted in the county where the alleged unlawful restraint is being exercised, and where, if it is necessary to call witnesses, the parties will not be subjected to unnecessary expense and inconvenience." This

language would seem to recognize the jurisdiction, but suggests that the matter of inconvenience and expense should be taken into consideration in exercising the jurisdiction. In *Eager v. Eager,* 74 Neb. 827; it is said: "The district court is a court of general jurisdiction and may send its original process to any part of the state, unless restricted therein by statute." It would seem that the practical construction that has been given to our statute for many years would justify the conclusion that the judge of the district court did not abuse the discretion given him in exercising the jurisdiction complained of.

2. The next question presented is a much more difficult and embarrassing one. The relators are the grandparents of the child. They have carefully cared for it since the death of its mother, which occurred at the home of the relators in September, 1901. They have evidently given the child the best of care. As far as the evidence shows they have done all that a father and mother could do for its welfare, and manifested the highest regard for its best interest. Their situation in life is such as to enable them to furnish this boy with every advantage. No attempt is made to controvert any of these propositions. The respondent is the child's father, and the laws of nature, as well as the common law of our country, declare that the best interests of every child demand that it shall have a father's care. The first query in controversies of this kind should always be: What do the best interests of the child require? And in determining this question due regard should be had to the rights and feelings of its parents, who are its natural guardians. The presumption always is that the father and mother are the most competent to determine what is best for the child, the most interested to determine rightly, and the best fitted to succeed in its successful nurture and training. The respondent is shown to be a young man of excellent character. Mr. Thompson, who knows him well, testifies that he has no bad habits. He is a bright, intelligent, industrious young man, devotedly attached to his boy, and, without doubt,

seeking earnestly to promote his welfare in every way possible. Both the relators and the respondent are in a position to know what is for the best interest of the boy, better than the court can determine, and, if they agreed, no court would hesitate to act upon their conclusion; but, unfortunately, they are not agreed, and, while both parties are acting in undoubted good faith, they are equally confident that they are unselfishly seeking the welfare of the child. The relators have a comfortable home in Grand Island, where they have lived for many years. They regarded their daughter, the mother of the child, with more than usual parental tenderness, and they say that shortly before her death, and also before the birth of the boy, she requested that in case anything should happen to her they would take care of her child. Immediately after her death they communicated this request to the respondent, and the result was that an agreement was entered into between the relators and the respondent, in which it was recited that it was the wish of the boy's mother that he "should make his home with her father and mother and have their friendly care and assistance," and that the respondent joined in that wish and decided to "aid in every way in carrying the same into full execution," and for that purpose the respondent agreed that, "if I shall remarry at any time during the minority of said son, I will, and do hereby, voluntarily relinquish all right to the custody and power over the said Eugene Thompson Porter, and all claim and interest in and to his services and wages, to the end that said parents of my wife shall have full and complete charge and control of the said Eugene Thompson Porter after the happening of the aforesaid event, and from that time until my said son becomes of age. And also that, if I should die prior to my said son's coming of age, he be left in the full care, custody and control of the aforesaid parents of my wife, or either of them that might be living at that time, until he becomes of age." In this contract the respondent also

agreed "that I will not at any time during the life of my said father-in-law and mother-in-law, or either of them, in any manner give the care, custody and control of the said child to any other person or persons, or place the said child in any other or different home, as long as the said William H. Thompson's and Nettie I. Thompson's home is my home, which shall be as long as I am fairly treated."

As the respondent did not remarry nor die during the minority of his son, the provisions conditioned upon these events, of course, are not effective. The child remained with the relators as long as their home was the respondent's home, and, of course, there is no question of the violation of that part of the agreement. It will be observed that the respondent agreed to make the relators' home his home as long as he was fairly treated, and, if this case depended in any way upon the construction and meaning of this contract, it would become very important to inquire whether the respondent was justifiable in leaving the home of the relators. Such contracts, of course, are always to be subject to the best interest of the child, and are never to be enforced to the sacrifice of its interest. Moreover, it is due to the parties to this controversy to say in this connection that, although there is no substantial evidence in the record of any unfair treatment practiced by the relators against the respondent, still we think it ought not to be found from the evidence that the respondent was wholly unjustifiable in leaving the home of the relators. The relations between Mr. Thompson and the respondent appear always to have been pleasant and just; neither of these two has any words of criticism for the other. There were, however, manifestly some misunderstandings between Mrs. Thompson and the respondent. The evidence fails to show any sufficient cause therefor. Mrs. Thompson desired that certain articles which she had presented to her daughter should be returned to her after her daughter's death. The respondent appears also to have prized these articles very much beyond their intrinsic value, and they were not returned to Mrs. Thompson.

Neither party appears to have been unreasonable in the matter, both being prompted by their great affection for the deceased wife and daughter.

A house and lot in Grand Island had belonged to the respondent and his wife. For some time they had made their home there. They procured it through the assistance of these relators and the parents of the respondent. After the death of the respondent's wife, this property was rented, and Mr. Thompson had charge of the collection of the rents. Out of these rents he paid taxes that had accumulated upon the property, and also made payments upon the respondent's life insurance. An account was kept by Mrs. Thompson, consisting of charges against respondent for meals and lodging, and also for various articles furnished for the child. She testified that the arrangement that the respondent should pay his board was at his suggestion, and that the amount to be paid was named by him, and that she always told him that it was wholly immaterial to her. We do not find that this testimony is disputed in the record, and there seems to be no cause for the misunderstanding between them arising out of these transactions. That each of these two recognized that their relations and feelings for each other were not such as are usually expected to exist between members of the same family manifestly appears from the evidence. The respondent testifies positively that in conversations between himself and Mr. Thompson they both recognized this fact, and that Mr. Thompson, just prior to the time that the respondent left relator's home, said that it would not be best for the respondent to continue longer to make his home with the relators, and that it was in accordance with this statement of Mr. Thompson that the respondent left their home. Mr. Thompson evidently did not intend that his remark should be understood to absolutely dismiss the respondent from his home. It would rather seem to be an acknowledgment on the part of Mr. Thompson that the existing conditions would justify the respondent in concluding that it would be

better that he should no longer remain a member of the family. Mr. Thompson does not contradict the evidence of the respondent in regard to their conversation referred to, and it seems clear that, within the purpose and spirit of their contract, the position of the respondent in the family was such as to justify him in seeking another home. The respondent accounts for the relations between himself and Mrs. Thompson by saying that Mrs. Thompson never liked him, and that she was always opposed to his marrying her daughter. While the home of the child was with the relators, the respondent was frequently there. These were occasions of great pleasure both to himself and his son. The relators do not seem to have interfered with them in any way, but rather to have encouraged these visits, and to have assisted the respondent in establishing himself in the boy's affections.

The respondent is a traveling man. While his wife was living, he was at home only occasionally, and since her death the conditions in that regard have remained substantially the same. In February, 1906, after he had left the home of the relators, he called there and informed them that he was going to take the child. They protested against it, and after some talk the respondent seemed to acquiesce in allowing the child to remain with the relators, at least for some time longer. Mr. Thompson suggested to the respondent that the matter of the custody of the child be left to the court; that they submit a friendly statement of the facts to the district court, and take the judgment of the court thereon and act accordingly; and, this not being acceptable, and Mr. Thompson being compelled to leave home for a few days, he suggested to the respondent that nothing should be done in regard to the taking away of the boy until his return. In this he understood the respondent to acquiesce. After Mr. Thompson had gone, the respondent took the boy out several times, and Mrs. Thompson testifies that, when he proposed doing so, she asked him if he was playing a trick on her, and he said that he was not, and took the child away and

brought him back again afterwards, and then, on a following day, taking the child away in the same manner, and without taking any clothing or other things that would indicate that he intended retaining the child, he went with the child to Omaha. In Omaha he had a home with his father and mother, which they had established together in a house which had been rented a month or more previously. The respondent says that he rented the house, and two receipts are in evidence showing that he paid rent for the house at $35 a month, for two months. On the evening of the same day that he took the child away, this application was made for a writ of habeas corpus, and by virtue of that writ the sheriff of Hall county took the child from the respondent and his parents in Douglas county, and returned with him to Hall county. A hearing was had in the district court for Hall county before both of the judges of that court sitting together, and by the judgment of the court the custody of the child was awarded to the relators. The record shows that the delicate duty thus imposed upon the judges of the district court was carefully and patiently performed. The witnesses gave their evidence in the presence of the court. The material facts are not substantially in dispute. What would the best interests of this little boy require of these judges? Judging alone from the words used by the witnesses, this question would be difficult to answer. The real interest and welfare of a child depend upon so many considerations of character, surroundings, and disposition as to require the nicest discrimination of judgment to solve such a question under circumstances like these. Many details of character and purposes, as well as of conditions and modes of living, that are of importance in selecting a home for a child cannot be described in words. The parties and their witnesses were before the trial court. The judges had an opportunity of observing those things which, when the evidence is otherwise evenly balanced, might turn the scale and control the decision. We cannot find from this evidence that the able judges who heard this case are

wrong in the matter. Moreover, there are many things disclosed in the evidence which tend to support the decision. The respondent was not of age when he was married. He had before his marriage, and has since the death of his wife, made his home with his parents. That is, although for the most of his time he travels upon the road, he has had no other home except theirs. His father apparently is of a roving disposition. He has during the recollection of the respondent made his home in nearly a dozen different places—in Iowa, Kansas, Nebraska, and other states. One of the purposes that led to the renting of the house in Omaha and establishing a residence there by the respondent and his parents was to enable the respondent to regain the custody of this boy. The respondent, although, according to his testimony, he has been able to earn from $125 to $150 a month for many years, has saved comparatively nothing from his earnings. The only means that he could mention as having accumulated consisted in household goods and furniture, mainly furnished to himself and his wife, while she was living, by their respective parents. He relies upon his mother to care for the boy, and, while she appears to be in all respects competent and suitable, she has not evinced any desire to assume such responsibility, but declared that she was not responsible for taking the child away from the relators, and that she had nothing to do with it.

While we cannot find that it is our duty to interfere with the judgment of the trial court, we feel that it is proper and necessary to say that this boy and his father must not be separated, and that the custody that is awarded to the relators should not be regarded as of a permanent nature. It may be that the events of a short time will demonstrate that the establishment of his home is permanent, and that such conditions will prevail that the benefit of a father's care and training will be of more importance to the child than any advantages that can come from denying a father's natural right. The decree of the district court provides that the relators shall have

the care and custody of the child until the further order of the court, but with the further restriction that no application shall be made to modify or change the order of the court "without leave of court upon good cause shown." We do not understand what force it was intended to give to this provision. Surely, if a showing is made that the conditions are so changed that the interest of the boy demands that the order should be modified, no other showing should be necessary, and we suppose that this was in fact the meaning of the court. If application is made in good faith to change or modify the decree, the court should hear the evidence and make such order thereon as the law requires.

We think upon the whole record the judgment is right, and as above modified it is

AFFIRMED.

ALGERNON S. PATRICK, APPELLANT, V. GEORGE E. BARKER, APPELLEE.

FILED MAY 10, 1907. No. 14,390.

1. **Statute of Frauds:** DEBT OF ANOTHER. An agreement made by the president of a bank with a proposed purchaser of its stock that the bank will accept certain notes and mortgages held by him, amounting to the face value of said stock, in payment therefor, and that if such purchase is made he will hold the purchaser harmless and indemnify him against any action of the bank to recover any further or other amount either on his indorsement of said notes or otherwise, in payment for said stock, is not a contract to answer for the debt, default or miscarriage of another.

2. **Contracts:** CONSIDERATION. Where, by reason of such agreement, the bank stock is actually purchased and paid for, according to its terms, such purchase is a sufficient consideration to support the agreement.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Robert W. Patrick, for appellant.

