Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/05/2026 05:00 AM CST

THOMAS GILLESPIE, APPELLEE, V. CITY OF SOUTH OMAHA, APPELLANT.

FILED JUNE 22, 1907. No. 14,886.

1. **Eminent Domain:** CONSTRUCTION OF VIADUCT: DAMAGES. Where a city partially vacates a street and builds a viaduct thereon opposite plaintiff's real estate abutting on such street, thereby diminishing the convenience of access to such property, the true measure of damages to the owner is the difference in the value of the property before and immediately after the improvement, unaffected by any increase or depreciation of property values generally in the same vicinity.

2. ———: ———: ———. In determining the amount of such damages, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining the market value of the property before and after the construction of such improvement.

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

Lambert & Winters, for appellant.

Smyth & Smith, contra.

CALKINS, C.

The plaintiff owned property abutting the north side of L street between Thirty-Eighth and Thirty-Ninth streets in the city of South Omaha. L street was much used, and the whole tide of travel passed by the property of the plaintiff. He owned a business building at the corner of Thirty-Eighth and L streets, which was used by him for a hotel and saloon. The travel east and west upon L street made his lots desirable for business purposes. This was the condition of his property when the city closed L street from Thirty-Eighth street west to Thirty-Ninth street, and vacated the south half of L street between Thirty-Eighth and Thirty-Ninth streets. On the half thus vacated the city constructed a viaduct, which started at

Thirty-Ninth street and ran east in front of the plaintiff's property across the railroad tracks to a point where L street intersects Thirty-Sixth street. Thirty-Ninth street is considerably higher than Thirty-Eighth street, and the viaduct passes in front of the plaintiff's property at a point about 20 feet above the surface of the street. As a result of the closing of the streets and the building of the viaduct, the travel which before passed in front of the plaintiff's building now crosses on the viaduct 20 feet above. To reach the plaintiff's property, travel from the east must go west over the viaduct to Thirty-Ninth street, and then retrace its course along the part of the street left open on the north side, so that, while access to the plaintiff's property from the public street is not prevented, its convenience is greatly diminished, and the amount of casual travel passing his place of business much reduced. This was an appeal to the district court from refusal of the city council to allow plaintiff's claim for damages. The jury found for the plaintiff in the sum of $3,000, and from a judgment rendered upon this verdict the defendant appeals.

1. In the first instruction the jury were told that the only question for its consideration was the amount of damages suffered by plaintiff on account of the depreciation in the value of his property caused by the vacation of L street and the erection of the viaduct mentioned in the plaintiff's petition; that its verdict must be for the plaintiff in some amount; but that, in considering damages sustained, it must be damages to the realty, and not to any business conducted by the plaintiff. Exception is taken to so much of this instruction as tells the jury it must find for the plaintiff in some amount, the contention being that, upon the theory of law contended for by the defendant, the jury might have found for the defendant. If the plaintiff was entitled to recover the depreciation in value of his property caused by the closing of the street and the erection of the viaduct, this instruction was right; for, while this depreciation was not estimated at so great

an amount by the defendant's witnesses as by those called for the plaintiff, its existence in some amount was conceded by all. The objection to this instruction involves the question whether the damages proved were such damages as the plaintiff was entitled to recover. This question arises upon the defendant's objection to the other instructions, and is, we think, the only question in the case. The position of the defendant is that there were in this case two kinds of damages, general and special, the former being such as are shared by the plaintiff generally with the public at large, and the latter such as are peculiar to the plaintiff's property; and it is sought to limit the latter by further restricting the same to such damages as he could have recovered at common law if the improvement had not been authorized by statute. Since at common law there must be a physical interference with the enjoyment of the possession of the property to sustain an action for damages thereto, it would follow from the adoption of this theory that there could only be a recovery in cases where the property is actually taken or access thereto entirely cut off. The defendant prepared and presented to the court requests for instructions embodying this view of the law, which were by the court refused. In this case no general damages common to the community at large are pointed out; and we are unable to understand how any such could exist. The effect of building a viaduct across railroad tracks upon a business street is a familiar one and easily understood. In order to attain the required height, it is usually necessary to commence the elevation of the viaduct some distance from the tracks. This results in lessening the range of use, and a consequent diminution of the value of property abutting on the street from the point where the viaduct leaves the grade of the street to the point where it again returns to such grade. All the other property affected by the improvement is benefited, while that between the two ends of the viaduct is necessarily damaged. The damages so suffered are special within the definition above given,

and not general. Section 21, art. I of the constitution, provides that "the property of no person shall be taken or damaged for public use without just compensation therefor." The interpretation of this constitutional provision is not new in this state. The precise question was before this court in *City of Omaha v. Kramer,* 25 Neb. 489, which was an appeal from the award of damages caused by the construction of a viaduct across the railway tracks on Eleventh street in the city of Omaha. Construing the constitutional provision above quoted, the court held that it embraced all damages which affected the value of a person's property. In other words, that the word "damage" in the constitution includes all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. The case of the *Pennsylvania R. Co. v. Marchant,* 119 Pa. St. 541, was cited to the court to sustain the proposition that the word "damage" should be construed to mean such legal wrong as would be the subject of an action for damages at common law. The court refused its assent to such construction, and expressly disapproved of the Pennsylvania case, and established the doctrine that the measure of damages caused by the construction of a publi improvement is the difference between the value of the property immediately before the location and construction of the improvement and immediately afterwards. It was aptly said by the court that constitutional guaranties are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property or override a plain constitutional inhibition. If the public desire to erect works for public use, then the public, the party benefited, must bear the burden, while each owner of private property, as one of the public, in some of the modes provided by law, must pay his share of the indebtedness or expense, and thus equalize the burden. The rule thus adopted has been often attacked, but always sustained by this court, and we are still satisfied

with its reasoning and conclusion. In a very recent case, that of *Stehr v. Mason City & Ft. D. R. Co.*, 77 Neb. 641, this court has had occasion to review and discuss the authorities upon that question, which renders it unnecessary for us to enter into another exhaustive consideration thereof. It necessarily follows that there was no error in refusing the instruction offered by the defendant submitting the theory of the law contended for by its counsel.

2. The defendant also excepts to so much of the instruction of the court as provided that the jury might take into consideration the question whether travel was diverted from the surface of the street in front of the plaintiff's property, and whether or not his premises were as desirable and accessible for business purposes after the closing of the street and the construction of the viaduct, and that it might also consider whether it appeared from the evidence that the business carried on by the plaintiff was affected by the building of the viaduct. These were given to the jury as elements of damages, and the jury were in each case informed that the measure of damages was the difference between the value of the property before the construction of the viaduct and closing of the street and immediately thereafter. It was pertinent to show that the business of the occupant of the property was affected by the improvement, and that the access thereto was less convenient, not as independent items of damage, but for the sole purpose of determining the difference between the market value of the property before and after the construction. *City of Omaha v. McGavock*, 47 Neb. 313; *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90. This definition was plainly kept before the jury in each of the instructions complained of, and there is no error in this respect.

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

JACKSON and AMES, CC., concur.

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

AFFIRMED.

CITY SAFE DEPOSIT & AGENCY COMPANY ET AL., APPELLANTS, V. CITY OF OMAHA, APPELLEE.

FILED JUNE 22, 1907. No. 14,889.

1. **Eminent Domain: APPRAISAL: LIENS: ESTOPPEL.** A purchaser of property at judicial sale is estopped to deny the validity of liens deducted from the appraisement, and the same rule applies to a city taking title by eminent domain, where it is provided in the judgment of appraisal that there shall be no deductions from the award "for taxes or special assessments, the said land being taken by the city subject to all special and general taxes against the property."

2. **Tax Sale: EFFECT.** The lien for taxes is not satisfied by a statutory sale of the property for the same, nor by the payment of prior or subsequent levies by the purchaser. Such sale only operates to transfer the lien to the purchaser.

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

E. W. Simeral and *J. W. West,* for appellants.

H. E. Burnam, I. J. Dunn and *John A. Rine, contra.*

CALKINS, C.

In January, 1896, one Phœbe Linton, being the owner of certain lots in the city of Omaha, executed a mortgage thereon to one John Morris. In May, 1898, Morris began an action to foreclose this mortgage. The defendant answered, attacking the validity of the mortgage, but the action resulted in a decree in favor of Morris, which was entered April 19, 1904. The taxes on the mortgaged premises being unpaid, Morris caused the same to be pur-

chased at tax sale in December, 1898, by the plaintiff, in whose name the certificate of sale was made and subsequent taxes paid. In 1899 the city of Omaha condemned the mortgaged property for boulevard purposes, appraising their value at $1,900. From this appraisement the owner of the property and the mortgagee appealed to the district court, which on March 21, 1902, rendered a judgment, in which it was provided that "the award of $1,900 appealed from shall stand, and no deduction shall be made from the award for the land appropriated for taxes or special assessments, the said land being taken by said city subject to all special and general taxes against said property." This action was brought against the city to recover the taxes and special assessments against said property, and resulted in a decree for the defendant. The plaintiff appeals.

The contention of the defendant is that, while the mortgagee had a right to pay the taxes on the land in question or to redeem the same from tax sale, the amounts of money expended by him for such purpose did not constitute a separate cause of action either against the mortgagor or the land, but became and were a part of the mortgage debt, and could only be enforced as such. The plaintiff claims that the rule so invoked is not applicable to the facts in this case; and, further, that the city, having taken the land subject to the taxes and assessments, and having thereby secured a corresponding reduction in the amount of the appraisement, is estopped to say that Morris should have enforced the lien for taxes in the foreclosure suit. There has been an extended argument on the first proposition, but, in view of the conclusion at which we have arrived upon the question of estoppel, it will not be necessary for us to determine the question so presented in this case. At the time of the rendition of the judgment of the district court upon the appeal from the appraisement, the foreclosure suit was still pending, and was not finally disposed of until two years afterwards. The effect of the judgment in the appraisement

case was to segregate the mortgage debt from the claim for taxes. The mortgage debt, if sustained, was left to be paid out of the cash award, from which nothing was to be deducted for taxes and assessments, these remaining a charge upon the lots, and to be paid by the party succeeding to the title, which in this case was the city. But for this judgment the mortgagee might have asserted his claim for taxes in the foreclosure suit at any time during the two years preceding the final decree therein. After the judgment in the appraisement proceedings, it is extremely doubtful whether he could have done so. If he had made the attempt, the defendants in the foreclosure suit might well have set up the decree in the appraisement case to show that the taxes and assessments should be charged upon the interest which had passed to the city, rather than upon the fund which had been awarded for their benefit free from tax liens. A private purchaser, securing a reduction in the price by taking property subject to liens for taxes and assessments, is estopped to say that the taxes and assessments should have been paid by his vendor, or to set up any defense which is purely personal to the grantor. The mortgagor was under a moral obligation to repay to the mortgagee the amount which he had expended to protect his security from extinguishment by the superior lien of the taxes and assessments, and the city, having received an abatement from the price of the property on account of the lien, is in no position to contest its validity or refuse its payment. This doctrine has frequently been applied to purchasers at judicial sales, who are held to be estopped to deny the validity of liens deducted from the appraisement; and no reason is suggested why it is not equally applicable to cities acquiring title by eminent domain. *Skinner v. Reynick*, 10 Neb. 323; *Koch v. Losch*, 31 Neb. 625; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286; *Battelle v. McIntosh*, 62 Neb. 647; *State v. Several Parcels of Land*, 77 Neb. 707.

Counsel for the defendant argues that, the city hav-

ing received the proceeds of the tax sale and subsequent taxes paid by the purchaser, the same were therefore to be considered as paid, and not as liens outstanding against the property. The sale of property to a tax purchaser does not divest the lien. It merely transfers it to the tax purchaser. It is well settled, that, even in cases where the certificate and sale are void, the lien is transferred to the purchaser. *Roads v. Estabrook,* 35 Neb. 297, 53 N. W. 64; *Grant v. Bartholomew,* 57 Neb. 673.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

JACKSON and AMES, 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 therewith.

REVERSED.

IN RE JULIUS REUSCH.

FILED JULY 12, 1907. No. 15,312.

ORIGINAL application for a writ of habeas corpus. *Writ allowed.*

E. F. Pettis and *C. S. Allen,* for plaintiff.

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

PER CURIAM.

We think that the intention of the legislature in the passage of sections 1, 2, 3 and 5 of the act assailed (laws 1907, ch. 82) was to prevent manufacturers, wholesalers or jobbers of intoxicating liquors, or their agents, from

selling or being interested in the sale of intoxicating liquors at retail, and not to prohibit an occasional sale of liquor by a retailer in a quantity in excess of an ordinary retail sale. Reusch is not charged with having made a sale at retail, but with having made a sale at wholesale, which is not within the inhibition of the law.

Having reached this conclusion, it is unnecessary to consider the question of the constitutionality of the act.

Prisoner discharged.

JUDGMENT ACCORDINGLY.

STATE, EX REL. THOMAS SHAW, APPELLANT, V. ANDREW ROSEWATER, APPELLEE.

FILED JULY 12, 1907. No. 15,186.

1. **Cities: OFFICER: FAILURE OF SUCCESSOR TO QUALIFY.** The city engineer of a city of the metropolitan class holds the office until his successor is elected and qualified. The failure to qualify by one who has been appointed as his successor by the mayor and confirmed by the council, but who has not taken possession of the office and entered upon the discharge of its duties, does not render the office vacant. Upon such failure to qualify the incumbent may qualify anew under section 17, ch. 10, Comp. St. 1905.

2. ———: ———: ———. When it is the duty of the mayor to appoint an officer and he fails to do so, the council may elect; but this power of the council does not exist when one who has been appointed by the mayor and confirmed by the council fails to qualify, there being an incumbent to hold over until his successor is elected and qualified. In such case the incumbent may qualify anew, and takes the office for the succeeding term.

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

John P. Breen, W. H. Herdman and *B. S. Baker,* for appellant.

Byron G. Burbank, contra.

SEDGWICK, C. J.

The district court for Douglas county denied the application of relator for a peremptory writ of mandamus, requiring the respondent to give him possession of the office of city engineer of the city of Omaha and of the records of said office. The relator has appealed to this court.

His claim to the office rests upon an election thereto by the city council without the concurrence of the mayor. Mr. Rosewater, the respondent, was duly appointed to that office in 1903 for the term which is fixed by statute at three years. His term of office under this appointment ended on the 3d Monday after the election in May, 1906, upon the appointment and qualification of his successor. In due time after his term had expired, the mayor of the city submitted to the council the reappointment of Mr. Rosewater to the office for the succeeding term. This appointment was rejected by the council, and, having been again submitted by the mayor and again rejected, the mayor appointed one Jesse Lowe to the office, and that appointment being submitted to the council was duly confirmed. Mr. Lowe refused to accept the office and failed to qualify. After the expiration of 30 days Mr. Rosewater qualified anew as city engineer under the statute, which provides: "When the incumbent of an office is reelected or reappointed he shall qualify by taking the oath and giving the bond as above directed; but, when such officer has had public funds or property in his control, his bond shall not be approved until he has produced and fully accounted for such funds and property; and when it is ascertained that the incumbent of an office holds over by reason of the nonelection or nonappointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified." Comp. St. 1905, ch. 10, sec. 17. It is provided in section 77, ch. 12*a*, Comp. St. 1905: "If the mayor

shall neglect or fail to make any of the appointments herein designated to be made at and within the time herein specified, then the city council shall be and is hereby empowered to fill such offices by election, a majority of the entire council, being requisite to elect such officer." Under this provision the city council proceeded on the 9th day of April, 1907, to elect the relator to the office. If a vacancy existed at the time of this action of the council, and the mayor neglected or failed to make an appointment, the council had power under the statute above quoted to elect the relator, and he is now entitled to the office. Under the statute this is an appointive office. When Mr. Rosewater's term ended in 1906, it was the duty of the mayor and council to select the officer for the succeeding term of three years. This was done by the appointment and confirmation of Mr. Lowe, the attempt to appoint Mr. Rosewater for the succeeding term having failed. When Mr. Lowe failed to qualify, and the mayor neglected to make another nomination, the city council could elect an engineer to fill the vacancy, if a vacancy existed.

The relator contends that there was then a vacancy in the office. He relies upon section 87, ch. 12*a*, Comp St. 1905, governing metropolitan cities, as amended in 1905. It is as follows: "If any person elected or appointed to any city office shall neglect, fail, or refuse, to have his official bond executed and approved as required by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant and such vacancy shall thereupon be filled by election or appointment as the law may direct in other cases of vacancy in the same office." This section is a substantial reenactment of section 15, ch. 10, Comp. St., the general statute entitled "Bonds and Oaths—Official." Before this section was made a part of the statute governing cities of the metropolitan class by the act of 1905, it had been construed by this court in *State v. Boyd,* 31 Neb. 682, 734, where it was said: "The provisions of section 15

were not intended by the legislature to apply to a case where the incumbent of an office holds over on account of the failure to elect a successor, but have reference to cases where the person elected to a public office has never taken the oath and given the bond required by law, and who has never entered upon the discharge of the duties of the office. Hold-over officers are governed and controlled by section 17 above quoted." Section 17 referred to in that opinion is section 17, ch. 10, Comp. St. 1905, which we have already quoted in full. The statute governing cities of the metropolitan class provides: "The general laws of the state governing public officers, so far as applicable, shall govern and fix the qualifications and the liability of sureties, the penalties for failure to give bonds, the bonds of persons appointed to fill vacancies or the bonds to be given by officers reappointed, reelected, or holding over." Comp. St. 1905, ch. 12*a*, sec. 88.

Sections 15 and 17 of the general statute referred to may therefore be considered as reenacted in the act of 1905 with the construction that had already been given to those sections by this court. If an officer holds over under the provisions of section 17 he holds for the next succeeding term. *Richards v. McMillin*, 36 Neb. 352. It may be that if he were reelected or reappointed and failed to qualify, or if upon the nonelection or nonappointment of a successor, or the neglect or refusal of the successor to qualify, he should fail to qualify anew, as provided in the statute, he would under such circumstances bring himself within the provisions of section 15. It was unnecessary to decide in *State v. Boyd, supra*, that under no circumstances could the provisions of section 15 apply in such case. What the court there intended to hold was that, "where the person elected to a public office has never taken the oath or given the bond required by law," it is his right to the public office which becomes vacant thereby, and no doubt, if he had taken possession of the office and entered upon the discharge of the duties thereof, so that there would be no other incumbent, the office itself would

become vacant by his neglect to qualify. But, where a person so elected has never taken possession of the office nor entered upon the discharge of the duties thereof, his neglect to take the oath does not forfeit the right of the incumbent. The incumbent's rights are regulated by section 17, *supra,* of the act. This view is in harmony with the general election law. Comp. St., ch. 26. Section 101 of that act specifies several "events" upon the happening of which a civil office shall become vacant, among which are: "A failure to elect at the proper election, there being no incumbent to continue in office until his successor is elected and qualified, nor other provisions relating thereto." This provision contemplates that an office shall not become vacant for failure to elect a successor, if there is an incumbent to continue in office until his successor is elected and qualified.

It is argued that, as Mr. Rosewater's term to which he was appointed had expired, it was the duty of the mayor to nominate a successor, who upon confirmation by the council would qualify, and as Mr. Lowe failed to qualify, this duty of the mayor continued, so that his failure to make another nomination devolved upon the council the duty to elect Mr. Rosewater's successor under sections 77 and 79 of the act. Comp. St., ch. 12*a*. This is not the meaning of section 17 above quoted. It does not apply to elective officers alone. An incumbent of the office holds over by reason of the nonappointment of his successor by the terms of the statute. This language makes section 17 applicable to appointive as well as to elective officers, and, if the successor who is regularly appointed and confirmed by the council neglects or refuses to qualify, the incumbent may qualify anew; and by section 79 it is only when the council refuses to confirm the appointment by the mayor that he is authorized to make another appointment. At the time that the city council attempted to elect the relator to this office, Mr. Rosewater was an incumbent of the office, and by the express provision of the statute was "to continue in office until his successor is

elected and qualified." "Hold-over officers are governed and controlled by section 17 above quoted." *State v. Boyd, supra.* Mr. Rosewater was clearly a hold-over officer, and, as such, within the meaning of section 17 as above construed, his right to "qualify anew" is declared in that section.

This disposes of the case, and requires us to deny the writ. It is therefore unnecessary to discuss the question so ably presented as to the propriety of proceedings in mandamus in a case like this.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. PLATTE COUNTY, ET AL., RELATORS, V. GEORGE L. SHELDON ET AL., RESPONDENTS.

FILED JULY 12, 1907. No. 15,274.

Statutes: CONSTRUCTION. When a statute has for nearly 40 years been practically construed by the officers whose duty it is to enforce it, and has during that time been several times reenacted by the legislature in substantially the same terms, such construction will be regarded as adopted by the legislature, although the language of the statute would indicate a different meaning.

ORIGINAL application for a writ of mandamus to compel respondents, members of the state board of equalization and assessment, to certify to the county clerk of Platte county the valuation of the Union Pacific Railroad in Platte county, and that the assessed valuation is 20 per cent. thereof. *Writ denied.*

W. N. Hensley and *J. J. Sullivan,* for relators.

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

SEDGWICK, C. J.

The county of Platte and the treasurer of said county have asked this court for a peremptory writ of mandamus

against the defendants as the state board of equalization and assessment to "certify and show in and by their return to the county clerk of Platte county that the true valuation of each and every mile of said railroad in said county is $75,000, and that the assessed valuation thereof is 20 per cent. of that amount."

The petition alleges, after the usual formal allegations, that, "heretofore, to wit, on the 1st day of June, 1907, the defendants, while convened and regularly in session as a state board of equalization and assessment, and having before it all information contemplated or required by law in relation to the value of said railroad (the road of the Union Pacific Railroad Company), including tangible property and franchises, did proceed to find, and did find and fix, the true value thereof at $75,000 a mile for each and every mile of said railroad in Nebraska, and did at the same time find and fix the assessed yalue of each and every mile of said railroad in Nebraska at 20 per cent. of the true or actual value thereof. The valuation of each mile of said road was by said board ascertained and determined by dividing the whole value thereof in this state by the number of miles of main track in this state, as required by section 89, art. I, ch. 77, Comp. St. 1905. The said county is, and for many years last past has been, under township organization. The county seat is the city of Columbus, a duly organized city of the second class having a population of between 4,000 and 5,000. About 20 miles of the main track of said railroad runs in a substantially easterly and westerly direction through said city and through the townships of Columbus and Butler in said county. Between 40 and 45 miles of the main track of said railroad runs in a substantially northerly and westerly direction from said city, through the townships of Columbus, Lost Creek, Monroe, Burrows and Granville, in said county. Although this road, running northerly and westerly from said city, is commonly known as the Omaha & Republican Valley Railroad, it is owned, controlled and operated by the Union Pacific Railroad

Company, and was by defendants, in ascertaining and determining the value thereof for the purpose of taxation, considered, treated and dealt with as a part of said company's mileage in Nebraska. Although defendants sitting and acting as a state board of equalization and assessment have, for the purpose of taxation, found and fixed the actual and true value of each and every mile of said railroad in said county at $75,000 a mile, and have fixed and assessed the value thereof per mile at 20 per cent. of the true value, they have determined, and they now threaten and intend, to make return to the county clerk of said county, to be used as the basis of levying taxes for county, township, city, village, school and road districts therein, showing an untrue, unjust and unlawful valuation of the said railroad property in said county. The said board threaten and intend, and, unless enjoined from so doing by the order of this court, will in the return to said county clerk, which it is required to make under sections 93 and 94 of said chapter and article of the Compiled Statutes, fail and refuse to show and certify that the average value per mile of said road in said county is $75,000, and that the assessed value of each mile thereof is $15,000, but will in and by such return show and certify that the average value per mile of the portion of said road running through said city and through the said townships of Columbus and Butler (being about 20 miles) is $110,000, or thereabouts, and that its assessed value is 20 per cent. of that amount, and that the average value per mile of the remainder of said road in said county (being 40 and 45 miles) is $42,000, or thereabouts, and that the assessed value thereof is 20 per cent. of that amount. If the said board is permitted to make its said return to the county clerk of said county as it now proposes, threatens and intends to make it, the assessed valuation of said railroad property apportioned to said county for the purpose of taxation will be about $776,000, instead of about $900,000, which is the assessed valuation to which it is justly entitled upon an apportionment made according to law."

The answer admits the facts to be as alleged in the foregoing quotation from the petition. The defendants admit that in their distribution of the taxable values of this railroad property and certification to the county clerks of the several counties they intend to place greater value upon the main line of the road than they place upon the branch lines thereof. The plaintiffs insist that they have no right to do this under the statute; that the valuation of the whole mileage of the road, including the main line and branch lines, have been ascertained to be $75,000 a mile, and must be so certified to the various county clerks. The answer alleges: "Ever since railroad property has been taxed in the state of Nebraska, it has been, and now is, a custom, under a statutory provision still in force, of the state board, having authority to estimate the value of and tax railroad property, to distribute or apportion the values to be used as the basis of levying taxes for county, township, city, village, school and road district purposes, according to their best judgment of the value of each of the main lines or of the branch or other lines of each railway system. It is the purpose of respondents to follow this custom; and, while no formal order of distribution or of apportionment has been made by the state board of equalization and assessment for the year 1907, the following tentative distribution as to taxable values for the Union Pacific has been considered by respondents: Main line 467.38 miles, at $21,500 per mile; Omaha & Republican Valley, 428.30 miles, at $9,200 per mile; Kearney branch 65.74 miles, at $6,575.45 per mile. Respondents aver that this custom is authorized by law, and is by reenactment of the old law the proper construction of the existing statutes. Respondents deny that the railroad property apportioned to Platte county for the purpose of taxation should be about $900,000."

The contention of the relators is that the board is required by statute to distribute the total valuation of this railroad property in the state to each county in proportion to the mileage of the road in such county, in-

cluding both the main line and branch lines; that is, having found that the valuation of the total property of the railroad company in the state is equal to $75,000 a mile of both its main and branch lines, the board must distribute it upon that basis for taxation to each county, $75,000 valuation for each mile of main and branch lines situated in that county. The board contends that it is within the discretion of the board to distribute a larger ratio of valuation per mile for the main line and a less valuation for branch lines. The case was considered urgent, and the defendant has not furnished us with a brief, but in the oral argument the attorney general contended that the statutes bearing upon the point in controversy were first enacted in 1869, and have ever since that time been construed as the defendants now propose to construe them, and that under these statutes the distribution of values for taxation has always been made in the manner the defendants now propose to make it; that the revenue laws of the state have been revised and altered at various times while this custom has existed, and during that time these provisions of the statute have been many times reenacted, but always in substance and effect the same as they existed in the act of 1869. These contentions on the part of the defendants were not controverted by the relators, but it was vigorously contended that the existence of such custom and practice for this long term of years did not give it the sanction of law. It was conceded that if the statute was of doubtful meaning, and if it was capable of being construed to sanction the method of distribution that had been pursued, the practical construction given it by the executive branch of the state government ought to control; but it was maintained that the construction contended for by relators was so plain and unequivocal that no practice in violation of the law could ever justify a disregard of the plain statutory provisions.

The solution of the question thus presented depends upon the construction to be given to sections 87, 89, 90

and 93 of the revenue act (Comp. St. 1905, ch. 77. art. I). The parts of the statute above cited bearing most directly and literally upon the points in question are the seventh subdivision of section 87 and the last sentence of section 89, which are as follows:

"A correct return of the value of all tools and materials used for repairs, and of all other personal property in the state of Nebraska, together with such other information as the state board of equalization and assessment may require in order to enable them to apportion such rolling stock between the main line and branches of said road."

"The valuation of each mile to be determined by dividing the whole value by the number of miles of the main track of each road or line."

The former assumes that the board will "apportion such rolling stock between the main line and branches of said road." The relators suggested that the section in which this language occurs relates to all persons, companies or corporations owning, operating or controlling any railroad or railroad service, as well as to railroad companies themselves, and that it is the rolling stock alone that it is assumed will be apportioned between "the main line and branches"; that this rolling stock is to be apportioned only to those lines and branches over which it is used, and that therefore subdivision 7 does not assume that the total valuation of the road is to be apportioned among the main lines and branches. This reasoning upon this point is very convincing, and it would seem that the construction so contended for was the one most natural to be derived from the language used; but it does not account for the use of the word "between" instead of the word "among," and the use of the word "between" may be thought to indicate that it was contemplated that the apportionment to the main line, upon the one hand, and the branches, upon the other, would be the principal feature of this part of the board's duties.

Again, although it may be thought that the natural

construction of the language of the last part of section 89 above quoted is as contended by the relators, still there is some reason for the contention that this language is susceptible of a different meaning. The words "main track" in this section are clearly used to distinguish from "side or second track and turn out, spur and warehouse track," and not to distinguish the main line from the branch line, as plainly appears from the first part of section 87 and from other sections of the act. The construction that has been placed upon the language now under consideration by the state board is that the number of miles of the main track of each road or branch line is to be taken as the divisor in finding the value per mile of such road or branch line, as the case may be, and that the thing to be divided by this divisor is the whole value of the road or branch line, as the case may be, when that value has been ascertained and apportioned by the board, that is, the board finds the whole value of the road and then determines what part of that whole value should be apportioned to the main line and what part to the branch lines respectively, and then divides the whole value apportioned to the main line by the number of miles of that line, and the whole value apportioned to each of the branch lines by the number of miles of each of the branch lines respectively. It must be confessed that such a construction of the statute is forced and unnatural, but it may perhaps with reason be contended that it is not an impossible construction. There is, of course, no doubt of the power of the legislature to have provided such a method of apportionment, and it must be remembered that the contemporaneous construction contended for is not the construction given it by the state board alone, but it is the practical construction given it by the legislature itself. Even in the construction of constitutional provisions some courts have held that the practical construction adopted and long continued by the legislative department will be followed, even when clearly erroneous. 8 Cyc. 737. This court has not generally adopted this

doctrine. It was said in *State v. Cornell,* 60 Neb. 276: "While a practical interpretation of the constitution by the legislature will not be lightly disregarded in doubtful cases, yet, when the language of the constitution is free from ambiguity, an interpretation thereof by the legislative department cannot be invoked to nullify the fundamental law." In a very recent case, the supreme court of Illinois has held that a practical construction by the executive department of an act of the legislature through a period of nearly 40 years will not be followed by the courts when such construction is clearly contrary to the intention of the legislature in enacting the law. *Whittemore v. People,* 227 Ill. 453, 477, 81 N. E. 427. From this proposition Mr. Justice Carter dissented. In his dissenting opinion he said: "All the facts and circumstances indicate that the construction placed upon this statute during 40 years by those charged with its enforcement has been in good faith, with the full belief that not only the letter but the spirit of the law was being observed. In some jurisdictions long continued, contemporaneous and practical construction by the legislative and executive departments has been followed, even though the courts believed the language under consideration clear and unambiguous. 8 Cyc. 737; 26 Am. & Eng. Ency. Law (2d ed.), 634. This court has stated that such construction will govern only where the language of the statute is doubtful, yet an examination of the decisions in this state will disclose that in almost every instance such contemporaneous, uniform and long-continued construction by public officials in the execution of the law has been followed by this court." In the case at bar the argument of contemporaneous construction is much stronger than it is in cases where it is attempted to apply it to the construction of constitutional provisions, or where the construction of statutes by executive officers is relied upon. If a constitutional provision which had been practically construed for a period of 40 years was adopted anew in a revision of the constitution without

change of the phraseology, the presumption that in readopting the phraseology the people approved of the construction that had been placed upon it would be strong, and would be analogous to the position in the case which we have at bar. The respective legislatures which have reenacted the provisions of the statutes from time to time must be presumed to know of the practical construction which was being put upon the statute, and by reenacting it without change the presumption arises that the construction so placed upon it met with the legislative approval. Under such circumstances, it seems to us that if the practice is to be changed it ought to rest with the legislature, and not with the courts, to inaugurate the change. The house of representatives of the last legislature adopted a resolution condemning the practice. The fact that the views of the house upon this subject were not concurred in by the senate nor approved by the governor gives emphasis to the conclusion that the change in the statute, if any is desired, ought to await the action of the legislature.

From these considerations, it follows that the peremptory writ of mandamus must be denied.

WRIT DENIED.

PLATTSMOUTH LODGE NO. 6, A. F. & A. M., APPELLANT, V. CASS COUNTY, APPELLEE.

FILED JULY 12, 1907. No. 14,844.

Taxation: EXEMPTIONS. Under the agreed statement of facts in this case the property of Plattsmouth Lodge No. 6, A. F. & A. M., is not subject to taxation for the year 1905.

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

S. M. Chapman and *S. P. Davidson,* for appellant.

C. A. Rawls, contra.

BARNES, J.

Plattsmouth Lodge No. 6, Ancient Free and Accepted Masons, is the owner of the upper or second story of a building, known as "Rockwood Hall," situated on lot 2 of block 35, in the city of Plattsmouth, Cass county, Nebraska, and certain furniture used exclusively for lodge purposes, worth about $300, together with $500 in bank, which it claims is a fund used exclusively for charitable purposes. Said property was listed by the assessor of the precinct in which it is located for taxation for the year 1905, and was returned by him for that purpose to the proper taxing authorities. The lodge appeared before the board of equalization at the proper time and objected to the assessment of said property, for the reason that it was exempt from taxation because it was used exclusively for charitable purposes, and asked that it be stricken from the assessment roll. After a full hearing the board overruled the objection and request, and the property was assessed for taxation for that year. The lodge appealed from said order or judgment of the board to the district court for Cass county. On the trial the judgment of the board was affirmed, and an appeal was thereupon taken to this court.

In the district court the trial was had upon an agreed statement of facts, which has been made a part of the record by a bill of exceptions, and constitutes all of the evidence presented for our consideration. The character, objects and purposes of the appellant, the uses to which the property in question is applied, and the purposes for which it is held are fully set out and explained in the agreed statement of facts, from which we quote, as follows: "The objects and purposes of said lodge are to nurse, care for, and provide for its sick, afflicted and needy members and their families, and bury the dead, care for the widows of its deceased members, care for and educate their orphan children, and to inculcate in its members the principles of morality, temperance, benevolence and

charity, and teach them their duty and true fraternal relation to mankind; to contribute to the maintenance and support of the Masonic Home at Plattsmouth, Nebraska, an institution for the support and maintenance of destitute master masons, their widows and orphans, at the expense of the masonic order, without allowing such destitute master masons, their widows and orphans to become charges upon the state of Nebraska or the public, and promote the blessings of masonic privileges. That the revenue of said appellant lodge is provided by membership fees and dues, paid by persons joining said lodge and by the members thereof, and not from any revenue derived from any other source whatever. Also each member of said appellant lodge is required to pay annually for the support of the Masonic Home and any other special assessment levied against the members of said lodge by the grand lodge of the order, for the maintenance and support of said Home. That, in addition to other committees of said lodge, the worshipful master, junior and senior wardens of said appellant lodge are the committee of said lodge on charity, and as such are authorized by the laws and usages and customs of said order to draw from the funds of said lodge by an order of the worshipful master such sum or sums as may be deemed necessary by said committee for the relief of any one object at one time. Except as above, the individual members of said lodge are not entitled to draw or receive any pecuniary benefits from said lodge, and in no case are they entitled to receive, directly or indirectly, any pecuniary benefits, or any benefit or profit or private gain from said lodge, or in any manner participate in the distribution of the funds or property of the lodge. That said Plattsmouth Lodge No. 6 is not engaged in any business for profit or gain, and is prohibited by the rules and regulations of the masonic order, of which it is a part, from engaging in any business for gain, or for any purpose whatever, except relieving the needy persons, as above stated." It is

further stipulated: "Said lodge owns and uses the upper or second story of said building exclusively for lodge purposes, that is to say, for the purpose of holding its lodge meetings, and for no other purpose whatever, and that said lodge owns no other property, real or personal, except that so situated in the second story of said building, * * * and the money mentioned in the pleadings, all of which is held and used exclusively for said lodge purposes."

From the facts thus stipulated, it seems clear that the appellant is a charitable institution, and this view is supported by the following authorities: *Philadelphia v. Masonic Home,* 160 Pa. St. 572, 23 L. R. A. 545, where it was said in the opinion: "The appellee clearly is a charity. It provides for and maintains in the Masonic Home indigent, afflicted and aged freemasons. This too from voluntary contributions, without charge to the beneficiaries, and with no profit either to the corporation, or its officers. Not one of the corporate officers receives a cent of compensation for administering its affairs. Such unselfishness excites the admiration and approval of all friends of humanity. * * * 'The money to support them is contributed by different masonic lodges, individuals, masons, men and women; the receipts are always less than the expenses, and a deficit has to be made up at the end of each year; no one is benefited except the inmates; they are fed, clothed, and lodged during life, and buried at death at the expense of the home.' Of course, if this be not purely charity, nothing is." However, the property of the institution was there held taxable, because it was a restricted, and not a purely public charity. See also *Mayor and Aldermen of Savannah v. Solomon's Lodge,* 53 Ga. 93; *Fitterer v. Crawford,* 157 Mo. 51, 50 L. R. A. 191; *Bangor v. Masonic Lodge,* 73 Me. 428, 40 Am. Rep. 369; *City of Indianapolis v. Grand Master,* 25 Ind. 518; *Massenburg v. Grand Lodge,* 81 Ga. 212; *Mayor and City Council v. Grand Lodge,* 60 Md. 280; *State v. Board of Assessors,* 34 La. Ann. 574.

In this case, however, our decision must rest, not on the nature of the masonic institution, but on the use which appellant makes of the property in question according to the facts which are stipulated and admitted. Section 2, art. IX of the constitution, provides: "The property of the state, counties and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation, but such exemption shall be only by general law." To render effective the clause of the constitution above quoted, the legislature by section 13 of the present revenue law (Comp. St. 1905, ch. 77, art. I) has declared: "The following property shall be exempt from taxes: First. All property of the state, counties, and municipal corporations. Second. Such other property as may be used exclusively for agricultural and horticultural societies, for schools, religious, cemetery and charitable purposes."

This brings us to the real question involved in this controversy: Is the appellant's property which was listed for taxation used exclusively for charitable purposes? This question must be determined, not from our personal knowledge, if any, of the nature of the masonic order, its organization, its character, its aims or its purposes, but from the stipulated facts in evidence before us. It will be observed that the parties have agreed that the objects and purposes of appellant are to nurse, care and provide for its sick, afflicted and needy members and their families, and bury the dead; to care for the widows of its deceased members and educate their orphan children; to inculcate in its members the principles of morality, temperance, benevolence and charity, and teach them their true relation to mankind; to contribute to the maintenance and support of the masonic home at Plattsmouth, which is an institution for the support and maintenance of destitute master masons, their widows and orphans at the expense of the order, without allowing such destitute persons to

become charges upon the state of Nebraska or the public; and to promote the blessings of masonic privileges. It appears that the revenue of the appellant is provided by membership fees and dues paid by persons joining the lodge and its members, and that it has no revenue derived from any other source whatever; that each member is required to pay annually for the support of the masonic home above mentioned, and such other assessments as may be levied against the members of appellant lodge by the grand lodge of the order, for the support and maintenance of such home; that its committee on charity is authorized to draw from the funds of the appellant lodge by an order to be approved by the worshipful master such sum or sums of money as may be deemed necessary for the relief of any one object at one time; that the individual members of the lodge are not entitled to draw or receive any pecuniary benefits from the lodge whatever, that they can receive no benefit, gain or profit directly or indirectly from the funds of the lodge, or in any manner participate in the distribution of such funds; that the appellant is not engaged in any business for profit or gain, and is prohibited by the rules and regulations of the masonic order, of which it is a part, from engaging in any business for gain, or for any purpose whatever, except relieving the needy persons, as above stated. It thus appears to be stipulated that the appellant is an institution wholly charitable in its nature, aims and purposes. While we find in the stipulation the words "inculcate in its members the principles of morality, temperance, benevolence and charity, and teach them their duty and true fraternal relation to mankind; * * * and promote the blessings of masonic privileges," there is vouchsafed to us no explanation of the meaning of these expressions, and there is nothing contained in them which would indicate any other purpose than that of the dispensation of charity to the members of the order. It is further stipulated that the property in question is held and used by the appellant for the purpose of holding its lodge meetings, and for no

other purpose whatever; that the lodge owns no other personal or real property, and that the money above described is held and used exclusively for said lodge purposes, to wit, the relief of the distressed and needy members of the order.

In *Fitterer v. Crawford, supra,* the facts there agreed upon were stated in almost the identical language used in the stipulation in the case at bar. It was further agreed, however, in that case, that the property there in question was a three-story building, together with the ground on which it stood; that the first story was rented and used for a storeroom; that the second story was also rented; that the third story was used and occupied by the members of the lodge as a lodge room and ante-rooms in connection therewith. It was held that the property was taxable, for the sole reason that a portion of it was rented for gain and produced an income to the lodge. As to that part of the property used exclusively for lodge purposes, the court said: "It is upon the condition that the property is 'used exclusively for purely charitable purposes' that it is exempted from taxation. It must be remembered that it is not exempted from taxation simply because it belongs to the masonic lodge, but because of its exclusive use by the lodge for charitable purposes. Now as to the third story there can be no question as to its use for such purposes, but as to the other stories, and the ground, they are not so used. And being parts of the same building, and belonging to the same party, it could not be parceled out, and thus assessed and taxed, so as to bring that part of it, 'used exclusively for charitable purposes,' within that provision of the statute which exempts such property from taxation. * * * There is a very material difference between the 'use of a building exclusively for purely charitable purposes,' and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge

becomes the competitor of all persons having property to rent for similar purposes, and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation."

As above stated, the second story of the building in question in this case, which is owned by the appellant, is used for lodge purposes only, and from the agreed statement of facts it appears that the lodge is conducted for charitable and benevolent purposes only. If so, then the property in question is used exclusively for such purposes. That such property is not subject to taxation seems to be clearly indicated by the opinion in *Young Men's Christian Ass'n v. Douglas County,* 60 Neb. 642. There the property sought to be taxed was certain real estate in the city of Omaha, upon which was erected a building used by the organization for the purpose of carrying forward its object, except the first floor thereof, which was rented for business purposes, and it was held that the portion of the property occupied for such purposes was not used exclusively for educational, charitable and religious work, and therefore was not exempt from taxation under the laws of this state. In the body of the opinion we find the following: "The language of the statute is clear and explicit. Under it all property used exclusively for the purposes mentioned is exempt from taxation * * * nor do we think that the proximity of one class of property to the other is material; the sole question being whether the use of the property renders it exempt. It is not necessary that the property should be such as to permit its separation into distinct and definite parcels or tracts of land. As is said in *Proprietors of Meeting House v. City of Lowell,* 42 Mass. 538, 541: 'There may be several distinct tenements under the same roof; and tenements are as essentially distinct, when one is under the other, as when one is by the side of the other.' A portion of appellant's property being used for business purposes, and, therefore, not within the purview and privilege of the statute referred to, we regard it as the evident intention

of the legislature that such property is and should be subject to the general revenue laws, as all other property in the state. * * * In reaching a conclusion in this case, we do not desire to be understood as holding that all of the property mentioned in the petition of appellant is subject to taxation, but only that part which is used for other than the purposes contemplated by the organization maintained by appellant."

It is contended, however, by the appellee that we must assume that the property in question is not used exclusively for charitable purposes, because it appears from the stipulation that the appellant in conducting its business has committees other than the one to dispense charity, and the rooms in question are used by its officers and members as a place of holding its meetings. A sufficient answer to this contention is that the stipulation falls far short of imparting any information from which we can draw such an inference. On the other hand we must take notice of the fact that every charitable institution in order to accomplish its objects must have and maintain an organization, must have its officers and committees, and must hold its meetings, otherwise it could accomplish nothing. Again, we should not be unmindful of the fact that our constitution was adopted in the year 1875, and the provisions of the present revenue law relating to exemptions, which is above quoted, was a part of the revenue law of 1879, and not until now have the taxing authorities ever claimed that the property of the masonic order, which is used for charitable purposes, is taxable. This contemporaneous construction of the constitution and statutes is entitled to great weight in solving the problem now before us. So we are of opinion that under the facts recited in the stipulation the property of the appellant in question in this case is exempt from taxation under the constitution and laws of this state. We do not wish, however, to be understood as holding that all property belonging to the masonic order is exempt from taxation, or that any of its property is exempt because it is such order. It is the

use of the property, and that alone, which determines the question, and the property of the order which is used for the purpose of gain or profit of any kind is surely taxable.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED.

LETTON, J., concurring.

This case was submitted upon an agreed statement of facts, and no evidence was taken. Upon the facts stipulated I am inclined to think that the opinion is correct, although no explanation is made as to what constitutes "the blessings of masonic privileges," which it is said the institution is intended to promote. I think that in a case involving a question of such importance as the taxation of such associations, and where the opinion of the court is liable to be taken as indicating its views upon the whole subject, the case ought not to be tried upon an agreed stipulation of facts. The stipulation in this case, as is pointed out in the opinion, is substantially one which was prepared in a case submitted to the supreme court of Missouri, and upon which that court had expressed its opinion. It is much better in a case of such general interest and importance that witnesses be examined, and the tests of examination and cross-examination be used, so that the whole matter may be fully presented for the consideration of the court.

The main question is not free from doubt, and depends largely upon the particular statutory and constitutional provisions for exemption. In this connection, see *Bangor v. Masonic Lodge,* 73 Me. 428; *Massenburg v. Grand Lodge,* 81 Ga. 212, and cases cited on pages 216, 217 of that opinion.

As to any money specially set apart and devoted to the support of the Masonic Home, there can be no question

but that it is exempt from taxation. Of course, if *all* the property of the lodge is used exclusively for charitable purposes, as the stipulation recites, it is also exempt, but it would have been much more satisfactory if the case had been submitted upon testimony.

HARRISON CLARK V. STATE OF NEBRASKA.*

FILED JULY 12, 1907. No. 14,917.

1. **Criminal Law:** ARGUMENT OF COUNSEL. Where the question as to the alleged misconduct of an attorney in his argument to the jury has been submitted to and decided by the trial court on conflicting evidence, such decision will not be disturbed unless it is unsupported by the testimony and is clearly wrong.
2. ———: INTENT: EVIDENCE. In cases where the guilt of the defendant depends upon the intent, purpose or design with which the act was done, or upon his guilty knowledge thereof, the rule is that collateral facts in which he bore a part occurring immediately before and leading up to the transaction complained of may be examined for the purpose of establishing such guilty intent, design, purpose or knowledge, even though such facts show the commission of another crime.
3. ———: INSTRUCTIONS. Error cannot be successfully assigned for the giving of an instruction because it fails to cover all of the questions of law arising in a criminal prosecution, if the instructions, when considered as a whole, fairly and correctly state the law applicable to the facts of the case as disclosed by the evidence.
4. ———: RECORD: REVIEW. Ordinarily, where the bill of exceptions shows upon its face that it is incomplete and does not contain all of the testimony, the supreme court will refuse to consider it; but in a capital case the court will carefully examine the whole record and determine for itself the sufficiency of the evidence contained in the record to sustain the conviction.

ERROR to the district court for Douglas county: ABRAHAM, L. SUTTON, JUDGE. *Affirmed.*

* Rehearing denied. See opinion, p. 482, *post.*

William H. Crow and *J. B. Strode*, for plaintiff in error.

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

BARNES, J.

Harrison Clark, Calvin Waln and Clarence Gathright were jointly charged in the district court for Douglas county with the murder of one Edward Flury while attempting to rob him. Clark, who will hereafter be called the defendant, demanded a separate trial, which was granted. He was convicted of murder in the first degree, as charged in the information, and the jury fixed death as his punishment. To reverse the judgment rendered on the verdict he brings the case here by petition in error.

The record discloses that on the evening of March 7, 1906, defendant went to the home of James Ross in South Omaha, and borrowed a 38-caliber Harrington & Richardson revolver. Later that evening, in company with Calvin Waln, he went to the home of the latter in said city, where he found Clarence Gathright, Mrs. Ewing, Mrs. Waln, and a man whose name is not disclosed, and they spent the evening together, talking and drinking beer. Waln, Gathright and the defendant remained in the house until about 10:30 o'clock, when Waln took some hoods or masks made by Mrs. Waln in a V shape, which fitted over the head, exposing the eyes only, and the three men left the house together. From there they went west to a saloon at Thirty-Second and Q streets, then south to Thirty-Second and R streets, and stopped at another saloon. Defendant asked Gathright to put on a mask. All three put them on, and defendant entered the saloon by the front door, the other two by the side door. After leaving this saloon they removed their masks, and went to Thirtieth and U streets, where they stopped at a third saloon. Defendant went to the window, came back, and ordered the other two men to put on their masks. The defendant then entered the front door, and the others the

side door of the saloon. At one of the saloons the defendant got another revolver, which he gave to Gathright. After leaving the last saloon they took off their masks, and went to the vicinity of the Rock Island depot. While at that place they saw a motor car, on what is called the "Walnut Hill" line, going south, and defendant said: "There goes a car, we will get that one." They walked on until they came to a car standing just east of the switch on the Benson and Albright line. Just at that time Edward Flury, the conductor, got off to throw the switch, and was attacked by Waln and the defendant, with the order: "Hands up!" Flury replied with a shot. Waln shot at him. Defendant then stepped out from a place where he was partially concealed, ran up to the conductor, and a number of shots were exchanged. Flury received bullet wounds in the wrist and the abdominal cavity from the effects of which he died in about six days.

The assignments of error presented by the defendant's counsel will be discussed in the order of their presentation.

1. His first contention is that the judgment of the district court should be reversed because of the alleged misconduct of the prosecuting attorney in his closing argument to the jury. The record of the trial fails to disclose the misconduct complained of, and is silent as to any objection to or ruling of the trial court on the remarks alleged to have been made by the prosecuting attorney, which are the basis of this contention. The question appears to have been raised for the first time on the defendant's motion for a new trial, and was presented by affidavits on the part of the defendant, which were controverted by the affidavits of the prosecuting attorney and his assistants. The district court found that the remarks attributed to the county attorney had not been made. The trial judge is presumed to have heard all that was said by the attorneys, and has decided this question on his personal knowledge and conflicting evidence in the form of affidavits, and his findings thereon should not be disturbed. *Cunningham v. State,* 56 Neb. 691.

2. It is contended that the defendant was not properly represented in the trial of this case on account of the ignorance and incompetency of the attorneys appointed by the court to defend him; that his legal rights were not properly safeguarded and protected; and that his attorneys permitted testimony to go to the jury, unobjected to, of distinct and separate robberies which had no connection with the crime for which he was being prosecuted. This contention is not well founded. It appears from the record that the defendant's rights were properly protected; that his attorneys not only safeguarded his rights, but actually preserved and prepared the record which is now before us.

3. The defendant insists that the district court erred in admitting the evidence of Clarence Gathright, H. H. King, Julius Grimm, Scott Holbrook, Joe Trapp and Lee Burket as to the hold-up and robbery of the saloons on Thirty-Second and Q streets, and Thirty-Second and R streets, and Thirtieth and U streets, all in South Omaha, because each of said transactions was a separate and entirely different crime from that charged in the information. The record shows that the transactions which occurred at the saloons above mentioned were carefully excluded from the jury. The state, by the evidence complained of, merely traced the defendant and his associates from the time they left the house of Calvin Waln until they arrived at the place where Flury was murdered. It was shown by this evidence that the three defendants named in the information were at the several saloons above described, but nothing was said by the witnesses as to what was done by them at those places. It was incidentally shown, however, that the defendant got a revolver at one of the saloons, which he delivered to Gathright, and there was a division of money between them. Now if the defendant had purchased a revolver at a hardware store, while on his way to the scene of the crime, there would be no question about the admissibility of evidence to establish that fact; neither would the fact that he procured the revolver by holding

up a saloon-keeper prevent its admissibility, although it incidentally connected him with another crime. Apparently every effort was made by the prosecuting attorney and the court to exclude all evidence of other transactions prejudicial to the rights of the defendant. It would seem, however, that the prosecution would have been justified in going into the transactions at the saloons mentioned, and might have been allowed to show fully what there occurred. Such evidence would have been admissible for the purpose of establishing the intent of the defendant to commit the attempted robbery charged in the information. *Knights v. State,* 58 Neb. 225, 76 Am. St. Rep. 78. "Where the evidence tends to establish any essential ingredient of the crime charged, the fact that it proves or tends to prove another felony not charged in the indictment is not a reason why it should be excluded. It is no objection to evidence of a fact, otherwise competent, that it proves or tends to prove a distinct felony." *People v. Stout,* 4 Park. Cr. Rep. (N. Y.) 114. In Underhill, Criminal Evidence, sec. 89, it is said: "Thus the movements of the accused prior to the incident of the crime are always relevant to show that he was making preparations to commit it. * * * And, generally, when several similar crimes occur near each other, either in time or in locality, as, for example, several burglaries or incendiary fires upon the same night, it is relevant to show that the accused, being present at one of them, was present at the others if the crimes seem to be connected."

Again, it seems clear that the evidence complained of was admissible to disclose the identity of the defendant, and show concert of action by him and his associates in carrying out a prearranged plan of operation to commit a series of robberies. "In all cases where the guilt of the party depends upon the intent, purpose, or design with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule, that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design,

purpose or knowledge," even though such facts show another crime. *Bottomley v. United States,* 1 Story (U. S.), 135. So we are of the opinion that the evidence complained of was both competent and proper, and the court rightfully allowed it to go to the jury.

It is also insisted that the court erred in receiving the testimony of policeman Joseph Blue, who arrested the defendant, and who stated that he found the revolver in defendant's room, and the money which fell to him in the division of the spoils in the coal house, where it had been hidden by the woman he had asked to take care of it for him. It appears that no objection was interposed to this testimony, and it seems to us that it was admissible as tending to connect the defendant with the crime charged against him.

4. The fourth and fifth assignments of error relate to the admission of the evidence of witnesses Briggs and McMillan as to an alleged confession of defendant. It is contended that a part of said confession has no connection whatever with the charge in the information, but related to the robbery of saloons and a division of money, and was therefore incompetent. The record discloses that the proper foundation was laid for the introduction of the evidence of those witnesses. They testified, in substance, as follows: Then, Mr. Clark said that Gathright's statement in regard to the transactions, in regard to the trouble at South Omaha, was not correct. He said that the statement was correct until they got to Thirtieth and R streets or Thirtieth and Q streets, and that from there on the statement was not correct. He stated that they got together, the three of them, and agreed to start out to hold up some saloon, and that they did hold up the saloons; and he said: "I will admit I was the leader, I broke the telephone wires, and stuck up the saloon-keepers, and I will admit I was the leader." He said after they got through with the saloons they went down to the Rock Island track, and there they divided the money, and while they were dividing the money there were two street

cars coming up, and at the time the second car came up they got to talking about going over to hold up the street car. Then they walked south on the railroad track until they got beyond the street car, and then crossed east to the street that the car was on; and he said that, when they came up to the street car, the conductor was not throwing the switch, but was standing close by the switch * * * at the time he was shot; and Clark was asked who shot him, and he said he didn't want to state at this time who did shoot him. But he said he was not throwing the switch; and he said that after the shooting he and one of the men, "I could not say for certain now which one it was," went up the hill together, and the other went in a different direction. It seems to me he went west, and they went northeast; and he said he dropped his hat, and went back and picked up his hat, and went on.

It is not contended that this confession was not made by the defendant, and it is difficult to see how the transactions described, other than the one in question, could have been eliminated from the statement so as to exclude them from the jury without destroying the confession itself. Again, the collateral matters contained in the confession were all admissible in evidence to show the purpose and intent with which the assault was made upon Flury, which resulted in his death. It was all the voluntary statement of the defendant, and was competent evidence tending to establish his guilt. *Pflueger v. State*, 46 Neb. 493.

5. Complaint is made by the sixth assignment of error of a remark made by the court while ruling on the objection of the defendant to a question propounded by the county attorney, and which had already been answered by the witness. The incident complained of occurred during the examination of the witness Julius Grimm. It appears that Grimm was at the saloon at Thirtieth and U streets when it was visited by the defendant and his associates. In the course of his examination he was asked: "Q. What was done there with reference to your gun

that night that you have heretofore identified? A. They took it. Q. Is there anything in particular that calls your attention to this large gun? A. They hit me over the head with it." This answer was objected to as being immaterial and having no bearing on the case. The court said: "That ought to be sustained. The purpose of this testimony is to corroborate the testimony or the story told by Gathright. But the fact that he saw the gun that night is all that is necessary. The objection is sustained." Not only was the ruling in favor of the defendant, but we fail to see how remarks of the trial judge in any way prejudiced his rights. They clearly limited the application of the testimony to the identification of the revolver, and the defendant has no ground for complaint on that account.

Many other errors are assigned for the admission of evidence, but such assignments are too general to require our attention. For instance: It is said that the court erred in admitting in evidence exhibits 1, 2, 3, 4, 5, 6, 7 and 8. We find that these exhibits are not attached to or made a part of the bill of exceptions, so we are unable to determine that question. It is sufficient in disposing of these general assignments to say that we have carefully examined the record, and are satisfied that it fails to show that any incompetent or improper evidence was received by the trial court.

6. It is further contended that the court erred in giving instruction No. 6, because it fails to state that the jury should find beyond a reasonable doubt that Clark was engaged in attempting to rob conductor Flury, or was present, aiding and abetting the other persons jointly charged with him in said attempted robbery. By paragraph 5 of the instructions the jury were told that, "it is essential, in order to warrant a conviction in this case, that the state prove beyond a reasonable doubt that the defendant, Harrison Clark, on the 8th day of March, 1906, in the county of Douglas, and state of Nebraska, did then and there individually, or in company with others,

forcibly and by violence, or by putting in fear, and with intent to rob, make an assault upon Edward Flury, and that the defendant Clark and his codefendant, Calvin Waln, or Clarence Gathright, while engaged in the common purpose or design of robbing said Flury, did wilfully, purposely and intentionally shoot said Flury, inflicting a mortal wound from which said Flury died within a period of ten days." It will thus be seen that paragraph No. 5 supplied the alleged deficiency of instruction No. 6. All of the instructions in the case should be read together, and, when so read and considered, they present a correct statement of the law applicable to the facts of this case as disclosed by the evidence.

Complaint of a general nature is also made of instructions Nos. 7, 8 and 11. But the foregoing remarks apply with equal force to said instructions.

7. It is also contended that the verdict is not sustained by the evidence. As above stated, the bill of exceptions in this case shows upon its face that it is incomplete, and does not contain all of the evidence. So we would be justified in refusing to consider this assignment at all. But, in view of the fact that this is a capital case, and the jury has fixed death as the punishment for the defendant's crime, we have read the record, and have given it our most careful consideration, and we are of opinion that it contains no reversible error. We are also fully satisfied that the evidence is sufficient to prove the defendant's guilt beyond the peradventure of a doubt.

8. Finally, counsel for the defendant has appealed to us, in case we are constrained to affirm the judgment of the trial court, to reduce the punishment in this case to imprisonment for life. After a careful consideration of the evidence, we are of opinion that it contains nothing which would justify us in modifying the verdict and the judgment of the trial court thereon.

For the foregoing reasons, the judgment of the district court is in all things affirmed; and Friday, August 30,

1907, is hereby fixed and appointed as the day for carrying into execution the judgment and sentence of the district court.

JUDGMENT ACCORDINGLY.

The following opinion on motion for rehearing was filed November 9, 1907. *Rehearing denied:*

1. **Criminal Law**: INSTRUCTIONS. In a prosecution for murder in the first degree, if the evidence establishes conclusively that the defendant is either guilty of the crime charged or is entirely innocent, a failure to instruct the jury in regard to inferior degrees of the crime charged in the information is not prejudicial error.

2. ———: EVIDENCE. Upon trial of a charge of murder by homicide while engaged in an attempt to rob, it is competent to prove upon the question of intent that the proceeds of several robberies committed by defendant and certain of his companions immediately before the act under investigation were divided, and that the defendant received a share therof.

3. ———: ARGUMENT OF COUNSEL: ACQUIESCENCE. It is only in the most flagrant cases of the use of improper language by a prosecuting attorney, even in the prosecution of capital offenses, that defendant's counsel can apparently acquiesce in the language used by remaining silent until the trial is finished, and then cause the trial and verdict to be set aside by complaining of statements to which he seemed at the time to consent.

SEDGWICK, C. J.

1. In the brief upon the motion for rehearing it is urged that the court erred in instruction No. 15 given to the jury. By this instruction the court submitted to the jury three forms of verdict only, one finding the defendant guilty as he stands charged in the information and fixing death as the penalty, and the other finding him also guilty and fixing the penalty at imprisonment for life, and the third finding the defendant not guilty. The information charged the defendant with murder in the first degree, and the contention is that the court should also have submitted to the jury the question of the defendant's guilt of a lower degree of that crime. This is not a new

question in this court. In *Strong v. State,* 63 Neb. 440, it is said: "The court, in charging the jury, is only required to state the law applicable to the facts proved and those which the evidence tends to prove. So, where it is conclusively shown that the defendant either committed the crime charged or is entirely innocent, the failure to instruct with respect to other crimes, or inferior degrees of the crime embraced within the facts alleged in the information, is not error." This language is quoted by this court in *Jahnke v. State,* 68 Neb. 154, and other decisions of this court are there also cited.

2. The second contention in the brief is that the judgment of the district court should be reversed, because upon the trial evidence was allowed, as is claimed, of other crimes committed by the defendant. This matter is quite fully discussed in the opinion, but the brief makes reference to the testimony of officer Hayes, in which he relates the admissions of the defendant Clark. It appears that, while this witness was testifying, counsel for the defendant objected to the witness making statements as to other crimes that may have been committed, and the objection was sustained. It is pointed out in the brief that the witness afterwards stated, referring to the admissions of the defendant: "He said that after he got through with the saloon they went down to the railroad track, and there divided the money." It does not appear that any objection was made to this evidence at the time, and, so far as we can see, the evidence was entirely competent. The defendant and his comrades started out together upon a marauding expedition, in the midst of which this crime was committed. The fact that they divided the proceeds of their undertaking tends to show that they joined in the intent to rob as a means of obtaining the money which they divided. The intent to rob was one of the elements of the offense charged in the information. It was therefore competent to prove that the defendant participated in that intent.

3. In the opinion herein it was said that the trial court

found that the prejudicial remarks attributed to the county attorney in his argument to the jury had not been made, and that the question was determined upon conflicting evidence, as well as upon the personal knowledge of the judge who tried the case, and that therefore the findings thereon ought not to be disturbed. In the brief upon the motion for rehearing it is pointed out that the prosecuting attorney filed his affidavit in resisting the motion for a new trial in the court below, and that in that affidavit it is admitted that in his argument to the jury the prosecuting attorney said, "The jury ought to bring in a verdict which will satisfy the community," and also used this language: "It has been said that there is no such thing as life imprisonment, and it has been said that life imprisonment means not more than ten years in the penitentiary because of pardons that may be granted." It is insisted that the use of such language is prejudicial error. Manifestly the language quoted ought not to have been used by the prosecuting attorney, and if it appears from the record that the rights of the defendant were prejudiced thereby, a reversal of the judgment would be required. A person accused of crime can be convicted only by legitimate evidence establishing his guilt beyond a reasonable doubt. The trial court should not allow the prosecuting attorney to use any other means to secure a conviction. But, when no objection is taken by defendant's counsel at the time, it will be presumed, in support of the ruling of the trial court, that the language complained of would not influence the verdict, unless the language itself is of such a character, or was spoken in such connection and under such circumstances, that it must necessarily have had that effect. A just verdict of the jury ought to satisfy the community that justice has been done, and to say that a verdict should satisfy a community might, if spoken in the proper connection, have had that meaning, and no other. And so of the other language complained of, it might have been so connected with other language used or accompanied with such expla-

nation as to be harmless. It is only in the most flagrant cases of the use of improper language, even in the prosecution of capital offenses, that defendant's counsel can apparently acquiesce in the language used by remaining silent until the trial is finished, and then cause the trial and verdict to be set aside by complaining of statements to which he seemed at the time to consent.

We do not find sufficient reason for a further hearing of the case, and the motion is therefore overruled. The 13th day of December, 1907, is appointed and fixed as the day for carrying into effect the judgment and sentence of the trial court.

REHEARING DENIED.

ELMER LEIBY V. STATE OF NEBRASKA.

FILED JULY 12, 1907. No. 14,956.

1. **Industrial Schools:** COMMITMENT: FINDINGS. A county judge, in committing a boy who has been found guilty of a criminal offense to the industrial school, is not required by section 9736, Ann. St., to make a written finding that the accused is a boy of sane mind and under 18 years of age.

2. ———: FINDINGS: PRESUMPTIONS. When, in such a case, the court makes a written finding that "the accused is a fit subject for the industrial school," and orders him committed to that institution, and the age of the accused is stated in the order, it will be presumed, on error, and in the absence of a direct showing to the contrary, that the court ascertained and found all of the facts necessary to support the order.

3. **Criminal Law:** PLEA OF GUILTY. A plea of guilty to a criminal complaint is equivalent to a finding of guilt, and will sustain such an order.

4. **Industrial Schools:** SENTENCE: WARRANT OF COMMITMENT. In committing a boy to the industrial school, the county court should not fix a definite and determinate sentence, because the law fixes the time when the accused shall be released, and it is sufficient in that regard if the warrant of commitment contains a statement of his residence and age.

5. **Criminal Law**: RECORD: PRESUMPTIONS. In a proceeding in error, where the record does not contain a copy of the warrant of commitment, it will be presumed that such warrant conforms to all of the requirements of the law.

ERROR to the district court for Thayer county: LESLIE G. HURD, JUDGE. *Affirmed.*

T. C. Marshall, for plaintiff in error.

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

BARNES, J.

On the 18th day of January, 1906, one Elmer Leiby, a minor, was charged in the county court for Thayer county with daylight burglary and larceny. Two days thereafter he was arrested and brought into court, accompanied by his father, where, as shown by the record, the following proceedings were had: "And now on this 20th day of January, 1906, at the hour of 5 o'clock P. M., this cause came on for hearing at the county court rooms of said county of Thayer and state of Nebraska, and the defendant being brought into open court, and the father of the said defendant, B. F. Leiby, being present in court, was fully advised as to the nature of the complaint. The defendant was arraigned, and pleaded guilty to the charge. On consideration I find that the said Elmer Leiby is a fit subject for the industrial school. It is therefore considered that said Elmer Leiby be committed to the state industrial school under the provisions of section 9736 of Cobbey's Annotated Statutes of 1903, to remain until released by due course of law. J. B. Skinner, County Judge, Thayer County." Thereupon the county judge made out his order or warrant as provided by law, and the accused was conveyed to the industrial school at Kearney, where he now is. On June 9, 1906, his father, as his next friend, filed a petition in error in the district court for Thayer county, praying for a reversal of the

order of the county court above set forth. The hearing resulted in an affirmance of the judgment, and the cause was thereupon brought to this court.

It is contended that the district court erred in affirming the order of the county judge because he failed to find (1) that the accused was a boy of sound mind; (2) the age of the accused; (3) that the accused was guilty of the offense charged; and (4) the court failed to fix a definite and determinate sentence. The section of the statutes which is the foundation of the proceedings in question reads as follows: "When a boy of sane mind under the age of eighteen years shall in any court of record in this state be found guilty of any crime, except murder or manslaughter, or who for want of proper parental care or other cause is growing up in mendicancy or crime and complaint is made therefor and properly sustained, the court may, if in its opinion the accused is a proper subject therefor, instead of entering judgment or sentencing said boy to the penitentiary, cause an order to be entered that said boy be committed to the state industrial school, in pursuance of the provisions of this act, and a copy of said order under the usual seal of said court shall be sufficient warrant for carrying said boy to the said school, and for his commitment to the custody of the superintendent thereof." Ann. St. sec. 9736. This section was under consideration in the case of *Scott v. Flowers,* 61 Neb. 620, where it was held that the county court is always, and under all circumstances, a court of record, and the county judge, in whatever official capacity he may act, is a judge of a court of record, and that the county court has final jurisdiction of the matters embraced in the section above quoted. From an examination of the act in question, it appears that the county court is not required to enter in the record the finding, in express words, that the accused is of sane mind, and under the age of 18 years, and it would seem that the only finding necessary to support the order is that, "in the opinion of the court, the accused is a proper subject to be committed to the

state industrial school." In *Ex parte Williams,* 87 Cal. 78, it was said: "If the record was silent on the subject of age, it being a case where written findings are not required, the presumption would be that the court had done its duty, and found the fact to be such as to warrant the judgment given." And that was a case wherein the prisoner, in place of being sentenced to the penitentiary, was committed to the house of correction under a statute somewhat similar to our own. Indeed, the rule is that "when jurisdiction of the parties and of the subject matter affirmatively appear, every other matter necessary to support the judgment will on error be presumed, unless it is required by statute to appear of record, or unless it be preliminary and necessary to the right to exercise jurisdiction." *Hansen v. Bergquist,* 9 Neb. 269. The county court being a court of record, and the statute not requiring a written finding of the sanity and the age of the accused, it will be conclusively presumed, until the contrary is affirmatively shown, that the court ascertained those facts before making the order complained of. From a further examination of the act, we find, however, that section 9470, Ann. St., provides: "The judge shall certify in the warrant the place in which the boy resided at the time of his arrest, also his age or as near as can be ascertained, and command the said officer to take the said boy and deliver him without delay to the superintendent of said school or other person in charge thereof, at the place where the same is located and established, and such certificate, for the purpose of this act, shall be conclusive evidence of his residence or age. Accompanying this warrant the judge shall transmit to the superintendent, by the officer executing it, a statement of the nature of the complaint, together with such other particulars concerning the boy as the judge is able to ascertain." We also find that the record contains no copy of the order or warrant committing the accused to the industrial school, and it will be presumed, in the absence thereof, that it contains the necessary findings as to the age and resi-

dence of the accused. So it would seem that the county judge complied with all of the requirements of the law in the first two matters complained of.

The assignment that the county court erred in not finding the accused guilty is not seriously urged. Indeed, we do not see how any reasonable contention could be founded on this assignment. The record discloses that the accused entered a plea of guilty. That this was the equivalent of a finding of guilt by the trial court, there can be no doubt. Upon the entry of such plea, the county judge is clothed with jurisdiction to make such further examination and orders in the case as may be proper and necessary.

Finally, it is urged that the order of the county court is void because it failed to fix a definite and determinate sentence in this case. It is a sufficient answer to this contention to say that the statute nowhere authorizes the court to pass such a sentence. The section quoted provides what the court shall do. Section 9742, Ann. St., provides: "Each boy committed to the school, under the provisions of this act, shall remain there until he arrives at the age of twenty-one years, unless sooner paroled or legally discharged." Under a like statute, it was held in *People v. Degnen*, 54 Barb. (N. Y.) 105: "A commitment of a juvenile offender to the house of refuge, in the city of New York, need not specify the period of imprisonment. The law fixes that, by directing that persons committed to the house of refuge shall be detained in its custody as follows: Males until their majority, and females until the age of eighteen." The order or warrant by which he is committed to the custody of the superintendent of that institution contains a statement of his age and his place of residence. That order is delivered to the superintendent with the accused, and nothing is required but an examination of the order of commitment to determine the time when the accused is entitled to his discharge.

An examination of the act in question impresses us with the spirit of beneficence which pervades all of its provis-

ions. Our industrial school is not a place of punishment. It is a place of education and reformation. This law affords the courts an opportunity to commit a boy, of sane mind, and under 18 years of age, who has been found guilty of a violation of the criminal laws of the state, or has pleaded guilty to such a charge, to that school, instead of sending him to the penitentiary, and thus branding him as a criminal for life. Instead of sending the unfortunate boy, who by reason of parental neglect or improper environment has arrived at such a condition morally and mentally as to be unable to resist the allurements of crime, to prison, there to become the associate and companion of confirmed criminals, the court places him where he will be instructed in the principles of morality, and in such useful branches of knowledge as are taught in the public schools of the state, together with the principles of mechanical arts, and he is also taught such practical trade as is best suited to his age and strength, and best adapted to enable him to honorably support himself after he reaches the age of majority. It is further provided that when he reaches that age, if he has not already been released, he shall be discharged, and such discharge shall be a complete release from all penalties incurred by the conviction of the offense for which he was committed. So it would seem that the legislature in passing this law was actuated by that high moral sentiment which accords with the best thought of our enlightened civilization, and by a laudable desire to benefit both the state and the individual. We feel that, as a court of review, we should construe this act liberally, and uphold the orders of the courts of original jurisdiction enforcing its provisions, unless such orders are found to be fatally defective.

We are of opinion that the record in this case contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

FRED WHEELER V. STATE OF NEBRASKA.

FILED JULY 12, 1907. No. 15,024.

1. **Criminal Law:** COMPLAINT. A complaint which charges the defendant with burglariously breaking and entering a storeroom with intent to steal the goods and property of the owner need not allege the value of the property stolen or intended to be stolen. And a preliminary examination on such a complaint will sustain a prosecution on an information charging the same facts, together with the value of the property actually stolen.

2. **Witnesses:** IMPEACHMENT: REDIRECT EXAMINATION. Where, on the cross-examination of the prosecuting witness, it is sought to discredit him by attempting to show that he has paid money to procure evidence against the defendant, he may, on his redirect examination, explain the transaction, under proper restrictions, by which it is sought to discredit him, although such matter of explanation would not have been admissible in evidence on his direct examination.

3. **Criminal Law:** VERDICT: REVIEW. A judgment of conviction in a criminal case will not be set aside because of conflicting evidence, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict.

4. ———: INSTRUCTIONS: REASONABLE DOUBT. An instruction defining a reasonable doubt is not rendered prejudicial to the defendant by the use of the word "fully," as, for example: "If the jury are fully satisfied to a moral certainty of the truth of the charges made against the defendant, then they are satisfied beyond a reasonable doubt." Such an instruction is more favorable to the defendant than to the state.

5. ———: ———: CREDIBILITY OF WITNESS. An instruction by which the jury were informed "that it is proper for them to consider the interest that a witness may be shown to have in the result of the case, his apparent capacity and understanding, the probability or improbability of his statement, his manner of giving testimony, and all other facts and circumstances connected therewith," cannot be said to permit the jury to go outside of the evidence in determining the weight and credibility of the testimony of the witness.

6. ———: ———: REFUSAL. It is proper to refuse instructions, tendered by the defendant, which the court has given in substance on his own motion.

ERROR to the district court for Clay county: LESLIE G. HURD, JUDGE. *Affirmed.*

T. H. Matters, Charles J. Greene and *Ralph W. Breckenridge,* for plaintiff in error.

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

BARNES, J.

Fred Wheeler, hereafter called the defendant, was convicted of the crime of burglary, and has brought the case here for review.

It is contended by his counsel that the information should have been quashed because the defendant never had a preliminary examination on the charge contained therein. It appears that the defendant, and one Harry Le Baron, were jointly charged, in the county court of Clay county, with breaking and entering the store of Martin & Haggard, in the village of Trumbull, with intent to steal. They were arrested and brought before the court, and on the 3d day of October, 1906, Le Baron waived preliminary examination, and was bound over to the district court. The hearing of the defendant was continued until the 18th day of that month, at which time testimony was taken both for the prosecution and the defense; and the county judge, as an examining magistrate, found there was probable cause to believe that the offense charged had been committed by the defendant. Thereafter, and in due season, an information was filed in the district court for said county charging said parties with the same offense. A motion to quash was thereupon filed by the defendant, based on the ground that he had never had a preliminary examination, which motion was overruled. The defendant entered a plea of not guilty, and was thereafter tried and convicted, as above stated. The argument is that because the complaint filed before the magistrate did not contain the word "value," or, in other words,

allege that the defendant broke and entered the building with intent to steal goods and property of value, it was void, and failed to state any offense punishable under the laws of this state; that because the information did contain the word "value," a different charge was preferred against the defendant in the district court from that contained in the complaint. Breaking and entering a building, with intent to steal property therefrom, constitutes the crime of burglary. By the provisions of section 48 of the criminal code it is made a felony for a person to break and enter a storeroom, with intent to steal property of any value. While the statute says property "of any value," we do not regard the words "of value" as being necessary ingredients of the charge. The allegation in the complaint was that the defendant did break and enter, with intent to burglariously steal, take and carry away the goods and property of the said Martin & Haggard. It has been held by the court of last resort in the state whose criminal code we adopted that if the allegation is of stealing goods and chattels, or goods and merchandise, it is not necessary to allege their value. *Spencer v. State*, 13 Ohio, 401. Again, the record clearly shows that the information was based upon the same transaction for which the defendant had a preliminary examination. In *Hockenberger v. State*, 49 Neb. 707, it was said, if the charge in the complaint is substantially the same as in the information, the plea of variance is unavailing. Where a preliminary examination was held upon a complaint charging the crime of burglary, with intent to steal, and the information filed by the county attorney in the district court charged the same offense, but with intent to commit a rape, it was held that the same crime, to wit, burglary, was described both in the complaint and in the information. *Alderman v. State*, 24 Neb. 97. So it would seem clear that the district court was right in refusing to quash the information.

Defendant's second contention is that the court erred in admitting and excluding certain evidence. It appears

that Martin, one of the owners of the store in question, had paid one William Rigg $10 in procuring his affidavit as to what he knew about who had broken and entered the store, which fact was brought out on cross-examination, and counsels' argument is directed, with particular force, to the following question and answer of the redirect examination: "Q. You may tell the conversation that you had with Rigg at that time. A. Well, he told me that Mr. Le Baron had confessed to him and another man in jail here at Clay Center that he, Le Baron, and Wheeler, had entered the store and taken the money." We find that this evidence was not objected to, and it may be further said that it was an explanation of matters brought out on cross-examination by the defendant's counsel. An attempt was made to discredit the testimony of the prosecuting witness by showing that he had been guilty of bribing witnesses, or, in other words, had paid money to procure testimony against the defendant. So, on his redirect examination, he was permitted to explain the transaction which had been partly brought out by the cross-examination. It was made clearly to appear that the prosecuting witness had not paid money to any one to testify, or to procure testimony to be used on the trial of the case. It was further shown that the witness had been informed that Rigg knew something of the transaction, and he therefore thought it advisable to procure Rigg's affidavit stating what he knew about the matter. In making this explanation the witness gave the testimony which is so severely criticised. As before stated, the evidence was not objected to. No motion was made to strike it from the record, and therefore error cannot be predicated upon its admission. Again, the matter comes squarely within the rule announced in *Craig v. State*, 78 Neb. 466, where it was held: "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, * * * he may, under proper restrictions, give such evidence on his redirect

examination," although it would not have been admissible as evidence in chief.

Defendant also complains because his counsel was restricted in his cross-examination of Le Baron. It appears that Le Baron testified for the prosecution, and stated in substance that he and the defendant broke and entered the store of Martin & Haggard at the time alleged in the information, and stole therefrom $45 in money and a revolver; that after leaving the store they got into the defendant's buggy, and after driving about a mile divided the money, the defendant taking $25 of it and Le Baron $20; that the defendant also kept the revolver; that they committed the robbery in order to have some money to spend on the Fourth of July following; that on the evening of July 3 they went to Hastings, and stayed together at the Bostwick hotel, on the following day went to Glenville, and late that night returned home to Trumbull. On his cross-examination Le Baron was asked: "Q. Do you hope to be relieved of any part of your punishment? Do you? A. I hope to. Q. Yes, you do? A. I hope to, yes. Q. That is why you are giving this testimony this way? A. Yes, partly." After the redirect examination of the witness, in which he testified that no promise of immunity had been made him by the prosecution, and that he was not influenced in giving his testimony by any hope of a mitigation of his punishment, he was again asked by counsel for the defendant: "Q. You hope, don't you, by making this statement to the court and jury, you will be relieved from a part of the punishment you would otherwise suffer?" This was objected to by the state, and the objection was sustained. It appears that the witness had answered the question above quoted several times, and it was right and proper for the court to put an end to the investigation. The defendant was deprived of no substantial right thereby. The whole matter had been fully investigated, and the motive and interest of the witness was fully disclosed.