E. J. Cornish, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Douglas county sustaining a general demurrer to the plaintiff's petition and dismissing his action. The petition alleged, in substance, that plaintiff is the sole surviving member of a late partnership, doing business in this state under the name and style of Patrick Brothers; that in 1888 the defendant and one Johnson were the president and cashier, respectively, of a state banking corporation doing business in the city of Omaha; that in July of that year, in order to convert said bank into a national banking association, under the name of the National Bank of Commerce, the defendant and Johnson each solicited the partnership to purchase 200 shares of the capital stock of their proposed national bank, at and for the par value of $100 a share; and, in order to induce the partnership to make such purchase, orally agreed with and guaranteed to them that the bank would receive certain notes and mortgages held by the partners, at that time understood to be worth $20,000 or more, in full payment for the said stock; and agreed with and guaranteed to them that the bank would not hold them liable upon their contracts of indorsement, or otherwise, for any other or further amount in payment of said stock. It is further alleged that in violation of said agreement the bank has commenced, and prosecuted to judgment, certain suits against the plaintiff for deficiencies arising upon the foreclosure of some of the notes and mortgages above mentioned, amounting to the sum of $5,600; and that the plaintiff has been compelled to pay said judgments, which amount the plaintiff seeks to recover in this action.

If we correctly understand the plaintiff's petition, his right to a recovery is based on an oral contract of the defendant and Johnson, by which they each agreed that

the bank would accept certain notes and mortgages, worth $20,000 or more, in full payment for that amount of its capital stock, and agreed to indemnify Patrick Brothers and the plaintiff for the bank's failure to observe the terms of said agreement. This was not a contract to be bound for the debt, default or miscarriage of another, but was an independent obligation, by which the defendant undertook to hold the plaintiff harmless for any action that might thereafter be taken by the bank requiring him to pay any other or further consideration for the stock so purchased than the notes exchanged therefor; and, when the bank obtained and collected the judgments above mentioned against Patrick Brothers, and the plaintiff, such proceeding amounted to a breach of the contract, and the measure of damages was the additional amount he was thus required to pay for said bank stock.

It is claimed, however, that the agreement is void for want of any consideration to support it. We do not so understand it. If Barker agreed with the plaintiff and his partner that, if they would take and pay for the stock and thus aid him in converting his state bank into a national bank, he would protect them from any liability as indorsers, or otherwise, upon the paper which it was agreed they should turn over in full payment for the stock, and plaintiff and his partner did, as alleged, actually purchase the stock and pay for the same as thus agreed upon, such purchase was a sufficient consideration to support the agreement, and it cannot be said to have been made without consideration.

It was suggested, however, in appellee's brief that the judgments obtained by the bank against the plaintiff amount to an adjudication against him of his right to recover in this action. This contention is without merit, because the agreement of defendant, as before stated, was an independent one, and, as he was not a party to the actions brought by the bank against the plaintiff, the rights of the parties under the present contract could not have been adjudicated in those actions.

Upon the whole, we are satisfied that the petition is sufficient to resist a general demurrer, and the judgment of the district court is therefore reversed and the cause is remanded for further proceedings according to law.

REVERSED.

ANGUS MARTIN ET AL. V. STATE OF NEBRASNA.

FILED MAY 10, 1907. No. 14,839.

1. **Larceny:** INDICTMENT. Where one person has the general ownership of property and another person a special ownership in the same thing, the property may be alleged to be in either in an indictment for larceny. *Sharp v. State*, 61 Neb. 187.

2. **Evidence** examined, and *held* to support a verdict finding the defendant Martin guilty of larceny.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

W. W. Dodge and *O. S. Erwin,* for plaintiffs in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

LETTON, J.

The defendants were convicted of larceny in the district court for Douglas county. On the afternoon of June 5, 1906, they entered the jewelry store of M. D. Franks in the city of Omaha. Martin asked to look at a diamond stud. Mr. Franks took it from the show case and handed it to him for examination. After looking at it for a moment, Martin handed it to Jennings, who took it to the front of the store apparently to examine it more closely. The jeweler became suspicious and made some remark, when Jennings seemingly handed back the stud. Franks discovered, however, that a substitution had been made by Jennings and an imitation of the stud returned to him in-

stead of the genuine. He at once gave an alarm and tried to seize Jennings, who fled, but was afterwards arrested. The genuine stud was found in his mouth after his arrest. Martin was detained in the store and arrested there. Both defendants were charged with the larceny of a diamond stud, the property of M. D. Franks. It developed at the trial that Franks was not the general owner of the diamond, but that it belonged to one Horne, and that he had it in his possession for the purpose of sale.

The principal error alleged is that there is a variance between the allegation of ownership and the proof. There is no merit in this contention. Where one person has the general ownership of property and another person a special property in the same thing, the property may be alleged to be in either. *Thomasson v. State,* 22 Ga. 499; *Barnes v. People,* 18 Ill. 52; *Littleton v. State,* 20 Tex. App. 168; *Sharp v. State,* 61 Neb. 187.

The second contention is that the evidence is not sufficient to establish the guilt of Martin. The proof showed that Martin entered the store in company with Jennings, and that he asked to see the diamond and handed it to Jennings, who made the substitution. It is urged that Martin's conduct in asking to see the diamond and handing it to Jennings was not criminal, and that he has not been shown to have participated in the criminal intent of Jennings to appropriate the diamond. While it may be possible that Martin was an innocent participant in the plan by which Jennings obtained possession of the diamond for the purpose of substituting a spurious imitation thereof, it is by no means probable. The proceedings of the two men show a concert of action, and the evidence is sufficient to uphold a verdict finding them both guilty. We find no error in the record.

Martin was sentenced to the penitentiary for five years and Jennings to seven years. It is urged that the punishment is excessive, and we are asked to reduce the term of imprisonment. The trial court evidently believed that these men were professional criminals, and we are not

prepared to say that the discretion which he exercised as to the length of sentence was abused.

The judgment of the district court is

AFFIRMED.

JULIUS REUSCH, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED MAY 10, 1907. No. 15,153.

1. **Intoxicating Liquors:** LOCAL OPTION. One of the main objects in the passage of chapter 50, Comp. St. 1881, known as the "Slocumb law," was to establish the principle of local option and to permit the people of each municipality in this state to determine for themselves whether or not the liquor traffic should be licensed therein.

2. **Statutes:** CONSTRUCTION. Where the provisions of a general law and a later act applying only to a certain special class are not repugnant, they will be construed together, and if the legislature has indicated its general policy in relation to the subject matter they will be construed, if possible, so as to carry out that policy.

3. **Intoxicating Liquors:** MUNICIPAL YEAR. By the term "municipal year," as used in the Slocumb law, is ordinarily meant the political year, and by so construing the term the principle of local option is conserved and applied.

4. ———: LOCAL OPTION. By the amendment made to the Lincoln charter in 1905, by which biennial elections instead of annual elections were provided for, the legislature did not intend to abandon the policy of local option.

5. ———: LICENSE: MUNICIPAL YEAR. The word "year" in section 5 of the Slocumb law and "municipal year" in section 25 of the same act should be construed together. County boards may not grant a license for a term exceeding a calendar year, but municipal authorities may grant a license for a municipal year, which may be either longer or shorter than a calendar year.

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

E. F. Pettis, for appellant.

E. C. Strode, contra.

LETTON, J.

The plaintiff brought this action to restrain the city authorities of the city of Lincoln from interfering with him in selling intoxicating liquors under a license issued to him for the municipal year beginning April 9, 1906. From an adverse decision in the district court he has appealed to this court.

Appellant claims the right to sell liquor by virtue of a license issued to him by the excise board of the city of Lincoln on the 9th day of April, 1906, which license by its terms expires at "the hour fixed by the excise board for the closing of places for vending such liquors on the *last Monday of this municipal year.*" It is upon the question when "this municipal year" expires that the case depends.

We have been favored with argument upon this question from three different standpoints. The appellant contends that the municipal year ends at midnight of the day before the day that city officers elected on the first Tuesday in May take their seats. This would be midnight of May 13, 1907. The city authorities maintain that the municipal year ended upon the 9th day of April, 1907, twelve calendar months from the date of the issuance of the license, while certain gentlemen as *amici curiæ*, agreeing with the city that the municipal year ended April 9, 1907, contend that the present municipal year began April 10, 1907, and ends at midnight on May 13, 1907, being midnight of the Monday before the new municipal year begins. Section 5, ch. 50, Comp. St. 1905, relating to intoxicating liquors, and known as the "Slocumb law," provides that "the license shall state the time for which it is granted, which shall not exceed one year." This provision is general, and applies to counties as well as cities. Section 25, the provisions of which confer power upon the corporate authorities of cities and villages to license, regulate and prohibit the liquor traffic, provides that a license issued by municipal authorities shall not extend beyond the municipal year in which it shall be granted. In 1881, at the

time of the passage of this act, the law relating to licensing the sale of intoxicating liquors provided that "no license shall be issued for a longer period than one year, nor for a less period than six months," etc. Gen. St. 1873, ch. 58, sec. 573. At this time, as at the present time, county authorities could issue licenses for a year, or for a specified number of months measured by the calendar, and limited only by the foregoing provisions as to time. City and village authorities had like power conferred upon them by the act then in force (Gen. St. 1873, ch. 58, sec. 586), and licenses were issued without reference to the beginning or the end of the municipal year. By the enactment of the Slocumb law a radical change was made in the policy of the state with reference to the liquor traffic. That law entirely prohibits the sale of liquors, except where the traffic is legalized by the county or city authorities. It introduced the principle of local option into the policy of the state with reference to the regulation of the traffic, and this was one of the most important and essential features which distinguished and differentiated that law from preceding enactments upon the same subject. While the law does not provide for the direct submission of the question whether or not the liquor traffic shall be licensed in the various municipalities of the state for the ensuing year, still the effect is the same, since at each election the question of whether or not the traffic shall be legalized, or how it shall be controlled, may be submitted to the people by the candidacy of individuals pledged to carry out either one policy or the other in conformity with the wishes of a majority of the voters in that regard.

While section 25, ch. 50, Comp. St. 1905, provides that the license shall not extend beyond the municipal year, nowhere in the statute is the municipal year limited or defined. By the provisions of the general laws relating to cities and villages at the time of the passage of this act, the time of the election of city officers was fixed at the first Tuesday in April of each year (Comp. St. 1881, ch. 13, sec. 11, and ch. 14, sec. 60), and the municipal year has

usually been taken to be the political year or year intervening between the taking of office by the respective city officers elected in each year. The term "year" usually means calendar year, but not always, since its meaning is often determined in contracts by the intention of the parties. It may mean the cropping season in farming operations, or the fruit season among horticulturists, and, in like manner, may be a longer or shorter period of time than twelve months, according to the connection in which it is used. *Brown v. Anderson,* 77 Cal. 236, 19 Pac. 487; *Williams v. Bagnelle,* 138 Cal. 699, 72 Pac. 408; *Grant v. Maddox,* 15 Mees. & Wels. (Eng.) *737; *Knode v. Baldridge,* 73 Ind. 54; *Inhabitants of Paris v. Inhabitants of Hiram,* 12 Mass. 262; *Thornton v. Boyd,* 25 Miss. 598. So also the term may be modified by prefixing modifying words, such as "fiscal year," "political year," "solar year," "leap year," etc., and such term may or may not correspond with twelve calendar months. The time of municipal elections was fixed at the first Tuesday in April of each year, and, as this day may fall on either the first or any day up to and including the seventh day of the month, the municipal year may vary several days in length. It is not a fixed number of days or weeks or months.

It seems plain that the intention of the legislature was to permit the people of each municipality to determine for themselves whether or not the liquor traffic should be licensed therein for the year following the municipal election, and it seems equally clear that by the term "municipal year" the legislature meant the political or governmental year, the year intervening between the time of taking office by those elected at the municipal election in one year and the date of such event in the next ensuing year. This has been the construction placed upon the law by common consent for over a quarter of a century, and it has been accepted as the proper construction by all the officers charged with its enforcement, as well as by the public at large. By the construction thus placed upon the law by local authorities the principle of local option has

been conserved, since a license could only be issued by a body of men coming fresh from the people and carrying into effect the latest expression of the popular will, and with no power to perpetuate the license beyond their term of office. Each licensing body had to return to the people for authority, which might be granted or withheld, as seemed best to the electors.

In 1905 a change was made in the statute governing cities of the class to which Lincoln belongs, providing for biennial instead of annual elections, and changing the day of election from the first Tuesday in April to the first Tuesday in May in each second year after 1905. It is this amendment of 1905 which has given rise to the problem before us. The excise board elected in April, 1905, issued licenses during the first year of its term, expiring upon the date in 1906 corresponding to the day before the new officers took their seats, as before, and at the expiration of such licenses issued licenses expiring the night of "the last Monday of this municipal year." The legislature had omitted to provide by statute when licenses issued by the board should expire, and the board therefore decided not to fix a date certain for the expiration of the licenses, but left the question open as to when the municipal year expired.