Defendant's third contention is that the evidence is not

sufficient to sustain the verdict. Without attempting to quote any considerable portion of the testimony, we may say that it appears that the defendant and Le Baron had been bosom friends and associates for sometime previous to the commission of the crime charged; that on the night of July 2 defendant had driven from his home, near the village of Trumbull, to that town; that he spent the evening there with Le Baron; that they were together riding in the defendant's buggy late in the night; that they both claimed that they rode down towards the depot, where several men were at work taking down a header; that two ladies were present at the time they drove down there; that soon thereafter they came back to the store of Martin & Haggard, and Le Baron says they both went in through a cellar window, then up into the store room to the money drawer, and took from a little box $45 in bills; that Le Baron took the money from the drawer in the presence of the defendant, who went to the safe and took a revolver; that they left the building, and after driving some distance divided the money, defendant taking $25 and Le Baron $20 and that defendant retained the revolver. They then went back to town, Le Baron got out and went to the place where he was stopping, and Wheeler went home. It also appears that they had arranged to go to Grand Island on the following day, but finally concluded to, and did, go to Hastings, where they stayed at the Bostwick hotel, and the next day they went to Glenville and attended the celebration. They drove the same horse and buggy which they used on the evening of the robbery, and defendant used the revolver in shooting blank cartridges. At about 11 o'clock that night they returned to Trumbull. The entering of the store and the stealing of the money and revolver was denied by the defendant, but in all other matters he corroborated the evidence of Le Baron. He claimed, however, that he was at home by a quarter to 11 o'clock on the night of the robbery, and his father, mother and one Rigg testified that defendant came home about 11 o'clock. There were many circumstances corrob-

orating the testimony of Le Baron that defendant was in town as late as 1:30 o'clock that night, which was about the time when the robbery was committed. Mrs. Gueck, the wife of one of the men who was taking down the header, went over to where the men were working, in company with a Miss Hamilton, to see when her husband would be ready to go home. She testified that it was 12 o'clock when she saw Le Baron and the defendant drive up in a buggy to where they were, while she was there talking to her husband. Her testimony was corroborated by a Mr. Wass, by Miss Hamilton, and by her husband, and it was shown that she and Miss Hamilton were the only ladies that were there that night. This, taken in connection with the defendant's admission that he drove down to where the men were working on the header, and saw the ladies there, makes it practically certain that the defendant was in town for more than an hour after it was claimed by his witnesses that he was at home. It is sufficient to say that the state's evidence, if believed by the jury, was amply sufficient to sustain the verdict.

Defendant in his fourth assignment of error complains of the giving of certain instructions by the court, and of the refusal to give other instructions requested by him. Objection is made to the first instruction because the court, in speaking of J. A. Haggard, who was a member of the firm of Martin & Haggard, referred to him as "Archie Haggard," and it is said that his full and true name was not indorsed upon the information. His evidence was not objected to for that reason, and it has been repeatedly held that the indorsement on the information of the initials of the witness with his surname is a sufficient compliance with the statute.

Complaint is also made of instruction No. 3 because the court used the expression: "If, after a careful and impartial examination and consideration of all of the evidence in the case, you can say that you feel an abiding conviction of the guilt of the defendant, and are fully

satisfied to a moral certainty of the truth of the charges made against him, then the jury are satisfied beyond a reasonable doubt." Exception is taken to the use of the word "fully." We deem it unnecessary to discuss this question because the instruction, if objectionable at all, was most favorable to the defendant, in that it required the jury to be *fully* satisfied to a moral certainty of his guilt; whereas, the law only requires the jury to be satisfied, not *fully* satisfied, of defendant's guilt.

The correctness of the fourth instruction is challenged because the jury were told: "You are the sole judges of the credibility to be given to the testimony of each and every witness who has testified before you. You ought not to arbitrarily disregard the testimony of any witness, but give to the testimony of each and every witness such consideration as, in the light of all the facts and circumstances shown by the evidence before you, you think the same is fairly entitled to. And in this connection it is proper to consider the interest that a witness may be shown to have in the result of the case, his apparent capacity and understanding, the probability or improbability of his statement, his manner of giving his testimony, and all the other facts and circumstances connected therewith." Objection is made to the clause last above quoted because it is claimed it permitted the jury to go outside of and beyond the evidence. This objection is without merit. It seems to us by a fair construction of the language the jury were clearly limited to a consideration of the facts and circumstances shown by the testimony of the witnesses and the manner in which they gave their evidence. There is no similarity between this instruction and the one referred to by counsel in the case of *Long v. State*, 23 Neb. 33. There the jury were told: "If you should conclude from the evidence, *which includes not only the sworn testimony of the witnesses who have testified, but all the circumstances surrounding the tragedy*, that the deceased was killed," etc., while in the case at bar they were restricted in their consideration to the testi-

mony itself and the manner in which the witnesses gave it.

Defendant offered four instructions, and the refusal of the court to give them is assigned as error. It appears that the substance of these instructions was given by the court on his own motion, and for that reason they were properly refused.

The foregoing disposes of the defendant's assignments of error. We may say, in passing, however, that a large part of his brief is devoted to what we deem an unwarranted criticism of the conduct and motives of the county attorney, the officers of the court and the witnesses who testified against the defendant. We say this attack was unwarranted, for a careful reading of the record fails to disclose any misconduct on the part of any one connected with the trial. We are satisfied that the evidence produced by the state was amply sufficient to sustain the verdict. It was simply the misfortune of the defendant that the witnesses for the prosecution were believed by the jury, rather than those who were produced by the defendant.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

ELMER HEIDELBAUGH V. STATE OF NEBRASKA.

FILED JULY 12, 1907. No. 15,077.

1. **Criminal Law:** OPINIONS OF WITNESS. In a prosecution for the crime of arson, evidence describing the shoes worn by the accused and footprints found near the place where the crime was committed is proper and competent. But it is error to allow the witness making such comparisons to express his opinion that the footprints were made by the accused.
2. ———: INSTRUCTIONS: ALIBI. It is not reversible error to fail to instruct the jury on the subject of an alibi, where no request to charge upon that feature of the case has been tendered.
3. **Arson:** EVIDENCE. Evidence examined, and *held* insufficient to sustain the verdict.

ERROR to the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed.*

E. D. Brown and *R. D. Sutherland,* for plaintiff in error.

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

BARNES, J.

On the 10th day of May, 1906, the barn of one August Schmelling, situated in Nuckolls county, Nebraska, was destroyed by fire, which was claimed to be of incendiary origin. Elmer Heidelbaugh, hereafter called the defendant, was arrested, and thereafter charged with having set fire to said barn. His trial resulted in a conviction, and he brings the case here for review.

Defendant contends (1) that the district court erred in receiving the evidence of the prosecuting witness as to footprints which he claims to have found in the vicinity of his barn, and also near a building called the "Guthrie corncrib," which had previously been destroyed by fire; (2) that the court erred in failing to instruct the jury as to the effect of the evidence which tended to establish an alibi; and (3) that the evidence is not sufficient to sustain the verdict.

The record discloses that the prosecuting witness was permitted to testify in substance, over the defendant's objections; that he found certain tracks or footprints in the sand on his premises, starting about 50 feet from where his barn stood, leading north and west toward the river; that he found footprints in the corn field, after the other fire occurred, about 175 yards from his place, leading right through the field; that said footprints were made by the same person as those found west of his barn after the fire in question; that he had observed the shoes that the defendant was wearing after the Guthrie fire occurred, and the footprints he had described were, in his opinion, made by defendant's shoes. It appears that he based his

opinion on the fact that the footprints were made by a No. 7 or No. 8 shoe; that the defendant's shoes were about that size, and were run down from the side. That this was prejudicial to the defendant there can be no doubt, because the state produced no other evidence by which it could be even inferred that defendant was within a mile and a quarter of the Schmelling barn on the evening when it was burned. It therefore must have been a controlling factor with the jury in arriving at their verdict. It also appears that no sufficient foundation was laid for its admission. The fact that the tracks were made by a No. 7 or No. 8 shoe was not sufficient to connect the defendant therewith, because shoes of that size are probably worn by at least two-thirds of the male population in the vicinity where the fire occurred. Again, there was nothing in the testimony to show when the tracks found in the corn field were made. They were not traced to or from the place where the Guthrie fire occurred, and those found in the vicinity of the fire in question were at least 50 feet from where the barn stood, and, so far as the evidence goes, they may have been made a week or a month before the fire occurred. To show how unreliable this evidence was, it is only necessary to refer to the testimony of the witness McDade. He testified that he took the shoe from the defendant's foot and fitted it in the tracks found. He stated repeatedly that he could not tell whether the tracks were made by the defendant's shoe or not. He further said that there was a large patch on the bottom of the shoe, and that he looked for that in the footprint and failed to find it. In conclusion, he said: "The only thing I could tell was that the shoe was about the size of the track. Just about the size; it would be impossible to tell exactly." Not only was the evidence complained of incompetent, but it tended to show that the defendant was suspected of having been the cause of the Guthrie fire, without showing that fire to have been of incendiary origin.

Finally, the witness without qualifying himself, was

allowed to express his opinion to the effect that the footprints were made by the defendant. This was reversible error. He should have been required to state the facts showing how his comparisons or tests were made, and allow the jury to determine the results thereof. The evidence complained of should have been excluded from the consideration of the jury.

It is next contended that the court erred in failing to instruct the jury as to the effect of defendant's evidence tending to establish an alibi. That question was before this court in *Ferguson v. State,* 52 Neb. 432, where it was said: "It is not reversible error to fail to instruct on the subject of an alibi, where no request to charge upon that feature of the case has been tendered." It appears from the record that the defendant tendered no request in this case; therefore, his contention cannot be sustained. *Hill v. State,* 42 Neb. 503; *Housh v. State,* 43 Neb. 163; *Metz v. State,* 46 Neb. 547; *Pjarrou v. State,* 47 Neb. 294.

Lastly, it is said that the evidence is not sufficient to support the verdict. It appears that the prosecuting witness and one McBride, who was working for him, left the premises in question shortly after 6 o'clock, and went on foot to the city of Superior, a distance of something over a mile and a quarter; that some time after arriving there they saw the defendant on the street, going in the direction of the river. This was not earlier than half past 6 o'clock in the evening before the fire occurred. It was more than a mile and a quarter from where these witnesses saw the defendant to the Schmelling barn. It was a mile and a half from the barn to the river, where the defendant was afterwards found, and that point was more than a mile and a half from the city. It appears that the defendant, with several others, was engaged in fishing on the afternoon and evening in question; that when in town he procured a luncheon for some of his companions at the river, which he placed in a paper sack and carried to them. Several witnesses saw him at the river with the paper sack at half past 7 o'clock. He was

also seen there by others at 8 o'clock and at half past 8 o'clock, at which time he, among others, noticed the fire in question. While it was not absolutely impossible for him to have gone from the town to the Schmelling barn, and from there to the fishing place on the river, where he was seen at half past 7 o'clock, yet it is quite improbable that he did so. It must be remembered that this was before sunset, and in the broad light of day, and it is not reasonable to suppose that he would have set fire to the barn at a time when he could have been readily seen by the persons who occupied the Guthrie place, which was only 18 or 20 rods therefrom.

An attempt was made to prove that defendant had a motive for the commission of the crime charged. It was shown that the prosecuting witness had told certain parties that he suspected that the defendant burned the Guthrie corncrib; that this fact had been communicated to the defendant, who thereupon said that he would get even with Schmelling or any other man that accused him of it. On cross-examination, however, the witness testified that the defendant said he was a poor man, and that such stories would injure him and destroy his opportunity to obtain work, and that he would make some one prove it. We are unable to see how this very natural expression tended in any way to show a motive for the commission of the crime. There was no evidence offered showing or tending to show that the fire was of incendiary origin. Its origin was, in fact, unaccounted for. Having in view the rule that the state in a criminal case must show the defendant's guilt beyond a reasonable doubt, it would seem that the evidence contained in the bill of exceptions is insufficient to sustain the verdict.

For the foregoing reasons, the judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED.

STATE OF NEBRASKA V. JOHN H. SPARKS.*

FILED JULY 12, 1907. No. 15,136.

1. **Criminal Law: FALSE PRETENSES: EVIDENCE.** In prosecutions for obtaining money or property under false pretenses, the facts, when clearly proved, usually speak for themselves, and other proof of guilty knowledge and intent is not required.

2. ———: ———: ———. In such cases evidence that the accused at other times and places, by acts independent of and not connected with the transaction complained of, has committed like offenses, should not be received to aid in establishing his guilt.

3. ———: ———: ———. When, however, the transaction on which the prosecution is based is of such a character as to require other or further proof, on the part of the prosecution, of the defendant's guilty knowledge and intent, evidence that he has committed like crimes in a similar manner, at or about the same time, or as a part of the same general scheme to defraud, may be received for that purpose.

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

M. W. Terry, L. M. Pemberton and *S. D. Killen,* for plaintiff in error.

Fulton Jack, contra.

BARNES, J.

This case is before us on the state's exceptions taken and prosecuted under the provisions of sections 483, 515 and 516 of the criminal code. It appears that the defendant, John H. Sparks, was tried in the district court for Gage county on an information charging him with obtaining a warrant from said county of the value of $539.04, by means of certain false pretenses. The substance of the information was that the defendant, on the 14th day of July, 1904, did falsely, knowingly and unlawfully pretend that he had built a certain bridge in said

* Rehearing denied. See opinion, p. 511, *post.*

county, and had a just and true claim against Gage county for the sum of $539.04 for building said bridge, which was due and wholly unpaid; that he made a charge and claim against said county for said sum for building said bridge, and, having duly verified it, filed it with the county clerk, and thereby pretended that he had built said bridge; that said sum was due and owing him therefor, and that he procured the county to issue him a warrant for said sum; that said representations were false; that he had not built a bridge as represented, which had not been paid for; that he did not have a just and true claim against said county for building said bridge, and that there was not due and owing him from said county for building said bridge said sum of $539.04, or any other sum. The jury found the defendant not guilty, and from the rulings of the trial court, excluding certain evidence offered by the prosecuting attorney, the exceptions herein are prosecuted.

The record discloses that the state introduced competent evidence which showed that on July 14, 1904, defendant filed claim No. 11,520 with the county clerk of Gage county for $539.04 for building a bridge between sections 31 and 32 in Island Grove township in said county; that said claim was allowed by the county board, and paid to the defendant by warrant No. 329. The evidence also shows that on December 3, 1903, claim No. 10,808 for $512.45 for building the same bridge at the same place was filed with the county board; that said claim was allowed and paid by warrant No. 129. It appears, however, by the state's evidence that the last mentioned claim was not in the handwriting of the defendant, but was made out and filed by one E. V. Martindale, who was employed in the defendant's office at St. Joseph, Missouri. The evidence further shows that the bridge in question was first built between sections 27 and 34, in said township, and was afterwards removed by the defendant, at the county's request, to its present location between sections 31 and 32; that on February 12, 1903, defendant

filed claim No. 9,931 against Gage county for $539.61 for building said bridge at its first location; that said claim was allowed by the county board for the sum of $523.84, and paid by warrant No. 108. It appears, however, that prior to the removal of the bridge from the place where it was first built to its present location the chairman of the board of county commissioners, acting for and on behalf of the county, entered into an agreement with the defendant, by which he was to build for said county a new steel bridge of 42 feet span between sections 27 and 34, in Island Grove township, as a substitute for the one in question, which was too small for that place. It also appears that it was believed the bridge fund was, or might be exhausted, or was insufficient to pay for the new bridge, and so it was agreed that the defendant should file a claim against the county for the difference between the value of the new 42 feet bridge and the one in question, and that the defendant should take the old bridge in payment for the remainder of the cost of constructing the new one. It was further agreed that he should remove the bridge which had thus been turned over to him to its present location, and after it was rebuilt and in proper condition for use upon the highway, and after the next tax levy, defendant should file his claim therefor, which the county would then pay.

The evidence further shows that Martindale, not being aware of the agreement of the defendant not to file the claim for the construction of the bridge in question until after the next tax levy, made out the bill known as claim No. 10,808 for $512.45 in his own handwriting; that he verified the same, signed the name of the defendant thereto, and filed it with the county board on December 3, 1903; that the claim was paid, and the proceeds thereof, with other items, were sent to St. Joseph, where the defendant had his principal office, and that the defendant was not advised that it was a payment for building the bridge in question at its present location. It further appears from the evidence that on July 14, 1904, and after the tax levy

for that year, the defendant called the attention of one Austin, who was his foreman in Gage county, to the fact that no bill had been filed for removing and rebuilding the bridge in question. And thereupon the defendant ascertained the amount of said claim from Austin, and, being then at Beatrice, made out claim No. 11,520 for $539.04, and verified and filed it with the county board for payment, as shown by the state's evidence. Martindale testified positively that he in no manner, and at no time, informed the defendant that he had previously filed claim No. 10,808 for the construction of the bridge in question, and the defendant testified as positively that he had no knowledge that such claim had been presented when he filed the one made out and verified by him on the 14th day of July, 1904.

The defendant on his part introduced competent and convincing evidence, which showed that about the 18th day of June, 1906, supervisor Campbell of Gage county, wrote to the defendant that he thought the records showed that defendant had twice received pay for building the bridge in question; that defendant answered the letter at once, saying that he would come to Gage county, and they would look the matter up; that he did so, and it was then for the first time ascertained by the defendant that such was the fact; that defendant thereafter went before the county board and asked to be allowed to refund the sum of $539.04, with interest thereon at the rate of 7 per cent. per annum. His request was granted, and the money was thereupon refunded. The record further shows that, when the prosecuting attorney ascertained the fact, which was during the introduction of the state's evidence in chief, that the defendant had not made out and filed claim No. 10,808, he sought to show the knowledge and intent of the defendant, and his guilt of the particular crime charged in the information, by offering to prove that the defendant had at other times, and in other cases, filed claims against the county for building and repairing bridges, which had been allowed and paid in the same

manner as the claim in question; that said bridges had not been built, and the repairing had not been done. The testimony so offered was excluded. The state excepted, and these are the exceptions which are now before us for consideration.

It is strenuously urged by the state that the district court erred in refusing to receive the testimony in question; while counsel appointed to defend the rulings of the trial court invoke the general rule that the state cannot prove against a defendant any crime not alleged in the information, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. As was said in *People v. Molineux,* 168 N. Y. 264. "This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto."

It is further urged by the defendant that this court is committed to the rule that evidence of the kind in question will not, under any circumstances, be received against a defendant on trial for the crime of obtaining money under false pretenses. While there are several cases decided by this court in which it has been held that such evidence should have been excluded in prosecutions of this kind, yet it seems to us that the ordinary or usual exceptions to this general rule are recognized in all of them. In *Cowan v. State,* 22 Neb. 519, it was held: "Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time and place the

accused committed or attempted to commit a crime similar to that with which he stands charged." While the evidence there offered was held to have been improperly received, still the above excerpt shows that the court clearly recognized an exception to the general rule. *Berghoff v. State,* 25 Neb. 213, was a case where the defendant was prosecuted for obtaining goods and merchandise under false pretenses from Kirkendall, Jones & Company of Omaha. On the trial, one E. A. Houghton was permitted to testify that his business was that of wholesale dry goods and notions; that he knew the defendant, who, on one occasion, by means of false pretenses, which were described and set forth in detail, obtained goods and merchandise from him of the value of about $1,500. It was held that the trial court erred in admitting the evidence. It was said: "Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that, at another time and place, the accused committed, or attempted to commit, a crime similar to that with which he stands charged." So, while announcing the general rule in that case, still it would seem that the court recognized the exception. In *Davis v. State,* 54 Neb. 177, the defendant was prosecuted on an information charging him with the crime of larceny as bailee. On the trial, a witness was permitted to testify that defendant was guilty of another distinct and separate crime from that charged in the complaint. The judgment of conviction was reversed because of the admission of such testimony and it was said: "In the trial of a criminal cause, the general rule operates the exclusion of evidence of the commitment by the accused of a crime or crimes separate and distinct from that for which he is being tried. To this rule there are exceptions, but in the case at bar reasons did not exist for the departure from the general doctrine." In the case of *Morgan v. State,* 56 Neb. 696, the defendant was charged with obtaining an indorsement of a certain draft by means of false pretenses. The state was permitted to show that the prisoner, a short time before, by like false representations,

obtained the indorsement of another person to a similar draft, and it was held that the evidence was not *res gestæ;* that it did not tend to prove the intent with which the prisoner made the false representations to the prosecuting witness, and its admission was reversible error. It was said in the opinion, however: "There are cases, such as prosecutions for receiving stolen goods, knowing them to be such, in which other acts of a like character are so connected with that which is the subject of the prosecution, either by some connection of time or place or as furnishing a clue to the motive on the part of the accused, as renders these similar acts competent evidence; but these cases rest upon the principle that the guilty knowledge of the accused is an essential ingredient of the offense. But the case on trial does not fall within that class of cases. The doctrine of this court is that, except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time and place the accused committed, or attempted to commit, a crime similar to that for which he is on trial."

So it will be seen by a careful examination of all of our decisions on this question, that we have always recognized certain well-known exceptions to the general rule contended for by the defendant. It is usually the case, however, that, in prosecutions for obtaining money or property under false pretenses the facts, when clearly proved, speak for themselves, and further proof of guilty knowledge or intent is unnecessary. In such case evidence that the accused at other times and places, and by acts independent of the transaction complained of, has committed like offenses is unnecessary, and should not be received to aid in establishing his guilt; but, where the facts are of such a nature that the prosecution is required to prove guilty knowledge and intent on the part of the accused in doing the act complained of by circumstantial evidence, proof of the commission of like crimes may be resorted to for that purpose.

This brings us to the question, does the case at bar fall

within such exception to the general rule? An examination of the record discloses that the offers of proof tended to establish a series of criminal transactions of a similar nature to the one for which the defendant was on trial, and might have assisted the jury in determining the good or bad faith of the transaction as shown by the defendant's witnesses. In *People v. Scaman,* 107 Mich. 348, 61 Am. St. Rep. 326, it was said: "Where it is necessary to show a particular intent in order to establish the offense charged, proof of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent, or, where it is claimed that the thing done was the result of an accident, proof of other like occurrences under like conditions has been held admissible."

It would seem that under the rule above stated the offers of proof in this case should have been received because they are evidently within the exception to the general rule; and the state's exceptions are therefore

SUSTAINED.

The following opinion on motion for rehearing was filed January 8, 1908. *Rehearing denied:*

Criminal Law: FALSE PRETENSES: EVIDENCE. When in a prosecution for obtaining money by false pretenses it is shown that defendant, after having been paid for work done for a county, filed a second claim for the same services and again received the money thereon, and his defense is that he received the second payment by mistake, not knowing that his claim had been paid in full, it is competent to prove that at about the same time he obtained double payment of similar claims in the same manner, without affirmative proof that in such other cases he knew at the time of receiving such second payment that the claim on which he received it had already been paid in full.

SEDGWICK, C. J.

The defendant upon his motion for rehearing in this case has furnished us with an interesting brief. He insists that all of the authorities upon the point determined in the opinion apply the principle that other similar transac-

tions occurring at about the same time may be shown as evidence of guilty knowledge in trials for obtaining money upon false pretenses, only in cases where the defendant is shown to have had such knowledge in the transactions offered in evidence, or else is shown to have engaged in an unlawful occupation, of which defrauding was the principal part. It will be observed that in this case the defendant was conducting a large business in different states, and that the first claim presented and allowed by the county board was not presented by him personally, and that he insisted that in receiving the second payment for this particular work he had no knowledge that he had previously been paid. This seems to be the principal issue in this case. The guilt or innocence of the defendant depends upon the question thus presented. If he knew that he had already been paid for this work, and intended to obtain a second payment to which he was not entitled, he is evidently guilty as charged. But if he was not aware that his agent had presented such claim, and presented his claim in good faith, believing himself entitled to the money, he is, of course, not guilty. The evidence offered and excluded by the trial court was that in at least four other instances, at about the same time, he presented a second claim for similar work, and received payment therefor from the county. The complaint presented in the brief is that it was not offered to show that in any of these transactions he had knowledge that the claim that he so presented had already been paid, and it is ingeniously argued that to show other innocent transactions does not tend to show guilty knowledge in the one being investigated.

We think, however, that the better rule is that the fact that the claim had already been paid and that the defendant had received the benefit of such payment furnishes some evidence that he knew of the prior payment; and, as was said in an old English case, quoted with approval by the supreme court of Michigan, in *People v. Hoffmann*, 142 Mich. 531: "It seems clear upon principle that when

the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often than once, and every circumstance which shows he was not under a mistake on any of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority." Of course such evidence is to be received with caution. The defendant had a number of men in his employ. He transacted a considerable business at different places and in different states. The transaction in this case was somewhat complicated, and while the evidence in question should have been admitted, and the whole matter submitted to the consideration of the jury, still, unless upon the whole evidence it was proved beyond a reasonable doubt that the defendant in this particular case knew that the claim had already been paid when he demanded and received the second payment from the county, he could not be convicted.

Motion for rehearing is

OVERRULED.

JAY O'HEARN V. STATE OF NEBRASKA.

FILED JULY 12, 1907. No. 14,903.

1. **Criminal Law:** CONFESSIONS. Statements or confessions made in the presence of one accused of crime, who remains silent, are admissible in evidence, if the time, the place and the circumstances are such as to lead to the inference that the accused by his silence assented to the truth of the same.

2. ———: ———. A statement made by a person under arrest charged with murder, upon a confession by an accomplice being read to him, and on being asked by a police officer if he wanted to make any statement in regard to it, that he would make his statement at the proper time, or that he would stand trial and tell his story then, *held* to show dissent rather than assent to the statement of the accomplice, and not to render it admissible in evidence as a tacit confession.

3. ———: EVIDENCE. When an accomplice has confessed and has gone upon the witness stand and testified to all the details of the crime, it is error to allow a number of other witnesses, who have heard him tell the same story at another time and place, who repeat in detail all that he told as to the occurrence.

4. ———: ———: REVIEW. Where a defendant voluntarily testifies as a witness in his own behalf, and the facts testified to by him, as well as sufficient other competent evidence, clearly show that he is guilty of the crime charged, a verdict of guilty will not be set aside on account of errors in the admission of evidence.

5. ———: SENTENCE. Under the circumstances of the case, punishment of death *held* excessive, and sentence reduced to imprisonment for life.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed: Sentence reduced.*

James P. English and *H. B. Fleharty*, for plaintiff in error.

W. T. Thompson, Attorney General, contra.

LETTON, J.

The defendant, Jay O'Hearn, was charged jointly with Raymond Nelson, Leo Angus and Joe Warren with murder in the first degree by shooting and killing one Nels Lausten on the 20th day of January, 1906, while in the attempt to perpetrate a robbery. O'Hearn was tried separately, convicted, and his punishment fixed by the jury at death. The other defendants pleaded not guilty, but afterwards the defendants Angus and Nelson were permitted to enter a plea of guilty of murder in the second degree, and were respectively sentenced to imprisonment for life. The defendant Warren was tried and acquitted. Nelson at the

time of the killing was 21 years of age. He had been for some years addicted to criminal practices to such an extent that he was unable to tell how many times he had been confined in jail for larceny and like offenses. Angus was 19 years old, and had also been convicted and confined in the Douglas county jail for some minor offense, and these two had been released from jail a few days before the crime was committed. O'Hearn is about the same age as the others. He and Angus lived in South Omaha, and had been acquainted for a long time, but Nelson and O'Hearn did not become acquainted until the day before the shooting. About 9 o'clock on the morning of the day the crime was committed Nelson and Angus went to the home of O'Hearn in South Omaha before O'Hearn had arisen, got him out of bed, and the three left the house together. They went to and drank in a number of saloons in South Omaha and in Omaha. About noon Nelson and Angus went to Council Bluffs for the purpose of buying a revolver, Nelson giving as a reason for buying it in that city the fact that he could not buy anything in Omaha without it being reported to the police, and O'Hearn went to the restaurant in Omaha where he worked as a waiter. In the afternoon O'Hearn and Angus again met, and went to the Krug Theatre, and to the saloon adjacent and to other saloons. They met Warren at one of these saloons, and after the three were together for some time O'Hearn went home, meeting Angus, Nelson and Warren in the evening by appointment at a saloon in South Omaha, where an agreement was made among them to commit robbery. Warren was 23 years of age, and had never met Nelson before that night. From South Omaha they all went to the Tunnel saloon in Omaha, where it was proposed by Nelson that they go to Nineteenth and Cuming streets and see if they could find a saloon to hold up. They took a street car, got off separately, but afterwards met and decided to rob the saloon of Nels Lausten on the corner of Twenty-first and Cuming streets. It was arranged that Angus and Warren should stand guard out-

side and Nelson and O'Hearn go into the saloon, which plan was at once put into execution. When O'Hearn and Nelson entered the saloon, O'Hearn ordered three glasses of beer. Lausten drew the beer, and as he turned to place the glasses on the bar O'Hearn and Nelson drew their revolvers and ordered him to hold up his hands. At this time a man named Bonney was standing at the north end of the bar, near a screen. Both Bonney and Lausten evidently thought the young men were joking, and on Lausten refusing to hold up his hands a shot was fired from a 32-caliber pistol, which penetrated his heart and killed him. Lausten did not fall immediately, but stepped forward and leaned upon the cigar case, while Nelson ran around the bar to the cash register, holding his pistol in one hand and emptying the till with the other. In the meantime Bonney started to leave, when O'Hearn ordered him to hold up his hands, and covered him with the revolver. Within a moment or two after the shot was fired, one Persinger came to the side door of the saloon and looked in, when O'Hearn threatened him with his revolver. Persinger then ran round the corner to the front of the saloon, and, looking in at the window, saw Nelson emptying the cash register and Lausten still leaning against the cigar case. He then ran across the street and gave an alarm. After the cash register was emptied, O'Hearn and Nelson ran out of the back door of the saloon. From thence they went to Washington Hall, where they had arranged to meet Angus and Warren.

As to these facts there is no conflict in the evidence. The only fact as to which there is any substantial conflict in the testimony is as to whose was the hand that fired the fatal shot. O'Hearn testifies that the pistol which Angus and Nelson bought in Council Bluffs was a 32-caliber Smith & Harrington; that, when they met in the South Omaha saloon that evening, he took this pistol away from Angus because he was too drunk to have it in his possession, and that afterwards, on the street, Nelson asked him for the 32-caliber gun, saying he pre-

ferred it to a 38-caliber; that he then exchanged guns with Nelson, giving him the 32-caliber and taking the 38-caliber; that Nelson asked Angus for the cartridges he had procured in Council Bluffs to fit the 32-caliber gun, and Angus gave them to him. He says that, while he was in the toilet room in the Tunnel saloon before going to Lausten's place, Warren came in and took this pistol from O'Hearn's overcoat pocket and looked at it. He testifies that after he and Nelson entered the Lausten saloon, when Lausten refused to throw up his hands, he, O'Hearn, jumped back in the middle of the room and covered Bonney with his revolver; that Nelson was then standing to the left and south of him; that Nelson again ordered Lausten to put up his hands, then fired the shot, and that he, O'Hearn, fired no shot that night; that he was carrying the 38-caliber gun, and that as they ran from the saloon Nelson said he would rather have the 38 gun, as it would be bad if he was caught with the 32; that he would be apt to be picked up by the police any time they saw him; that they exchanged guns, and that he told O'Hearn to dispose of the 32. On the other hand, Nelson testifies that the 38-caliber Iver & Johnson gun belonged to him, and that it was never out of his possession from early in the evening of Friday until the next morning after the shooting when he gave it to Warren. He denies that he ever had the 32-caliber gun in his hands that night, and says that he never asked Angus for shells for it, and never loaded it. He testifies that, after they entered the saloon and ordered Lausten to hold up his hands, Lausten was in front of O'Hearn, and O'Hearn shot him; that he, Nelson, then ran around the bar and took the money out of the cash register, and that while he was doing this Lausten fell, and they ran away. He further testifies that, when they met at Washington Hall after the shooting, Angus asked O'Hearn: "What did you do, kill him?" And O'Hearn said: "Shut up; yes, I smoked him." This testimony as to the shooting and the talk with Angus is positively denied by O'Hearn.

Bonney testifies that the shot was fired by the man who stood nearest to him, and that the man who was farthest away took the money from the cash register while the other man covered Bonney with a gun. Persinger testifies that he was about to enter the saloon at the northeast door when he heard a shot inside and saw two men running from the rear entrance of the saloon. As he started to enter the side door, a man inside drew a gun upon him. This man was wearing a short light overcoat and a light hat, and at the trial he identified O'Hearn as the man. He immediately ran around the corner of the building to the Cuming street window, and saw a man taking money out of the cash register, wearing a long black overcoat and a black hat, while Lausten stood leaning against the cigar case. There is no dispute as to O'Hearn wearing a short light overcoat and a light hat that night.

On the day after the crime, Angus, Warren and Nelson, being under arrest, were questioned by the police officers, and their separate statements taken down by a stenographer, reduced to long hand, and after being read over to each of them were by each respectively subscribed. At the trial a part of the statements of Angus and Warren thus taken was offered in evidence by the state. The statement of Warren was relatively of little importance, and its admission was in no way prejudicial to the defendant, since it merely tended to corroborate his own testimony. The statement of Angus, however, contained matter of serious and grave import to the defendant. It was, in substance, to the effect that he looked in at the window of the saloon just as the shot was fired; that, as near as he could see, O'Hearn fired the shot, and that he saw O'Hearn at Washington Hall afterwards, and asked him if he shot the man behind the bar, and O'Hearn answered: "Yes, I smoked him." The defendant strenuously objected to the admission in evidence of the written statement of Angus, on the ground that it was incompetent; that it was not shown to have been made in the presence of the defendant; that it was made while he was in jail

and in the custody of officers upon this charge; that it was read in his presence by the authorities while he was under restraint for the purpose of trying to draw out a statement from him; and that his refusal to make a statement at the time should not be taken as evidence against him.

There are two questions presented relative to the introduction of this testimony: Was its admission prejudicial to the defendant? And was the evidence competent under the rules governing the introduction of confessions or admissions?

O'Hearn's own statements on the witness stand and other undisputed evidence in this case show clearly that O'Hearn is guilty of murder in the first degree, and, if the penalty for this crime were definitely fixed by the statute, no error prejudicial to the defendant could have been committed by the admission of any of the testimony which he asserts was erroneously received. He took the stand himself, and out of his own mouth he is convicted. By the law of this state, however, the punishment to be inflicted for the crime of murder in the first degree is left to the determination of the jury, the statute defining murder in the first degree providing that upon conviction thereof every person convicted "shall suffer death or shall be imprisoned in the penitentiary during life in the discretion of the jury." Criminal code, sec. 3. If by the admission of testimony which should not have been received it is probable that the minds of the jury were influenced to a greater degree against the defendant than if no such testimony had been received, then the error would be prejudicial to the defendant. This is especially so if the evidence erroneously received tends to excite in the minds of the jury that detestation for the crime and instinctive demand for the severe punishment of a man who takes the life of another without justification or excuse, which is common to the majority of men. While under the law the man who actually fired the fatal shot is guilty of no greater crime than the man who was present, assisting in the robbery, yet, unless a prior intent upon the part of both to kill

were shown, the natural tendency would be to impose the weightier punishment upon the one who actually fired the shot. In this case there is a direct contradiction between Nelson and O'Hearn as to which it was who fired the fatal shot. Nelson is corroborated to some extent by the testimony of Bonney and Persinger, but the principal evidence as to the act of shooting was furnished by Nelson, a self-confessed criminal, who could not tell upon the witness stand how many times he had been confined in jail for larceny and other offenses, who was apparently the instigator and ringleader in the perpetration of the crime, and who, it is shown, suggested to Angus and Warren that they had better turn state's evidence with him and place the crime upon O'Hearn's shoulders. His testimony was positively contradicted by O'Hearn; and who can say whether, in the absence of other testimony, the jury might not have given O'Hearn the benefit of the doubt and inflicted the lighter penalty? But, when the statement of Angus that the shot seemed to be fired by O'Hearn, and that O'Hearn after the shooting, when asked by Angus if he killed Lausten, said, "Yes, I smoked him," was added to Nelson's tale, this may have been the very factor which turned the scale in the minds of the jury between the imposition of life imprisonment or the infliction of the death penalty.

It is contended by the state that Angus' statement was admissible under the rule that confessions made by an accomplice in the presence of the accused are competent and proper to be received in evidence against him. This rule, however, is not of general application. The ground upon which it is based is the presumption that silence gives consent, and that if a man stands silent when the time, the place, the occasion, and the circumstances are such as would naturally or properly call for some statement or reply from an ordinary person under similar circumstances, then it is presumed that by remaining silent the accused person admits the truth of the accusation made against him. There is no doubt that under certain

circumstances the fact that accusations have been made against a person, and that he remained mute when every consideration called upon him to speak, may be shown to the jury, and under such circumstances the accusations made may be received as being in some sense admissions of the defendant; but, viewed even in the most favorable light, such evidence is weak and infirm, and the vicissitudes to which it may be subject in the course of transmission, depending, as it often does, upon the recollection of witnesses as to conversations, etc., renders it of doubtful value, and in grave and important cases the rules governing its admission ought to be restricted, rather than enlarged. Mr. Wharton makes a succinct statement of the rule as follows: "If A, when in B's presence, and hearing, makes statements which B listens to in silence, interposing no objections, A's statements may be put in evidence against B whenever B's silence is of such a nature as to lead to the inference of assent." Wharton, Criminal Evidence (8th ed.), sec. 679. Mr. Underhill says: "For silence to be equivalent to a confession, it must be shown that the accused heard and understood the specific charge against him, and that he heard it under circumstances not only permitting but calling for a denial, taking into consideration the circumstances and the persons who were present." Underhill, Criminal Evidence, sec. 122. The statement of Angus was taken the day after the crime. About ten or twelve days afterwards the accused four were taken by the police officers to a small room in the city jail, and there the statement was read over to Angus in O'Hearn's presence, and Angus, upon being questioned, said that it was his voluntary statement, and that he signed the same. O'Hearn was asked by a police captain if he wanted to make any statement in regard to it. He said he did not; he would make his statement at the proper time, or that he would stand trial and tell his story then, as the witnesses variously testify. This was upon the day of the preliminary hearing and just prior thereto. The defendant had been taken to this room for

the purpose of procuring an admission from him. By his conduct and words he neither assented to nor denied the truth of the statement read, but indicated his purpose to make his own statement and tell his own story at the proper time. Under such circumstances, taking into consideration the fact that the defendant was under arrest, that it was sought by the officers in whose custody he was to elicit a statement from him as to the facts of the crime to be used against him, surrounded by hostile influences, and with the fear that what he might say might be misconstrued, or used to his injury, the fact that the defendant reserved his statement until some future time is far from giving countenance to the idea that he thereby assented to the statement which had been read in his hearing. So far from giving color to the idea of assent, it rather conveys to an unprejudiced mind the idea of dissent and the intention to tell the true facts himself. Perhaps the weight of authority in this country is with those courts which hold that the mere fact of arrest is sufficient to render a statement made in the presence of the prisoner, to which he makes no reply, incompetent evidence, for the reason that no assent can be presumed under such circumstances, and that the very surroundings of the accused in such case are such as to render it entirely proper and natural for him to keep silent in the fear of misquotation or misconstruction. A person in such a situation would naturally fear that the worst possible interpretation would be placed upon his language; that the memories of those present would lean to statements prejudicial to his interests, and that an officer seeking to convict might supply through zeal any defect in the statement which was actually made. One of the leading cases on this subject is *Commonwealth v. Kenney*, 12 Met. (Mass.) 235. The facts in this case were that one Russell was arrested for robbery. After the arrest the person robbed pointed to the defendant and said: "That man has stolen my money." To this the defendant made no reply. In the opinion Chief Justice Shaw says that in some cases where a decla-

ration of this kind is made in one's hearing, and he makes no reply, it may be a tacit admission of the fact, but that this depends upon certain facts, among which are whether the statement is made under such circumstances and by such persons as naturally to call for a reply if he did not intend to admit it. So, if he is restrained by fear, by doubts of his rights, or by a belief that his security will be best promoted by his silence, then no inference of assent can be drawn from his silence. And, with reference to the facts in the case, it was said that the defendant "might well suppose that he had no right to say anything until regularly called upon to answer." This rule has been followed in Massachusetts in *Commonwealth v. Walker,* 13 Allen (Mass.), 570; *Commonwealth v. Brailey,* 134 Mass. 527. See, also, *Merriweather v. Commonwealth,* 118 Ky. 870, 82 S. W. 592; *State v. Young,* 99 Mo. 666, 12 S. W. 879; *State v. Howard,* 102 Mo. 142, 14 S. W. 937; *State v. Weaver,* 57 Ia. 730. A contrary doctrine seems to find support in *Kelley v. People,* 55 N. Y. 565, and in *Murphy v. State,* 36 Ohio St. 628. The former case, however, has been somewhat weakened as authority in that state by the opinion in *People v. Smith,* 172 N. Y. 210, in which it is said: "Moreover, he was at the time under arrest and in the custody of an officer, and might well have been silent without its being regarded as an acquiescence in any act proved to have been performed." And in the latter case the competency of the evidence is doubted, but was admitted upon other grounds.

While the presumptions are against the theory that the silence of a prisoner gives his assent to statements made in his presence accusing him of crime, it is unnecessary to decide in this case that in no event and under no circumstances can a tacit admission of the truth of a statement made against him in his presence be made by a person under arrest charged with a crime. The evidence shows that O'Hearn did not remain silent, and did not assent either directly or indirectly to the truth of the statements made by Angus or Warren. Their admission

in evidence therefore was erroneous, and in the case of the statement of Angus it was of such a nature as in all probability operated to the prejudice of the defendant.

It may further be said that, if such a practice were permitted as the introduction in evidence of a written statement of this kind as original evidence where the person making the statement is within reach and can be produced, it would deprive the defendant of one of the most valuable rights granted to him by the constitution, namely, the right "to meet the witnesses against him face to face." It takes away from him the keen scalpel of cross-examination, the power to dissect and lay bare the truth, it may be, from amid a mass of falsehood. If an unscrupulous wretch should make a false statement in writing, and if the accused thought it necessary or advisable to refrain from denying it while under arrest, if this practice were tolerated, his defense would be made more difficult, and false swearers might find an easy method of perjuring themselves.

A number of other errors are assigned and have been discussed in the briefs and oral arguments. It seems that on the Monday after the shooting the defendants were taken by police officers to Lausten's saloon, and there, in the presence of a number of police officers and individuals called in for the purpose of listening and being made witnesses, Nelson was permitted to tell and act out the details of the tragedy, and Angus was also called upon to tell his story. The state was permitted to show at the trial that during these recitals O'Hearn with the other defendants rolled cigarettes and smoked them, though afterwards the trial judge told the jury to disregard the fact of cigarette smoking; and a number of witnesses were permitted, over the objection of the defendant, to recite in detail before the jury all that they could remember of what was said by Nelson and by Angus at that time and place in O'Hearn's presence. We are of the opinion that the admission of this evidence was improper for the reasons, first, that the circumstances in evidence

do not show that O'Hearn assented to the truth of the statements; and, second, that Nelson had already testified in the case and told the same story that he told at the saloon, and thus an undue repetition was made by the several witnesses of the story told by Nelson. The effect of the repeated narration of Nelson's story must necessarily have been to induce the jury to attach greater weight to it than to that of O'Hearn, told by himself alone.

Counsel for defendant concede that O'Hearn is guilty of murder in the first degree. They ask that the case be reversed, and that this court, in view of the fact that Nelson and Angus, who appear to have been co-conspirators and equally guilty with him, have been sentenced to imprisonment for life, impose a life sentence upon O'Hearn. We cannot, however, reverse the judgment of the district court and still reduce the sentence, since a reversal of the judgment carries with it the extinguishment of the sentence.

The verdict in so far as it responded to the issues of guilty or not guilty of the crime of murder in the first degree was fully justified, but in view of the evidence, which shows that Nelson, while not the oldest in years, was the oldest in crime, was the only defendant who was acquainted with the saloons in the part of the city where the crime was committed, that he with Angus purchased the revolver with which the fatal shot was fired, and that he was apparently the ringleader, and considering the further fact that the defendant has barely arrived at man's estate, it is our opinion that the punishment imposed, taking all the circumstances of the case into consideration, is excessive. Since the defendant acknowledged the crime, the judgment of the district court is affirmed, but the sentence of death heretofore pronounced is set aside, and the judgment and sentence of the court is that the defendant shall be imprisoned in the state penitentiary during life.

JUDGMENT ACCORDINGLY.

JOE WARREN V. STATE OF NEBRASKA.

FILED JULY 12, 1907. No. 15,007.

1. **Criminal Law:** JEOPARDY. When a plea of former jeopardy is made by reason of *autrefois acquit*, the test to determine the identity of the two offenses is whether the evidence necessary to convict in the second case was admissible under the former charge, related to the same crime, and was sufficient to have warranted a conviction upon the former charge. If such a condition is shown to exist, the former acquittal is a bar to the second prosecution, but otherwise it will not operate to prevent prosecution upon another charge, even though based upon acts closely related in point of time.

2. ———: ———. An acquittal of the defendant upon the charge of the murder of one Lausten, *held* not to be a bar to a prosecution for the crime of robbery of Lausten committed at or about the time of the killing.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed: Sentence reduced.*

H. B. Fleharty and *T. S. Hollister*, for plaintiff in error.

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

LETTON, J.

On the 14th day of February, 1906, an information was filed in the district court for Douglas county charging Jay O'Hearn, Raymond Nelson, Leo Angus and Joe Warren with robbery upon one Nels Lausten. Joe Warren was separately tried. He filed a plea in bar, alleging that at the February term, 1906, of the same court, an information was presented against him for the same offense, and that he was tried thereon and acquitted. The plea sets forth at length the information upon which he was tried. This information charges O'Hearn, Nelson, Angus and Warren with the murder of Lausten in the attempt to perpetrate a robbery, while the present information

charges the same persons with the robbery of $18.70 in money from Lausten. The plea further alleges that all of the evidence upon the trial was with reference to the crime of murder, and is necessarily the same as the evidence to be adduced in the case at bar, and the defendant prayed that he might be dismissed from the present charge. The county attorney demurred to this plea. The court sustained the demurrer, and the defendant was placed upon trial and convicted.

The principal errors alleged depend upon the question whether the crime charged against the defendant of murder in the attempt to perpetrate a robbery, and for which he was tried, is the identical crime which is charged in the present case. The defendant insists that the acts and circumstances which were relied upon to establish the charge of murder are identically the same acts and circumstances which are relied upon in this case to establish the charge of robbery; that it is the same transaction which is the subject of the charge; that in the former case the intent to perpetrate the robbery was an essential element of the crime charged, and that the acts relied upon to show the intent to rob in the first case are those relied upon to prove the robbery in the present case. It is further contended that the lesser crime of robbery is necessarily involved in the greater crime of murder, since the deliberation and malice necessary to make the killing murder in the first degree are presumed from the fact that the defendant was engaged in the perpretration of a robbery at the time.

An examination of the authorities bearing upon the question presented shows that it is not entirely free from doubt, and that no fixed rule or principle is universally accepted, and no fixed and uniform criterion established, whereby to determine the identity of causes. The English rule seems to be plain and well established that, unless the former indictment was such that the prisoner might have been convicted under it by proof of the facts set up in the second indictment, an acquittal on the first

indictment cannot be a bar to the second. 2 East, P. C. (Eng.) 522. But the American courts seem in some measure to have departed from the rule or test laid down by the English courts and have become a law unto themselves. It seems to be settled by the weight of authority, however, that where the second transaction is for a crime which is but another degree of the crime for which the first prosecution was had, the previous jeopardy will constitute a bar. A man cannot be tried for manslaughter when he has previously been tried for murder of the same person, nor *vice versa,* for the gist of the charge is the same in both cases, namely, the unlawful killing. The degree of the crime, or, in other words, the gravity of the punishment which may be inflicted, depends upon the circumstances surrounding the transaction, which may aggravate or mitigate the punishment according to its heinousness or the degree of moral turpitude of the guilty party in its commission. Since in such a case the defendant might have been convicted of manslaughter under the charge of murder in the first degree, the identity of the crime is clear, and as to such a state of facts there is no conflict in the authorities. Where, however, the same transaction or criminal acts may constitute more than one crime, the question becomes more difficult. If a man breaks into a building and steals from the person of an inmate by force and violence or by putting him in fear, he is guilty of burglary on account of the breaking, of robbery because of the larceny perpetrated by the assault and putting in fear, and of simple larceny on account of the taking and asportation of the goods or money. In such a case a man may be indicted for the burglary, for breaking and entering with intent to steal, or he may be indicted for the robbery, or for the simple larceny. Since these are crimes which differ in their essential elements, the authorities are almost uniform that the former jeopardy of one is no bar to a prosecution for the other (1 Bishop, New Criminal Law, sec. 1062), although a few courts, notably North Carolina and Georgia,

hold to the contrary. *State v. Lewis,* 2 Hawks (N. Car.), 98, 11 Am. Dec. 741; *Roberts & Copenhaven v. State,* 14 Ga. 8, 58 Am. Dec. 528. See, also, *State v. Colgate,* 31 Kan. 511. The rule which seems to be best supported by the authorities is that, where "the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act." *State v. Elder,* 65 Ind. 282; *Morey v. Commonwealth,* 108 Mass. 433; *Wilson v. State,* 24 Conn. 56; *State v. Caddy,* 15 S. Dak. 167, 87 N. W. 927; *State v. Magone,* 33 Or. 570, 56 Pac. 648; *State v. Martin,* 76 Mo. 337. "A test almost universally applied to determine the identity of the offenses is to ascertain the identity, in character and effect, of the evidence in both cases. If the evidence which is necessary to support the second indictment was admissible under the former, related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar." 12 Cyc. 280, *et seq.*

The rule thus deduced seems to be supported by the authorities generally, and this test seems to coincide with those laid down by Mr. Bishop (1 Criminal Law, sec. 1051). Tried by this standard, and assuming as true the allegation that the evidence at the former trial was the same as in this case, has the defendant been placed in jeopardy under the same charge? The charges in the two informations are based upon different statutory provisions. The evidence as to the transaction was the same, but in order to convict the defendant of robbery it was entirely unnecessary to show that Lausten had been killed. If the evidence had shown merely that he was threatened with a pistol, and that while so threatened the money was

taken from his possession by putting him in fear, it would have supported a conviction of the present charge, while it would have fallen far short of warranting a conviction of the crime of murder in the attempt to perpetrate a robbery. The defendant might have been convicted of the murder of Lausten under the former charge, even if no robbery had actually been committed, or he might have been convicted of robbery in this case without any proof of the death of Lausten. The charge in the first case was not that Lausten had been robbed by the defendant; the robbery was not the gist of the offense, but the attempt to rob was merely alleged as an element which the statute seems to consider as presumably showing premeditation and deliberation in the commission of the crime, or, rather, to take the place of proof of such elements. The evidence is clear that the four young men formed the design to rob Lausten, that they proceeded to put this design into execution, and that in the attempt to carry it out that at least two of them committed murder. The jury found that Warren was not guilty of murder. It appears that at the former trial Nelson, the main witness for the prosecution, testified that Warren had no revolver on the night of the murder, while in this case he testified that he did have one. In all probability the jury on that trial were of the opinion that he was not guilty of participation in the murder, since he was not in the saloon that night, and was not armed. They might have well believed at the same time that he was guilty of the robbery, since he went to the locality with the guilty participants in that act, and with the intention and design to rob. If they had so believed, they could not have convicted him of robbery under that information, and hence were compelled to acquit. The evidence relied upon to convict in this case was not sufficient to convict in that, since it lacked the further proof necessary to convict of murder. The charges were not identical, and the evidence necessary for conviction in this case, while admissible in the former to show intent, would not be sufficient

to convict. As has been aptly stated in *State v. Stewart*, 11 Or. 52: "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." *State v. Innes*, 53 Me. 536; *Sharp v. State*, 61 Neb. 187; *Price v. State*, 19 Ohio 423; *State v. Helveston*, 38 La. Ann. 314. In the latter case it was held that a plea in bar is not good to defeat a charge of assault with a dangerous weapon with an intent to kill and murder, where it appeared that the previous trial had been on the charge of robbery, although at the same time and on the same person, and it was said that in order to support the plea "the accused must show that the previous trial which he sets up in bar was precisely for the same offense which had been charged in the subsequent proceedings, and that the same proof would be sufficient to establish either of the charges for which he is put on his trial." To the same effect is *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225.

The essential elements necessary to constitute the crime of murder and those necessary to the crime of robbery are entirely different. In proving the commission of murder, under some circumstances it may be necessary to show an attempt to rob or an actual robbery, but, in proving a robbery, it can never be important or necessary to show the murder of the person assaulted. The same proof is not required in both cases, and the crimes are dissimilar, except that in both an assault is an essential element. Tested by every accepted rule, there is no identity between the former charge upon which the defendant was tried and the charge upon which he was convicted. The evidence is clear that he was a participant in the design to rob, even though he was not present in the saloon at the time the money was taken.

Under the testimony in the case, we find it unnecessary to consider the other errors alleged, since none of them appear to have been prejudicial to the defendant.

It would seem that the punishment inflicted, consider-

ing the fact that Warren only made the acquaintance of Nelson, who appears to have suggested the robbery, the same day, that he was not in the saloon when the robbery was committed, and was in all probability unarmed, and taking into consideration the fact of his youth, is excessive, and we are inclined to think the fact of the killing of Lausten by the other defendants must have unconsciously influenced the court in imposing a heavier sentence than otherwise would have been pronounced. We consider a sentence of fifteen years excessive, and that a sentence of ten years will better subserve the ends of justice.

The judgment of the district court is affirmed, but sentence reduced to ten years.

JUDGMENT ACCORDINGLY.

STATE, EX REL. JOHN F. CROCKER, V. GEORGE C. JUNKIN, SECRETARY OF STATE.

FILED JULY 12, 1907. No. 15,171.

1. **Statutes: JOURNALS OF LEGISLATURE: SECONDARY EVIDENCE.** Where the evidence furnished by the journals of the legislature is ambiguous or contradictory as to the actual time of its final adjournment, so that it is impossible to tell with certainty by an examination thereof upon what day the legislature adjourned *sine die*, recourse may be had to other competent evidence to show the actual fact and to supply the evidence which the journals fail to set forth.

2. ———: **APPROVAL OF GOVERNOR.** The governor, as respects approval or veto of bills, acts as a part of the lawmaking power, and may approve or reject within the time limited by the constitution, as long as bills remain in his possession and under his control.

3. ———: ———. The agreement of the secretary of state to consider a bill which the governor desired to file in his office with his objections thereto as having been filed, and the indorsement thereafter of the date of such consent as the date of the filing,

will not take the place of the actual filing, if the bill remains in the governor's possession, subject in all respects to his control and within his power to approve or reject.

4. ———: JOURNALS OF LEGISLATURE: SECONDARY EVIDENCE. Legislative journals examined, and *held* so ambiguous and contradictory as to the time the legislature adjourned *sine die* as to permit evidence *aliunde* to supply the facts.

ORIGINAL application for a writ of mandamus to compel respondent, as secretary of state, to authenticate a certain act of the legislature. *Writ denied.*

H. M. Sinclair, W. D. Oldham and *T. F. Hamer,* for relator.

H. J. Dobbs, for intervener.

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

F. G. Hamer, amicus curiæ.

LETTON, J.

This is an application for a writ of mandamus to compel George C. Junkin, secretary of state, to authenticate a certain act passed at the 1907 session of the legislature, entitled "A bill for an act to appropriate $85,000 to erect and equip the north and south wings of the main building for the state normal school located at Kearney, Nebraska." The petition alleges that the act was passed on the 3d day of April, 1907, that it was enrolled and duly signed while the legislature was still in session and capable of transacting business by the speaker of the house of representatives and president of the senate in the presence of the respective bodies over which each presided, and was presented to the governor of the state of Nebraska for his approval on the 4th day of April, 1907, at the hour of 11:15 A. M.; that the legislature adjourned *sine die* at 12 o'clock noon of said day, as shown by the journals of the respective branches of such body; that the governor did

not approve the bill nor did he file it with his objections thereto in the office of the secretary of state within five days after the adjournment of the legislature; that by reason of the premises the enactment became a valid law of the state, and that the respondent refuses to authenticate the bill by his signature thereon, as it is his duty to do.

The respondent admits the passage and signature of the bill as alleged in the petition. He denies it was presented to the governor for his approval at the hour of 11:15 A. M. on the 4th day of April, and alleges that it was not presented to or received by the governor until the hour of 2:45 P. M. on said day. He admits that the journals of the Thirtieth session of the legislature show the session to have adjourned on the 4th day of April, but alleges that the session did not in fact adjourn until about 4 o'clock P. M. of April 6. He avers that house roll No. 112 was filed in the office of the secretary of state on the 10th day of April, 1907, as shown by the indorsement thereon, within five days after the presentation of the bill to the governor and within five days after the adjournment of the legislature, and admits that he refuses to authenticate the bill. Ed S. Miller intervened in the case, and alleges substantially the same facts with reference to the passage and approval of house roll No 381, "A bill for an act authorizing the construction and furnishing of an additional fire-proof building at the institute for feeble minded youths located near Beatrice, Nebraska, making an appropriation therefor and providing for the expenditure of such appropriation."

There is but little dispute as to the facts in the case. Since the history of both acts is alike, we shall consider that of house roll No. 112. The act in question was passed and signed by the respective presiding officers of the two houses before noon on Thursday, the 4th day of April, 1907. It was presented to the governor the same day. He retained it without taking action thereupon until the night of Wednesday, the 10th day of April, when he caused to be prepared the following message to the

secretary of state: "April 10, 1907. To the Honorable, The Secretary of State, Lincoln, Nebraska. Sir: House roll No. 112 is respectfully delivered to you without my approval. This is an act appropriating $85,000 to erect two wings to the Kearney normal school. The appropriations for the coming biennium must be kept safely within the state's income. In my judgment the necessities of this institution and the present condition of our finances do not warrant this expenditure. George Lawson Sheldon, Governor." About 11 o'clock P. M. of that day, after having prepared and signed this veto measure, the governor directed his chief clerk to go to the office of the secretary of state, and find out if any one was there who could receipt for this bill, together with others that he desired to deposit. The clerk found no one at the office to receive the bills, the door being locked. At the request of the governor he then called the secretary of state to the telephone at his home. The governor then informed that officer that he had vetoed house roll No. 112, and several other bills, specifying the numbers of the bills, and said that he wished to deliver them to him before 12 o'clock that night, and asked if he would come down and receive the bills. Mr. Junkin told him, if it was necessary, he would do so, that he preferred to have the bills delivered in the morning, but was willing to accept them and consider them in his possession that night. The office of the secretary of state was closed about 5 o'clock in the afternoon, and remained closed until the next morning. The secretary of state received actual possession of the bills upon April 11, in the afternoon, which he indorsed as received April 10. It is further shown by parol testimony that the legislature continued in session, transacting business, during the afternoon of April 4, all of April 5, and until the afternoon of April 6, when it finally adjourned *sine die*. The journals of both houses show that upon April 2 a joint resolution was adopted to adjourn at noon on April 4, and the last day's proceedings for the most part bear the date of April 4.

The relator contends that the journals of the legislature show that it adjourned *sine die* April 4, 1907, at noon; that the testimony of the secretary of state shows that house roll No. 112 was not delivered to him until the afternoon of April 11, more than five days, excluding Sunday, from that adjournment; and that consequently it became a law without the governor's approval at the expiration of the 5th day from the final adjournment, which was April 10; that the record of the legislature made by its journals imputes absolute verity, and cannot be contradicted by parol testimony; that the indorsement of the date of receipt by the secretary of state upon the bill as April 10, 1907, is not of such weight and dignity as a record that it cannot be impeached; and that, since it is shown clearly that the actual possession of the bill was retained by the governor until longer than the constitutional period, the bill became a law without his signature.

Section 15, art. 5 of the constitution, provides: "Every bill passed by the legislature, before it becomes a law, and every order, resolution or vote to which the concurrence of both houses may be necessary (except on questions of adjournment), shall be presented to the governor. If he approve he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider the bill. If then three-fifths of the members elected agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by three-fifths of the members elected to that house, it shall become a law, notwithstanding the objections of the governor. In all such cases, the vote of each house shall be determined by yeas and nays, to be entered upon the journal. Any bill which shall not be returned by the governor within five days (Sunday excepted), after it shall have been presented to him, shall become a law in like manner as if he had signed it; unless the legislature

by their adjournment prevent its return; in which case it shall be filed, with his objections, in the office of the secretary of state within five days after such adjournment, or become a law. The governor may disapprove any item or items of appropriation contained in bills passed by the legislature, and the item or items so disapproved shall be stricken therefrom, unless repassed in the manner herein prescribed in cases of disapproval of bills." The legislature by its adjournment prevented the return of the bill to that body by the governor within five days after it was presented to him. It was necessary therefore that it should be filed with his objections in the office of the secretary of state within five days after such adjournment, in order to give the veto effect.

The questions to determine are: First, whether the failure of the governor on April 10, the fifth day (Sunday excepted) from the adjournment as shown by the record, on account of the absence of the secretary of state from his office, actually to file the same in that office with his objections, the acceptance by the officer of a fictitious or constructive delivery, and the indorsement of the date of such constructive delivery upon the bill, constituted a filing in the office of the secretary of state; second, whether the legislature adjourned at noon upon the 4th day of April, or upon the afternoon of the 6th day of April. If parol evidence can be received to show the date of actual adjournment, which was upon April 6, the bill was actually filed in the office of the secretary of state within the constitutional period fixed for the veto to become effective.

1. We are of the opinion that the failure of the secretary of state to receive possession of the bill upon the 10th day of April, his agreement to consider the same as having been filed that day, and his indorsement showing the receipt of the same as of that date, cannot take the place of the actual filing of the bill with the governor's objections within the time limited by the constitution. The governor, in so far as the function of approval or

disapproval of bills is concerned, is a part of the lawmaking body. *Fowler v. Peirce,* 2 Cal. 165. His rights and his duties with respect to such functions are positively and clearly limited by the foregoing constitutional provisions. As long as the bill remained in his possession it was subject to his action. It was still within his power after he had notified the secretary of state by telephone that he had vetoed the bill, and before the bill with the accompanying veto was filed in the office of the secretary of state, to change his views as to the propriety of such legislation and to affix his approval to the measure. In such case we think there would be no question but that the act would become effective. So long as he was free to change his views, and to make such change effective by his approval, the bill was still susceptible to the exercise of the lawmaking power, and, until, by his voluntary action, the governor had put it beyond his power in any manner to affect the measure, he was still in as full and actual control of it as if he had never signed the veto message or notified the secretary that he desired to file it in his office. *People v. Hatch,* 19 Ill. 283; *Harpending v. Haight,* 39 Cal. 189. We think the intention to file the bill with his objections cannot take the place of actual filing, as long as the governor retained actual control and disposition over the document. We are also of the opinion that the indorsement of the secretary of state of the time of the receipt of the bill, while *prima facie* evidence, is subject to rebuttal to show the actual fact. It may be suggested that, if the secretary of state could, by the mere locking of his office door and refusal to receive a bill, put it out of the power of the governor to file the same, he might effectually deprive that officer of the veto power conferred upon him by the constitution, but this does not necessarily follow. Since the contingency may never arise, it is unnecessary to point out a method of action, but some means certainly could be found for the governor, in the endeavor to carry out the constitutional

requirement, to put the measure beyond his control and within that of the secretary of state.

2. Can we look beyond the legislative journals to ascertain at what time the actual adjournment of the legislature took place? We have held repeatedly that the enrolled bills and the journals of the two houses are the only competent evidence relative to the enactment of laws. *State v. Abbott,* 59 Neb. 106; *Webster v. City of Hastings,* 59 Neb. 563; *In re Granger,* 56 Neb. 260. We have also held that, when the legislative journals are defective, mutilated or incomplete, a missing portion of the record may be shown by evidence *aliunde. State v. Frank,* 60 Neb. 327. The doctrine which these cases declare is substantially that, when a fact is plainly shown to exist by the legislative journals, that fact is unimpeachable by other evidence. In *State v. Frank, supra,* the journals were defective and incomplete, and it is said by SULLIVAN, J., in the opinion: "When the journals are defective, mutilated or incomplete, their silence should not, as against the enrolled bill, be taken as evidence that the yeas and nays were not recorded as required by the constitution. The condition of the house journal, as a record of legislative action upon house roll No. 251, does not justify us in accepting it as an unimpeachable witness." It is a settled rule in this court that the court will take judicial notice of the contents of the legislative journals, and, in view of the importance of this case, we have examined the original senate and house journals of the legislature of 1907 deposited with the secretary of state. An examination of the original journals shows several hundred pages of matter containing resolutions offered and the vote upon the same, the passage of bills with the yea and nay vote thereon, reports of various committees, the contents of messages from the governor and from one house to the other, announcements by the respective presiding officers as to the signing of certain bills, together with much other miscellaneous matter. Most of the papers apparently forming the pages covering the last day's proceed-

ings are dated April 4. The house journal, however, under date of April 5, shows that the joint committee on engrossed and enrolled bills, at 9 o'clock P. M. of that day, presented to the governor for his approval and signature senate file No. 47, with twelve other bills, and another report of the same committee shows that, at 3:15 o'clock of that day, house rolls Nos. 293, 346, 396, 429 and 188 were presented to the governor. Under date of April 6, the journal shows that the joint committee on engrossed and enrolled bills reported that, at 2 o'clock of said day, they had presented to the governor house rolls Nos. 90, 91, 92, 147 and 161. The original senate journal, under a date line in which April "5th" is erased and "4th" written in, shows that 25 bills were presented to the governor by the joint committee that day, and, under a similarly changed date line, the senate journal shows that the joint committee on engrossed and enrolled bills report that, at 11:20 A. M. of that day, it had presented to the governor house rolls Nos. 293, 346, 429 and 188. The hour mark 3:15 is scratched out, and 11:20 apparently inserted on this page. These are the identical bills which the journal of the house shows were presented to the governor at 3:15 o'clock of April 5. The senate journal also shows, under a similarly changed date line, that the same committee presented to the governor, at 9 o'clock P. M., senate file No. 47, with twelve other bills, which are shown by the house journal to have been presented by that committee at 9 o'clock P. M., on April 5. The dates of certain reports made by the committee on accounts and expenditures are also changed from April 5 to April 4. Under date of April 6, changed to April 4, the senate journal shows that the committee on engrossed and enrolled bills presented to the governor, at 11:40 A. M., house rolls Nos. 90, 91, 92, *et seq.*, being the same bills which are shown by the house journal to have been presented to the governor upon April 6, at 2 o'clock, by the same committee. The majority of the pages bear the date line of April 4, but the fact that the journals of

the house and the senate contradict each other as to the day and hour with reference to the time that bills were presented to the governor, and the further fact that certain proceedings seem to have been had upon the 5th and 6th days of April, as shown by the house journal, and that dates in the senate journal appear to have been changed from the 5th and 6th to the 4th day of April, render the evidence of the journals contradictory, ambiguous and defective. It is shown by the record kept by the secretary of the governor, which has been introduced in evidence, that upon April 5, 1907, at 9 o'clock P. M., the governor received from the chairman of the committee on engrossed and enrolled bills senate file No. 47, and the other twelve senate files, which the house journal shows were delivered to him at that time, and which the senate journal apparently showed were delivered to him at that time, before the date was changed. The governor's record also coincides with that of the house journal in showing that upon April 5, at 3:15 P. M., the governor received house rolls Nos. 293, 346, 429 and 188. Both the house journal and the governor's record show that, at 2 o'clock P. M. upon April 6 the governor received house rolls Nos. 90, 91, 92, 147, *et seq.*, which the senate journal shows were presented to him by the committee under date of April 6, changed to April 4, at 11:40 A. M. The testimony of the clerk of the house and the secretary of the senate shows conclusively that no final adjournment was actually had until the afternoon of April 6. Indeed, it seems to be conceded that, pursuant to an ancient custom, more honored in the breach than in the observance, the legislative clocks were stopped at 12 o'clock noon upon April 4 in an attempt to carry out the fiction of adjournment at the date previously determined upon, although both houses continued in actual session for more than 48 hours thereafter.

In the two opinions written respectively by SULLIVAN, J., and NORVAL, C. J., in *State v. Frank*, 60 Neb. 327, and 61 Neb. 679, the manner of keeping the journals of the

legislature as practiced in this state was severely criticised, and it is said: "A system better calculated to facilitate mistakes, or the loss, through either design or carelessness, of portions of the journal, could not well have been adopted" (61 Neb. 679). If we should follow the opinion of the supreme court of Alabama in *Montgomery Beer Bottling Works v. Gaston,* 126 Ala. 425, 51 L. R. A. 396, we would hold that the bundle of memoranda, records of votes, reports of committees, etc., tied together and deposited in the office of the secretary of state, do not in fact constitute the legislative journals. We are not prepared to go to this extent, however, but desire at this time to again express our views as to the manner which the legislature has provided for keeping such an important record as the journal of its proceedings. If better means were provided and closer attention were paid by each member of the legislature to the making up of an accurate record of each day's business, much of the uncertainty as to the validity of our legislation would be done away with. The case here is not one in which we have the presumptive evidence of regularity furnished by a properly enrolled bill, authenticated by the signatures of the presiding officers of the house and senate, upon one side, and a defective record on the other. In such case there exists, or should exist, two records, the authenticated bill and the journals, and the evidence furnished by the presence in the proper archives of the enrolled bill in proper form furnishes all evidence needed to prove its passage as against incomplete or defective journals. Here, however, it is the existence of a fact of which the journals should furnish the only evidence which is in controversy, and the evidence of which we must look to the journals in the first place to supply. It is impossible to tell with any certainty from the legislative record, as preserved in the office of the secretary of state, at what time the legislature of 1907 ceased the transaction of business. A legislative record is like any other record, and, when it is mutilated or ambiguous and contradictory, the

best evidence obtainable may be received, not to impeach it and make a new record, but to establish what was the actual fact. The journals of the legislature are confused, contradictory, uncertain and ambiguous in their recitals of what actually took place upon the 4th, 5th, and 6th days of April, and we are therefore at liberty to resort to other evidence; and, since such evidence shows conclusively that the legislature did not adjourn until April 6, and since the bills were actually filed with the governor's objections in the office of the secretary of state upon the 11th day of April, 1907, they were so filed within the five days limited by the constitution, and never became operative.

Aside from these considerations, it may be questioned whether in any event the legislature, by the simple expedient of stopping the hands of the clock while it still continued to transact business, could deprive the governor, and through him the people of the state, of the safeguard against hasty and illconsidered legislation provided by the time given after final adjournment for the consideration and filing of bills, with the governor's objections thereto, in the office of the secretary of state. The governor is a part of the law making machinery, as well as the house and senate, and his right to exercise the duties imposed upon him in a proper and orderly manner, and with the time for deliberation conferred upon him by the constitution, cannot be curtailed by the action of a co-ordinate branch of the lawmaking power. The people of the state are entitled to the benefit of the deliberate judgment of the executive upon the expediency and necessity of proposed laws and appropriations, and it cannot be taken away by a mere sham. To allow this to be done would be to say that the wise provision of the fundamental law could be nullified by a device so hollow and transparent as to be ridiculous—to prefer the shadow to the substance, and a falsehood to the truth.

The respondent is justified in refusing to certify the bills, and the writ prayed for is refused.

WRIT DENIED.

CHRIS JENSEN, APPELLEE, V. FRANK SHOWALTER, APPELLANT.

FILED JULY 12, 1907. No. 14,734.

1. Easements: PRESCRIPTION. The owners of adjoining lots made an agreement to establish an alley or driveway along the division line from the road on which their lots fronted down to the point where their outbuildings were located, each giving six feet of their respective lots for the purpose. The alley was measured off and staked, and the parties afterward graded and improved their lots with reference thereto, and the owners, with others having occasion to do so, used the alley for more than ten years. *Held*, That each owner had acquired an easement by prescription in that part of the lot of the other included in the alley.

2. ———: ———. An easement by prescription may be acquired in a homestead as in other property.

3. ———: ———: PRIOR MORTGAGEE. While an easement in real property cannot be granted by the owner thereof so as to affect the rights of a prior mortgagee, the party claiming the easement has the same rights as any other subsequent incumbrancer. If the easement has attached by lapse of time, he must be made a party to the foreclosure proceeding, and, if not, the purchaser at foreclosure sale must take action to dispute his claimed right before the statute has fully run.

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

Grant G. Martin and *R. J. Stinson,* for appellant.

F. W. Button, contra.

DUFFIE, C.

Plaintiff and defendant are owners of adjoining property in South Side subdivision of section 26, township 17, north, of range 8, east, of the 6th P. M., Dodge county, Nebraska. The plaintiff claims that in 1893, and while one Rasmus Nielsen was owner of the property now owned by the defendant it was agreed between them that an alley of twelve feet in width should be established

from the highway on the north of their property down for a certain distance through their lots to the place where their barns and outbuildings were established; that of this alley each was to give six feet off from the respective premises owned by them; that said alley was laid out and has been in continuous use by the parties and others having occasion to use it until about the time of the commencement of this action, when the defendant Showalter, who had become owner of the property, attempted to build a fence along the division line of their respective properties, thus closing the alley and making it inaccessible. This action was brought to enjoin the defendant from closing or interfering with the free use of the alleged alley. The district court issued a temporary injunction, which upon the hearing was made perpetual, and the defendant has appealed.

The evidence is quite conclusive that in 1893 the plaintiff and Rasmus Nielsen, who then owned the land of which the defendant is now the owner, agreed to establish an alley 12 feet in width, taking six feet off from each of their respective premises, in order to accommodate them in reaching their outbuildings. They each planted trees on his side of the alleyway and graded their respective lots so as to leave the alley lower than the lots on each side, and constructed a crossing from the street to the alley across the gutter. No written agreement to this effect was made, and an easement by deed is not claimed. It is insisted, however, that an easement by prescription is established by the evidence, and it cannot be denied that, where a parol license to enter upon the land of another has been granted, the use of such land under a claim of right for the statutory period will grow into an easement by prescription. So, also, it has been held in this state that a court of equity will give effect to a parol grant of an easement, where there has been a valid consideration, and where the grant is certain in its terms, and there has been such a performance on the part of the

grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds. *Gilmore v. Armstrong,* 48 Neb. 92. An easement, being an interest in real estate, can be acquired only by deed; but, by user for the statutory time necessary to gain title to real estate by adverse possession, a grant will be presumed and an easement by prescription established.

The defendant claims that the agreement between the parties was a mere license, one to the other, to use their respective share of the lots in question for an alley for their mutual convenience, and that such license is revokable by either one at their pleasure. The rule is well established that, where one enjoys a right of way under a claim of right, the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the right claimed by the other party. *Pierce v. Cloud,* 42 Pa. St. 102, 82 Am. Dec. 496. In the case we are considering it was satisfactorily shown by the evidence that in 1893 the plaintiff and Nielsen entered into a parol agreement to establish an alley to continue for all time along the division line of their respective lots; each giving six feet of their own lot for that purpose. At that time the alley was laid out and staked, and each thereafter improved their lots with reference thereto, and, here, we might say that we think the district court was in error in admitting in evidence the testimony of the plaintiff and his wife relating to such agreement; Nielsen being dead, and the defendant, the present owner of the lot, being his representative. The agreement, however, was established by the testimony of Nielsen's wife and other disinterested third parties, and, as before stated, is established to our entire satisfaction. The testimony is clear to the further effect that the alley in question was used by the parties and by others having occasion to make delivery of groceries and other articles to the respective parties, and that this continued down to the time of the commencement of this action in 1905, a period of

more than ten years, the time fixed by our statute to acquire title by prescription. The cases are not uniform that an agreement of this kind, and user for the statutory period, gives to the parties a prescriptive right in the alley, but the great weight of authority is in that direction. In the well-considered case of *Barnes v. Haynes,* 74 Am. Dec. 629 (79 Mass. 188), it was held: "Grant of easement in that portion of passage-way between adjoining lots of land which lies upon the lot of the other owner will be presumed in the owner of each lot, where the way, which extended from a street along and upon the dividing line between the lots and was the only means of access to the back part of either, was used uninterruptedly for twenty years by the owners of both lots, without limit, restriction, interruption, or objection, or any claim or right, except what might be implied from such use, and no mention of any right of way was made in any of the conveyances of any of the lots for a much longer time." In *Rhea v. Forsyth,* 78 Am. Dec. 441 (37 Pa. St. 503), the following was held: "Under parol agreement by owners of adjacent lots, dedicating an alley to the common use of the lots, and in pursuance of which the owners erect their buildings in reference to the alley, the easement becomes appurtenant to each lot, and is not defeated by the statute of frauds, and subsequent purchasers of the lots take the easement as an appurtenance." In *Clark v. Henckel,* 26 Atl. (Md.) 1039, the following was held: "The owner of a lot conveyed part of it, and, in accordance with an oral agreement with his grantee that an alley should be left between their properties for their mutual benefit, one was laid out, half on the property of each, and used continuously by the owners of the property for 35 years. *Held,* That, the agreement having been fully performed on both sides, neither could inclose the part of the alley which had been taken from his property. Use of an alley under a claim of right to the mutual use of the whole alley is adverse to a separate and exclusive right to a part of it by either of the owners of the adjoin-

ing property." In *Wait v. Brock,* 109 N. W. (Ia.) 471, the supreme court of Iowa said: "Where the true location of a boundary line is a matter of some uncertainty, and for a long time the adjacent owners have made use of a portion of the strip in dispute as a neutral ground for an entrance to both lots, substantial justice is done in determining the true boundary by recognizing and confirming an easement in such portion in favor of the one not entitled to the ownership thereof."

Defendant cites us to *Wilkinson v. Hutzel,* 142 Mich. 674, in which it was held: "Where the owners of adjoining lots for mutual convenience established a driveway between the same, one-half thereof being on each lot, their acquiescence for a long term of years in such mutual user of the way did not create title in and to the land of the other in either party; there being nothing hostile or adverse in such user." In that case it does not appear that there was any agreement for a permanent right of way between the lots, while in the case we are considering the agreement was for a right of way to continue for all time. A further difference between the cases appears from the fact that, in the Michigan case, the owner of one of the lots married a grantee of the other lot and joined with him in a conveyance thereof, which, it was held, operated as a revocation of the license to use the driveway as to purchasers from her of the first named lot. An exhaustive examination of the cases on the subject convinces us that the great weight of authority is in favor of acquiring by prescription a right of way under the circumstances disclosed in this case, and that the facts of the case fully warranted the holding of the district court.

Two other objections urged by the defendant may be briefly disposed of. It was said in argument that the Nielsen lot was a homestead, and that the agreement made between Nielsen and the plaintiff was an incumbrance upon the homestead and void, because not reduced to writing and signed by both husband and wife. It need only be said that the claim now made by the plaintiff is the ac-

quisition of a right of way by prescription, and a prescriptive right may be acquired in a homestead as in other property. It is further urged that, at the time of the agreement in 1893, a mortgage existed upon Nielsen's lot, and that the agreement was void as to the mortgagee, who afterwards foreclosed his mortgage and bid in the property, and thereafter conveyed it to the defendant. But the assignee of the mortgage, after he procured the title, built a fence along the line of the alley recognizing its existence, and continued to use it until sold to the defendant. It will not be denied that the mortgagor of real estate may incumber it in any way he sees fit after the making of his mortgage. Such incumbrance is subject to the rights of the mortgagee, and, on foreclosure of the mortgage, the subsequent incumbrancers may be barred of any right interfering with the enforcement of the first mortgage lien. In order to do this, however, the subsequent incumbrancer must be made a party to the foreclosure action, which was not done in this case. At the time of the foreclosure the alley had been established and was being used by the plaintiff. That use has continued up to the time of the commencement of this action without interference or objection, and a prescriptive right to such use has, in our opinion, vested in the plaintiff.

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

ALBERT, C., concurs.

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

AFFIRMED.

LIZZIE M. NIXON, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JULY 12, 1907. No. 14,805.

1. **Street Railways:** INJURY: EVIDENCE. Plaintiff, in an action for damages for being thrown from a street car while attempting to board the same, testified that after reentering the car the conductor asked her if she was hurt, and she replied that she was. *Held*, That the court did not err in refusing to strike this testimony from the record.

2. **Damages:** INSTRUCTIONS. In an action to recover for a personal injury suffered on account of the alleged negligence of the defendant, the instructions should limit the recovery for future pain and suffering to such as are reasonably certain to result from the injury.

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

John L. Webster and *W. J. Connell,* for appellant.