Where the provisions of a general law and a later law applying only to a certain special class of municipalities are not repugnant, they will be construed together, and, if the legislature has indicated its general policy in relation to the subject matter, they will be construed, if reasonably possible, so as to carry out and effectuate that policy. In the passage of the various acts to which we have referred, the legislature has in no wise indicated its intention to vary from or in any way interfere with the policy of local option. We feel bound, therefore, to carry this principle in mind in construing the statute, and to adopt that construction which is most conformable to such policy. The city attorney has argued that by the term "municipal year" is meant "license year," and that

it is within the power of the excise board to fix the termination of the license or municipal year and to grant licenses for such period; that consequently it has the power to issue licenses during the present month of April good for twelve months. We find no warrant for such a construction of the statute. If the present board may fix the beginning and the ending of the license year, why could not another board, elected to succeed the present one, fix new terms for the license year, and so on *ad infinitum?* Moreover, to construe the law as the city authorities desire would permit an excise board whose term of office will expire within a few weeks to regulate the liquor traffic for a period of more than eleven months after their term of office has expired, and thus defer the operation of the will of the voters about to be expressed at the ballot box, and do violence to the principle of local option, at least for that length of time. We do not think that it was the intention of the legislature to allow a retiring board to fix the policy of the city in respect to the liquor traffic for the future, as would be done if this construction were upheld. Within a few weeks the voters of the city will be called upon to express themselves as to their choice of men upon whom the duty will fall to regulate and control the traffic in intoxicating liquors in the city for the next two years. It may be that the electors are not in sympathy with the course pursued by the present excise board. On the other hand, it may be that the manner in which it has performed its duties has commended itself to the electorate, and that the members of the present board will again be elected to that position. Whatever the result may be, we think it clear that it was the intention of the legislature that the question of what the policy of the city as to license for the ensuing two years should be, might, if so desired, be submitted to the people at each election. If the legislature had intended to remove the excise board from the control of the people at each recurring election, it might have made it a con-

tinuing body of which a majority should be retained in office, in like manner as a board of county commissioners, or it might have provided for their appointment by the governor, as has been done in cities of the metropolitan class. Since it made no change in this respect, we are convinced that the principle of local option was intended to prevail in cities of this class, and that, though, on account of the provisions for biennial elections, the policy of the city with respect to the liquor traffic is fixed for two years at each election, instead of one year as in other cities and villages, this does not alter the legislative intent.

Since, as we have seen, the municipal year varies in length, this term is not fixed and unalterable. We think the word "year" in section 5 must be construed together with the words "municipal year" in section 25. County boards are not permitted to grant a license for a term exceeding a calendar year. Such boards are continuing bodies, and the principle of local option does not apply. But municipal authorities may grant a license for a term more or less than a calendar year, as the case may be, but not exceeding the municipal year, because otherwise the local option feature would be nullified. The law in such circumstances as those in this case will not regard a short period of time, but will consider that the legislature, either by accident or design, allowed the pending municipal year to extend a short time longer than the customary period of duration, but that in so doing it did not intend to allow an excise board elected two years ago to fix the policy of the city with regard to liquor traffic for nearly a year in advance, nor did it intend, on the other hand, to inhibit the carrying on of the traffic by the appellant while holding a license which does not expire either by its terms or by the law until "the last Monday of this municipal year."

The judgment of the district court is reversed and the cause remanded, with directions to grant an injunction as prayed.

REVERSED.

MARK J. WILBER, APPELLANT, V. NICHOLAS RESS, SHERIFF, APPELLEE.

FILED MAY 10, 1907. No. 15,150.

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

E. J. Murfin, T. J. Doyle and *W. D. Oldham,* for appellant.

E. C. Strode, contra.

Thomas Darnall and *H. J. Whitmore, amici curiæ.*

LETTON, J.

The petitioner was arrested, charged with selling intoxicating liquor without a license, in violation of the liquor laws of this state. At the time of his arrest he held a license issued by the city authorities of the city of Lincoln, which by its terms expired at "the hour fixed by the excise board for the closing of places for vending such liquors on the last Monday of this municipal year." The case falls within the points decided in *Reusch v. City of Lincoln, ante,* p. 828. At the time of his arrest his license was still in effect. He is therefore unlawfully restrained, and is entitled to his discharge.

The judgment of the district court is reversed and the petitioner discharged.

REVERSED.

DAVID BRADLEY & COMPANY, APPELLANT, V. FRED E. BROWN ET AL., APPELLEES.

FILED MAY 10, 1907. No. 14,615.

1. **Insurance:** PRINCIPAL AND AGENT. When an agent in the possession of goods has contracted to become absolutely and unconditionally liable to his principal, to the extent of this value, for their loss or damage by fire, and procures insurance upon them in his own name, such insurance is for his own exclusive benefit and advantage, and does not affect or add to his obligation to his principal upon his contract.

2. ———: ———. In a case like the foregoing, money due from an insurance company on account of a loss under its policy is not a trust fund for the benefit of the principal, but is an indebtedness to the agent, and is subject to his disposition and liable for his debts like other money and property belonging to his estate.

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

Flickinger Bros. and *Needham & Doten,* for appellant.

H. C. Vail, C. E. Spear and *F. D. Williams, contra.*

AMES, C.

Fred E. Brown was a retail dealer in farm implements and machinery at Albion, Nebraska, where he owned and conducted a general store of such goods. In August, 1904, he received into his store building from the plaintiffs, David Bradley & Company, and as a part of his stock in trade, and to be disposed of and accounted for pursuant to a written contract between the parties, a considerable number or quantity of implements. The contract stipulated, in effect, that the goods should remain the property of Bradley & Company, and that Brown should sell them as their agent, retaining a specified compensation for his services, and contained the following paragraph: "In consideration of party of the first part (Bradley & Company) carrying said stock of goods subject to sale, and at

the expense of interest for value and special terms given, party of the second part agrees to be fully responsible for all damage or loss by fire, or otherwise, to any and all goods shipped under this contract." Brown procured policies of fire upon the goods, which were destroyed by fire a short time afterwards, and later he was adjudged a bankrupt, and the defendant Spear was appointed trustee of his estate. This is a suit begun by Bradley & Company against Brown and the insurance companies to recover the amount of the loss. Spear, after the adjudication in bankruptcy, was substituted for Brown. The insurance companies do not resist payment, but have filed an answer in the nature of an interpleader, praying that the court determine to whom the money is owing. There is no dispute in regard to the facts which were settled by stipulation. The district court awarded the fund to the trustee, and the plaintiffs have appealed.

Each of the policies recited that it should protect property belonging to the insured, and that "held in trust by him, or on commission, for which he may be legally liable." It is not disputed that the property in question falls under this description, and counsel for plaintiffs contends for the application of the rule that, where an agent in the possession of personal property insures it against fire. the money due upon the policy after the loss belongs to his principal, who may recover it directly from the insurance company, and that if it is paid to the agent the latter holds it in trust, merely, for the benefit of the party ultimately entitled. Authorities to this effect are not wanting, and in our opinion are sound. *Snow v. Carr,* 61 Ala. 363; *Home Ins. Co. v. Baltimore Warehouse Co.,* 93 U. S. 527; *California Ins. Co. v. Union Compress Co.,* 133 U. S. 387; *Johnston v. Abresch,* 123 Wis. 130; *Stillwell v. Staples,* 19 N. Y. 401; 1 Wood, Fire Insurance (2d ed.), sec. 293; *Hyde v. Hartford Fire Ins. Co.,* 70 Neb. 503.

With the foregoing general proposition of law we understand counsel for the trustee to be also satisfied, but he contends that it is inapplicable to this case, for the reason

that, by the above quoted stipulation in the contract, Brown became himself an insurer of the goods against loss or damage by fire, and became instantly indebted for their value, upon the happening of the loss, irrespective of whether he had procured insurance upon them or not, and that the case is not like one where a debtor agrees to insure for the benefit of a mortgagee, or a factor for the benefit of his principal. The argument appears to us to be sound. The parties cannot be supposed to have contracted with a view to future insolvency. They had seen fit to fix their rights and obligations in event of a loss or damage by fire. Brown was bound to respond absolutely and unconditionally, and it follows, as it seems to us, that the insurance he procured upon the goods was for his own benefit and advantage exclusively. The moment the goods were destroyed by fire, the relation of principal and agent ceased, and that of debtor and creditor supervened. If he had not become bankrupt, and the insurance money had been paid to him, such payment would neither have created a trust fund in favor of the plaintiffs nor have affected the liability he had already incurred under the terms of the contract by the happening of the loss. The money would have been his, subject to his disposition, or to seizure for his debts, in like manner as other moneys and property of his estate, and he would have been liable to the plaintiffs upon his common law obligation of contract, as in other like cases. It is not doubted that the trustee stands in the shoes of Brown, or that his rights are measured by those of the latter, and we therefore recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: The judgment of the district court is

AFFIRMED.

LETTON, J., concurring separately.

The contract between the plaintiff and the defendant Brown was, in effect, a contract of insurance. By its

terms Brown became absolutely liable upon the happening of a loss by fire to pay David Bradley & Company the value of the goods destroyed. When he insured these goods with the several insurance companies, he became, in effect, a reinsurer. He stood in the same relation to the owner of the goods and to the insurance company that the original insurer, if it reinsures, stands to the insured and to the reinsuring company. The principles of law governing this relation are well settled, and it is held by a majority of the courts passing upon the question that the liability of a reinsurer to pay the whole amount of the loss to the reinsured is not affected by the insolvency of the latter or his inability to fulfil his own contract with the original policy holder. It is said in *Goodrich & Hick's Appeal,* 109 Pa. St. 523: "Reinsurance is properly applied to an insurance effected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has assumed; that is to say, after an insurance has been effected, the insurer may have the subject of insurance reinsured to him by some other. There is in such case, however, no privity between the original insured and the reinsurer; the latter is in no respect liable to the former, as a surety or otherwise, the contract of insurance and of reinsurance being totally distinct and disconnected. * * * Even if the insurer fail, or became insolvent, so that his insured receives only a dividend, however small, the reinsurer can gain nothing by this, but must pay the amount of the loss to the first insurer." Where an insurance company has written a policy and afterwards causes itself to be reinsured, and after the loss of the property insured such company becomes insolvent, the person originally insured has no equitable lien upon the sum of money due on the part of the reinsurer, but the fund belongs to all the creditors of the insolvent company ratably. *Herckenrath v. American Mut. Ins. Co.,* 3 Barb. Ch. (N. Y.) 63. See, also, *Blackstone v. Alemannia Fire Ins. Co.,* 56 N. Y. 104; *Consolidated R. E. & F. Ins. Co. v. Cashow,* 41 Md. 59; *Eagle*

Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant Cas. (Pa.) 71; *Strong v. American Central Ins. Co.*, 4 Mo. App. 7.

These decisions seem to be supported by sound reason. The original insurer has an insurable interest in the property because, in case of its loss by fire, he is liable to pay the loss to the extent to which he has insured it. When a loss occurs, the relation between him and the insured is that of debtor and creditor. There is no privity between the insured and the reinsurer, and any sum recoverable by the insurer from the reinsurer is an asset of his estate, liable to the claims of his general creditors, and not subject to any specific lien or charge in favor of the insured.

CURTIS HUDSON, APPELLANT, V. GEORGE F. TRUMAN ET AL., APPELLEES.

FILED MAY 10, 1907. No. 14,724.

1. **Appeal: VERDICT: EVIDENCE.** A verdict upon conflicting evidence will not be disturbed unless the evidence is clearly insufficient to sustain it.

2. **Malicious Prosecution: PROBABLE CAUSE.** A criminal prosecution from malicious motives is not a cause of action for damages, if there was a probable cause.

3. **Instructions.** Error cannot be assigned for the refusal of an instruction, the substance of which is contained in instructions given by the court of his own motion.

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

J. M. Guile, B. F. Johnson and *H. F. Guile*, for appellant.

Field, Ricketts & Ricketts, contra.

AMES, C.

The defendants caused the plaintiff to be arrested upon a criminal charge for an alleged felonious embezzlement. There was a preliminary examination before a justice of the peace, as a result of which the plaintiff was discharged from custody. This is an action to recover damages for the arrest as having been malicious and without probable cause. As to whether it was either the evidence is conflicting, and there was a verdict and judgment for the defendants, from which the plaintiff appealed.