John W. Cooper and *George W. Cooper, contra.*

DUFFIE, C.

It is claimed by Mrs. Nixon, the appellee, that while she was in the act of entering a street car at Sixteenth and Leavenworth streets, in the city of Omaha, the car suddenly started forward, and she was thrown from the step of the car upon the pavement, sustaining the injuries of which complaint is made. The trial resulted in a judgment in her favor for $500, to reverse which this appeal is taken.

On her examination, she testified that after being thrown to the pavement she arose and again boarded the car, which had stopped for her at a distance of about 30 feet from where she had fallen. She stated that after she had boarded the car she gave the conductor her transfer slip within a short time, and the following question was asked her: "Now, you may state what, if anything,

the conductor said to you at the time you handed him a transfer slip, and what you said to him? To this question the defendant objected, and, the objection being overruled, she answered: "When the conductor came for my transfer, he asked me if I was hurt, and I told him that I was." It is now insisted that this conversation with the conductor, if it took place, was some time subsequent to the accident and formed no part of the *res gestae.* We are inclined to think that the objection is not well taken. The question asked by the conductor did not call for an expression of how the accident occurred, nor did the reply of the plaintiff attempt to go into the particulars of her fall or the cause thereof. The question called for the present condition of the plaintiff, and her answer was restricted to the scope of the inquiry. In *Cleveland, C. C. & I. R. Co. v. Newell,* 104 Ind. 264, 54 Am. Rep. 312, it was held that, in an action for damages for a personal injury, evidence of expressions by the injured person of pain and sickness, and declarations as to its seat at the time of or subsequent to the occurring of the injury and without regard to how made, is competent. In *Roosa v. Boston Loan Co.,* 132 Mass. 439, it is held that it is only when such declarations assume the form of a narrative of past experience or suffering, or a relation of the cause and manner of the injury, or where they are made *ante litem motam* to one not an attending physician or a medical expert, under conditions above mentioned, that their admissibility becomes the subject of serious discussion.

Objections were taken to the thirteenth instruction of the court which is in the following language: "You are instructed that if you find for the plaintiff you will assess and allow her damages at such sums as will compensate her for the injuries which she is shown by the evidence to have sustained. In determining the amount of such damages, you should carefully consider from the evidence the nature, extent and character of the injuries sustained by the plaintiff, and should determine whether or not such

injuries or any of them are permanent, and you should allow her for all damages which you find from the evidence naturally and directly result from such injuries. In determining the damages, you have the right, and it is your duty, to consider the testimony as to physical pain and mental suffering, if any, endured by the plaintiff, or which she may endure in the future as a result of the injuries received at the time complained of, and expense incurred for medical attendance, which expenses, in this case, cannot exceed the sum of $150, the amount at which such expenses are stated and claimed in the petition, and the loss of time occasioned by said injury, which in this case cannot exceed the sum of $100, the amount stated and claimed in the petition, and the impairment of plaintiff's ability to earn money in her business or calling, if any such impairment you find from the evidence." The following part of the instruction, it is said, is clearly erroneous: "In determining the damages you have a right, and it is your duty, to consider the testimony as to physical pain and mental suffering, if any, endured by the plaintiff, or which she may endure in the future as a result of the injuries received at the time complained of."

In *Chicago, M. & St. P. R. Co. v. Lindeman,* 143 Fed. 946, it was held that "the liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such pain and other evil effects as are reasonably certain to result from it. Possible, even probable future effects are too remote and speculative to form the basis of legal recovery." In *Hardy v. Milwaukee Street R. Co.,* 61 N. W. 771 (89 Wis. 183), the court said: "A charge which allows damages for the pain and suffering which plaintiff 'may endure hereafter' and for the loss of such time as the evidence shows 'she will be likely to suffer hereafter' is erroneous, as allowing the jury to go into the field of mere probability." The same principle is announced in *Chicago, R. I. & P. R. Co. v. McDowell,* 66 Neb. 170, where it is said: "In an action for personal injuries com-

pensation can be recovered for only such evident damages as are shown with reasonable certainty to be consequent thereon. * * * We think that in order to satisfy the rule under discussion it must appear with reasonable certainty that disabilities have resulted from the injury complained of, and that reasonably certain future damages will result therefrom. The greater or less degree of permanency of the injury affects the question of the continuing nature of the damages, but does not determine their amount, which must also be ascertained with reasonable certainty." To the same effect are *Haas v. St. Louis & S. R. Co.*, 111 Mo. App. 706, 90 S. W. 1155; *Ford v. City of Des Moines*, 106 Ia. 94, 75 N. W. 630; *Groundwater v. Town of Washington*, 95 Wis. 56, 65 N. W. 671. The rule of the instruction is a clear violation of the principle announced in the cases above quoted from.

It is urged by the plaintiff that by the first paragraph of the instruction the jury were limited in allowing damages to those which "naturally and directly" resulted from her injuries. All damages are ordinarily limited to such as are the natural and direct result of the defendant's wrong. For such suffering and pain as the party may endure in the future, the rule is that they are limited to such as are reasonably certain to result from the injury. There is an important difference between damages which naturally and directly result and such as are reasonably certain to naturally and directly result from the wrongful act of the defendant. It would hardly be possible to determine how much the plaintiff may suffer naturally and directly as a result of her injuries, and the jury, in awarding damages, must limit the amount to such as they find to be reasonably certain to be suffered by the plaintiff from future pain and suffering.

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

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.

HAZEL WILLIAMS, APPELLEE, V. PATRICK B. RILEY, APPELLANT.

FILED JULY 12, 1907. No. 14,815.

1. **Highways:** OBSTRUCTION: SUIT BY OVERSEERS. Overseers of highways, being liable to a penalty for failure to keep the roads in their district in good condition, may, when a road is obstructed and the continuance of such obstruction threatened, maintain injunction proceedings against the trespasser.
2. **Injunction:** EQUITY. The general rule that a court of equity will not interfere to protect a legal right in property until the complainant has established his title or right by an action at law is subject to the exception that, where a right has been enjoyed by the complainant for a long period of years, its violation will be enjoined without the right being first established at law.

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

Sullivan & Squires, for appellant.

A. P. Johnson and *C. L. Gutterson, contra.*

DUFFIE, C.

Hazel Williams, overseer of road district No. 1 in Victoria township, Custer county, Nebraska, brought this action to restrain the defendant Patrick B. Riley from trespassing upon and obstructing a public road, and from placing or putting a fence therein. On the final hearing the injunction was made perpetual, and the defendant has appealed.

Riley is the owner of the southwest quarter of section 28, township 19, of range 21, in Custer county. It is alleged in the plaintiff's petition that in the year 1884 a

public road was regularly laid out, platted and opened, running north and south along the section line between said sections 28 and 29, the road being four rods wide, two rods on each side of the section line; that the road has been traveled continuously since 1884, and has been worked and graded by the overseer of said district ever since said date; that in 1905 the defendant, desiring to fence his land, dug post holes and set posts along what he claimed to be the east line of the road, but that many of the posts were set across said traveled road, the posts on the north being in the middle of the highway, and two rods west of the east line of the road where established in 1884 and used and traveled for more than 20 years; that plaintiff served notice upon the defendant to remove the posts and fill up the post holes, which he neglected to do, whereupon the posts were removed by the plaintiff in his official capacity as road overseer. Plaintiff thereupon filed this action. In his answer the defendant admits the establishment of a road at the time alleged in plaintiff's petition. He admits that he was about to inclose his land, and that the posts set by him were removed by the plaintiff. He denies that he had any purpose or intention of encroaching upon the limits of the road as laid out in 1884. He denies each and every other allegation of the petition. The court found that the defendant had commenced to fence the road as alleged in the petition; that it was his intention to complete said fence and to maintain the same in the road, and that when this suit was instituted the defendant was in the act of erecting said fence, which, if completed, would obstruct the public highway; further, that the public has openly and notoriously traveled the road sought to be fenced by the defendant for more than 15 years last past, and that the same was accepted and worked by the public authorities as a public highway during that time; that the defendant contested and defended this action, and claimed the right to build his fence over said road, and did not disclaim an interest therein.

It is first insisted by appellant that the plaintiff has no such interest as entitles him to maintain this action. As a general proposition this might be conceded, but, under the provisions of our statute, it is made the duty of the overseer of highways to keep the roads in his district in good repair and free from obstructions. Section 55, ch. 78, Comp. St. 1905, provides that, if he neglects to perform any of the duties imposed upon him by this chapter, he shall be liable on his official bond to pay a fine of not less than $5 nor more than $50 to be recovered by civil action before any justice of the peace in the county, at the suit of any citizen, for the benefit of the school fund. Complaint had been made to the overseer by those interested in the road that the same was being obstructed. The defendant refused to remove the obstructions, and appearances indicated that he intended to complete the building of the fence, and on the trial he insisted on his right so to do. Under these circumstances we think that the overseer had such a special interest as entitles him to maintain the action. He could not stand by from day to day to prevent the defendant from erecting his fence, and he was liable upon his bond unless he performed his duty and kept the road open and free from obstruction. It was surely better to apply to the court for an injunction against the defendant than to attempt with physical force to keep the road open. Unless one course or the other was adopted, he was subject to a fine, and the course adopted was the better and probably the most effective.

It is further urged that defendant's encroachment upon the road had been removed previous to the commencement of this action, and that there was then no existing, continuing or threatening nuisance or trespass to call for the interposition of the court. We cannot overlook the fact that Riley had commenced to obstruct a thoroughfare which had been traveled for more than 15 years; that he did this under a claim of right, insisting that the road encroached upon his land, and that the true line of the

road was something like two rods further west than claimed by the plaintiff; that upon his examination he stated that he did not intend to abandon any right that he had claimed, except "under the advice of good legal authority." This, we think, sufficiently showed his intention to continue in the alleged trespass. The evidence relating to the true location of the section line between sections 28 and 29 was very conflicting, and it is not entirely clear that the road as now traveled does not encroach upon the defendant's land. Defendant invokes the general rule that a court of equity will not interfere to protect legal rights in property until the complainant has established his title or right by an action at law, and he insists that, until the true location of the section line is shown, the court ought not to interfere by the extraordinary writ of injunction. The rule invoked, like all general rules, has its exceptions, and one of the exceptions to this rule is that, where a right has been enjoyed by complainant without interruption for a long period of years, its violation will be enjoined without the right being first established at law. *Falls Village W. P. Co. v. Tibbetts,* 31 Conn. 165; *Shirley v. Hicks,* 110 Ga. 516; *Jordan v. Woodward,* 38 Me. 423; *Olmstead v. Loomis & Graves,* 9 N. Y. 423; 22 Cyc. 820.

Because of the great length of time which the road has been traveled and worked by the public, the court was fully justified in interfering to prevent its obstruction, and we recommend that the decree appealed from be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

AFFIRMED.

L. A. WAGENER ET AL., APPELLEES, V. SYLVANUS L. WHITMORE ET AL., APPELLANTS.*

FILED JULY 12, 1907. No. 14,865.

1. **Judgment, Vacating: PETITION.** A petition to vacate a judgment for fraud under the provisions of section 602 of the code is defective, which pleads "that plaintiffs have at the time of filing this petition a meritorious and valid cause of action against the defendants," without more upon this point; but, in the absence of any attack upon the same in the trial court by motion or demurrer, the general statement will be held sufficient in this court.
2. **Trial.** A party is as much entitled to be heard in the trial court upon questions of law as upon issues of fact.
3. **Judgment, Vacating: EVIDENCE.** The evidence examined, and *held* to support a finding that the decree sought to be vacated was obtained by fraud and misrepresentation.

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

O. A. Williams, G. W. Berge and *M. [illegible]gton,* for appellants.

W. A. Meserve and *H. F. Barnhart, contra.*

DUFFIE, C.

This action was brought under the fourth subdivision of section 602 of the code to vacate a decree entered in the district court for Antelope county on June 28, 1904. The petition is quite voluminous, but the material facts alleged are the following: The original case was brought by Wagener, in the year of 1902, for the purpose of redeeming certain lands in Antelope county from a judicial sale thereof made for delinquent taxes. Kruse was a defendant in the action, and filed an answer and cross-bill claiming an interest in the land as mortgagee, and in his cross-bill he also asked to be allowed to redeem

* Rehearing denied. See opinion, p. 564, *post.*

from the judicial sale made for delinquent taxes. Before the case was reached for trial, the case of *Logan County v. McKinley-Lanning Loan & Trust Co.*, 70 Neb. 406, had been filed in the supreme court, and, as it was supposed to involve legal questions essential to the determination of the action, the judge of the district court expressed a desire to have the case passed until the supreme court should finally determine that case. Thereupon, with the knowledge and sanction of the district court, the parties agreed that the case should stand continued until the *Logan County-McKinley* case had been finally determined. That notwithstanding this agreement, and in June, 1904, and before the final decision in the *Logan County-McKinley* case, the attorney for defendants represented to the court that he was advised by counsel representing plaintiff and Kruse that they did not intend to and would not further appear in said action, and induced the court to try the case and enter a decree therein dismissing the plaintiff's petition and Kruse's cross-bill. It is further alleged in the petition to vacate the judgment that plaintiffs had no knowledge of the fraudulent acts of defendants' attorney and his misrepresentations to the court to induce it to hear and dispose of the case until December, 1904, and after the court had adjourned for the term. Before commencing the trial of the present action, the defendants filed a written request that the court make special findings of fact in order that they might except to questions of law involved in the findings. The court found specially that there was an agreement, as alleged in plaintiffs' petition, to continue the case until after the final decision by this court of the *Logan County-McKinley* case, which was entered into by the parties in the presence of and with the knowledge and approval of the court; that the plaintiffs relied upon said agreement, and paid no further attention to the case pending the decision of that case; that on June 28, 1904, in violation of this agreement, and before this court had settled and determined the law with reference to redemption from county tax

sale foreclosures, and before this court had handed down its final opinion in the case of *Logan County v. McKinley-Lanning Loan & Trust Co.*, and without the knowledge or consent of the present plaintiffs or their counsel, and in their absence, counsel for defendants, in open court, called up the case, and had the same set down for hearing, and caused the same to be heard and the judgment and decree described in the petition made and entered fraudulently and in disregard of the rights of the present plaintiffs; that the plaintiffs and the counsel for Wagener and Kruse were not aware of and had no knowledge of said decree until after the court had adjourned, and that they used due diligence in the premises. The trial judge embodies the following statement in the bill of exceptions: "I distinctly remember promising Mr. Meserve that I would not pass upon the demurrer involved in the case of *Wagener v. Whitmore* until the supreme court had finally settled the question of redemption from tax sales, and said cause was continued from time to time by reason of that fact and the agreement of counsel in regard thereto. On June 28, 1904, Mr. Williams called said case up, and there being no attorneys for the plaintiffs and the defendant William G. Kruse present, such fact and the fact of the agreement was by me called to the attention of Mr. Williams, and he informed me that he had taken the matter up with one of the attorneys interested for the plaintiffs and the defendant William G. Kruse, and that they had told him that they did not desire to appear further or do anything further in the case. Acting upon this statement I rendered the judgment as shown by the record." The district court entered a decree vacating the judgment entered on June 28, 1904, and reinstating the case for trial as fully as if said judgment had not been made and rendered, and from this decree the defendants have appealed.

We have examined the evidence with some care, and there can be no question that the action brought to redeem from the tax sale was, by agreement of the parties

to that action, to be continued to await the action of this court in the *Logan County-McKinley* case. It is too plain for dispute that the attorney for defendants in that action fraudulently represented to the court that plaintiffs therein and the defendant Kruse, who had filed a cross-bill, did not wish to appear further in the case. We cannot overlook the statement by the trial judge, who has a distinct remembrance of calling the counsel's attention to the agreement. He evidently desired that it should be carried out in good faith. That the court was imposed upon and entered the decree upon the false representations made by defendants' attorney is too clear for controversy, and in this state of the case it cannot be expected that this court will be swift to look for errors in the record or to discover reasons for reversing a judgment which vacates a decree entered through fraud practiced by the attorney of the successful party, and misrepresentations made to the court to induce him to disregard an agreement made with his consent and approval. It is insisted that the petition to vacate the judgment does not state a cause of action. At the time of the agreement to continue the original case to await the action of this court, Wagener's petition stood upon demurrer interposed against it by the defendants. On June 28, 1904, when the case was taken up for trial, this demurrer was sustained by the court, and, at the suggestion of defendants' counsel, and in the absence of any one representing the plaintiff, the court made an entry to the effect that the plaintiff elected to stand upon his demurrer, and thereupon a final decree was entered dismissing the petition. It is now insisted by appellants that no fraud was practiced by them, because no question of fact was involved in the proceedings had by the court. In their brief it is said: "It was impossible to practice fraud. If the court and appellants had combined, they could not practice fraud in the entry of the decree which it is sought to set aside. Where there is no question of fact to be investi-

gated, there can be no fraud in procuring the decree. The sole question involved in the case was one of law. Whether the district court decided that question of law properly or improperly is immaterial on the question of fraud. If the court decided it wrong, it does not constitute fraud. The court sustained a demurrer to the petition, gave the plaintiff an exception, and dismissed the action. The demurrer admitted the truth of every fact stated in plaintiff's petition. The court did not determine any fact against appellees. Every fact they claimed was admitted by the demurrer. The rule of the court was based solely upon the law. No matter which way the court ruled its ruling could not constitute fraud."

The petition to which the demurrer was interposed showed that the action to redeem was brought within two years from the date of the judicial sale. In *Logan County v. Carnahan,* 66 Neb. 685, and *Clifford v. Thun,* 74 Neb. 831, we held that an action to redeem from a judicial sale for taxes might be maintained if brought within two years from the date of the sale. That appears to have been the very question raised by the demurrer. The parties were entitled to be heard upon that question, not then decided. A party is as much entitled to be heard upon a legal proposition pending before the court as upon questions of fact raised by the pleadings. To deprive a party of his right to be heard upon a question of law raised by the pleadings, in violation of an agreement that he shall be heard, is, to our minds, as censurable as to deprive him of a hearing upon issues of fact made.

It is further claimed that, as to Kruse, he is entitled to no relief from the fact that his cross-bill seeking to redeem his mortgage was not filed for more than two years after the judicial sale. It may be true that the facts stated in his cross-petition would not entitle him to redeem on account of his failure to apply to the court for that purpose in due time, but it cannot be denied that if Wagener, the plaintiff in the action, was allowed to redeem, and

was reinvested with the legal title, Kruse might then assert his mortgage against it. This being the case, he had an interest in the success of the plaintiff, and he might, if he so elected, file an intervention under section 50*a* of the code, "by joining the plaintiff in claiming what is sought by the petition." It might be further stated that the answer to Kruse's cross-petition did not raise the issue that his application to redeem did not come in time.

It is further urged that plaintiffs herein were not diligent in taking steps to vacate the judgment after learning that it had been entered. Were this a suit in equity to obtain a new trial, the objection would be a serious one; but the statute under which the action is brought gives the plaintiffs two years in which to proceed under it. A similar statute in Iowa limits the time within which a petition to vacate a judgment for fraud may be filed to one year. In *Independent School District v. Schreiner*, 46 Ia. 172, objection was made that the plaintiff had not acted promptly in availing itself of the provisions of the statute, and the court said: "The action was commenced within one year after judgment was rendered. The statute provides that the proceeding may be instituted within that time. The remedy is secured by the statute to be prosecuted at any time within the year. Laches will not be imputed in the exercise of a legal right within the time prescribed by statute." The judgment sought to be vacated was enfered June 28, 1904, and plaintiffs commenced this action February 25, 1905, and within eight months from the time that the right accrued to them. There was no laches.

It is further objected that the petition in this case does not allege facts showing that the plaintiffs have a meritorious cause of action against the defendants. It is true that their petition is defective in this respect, the tenth paragraph of the petition alleging in general terms only "that each of said plaintiffs have at the time of filing this petition a meritorious and valid cause of action against the defendants," etc. The sufficiency of the petition in this

respect was not questioned by motion, demurrer, or in any other way, in the trial court, and, since the petition contains the necessary allegation in general terms, the defendants cannot, for the first time, raise the question in this court, and ask a reversal on a point not raised or passed on by the court below. *Omaha Nat. Bank v. Kiper,* 60 Neb. 33.

The foregoing, while perhaps not noticing each particular objection raised by the appellants, covers the principal questions discussed and disposes of the principles involved in the case.

We recommend an affirmance of the judgment appealed from.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is

AFFIRMED.

The following opinion on motion for rehearing was filed February 20, 1908. *Rehearing denied:*

REESE, J.

An opinion was written in this case by Commissioner DUFFIE, which is reported *ante,* p. 558. Defendant has filed a motion for rehearing supported by a vigorous brief.

After a careful consideration of the motion and brief, the court is inclined to the opinion that the result of the hearing before the commission is right and that the conclusion should stand. But it may be, and probably is, true that the attorney for defendants acted in good faith in his efforts to apprise plaintiffs of what he designed doing in the matter of calling the case for trial and also in seeking to notify him of the action of the court after the decision of the case. It would hardly be in accordance with the spirit of equity and justice to deprive plaintiffs of their legal right to redeem their land because they relied upon the agreement to allow the case to stand

without trial until the case of *Logan County v. McKinley-Lanning Loan & Trust Company,* then pending in this court, should be decided. That such an agreement was made in open court, and so understood by plaintiffs and the judge presiding at the time, must be believed. While the statement of the judge of the fact included in the bill of exceptions may have been somewhat irregular, yet it cannot be ignored, and must be taken as true. It, no doubt, expresses truthfully the understanding the judge had in the matter. An opinion was rendered by the supreme court in the *McKinley-Lanning* case upholding the contention of the defendants. Their attorney then, in a somewhat informal way, notified one of the previous counsel for plaintiffs, not knowing that he had severed his connection with the case, that he proposed calling up the case at a session of the court soon thereafter to be held. He did so call up the case and took his judgment. In the meantime, a rehearing was allowed in the *McKinley-Lanning* case, and a final decision was rendered, reversing the former one and holding in favor of plaintiffs. The mistake of defendants was made in not ascertaining the fact of the motion and final action of the court in that case on the rehearing. It is the opinion of the writer and his associates that the defendants probably acted in good faith and without actual fraudulent intent in procuring the judgment of which complaint is made, but yet the case comes within the rule, and the decision of the district court setting aside the former judgment must stand.

The motion for rehearing is overruled, and a rehearing

DENIED.

JAMES S. CLARK, APPELLANT, V. AUGUST HANNAFELDT ET AL., APPELLEES.

FILED JULY 12, 1907. No. 14,877.

Mortgages: SUIT TO REDEEM: LIMITATIONS. An action to redeem from the lien of a mortgage does not accrue to the mortgagor until the mortgagee takes possession of the premises after default in payment, and the action is not barred until ten years from the date of such possession.

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

M. F. Harrington and *W. R. Butler,* for appellant.

O. W. Rice and *J. Koenigstein, contra.*

DUFFIE, C.

This action was brought by the plaintiff to redeem certain lands in Knox county from the lien of a mortgage. The district court sustained a demurrer to the petition, and, the plaintiff electing to stand thereon, the action was dismissed at his cost. The petition alleges that William B. Truesdell was the owner of the land in 1887; that on said date Truesdell and wife executed and delivered to the Colonial & United States Mortgage Company a mortgage to secure the payment of the sum of $840; that the mortgage bore interest at 6 per cent. and matured January 1, 1901; that by certain mesne conveyances the title to said real estate was vested in the plaintiff June 7, 1890, and that the plaintiff is now the owner thereof in fee simple; that, upon obtaining his deed he took actual possession of the land, and on November 25, 1893, rented the same to August Hannafeldt for the term of five years by a written instrument duly filed and recorded in Knox county; that Hannafeldt continued in possession as tenant of plaintiff until July, 1896; that in the fall of 1896 the Colonial & United States Mortgage Company went into

possession of said real estate under its said mortgage, receiving and appropriating to its own use and benefit the rents, issues and profits of the same for that season; that in the spring of 1897 the defendant August Hannafeldt went into possession of said real estate under a claim of being the successor in right of the Colonial & United States Mortgage Company, and has ever since that time occupied the same, receiving and appropriating to his own use the rents, issues and profits thereof; that a considerable part of the indebtedness secured by the mortgage had been paid by plaintiff's predecessors in title; that plaintiff does not know, and has been unable to ascertain, the amount so paid or the amount of the indebtedness yet remaining unpaid; that he does not know, nor has he been able to ascertain, the amount or value of the rents, issues and profits of said real estate received and appropriated by the defendant Hannafeldt and his predecessor in possession of said land, the Colonial & United States Mortgage Company; that the defendant claims to be the absolute owner of the land as well as the assignee and owner of the mortgage, and denies that plaintiff has any right, title or interest in the land, and also denies the plaintiff's right of redemption from the lien of said mortgage, and declines to negotiate or deal with plaintiff as owner of the property, refusing to account to him for the rents and profits, or to recognize his right of redemption; that he is able, ready and willing to pay the amount remaining due on the mortgage, and admits a part of the indebtedness secured thereby is still due. He asserts that the defendant is the assignee and owner of the unpaid portion of the mortgage and is entitled to receive such portion of said indebtedness as has not been paid, and he offers to bring and pay into court for the defendant's benefit any sum that, on an accounting, may be found due on the mortgage.

Upon what theory the district court sustained the demurrer is not disclosed. The petition distinctly asserts that the mortgagee took possession in the fall of 1896, and

that defendants took possession as successors in interest of the mortgagee and as owners of the mortgage in the spring of 1897. The mortgage matured and was payable in January, 1901, and the plaintiff was entitled to pay it at that date. This action to redeem was commenced October 3, 1905, and within ten years from the date of possession taken by the mortgagee in 1896. An action to redeem a mortgage is barred in ten years from the time of taking possession by the mortgagee. In 2 Jones, Mortgages (6th ed.), sec. 1156, the rule is stated as follows: "The cause of action accrues when the mortgagee enters into possession, not when the money secured by the mortgage becomes due. Until then the plaintiff has no occasion for this remedy to regain possession. The possession may be explained, so that it is not so much the possession itself as the nature of it that operates as a bar to the right to redeem; but the presumption is that the possession is adverse after an entry upon a default in the mortgage. When the mortgagee has entered, not as mortgagee only, but by virtue of having a limited interest in the equity of redemption, as, for instance, a life estate, it is held that time will not run in his favor during the continuance of that interest, for it would be his duty to keep down the interest on his mortgage in favor of the remaindermen. As against the owner of the equity of redemption, the statute does not begin to run until the mortgagee takes actual and open possession of the mortgaged premises; and it does not begin then if he holds merely under his mortgage title and recognizes the mortgagor's right of redemption." This text is supported by numerous authorities, and the rule undoubtedly is that the statute does not run against an action to redeem until possession taken by the mortgagee. Hannafeldt's possession of the land previous to 1906 is distinctly alleged in the petition to be a possession as tenant of the premises. He was in under a five-year lease, and during his occupancy in that relation could not claim the benefit of the statute, as he could not deny his landlord's title.

The petition states facts sufficient to entitle the plaintiff to redeem from the mortgage, and the court erred in sustaining the demurrer.

We recommend a reversal of the judgment.

EPPERSON and GOOD, CC., concur.

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

REVERSED.

NANCY D. MONROE, APPELLEE, V. MARY A. HUDDART, APPELLANT.

FILED JULY 12, 1907. No. 14,899.

1. **Wills: SPOLIATION: PAROL EVIDENCE.** Alterations of any sort made in a will by a stranger to it, without the knowledge of the testator, have no effect whatever, and the intrument must be admitted to probate as it stood originally. Such changes are a mere spoliation, and parol evidence will always be received to show the original contents of the will.

2. **———: EXECUTION: PROBATE.** The attestation clause is not a necessary or material part of a will, and the fact that the name of the testatrix is incorrectly given therein does not affect the validity of the will, and probate thereof should not be denied where the subscribing witnesses are clear in their testimony that all statutory requirements were observed in its execution.

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

C. W. Seymour and *John C. Watson,* for appellant.

Pitzer & Hayward, contra.

DUFFIE, C.

September 12, 1904, Mrs. Matilda Diener made her will, of which M. C. Joyce, then county judge of Otoe county, was the scrivener. She died in Otoe county, Nebraska, December 4, 1904, at the age of 67 years, leaving surviv-

ing her a husband, John C. Diener, two daughters, Mrs. Mary A. Huddart, the contestant, and Mrs. Nancy D. Monroe, the proponent, wife of Dr. Hackman Monroe, and a granddaughter, Ida M. Halverson, the child of a deceased daughter. By the terms of the will the contestant, Mary A. Huddart, was given the sum of $5, the residue of the estate going to the daughter Nancy, with a request that if the husband survive the testatrix he be cared for as long as he lived, and also that she provide a home for the granddaughter, Ida Halverson, as long as she remained single. This will was admitted to probate in the county court, and, on appeal taken by Mrs. Huddart, the district court also entered an order admitting the will to probate. The particular objections urged by the contestant are (1) that the judgment of the district court is not sustained by sufficient evidence; (2) that the findings and judgment of the court are contrary to the law and evidence; and (3) that the judgment should be for the appellant and against the appellee.

The evidence is convincing that Mrs. Diener, at the time of making the will, was of sound and disposing mind and was not subject to any undue influence. Two objections to the probate of the will, urged with great confidence by the contestant, are the following: The third paragraph of the will, as originally written, is in the following language: "Third. I hereby give, devise and bequeath to my daughter Mrs. Monroe Hackman all the rest and residue of my estate, both real and personal, wherever found, with this request, that if my husband John C. Diener survives me that she care for him as long as he shall live and that she provide a home for my granddaughter Ida Halverson as long as she shall remain single." The fourth paragraph of the will is in the following words: "Fourth. I hereby appoint my daughter Mrs. Monroe Hackman executrix of this my last will and testament, hereby revoking all former wills by me made." The will was written in the office of the county judge, and there were present Mrs. Diener, the testatrix, John

C. Diener, her husband, Mrs. Nancy Diener Monroe, the daughter described in the third and fourth paragraphs of the will as "Mrs. Monroe Hackman," and Ida Halverson. Judge Joyce, who drew the will, on being asked how Mrs. Diener designated to him the person who is named as "Mrs. Monroe Hackman," answered: "She called her 'my daughter Nancy,' pointing to her daughter. Q. Was she in the room at the time this talk occurred? A. She was. Q. Will you state to the court how the name came to be written in the will as 'Mrs. Monroe Hackman' originally? A. I would state that Mrs. Matilda Diener told me what she wished to give to her daughter Nancy, and my understanding, as I stated before, was that it was Mrs. Monroe Hackman, so I wrote it on the typewriter, and brought it in and read it over to her in the presence of Mrs. Monroe and Miss Halverson, and it was further read by Mrs. Diener herself." Some time after this will was executed the county judge learned that he had made a mistake in designating the daughter Nancy as "Mrs. Monroe Hackman," instead of "Mrs. Nancy Diener Monroe," and drew a pen through the word "Hackman," and inserted between the words "Mrs." and "Monroe" with pen and ink the two words "Nancy Diener," so that the third paragraph of the will, as it now appears, and as it appeared when offered for probate, is as follows: "Third I hereby give, devise and be-

Nancy Diener

queath to my daughter Mrs. ∧ Monroe ~~Hackman~~ all the rest and residue of my estate, both real and personal, wherever found, with this request, that if my husband John C. Diener survives me that she care for him as long as he shall live and that she provide a home for my granddaughter Ida Halverson, as long as she shall remain single." A similar change was made in the fourth paragraph of the will, so that it now appears as follows: "Fourth. I

Nancy Diener

hereby appoint my daughter Mrs. ∧ Monroe ~~Hackman~~ executrix of this my last will and testament, hereby revok-

ing all former wills by me made." No erasure of the word "Hackman" was made by the county judge, but a pen was drawn through the name, leaving the word "Hackman" clearly discernible, so that the will as originally written is apparent to every one. In this condition the judgment of the trial court adjudging the will valid will be taken as probating the will as originally signed and attested, and not as including those marks and interlineations which the evidence clearly shows was no part of the will as originally drawn.

What is the effect of this alteration, or, as it is called by some authorities, this "spoliation," made in the will by the scrivener? Mr. Page defines an alteration as "a change in the words of a will, by addition, or erasure, or both, made by the testator, or some one acting under his authority, after the execution of the will." Page, Wills, sec. 298. "Spoliation" he defines as "a change in the wording of a will, made after execution by one who is neither the testator nor is authorized by him"; or the total "destruction of a will by some one other than testator or one authorized by him." Sec. 300. The rule governing spoliation by a stranger to the will he gives in the following words: "The effect of a spoliation depends upon who changes the will or causes it to be changed. If a stranger to the instrument change it, such spoliation is a nullity. The part inserted by the stranger is disregarded. The part erased by him is to be read as it was originally written, if it is possible, either from the will itself or from extrinsic evidence, to determine the words originally employed." Sec. 301. This rule is supported by *Miles' Appeal,* 68 Conn. 237; *Thomas v. Thomas,* 76 Minn. 237; *Holman v. Riddle,* 8 Ohio St. 384. 1 Underhill, Law of Wills, sec. 267, gives the rule in the following language: "Alterations of any sort made in a will by a stranger to it, without the knowledge of the testator, have no effect whatever, and the instrument must be admitted to probate as it stood originally. Such changes are a mere spoliation, and parol evidence will always be received

to show the original contents of the will." The evidence is undisputed and conclusive that Judge Joyce made the alteration, without the knowledge or consent of the testatrix, and the court did not err in receiving such evidence or in allowing the will to probate as originally drawn and executed.

There remains one other objection urged by the contestant. The true name of the testatrix is *Matilda* Diener, and the will is so signed. In the attestation clause her name is written *Malinda* Diener. If the attestation clause were a necessary and material part of the will the objection would be serious. The purpose of the formal attestation is to make a *prima facie* case that the acts therein recited have all been properly done when proof of the signature of the witnesses is made. Mr. Dame says: "The attestation clause is not, of itself, necessary to make a will valid. The instrument may be probated when it contains no clause whatever—merely the signature of the witnesses—provided their evidence shows that they signed it in the presence of the testator, and that the formalities required by the statute have been actually complied with." Dame, Probate and Administration, sec. 27. Under a statute similar to our own the supreme court of Michigan has announced the same doctrine. *Ferris v. Neville,* 127 Mich. 444; *Lautenshlager v. Lautenshlager,* 80 Mich. 285. See, also, Page, Wills, sec. 223. In *Williams v. Miles,* 68 Neb. 463, the eleventh paragraph of the syllabus is in the following words: "Hence the subscribing witnesses to a lost will may testify that the testator signed and they witnessed and subscribed in the required manner, without proving that there was an attestation clause, or establishing the contents thereof." The witnesses to the will in this case were positive in their testimony that they signed the instrument on request of the testatrix, that it was signed in her presence, and that she declared it to be her last will and testament.

We discover no error in the record, and recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

JACOB YARYAN, APPELLANT, V. LAURA YARYAN, APPELLEE.

FILED JULY 12, 1907. No. 14,915.

Divorce: ALIMONY. Where the evidence in the record is not sufficient to fully inform this court of the value of the husband's property, and the trial court in granting a divorce to the wife awarded alimony grossly in excess of what should be allowed, considering the value placed upon the property of the husband by its special findings, the case will be remanded for the purpose of taking further evidence, and for a further finding relating to the amount of property owned by the husband, and whether he has an equity in property alleged to have been conveyed by him to defraud the wife of her marital rights in such property.

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

Clarke & Easeley and *M. F. Harrington,* for appellant.

Allen G. Fisher and *A. M. Morrissey, contra.*

DUFFIE, C.

The plaintiff, Jacob Yaryan, brought this action against Laura Yaryan, praying that he might be divorced. The defendant's answer contains a cross-petition, in which she asks a divorce from the plaintiff. A decree of divorce was awarded the defendant upon her cross-petition, and she was given the custody of their two minor children. The decree also awards her $2,000 permanent alimony, $25 a month to be paid monthly in advance for the support of her children, and $200 was directed to be paid into court as counsel fees for the defendant's attorneys.

There appears in the record a finding of facts relating

to the property owned by the defendant. From these findings it appears that the plaintiff is the owner of 360 acres of unincumbered land in Cherry county of the value of $1,040; that he owns 480 acres of land worth no more than the incumbrance upon it; that he owns a school lease of the value of $200, and personal property of the value of $250, and that this includes all his property. The certificate of the clerk attached to the transcript does not cover the special findings by name, but it does recite that the transcript contains the journal entry, and as the special findings are properly a part of the journal entry, we think they must be considered as authenticated by the clerk's certificate. The plaintiff's appeal is based wholly upon the award of alimony given by the court. Viewed from the standpoint of the special findings relating to his property, the alimony is not only excessive, but extravagantly so, and we have examined the evidence contained in the bill of exceptions to ascertain whether it supports these findings. The plaintiff was for some years engaged in the ranch business in partnership with his father, who deceased in the year 1900. At the time of his death the partnership was the owner of something over 300 head of cattle and quite a tract of land, most of it incumbered. The partnership owed debts to the amount of $2,800. The plaintiff testified that the father's share of the partnership property was acquired by money received by his wife from her mother's estate. It is claimed that the children, including the plaintiff, recognized their mother's rights in the property held by her husband and conveyed to her the land in which the husband was interested, and there is a deed from plaintiff to his mother under date of June 15, 1900, conveying 960 acres of land, the consideration recited therein being $1. It is also shown that the plaintiff purchased from his mother and the other heirs of his father their interest in the partnership cattle, and it is asserted by the plaintiff that his mother borrowed $3,000, which was loaned to him and used, so far as it went, to pay the other heirs for

the cattle purchased. While it is claimed by the defendant that the conveyance of 960 acres of land made by Jacob Yaryan to his mother was without consideration and for the purpose of defeating alimony, the court has made no finding upon that issue, and as the record is almost entirely barren of any evidence relating to the value of the land so conveyed and of other lands conveyed by the plaintiff to other parties at a later date, and subsequent to his marriage, we are unable to arrive at any satisfactory conclusion relating to these conveyances. The amount of alimony awarded by the court is almost conclusive that he regarded the plaintiff as the equitable owner of some, if not all, of these lands, which he has conveyed, and indicates that the special findings relate only to the property standing in his name. In this condition of the record, justice to the parties and to ourselves requires that we should remand the case, so far as it deals with the alimony awarded the defendant, for a further investigation by the district court.

We recommend that the decree be affirmed so far as it awards the defendant a divorce and custody of her children, and that it be remanded to the district court, with directions to take evidence and determine whether any or all of the conveyances made by the plaintiff were *bona fide* in their character, or made with the intent on his part to defraud the defendant of her marital rights in his property.

By the Court: For the reasons stated in the foregoing opinion, the decree is affirmed so far as it awards defendant a divorce and custody of children, reversed as to alimony, and remanded to the district court for a new trial.

JUDGMENT ACCORDINGLY.

HARRY C. MCKIBBIN, APPELLANT, V. F. E. BAX & COMPANY, APPELLEES.

FILED JULY 12, 1907. No. 14,926.

Sale of Drugs: NEGLIGENCE. One who has suffered a direct injury by the unlawful or criminal act of another may maintain an action for the recovery of the damages sustained; but the unlawful sale of a poisonous drug to a minor eighteen years of age, a quantity of which was by said minor administered to another minor to his injury, does not create a cause of action in favor of the father of the latter for loss of his son's services and the expense of medicines and doctor's bills, as it cannot be said that the defendants might reasonably have anticipated that such use would be made of the drug, especially as from the circumstances of the case the presumption arises that the purchaser knew the qualities thereof and the effect which giving it to another would produce.

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

H. D. Rhea, for appellant.

H. M. Sinclair and *Warrington* and *Stewart, contra.*

DUFFIE, C.