Appellant insists that the verdict is not sustained by the evidence, but we are convinced, upon an examination of the record, that it was so far conflicting in essential respects that a determination of its weight and sufficiency was within the sole province of the jury. A review of it in this opinion would serve no useful purpose.

Appellant also complains of a refusal by the court to give to the jury each of four instructions tendered by him on the trial. The first two request that the jury be told, in substance, that a criminal prosecution for any other purpose than to bring the accused person to justice, or for the purpose or with the motive of compelling the payment of a sum of money claimed to be due from him, is a malicious prosecution, entitling the accused to a recovery in an action for damages therefor. These proposed instructions were faulty, and their refusal was not error because of the omitted mention of the indispensable element of want of probable cause. Although the prosecution may have been malicious, yet if there was probable cause an action for malicious prosecution will not lie. *Turner v. O'Brien,* 5 Neb. 542; *Dreyfus v. Aul,* 29 Neb. 191.

The third request asked that the jury be told that it was a presumption of law that the plaintiff was of good character at the time of his arrest, and that such presumption remained unless removed by sufficient evidence, and should be taken into consideration in determining the

question of probable cause. We have been cited to no authority in support of such an instruction, and it appears to us that the conduct rather than the character of the plaintiff was in issue. His character may have been unimpeachable, and his innocence, after investigation, indisputable, and yet it may have been his misfortune that sinister circumstances created a strong probability of his guilt at the time of the beginning of the prosecution. In short, it does not appear to us that his character was in issue except in so far as it was involved in the very accusation made against him. The fourth request, in so far as it was free from fault, which it was not entirely, was included in the instructions given by the court of its own motion, which was not excepted to and concerning which no complaint is made.

It is recommended 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

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4. The self-imposed limitations on the power to amend the constitution should not be so construed as to defeat the will of the people, plainly expressed, if the requirements are substantially observed. *State v. Winnett* 379
5. Where there is a substantial compliance with sec. 1, art. XV, const., providing for publication of proposed amendments, that the publication was made for one week less than the required time in one county of the state will not invalidate the amendment. *State v. Winnett* 379
6. Where the legislature by resolution submits proposed constitutional amendments at a general election it will be presumed that the legislature intends that the requirements of the general election law are to be observed. *State v. Winnett* 379
7. The act of 1901 (laws 1901, ch. 29), providing for counting straight party votes for a constitutional amendment when such party has indorsed such amendment, *held* constitutional. *State v. Winnett* 379
8. Sec. 13, ch. 17, laws 1899, which provides the manner of listing shares of building and loan associations for assessment, *held* constitutional, and not repealed by the revenue law of 1903. *Nebraska Central B. & L. Ass'n v. Board of Equalization* 472

Constitutional Law—*Concluded.*

9. When the legislature has construed a provision of the constitution in an administrative matter in one of two equally reasonable ways, the courts will adopt the legislative construction. *State v. Sheldon* 552

10. The occupancy by the governor of the executive mansion provided by the state, as required by law, *held* not a "perquisite of office or other compensation," and not prohibited by the constitution. *State v. Sheldon* 552

11. An unconstitutional statute confers no right, imposes no duty, and affords no protection. *State v. Several Parcels of Land* 703

Contempt.

1. All wilful attemps to improperly influence jurors, whether by conversations or attempts to bribe, constitute contempt. *Emery v. State* 547

2. In a prosecution for contempt where the act complained of is in itself a contempt, a denial on oath of its commission raises an issue of fact for trial, and does not entitle accused to an acquittance. *Emery v. State* 547

Continuance.

1. An application for a continuance over the term, *held* properly overruled where applicant did not show that he could not be in attendance at some subsequent day of the term. *Good v. Bonacum* 792

2. An affidavit for continuance on the ground that defendant is a material witness in his own behalf, *held* defective if it fails to show what he would testify to if present at the trial. *Good v. Bonacum* 792

Contracts.

1. Evidence *held* to support finding that a written contract prohibiting a physician from practicing within certain territory was not superseded by a subsequent parol agreement. *Baker v. Montgomery* 98

2. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it. *Patterson v. First Nat. Bank* 228

3. To avoid a contract on the ground of drunkenness, a party must be so far deprived of reason and understanding as to render him incapable of understanding the character and consequence of his act. *Case Threshing Machine Co. v. Meyers* 685

4. To avoid a contract on the ground of drunkenness, one must rescind the contract within a reasonable time after recover-

Contracts—*Concluded.*

ing his senses, or, if he has received no consideration therefor, he must, within a reasonable time, disclaim liability thereon. *Case Threshing Machine Co. v. Meyers*..... 685

5. An agreement by a public officer to serve for less than the compensation fixed by law is void. *Abbott v. Hayes County*, 729

6. An agreement between the president of a bank and a proposed purchaser of its stock that he will hold the purchaser harmless, where the bank stock is purchased according to its terms, is based on a sufficient consideration. *Patrick v. Barker*..... 823

Coroners.

1. Jurisdiction to hold an inquest is not defeated by the mere fact that the violence was inflicted or the death occurred in another county. *Moore v. Box Butte County*..... 561

2. Jurors and witnesses summoned on an inquest cannot be denied their fees because the inquest was unnecessary. *Moore v. Box Butte County*..... 561

Corporations.

1. Corporations may ratify acts or contracts made in their behalf which they might have done or made originally. *Bishop v. Fuller*..... 259

2. Regulation of stock transfers is a legitimate subject of corporate legislation in the form of by-laws. *Miller v. Farmers M. & E. Co*..... 441

3. By-laws regulating stock transfers will not be enforced, where their enforcement would operate as an infringement on the property rights of others, or as an unreasonable restraint on transfers of stock of the corporation. *Miller v. Farmers M. & E. Co*..... 441

4. Sec. 124, ch. 16, Comp. St. 1905, not only defines the general powers of a corporation, but also expresses certain corporate qualities or consequences which follow the act of incorporation. *Miller v. Farmers M. & E. Co*..... 441

5. Clause 5, sec. 124, ch. 16, Comp St., *held* not intended to make the transferability of stock dependent on some affirmative act of the corporation, but to impress stock with that quality. *Miller v. Farmers M. & E. Co*..... 441

6. A by-law of a corporation, which limits the number of shares a person may hold, or forbids a transfer of stock to a nonstockholder without the consent of the directors, *held* void. *Miller v. Farmers M. & E. Co*..... 441

7. Where an insolvent corporation, in fraud of its creditors, transfers its assets to a new corporation not its successor, in consideration of stock, the new corporation is liable to

Corporations—*Concluded.*

the creditors of the old corporation only for the value of the property received. *Sharples Co. v. Harding Creamery Co.* .. 795

8. In such case, an action at law will not lie against the receiving corporation. *Sharples Co. v. Harding Creamery Co.*. 795

Costs.

Under sec. 354 of the code, witnesses' traveling fees should be taxed for the distance only that a subpœna compels their attendance. *Smith v. Bartlett* 359

Counties and County Officers.

1. Under sec. 10 of the general election law, which provides that a county treasurer is disqualified to be elected to office for more than two consecutive terms, an appointment to complete the term of another *held* not an election. *Dodson v. Bowlby* 190
2. A coroner will not be denied compensation for holding an inquest in the absence of a showing of bad faith. *Moore v. Box Butte County* 561
3. An undertaker who, in good faith and by direction of the coroner, causes the burial of a dead body on which the coroner had held an inquest, will not be denied compensation though the inquest was unnecessary. *Darling v. Box Butte County* 564
4. In an action on the bond of the clerk of a district court for failure to index certain judgments, where the defense was negligence, evidence *held* to sustain judgment for defendants. *German Nat. Bank v. Laflin* 715

Courts.

1. Where a former decision of the supreme court has established a rule of property, which has been relied on for many years, it will not overturn such rule though it cannot assent to the reasoning upon which it is based. *Grandjean v. Beyl* 354
2. The district courts of this state are courts of general equity jurisdiction, and are not limited in the exercise of such jurisdiction by statute. *Rhoades v. Rhoades* 495
3. The supreme court will not entertain original jurisdiction in an action to compel a former manager of a private charitable corporation to account. *State v. Tabitha Home* 651

Creditors' Suit.

1. In a creditor's suit to set aside a conveyance to a near relative for a debt past due, the burden is on the grantee to show the consideration and good faith. *Flint v. Chaloupka*, 594
2. A creditor's suit is an action *in rem* and not barred by a discharge of the debtor in bankruptcy. *Flint v. Chaloupka*.. 594

Creditors' Suit—*Concluded.*

3. A fraudulent grantee cannot plead the subsequent discharge in bankruptcy of his grantor as a defense in a creditor's suit brought more than four months prior to the bankruptcy proceeding, where the land involved was never within the jurisdiction of the bankruptcy court. *Flint v. Chaloupka*.. 594

Criminal Law. See HOMICIDE. INDICTMENT AND INFORMATION. LARCENY. RAPE.

1. A plea in abatement is proper where there is a defect in the record shown by facts extrinsic thereto. *Steiner v. State*.. 147

2. Pleading *held* not to constitute a plea in abatement under sec. 441 of the criminal code. *Steiner v. State*..... 147

3. Where a so-called plea in abatement does not state facts sufficient to constitute such a plea, and contains no negation of any element of the offense charged, a demurrer thereto is properly sustained. *Steiner v. State*..... 147

4. A municipal court will take judicial notice of the ordinances of the city, and on appeal from a conviction of a violation of a city ordinance the district court will on a trial *de novo* take notice of whatever facts the former court was required to notice judicially before the removal of the cause. *Steiner v. State*..... 147

5. If on a second appeal substantially the same state of facts is presented, the former decision on the sufficiency of the evidence is conclusive. *Lucas v. State*..... 454

6. Where evidence is conflicting a verdict will not be set aside unless clearly wrong. *Craig v. State*..... 466

7. Where counsel for the defendant, by his cross-examination, has made it necessary for a prosecuting witness to give evidence as to the character of accused, he may give such evidence on his redirect examination. *Craig v. State*..... 466

8. Where two persons charged with homicide, one as principal, and the other as accessory before the fact, admit the killing, but rely on self-defense on the part of the principal, a statement in an instruction "that defendants set up necessary self-defense," *held* not prejudicial. *Craig v. State*..... 466

9. A criminal statute, though not providing a minimum penalty for its violation, *held* valid. *Siren v. State*..... 778

Curtesy.

Under sec. 29, ch. 23, Comp. St. 1905, the husband is not entitled to an estate by curtesy in lands held by his wife under a contract of purchase, but the estate to which curtesy may attach must be at least a freehold. *Grandjean v. Beyl*..... 349

Damages.

1. Where the evidence discloses that damages were assessed under the influence of passion or prejudice, and are excessive, a new trial will be ordered. *Babbitt v. Union P. R. Co* 410
2. Damages awarded must be sustained by ascertained and established facts. *Poels v. Brown* 783

Depositions.

A deposition and exhibit attached, when properly identified, may be given in evidence by the party not taking it. *Keller v. Chicago, B. & Q. R. Co* 604

Descent and Distribution.

A vendee in possession under a contract of purchase holds equitable title to land, which descends to his heirs. *Grandjean v. Beyl* 349

Divorce.

1. Evidence *held* insufficient to sustain the allegations of extreme cruelty and failure to support. *Whitney v. Whitney* .. 240
2. In a suit for divorce and alimony, a district court has jurisdiction to award to the wife specific personal property in addition to alimony. *Washington v. Washington* 741

Ejectment.

1. In ejectment, where plaintiff's chain of paper title does not reach back to the sovereign, or to a common source, he must prove possession in himself or one of his grantors at some time before he can recover. *Runkle v. Welty* 574
2. In ejectment, where plaintiff's testimony shows defendant in possession under claim of ownership, plaintiff must show a superior title. *Runkle v. Welty* 571
3. In ejectment, evidence *held* to sustain judgment for plaintiff. *Smith v. Nelson* 745

Elections.

1. In a contest of the office of county treasurer under secs. 5682 and 5683, Ann. St., it is necessary to allege and prove that the contestant is an elector of the county in and for which the contestee is declared elected. *Dodson v. Bowlby* .. 190
2. An entire proposed amendment need not be printed on the official ballot, but only enough to identify it and show its character and purpose. *State v. Winnett* 379

Eminent Domain.

The taking of private property only is authorized by statutes providing for the exercise of the power of eminent domain, unless there is express or clearly implied authority to extend them to public property. *State v. Boone County* 271

Equity.

1. The question of laches is to be decided upon the particular circumstances of each case. *Harrison v. Rice* 660
2. Generally when a statute of limitations is applicable, lapse of time alone, short of the period of limitation, will not bar relief. *Harrison v. Rice* 660
3. In equity, when suit is brought within the time fixed by the analogous statute of limitations, the burden is on defendant to show laches, but when brought after the statutory time, plaintiff must plead and prove that laches does not exist. *Harrison v. Rice* 660
4. In applying the doctrine of laches, the true inquiry should be whether the adverse party has been prejudiced by the delay and whether reasonable excuse therefor is offered. *Harrison v. Rice* 660
5. A delay of three years and ten months, pending litigation to establish validity of contract for sale of real estate, sought to be specifically enforced, *held* not to render vendee guilty of laches barring equitable relief, though the land has increased in value. *Harrison v. Rice* 660

Estoppel.

One claiming title under a decree cannot dispute the authority of the attorney to enter into the stipulation upon which the decree was based. *Peterson v. Ramsey* 235

Evidence. See APPEAL AND ERROR, 6-9. CONTRACTS, 1. CRIMINAL LAW.

1. The statutes and constitution of another state cannot be proved by parol, under sec. 396 of the code. *Cook v. Chicago, R. I. & P. R. Co* 64
2. In the absence of proof to the contrary, the constitution and laws of this state will be presumed to have been in force at the place of the making of the contract in issue. *Cook v. Chicago, R. I. & P. R. Co* 64
3. The defense of fraud and want of consideration may be shown by parol to destroy the legal effect of a written contract. *Minneapolis Threshing M. Co. v. Otis* 233
4. In the absence of ambiguity, and of fraud, accident or mistake, parol evidence is not admissible to assist in the interpretation of a written contract. *Wheeler v. Moore* 484
5. In an action of forcible entry and detention, question as to who was in possession, *held* not objectionable as calling for a conclusion. *Iler v. Miller* 675
6. Where the mental capacity of a testator is in issue, the opinion of a witness thereon *held* improper. *In re Estate of Cheney* 274

Evidence—*Concluded.*

7. One intimately acquainted with a person and familiar with his general conduct, and who observed his condition at the time when his state of mind is in dispute, may testify that he was of sound mind, while an opinion that such person was of unsound mind must be based on acts or conduct indicating unsoundness. *In re Estate of Wilson*..... 758

8. In an action against a beneficiary association, where the issue is as to the standing of assured at death, statements of deceased are admissible in favor of the association. *Ogden v. Sovereign Camp, W. O. W*..... 804

9. Testimony tending to establish a relevant fact may not be excluded as cumulative. *Ogden v. Sovereign Camp, W. O. W.*, 806

10. A statement by a party or his privy as to any fact in issue, unfavorable to the contention of such party, should go to the jury. *Ogden v. Sovereign Camp, W. O. W*..... 806

Executors and Administrators.

1. A suit to recover money due an estate, alleged to be held in trust, cannot be maintained by the heirs or devisees before the administration of the estate is terminated. *Prusa v. Everett*..... 250

2. The administrator *de bonis non* has all the powers of his predecessor, and may sue to recover funds in the hands of agents employed by his predecessor. *Prusa v. Everett*..... 251

3. Where debts and charges have been paid, and the statutory settlement alone remains, and the administrator *de bonis non* refuses to sue to recover assets, the only heir and beneficiary under the will may sue, making the administrator a party. *Prusa v. Everett*..... 251

4. Administrator *de bonis non* defined. *Prusa v. Everett*..... 251

5. The rule that the allowance of claims by the probate court is tantamount to a judgment does not apply to expenses of administration and the latter are not conclusively determined until final settlement. *In re Estate of Erickson*..... 642

6. On appeal from judgment in a proceeding for settlement of accounts of an executor, evidence *held* to sustain judgment. *In re Estate of Van Auken*..... 744

Exemptions.

The institution of a suit in another state against the employee of a railroad company is only *prima facie* evidence of evasion of the exemption laws of this state. *Satterlee v. First Nat. Bank*..... 691

Fees. See CORONERS, 2.

Fraud.

1. Petition *held* to state a cause of action for fraud and deceit. *Cerny v. Paxton & Gallagher Co* 134
2. Where one by means of a promise made with secret intent of not performing it induces another to part with property, he is guilty of actionable fraud. *Cerny v. Paxton & Gallagher Co* 134
3. A promise by a creditor who induced his debtor to secure a debt by a chattel mortgage, *held* not a collateral undertaking, and not within sec. 9, ch. 32, Comp. St. 1905, relating to the sale of personal property. *Cerny v. Paxton & Gallagher Co* 134
4. Measure of damages in an action for fraud stated. *Cerny v. Paxton & Gallagher Co* 134

Fraudulent Conveyances.

1. Though distant relationship between a grantor in fraud of creditors and his grantee does not of itself raise a presumption of fraudulent intent of the grantee, such relationship, together with facts and circumstances of knowledge and intimacy, may suffice to that end. *Martin v. Shears* 404
2. Evidence *held* sufficient to establish the fraudulent character of conveyances. *Martin v. Shears* 404
3. A contract or conveyance fraudulent as to creditors is not, for that reason alone, void as between the parties to it. *Martin v. Shears* 404
4. Where it appears that the grantee purchased the property and paid full value therefor in good faith, and without any intent to aid the grantor in defrauding his creditors, a transfer between relatives will be upheld. *Gage Bros. & Co. v. Burns* 737
5. Mere suspicions of fraud will not prevail against positive and unimpeached testimony showing the good faith of the transfer. *Gage Bros. & Co. v. Burns* 737

Forcible Entry and Detainer.

Evidence in action of forcible entry and detention *held* to sustain verdict for plaintiff. *Iler v. Miller* 677

Guardian and Ward.

Where a guardian places his interests in conflict with those of his ward, he should be discharged. *Robertson v. Epperson* .. 279

Habeas Corpus.

1. The district court or a judge at chambers may, when the right of personal liberty makes it necessary, issue a writ of habeas corpus to a county outside his judicial district. *State v. Porter* 811

Habeas Corpus—*Concluded.*

2. In a controversy for the custody of a minor between grandparents and father, the rights of the father must yield to the welfare of the child. *State v. Porter*..... 811

Highways.

1. A commissioner appointed to examine into the expediency of a proposed road should, upon recommending its establishment, cause it to be surveyed, if the location cannot otherwise be given. *Hoye v. Diehls*..... 77

2. An irregularity in the report of a commissioner as to the expediency of a proposed road is waived by the filing of a claim for damages on account of its establishment. *Hoye v. Diehls*..... 77

3. An injunction cannot be maintained to prevent the establishment of a highway by one who has filed a claim for damages on account of the establishment thereof. *Hoye v. Diehls* 77

4. The acceptance of a grant of land to a county for road purposes may be shown by proof that the public authorities assumed control over it and improved it, and that it was used by the public as a highway. *Lyons v. Mullen*..... 151

5. Evidence *held* insufficient to show abandonment of a public road. *Lyons v. Mullen*..... 151

6. The statutes do not authorize the taking of public lands for roads not on section lines. *State v. Boone County*..... 271

7. In a suit to restrain a road overseer from removing fences from land claimed by such overseer to be a highway, the burden was on defendant to establish the highway. *Van Wanning v. Deeter*..... 284

8. Gen. St. 1873, p. 959, did not of itself create public highways, but provision must first be made for the payment of damages for the right of way. *Van Wanning v. Deeter*.... 284

9. A highway over wild, uninclosed prairie lands cannot be established by user without the knowledge or consent of the owner. *Van Wanning v. Deeter*..... 284

10. An information under sec. 108, ch. 78, Comp. St. 1905, making it unlawful to build a barbed wire fence across or in any plain traveled road or track in common use, which omits to charge that the road or track was in common use, will not support a conviction. *Gilbert v. State*..... 636

Homestead.

A lease of a homestead for five years is a conveyance under sec. 6203, Ann. St., and void unless executed and acknowledged by both husband and wife. *Kloke v. Wolff*..... 504

Homicide.

1. Where the circumstances attending a homicide are fully testified to by eye-witnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing. *Lucas v. State* 454
2. Where homicide is in self-defense, and there is no evidence to warrant a finding beyond reasonable doubt that the accused purposely intended to kill the deceased, he may still be convicted of manslaughter, if with reasonable prudence and caution the killing might have been avoided. *Lucas v. State* 454

Husband and Wife.

1. Jurisdiction in a suit for maintenance to subject property to satisfaction of a decree may be acquired by service by publication and placing the property in the hands of a receiver. *Rhoades v. Rhoades* 495
2. In a suit for maintenance, residence of the wife in the county where the property of the husband sought to be sequestered is situated is not required. *Rhoades v. Rhoades*, 495
3. A suit for maintenance lies, though no other relief is sought, where the wife is separated from the husband without her fault. *Rhoades v. Rhoades* 495
4. Service by publication is authorized by sec. 77 of the code in a suit for maintenance against a nonresident to subject real estate of the husband to the payment of the decree. *Rhoades v. Rhoades* 495
5. To warrant a conviction under sec. 212*a* of the criminal code, both the abandonment and failure to support must have occurred since the taking effect of the statute. *State v. Hoon* 618

Indians. See MARRIAGE.

Indictment and Information.

1. Where the charge of contempt is set forth in an information in positive terms, the statement by the public prosecutor in his verification that the allegations in the information "are true, as he verily believes," does not render the information void. *Emery v. State* 547
2. One cannot object to the verification of an information after plea of not guilty, unless such plea has been withdrawn, and objection first made in motion for new trial comes too late. *Emery v. State* 547
3. Where several offenses are joined in an indictment or information, the court should require the prosecutor to elect on which count he will rely. *Miller v. State* 645

Indictment and Information—*Concluded.*

4. Where, by a single act, accused may be guilty of two criminal offenses, the state is not required to elect between counts of an information. *Miller v. State* 645

Infants.

An infant who seeks to disaffirm a contract must return so much of the consideration as remains in his possession, but an actual tender is not required when it is known that it will be refused. *Star v. Watkins* 610

Injunction.

In a suit on an injunction bond given in a suit to restrain the enforcement of a judgment, the extent to which the amount collectible on the judgment has been reduced in consequence of the injunction is a proper element of damage. *Stull Bros. v. Beddeo* 114, 119

Insurance.

1. In an action on a life insurance policy, evidence of a statement by the insured, shortly before his death, that the premiums on the policy had all been paid, *held* to be some evidence of payment. *Hanson v. Aetna Life Ins. Co* 421
2. Where an agent in possession of goods has contracted to become unconditionally liable to his principal for their loss by fire, and procures insurance thereon in his own name, such insurance is for his exclusive benefit, and does not affect his obligation to his principal on his contract. *Bradley & Co. v. Brown* 836
3. In case of conflict between the provisions of a life insurance policy and the statements contained in the application for insurance, the provisions of the policy will control. *Harr v. Highland Nobles* 175
4. A rule of a fraternal benefit association, which requires an appeal from the action of its officers vested with authority to allow or reject death claims to the supreme body, whose action is final, is void as against public policy. *Markham v. Supreme Court, I. O. F* 295
5. A by-law of a fraternal benefit society providing for the suspension of a member for nonpayment of dues, without other notice than that imparted by the by-law, *held* reasonable. *Nelson v. Modern Brotherhood of America* 429
6. Remittance of an assessment, addressed to an agent, reaching his designated post office on the day it became due, *held* a payment of the assessment. *Vancura v. Zapadni Cesko Bratrska Zednota* 755
7. Where the members of a beneficiary association may designate and change the beneficiary, the beneficiary acquires no vested rights during the life of the assured. *Ogden v. Sovereign Camp, W. O. W* 804

Intoxicating Liquors.