The defendants are partners conducting a drug store at Lexington, Nebraska. On June 24, 1905, a clerk in the store sold to one Roy Barron, a minor 18 year old, a bottle of croton oil containing one or two drams. The medical witnesses describe croton oil as a drastic purgative. Barron and a companion put a few drops of the oil on a pie, some of which they induced Charles McKibbin, the minor son of the plaintiff, to eat, causing him great pain, distress and sickness from which he suffered for some days. This action is brought by the plaintiff for loss of services of his son and for medicine and doctor's bills. Article III, ch. 55, Comp. St. 1905, provides for a board of pharmacy, who are to examine and grant cer-

tificates of registration to persons found competent to act as pharmacists. Section 8, art. III, ch. 55, *supra,* provides a penalty for any proprietor of a pharmacy who permits the compounding or dispensing of prescriptions or the vending of drugs, medicines or poisons in his place of business, except by or in the presence of or under the supervision of a registered pharmacist. Section 42 of our criminal code relates to dispensing poisons, and provides for keeping a register of the name, age, sex, place of abode of the purchaser, the quantity sold, and writing the word "poison" upon the package or wrapper. It further makes it unlawful to either sell or give away any article of poison to minors of either sex. Section 44 provides a penalty for the violation of section 42. It is alleged in the petition that the clerk who sold the croton oil to Barron was not a registered pharmacist; that the bottle containing the oil was not labeled poison; and that no registry of the sale was made as required by section 42 of our criminal code; and it is upon these grounds that it is sought to make the defendants liable. The case was tried to the court without the intervention of a jury, and judgment was entered for the defendants upon the ground that the unlawful sale was not the proximate cause of the injury to plaintiff's son.

It is urged with much earnestness that the sale of the poisonous drug to Roy Barron, a minor, in violation of our statute, was the great and moving cause of the injury to the son of the plaintiff, and that defendants are legally responsible for all damages accruing from their unlawful act. In the leading case of *Thomas v. Winchester,* 6 N. Y. 397, it was held that a manufacturing druggist who sold a poisonous drug labeled as harmless was liable in damages to a person who, without carelessness on his part and relying on the erroneous label, took such drug as a medicine, on the ground of breach of public duty, and this whether the injured person was an immediate customer of the defendant or not. In that case it is said: "The defendant was a dealer in poisonous drugs. Gilbert was

his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label." In that case it was urged by defendants' counsel that the damages were too remote, and it was argued that if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury; that, although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with. In reply to this and other similar examples found in defendants' brief, the court said: "In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant, to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? *. * * Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act." It will be seen from the above that the case, as numerous other cases of like character cited by the plaintiff, was placed upon the ground that the injury for which suit was brought was the direct, natural and probable consequence of the defend-

ant's negligence. In the case we are considering, if Barron had called for some harmless medicine and, through the neglect of the defendant's clerk, croton oil, or any other poisonous substance, had been given him, and this had been taken under the supposition that it was the article called for, there would be no doubt of the defendants' liability; but the rule is universal that the act complained of must be the proximate cause of the injury. In *Brotherton v. Manhattan Beach I. Co.*, 48 Neb. 563, it is said: "To establish a cause of action based on negligence it is not sufficient for the plaintiff to show that negligence existed, but he must also show that the negligence pleaded and proved was the proximate cause of the injury complained of." In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, the supreme court of the United States, in discussing the question of proximate cause, said: "It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. * * * The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." This case was cited with approval by this court in *City of Crete v. Childs*, 11 Neb.

252. In *Milwaukee & St. P. R. Co. v. Kellogg, supra,* the court further said: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." The illegal sale of the croton oil was not the immediate and proximate cause of the injury of which the plaintiff complains. That injury arose, not from the sale of the oil, but from putting it upon the pie which plaintiff's son was induced to eat by another and independent agency—the act of Barron, the purchaser. Barron asked for croton oil, and undoubtedly knew the effect which giving it to young McKibbin would produce. He was a witness for plaintiff on the trial, and, when asked for what purpose he bought the oil, replied: "Just thought we would have a joke on the boys was all." There was no showing that Barron did not know the dangerous character of the article which he bought, or that he labored under any misapprehension of the effect which giving it to plaintiff's son would have. It was not given by mistake, or in the supposition that it was harmless, or, at least, no attempt has been made to show that such was the case. While the defendants may have been guilty of negligence and the violation of our statute in allowing sales to be made by unregistered pharmacists and by a sale of a poisonous medicine to a minor, it cannot be said that injury to the plaintiff's son was reasonably to be expected from such a sale or that his injury was the natural and proximate consequence thereof.

The district court was right in dismissing the plain-

tiff's action, and we recommend an affirmance of the judgment.

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

AFFIRMED.

MARY C. NASON, APPELLEE, V. ABNER W. NASON ET AL., APPELLANTS.

FILED JULY 12, 1907. No. 14,930.

1. **Pleading:** ADMISSIONS. Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, though the answer also contains a general denial. *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528.

2. **Evidence:** SUBSCRIBING WITNESS. Where an instrument is attested, the subscribing witness should be produced at the trial to prove the execution, unless his absence or disability is accounted for, or the execution of the instrument admitted by the adverse party.

3. **Trial:** OBJECTION TO EVIDENCE. An objection to the admission in evidence of a written agreement made on behalf of two or more parties must be good as to all the parties making the objection in order to constitute error in admitting it.

4. **Parties:** WAIVER. A defect of parties must be taken advantage of by demurrer or answer, or the defect will be deemed waived.

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

O. C. Redick and *Albert Swartzlander*, for appellants.

Smyth & Smith, contra.

DUFFIE, C.

Prior to June 7, 1901, Mary C. Nason, the plaintiff, held legal title to lot 5, in block 23, in the city of Omaha. On said date the plaintiff and William N. Nason, her hus-

band, executed the following declaration and agreement: "This article of agreement made and entered into by and between Wm. N. Nason and Mary C. Nason, both of Omaha, Nebraska, witnesseth: That, whereas the said Mary C. Nason has this day conveyed to the said Wm. N. Nason lot five (5), in block twenty-three (23), in the city of Omaha, as surveyed, platted and lithographed, which said property is jointly owned by said parties; now, therefore, in consideration of said conveyance, the said Wm. N. Nason hereby agrees that in the event of the death of Mary C. Nason before his own he will convey by proper deed of conveyance or by will the undivided half interest in and to said property to Laura Vandergrift, sister of the said Mary C. Nason, and to the heirs of her body or to such other person as the said Mary C. Nason shall by will or written request direct during her lifetime. It being understood that this agreement shall be subject to such reservations and changes as shall be mutually agreed upon by the parties hereto. Witness our hands this 7th day of June, A. D. 1901. Mary C. Nason. W. N. Nason. Witness: Jas. W. Carr."

William N. Nason departed this life April 15, 1904, leaving as his sole heirs at law the widow and the defendants Abner W. Nason and Esther Miner, a brother and sister. The petition sets forth the foregoing facts, and further alleges that, by reason of the premises, William N. Nason took the title to the undivided half of said lot in trust for plaintiff, and that the plaintiff now owns such undivided one-half of the lot. The prayer is for a decree that she owns in fee simple an undivided one-half of the lot; that the defendants have no interest, right or title to said undivided one-half interest; and that the title to said interest be quieted in the plaintiff. The district court entered a decree as prayed in the petition, and defendants have appealed.

It is urged that the court erred in receiving in evidence the declaration and agreement made between the plaintiff and her husband bearing date June 7, 1901, the same not

having been authenticated by the testimony of Jas. W. Carr, the subscribing witness. It is an ancient rule of law that, where an instrument is attested, the attesting or subscribing witness should be produced at the trial to prove the execution. In this state this rule probably applies only to instruments that are required by law to be attested or witnessed. 2 Jones, Evidence, sec. 539; 1 Greenleaf, Evidence (16th ed.), sec. 569; *M'Pherson v. Rathbone,* 11 Wend. (N. Y.) 96, and authorities cited by Jones under sections 538-540. The exceptions to the rule at common law are the death of the subscribing witness, his absence from the jurisdiction of the court, his insanity or incompetency, and his residence being unknown. Our own statute, section 343 of the code, contains the additional exceptions to the rule requiring the production of a subscribing witness as follows: "When a subscribing witness is absent from the county in which the action is pending, denies or does not recollect the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence." Where the adverse party admits the execution of the instrument, then, of course, no proof of its execution is necessary. In the answer of Mrs. Miner we find the following allegations relating to the agreement in question: "If said agreement was made, it was made without any consideration." And further: "If said agreement was made and entered into by and between said William N. Nason and said plaintiff, it was afterwards agreed by and between said William N. Nason and said plaintiff that said plaintiff would have a lawful interest in said real estate only in case she survived the said William N. Nason, such as she would take under the laws of the state of Nebraska." This we think a substantial admission of the execution of the agreement by William N. Nason. In *State v. Hill,* 47 Neb. 456, we held the following: "Where the petition alleges the delivery of the official bond declared on, the allegation in the answer of a surety, following an averment therein that he signed upon condition the

principal should also sign; that 'if it (the bond) was ever delivered, it was done in violation of the express condition aforesaid upon which defendant signed said instrument,' must be treated as a substantial admission of the delivery of the bond." This rule was followed in *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349, and has become the settled rule of pleading in this jurisdiction. When the agreement was offered in evidence the following objection was made: "The defendants object to the paper being received in evidence on the ground that it has not been properly authenticated and that it is incompetent." As against Mrs. Miner who admitted its execution it needed no authentication, and, the objection being made by both defendants, it could not in that form be sustained by the court, and there was no error in admitting it. The objection was also too general, and did not bring to the attention of the court the precise question upon which a ruling was asked. The real objection to the introduction of the paper was that Jas. W. Carr, the subscribing witness, had not testified to its authenticity, and if the objection had been more specific in this respect the attention of the court would have been called to the precise point upon which a ruling was asked.

A further objection is that the court erred in permitting Mrs. Nason to testify to communications had with her husband. Our statute prohibits a person having a direct legal interest in the result of any civil action, when the adverse party is a representative of a deceased person, from testifying to any conversation or transaction had between the deceased person and the witness. Code, sec. 329. We have examined the record with some care to ascertain whether the rule of our statute has been violated in this case. The nearest approach to it was in the following question: "Do you remember making an agreement with your husband in 1901 with respect to your property on the corner of Seventeenth and Cass?" She answered, over the objection of the defendants: "I do." This can hardly be said to violate the rule. She did not

attempt to state the terms of the agreement, nor upon what consideration it was based, nor did she identify the agreement when it was produced. There was no transaction had with her husband which she attempted to describe, and no conversation with him which she sought to relate. The court apparently had the rule well in mind, and limited her evidence to its requirements.

It was disclosed in the testimony that subsequent to the agreement above referred to William N. Nason made a will disposing of the property, but that the will could not be found after his death. The defendants seek to make the point that plaintiff should make her claim under the will, and, if lost, have it probated as a lost will. Until the probate court passes upon the question, we cannot say that any valid will ever had any existence, and parties having an interest under a will, if one was made, must take the necessary steps to have it probated and allowed. In the absence of a will and the probate thereof, the rights of the parties must be determined by what is now before the court. If a will was made, and the agreement sued upon was in any way affected thereby, it was for the defendants to make proof of said fact, but they tendered no such issue and the question was not before the court for determination. Neither can we see how William N. Nason could by will divest his wife of her interest in this property. By the terms of the agreement his right to dispose of the property either by deed of conveyance or by will was conditioned upon the death of the plaintiff prior to his own decease. At his death the agreement was terminated, and plaintiff then had a right to assert her interest in the property and to have it reconveyed to her.

It is insisted that George M. Nattinger, the administrator of the estate of William N. Nason, deceased, should have been made a party to the action. No objection was taken in the trial court of a defect of parties, and, under the provisions of our code, if Nattinger was a necessary party the defect has been waived. Code, sec. 96. But

more than this, Nattinger has no title to the property. The right of possession which vests in the administrator was not involved and no interest of the estate which he represents was affected by the decree entered.

We discover no reversible error in the record, and recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

NEBRASKA CHICORY COMPANY, APPELLANT, V. ANTON LEDNICKY, APPELLEE.

FILED JULY 12, 1907. No. 14,779.

1. **Corporations:** SUBSCRIPTION TO STOCK. Any agreement by which a person shows an intention to become a stockholder in a corporation is sufficient as a contract of subscription, as against both himself and the corporation.

2. ———: ———. A subscription by a number of persons to the stock of a corporation, to be thereafter formed by them, constitutes a contract between the subscribers themselves to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, and, as such, it is binding and irrevocable from the date of the subscription. It is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it, becomes as to each subscriber a contract between him and the corporation.

3. ———: ———. Such contract is based upon a sufficient consideration. There is a mutuality of promise in the act of the particular subscriber in subscribing with others which obliges him to make good his promise to the corporation after it comes into existence.

4. ———: ———: ACTION. A subscription to corporate shares, made before the corporation comes into existence, but accepted by the corporation after coming into existence, either expressly by issuing the share certificates, or impliedly by recognizing the sub-

scriber as a shareholder, makes him a shareholder, and the corporation may maintain an action upon the subscription against the signers.

5. ———: ———: STATUTORY PROVISION. Section 39, ch. 16, Comp. St. 1905, authorizing the opening of books for stock subscriptions, does not limit the right of individuals to subscribe for stock by special agreement for that purpose made either before or after the filing of the articles of incorporation.

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

G. W. Wertz and *Moodie & Burke,* for appellant.

A. R. Oleson, contra.

EPPERSON, C.

In February, 1897, certain citizens of Schuyler, Nebraska, united in a movement for the organization of a company for the manufacture of chicory at that place. Articles of incorporation were prepared and discussed on one or more occasions by the interested parties, and during said month a written agreement, of which the following is a copy, was prepared and circulated and signed by a considerable number of persons, the signature of the defendant being attached thereto as below indicated: "We the undersigned do hereby agree to take shares of stock in the Nebraska Chicory Company of Schuyler, Nebraska, to be organized on the plan set forth in the articles of incorporation, and we agree to pay for the number of shares set opposite our respective names in accordance with the by-laws, rules and regulations of the company, which provide for a division of the capital stock of $50,000 in shares of $50 each, to be paid in monthly instalments of 4 per cent. per month, beginning on the first Saturday of March, 1897. (Signed.) Anton Lednicky, 5 shares." Some time after the defendant signed the foregoing, and on or about March 8, 1897, a certificate of incorporation was filed with the county clerk, and with the secretary of state on March 25. Section 4138, Ann. St., provides that upon this latter filing the organ-

ization should be deemed completed and the persons whose names are subscribed thereto be deemed a body corporate. Section 4140 is as follows: "The persons named in the certificate of incorporation, or a majority of them, shall be commissioners to open the books for the subscription to the capital stock of said company, and at such time and places as they shall deem proper, and the said company are authorized to commence operations upon the subscription of ten per cent. of said stock." No stock subscription book, other than the paper above set out, was opened by the authority of the corporation, but that body proceeded to transact business by the purchase of grounds and the erection of buildings and supplying the same with fixtures and machinery, chicory, etc., and the defendant, for eight months consecutively, paid into its treasury monthly instalments of $10 each pursuant to the terms of his agreement. On June 29, 1897, the president and secretary executed and delivered to him a paper certifying that he had subscribed for five shares of the capital stock of the company and would be entitled to the same "upon the surrender of this certificate and compliance with the rules and by-laws of this company." For this "certificate of entitlement," as it was called, he subscribed and delivered to the company a written receipt. He ceased to pay on and after the ninth instalment, and this is an action to recover the unpaid residue upon his promise of subscription above copied. At the close of plaintiff's evidence the court directed a verdict for defendant. Plaintiff appeals.

The principal question for determination is whether the written agreement for subscription to the capital stock of the corporation is a contract which the corporation can enforce? It appears that more than 10 per cent. (about $20,000) of the capital stock had been subscribed before the company began business; that the paper signed by defendant and other subscribers was the only subscription book used or kept by the company; that defendant signed the instrument before the time of the filing of the articles

of incorporation, and had paid $80 on his subscription before this suit was instituted. It was held in *Bolton v. Nebraska Chicory Co.*, 69 Neb. 681, that this identical corporation is a manufacturing corporation, the court saying: "The statute here in question was obviously designed to encourage the promotion of manufacturing enterprises of all kinds, in the widest sense, by relaxing the rules as to organization. There is every reason for giving it a liberal construction, and no fraud can result from so doing."

Defendant contends, however, that one who signs a subscription paper, whereby he agrees to take a certain number of shares in a corporation thereafter to be formed, does not become liable as a shareholder, even after the corporation is formed, and the corporation cannot maintain an action against him upon the subscription paper. There are courts, notably Kansas, Massachusetts, Michigan, Pennsylvania and West Virginia, which hold to this doctrine. *Nemaha Coal & Mining Co. v. Settle & Keith*, 54 Kan. 424; *Hudson Real Estate Co. v. Tower*, 161 Mass. 10; *Shurtz v. Schoolcraft & T. R. Co.*, 9 Mich. 269; *Northern C. M. R. Co. v. Eslow*, 40 Mich. 222; *International F. & E. Ass'n v. Walker*, 88 Mich. 62; *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182; *Muncy Traction Engine Co. v. Green*, 143 Pa. St. 269; *Auburn Bolt and Nut Works v. Shultz*, 143 Pa. St. 256; *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738. See decisions cited in 10 Cyc. 385, note 97, and 386, note 99. Also *Thrasher v. Pike County R. Co.*, 25 Ill. 393; *Sedalia, W. & S. R. Co. v. Wilkerson*, 83 Mo. 235; *Coyote Gold & Silver M. Co. v. Ruble*, 8 Or. 284.

The doctrine of these cases cannot be regarded as settled in American law. "This rule proceeds upon the narrow and strict ground that a contract, such as will bind the intending obligors, must be tendered to the other contracting party, to an artificial being not yet *in esse*, and in the precise statutory mode, or not at all." 10 Cyc. 386, note 2.

It is said that this court is committed to the rule of the cases above cited, and our attention is called to *Livesey v. Omaha Hotel Co.*, 5 Neb. 50, and *Macfarland v. West Side Improvement Ass'n*, 53 Neb. 417. In *Livesey v. Omaha Hotel Co., supra,* the sole ground upon which the defendants were held not liable upon their subscription was that the specified amount of capital stock was not subscribed for; and in *Macfarland v. West Side Improvement Ass'n, supra,* the same principle was announced, to wit, that the subscriber was not liable upon his subscription until the capital stock was fully subscribed for, "unless by law or charter provision the corporation is permitted to proceed with its main design with a less subscription." In that case, however, it was held that the defendant was estopped by his conduct to deny his liability. Neither of the above cases have any application to the case at bar, since the statute under which this corporation was formed provides that the corporation may commence operations upon the subscription of 10 per cent. of its capital stock. In *Lincoln Shoe Mfg. Co. v. Sheldon,* 44 Neb. 279, it is held that a contract as follows: "For value received we, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our respective names in the Lincoln Shoe Manufacturing Company at fifty dollars per share"—upon several conditions recited, was a subscription to the stock of the corporation. This case, however, may be distinguished from the case in hand. In that case, the subscription paper was signed after the articles of incorporation were filed. In the case at bar, it was alleged, and we understand the evidence to show, that the defendant placed his name to the subscription paper prior to the filing of the articles of incorporation. Therefore, whether defendant herein is liable to the corporation on the subscription paper we deem an open question in this state.

Mr. Seymour D. Thompson in his excellent article on "Corporations" in 10 Cyc. 385, *et seq.*, discusses the doctrine for which defendant contends as follows: "The theory

of these cases seems to be that if a number of coadventurers mutually agree to subscribe for shares in a corporation thereafter to be formed, this does not amount to an irrevocable contract to become shareholders when the corporation is formed; but they must perform the additional act of executing the statutory contract of membership by signing and acknowledging the articles of association where the corporation is unformed, or by entering their names on its stock-book where it is formed. This theory is that until this additional act is performed there is no offer which the corporation, when formed, or even if already formed, can accept, and that the subscribers do not therefore become shareholders and liable to be charged as such, unless they choose to carry out their agreement by subscribing for the shares. This doctrine, which treats preliminary share subscribers to corporations not yet formed with the utmost levity, which ignores the principle, hereafter explained, that such subscriptions are mutual promises among the subscribers as toward each other, that this mutuality of promise constitutes a sufficient consideration for such a subscription, and that it is none the less so because the promise is made to a third person, the corporation, which is not yet *in esse,* has been taken up and adopted by a good many modern courts." See "Consequences of Rule." 10 Cyc. 387. In view of the liberal construction given our statute (*Bolton v. Nebraska Chicory Co., supra*), we think the rule for which defendant contends proceeds upon too strict and narrow grounds and should not be adopted in this state. There is good authority for our conclusion. The same learned author further says in 10 Cyc. 388, 389: "Many courts, expressing their reasoning in various ways, have reached the conclusion that a subscription to corporate shares made before the corporation comes into existence, but accepted by the corporation after coming into existence, either expressly by issuing the share certificates, or impliedly by recognizing the subscriber as a shareholder and by extending to him the rights which pertain to that

relation, makes him a shareholder. The subscription paper may be informal, yet if the intent of the subscription can be collected from it, as where it states the names and residences of the shareholders, and the number of shares taken by each, it constitutes a subscription to shares of the forthcoming corporation, and the corporation may maintain actions upon it against the signers"—citing *Mahan v. Wood,* 44 Cal. 462; *Glenn v. Busey,* 5 Mackey (D. C.), 233; *Johnston v. Ewing Female University,* 35 Ill. 518; *Tonica & P. R. Co. v. McNeely,* 21 Ill. 71; *Cross v. Pinckneyville Mill Co.,* 17 Ill. 54; *New Albany & S. R. Co. v. McCormick,* 10 Ind. 499; *Nulton v. Clayton,* 54 Ia. 425; *Penobscot R. Co. v. White,* 41 Me. 512; *Penobscot R. Co. v. Dummer,* 40 Me. 172; *Kennebec & P. R. Co. v. Palmer,* 34 Me. 366; *Thompson v. Page,* 1 Met. (Mass.) 565; *Michigan & C. M. R. Co. v. Bacon,* 33 Mich. 466; *Red Wing Hotel Co. v. Friedrich,* 26 Minn. 112; *Ashuelot Boot & Shoe Co. v. Holt,* 56 N. H. 548; *Lake Ontario, A. & N. Y. R. Co. v. Mason,* 16 N. Y. 451; *Yonkers Gazette Co. v. Taylor,* 30 N. Y. App. Div. 334; *Hamilton & Deansville P. R. Co. v. Rice,* 7 Barb. (N. Y.) 157; *Bell's Appeal,* 115 Pa. St. 88; *Gleaves v. Brick Church Turnpike Co.,* 1 Sneed (Tenn.), 491; *Belton Compress Co. v. Saunders,* 70 Tex. 699.

In *Planters & Merchants I. P. Co. v. Webb,* 39 So. 562 (144 Ala. 666), it was held: "Any agreement by which a person shows an intention to become a stockholder in a corporation is sufficient as a contract of subscription as against both him and the corporation." A subscription by a number of persons to the stock of a corporation to be thereafter formed by them, constitutes a contract between the subscribers themselves to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, and as such it is binding and irrevocable from the date of the subscription. It is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it, becomes as to each subscriber a contract between him and the corporation. See *Minneapolis*

Threshing M. Co. v. Davis, 40 Minn. 110, 3 L. R. A. 796. Such a contract is based upon a sufficient consideration. Such subscriptions are mutual promises among the subscribers as toward each other, and this mutuality of promise among the subscribers constitutes a sufficient consideration for such a subscription. There is in the act of the particular subscriber, in subscribing with others, a mutuality of promise which obliges him to make good his promise to the corporation after it comes into its existence. 10 Cyc. 394, note 58, and cases there cited. "Whenever an intent to become a subscriber is manifested, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, very much a question of intent. Formal rules are for the most part disregarded. And in general a contract for subscription may be made in any way in which other contracts may be made. Any agreement by which a person shows an intention to become a stockholder is sufficient to bind him and the corporation." 1 Cook, Corporations (5th ed.), sec. 52; 26 Am. & Eng. Ency. Law (2d ed.), 902, 903. "That a subscription for stock implies a promise to pay for it, even though the subscription was before incorporation, is the rule sustained by the great weight of authority." 1 Cook, Corporations (5th ed.), secs. 71, 72, 75; 26 Am. & Eng. Ency. Law (2d ed.), 902; 1 Morawetz, Corporations (2d ed.), secs. 47, 54. We gather this proposition from the decisions and think it is sustained by the weight of authority: A subscription to corporate shares, made before the corporation comes into existence, but accepted by the corporation after coming into existence, either expressly by issuing the share certificates, or impliedly by recognizing the subscriber as a shareholder, makes him a shareholder and the corporation may maintain an action upon the subscription against the signers.

It is argued, however, that the subscription in the case at bar is invalid because not entered by the commissioners in the corporate books as provided by section 4140, Ann.

St. As a general rule, "unless the charter or governing statute so provides, it is not necessary to the validity of the subscription that it should be originally made in a book prepared for that purpose." 10 Cyc. 392. We believe our statute should be liberally construed, and are of opinion that the true rule is that, although the statute provides for the opening of books, the use of subscription papers in the first instance instead of a book does not make the suscription void. 10 Cyc. 392, citing in note 43: *Brownlee v. Indiana & I. R. Co.,* 18 Ind. 68; *Hamilton & D. P. R. Co. v. Rice,* 7 Barb. (N. Y.) 157; *Ashtabula & N. L. R. Co. v. Smith,* 15 Ohio St. 328; *Mobile & O. R. Co. v. Yandal,* 5 Sneed (Tenn.), 294; *Stuart v. Valley R. Co.,* 32 Grat. (Va.) 146. "Inasmuch as acts 1903, p. 310, containing provisions for stock subscriptions, does not provide that unless the specified conditions are complied with a subscription shall not be binding, a subscription is binding, though not formally, or even regularly, made." *Planters & M. I. P. Co. v. Webb, supra.*

The trial court was in error in directing a verdict for defendant, and we recommend that the judgment be reversed and the cause remanded for a new trial.

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.

FIELDEN C. HULEN, APPELLEE, V. JOEL T. CHILCOAT ET AL., APPELLANTS.

FILED JULY 12, 1907. No. 14,821.

1. **Creditors' Suit: EVIDENCE.** Evidence examined in this, a creditors' suit, and *held* insufficient to overcome the presumption of fraud which the law raises against the debtor and his grantee.

2. **Lis Pendens: SUPPLEMENTAL PLEADINGS.** The rule of *lis pendens* cannot be extended to charge third parties with notice of a new

and independent cause of action set up subsequently to their purchase by supplemental pleadings.

3. ———. By the filing of a notice of *lis pendens*, as required by section 85 of the code, a creditor cannot impound the property of his debtor for the payment of a debt which is neither a general nor specific lien upon the property.

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

A. R. Oleson and *H. F. Rose*, for appellants.

George L. Loomis and *H. C. Maynard, contra.*

EPPERSON, C.

August 2, 1904, plaintiff filed his petition in the form of a creditor's bill to subject the real estate in controversy to the payment of a judgment for $1,216.15 obtained by plaintiff May 11, 1904, against the defendant Joel T. Chilcoat. Plaintiff alleged that the property was bought with the money of his debtor, but fraudulently placed in the name of the latter's son, the defendant Roy E. Chilcoat, and held by him in trust for his father. Plaintiff filed a notice of *lis pendens* in the office of the register of deeds as provided by law. August 11, 1904, defendant White purchased the land in controversy of Roy E. Chilcoat. February 2, 1905, plaintiff obtained another judgment for $1,087.50 against Joel T. Chilcoat upon a note due November 4, 1904. On February 9, 1905, plaintiff filed a supplemental petition in this cause, alleging that he had obtained the second judgment, and praying that the property in controversy be subjected to its payment. Later plaintiff filed an amended and supplemental petition, alleging, among others, the above facts, and making White a party defendant, but charging no fraud on his part. Upon trial the court found against all of the defendants, and directed a sale of the property for the satisfaction of plaintiff's judgments. Defendants appeal.

This case involves the right of plaintiff to recover

against the Chilcoats, and, if that be resolved in plaintiff's favor, his right to recover as against the defendant White must be determined.

1. As to the defendants Chilcoat: The undisputed evidence shows that on August 14, 1903, $3,800 belonging to the father and $200 belonging to the son were deposited in a bank at Wisner, Nebraska, in the name of the son. On the same day $3,000 of this amount was paid for the property in question and the title taken in the name of Roy E. Chilcoat, who was then but a few months past twenty-one years of age. Negotiations therefor were made jointly by the father and son. Plaintiff then held two notes against Joel T. Chilcoat, due respectively November 4, 1903, and November 4, 1904, upon which the judgments above mentioned were obtained. To overcome the presumptions against them, defendants introduced evidence tending to show that the $3,000 paid for the property was obtained by Roy E. Chilcoat in the following manner: Joel T. Chilcoat owed his brother William $2,200, which Roy assumed. This sum, together with $600 borrowed from his father and $200 of his own money, made up the purchase price of the property. A short time before William agreed to take Roy for this $2,200 indebtedness, he refused to grant an extension of time to Joel for its payment, because he needed the money. Yet in a very short time we find him releasing his brother, who was then able to pay the debt, and accepting therefor the young man whose property interests it appears did not exceed $200 in value. A part of the alleged $2,200 indebtedness owing to William was contracted in 1892. No written evidence of the indebtedness between the Chilcoats was introduced in evidence, nor its absence explained. We are satisfied that the defendants Chilcoats did not overcome the presumption which the law raises against them, and, so far as their interests are concerned, the judgment of the district court is right and should be affirmed.

2. The defendant White concedes that he has no defense to the cause of action alleged in the original petition

which was pending at the time he purchased the property, and he reserved $1,250 from the purchase price to protect himself against the plaintiff's claim as there alleged. But he contends that the supplemental petition subsequently filed does not relate back to the filing of the original petition so as to charge the property in his hands with the lien claimed by plaintiff for the first time in the supplemental petition: The rule of *lis pendens* is not intended to prevent the sale of the property, but to hold it within the jurisdiction of the court for the purpose of granting the relief sought. *Merrill v. Wright,* 65 Neb. 794. It is a general rule that pending litigation neither party can alienate the property in controversy so as to affect the rights of the other. This court recognized this rule in *Merrill v. Wright, supra,* and cases there cited. But can it be said that a litigant is entitled to the enforcement of rights accruing to him subsequently to the institution of an action, and alleged in supplemental or amended pleadings, as against a purchaser whose title vested prior to such accruing rights. An amendment which more fully sets forth the original cause of action will undoubtedly relate back to the institution of the suit, and thereby purchasers *pendente lite* are not relieved. But the bringing in of a new cause of action, which of itself constitutes a separate ground of relief, is a different matter, and, in our opinion, has no relation to the filing of the original petition so as to charge the property in the hands of a *pendente lite* purchaser against whom no fraud is charged.

In Bennett, Lis Pendens, sec. 32, it is said: "Where the original bill or petition does not involve the property, but, pending the suit, an amendment or amended petition or bill is filed alleging new matter, and involving property not before in litigation, the *lis pendens* created by the amendment will commence from the filing of the amendment or amended pleading, and will not relate back to the commencement of the action so as to affect intervening rights." 1 Freeman, Judgments (4th ed.), sec. 199, is as

follows: "It is further necessary, in order to conclude a purchaser by virtue of a judgment, that by the record in the case at the time of the purchase the parties to the suit and the nature of the claim made to the property should be so stated that no subsequent amendment will be necessary. If any amendment is made, *lis pendens* as to the matters and parties involved in the amendment dates from the time it is made. The amending of a bill to show a new equity creates a new *lis pendens.* Thus where property was sought to be subjected to the payment of plaintiff's demands upon one ground, and that ground becoming untenable, the bill was amended to show another equity, upon which plaintiff prevailed in the suit, a purchaser preceding the amendment was held not to be bound by the decree." In *Stone & Warren v. Connelly,* 1 Met. (Ky.) 652, the plaintiff attached the property of his debtor. Later, and subsequently to a sale of the property by the debtor, an amended petition was filed, alleging a judgment obtained upon the debt and the return of an execution "no property found." The evidence failed to support the case as first alleged, and regarding the amendment with reference to the purchaser the court said: "An entirely new *lis pendens* was created by this amendment. By it the plaintiff's right to come into a court of equity was placed upon a different and distinct ground. It did not operate as a continuation of the original equity which had been relied on, but asserted an additional and independent ground of equitable relief. It presented an entirely different state of case, and amounted, substantially, to a new cause of action. The *lis pendens* which it created cannot be permitted to relate back to the commencement of the action, so as to affect intervening rights."

An amended or supplemental petition setting forth a new or different cause of action is in the nature of a new suit. The only purpose we can see for permitting it is to save a multiplicity of suits. All defenses accruing to the date of the amendment may be pleaded against it. It follows that one who purchases pending the suit under the

original petition is a *lis pendens* purchaser only as to the cause of action therein stated. As to the cause of action subsequently arising, and alleged by supplemental pleading, he has purchased before suit, and his title is superior to the lien thus pleaded unless, of course, he has been guilty of fraud. In *Wortham v. Boyd,* 66 Tex. 401, it is said: "It has been held that a plaintiff cannot set up a new equity so as to affect a purchaser who bought previous to the filing of the amendment in which it is alleged, though the prayer for relief be not changed. *Stone & Warren v. Connelly,* 1 Met. (Ky.) 652. Much less will the amendment affect such a purchaser, if the equity be different and contradictory of the original bill, * * * so far as the pendency of the suit can affect others than the parties to the suit, the cause is considered as pendent only from the time of the amendment." In *Bradley v. Luce,* 99 Ill. 234, an amendment alleging new matter was held notice to purchasers only from the time it was incorporated in the original bill. And in *Gage v. Parker,* 178 Ill. 455, it was held that the doctrine of *lis pendens* does not extend to a supplemental bill and adjudication under it.

The defendant White does not attempt to defeat the claim first alleged. He is as to that a *lis pendens* purchaser. But his estate is subject only to the judgment and lien set forth and claimed at the time of his purchase. By the proceedings as they existed at the time he purchased, he was in substance notified that plaintiff claimed a lien upon the property in the amount of the first judgment, for the satisfaction of which the court would retain jurisdiction over the property. Subservient to that, and that only, he purchased. In *Lincoln Rapid Transit Co. v. Rundle,* 34 Neb. 559, it is held: "Under section 85 of the code, as it existed prior to 1887, where an action had been brought which affected the title or possession of real estate, and summons had been served or publication made, third parties were charged with notice of the pendency of the action, and while the action was pending could acquire

no interest in the subject matter as against the plaintiff's title." There is no question but that the above stated the law correctly, as it existed prior to the amendment of 1887; but the action of which third parties are charged was the action pending at the time of the purchase, and the plaintiff's title against which the third parties could acquire no interest was the title owned by the plaintiff, and alleged in suit pending at such time. By the amendment of 1887 the legislature did not extend the rule of *lis pendens* to include causes of action accruing later, nor protect additional interests acquired by the plaintiff. The statute in part provides: "When the summons has been served, or publication made, the action is pending, so as to charge third persons with notice of pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title. * * * From the time of filing such notice shall the pendency of such action be constructive notice to any purchaser or incumbrancer to be affected thereby, and every person whose conveyance or incumbrance is subsequently executed * * * shall be deemed to be a subsequent purchaser or incumbrancer and shall be bound by all proceedings taken in said action after the filing of such notice to the same extent as if he were made a party to the action." Code, sec. 85. From the filing of the notice the pendency of the action is constructive notice to a prospective purchaser, who shall be bound by all proceedings therein. This clearly means that third persons are bound by all proceedings had upon the cause of action then existing and pleaded. He is not bound by the proceedings of the court upon other causes of action alleged by supplemental pleadings after his purchase. The relief sought at the time of the purchase is the only relief in which the court is interested, and for this alone jurisdiction over the property is retained.

Plaintiff in his original petition alleged the existence of the note upon which he afterwards obtained the judgment set forth in his supplemental petition. This he contends

charged White with notice. We cannot see that such allegation in any way enlarged the jurisdiction of the court or diminished the estate acquired by White. The allegation was unnecessary. It was no part of his claim then existing. His prayer for relief only asked for the enforcement of his first judgment. Had White then paid the first judgment and procured the dismissal of the first action, could plaintiff by later alleging the second judgment have charged White with notice? Certainly not. And by supplemental pleading he acquired no greater rights than he would have acquired by the institution of an independent action. A cause of action is not pending until pleaded. The title of a creditor seeking to enforce an equitable lien attaches only upon the institution of an action in which his lien is set forth. The existence of an indebtedness is not alone sufficient. It must have been reduced to judgment and uncollectible at law. A lien does not attach until a judgment is obtained and pleaded. To give plaintiff the relief sought, because he alleged in his original petition the existence of his then unmatured note, would be to impound the property for the benefit of a creditor whose debt is neither a general nor specific lien upon the property. This would be contrary to a well-established rule to which this court is committed. *Brumbaugh v. Jones,* 70 Neb. 786; *Missouri K. & T. T. Co. v. Richardson,* 57 Neb. 617.

Plaintiff cites *Tilton v. Cofield,* 93 U. S. 163, as decisive of this case. In that case plaintiff set up a cause of action on a book account, and attached the property. He obtained judgment, which was afterwards reversed. Pending suit the property was sold. Later plaintiff amended his affidavit and declaration, alleging upon a note, and prevailed, even against the purchaser. The note described in the amended declaration and the book account first alleged represented the same debt. It is not decisive of the case at bar. One of the controlling features in the case cited was the fact that the amendment did not change the cause of action or allege a different ground for relief.

In reference to the amendment the court said: "The description of the cause of action was changed, but in the view of equity, and in point of fact, it was substantially the same with that originally described." The trial court properly found against the defendants upon the first judgment obtained by plaintiff against Joel T. Chilcoat, and declaring the same a lien upon the property in controversy; but was in error in subjecting the property to the payment of the second judgment.

We recommend that the judgment be reversed and the cause remanded, with instructions to modify the decree to conform to the conclusions herein announced.

DUFFIE and GOOD, 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, with instructions to enter a decree in conformity to the conclusions therein announced.

REVERSED.

BELLE M. AGNEW, APPELLEE, V. CITY OF PAWNEE CITY ET AL., APPELLANTS.

FILED JULY 12, 1907. No. 14,831.

1. Easements. An easement in real estate may be acquired by open, notorious, uninterrupted, adverse possession for the statutory period of ten years.
2. Easement in Street. An easement in a city street could be acquired by open, notorious, uninterrupted, adverse possession for the statutory period of ten years prior to the statute of 1899.
3. Courts: JUDICIAL NOTICE. The courts will take judicial notice of the fact that a city is an incorporated city, of the time when it was incorporated, and of the salient facts of its geography and history.
4. Easements: TRANSFER. An easement will pass by a deed or grant of conveyance, even if the word "appurtenance," or a similar expression, is not used in the instrument, if it is apparent to an

ordinary observer, and naturally and necessarily belonged to the premises.

5. ———: ABANDONMENT. Nonuser of an easement for a less period than the statutory period of ten years will not of itself work an abandonment of the right.

6. ———: ———: BURDEN OF PROOF. The burden of proof is on the party alleging it to show abandonment, and such abandonment must be pleaded.

7. **Injunction** will lie to protect the owner of an easement in its enjoyment.

8. **Pleading**: JUDGMENT. The failure to allege in the petition that the plaintiff had been in the exclusive adverse possession of the premises for ten years, and of the court to find that fact in the decree, is not material after judgment, where the proof admitted without objection shows the possession to have been of that character.

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

Story & Story, for appellants.

John B. Raper and *Frank A. Barton, contra.*

EPPERSON, C.

This is an injunction suit to restrain the defendant city and its officers from removing a stairway constructed by plaintiff on a public street. In 1881 the then owners of plaintiff's lot erected thereon a brick building, the north wall of which rested on the line between the premises and the street. At the same time the stairway in question was built extending from the ground to a second story door in the north wall of the building and projecting into the street two and one-half feet. The stairway was used continuously for nearly 20 years. In 1900 it was removed by the city, and was not rebuilt until four years later, when plaintiff purchased the premises, and, claiming that her grantors had acquired an easement by adverse possession, constructed a new stairway of the same size and at the same place. The city authorities threatened to re-

move the new structure, but were enjoined by the district court. Defendants appeal.