1. One having no knowledge to the contrary may deal with a person having charge of a saloon licensed to sell liquors, on the presumption that such person is the owner and licensee, or his authorized agent. *Moise v. Weymuller*..... 266
2. The courts will not enforce payment for a sale of liquors made by one possessing no license therefor. *Moise v. Weymuller* 266
3. Two statutes relating to the publication of application for liquor license *held* not repugnant, and *held*, further, that both must be complied with by parties affected thereby. *Tanner v. Hedgreen*..... 772
4. Under ch. 50, Comp. St. 1881, known as the "Slocumb law," each municipality may determine for themselves whether the liquor traffic shall be licensed therein. *Reusch v. City of Lincoln*..... 828
5. The term "municipal year," as used in sec. 25, ch. 50, Comp. St. 1905, means the political year. *Reusch v. City of Lincoln* 828
6. By the amendment to the charter of the city of Lincoln in 1905, by which biennial instead of annual elections were provided for, the legislature did not intend to abandon the policy of local option. *Reusch v. City of Lincoln*..... 828
7. Under sec. 5, ch. 50, Comp. St. 1905, county boards may not grant a license for a term exceeding a calendar year, but under sec. 25 municipal authorities may grant a license for a municipal year, which may be either longer or shorter than a calendar year. *Reusch v. City of Lincoln*..... 828

Judgment. See JUSTICE OF THE PEACE, 1-3.

1. Judgment of district court in suit for accounting, *held* to conform with mandate on former appeal. *Albin v. Parmele*, 74
2. It is error for a county court to enter final judgment against a defendant on the day of his default. *Oakdale Heat & Light Co. v. Seymour*..... 47
3. The county court cannot enter judgment by default on the first day of the term at which a cause first stands for trial, but, when the cause has been by agreement continued to a day certain, if defendant fails to attend, the cause may be tried in his absence. *Oakdale Heat & Light Co. v. Seymour*, 50
4. Where one who claims a lien on real estate on account of detached interest coupons is made a party to a foreclosure and his coupons are put in issue, and he makes default, he is barred from thereafter foreclosing his coupons. *Wyman v. Embree*..... 84
5. In a suit for divorce by a wife, the court will not consider

Judgment—*Continued.*

evidence of conduct prior to a judgment of dismissal after a trial in a former suit between the same parties on the same grounds. *Whitney v. Whitney* 240

6. A judgment of a county court against Alex Simon, entered in the judgment docket of the district court, but not indexed alphabetically, is not a lien on the lands of Simon Alexander, as against a subsequent *bona fide* purchaser. *Citizens Bank v. Young* 312

7. Equity will not enjoin a judgment at law, where due service was had, unless it clearly appears that the default was without defendant's fault, and that a valid defense exists. *Rowland v. Standiford* 343

8. While the award of costs in a judgment cannot be changed after the term, except as provided in secs. 602 *et seq.* of the code, the rule does not apply to an application to retax costs taxed illegally or by mistake. *Smith v. Bartlett* 359

9. A judgment rendered by the county court by consent, in a term case, outside the statutory term, is not void for want of jurisdiction. *Hayward v. Fisher* 364

10. Where a state court enters judgment in a cause removed to a circuit court of the United States, *held* error to refuse to vacate such judgment at the term of its rendition, on a proper showing, though the records of the state court did not disclose want of jurisdiction. *Tomson v. Iowa State Traveling Men's Ass'n* 400

11. A decree in foreclosure entered after death of plaintiff, where jurisdiction had attached, is an irregularity not open to collateral attack. *Wardrobe v. Leonard* 531

12. Failure to vacate decree, rendered after death of plaintiff, within three years, as required by sec. 602 *et seq.* of the code, renders the decree unassailable. *Wardrobe v. Leonard* 531

13. Under sec. 602 of the code, the courts will relieve against a decree on the ground of fraud committed by the successful party. *State v. Omaha Country Club* 178

14. The power to vacate or modify a judgment after the term should be exercised in the court where the judgment was entered. *Trimble & Blackman v. Corey & Son* 639

15. Where the allegations of a petition for a new trial under secs. 602, 603 of the code are denied, *held* error to vacate the judgment without evidence. *Trimble & Blackman v. Corey & Son* 639

16. Evidence *held* to sustain finding that certain judgments had not been procured by wilfully false testimony given by the

Judgment—*Concluded.*

judgment plaintiffs. *Citizens Ins. Co. v. Herpolsheimer Imp. Co* 707

17. In an action to vacate a judgment for fraud, plaintiff must allege and prove that he exercised due diligence at the former trial, and that the decision was not attributable to his own fault or negligence. *Citizens Ins. Co. v. Herpolsheimer Imp. Co* 707

18. A proceeding to revive a dormant judgment, which is assigned, may be had in the name of the judgment creditor, if living, or in the name of the assignee. *Moline, Milburn & Stoddard Co. v. Van Boskirk* 728

Judicial Sales.

One who purchases at a judicial sale, without questioning the validity or priority of an apparent lien deducted by the appraisers, is thereafter estopped from so doing. *Merrick County v. Stratton* 539

Justice of the Peace.

1. An offer to confess judgment under sec. 1004 of the code, contemplates an offer made in terms that, when accepted as made, entitles the plaintiff to judgment therefor, and costs, without further litigation. *Palmer v. Stiles* 362

2. Acceptance of an offer to confess judgment on condition that the judgment shall include costs entitles the plaintiff to judgment for the amount offered, and costs. *Palmer v. Stiles* 362

3. Where acceptance of an offer of judgment is made on condition that it include costs, and is rejected, the rejection amounts to a withdrawal of the offer of judgment. *Palmer v. Stiles* 362

4. On appeal from a judgment of a justice on a set-off, the plaintiff cannot defeat the judgment by a dismissal of his action. *Hess v. Hess* 347

5. Under sec. 1011 of the code, a district court may render judgment against plaintiff on a set-off, without notice, when plaintiff fails to file his petition as required by statute. *Hess v. Hess* 347

6. Petition in action on appeal bond *held* sufficient. *Cochran v. Moriarty* 669

Laches. See EQUITY.

Landlord and Tenant.

1. A clause in a lease attempting to create a lien on the crops to be raised is ineffectual to create either a legal or equitable lien on the crops grown thereafter on the leased premises. *Thostesen v. Doxsee* 40

Landlord and Tenant—*Concluded.*

2. Fixing a time for removal of fixtures in a decree, *held* not to abridge right of tenant to remove them at any time while in possession. *Fenimore v. White* 520

Larceny.

1. Evidence *held* sufficient to sustain conviction. *Titterington v. State* 8
2. Giving and refusal of instructions in a prosecution for larceny of cattle, *held* not prejudicial. *Titterington v. State,* 8
3. Where one person has the general and another a special ownership in property, it may be alleged to be in either in an indictment for larceny. *Martin v. State* 826
4. Evidence *held* to support verdict of guilty. *Martin v. State,* 826

Libel.

1. In actions for libel, an instruction that the truth alone is not a sufficient defense, but it must appear that the publication was made with good motives and for justifiable ends, *held* without prejudice. *Fordyce v. Richmond* 752
2. In an action for libel, *held* not error to instruct that punitive damages cannot be recovered, when the instruction defines such term, and states the true measure of damages. *Fordyce v. Richmond* 752

Limitation of Actions.

1. Under sec. 22 of the code, any payment on a written contract made through the arrangement of the maker, or as a sequence of his agreement, will stay the statute of limitations. *Bosler v. McShane* 86
2. Payment of dividends on the stock of a corporation assigned to the payee by the maker of a note as collateral, and their application on the note, will stay the statute of limitations. *Bosler v. McShane* 86, 91
3. Limitations begin to run against remaindermen at the time the adverse claim attaches. *First Nat. Bank v. Pilger* 168
4. The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the discovery of the fraud, but not in favor of the trustee of a resulting trust until he repudiates his trust. *Hanson v. Hanson* 584
5. Part payment on a debt secured by mortgage, when made by one having authority to bind the property, tolls the statute limiting the time within which foreclosure may be brought. *McLaughlin v. Senne* 631
6. Payment by owner of equity of redemption on a mortgage debt before the statute has run, tolls the statute as against a subsequent mortgagee with notice of the prior mortgage. *McLaughlin v. Senne* 631

Limitation of Actions—*Concluded.*

7. The general law as to limitations does not apply to proceedings to revive a dormant judgment. *Moline, Milburn & Stoddard Co. v. Van Boskirk* 728

Malicious Prosecution.

A criminal prosecution from malicious motives is not a cause of action for damages, if there was a probable cause. *Hudson v. Truman* 840

Mandamus.

1. If the relator in mandamus refuses to produce evidence, the case should be dismissed; but the respondent, by assuming the burden and introducing evidence, waives the error and the case must be determined on the evidence. *Vermillion v. State* 107
2. Where the only objection made to an appeal bond is that the surety did not sign in the presence of the justice, the party tendering the bond is entitled to a mandamus directing the justice to approve the same. *State v. Kloke* 133
3. Where mandamus is sought to compel the commissioner of public lands and buildings to execute a contract of sale for school lands, the writ will be denied unless it is clear that the lessee has substantially complied with the law, and the board has been guilty of an abuse of discretion. *State v. Eaton* 202
4. An action to procure writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed, and a notice that a writ will be applied for, served before any papers have been filed, does not confer jurisdiction to issue a peremptory writ. *State v. Harrington* 395
5. It is only where there is no room for controversy as to the right, and where from the facts set forth in the affidavit a court can take judicial notice that a valid excuse cannot be given, that a peremptory mandamus may issue without notice. *State v. Harrington* 395
6. A court has no power to issue a peremptory mandamus without notice compelling a railroad company to furnish cars to a shipper, since it cannot be apparent that no valid excuse can be given. *State v. Harrington* 395

Marriage.

Marriages valid under the customs of an Indian tribe, *held* valid, and children of such marriages legitimate. *Ortley v. Ross* 339

Master and Servant.

1. Ordinarily an employer may rely on the presumption that each employee will exercise due care to avoid injury to

Master and Servant—*Concluded.*

himself and his coemployees. *Bryant v. Beebe & Runyan F. Co* 155

2. The negligence of plaintiff and his coemployees *held* to be the proximate cause of injury. *Bryant v. Beebe & Runyan F. Co* 155

3. Where a servant subject to another servant is injured through the negligence of his superior, the master is liable. *Bell v. Rocheford* 304

4. Defects in scaffolds and temporary structures, *held* not defects of the structure due to its unfinished state. *Bell v. Rocheford* 310

Mortgages.

1. In a foreclosure suit, an admission on the trial by defendant that plaintiff is the owner of the note and mortgage, *held* to relate to the time of filing the petition. *Wood v. Speck* 435

2. To constitute a mortgage the relation of debtor and creditor must exist. *Lemke v. Lemke* 525

3. Evidence *held* to negative the claim that a certain deed, absolute in form, was intended as a mortgage. *Lemke v. Lemke* 525

4. Where the assignee of record of a decree of foreclosure procures the property to be sold after the death of plaintiff, and without revivor, confirmation of the sale cures any irregularity as against an action to redeem. *Wardrobe v. Leonard* 531

5. Findings *held* insufficient to sustain decree giving plaintiff's mortgage priority. *McLaughlin v. Senne* 631

Municipal Corporations.

1. Unofficial citizens cannot sue on behalf of public corporations to recover for the conversions or embezzlements or other torts of officials. *Cathers v. Moores* 13

2. A resident taxpayer of a city may maintain an action against its officers to recover misappropriated funds for the benefit of the corporation, where its proper law officer refuses to act. *Cathers v. Moores* 17

3. To entitle a taxpayer to a judgment in such a case, it must appear that the municipality could have maintained the action in the first instance. *Cathers v. Moores* 17

4. Where a city receives substantial benefits under a contract which it was authorized to make, but void because irregularly executed, it is liable for the reasonable value of the benefits received. *Cathers v. Moores* 17

5. A taxpayer who has full knowledge of the allowance of a claim by municipal authorities, and has an opportunity to

Municipal Corporations—*Continued.*

but does not appeal from such allowance, cannot sue the officers of the municipality to recover money disbursed on such allowance. *Cathers v. Moores* 17

6. A provision in an ordinance of a city that it shall be unlawful to erect a gas tank therein without the written consent of the owners of all the property within a radius of 1,000 feet, *held* void. *State v. Withnell* 33

7. The city of Omaha, under its charter of 1903, is liable to the husband for consequential damages suffered by him in consequence of injuries to his wife caused from a defective street. *Wright v. City of Omaha* 124

8. Written notice to the city by the wife, conforming to sec. 22, ch. 12*a*, Comp. St. 1903, which brings home to the city knowledge that the injured party is a married woman, is sufficient to enable the husband to maintain an action for consequential damages. *Wright v. City of Omaha* 124

9. The statute requiring an estimate of the cost of a public improvement to be submitted before a contract is let is mandatory. *Murphy v. City of Plattsmouth* 163

10. Where a statute provides that an estimate of the cost of a public improvement shall be published with the advertisement for bids, and that no contract shall be let for a price exceeding such estimate, letting a contract at a price in excess of the estimate cannot be evaded by raising the estimate after the bids have been opened. *Murphy v. City of Plattsmouth* 163

11. Any material departure in a contract for a public improvement from the terms on which the bidding was had is an evasion of the statute. *Murphy v. City of Plattsmouth* 163

12. Where a contract for a public improvement provides that it shall not be assigned, an assignee thereof cannot recover money due thereunder. *Murphy v. City of Plattsmouth* 163

13. Whether property will be especially benefited by a street improvement is a question for a local board or officer making it, and, in the absence of fraud, mistake or transgression of authority, will not be reviewed by the courts. *State v. Several Parcels of Land* 225

14. One whose property is not taken or damaged by a street improvement cannot defeat a special assessment for benefits on the ground that others have waived their right to compensation in money and have accepted something in lieu thereof. *State v. Several Parcels of Land* 225

15. An omission by a petitioner for a street improvement to note in the petition the date of his signature, as required by statute, will not defeat an assessment for special bene-

Municipal Corporations—*Continued.*

fits where the improvement has been completed without objection. *State v. Several Parcels of Land*..... 225

16. Under sec. 161, ch. 12*a*, Comp. St. 1901, when it was proposed to equalize the benefits to, and relevy special taxes against, a part only of the property benefited, notice to the owners of other property benefited, who had paid taxes formerly assessed for the same improvement, was not required. *Richardson v. City of Omaha*..... 79

17. A city council will not be restrained from passing an ordinance levying special taxes, equalized by it, when sitting as a board of equalization, in the absence of proof of fraud, gross injustice or mistake. *Richardson v. City of Omaha*... 79

18. Towns and villages are incorporated in this state under a general statute, by resolution of the board of county commissioners, whose acts are ministerial. *Commonwealth R. E. Co. v. City of So. Omaha*..... 368

19. County boards have no authority to include large rural districts within the corporate limits of cities and villages. *Commonwealth R. E. Co. v. City of So. Omaha*..... 368

20. Where a county board has included within the corporate limits of a village agricultural land, the courts will, in a proper action, grant relief. *Commonwealth R. E. Co. v. City of So. Omaha*..... 368

21. An ordinance, adopted in pursuance of an unconstitutional statute, is ineffectual to extend the corporate limits of a municipality. *State v. Several Parcels of Land*..... 703

22. Under ch. 63, Comp. St., the right to compensation for improvements is not affected by the fact that such improvements were made in supposed compliance with a municipal regulation which was void. *Flanagan v. Mathisen*..... 412

23. Where a city council, acting under sec. 8739, Ann. St., vacates a street, such action has the force of a judgment, and mere irregularities will not invalidate the vacation. *Enders v. Friday*..... 510

24. The courts will not inquire into the motive of a city council in its exercise of a discretionary power conferred by the legislature. *Enders v. Friday*..... 510

25. Where part of a street is vacated, only property owners whose property abuts on the part vacated are entitled to damages. *Enders v. Friday*..... 510

26. In an action for injuries from a defective sidewalk, an instruction requiring plaintiff to prove that the walk was in an unreasonably dangerous condition, *held* erroneous. *Brown v. Village of Pierce*..... 623

Municipal Corporations—*Concluded.*

27. The exhibition of a stallion on the public streets of a city or village may be declared a nuisance and punished as such. *State v. Iams* 678

Negligence.

1. In an action for injuries to an infant by the negligence of another, the foundation for recovery is the culpable negligence of the defendant. *Johnston v. New Omaha T.-H. E. L. Co* 24
2. In an action for injuries by the negligence of another, recovery can be had for such consequences only of the act complained of as ought reasonably to have been anticipated. *Johnston v. New Omaha T.-H. E. L. Co* 24
3. A boy 12 years old who purposely takes hold of a live wire to obtain a shock is, as a matter of law, guilty of contributory negligence. *Johnston v. New Omaha T.-H. E. L. Co* ... 27
4. One who is negligent in a situation of danger, the existence of which he knows, cannot recover for an injury which his negligent conduct invites. *Johnston v. New Omaha T.-H. E. L. Co* 27
5. Contributory negligence is an affirmative defense, which must be pleaded, and ordinarily involves questions of fact for the jury. *Cook v. Chicago, R. I. & P. R. Co* 64
6. To warrant a finding that a negligent act is the proximate cause of an injury, it must appear that the injury was a natural consequence, which ought to have been foreseen. *Bryant v. Beebe & Runyan F. Co* 155
7. Proximate cause is the primary fault where no intermediate cause intervenes to produce the effect. *Bell v. Rocheford* .. 310

New Trial.

1. The county court in term cases has jurisdiction to grant a new trial under sec. 602 of the code. *Oakdale Heat & Light Co. v. Seymour* 50
2. In an action on a life insurance policy, *held* not error to overrule a motion for a new trial for newly discovered evidence of alleged statements by the insured that he had not paid the premiums on the policy. *Hanson v. Aetna Life Ins. Co* 421
3. Evidence of possession by defendant of an uncanceled receipt for an insurance premium, *held* insufficient to justify setting aside the verdict on motion for a new trial. *Hanson v. Aetna Life Ins. Co* 421
4. Where one applying for a new trial, after the term, fails to show that he could not have discovered the evidence before by reasonable diligence, the application is properly denied. *Citizens Ins. Co. v. Herpolsheimer Imp. Co* 707

Occupying Claimants. See TAXATION, 18, 19.

Officers.

When an amendment to the constitution creates a public office, such office may be filled by vote of the electors at the same election at which the amendment is adopted. *State v. Winnett* 379

Parties.

1. In a suit by a mortgagee to redeem from a judicial sale of real estate for taxes, the mortgagor is not a necessary party. *Wood v. Speck* 435
2. When plaintiff is ignorant of the names of the defendants, he may designate them in his petition and summons by supposed names. *Davis v. Jennings* 462

Partnership.

Where members of a copartnership reside in another state and are not within this state, service of summons upon the firm cannot be made in a county where it has no usual place of doing business. *Stelling v. Peddicord* 779

Paupers.

1. The liability of one county to another for relief to a pauper chargeable in the former is statutory. *Otoe County v. Lancaster County* 517
2. In an action to enforce the liability of one county to another for relief to a pauper, it must appear that the relief was furnished to a person chargeable as a pauper. *Otoe County v. Lancaster County* 517
3. When a person is chargeable as a pauper under ch. 67, Comp St., stated. *Otoe County v. Lancaster County* 517
4. Secs. 9360-9362, Ann. St., providing for the care of nonresident paupers, apply to all counties. *Rock County v. Holt County* 616

Payment.

Where an agent receives commissions payable in instalments as notes given for machinery are paid by purchasers, the principal cannot indorse funds received as partial payments on a series of notes, where the effect is to deprive the agent of his commission. *Belcher v. Case Threshing M. Co* 798

Pleading. See APPEAL AND ERROR, 14-18. BILLS AND NOTES, 5. BROKERS, 3. JUSTICE OF THE PEACE, 6.

1. Where no reply is filed, and a cause is tried on the theory that a material allegation of the answer is in issue, a claim that such allegation stands admitted comes too late, after verdict. *In re Estate of Cheney* 274
2. A negative pregnant is a negative expression implying an affirmative. *Lemke v. Lemke* 525

Pleading—*Concluded.*

3. Where defendant is privileged from suit in the county where sued, he may set up want of jurisdiction by answer, with other defenses. *Stelling v. Peddicord*..... 779

Powers.

A power coupled with an interest is not arbitrarily revocable without the consent of the donee. *Harrison v. Rice*..... 654

Principal and Agent. See PAYMENT.

1. A principal is bound by only such representations of his agent as occur in the course of his business, and are within the agent's real or ostensible authority. *Hanson v. Aetna Life Ins. Co*..... 418
2. Petition which stated that defendant, as agent, fraudulently concealed from his principal all facts relative to money received by defendant as a part consideration for land, *held* sufficient. *Wells v. Cochran*..... 612
3. Letters written by the holder of title to land, *held* to satisfy the statute of frauds, and to authorize the person addressed to obligate the writer by a contract for the sale of the land. *Harrison v. Rice*..... 654
4. The owner of a note in judgment, who places it in the hands of a collection agency with a distinct agreement that no suit is to be brought thereon, is not bound by the unauthorized action of the agent in bringing suit. *Satterlee v. First Nat. Bank*..... 691
5. Where one party requests another to perform services in effecting a sale, agreeing "to protect" him if such sale is made, the contract is enforceable. *Fredrickson v. Locomobile Co. of America*..... 775

Principal and Surety. See BANKRUPTCY, 2.

Process. See PARTNERSHIP.

That defendants whose names are unknown are designated in a summons by supposed names affords no ground for quashing the writ or service thereof. *Davis v. Jennings*..... 462

Public Lands.

1. Under sec. 19, art. I, ch. 80, Comp. St. 1881, the county treasurer, county judge and county clerk are required, in appointing appraisers to value school lands for the purpose of sale, to act together. *State v. Eaton*..... 202
2. Where a lessee of school land exercises his option and makes an application to purchase, the board of educational lands and funds may, in the exercise of a reasonable discretion, reject the appraisement. *State v. Eaton*..... 202
3. While the board of educational lands and funds has discretionary power in passing on appraisements of school

Public Lands—*Concluded.*

lands under an application of a lessee to purchase, an unreasonable refusal of the board to approve a fair appraisement will not justify the commissioner in refusing to issue a certificate of purchase. *State v. Eaton* 208

4. Under sec. 2477, Rev. St. U. S., government land not reserved for public purposes may be used for public roads. *Van Wanning v. Deeter* 282

5. Acceptance of dedication of government land for public roads, under sec. 2477, Rev. St. U. S., may be shown by the acts of the public authorities, or of the public itself. *Van Wanning v. Deeter* 282

6. A settler on public land, on which there is a road in common use, takes subject to the public easement therein. *Van Wanning v. Deeter* 282

7. Evidence *held* not to sustain the assumption that the land in question was a part of the public domain at the time of the passage of sec. 2477, Rev. St. U. S., granting right of way over public land for highways. *Van Wanning v. Deeter*, 284

Quieting Title.

1. An action to quiet title may be maintained by remaindermen during the continuance of the particular estate. *First Nat. Bank v. Pilger* 168

2. In a suit to quiet title, where the holder of a mortgage barred by limitations asks affirmative relief, the court may, on proper proof, declare such mortgage barred, without requiring the holder of the legal title to do equity by tendering the amount due thereon. *Peterson v. Ramsey* 235

3. Action of the trial court permitting plaintiff to dismiss petition to quiet title without prejudice to the right of defendant to file supplemental answer and cross-petition, *held* not prejudicial. *Hanson v. Hanson* 584

Railroads.

1. In an action for damages for loss by fire, evidence *held* sufficient to raise a presumption of negligence in the management or equipment of defendant's engine. *Shipman v. Chicago, B. & Q. R. Co* 43

2. Evidence in an action for damages for killing live stock, *held* to sustain judgment for plaintiff. *Sands v. Chicago, B. & Q. R. Co* 299

3. Evidence in an action for killing cattle, *held* to sustain judgment for plaintiff. *Stading v. Chicago, St. P., M. & O. R. Co* 566

4. Instructions as to duty of engineer to keep a lookout for obstructions on track, *held* not prejudicial. *Stading v. Chicago, St. P., M. & O. R. Co* 566

Railroads—*Concluded.*

5. It is error to instruct the jury that, if evidence is evenly balanced on the question of defendant's negligence, they should find for plaintiff. *Shipman v. Chicago, B. & Q. R. Co* 43
6. An instruction that the burden is on plaintiff to show unreasonable delay in shipment of live stock, *held* proper. *Nelson v. Chicago, B. & Q. R. Co* 57
7. Where an engineer by looking might have avoided injury to cattle, the company is liable. *Stading v. Chicago, St. P., M. & O. R. Co* 566
8. Ordinarily a railroad company is not liable for injuries caused by a team taking fright at the noises incident to the ordinary operation of a train on its road. *Williams v. Chicago, B. & Q. R. Co* 695
9. Where noises of a train endanger persons at a crossing, ordinary care and prudence require that they be stayed until the danger is past. *Williams v. Chicago, B. & Q. R. Co.*, 695
10. To turn on the steam of a locomotive standing at a public crossing without warning, *held* actionable negligence, in the absence of special circumstances justifying the act. *Williams v. Chicago, B. & Q. R. Co* 695
11. A train standing at a public crossing and a traveler have equal rights, and each is bound to act with due regard to the rights of the other. *Williams v. Chicago, B. & Q. R. Co.*, 695
12. Whether an engineer is guilty of negligence in failing to ring the bell or give other warning of the starting of the engine is a question for the jury. *Wiliams v. Chicago, B. & Q. R. Co* 701

Rape.