1. It is now claimed that an easement by adverse possession was not established. It has been held that an easement in real estate may be obtained by open, notorious, peaceable, uninterrupted, adverse possession for the statutory period of ten years (*Omaha & R. V. R. Co. v. Richards,* 38 Neb. 847), and that title may be acquired by adverse possession in a city street. *Meyer v. City of Lincoln,* 33 Neb. 566; *Lewis v. Baker,* 39 Neb. 636. It has been held that title to a part of a country road cannot be acquired by adverse possession. *Krueger v. Jenkins,* 59 Neb. 641; *Lydick v. State,* 61 Neb. 309. In *Krueger v. Jenkins, supra,* SULLIVAN, J., clearly points out the reasons for not applying the rule to city streets. He says: "It would seem that there is in this state much reason for holding that incorporated cities should, in actions relating to their streets, be subject to the operation of the statute of limitations. They own in fee simple the streets, alleys and other public places within their corporate limits. See Compiled Statutes, 1899, ch. 14, art. I, secs. 104, 106. They may maintain ejectment to recover possession of them; they may, speaking generally, vacate them either in whole or in part. The right is even given to sell and dispose of them, and apply the money derived from the sale to any legitimate municipal purpose. See Compiled Statutes, 1899, ch. 14, art. I, sec. 77. In other words, municipal corporations are invested with a sort of proprietary interest in this class of property, and may be required, therefore, to guard it with the same degree of vigilance as that which is exacted of private owners. It is believed that the authorities are all agreed upon the proposition that as to property which is held in private ownership, and not upon public trust, municipal corporations are on the same footing with private individuals and equally affected by the limitation laws." It seems clear from this reasoning, and the cases above cited, not only that title may be acquired by adverse possession in a

city street, but that the title in the street is such that it may become servient to an abutting lot by the establishment of an easement therein. No statute applicable to the case at bar existed prior to the amendment of section 6 of the code in 1899, and we think the trial court was justified in finding that plaintiff's grantors in 1881 constructed a stairway in one of the city's streets shown on the recorded plat, and of which the courts take judicial notice (16 Cyc. 852, 858, 859, 862, 864, 868, 909), and had acquired an easement by adverse possession.

2. But it is earnestly contended that such easement was not transferred to plaintiff, and that she is not now entitled to an easement in the property. It appears that, after plaintiff's grantors had constructed the stairway and used it for nearly 20 years, the city removed the structure. No stairway was in existence when plaintiff secured title to the property, and the point for determination is whether plaintiff's deed carried with it the easement acquired by her grantors. The deed recites that the grantors "hereby grant, bargain, sell, convey and confirm" unto plaintiff the lot therein described by metes and bounds. The instrument did not contain the usual clause: "Together with all appurtenances thereunto belonging." And the question is: Did the easement pass by implication? We think it did. "Where an easement is annexed as appurtenant to land, it passes as an appurtenance with a conveyance * * * of the dominant estate and need not be specifically mentioned in the deed." 14 Cyc. 1184, 1185. "A principal thing will draw to it all its incidents and appurtenances, and upon a transfer of the principal thing they will pass with it, although not specifically named." *Morgan v. Mason,* 20 Ohio, 401, 55 Am. Dec. 464. In *Jarvis v. Seele Milling Co.,* 64 Am. St. 107 (173 Ill. 192), it is said: "Appurtenances will pass by a deed or grant of conveyance, even if the word 'appurtenance,' or a similar expression, is not used in the instrument." See, also, *Berry v. Billings,* 44 Me. 416, 69 Am. Dec. 107; *Hammond v. Woodman,* 41 Me. 177, 66 Am. Dec. 219.

3. It is argued, however, that the authorities have limited easements by implied grant to such as were open and visible, such as would be apparent to an ordinary observer, continuous and necessary to the enjoyment of the estate granted or retained, and hence, the stairway being removed at the time of plaintiff's purchase, plaintiff did not acquire an easement by implied grant. It has been held that an easement not expressly mentioned in a deed does not pass unless it naturally and necessarily belongs to the premises. *Green v. Collins,* 86 N. Y. 246, 40 Am. Rep. 531, and note; *Whiting v. Gaylord,* 66 Conn. 337, 50 Am. St. Rep. 87; *Carbrey v. Willis,* 7 Allen (Mass.), 364, 83 Am. Dec. 688; *Butterworth v. Crawford,* 46 N. Y. 349, 7 Am. Rep. 352; *Elliott v. Rhett,* 5 Rich. Law (S. Car.), 405, 57 Am. Dec. 763; *Bumstead v. Cook,* 169 Mass. 410, 61 Am. St. Rep. 293, and note. This rule seems to apply more particularly to the creation of easements by implied grant upon the severance of the estate; but, conceding its applicability to the case in hand, we think the easement in question was apparent to an ordinary observer and naturally and necessarily belonged to the premises. It is true the stairway had been removed, but the landing at the second story door remained. The building was located on the northwest corner of the block, and faced the west on one of the principal streets of the city. There were five rooms in the second story. The two in the west end of the building were used for office purposes and the other three were occupied by tenants as a dwelling. A hall, running north and south, and extending from the door in the north wall to the south wall of the building, separated the east rooms from the west or office rooms. This hall connected with another hall running east near the south wall to a door in the rear of the building. A stairway extended from this rear door to the sidewalk in the street at the northeast corner of the building. There was no front entrance to the second story of the building, and, in view of the fact that the landing still remained, it cannot be said that the easement would not be apparent

to an ordinary observer. Neither can it be claimed that the easement was not necessary to the enjoyment of the estate. The back stairway did not provide sufficient ingress and egress to the second story. After the stairway in controversy was removed, the owners of the building were unable, for this reason, to rent the rooms on the second floor, and it is clear that a stairway leading from the second story to the main street was necessary to the proper enjoyment of the estate. See *Simmons v. Cloonan,* 81 N. Y. 557; *Charleston, C. & C. R. Co. v. Leech,* 33 S. Car. 175, 26 Am. St. Rep. 668.

4. Defendants' next insistence is that the easement had been abandoned after the structure had been removed by the city and prior to the plaintiff's purchase. This contention is untenable. Four years elapsed after the removal and before plaintiff became the owner; but the rule is that nonuser of an easement for a less period than the statutory period of ten years will not work an abandonment of the right. "Nonuser for a period sufficient to create an easement by prescription will raise a presumption to defeat the right. But this nonuser is open to explanation and may be controlled by proof that the owner had no intention to abandon his easement while thus omitting to use it." 14 Cyc. 1186. The burden of proof is on defendants to show abandonment, and such abandonment must be pleaded and proved. *Hennessy v. Murdock,* 137 N. Y. 317.

5. Plaintiff's right to an injunction is questioned. "It is well settled that injunction will lie to protect the owner of an easement in its enjoyment." 14 Cyc. 1216; *Barr v. Lamaster,* 48 Neb. 114; *Keplinger v. Woollsey,* 4 Neb. (Unof.) 282; 1 High, Injunctions (4th ed.), sec. 545.

6. Defendant's final contention is that the petition does not state facts sufficient to constitute a cause of action, because it is not therein stated that the alleged adverse possession was exclusive and that it was made under a claim of ownership. In *Tourtelotte v. Pearce,* 27 Neb. 57, it was held: "The failure to allege in the petition that the

plaintiff had been in the *exclusive* adverse possession of the premises for ten years, and of the court to find that fact in the decree, is not a material error after judgment, where the proof shows the possession to have been of that character."

There is no error in the record, and an affirmance of the judgment is recommended.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

JOHN MILLER ET AL., APPELLEES, V. WILLIAM MCGANNON, APPELLANT.

FILED JULY 12, 1907. No. 14,896.

1. Trial: COUNTERCLAIM. The practice in this state is that an action, including a counterclaim, shall be tried as an entirety, and not as separate suits.
2. ———: ———: WITHDRAWAL. If for any reason the defendant does not desire to have his counterclaim disposed of in the action wherein it is pleaded, he should move to withdraw it before the final submission of the cause.
3. ———: ———: WAIVER. Defendant pleaded a counterclaim, and upon the conclusion of the plaintiff's evidence moved for and procured an order of the court directing a verdict for defendant upon the plaintiff's cause of action. *Held*, That defendant was not entitled thereafter to introduce evidence to prove his counterclaim, that the order directing the verdict concluded the trial, and that defendant by moving for a directed verdict and obtaining a favorable ruling thereon waived a hearing on his counterclaim.

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

Allen G. Fisher, for appellant.

A. W. Crites, contra.

EPPERSON, C.

Plaintiffs, Chicago commissionmen, allege in their petition herein that, under written contract, they advanced $1,000 to defendant in 1900, for which he sent them 4,881 pounds of wool to be held until he (defendant) directed a sale; that defendant failed to order the wool sold and refused to indemnify plaintiffs against the decline in market prices; that in January, 1903, plaintiffs sold the wool at a loss of $546.17, for which they ask judgment. Defendant pleaded a general denial and a counterclaim, alleging that he sold plaintiffs 6,996 pounds of wool in 1900 at an agreed price of 19¼ cents a pound, none of which had been paid, and prayed judgment for $1,795.61. The reply was a general denial. At the conclusion of plaintiffs' evidence, defendant moved the court to direct a verdict in his favor. Upon this motion being sustained by the court, defendant, without first withdrawing his request for an instructed verdict, called witnesses and asked to have them sworn, and that he be permitted to prove his counterclaim. This request was denied, and the court thereupon instructed the jury to return a verdict for defendant. Defendant filed a motion objecting to the form thereof, and asked that it be set aside, and for a new trial of his counterclaim, alleging as his reasons statutory grounds for a new trial, which need not be set out here. This motion was also overruled, and judgment entered that plaintiffs' petition and defendant's counterclaim be dismissed, that each party go hence without day, and that defendant recover his costs. Defendant appeals.

The principal error assigned, and the only one argued, is the refusal of the court to hear evidence in support of defendant's counterclaim after the court had sustained defendant's motion to direct a verdict in his favor. Our code provides the manner of conducting a trial. Section

283 of the code provides: "When the jury has been sworn the trial shall proceed in the following order, unless the court for special reasons otherwise directs:" Here follows provisions for opening statements to the jury and the admission of evidence. Continuing, the section provides: "Fifth: When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court. Sixth: The parties may then submit or argue the case to the jury." It is a well-established rule of procedure in this state that, when the plaintiff's evidence is insufficient to entitle him to recover, the court should, on motion of the defendant, direct a verdict for the defendant. *Anders v. Life Ins. Clearing Co.*, 62 Neb. 585; *People's Building, L. & S. Ass'n v. Palmer*, 2 Neb. (Unof.) 460; *Fremont Brewing Co. v. Hansen*, 65 Neb. 456; *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8. It is also the practice that issues presented in an action shall be tried as an entirety, and not as separate suits. Section 441 of the code provides: "If a counterclaim or set-off established at the trial exceeds the plaintiff's claim so established, judgment for the defendant must be given for the excess; or, if it appear that the defendant is entitled to any affirmative relief, judgment shall be given therefor." It is not intended that there should be two trials in an action where a set-off or counterclaim is pleaded, but plaintiff's claim and the cross-claim should be disposed of at one trial. If for any reason the defendant does not wish to have his counterclaim tried in the pending action, he should move to withdraw it before the final submission of the cause, when, under the provisions of section 126 of the code, the same may be entered as a separate cause, or an independent action subsequently maintained.

The proceedings requested by the defendant are not authorized by the practice in this state. By moving for an instructed verdict and obtaining a favorable ruling, he waived his counterclaim and terminated the trial. The evidence introduced did not show that defendant was en-

titled to a money judgment. Having procured a ruling, which, under the practice, terminated the trial, defendant cannot complain of the only judgment which could be rendered upon the verdict he requested. Upon granting the defendant's motion for a directed verdict, the only thing remaining to be done was the formal entry of the verdict and judgment. Defendant, being instrumental in bringing this about, cannot predicate error in the proceeding. In *Missouri P. R. Co. v. Fox,* 60 Neb. 531, it is held that "it is a sound and salutary principle that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about." See also, *Weander v. Johnson,* 42 Neb. 117, and cases cited in 1 Page, Nebraska Digest, pp. 145, 146.

Plaintiffs, on April 20, 1903, thirteen months after the rendition of the judgment in the district court, filed cross-assignments of error herein and request a hearing thereon. Their right to a hearing is seriously questioned; but it is unnecessary to decide that point, as the record clearly shows that the order of the trial court directing a verdict for defendant was right, and plaintiffs have not assailed it in their brief.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

LEO N. BRANDT, APPELLEE, V. OSCAR OLSON, APPELLANT.*

FILED JULY 12, 1907. No. 14,943.

1. **Highways: DEDICATION: EVIDENCE.** To prove an implied dedication of a road to the public as a highway and the acceptance thereof by the public, it is not necessary to prove that the public

* Rehearing allowed. See opinion, p. 617, *post.*

authorities have improved or repaired the road, where the evidence showed that it required no improving or repairing to fit it for public travel.

2. ———: ———: PRESUMPTIONS. Evidence of ten years' use by the public of a road through cultivated land without substantial variance, with the knowledge and acquiescence of the owner for a period of ten years, raises the presumption of an implied dedication and acceptance of such road as a public highway.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Affirmed in part and reversed in part with directions.*

C. M. Miller, W. S. Morlan and *Gomer Thomas,* for appellant.

John Everson, contra.

EPPERSON, C.

Plaintiff owns the southeast quarter of the southeast quarter and the west half of the southeast quarter of section 2, town 19, range 6 west, in Harlan county, Nebraska. Defendant, a road overseer, believing that a highway existed along the section line south of plaintiff's land, and also that another road running north and south had been established close to the west line of said southeast quarter of the southeast quarter, removed plaintiff's fence posts obstructing the alleged highways, and plaintiff brought this action to enjoin defendant and his successors from interfering with plaintiff's use thereof. The district court found for defendant as to the section line or east and west road, but enjoined defendant as to the north and south road extending through plaintiff's forty. Both parties appeal.

1. We have carefully read the record, and are convinced that the learned trial court reached the only conclusion warranted by the evidence as to the section line or east and west road. It is unnecessary to set out the evidence or the substance of it. We think the judgment on plaintiff's appeal should be affirmed.

2. Defendant complains of the decree enjoining him from removing obstructions on the north and south road. The evidence shows that in 1885, and prior thereto, the public had traveled through the southeast quarter of said section 2 in a northeasterly and southwesterly direction, entering the southeast quarter of the southeast quarter at a point near the southwest corner thereof, and leaving the forty about 200 yards east of the northwest corner. At that time the land was wild, unbroken prairie. In 1885 or 1886 the owner thereof broke out the prairie and prepared to farm part of the forty, and caused the travel to turn to the west on the west side of the broken field to a point where the road is now located. On the west of the road the land remained open prairie until about 1893. Under the decisions of this court, we consider that up to the time of the improvement of the land on both sides of the traveled road there was no adverse user, and that the actual use thereof by the public with the consent of the owner was not evidence of an intention on the part of the owner to dedicate the particular strip of land in controversy to the public as a highway. *Bleck v. Keller*, 73 Neb. 826; *Engle v. Hunt*, 50 Neb. 358.

It is fairly well established that at least as early as 1893 the land on the west side, except about 10 rods at the south end thereof, was improved by the owner, who plowed and cultivated up to the alleged highway. The evidence of many witnesses, including some called by plaintiff, clearly establishes the fact that plaintiff's grantors recognized said road as a public highway for more than 10 years by cultivating the land on either side, except the 10 rods hereinafter referred to, and by leaving for public travel the strip in controversy, and that during the entire period of time the public accepted and used it as such, with full knowledge and acquiescence of the plaintiff and his grantors, until about the time this suit was instituted in 1905.

At the south end, where the north and south road enters upon the highway between sections 2 and 11, the travel

has encroached for about 10 rods upon the other lands of the plaintiff. It seems that in turning the corner, as is often the case, the travel would turn before the intersection was reached. When the travel coming from the north reached a point about 10 rods north of the intersection with the east and west road, some of the travel would turn to the southwest and enter the section line a few rods west of the corner, and some would turn to the southeast and enter the section line road a few rods east of the corner, thus making a Y shape appearance in the traveled paths. In the present case, nothing prevented the travel from thus cutting short the corner until 1901, when it was stopped and thereafter confined to the narrow strip in controversy throughout its entire length, intersecting the east and west road at right angles. Apparently the most serious question here is to determine whether or not the diverging from the narrow strip at the corner will prevent the acquisition of the entire strip or any portion of it.

There would be no difficulty in arriving at the conclusion that a right to use the road as a public highway had been acquired by implied dedication, were it not for the divergence of the travel at the point where the road intersects the section line. Apparently the trial court granted the injunction because of such divergence. The south end of the road in controversy was never closed. Some of the traveling public used it all the time, and all since 1901, when the owner of the land confined the travel to the straight line. It is true the cut-offs at the corner were abandoned in 1901, but it does not appear that the travel straight to the corner or section line was ever discontinued or interfered with. In *Rube v. Sullivan,* 23 Neb. 779, it is said: "Ten years' uninterrupted use will create the presumption, but a much shorter period will be sufficient where the act of the owner from which the dedication is inferred is clear and unequivocal, and accompanied or immediately followed by public use. * * * But, unless there is some clear and unequivocal manifes-

tation of an intention to dedicate, there will be no presumption of dedication until after the lapse of 10 years." See, also, *Rathman v. Norenburg,* 21 Neb. 467; *Shaffer v. Stull,* 32 Neb. 94; *City of Omaha v. Hawver,* 49 Neb. 1; *Engle v. Hunt,* 50 Neb. 358. Witness Smith, who owned the land from 1892 to 1901, testified that he broke out and cultivated the land on the west side of the road, leaving the strip in controversy for the sole use of the public, intending that it should be used as a highway. His successors in title (except plaintiff) never changed its use. The diversion of the travel at the south end of the road was not a substantial variance which would defeat the presumption that the owners of the fee dedicated the land to the public.

The public authorities never improved or repaired the road, but did work that part of the highways connected with this road. The road north of this, which was improved by the public officers, was without value, except when used in connection with the road in controversy. Moreover, the evidence shows that the road needed no improvement. Undoubtedly the improvement or repair by the officers of a road claimed to have been dedicated to the public would be strong evidence tending to show an acceptance, but, where no improvement is necessary, the absence of such evidence will not defeat the presumption of a dedication, which arises from the fact that the public have used the road for a period of 10 years. From 1893, plaintiff's land ceased to be wild uncultivated prairie, and the owners, by their conduct in leaving the road between their improved fields, dedicated it to the public, and the public have accepted the same by using it for more than 10 years.

We therefore recommend that the judgment of the district court be affirmed on plaintiff's appeal, and reversed on defendant's appeal, and the cause remanded, with directions to dissolve the injunction restraining defendant and others from using the north and south road intersecting the east and west road at right angles.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court on plaintiff's appeal is affirmed, and reversed on defendant's appeal, and the cause remanded, with directions to dissolve the injunction restraining defendant and others from using the north and south road intersecting the east and west or section line road at right angles.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed January 8, 1908. *Former judgment adhered to:*

Highways: PRESCRIPTION. Where a highway is established presumably upon a section line, and used for ten years or more by the public without objection made by an adjoining landowner, and thereafter it becomes known that the road is in fact partly upon his land and away from the section line, *held* that the right of the landowner to recover the strip of his land thus used is barred by prescription.

EPPERSON, C.

In our former opinion we did not discuss at length the question involved pertaining to the east and west road. For more than 10 years the public have used a road running east and west at or near the south line of plaintiff's property, the south half of the southeast quarter of section 2. It is contended by plaintiff that this road is not upon the section line, but that a part of it is wholly within his land; that at the southeast corner of his land the road is on the line, but that it bears off to the north, so that at the west side of plaintiff's farm it is about four rods north of the line. Plaintiff concedes that the public is entitled to a road on the line. Consistent with his present contention, plaintiff set fence posts within the strip now used as a highway along what he contends should be the south line thereof. He brings this action to restrain the defendant road overseer from removing the posts. A survey was made by the county surveyor, who gave testimony sup-

porting plaintiff's contention that the road now used bears off from the section line to the north. The correctness of the method used by the surveyor is challenged, but, as we view the case, no occasion exists to discuss this question, and we adopt the survey as establishing the facts relied upon by plaintiff. The question is whether or not the strip of land actually used is a public highway. In other words, does the use thereof for 10 or more years by the public, under the mistaken belief that the road is upon the section line, establish it as a highway?

Plaintiff cities *Bolton v. McShane,* 44 N. W. 211 (79 Ia. 26), wherein it was held: "No length of use by the public of a highway which is supposed to be upon a certain line, but which, by mistake, is not, can give any claim to the highway under the statute of limitations, except as to the true line." The reason for this holding is expressed in the opinion of the court as follows: "It appears, beyond question, that the track traveled, and which is outside of appellant's fence, has been used for public travel for more than twenty years. It is evident that all parties supposed the traveled road to be along the section line. This court has repeatedly held that, in case of mistake of landowners as to the division line in their lands, the possessor holding the lands as a part of his tract, and believing it to be within his boundaries, is not protected by statute. *Grube v. Wells,* 34 Ia. 148. In *State v. Welpton,* 34 Ia. 144, it was held that 'this rule is applicable to the case of the public using a way supposed to be on a certain line, but which, through mistake, is not really upon it. The claim of the public is confined to the true line. The use, in order to draw the benefit of the statute, must correspond with the claim of right.'" (79 Ia. 26.)

This court has reached a different conclusion in its adjudication of the analogous question which controlled the decision in *Bolton v. McShane, supra.* See *Baty v. Elrod,* 66 Neb. 735, and cases there cited. In the *Baty* case, this court expressly disapproved *Grube v. Wells,* 34 Ia. 148, relied upon to support *Bolton v. McShane. Manrose v.*

Parker, 90 Ill. 581, seems to support plaintiff's contention, but we find that *Landers v. Town of Whitefield,* 154 Ill. 630, holds that, under circumstances similar to those in the case before us, the landowner was barred by prescription from fencing in the strip actually used for a road. See, also, *Axmear v. Richards,* 112 Ia. 657; *Meyer v. Town of Petersburg,* 99 Minn. 450; *Buch & Peiffer v. Flanders,* 119 Ia. 164. It is a well-established rule of this court that, as between individuals, possession may be adverse, though the claimant occupies under a mistaken belief that the true boundary is different than it really is. This rule is applicable to questions of disputed boundaries of public highways, and the defendant had the right to remove the fence posts which plaintiff placed in this highway.

We have also reexamined the case with reference to the north and south road. It is contended that we were in error in stating in the former opinion "that at least as early as 1893 the land on the west side, except about 10 rods at the south end thereof, was improved by the owner, who plowed and cultivated up to the alleged highway." The witness Smith, who owned the farm in 1893, testified: "Q. Commencing on the south line of section 2, at the road, east of that house, what cultivation was there east of the road when you went there? A. There were 20 acres cultivated there, lying on the east side of the road. Q. Then you owned the land both east and west of the road, up 80 rods? A. Eighty rods, yes, north. Q. How long, to your knowledge, was the strip of uncultivated land left between those two forties, and used as a road? A. The land was cultivated when I went there on each side of that road. Q. How long, to your knowledge, was the strip of uncultivated land left between those two forty acres, and used as a road? A. I don't know. Of course as to that I know it was used before I came there. Q. How long do you know of it not being used? A. Being used as a road? Q. Yes, how long do you know of it? A. Ever since 1893. Q. For what purpose did you leave that strip you have

been talking of as a road uncultivated? A. From the fact of it being established from self-establishment, as I supposed, on account of being traveled and left there previous years. Q. For what purpose did you leave it? A. For the purpose of a road. Q. What improvements or fences were there along the road on the west side? A. It was broke up when I got there. Q. It was broken up west of the road when you got it? A. Yes, sir. Q. Now, across what is known as the road, what improvements, if any, were across that, on what is known as the road? A. What do you have reference to? Q. I have reference to what is known as the road. A. There wasn't any improvements across the road. There was land cultivated across each side. Q. In what was known as the road, it wasn't cultivated? A. No, the road wasn't cultivated up. Q. How wide was the strip that was left uncultivated between the strips east and west of it? A. Oh, probably a rod and a half or two rods. The plowing came up to the road on either side." Other witnesses gave testimony of a similar import, and the record fully justifies the statement in the former opinion "that plaintiff's grantors recognized said road as a public highway for more than ten years by cultivating the land on either side."

We recommend that the former opinion be adhered to.

DUFFIE and GOOD, CC., concur.

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

FORMER JUDGMENT AFFIRMED.

CHARLES G. ELMORE, APPELLANT, V. DUNCAN MCMILLAN ET AL., APPELLEES.

FILED JULY 12, 1907. No. 14,902.

1. **Appeal:** DISMISSAL: AFFIRMANCE. The decree of the district court dismissing plaintiff's cause of action will be affirmed, where the record discloses that the only relief sought would have been against a nominal defendant who did not appear in the action and upon whom the record fails to show service of process.
2. **Evidence** examined, and *held* to sustain the decree of the district court.

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

Allen G. Fisher, for appellant.

A. W. Crites, contra.

GOOD, C.

On August 4, 1904, the appellant Elmore filed his petition in the district court for Dawes county, praying for an injunction to restrain the several defendants therein named from disconnecting or interfering with plaintiff's use of a certain telephone in his office. The defendants named were the Chadron Cooperative Telephone Company and six individuals, several of whom were officers and directors of the Chadron Cooperative Telephone Exchange. Plaintiff claimed to be entitled to the rights and privileges of a stockholder in the corporation named as a defendant by virtue of a purchase of one share of stock therein from one Willis Schenck, and claimed the right, as a stockholder, to the use of his telephone at a monthly rental of 75 cents, and alleged that the defendants had disconnected his telephone on the 3d day of August, because of his refusal to pay a higher rate of rental, to wit, $2 a month. A temporary injunction was allowed pending the hearing of the cause. All of the defendants, except the

Chadron Cooperative Telephone Company, answered the petition, and denied that the share of stock which plaintiff had purchased from Schenck entitled plaintiff to the reduced rate of rental claimed by him. There is nothing in the record to show the issuance or service of process upon the Chadron Cooperative Telephone Company, or upon the Chadron Cooperative Telephone Exchange, and the corporation made no appearance in the action. Upon a hearing of the cause, the trial court found that Schenck was a necessary party to the action, continued the hearing to a later date, and ordered that Schenck be made a party defendant. Schenck answered, and admitted the sale to plaintiff of one share of "common stock" in the Chadron Cooperative Telephone Exchange, and averred that said share of stock did not carry with it the privilege of a telephone at the rate of 75 cents a month, and alleged that plaintiff had knowledge of these facts when he purchased said stock. Afterwards, upon a completion of the trial of the cause, the district court found in favor of the defendants, dissolved the temporary injunction, and dismissed plaintiff's cause of action. From this judgment of the district court the plaintiff appeals.

The material facts underlying this controversy are as follows: For some time previous to October 15, 1903, an unincorporated association of individuals owned and operated a telephone exchange in the city of Chadron, under the name of the Chadron Cooperative Telephone Exchange, for the benefit of the members of the association, and also furnished telephone service to outsiders for a monthly rental of $2 for each telephone. The members of the association paid but 75 cents monthly rental for their telephones. On the 15th of October, 1903, the members composing the association incorporated the same under the same name, each member being entitled to one share of the capital stock of the corporation. No certificates of stock were issued at that time. Defendant Schenck was one of the original members of the association, and was entitled to one share of stock in the corpora-

tion. In December following the board of directors of the new company passed a resolution to issue 69 shares of additional stock in the corporation of the face value of $25 each, which were to be sold publicly. It was provided that this stock should be called "common stock," and that shares of stock theretofore provided for should be called "original stock," but the face or par value of the so-called shares of "original stock" does not appear. It was also provided that the subscribers to the common stock should not be entitled to the reduced rate, or 75 cents monthly telephone rental, as the original stockholders were. Defendant Schenck was a subscriber to one share of the common stock. At the time that he subscribed for this share of common stock, all that he received was a receipt in the following language: "$25. Chadron, Jan. 22d, 1904. Received from Willis Schenck twenty-five dollars for one share of stock Chadron Cooperative Telephone Company. G. H. Willis, Secy." No certificates for any shares of stock were issued until the 14th day of July, 1904, and the certificates to Schenck were not delivered to him until the 6th day of August, 1904. On the 23d day of May, 1904, Schenck sold one share of stock for the sum of $25 to plaintiff, and delivered to him the above receipt, with the following indorsement thereon: "May 23d, 1904. For value received, I hereby sell, assign and set over to C. G. Elmore this share of telephone stock. Willis Schenck." Plaintiff contends that the share of stock which he purchased from Schenck was the original share and that it entitled him to a telephone at the rate of 75 cents a month. All of the answering defendants claim that it was the share of common stock which the plaintiff purchased. When the telephone company presented its bill to plaintiff for telephone rental for the month of June, plaintiff paid 75 cents and refused to pay more. On the first day of August the telephone company again presented its bill for $2 for July service, together with the unpaid remainder for June. Plaintiff tendered payment of 75 cents for July, which the company refused to accept.

The telephone company then notified plaintiff that, unless he would pay full rental at $2 a month for June and July before the 5th of August, his telephone would be disconnected. Plaintiff would not pay, and on the 3d day of August the telephone connection between plaintiff's office and the telephone exchange was severed, and on the following day plaintiff brought this action.

The only serious dispute arises out of the transaction between plaintiff and defendant Schenck, whereby a share of stock was sold to plaintiff. We have examined the evidence in the record, and are convinced that the share of stock sold by Schenck to the plaintiff was the second share of stock acquired by Schenck, that is denominated "common stock," and that the plaintiff was advised and knew of this fact at the time he purchased it. Plaintiff contends, however, that Schenck represented to him that this share of stock would entitle him to the reduced telephone rental, and that the defendants are estopped to deny this contention because some of them advised plaintiff that such was the fact before the sale. Plaintiff alone testified to this state of facts, but his evidence is directly contradicted by other witnesses of apparently equal credibility. When Schenck received the certificates of stock from the telephone company, two days after the commencement of this action and prior to his being made a party to it, he tendered to the plaintiff the certificate for the share of common stock. Plaintiff refused to accept this and demanded the certificate for the original share. Schenck thereupon offered to return to the plaintiff the purchase price of the share of stock which plaintiff declined. It does not appear that plaintiff ever demanded of the telephone company a transfer of a share of common stock upon its books, and the only demand or request made by plaintiff upon the company was that it transfer to him Schenck's share of original stock, or to issue to him a certificate for an original share. Under these circumstances it is clear that plaintiff was neither entitled to have the telephone company issue to him an original share of stock,

nor to a transfer upon its books of the original share held by Schenck. By his refusal to accept from Schenck the share of common stock, the only one to which he had any right, he eliminated all legitimate contention that he was entitled to the transfer upon the books of the company of any share of stock. As to what rights plaintiff might be entitled to, if he had accepted the share of stock tendered, and as to whether or not the corporation could lawfully discriminate between the holders of so-called original stock and holders of so-called common stock, it is unnecessary to determine, nor do we see how we could determine those questions without the corporation being a party to the proceeding, so that it would be bound thereby. Since plaintiff has refused to accept the share of stock tendered to him by Schenck, he is in no position to insist upon the rights of a shareholder, whatever they may be. He is not, therefore, in position to demand of the corporation telephone service at the rate of 75 cents a month, and being in default of payment for telephone rental, and refusing to pay the regular rental charged to outside subscribers, he is not entitled to the relief prayed for.

It is perhaps inferable that the plaintiff, at the time he brought this action, was not aware that the Chadron Cooperative Telephone Exchange had become incorporated, and that, perhaps, accounts for the fact that he made the individuals, who had formerly been members of the voluntary association, the parties defendant. No relief could be granted in this action against any of the defendants, and the judgment of the district court is right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

ORAN B. PHILLIPS, GUARDIAN, APPELLANT, V. WILLIAM REYNOLDS, APPELLEE.

FILED JULY 12, 1907. No. 14,909.

1. **Indians: VOID LEASE: USE AND OCCUPATION.** An Indian may recover in an action for mesne profits the rental value of lands allotted to him by the United States government from a person who has used and occupied the same under a lease that is void because not sanctioned and approved by the officers of the interior department.

2. **Petition** in this action examined, and *held* sufficient to sustain an action for mesne profits.

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

Thomas L. Sloan and *C. L. Day,* for appellant.

H. Chase, contra.

GOOD, C.

This was an action to recover mesne profits of certain lands in Thurston county for the year ending March 1, 1903. The facts out of which this controversy arises are substantially as follows: Oran B. Phillips, plaintiff and appellant, is the guardian of Blanch R. Phillips, an Indian minor, to whom had been allotted the land in controversy. The instrument by which the United States government allotted the land in controversy to said minor contained the following conditions, founded upon acts of congress applicable to such allotments: "That this patent shall be of the legal effect and declare that the United States does and will hold the land thus allotted for a period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state of Nebraska, and that at the expiration of said period the United States will convey the same by patent

to said Indian, or his heirs aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." This allotment was made to said minor in May, 1900, pursuant to an act of congress passed and approved in August, 1882, and amended in March, 1893. Plaintiff, as guardian of the minor allottee, attempted to lease the land to the defendant Reynolds for a period of two years commencing March 1, 1901. Reynolds entered into possession and used and occupied the same for the term of the lease. Under the law by which the land was allotted to said minor, any contract touching the same was absolutely null and void. This would include a lease of the lands. By subsequent legislation of congress, provisions were made whereby leases of the lands so allotted might be made under the sanction and approval of the proper officers of the interior department. No such sanction or approval was obtained for this lease. The defendant Reynolds refused to pay the rent stipulated for, upon the ground that the lease was void. The plaintiff instituted an action in the district court for Thurston county to enjoin the defendant from occupying the said land and from harvesting the crops that he had planted thereon, apparently upon the ground that the defendant was a trespasser and was continually trespassing upon the land. In that action plaintiff alleged that defendant was insolvent and that he had no adequate remedy at law. Upon a trial of this cause, the court found against the plaintiff and dismissed his petition for want of equity. Thereupon the plaintiff instituted this action in the county court to recover the value of the possession of the premises for the year ending March 1, 1903. In his petition he alleged that his ward was the owner of the land, describing it, and averred that the defendant had entered upon said described premises and had used and occupied the same

since the first of March, 1902, and had raised large and valuable crops thereon, and had had the use and benefit thereof, which use, occupation and benefit are of the value of $250. These averments were followed by allegations of demand upon, and nonpayment by, the defendant. The defendant answered, first, with a general denial, and, secondly, a plea of former adjudication, setting up the former action herein referred to. The trial in the county court resulted in judgment in favor of the plaintiff, and the defendant appealed to the district court, where, upon trial, that court found in favor of the defendant and dismissed plaintiff's cause of action. Plaintiff appeals to this court.

In this court, it appears that the defendant has abandoned, and does not now rely upon, the defense of former adjudication, but relies solely upon the defense that the action is for use and occupation of the real estate, and that this action is based upon the relation of landlord and tenant, which presupposes a contractual relation between the parties, and that, as no valid contract with relation to the premises was made, no recovery can be had. Since the lease that was entered into between the parties was made without the sanction or approval of the proper officers of the interior department, it necessarily follows, under the United States statutes, that such lease was null and void, that it never had any vitality and is the same as if it never existed, and that no valid contract was ever made between the parties for the lease of the land whereby the relation of landlord and tenant could arise. But we think this does not determine the question at issue. The law forbidding the making of any contract touching the land was obviously made for the protection of the Indians. But the government, under the law, gave to the Indian the use and occupation of the land, and the Indian was, therefore, entitled to the use and occupation during the 25 year period in which the government held the title in trust. This use and occupation was a valuable right, and any one who interfered therewith and deprived

the Indian of such right would be manifestly liable therefor, and the only question is whether or not the plaintiff has resorted to the proper action.

If the action must be strictly construed as one for use and occupation, we would be inclined to the view that it would have to rest upon the relation of landlord and tenant, and therefore arise out of a contractual relation, which does not exist in this case, and that defendant could not be held liable in such action. But, one who enters unlawfully and without authority upon the lands of another and uses and occupies the same is liable to such other person in trespass, or for the mesne profits during the time that he is wrongfully in possession. An instance in which such action is frequently resorted to is that of ejectment where plaintiff joins with his action for the recovery of the land an action for the mesne profits during the time the defendant has been wrongfully in possession of the lands. It appears that no special form of averment is necessary to entitle one to recover under such circumstances for the mesne profits. In the case of *Johnson v. Visher,* 96 Cal. 310, it was held that the complaint in ejectment, alleging that defendant wrongfully ousted plaintiff and took possession of the premises to the plaintiff's damage, is sufficient without an averment that the defendant had received the rents and profits. In that case it appeared that plaintiff had alleged that defendant wrongfully ousted her from the premises in controversy, and that he retained possession of the same from the plaintiff to plaintiff's damage in the sum of $500, and that the rental value of said real estate was the sum of $1,500 per annum. It was held a sufficient averment to permit the recovery of mesne profits. In the case of *Patterson v. Ely,* 19 Cal. 28, in an action of ejectment, it was held that an allegation of the value of "the use and occupation, rents and profits" was a sufficient averment to entitle plaintiff to recover for mesne profits.

In the present action the averment is more complete than in the California cases. It shows that the defendant

had entered upon the premises described, and had used and occupied the same, and had raised large and valuable crops thereon, and had had the use and benefit thereof, and alleged the value of such use and occupation and benefit. An action to recover mesne profits does not rest upon a contractual relation, but is an action in the nature of trespass, and is a proper action to resort to where the defendant has wrongfully gone into possession of, and appropriated to his own use and benefit, the premises of another. The measure of plaintiff's damage in such an action would be the rental value of the premises, as this is what the plaintiff in an action of ejectment is permitted to recover. As we view it, the allegations of the plaintiff's petition were sufficient to entitle him to recover for mesne profits, and, as the evidence is undisputed that the defendant did occupy and use the land, plaintiff was entitled to a judgment. The defense sought to be interposed, that no valid contract was made touching the premises, has no application to the case at bar.

The judgment of the district court is erroneous, and we recommend that it be reversed and the cause remanded for a new trial.

DUFFIE 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 a new trial.

REVERSED.

ORAN B. PHILLIPS, ADMINISTRATOR, APPELLANT, V. WILLIAM REYNOLDS, APPELLEE.

FILED JULY 12, 1907. No. 14,910.

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

Thomas L. Sloan and *C. L. Day,* for appellant.

H. Chase, contra.

GOOD, C.

This action is in all respects similar to the case of *Phillips v. Reynolds, ante,* p. 626. The only difference is that a different tract of land is involved and that in this action Phillips sues as administrator of the estate of Mary V. Phillips. In this case the same issues were joined and a like judgment was entered by the district court as in the case of *Phillips v. Reynolds, supra.*

For the reasons given in the opinion in that case, the judgment in this case is erroneous, and should be reversed and the cause remanded for a new trial.

DUFFIE 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 a new trial.

REVERSED.

DAVID VAN ETTEN, APPELLANT, V. PASSUMPSIC SAVINGS BANK, APPELLEE.

FILED JULY 12, 1907. No. 14 934.

1. **Husband and Wife:** ADVANCEMENTS. Where a husband purchases real estate with the intention of making it the family home and has the title thereto placed in the name of his wife, the presumption is that it was intended as a gift or an advancement to the wife.

2. **Judgment:** RES JUDICATA. Where the title to real estate held in trust is drawn into controversy in litigation, and the trustee prosecutes or defends with the knowledge and consent of the beneficiary, the beneficiary will be concluded by the result of the litigation to the same extent as the trustee.

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

David Van Etten, for appellant.

F. A. Brogan, contra.

GOOD, C.