1. Testimony of prosecuting witness alone will not support a conviction. *Fitzgerald v. State* 1
2. Evidence that defendant and prosecuting witness were frequently together, *held* insufficient to corroborate her testimony. *Fitzgerald v. State* 1
3. In a prosecution for rape, to show that the assault was against the will of the prosecutrix, her resistance must be proportionate to the occasion, under the circumstances, and at the time of the act complained of. *Vaughn v. State* 317
4. In a prosecution for rape, where the evidence shows that the prosecutrix made no outcry and did not complain, *held* error to refuse an instruction that the jury should take these circumstances into consideration, with other evidence, in determining the guilt or innocence of the accused. *Vaughn v. State* 317
5. Evidence *held* insufficient to support the verdict. *Vaughn v. State* 317

Reference.

Where, in a suit to quiet title to partnership lands, it appears that no final acounting has been had, the court may appoint a referee to state the account preliminary to determining the interests of the partners in the lands. *Hanson v. Hanson* 584

Reformation of Instruments.

Equity will reform a written contract when the proof is clear that a mistake was made in omitting a material provision agreed to by both parties. *Baker v. Montgomery*..... 98

Removal of Causes.

1. Merely formal defects in a petition to remove a cause from the state to the federal court are waived by appearing in the latter court and moving to remand on the ground that the alleged cause for removal does not exist. *Tomson v. Iowa State Traveling Men's Ass'n*..... 400
2. Pending a controversy in a United States court as to the sufficiency of the ground for removal of a cause, a state court is without jurisdiction to proceed, or to make any judgment or order in the suit. *Tomson v. Iowa State Traveling Men's Ass'n*..... 400

Replevin.

A writ of replevin issued without the filing of the affidavit required by sec. 182 of the code should be set aside. *Case Threshing M. Co. v. Rosso*..... 184

Sales.

1. In an action for the price of coal, evidence examined and *held* sufficient to sustain the judgment. *Germer Stove Co. v. Haws H. & F. Co*..... 232
2. Where a vendee sued to recover partial payment on a sale of personalty after the vendor had performed the agreement on his part, and while the action was pending the vendor replevied the goods as owner, *held* that a rescission was effected, and the vendee was entitled to recover. *Wagman v. Kessler & Co*..... 263

Schools and School Districts.

1. Under sec. 11079, Ann. St., school boards can suspend or expel a pupil for gross misdemeanor or persistent disobedience, without notice or formal trial. *Vermillion v. State*... 107
2. A school board may adopt any procedure in obtaining evidence of the conduct of a pupil; but in an action to procure reinstatement misconduct can only be shown by witnesses cognizant of the facts. *Vermillion v. State*..... 107
3. If, pursuant to an opinion of the state superintendent of public instruction, one of two contestants for the office of school director acts as such officer, he is a *de facto* officer. *Bishop v. Fuller*..... 259

Specific Performance.

1. A suit for specific performance may be maintained against a subsequent purchaser, where he takes with notice of the contract. *Peterson v. Ramsey* 235
2. Evidence in a suit for specific performance *held* insufficient to sustain decree for plaintiff. *Thompson v. Marshall* 373
3. Mere forbearance, not accompanied by conduct tending to mislead defendant, *held* not to bar suit for specific performance. *Harrison v. Rice* 654

Statute of Frauds.

1. An agreement between the president of a bank and a purchaser of its stock, *held* not a contract to answer for the debt, default or miscarriage of another. *Patrick v. Barker* .. 823
2. Instruction that a verbal contract for the sale of real estate is void, and a payment of part of the purchase price alone does not make it valid, *held* proper. *German Nat. Bank v. Laflin* 715

Statutes.

1. Courts will not read into a statute exceptions not made by the legislature. *Siren v. State* 778
2. Where the provisions of a general law and a later act applying only to a certain special class are not repugnant, they will be construed together. *Reusch v. City of Lincoln*, 828

Street Railways.

1. A city ordinance, which requires street railway companies and other corporations to comply with specified requirements before entering upon and obstructing the streets, and which gives the city council power to grant or refuse such permit, *held* valid. *State v. Frost* 325
2. The court will not presume that under such an ordinance the city authorities will act arbitrarily. *State v. Frost* 325
3. One who negligently attempts to cross a street railway track in front of an approaching car cannot recover for injuries sustained by being thrown from his wagon by impact with the car, unless those in charge thereof wilfully or wantonly produce the collision. *Harris v. Lincoln Traction Co* 681
4. The mere fact that a street car was running at a rate of speed prohibited by ordinance does not of itself entitle recovery for injury at crossing. *Harris v. Lincoln Traction Co.* 681
5. The right to use the streets of a city by the driver of a horse and the manager of a street car are equal. *Olney v. Omaha & C. B. Street R. Co* 767
6. If a horse shows no signs of fright at a street car which are observable to the motorman until too late to stop, he is

Street Railways—*Concluded.*

not negligent in running into it if it rears and alights immediately in front of the car. *Olney v. Omaha & C. B. Street R. Co* 767

7. In an action for injury to a horse colliding with a street car, evidence *held* sufficient to submit to the jury. *Olney v. Omaha & C. B. Street R. Co* 767

8. Evidence in action for injury at crossing, *held* insufficient to require its submission to the jury. *Harris v. Lincoln Traction Co* 681

Taxation.

1. Courts will not aid in the depletion of the public revenues by permitting private property to escape taxation, except in obedience to positive law. *State v. Omaha Country Club*, 178

2. Under sec. 28, art. I, ch. 77, Comp. St. 1903, every person in possession or control of personal property is required to list it for taxation, and return a description of it, the name of the owner, and its value. *Lincoln Transfer Co. v. County Board* 197

3. Where a warehouseman fails to make the proper return of personalty for assessment, and prevents the assessor from examining it, it is the duty of that officer to assess it by the best description he can and value it according to his best judgment. *Lincoln Transfer Co. v. County Board* 197

4. Such an assessment will not be set aside on the application of one whose conduct has made it necessary. *Lincoln Transfer Co. v. County Board* 197

5. Building and loan associations should be assessed as indicated by sec. 13, ch. 17, laws 1899, and an assessment of the mortgages taken to the association, which the assessor assumes are unpaid, cannot be upheld. *Nebraska Central B. & L. Ass'n v. Board of Equalization* 472

6. One who returns his personal property under an assumed name is estopped to complain of any irregularity arising from that cause. *Moore v. Furnas County Live Stock Co* ... 558

7. The failure of the county treasurer to file with the county clerk duplicate tax receipts on payment of taxes due on lands sold for taxes is not such an irregularity as will affect the sale or the rights of the purchaser. *Cowles v. Adams* ... 130

8. On filing petition for foreclosure of taxes under art. IX, ch. 77, Comp. St. 1905, the county treasurer has authority to designate a paper for the publication of the notice of the pendency of the suit if the county commissioners have failed so to do. *Bee Publishing Co. v. Douglas County* 244

9. Compensation for publishing notice of foreclosure of taxes determined. *Bee Publishing Co. v. Douglas County* 244

Taxation—*Concluded.*

10. Sec. 3, art. IX, const., providing for two years' time within which to redeem from tax sales, applies to judicial as well as to administrative sales. *Wood v. Speck*..... 435
11. A statutory requirement that an action to recover personal taxes shall only be brought by direction of the county board is waived after answer and trial without objection. *Moore v. Furnas County Live Stock Co*..... 558
12. After purchase at foreclosure sale by the mortgagee, the mortgagor cannot restrain the collection of taxes levied after the execution of the mortgage, unless bound by covenant to pay them. *Sholes v. City of Omaha*..... 576
13. Petition in suit to cancel taxes, *held* demurrable. *Sholes v. City of Omaha*..... 576
14. Evidence *held* insufficient to overcome the presumption of regularity attending a private tax sale arising from the issue of a tax sale certificate. *Cowles v. Adams*..... 130
15. In a suit to enforce collection of taxes under ch. 77, art. IX, Comp. St. 1905, the petition is *prima facie* evidence of their legality, and of the several amounts levied, and that such taxes are delinquent. *State v. Several Parcels of Land*..... 581
16. The validity of an annexation ordinance adopted in pursuance of an unconstitutional statute, may be collaterally impeached in a proceeding brought to enforce a city tax levied against real estate in the annexed territory. *State v. Several Parcels of Land*..... 703
17. A tax levied under a void ordinance is one levied for an "unauthorized purpose," within Comp. St. 1905, ch. 77, art. IX, sec. 15. *State v. Several Parcels of Land*..... 703
18. The so-called "Occupying Claimant's Act" (Comp. St., ch. 63), *held* valid, and applicable to lands of which adverse claimants had actual title at the time of its enactment. *Flanagan v. Mathisen*..... 412
19. The owner of the real title to land cannot be compelled, under ch. 63, Comp. St., to convey the same to a claimant on being paid or tendered its appraised value. *Flanagan v. Mathisen*..... 412

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. Where special findings can be reconciled with a general verdict, a motion for judgment on the special findings, notwithstanding the general verdict, should be denied. *Kafka v. Union Stock Yards Co*..... 140
2. In an action for damages for death, special findings *held* not irreconcilable with the general verdict, and insufficient to sustain judgment for defendant. *Kafka v. Union Stock Yards Co*..... 140

Trial—*Concluded.*

3. It is the duty of the court to direct a verdict in a proper case. *Hibner v. Westover* 161
4. A verdict should not be directed for one party when there is competent evidence sufficient to support a verdict for the adverse party. *Wells v. Cochran* 612
5. On motion to direct a verdict, the court should consider as established all the facts proved and all inferences which can reasonably be drawn from the evidence. *Harris v. Lincoln Traction Co* 681
6. In replevin, direction of verdict for plaintiffs sustained. *Coburn v. Bolton* 736
7. In a trial to the court, the court may set aside the judgment and allow plaintiff to introduce further evidence. *Cochran v. Moriarty* 669
8. A court may recall its instructions at any time before verdict. *Hibner v. Westover* 161
9. Instruction as to weight of evidence, *held* proper. *Kemp v. Slocum* 440
10. The practice of setting out the pleadings at length in instructions, instead of a concise statement of the issues, disapproved. *Home Savings Bank v. Stewart* 624
11. Error cannot be assigned for the refusal of an instruction, the substance of which is contained in instructions given by the court of his own motion. *Hudson v. Truman* 840
12. An objection to a question as to the mental capacity of a testator, that it is incompetent and calls for the opinion of the witness, is sufficiently specific. *In re Estate of Cheney* .. 274
13. Where a party objects to evidence, he does not waive the error by introducing evidence rebutting the evidence to which he excepted. *In re Estate of Cheney* 274
14. The weight and credibility of testimony are for the jury. *Husenetter v. Little* 220
15. Where the facts are disputed, or where different minds might draw different conclusions, the case is for the jury. *Ogden v. Sovereign Camp, W. O. W* 806

Waters.

In an action against mere trespassers for damage to land occasioned by their release of water from an artificial ditch, that plaintiff was not the owner of the land is no defense. *Reams v. Clopine* 166

Wills.

1. Instructions given by request, relating to testamentary capacity of testatrix, *held* cured by instructions given by the court on its own motion. *In re Estate of Wilson* 758

Wills—*Concluded.*

2. Instructions requested by contestant in proceedings to probate a will, *held* properly refused. *In re Estate of Wilson*.. 758

Witnesses.

1. The provisions of the code against disclosure of confidential communications may be waived by the personal representative of a deceased person. *Parker v. Parker*..... 535
2. A wife may testify as to a crime committed against her by her husband. *Miller v. State*..... 645