The appellant, David Van Etten, brought this action to quiet title to a strip of ground 7 feet wide and 120 feet long, being a part of lot 9, Capitol addition to the city of Omaha. The north end of this strip of ground fronts on the south side of Harney street, and the east line of the strip is 74 feet west of the west line of C. W. Keyes' land. The plaintiff in his petition alleges that he is the owner and has been in continuous possession of this strip of land since the 7th day of December, 1878, and avers that the defendant, the Passumpsic Savings Bank, claims to be the owner of said strip of land by reason of certain conveyances, judgments and decrees of court, which are of record, and that these conveyances, judgments and decrees are clouds upon his title. He prays to have his title quieted and defendant enjoined from claiming any right of property or possession to said parcel of real

estate, and from in any way interfering with plaintiff's ownership, rights of property and possession thereof. The defendant in its answer avers that it is the owner of the real estate in controversy, and asserts title to the same by reason of a conveyance from one Edward F. Test and by reason of judgments and decrees rendered against one Emma L. Van Etten, wife of the plaintiff herein. One of said judgments was in favor of said Test in an action of ejectment, brought by said Emma L. Van Etten against said Test, and the other a decree in an action to quiet title by said Emma L. Van Etten against said Test and the Passumpsic Savings Bank, both said judgments having been prosecuted to a final determination in the district court for Douglas county. Defendant further avers that plaintiff is the husband of the said Emma L. Van Etten, against whom said judgments and decrees were rendered, and that said Emma L. Van Etten claimed title to the real estate in controversy in this action under a deed of conveyance taken in her name in December, 1878, and that said deed was procured to be taken in her name by the plaintiff herein, and that the plaintiff acted as the attorney for said Emma L. Van Etten in both of said prior actions and in the prosecution thereof, and that said David Van Etten thereby held out the said Emma L. Van Etten as the sole owner of the title to the real estate in controversy, and further avers that the claim, or asserted right, now set forth in this action is the same claim of title which was made by the plaintiff as attorney for said Emma L. Van Etten in said former litigation, and that said David Van Etten at no time asserted any interest in himself in the real estate, except in his capacity as the husband of said Emma L. Van Etten, and that the plaintiff is now estopped from asserting any separate ownership or claim of title in himself as distinct or independent from the claim of title asserted by his wife in the former actions. Defendant also denied any title to, or any possession of, the property by the plaintiff. Plaintiff in his reply avers that he was not a party to the former actions brought by

Emma L. Van Etten, and asserts that he is not estopped by reason of his nonappearance in said actions, and avers that no verdict was rendered for the defendant in the action of ejectment brought by his wife against Test, and avers that the verdict was, in fact, returned for the plaintiff in said action, and that through fraud the journal of the court was falsely made to show that a verdict was returned in favor of the defendant, when in fact the verdict was in favor of the plaintiff, and asserts that the judgment of the district court and of the supreme court affirming it are null and void, and denied all of the other allegations of the answer. Trial was had resulting in findings and a decree for the defendant and dismissing plaintiff's petition. Plaintiff appeals to this court.

The facts gleaned from the record, necessary to an understanding of the case, are as follows: In 1878 one Gibson was the owner of a considerable portion of lot 9, Capitol addition to the city of Omaha, fronting on Harney street. In December of that year David Van Etten purchased from Gibson, and caused him to convey by warranty deed to Emma L. Van Etten, a portion of this lot, 40 feet wide, fronting on Harney street, and 126 feet deep. The east line of this strip was described as being 74 feet west of the west line of C. W. Keyes' land. This deed was recorded on the 7th day of December, 1878. Emma L. Van Etten, to secure the major portion of the purchase price, executed a mortgage to Gibson upon the land so conveyed to her. This mortgage was canceled and discharged upon the records by Gibson on the 20th day of July, 1880, and on the same day Gibson executed another warranty deed to Emma L. Van Etten, conveying to her a strip of land 40 feet wide by 120 feet deep in said lot 9. The east line of this strip was described as being 81 feet west of the west line of C. W. Keyes' land, and in this deed was a recital that it was executed to conform to a corrected survey, making the point of commencement 81, instead of 74, feet west of the west line of the Keyes land, as described in the former deed, referring to it by

date. There is a further recital that the former deed is superseded by this. This second deed was recorded on the 21st day of July, 1880. On the 3d day of April, 1880, Gibson conveyed to one Lindquist a strip of land 40 feet wide immediately east of the land described in the second deed to Emma L. Van Etten. The strip of land conveyed to Lindquist covered the land in controversy in this case, being the strip of land lying between the lines 74 and 81 feet west of the west line of Keyes' land, and extending 120 feet south of the south line of Harney street. Subsequently, by mesne conveyances, the Lindquist title was vested in Edward F. Test, who executed a mortgage upon the land. The Passumpsic Savings Bank became the owner of this mortgage by assignment, and foreclosed it in the United States circuit court for the district of Nebraska. The foreclosure proceedings resulted in a decree and sale of the property thereunder to the Passumpsic Savings Bank, and a deed by a special master commissioner was executed and delivered to said bank on the 8th day of December, 1892. On the 24th day of March, 1890, Emma L. Van Etten, by her attorney, David Van Etten, began an action of ejectment against Edward F. Test in the district court for Douglas county to recover possession of the strip of land in controversy, and in her petition alleged that the defendant Test had been unlawfully in possession of the said premises since the 26th day of June, 1886, and that he had received the rents and profits of the said land during said time, and prayed for judgment for the ownership and possession of the land and for the rents and profits. The petition was verified by the oath of David Van Etten. The defendant Test appeared, and answered in the case, and claimed the ownership of the lands. A trial was had resulting in a judgment for the defendant. The case was taken to the supreme court, where the judgment of the district court was affirmed, the opinion appearing in 49 Neb. 725. After the final determination of that action, and on the 18th day of September, 1897, Emma L. Van Etten commenced an

action against the said Test and the Passumpsic Savings Bank to quiet title to the land now in controversy. Both the defendants answered, and the defendant Passumpsic Savings Bank, by way of cross-action, asked to have its title quieted and confirmed to the strip of land. A trial was had to the court, resulting in findings and a decree in favor of the defendant. From this judgment Mrs. Van Etten prosecuted an appeal to this court. The decree of the lower court was affirmed by this court, the opinion being found in 64 Neb. 407. David Van Etten appeared as one of the attorneys for plaintiff in all of said litigation. After a motion for a rehearing had been overruled and a mandate issued, David Van Etten then commenced this action in his individual name.

Plaintiff contends that, as he paid the consideration for the purchase price of the property and directed the deed to be made to his wife, a trust resulted in his favor, and that he was the equitable owner of the property. It may be conceded, as a general rule, that, where one pays the purchase price for real estate and causes the title to be taken in the name of another, a trust will result, and that the person holding the legal title will be deemed as holding the same for the person who paid the purchase price. But this rule does not obtain where the property is purchased by the husband and the title is taken in the name of the wife. In such case it will be presumed to be a gift or advancement to the wife, and there is no resulting trust. This doctrine has been substantially announced by this court in *Gray v. Gray*, 13 Neb. 453, and in *Kobarg v. Greeder*, 51 Neb. 365. In this case the plaintiff testified that the property was purchased for a home for himself and family, and that upon a portion of said premises he erected a house shortly after the purchase, in which he and his family have since resided. Where the property was intended to be a homestead and for the use of the purchaser's family, and the title thereto is taken in the wife's name, although the husband paid the purchase price, we think the presumption

would be even stronger that it was intended as a gift or advancement, and that no trust would result. But, even if it be conceded that Emma L. Van Etten held the legal title in trust for David Van Etten, still the plaintiff would be entitled to no relief.

It is a well-established principle of law that a trustee, who holds the title to property, may defend for the beneficiary; and, when the title is attacked and the trustee defends with the knowledge and consent of the beneficiary, the beneficiary will be concluded by the result of the litigation to the same extent as the trustee is concluded by it. In the actions brought by Emma L. Van Etten to recover possession of the property and to quiet the title thereto, it appears that David Van Etten appeared for her, acted as her attorney, and had actual, full and complete knowledge of the litigation, and, in fact, directed and carried it on. The litigation in the actions prosecuted by Emma L. Van Etten was not only conclusive of her rights, but was conclusive of any rights that David Van Etten may have had in the property. He is as effectually bound by the decisions in the two former cases as if he had been a party thereto.

The plaintiff contends that the former decisions against Emma L. Van Etten are void, because by fraud the journal of the court was made to show that a verdict had been returned in the ejectment case for the defendant, when in fact it was rendered for the plaintiff, and that the judgment in the second action was based upon the adjudication in the ejectment action. It is sufficient answer to this to say that there is no competent evidence in the record to sustain the plaintiff's contention. It is true, the court permitted the plaintiff, over objections, to testify that the verdict in the ejectment action was in favor of the plaintiff, but the verdict was not produced and offered in evidence, nor was the clerk of the court, who is the proper custodian thereof, called to ascertain whether or not the original verdict could be produced. No sufficient foundation was laid to permit the plaintiff

to testify as to the contents of the verdict. The court journal, showing that the verdict was in favor of the defendant, was received in evidence. It is not to be permitted to overturn the solemn and binding judgments of courts of record in the manner attempted by plaintiff.

It follows that the judgment of the district court is right and should be affirmed.

DUFFIE 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 ET AL., APPELLANTS.

FILED JULY 12, 1907. No. 15,057.

1. **Tax Foreclosure**: PETITION: EVIDENCE. In a tax foreclosure under what is commonly called the "Scavenger act," section 10651, Ann. St., makes the petition *prima facie* evidence of the legality of all the taxes and assessments set forth therein and of the several amounts therein levied on behalf of the state, county or city; and, in the absence of evidence to overcome such *prima facie* evidence, every step necessary to levy a valid tax will be presumed to have been taken.

2. **Eminent Domain**: COMPENSATION. Section 21, art. I of the constitution, which provides that "the property of no person shall be taken or damaged for public use without just compensation therefor," does not require that payment shall precede the taking of the land for public use. It is left to the legislature to determine the manner of the taking and the time and manner of payment.

3. ———: BOULEVARDS. The appropriation of private lands for boulevard purposes, referred to in this action, is governed by section 101*b*, ch. 12*a*, Comp. St. 1897.

4. **Statutes**: CONSTRUCTION. Where two sections of the same statute, one general and the other special, relate to the same subject, the special statute controls as to the matters falling within its provisions.

5. **Eminent Domain**: COMPENSATION. Cities of the metropolitan class are liable to the owners of property appropriated for parks, park ways and boulevards, and a judgment against the city may be had for the value of the property taken. *Held*, That the provisions of section 101*b*, ch. 12*a*, Comp. St. 1897, providing for the payment for property appropriated for parks, parkways and boulevards, are not exclusive, and that the provisions of said section, together with the general liability of the municipality, provide for a safe and adequate fund, to which the owners of property appropriated for boulevard purposes in cities of the metropolitan class may look for payment.

6. **Cities**: BOULEVARDS: ASSESSMENTS FOR BENEFITS. Public parks belonging to a city of the metropolitan class are not liable to taxation, and cannot be taxed by the city for any special benefits supposed to have accrued by reason of the establishment of a boulevard.

7. ———: ———: ———. Under section 101*b*, ch. 12*a*, Comp. St. 1897, special assessments may be levied to pay for property appropriated for boulevard purposes upon all property that is specially benefited, and such special assessments are not limited to property which abuts upon or is adjacent to the boulevard.

8. **Rulings of the** trial court in the admission and exclusion of evidence examined, and *held* to be free from prejudicial error.

9. **Evidence** examined. and *held* to sustain the findings and judgment of the trial court.

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

B. N. Robertson, for appellants.

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

GOOD, C.

This cause was instituted in the district court for Douglas county, under what is commonly called the "Scavenger act," to foreclose for delinquent taxes on a large number of tracts of land in Omaha. James Megeath and four other defendants in the action, each being the owner of one or more parcels of land, filed answers setting forth substantially the same defense. By order of the court,

these defendants acquiescing, the five causes were consolidated and tried together. A trial was had to the court, which resulted in a decree for the plaintiff, and the court found that the special assessments set forth in the petition for parks, parkways and boulevards were valid liens against said parcels of land, and entered a decree of foreclosure. From this decree Megeath and his four associate defendants appeal to this court.

There were other taxes included in the foreclosure proceedings than the special assessments for parks, parkways and boulevards, but complaint is made only as to the last named special assessments. The special assessments complained of were those arising from the establishment of two boulevards in the city of Omaha, one, known as the "Southwest Boulevard," extending from Arbor street on the north to Riverview Park on the south, and the other, extending from Burt street on the north to Pacific street on the south, known as the "West Central Boulevard." The special assessments were levied upon property alleged to have been specially benefited by the establishment of the boulevards, and to raise a fund with which to pay for the lands appropriated for boulevard purposes. The first step in this public improvement was taken in March, 1898, by the passage and approval by the mayor and council of the city of Omaha of ordinance No. 4,372, which declared the necessity of appropriating the property therein described for boulevard purposes. This ordinance provided for the appointment of appraisers to assess the damages of the owners of property to be appropriated. Appraisers were appointed, who met and appraised the damages and made report of their acts as such appraisers. Some time thereafter the city engineer of Omaha prepared and submitted to the city council a plan of assessment for apportioning to the several parcels of land, that would be specially benefited by the establishment of this boulevard, the proportionate share of the special benefits conferred upon the several tracts of land. This special assessment, for benefits conferred, was for the purpose of

raising money to pay for the lands appropriated for the boulevard. In March, 1899, the city council of Omaha, acting as a board of equalization, found that the several parcels of land described in the city engineer's report, or proposed plan of assessment, would each be specially benefited to the full amount of the proposed assessment as set forth in the engineer's plan, and further found and determined that such assessment and levy should be made. In May, 1899, levy ordinance No. 2,188 was passed and approved by the mayor and city council. It provided for the levy of the special tax and assessment against the several parcels of land that the city council had previously found to be specially benefited. This ordinance made the levy for the purpose of making payment for the land appropriated for the boulevard. All of these foregoing proceedings related to the Southwest boulevard. Some time later identical proceedings were had for the establishment of the West Central boulevard, and the levy ordinance for the raising of funds to pay for the lands appropriated for this boulevard was passed and approved in May, 1903.

It is first contended by the appellants that the appraisers did not limit their appraisement of damages to the property that was described in ordinance No. 4,372, and that in a number of instances the property appraised was different from the property described in the ordinance. A long list of alleged discrepancies is set forth in appellants' brief. In several instances, where parts of lots were described in the ordinance and sought to be appropriated by the city, it is contended that the appraisers allowed in their estimate of damages for the whole of such lots or tracts, when only a part thereof was taken. There is no evidence to support these contentions, except the report of the appraisers. A careful scrutiny of the said report leads to a conclusion contrary to that contended for by appellants. We quote from the report: "We do find that the damages to the owners of, and to those interested in, the

respective lots, pieces or parcels of land to be taken, wholly or in part, by reason of the taking of the *portion proposed to be taken* by this proceeding, is as follows: On schedule 'B,' hereto attached, the first column shows the names of the owners of, and of the persons interested in, each lot, piece or parcel of property *all or a portion of which is to be taken by this proceeding,* the second column, the lot, piece or parcel of property *all or a portion* of which is to be taken by this proceeding, and the last column, the damages sustained by reason of the taking of the *portion to be taken.*" And, again, in the supplemental report we find the following: "That after such careful personal examination of all of said property and land, including the portion not appropriated adjacent to or being a part of portions appropriated, as well as such portions appropriated, do find and hereby report and declare that no portion or part of any lot or tract of land not declared necessary to be appropriated has been or will be in any manner damaged or injuriously affected by the taking or appropriation of the portion of lots and lands declared necessary to be appropriated. * * * It was our intention and purpose to report that we had carefully considered the question of any possible injury or damage to any portion of any lot or tract of land not appropriated, and that *no allowance was made therefor,* but that the full and actual value of portions proposed to be appropriated was allowed." It is true that in schedule "B" the appraisers have frequently given a description of full lots where in some instances only portions of lots were taken, but the appraisers awarded damages only for the portion of the lot that was appropriated, and that they inserted, as a matter of convenience, a description of the lot, instead of making a long and detailed description of the irregular portion taken. There are also a number of instances in the report where the appraisers have used different language from that used in the ordinance to describe the tracts appropriated, but a careful examination of the record shows that it was but another method

of describing the same property that was described in the ordinances. However, in one instance it appears that the appraisers did award damages in the sum of $35 to the owner of lot 9, block 5, Deer Park addition, and that no part of this lot was described in the ordinance. To this extent the appellants had cause for complaint, but it appears by the decree entered by the trial court that it ascertained the amount that this unauthorized award would affect the tax of each of the appellants and scaled down the amount of each one's tax accordingly, so that equity has been done to the appellants as to this item, and they have no cause to complain of the action of the trial court in this respect.

Appellants next contend that the report of the appraisers does not show that they made or entered an order fixing a time and place for a hearing, so that those interested might appear and make a showing to the appraisers as to the extent of the damages they would sustain by the taking of their property. Appellants also complain because the record does not disclose that anyone was appointed by the appraisers to serve notices of the time and place of their meeting, as required by the ordinance, and also complain because the report of the appraisers fails to show that a proper notice was served upon the parties whose land was sought to be taken. With reference to the first of these contentions, the only evidence in the record is that contained in the sworn return of the person serving the notices. It contains the following: "That he is special agent for the city of Omaha and is the party charged with the duty of serving notices for the city." There is no evidence in the record that he was not appointed, nor is there any requirement of the statute or ordinance that makes it necessary that his appointment should be in writing, as contended by the appellants. As to the question of the appraisers making and entering an order fixing a time and place for the hearing, there is no evidence tending to show that such action was taken other than that which would be presupposed by the form of the notice

which was given, and no evidence at all that such order was not made and entered. The contention that no proper notice was served is not supported by the record, but, on the other hand, the record discloses that full and complete notice was given to the property owners. Section 10651, Ann. St., provides, in an action of this kind: "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. Such petition shall be considered as in evidence, on behalf of the state, without a formal offer." Under this section of the statute, the petition alone was *prima facie* evidence of the validity of the tax and special assessment, and is therefore *prima facie* evidence of every step necessary to be taken to levy a valid tax. In the absence of evidence to overcome this presumption, the appellants' contentions, to the effect that no order was made and entered by the appraisers fixing a time and place for the hearing, and that no appointment was made of any one to serve the notices, and that no proper and sufficient notice was served, must fail.

Appellants further contend that the assessments made for the purpose of paying for the property taken by the city for boulevards were levied and imposed on the property of defendants in advance of the condemnation of the property described in the appropriation ordinances, and were therefore illegal and void. It is true that the levy ordinances, imposing the tax upon the property benefited, were passed previous to the actual occupancy of the property by the city for boulevard purposes. The substance of appellants' contention in this respect seems to be that the city, not having actually paid the condemnation money, acquired no right to the property sought to be taken, and that the city, in going upon the property and taking possession of it before making payment, acquired no rights in the property, and that, not having acquired

any rights in the property, no benefit could be conferred upon adjacent property, and that no levy could therefore be made for special benefits, because no benefits could accrue until the city has lawfully taken possession of the property. Appellants contend that this was asking them to pay taxes for special benefits without rendering any equivalent, and contend that the city must first acquire title to the property sought to be taken by lawful proceedings before it can levy a tax for special benefits. This contention of the appellants would require that the city should first raise the money and pay the owners of the property taken by the condemnation proceedings in order to acquire title, and it could only levy a tax for special benefits to reimburse itself for the funds expended in acquiring title to the property taken. Many cases from other courts are cited that support this contention. Whether the city had authority to proceed in the manner in which it did must depend, first, upon the provisions of the constitution, and, second, upon the provisions of the statute under which it acted. The constitutions of many states require that, before private property can be taken under condemnation proceedings for public purposes, payment therefor must be made or tendered. Our constitution has a different provision. Section 21, art. I, of our constitution, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." In the present case no attempt was made to take private property without just compensation, and the constitutional provision quoted can not fairly be construed to mean that payment must be made in advance of the actual taking of the property. It only requires that just compensation must be made for the property taken. It is left to the legislature to determine the manner of taking and the time and manner of payment. It might require that payment be made before the taking of the property, and in a number of instances it has so provided. Our attention has been called to the cases of *Hurford v. City of Omaha*, 4 Neb. 336; *McGavock v. City of Omaha*,

40 Neb. 64; *Brown v. Chicago, R. I. & P. R. Co.*, 66 Neb. 106; *State v. Missouri P. R. Co.*, 75 Neb. 4; and *Lewis v. City of Lincoln*, 55 Neb. 1. In all of these cases the condemnation proceedings were under statutes which required that payment should precede the actual taking of the property, and, as we shall presently see, have no application to the present case.

There are two sections of the Omaha charter of 1897, relating to the exercise of eminent domain. Section 29, ch. 12*a*, Comp. St. 1897, is in part as follows: "Whenever it shall become necessary to appropriate private property for the use of the city for streets, alleys, avenues, sewers, parkways, boulevards, public squares, gas works, electric light plants, waterworks, or other purposes authorized by this act, and such appropriation shall be declared necessary by ordinance, the mayor, with the approval of the council, shall appoint three disinterested freeholders of the city, who * * * shall assess the damages to the owners of the property and parties interested therein respectively taken by such appropriation. Such assessment shall be reported to the advisory board, * * * if the same shall be confirmed, the damages so assessed shall be paid to the owners of such property, or deposited with the city treasurer subject to the order of such owners respectively, after which such property may at any time be taken for the use of the city." This section contains general provisions for the exercise of the power of eminent domain by the cities of the metropolitan class. But section 101*b* of the same chapter provides: "In each city of the metropolitan class there shall be a board of park commissioners who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, parkways and boulevards, and it shall be the duty of said board * * * to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose. And thereupon it shall be the duty of the mayor and council to take such action as may be neces-

sary for the appropriation of the lands, lots or grounds so designated, the power to appropriate lands, lots or grounds for such purpose being hereby conferred on the mayor and council, and, for the purpose of making payments for such lands, lots or grounds so appropriated, or purchased as hereinafter provided, assess such real estate as may be specifically benefited by reason of the appropriation or purchase thereof for such purpose, and issue bonds as may be required for such purpose, to the extent and amount required in excess of such assessments." This latter section relates exclusively to the appropriation of property for parks, parkways and boulevards, and is special in its nature. At first it might appear to be in conflict with section 29, *supra,* but the proper rule of construction is that, where there are two statutes, or two sections of the same statute, relating to the same subject, one of which is general and the other special, the special statute controls as to the things which fall within its provisions. *Richardson County v. Miles,* 14 Neb. 311; *Merrick v. Kennedy,* 46 Neb. 264; *State v. Cornell,* 54 Neb. 72. Applying this rule of construction, it is clear that section 29 is not applicable to proceedings to condemn property for boulevard purposes, which proceedings are governed by section 101*b*. By this section of the charter the legislature has given authority and power to the city of Omaha to appropriate private property for boulevards without requiring payment to the owners in advance of the taking of the property, and has provided therein that the city may levy upon the property that will be specially benefited a tax to raise funds with which to pay for the property appropriated. It follows that the city of Omaha had the power to levy a special assessment to pay for the property taken for boulevard purposes in this case in advance of the actual payment therefor.

Appellants next contend that no adequate and safe fund was created by the city to pay for the lands appropriated, that the provisions made by special assessment for a fund out of which payments were to be made left it uncertain

and doubtful whether the fund would be sufficient to meet the demands made upon it, and that for this reason the condemnation proceedings were invalid. It will be conceded, as a general rule, where private property is taken by the exercise of the power of eminent domain and payment does not precede the actual taking of the property, that a safe and adequate fund must be provided to which the owners of the property taken may look for compensation. If the special assessment provided for by section 101*b* is insufficient, there is also a provision for the issuing of bonds, from the proceeds of which the owners of the property taken may be paid. Conceding that this fund may be insufficient, the owners have still another recourse for compensation. It is generally recognized as the rule that, when property is appropriated by a municipality, there is a general liability against the municipality for payment for the lands appropriated. It is generally recognized that, where the taxable property of the municipality is all liable for taxation to make payment for the property appropriated, the rule requiring a safe and adequate fund is complied with. In *Sweet v. Rechel,* 159 U. S. 380, where a similar question was under consideration, Justice Harlan, writing the opinion, used the following language: "It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages, which can be enforced, that is, collected, by judicial process." In the event that the fund provided should prove inadequate, resort may be had to a judgment against the city, and, where a general judgment is entered against the city, all of its taxable property is liable to meet a levy to pay such judgment. That the city, or municipality, making the appropriation of private property is liable has been recognized by this court in a number of cases. *Wead v. City of*

Omaha, 73 Neb. 321; *Second Congregational Church Society v. City of Omaha*, 35 Neb. 103; *City of Omaha v. Clarke*, 66 Neb. 33; *Rogers v. City of Omaha*, 75 Neb. 318. In view of the rule adopted by this court, making the taxable property of the municipality liable for the judgment to pay for property appropriated, it must be held that a safe and adequate fund was provided.

Appellants contend that Hanscom Park, being a public park belonging to the city of Omaha and lying adjacent to the boulevard, should have been taxed as being specially benefited, and that the omission of this large tract of land, placing all of the burden of special benefit upon the private property owners, was a fraud upon them. This question has been settled by recent decisions of this court. In *Herman v. City of Omaha*, 75 Neb. 489, it was held that the municipality is not required to tax its own property for the purpose of creating funds with which to pay for a public improvement; in other words, that the city has no power or right to tax its own property. Hanscom Park was therefore not liable for any special benefit.

Complaint is also made because the tax for special benefits was not levied proportionately upon all the property benefited, and that in some cases the special assessment was grossly unjust, and so inequitable as to amount to a fraud upon the appellants. It is not possible to levy a tax of this kind, or in fact any tax, upon property, whereby absolute equality and exact justice is meted out to each owner. The question as to the value of a particular piece of property, or the relative values of several pieces of property, is largely a matter of opinion, and the question of special benefits that will be conferred upon several pieces of property cannot be adjusted with exact nicety. It is not expected, nor required, that men with only finite powers will be able to perform their duties with the wisdom of Infinity. It is sufficient if the taxes levied against the various parcels of land are so levied that they cannot be said to be grossly inequitable or unjust, and that each parcel bears approximately its just share of the

burden. We have examined the evidence upon this question, and are convinced that there is no such inequality in the special assessment as would amount to a fraud upon the rights of the appellants, and that the burden of taxation was as nearly equally distributed upon the property of all those liable therefor as could be expected, and that the work of levying the special assessment was fairly and honestly done.

Appellants also contend that the mayor and council had no power to levy an assessment for special benefits upon any property other than that abutting upon, or adjacent to, the boulevard. We think that section 101*b* of the statute above referred to is sufficient answer to this contention. It provides that special assessments may be levied against such real estate as may be specially benefited by reason of the appropriation. It does not limit it to the property which abuts upon, or is adjacent to, the boulevard. The only limitation is that the property be specially benefited.

Appellants claim that the city never obtained possession of certain portions of the property sought to be appropriated, and to support this contention they offered evidence to the effect that there is a house upon one of the lots, and that the lots to the north of this house in the same block, which were included in the lands condemned, have not been graded for boulevard purposes. The evidence does not show that any person is occupying this house or these lots, and there is nothing to show that any person is claiming title thereto adverse to the city. The evidence falls far short of showing that the city never obtained title or possession of the property. It might be that part of these lots have never been graded for boulevard purposes, but this would not deprive the city of its title to the lots, nor affect its right to levy the special assessment to pay for the property appropriated. The special assessments were not made for the purpose of grading and placing the property in condition to be used

for boulevard purposes, but were made to pay for the property appropriated.

Appellants also contend that, because a considerable number of the owners of the property appropriated have not yet received their pay therefor, and because warrants drawn by the city for the payment for the property have not been delivered, no title was acquired to the property, and no special assessment could be made to pay for the same. It is not made to appear wherein the failure of the property owners to receive or cash their warrants could be material. If a safe and adequate fund has been provided, this is all that is necessary. If the property owners do not choose to accept the payment when the same has been provided, that is their affair, and could constitute no defense to the special assessment made to pay for the property.

Numerous rulings of the trial court on the admission and exclusion of evidence are complained of. The appellants have not pointed out to us wherein they have been prejudiced by any of these rulings, and from an examination of them no error is apparent.

After a careful consideration of all the questions raised by the appellants, we are convinced that the decree of the district court is right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

WILLIAM FEDDERN V. STATE OF NEBRASKA.

FILED JULY 12, 1907. No. 15,094.

1. **Criminal Law: TRIAL: PRESENCE OF ACCUSED: PRESUMPTIONS** Where the record in a criminal prosecution discloses that the defendant was present during the trial, but is silent as to whether he was present when the verdict was received, it will be pre-

sumed that the verdict was properly received and that the defendant was present in court at the time.

2. **Intoxicating Liquors:** EVIDENCE. In a prosecution under section 7170, Ann. St., for keeping intoxicating liquors with the intention of disposing of the same without a license, it is competent for a witness, who is familiar with the taste of beer and has tasted some of the liquors seized, to testify that they tasted like beer.

3. ———: ———: HARMLESS ERROR. In such prosecution it is not prejudicial error to admit testimony of keeping of other liquors than those charged in the information, when the evidence shows that the liquors charged in the information were kept for sale and were intoxicating.

4. ———: INSTRUCTIONS. In such prosecution, where the evidence tends to show that the liquors kept for sale under the names and labels of "Hop Soda," "Cream of Malt" and "Malt Extract," were in fact beer, it is not error for the court to instruct the jury, as a matter of law, that beer is an intoxicating malt liquor, and is within the meaning of the words intoxicating liquors, as used in the statute.

5. **Criminal Law:** CONDUCT OF JURY: HARMLESS ERROR. It is not such misconduct of a juror as will call for a reversal of the case for a juror to state to his fellow jurors, during their deliberations upon the verdict, that he knew about the facts and had personal knowledge of the facts before he was selected as a juror, where he does not disclose to his fellow jurors the facts that were within his personal knowledge.

6. ———: ———: RECORD: REVIEW. This court will not consider affidavits made after the trial to determine the question of whether or not a juror had made statements during the deliberations of the jury upon the verdict that were at variance with his *voir dire* examination, when such *voir dire* examination is not in the record, unless it is shown that the complaining party was prevented, without fault on his part, from having such examination taken and preserved in the record.

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

Willard & Snider and *C. B. Willey,* for plaintiff in error.

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

GOOD, C.

In this action the defendant was charged with the violation of section 7170, Ann. St., making it unlawful for any person to keep for the purpose of sale without a license any malt, vinous or spirituous liquors in the state of Nebraska, and making it a misdemeanor for any person to be found in possession of any intoxicating liquors within the state with the intention of disposing of the same without a license. The defendant, having been found guilty and sentenced to pay a fine of $100, brings the case to this court for review.

From the undisputed evidence it appeared that the defendant had been operating a saloon in the village of Randolph for several years immediately preceding the first day of May, 1906; that during the year 1906 no saloon licenses were granted by the village authorities of Randolph. The defendant continued in business in his saloon building, selling certain drinks under the names of "Hop Soda," "Cream of Malt," "Malt Extract," and "Fremont Old German Tonic." On the 10th day of November, 1906, the defendant's premises were searched, and a large quantity of the above mentioned liquors was seized. That the defendant had the liquors in his possession for the purpose of sale, and was selling them, is conceded. The theory of the defense was that the liquors were not intoxicating.

Defendant first contends that the transcript does not show that the jury were sworn to try the case, that neither the defendant nor his counsel were present when the verdict was returned, and that the jury were not polled. As to the first of these assignments, it is sufficient to say that the transcript does not bear out defendant's contention. It clearly shows that the jury were duly impaneled and sworn. As to whether or not defendant or his counsel were present when the verdict was received the record is silent. Nowhere in the record does it appear that either was absent at the time. The presumption arises that,

when the defendant in a misdemeanor case is once shown to be present, his presence is continued during the progress of the trial, unless the contrary be made to appear. The record discloses that the defendant was present at the trial and testified as a witness in his own behalf. The presumption is always in favor of the regularity of the proceedings of a court of record, and the presumption obtains here that, defendant being once present, his presence is continued until the verdict was received. *Folden v. State,* 13 Neb. 328; *Bolln v. State,* 51 Neb. 581. There is no requirement of the law that the jury shall be polled. Section 486 of the criminal code provides that the jury may be "polled at the request of either the prosecuting attorney or the defendant." In this case there was no request to have the jury polled, and therefore no right accorded to defendant by the law was denied him. It is necessary that the jury should be polled only when requested by either the defendant or the prosecuting attorney.

Defendant next contends that there was error in the admission of certain testimony. Several witnesses who had tasted and drunk of the liquors that defendant had kept and sold, and that had been taken from his premises under the search warrant, were permitted to testify that the liquors in question tasted like beer. Defendant contends that this was erroneous. A chemist had analyzed several samples of the different kinds of liquors taken from the defendant's premises under the search warrant, and testified as to the results of his analysis, as to the percentage of alcohol in each, and that each of the samples contained more than 2 per cent. of alcohol, ranging from 2 1-10 to 2 72-100 per cent. The chemist testified that he was familiar with beers and their composition, and that the several liquors labeled as "Hop Soda," "Cream of Malt," "Malt Extract" and "Fremont Old German Tonic" were malt liquors and belonged to the class of liquors known as beers. From a consideration of the evidence in the case, it is apparent that the liquors known

as "Hop Soda," "Cream of Malt," "Malt Extract" and "Fremont Old German Tonic" were, in fact, malt liquors and were beers of the lighter class, though sold under names and labels that did not disclose their true properties and characters. Evidence of those who were competent to give an opinion on the subject that they tasted like beer was, under the circumstances, properly admissible. While the liquors were sold under names and labels that did not necessarily indicate that they were intoxicating liquors, the evidence of those who had tasted and drunk thereof, to the effect that they tasted like beer, was competent as tending to show that the liquors belonged to the class, the keeping of which for sale was inhibited by the statute.

The description of the liquors in the information was in the following language: "Certain intoxicating liquors, to wit, Malt Extract, Cream of Malt and Hop Soda." No mention is made in the information of the liquor called "Fremont Old German Tonic." Evidence was admitted on the trial showing that the defendant kept for sale and was selling liquors under this name, and the chemist was permitted to testify as to the analysis of it and as to the percentage of alcohol contained in it. Defendant complains because this evidence was admitted, for the reason that he was not charged in the information with the keeping for the purpose of sale Fremont Old German Tonic. He contends that he was, or at least might have been, found guilty of keeping for sale a liquor, with the keeping of which he was not charged in the information. If there was no evidence of the keeping for sale of the liquors described in the information, and the only evidence as to the keeping of liquors was as to that called "Fremont Old German Tonic," there would be much greater force in defendant's contention. But the evidence is ample, and, in fact, it is admitted by the defendant, that he did keep and sell all of the liquors charged in the information, and there is ample evidence in the record that all of these liquors charged in the information were intoxicating. In

fact, the only evidence to the contrary is that of certain persons who drank of the liquors and experienced no intoxicating effect from the drinking of the same. The evidence as to the percentage of alcohol contained in each of the liquors was not controverted or denied. The admission of evidence that the defendant had in his possession intoxicating liquors other than those described in the information was, under the circumstances, not erroneous. He was charged with keeping intoxicating liquors for sale under three separate denominations. The state went further, and proved the three charged and one additional, and, while various names were given to the liquors, the evidence fairly discloses that all of the liquors were, in fact, beers that were being sold under fanciful names. The court in its instructions to the jury limited its consideration to the liquors described specifically in the information, and limited the right of the jury to convict to the liquors therein described. We cannot presume that the jury disregarded the instruction of the court and convicted the defendant of unlawfully keeping for sale a liquor not described in the information.

The defendant complains of instruction No. 5, given by the court. It is in the following language: "The word 'beer,' without restriction or qualification, denotes an intoxicating malt liquor, and is within the meaning of the words 'intoxicating liquor,' as used throughout the statute." The defendant contends that this instruction was erroneous, because of the fact that he was not charged with the keeping for sale of beer. However, the evidence fully justifies the conclusion that the liquors sold were, in fact, beers, and this court has held, in the case of *Peterson v. State*, 63 Neb. 251, that the courts of this state will take judicial notice that beer is an intoxicant. The instruction given was correct, as a matter of law, and, under the evidence introduced in this case, it was peculiarly fitting and applicable, and was properly given.

We now come to the consideration of the last, as well as the most serious, of defendant's contentions, namely,

the misconduct of one of the jurors. It is made to appear by the joint affidavit of four of the jurors that another of the jurors, who had sat in the case, stated to his fellow jurors, while they were deliberating upon the verdict, that he knew about the facts, that he knew about the case of his own personal knowledge before he was selected as a juror, and that he was surprised that none of the attorneys in the case asked him whether or not he knew anything about the case, and that they did not ask him if he had his mind made up, that he had been in Randolph and knew how the said defendant was conducting and running his place of business, and that he knew of his own personal knowledge about the liquids seized, and that a detective had been employed to apprehend the defendant, and that he knew how he worked it to trap him. In the case of *Falls City v. Sperry,* 68 Neb. 420, upon a showing very similar to that in the case at bar, the court held the misconduct was such as to require a setting aside of the verdict. We have carefully examined the case, and are satisfield as to the propositions of law stated therein; but we are inclined to the opinion that a wrong application was made of the principles therein announced. In the syllabus the following language is used: "Where it appears * * * that one of the jurors had prior knowledge of the premises involved in the controversy, that he based his own conclusion partly thereon and used it to influence his fellow jurors in arriving at their verdict, the latter must be set aside." We are in entire accord with the proposition of law as thus announced, but the affidavit filed in that case by the fellow jurors was very similar to the affidavit filed in the case at bar. A careful examination of the affidavit in that case, as well as the one in the case at bar, will show clearly that it goes only to the fact that the juror knew about the case on trial and had knowledge of certain facts in the case, but the affidavit in neither case goes to the extent of showing that the juror disclosed the knowledge he possessed to any of his fellow jurors. It is

not disclosed by the affidavit in that case, nor in the case at bar, that the juror stated a single fact to his fellow jurors that could have been material evidence either for or against the defendant, and it falls far short of showing that the juror stated any fact that might have been prejudicial to the defendant in the case. If the juror had gone further, and not only stated that he possessed the knowledge, but had detailed the knowledge to his fellow jurors, then there would be such misconduct as would call for a reversal. But this is not the case. In the case of *Falls City v. Sperry, supra,* there were affidavits of others than the jurors, to the effect that the juror there had made up his mind at least partly from his personal knowledge, and that he had based his verdict at least partly upon the information he possessed before the trial. These affidavits were by persons who had heard the juror make statements after the verdict had been rendered. It may well be doubted whether this practice is permissible. The general weight of authority seems to be to the contrary. The affidavit in the case at bar does not go to the extent of showing any statements made by the juror to his fellow jurors that would be prejudicial to the defendant. There is another phase of the case that should not be overlooked. In this case the keeping of the liquors for sale by the defendant was not controverted, but was admitted by him. The only defense that he attempted to make was that the liquors were not intoxicating. Under these circumstances, that was practically the only issue in the case, and the affidavit nowhere indicates that the juror had, or claimed to have, any knowledge as to the character of the liquors and as to whether or not they were intoxicating.

The defendant further contends that the statements made by the juror are at variance with his *voir dire* examination, and that, by reason of the statements made upon his *voir dire* examination, they were misled into accepting him as a juror, and that his statements to his fellow jurors show that he was biased and prejudiced, while the *voir dire* examination did not disclose such fact,

and that this constitutes such misconduct of the juror as would entitle defendant to a new trial. The *voir dire* examination of this juror is not in the record. No reason is given for omitting it. The *voir dire* examination of other jurors appears in the record, and the defendant has attempted to supply the *voir dire* examination of this juror by the affidavits of the defendant and his counsel. If the *voir dire* examination of the juror was in the record, and that examination showed a material variance with the statements made by the juror to his fellow jurors, we should feel constrained to hold that it might, under some circumstances, be such misconduct as would call for a reversal of the case. But we do not think it is proper practice to permit the *voir dire* examination of a juror to be supplied in the record by affidavits made subsequently to the trial by those who heard such examination, unless the defendant has been prevented, without fault on his part, from having the *voir dire* examination taken and preserved in the record. There is no excuse or reason given for not having such examination in the record. The frailties and imperfections of human memory are proverbial, and for a person to undertake to detail the substance of the examination of one of the jurors out of a dozen, or two dozen, examined would be extremely dangerous practice. We think that such practice would be likely to lead to consequences that would be disastrous, and would be opening the door to an easy method of overturning a verdict in almost any case. We deem it contrary to sound policy to permit affidavits made after the trial to take the place of the official record of the *voir dire* examination, unless it is shown that the party complaining has, through no fault on his part, been deprived of having the *voir dire* examination preserved in the record. Our attention has not been called to any case, nor have we been able to find any, except the case of *Falls City v. Sperry, supra,* wherein it was sought to supply the *voir dire* examination by affidavits made subsequently to the trial by those who heard

the examination. The question seems to have been raised, but not decided, in that case.

We fail to find any prejudicial error in the record, and therefore conclude that the judgment of the district court is right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

C. H. HOLCOMB, RECEIVER, APPELLEE, V. B. J. TIERNEY, EXECUTOR, ET AL., APPELLANTS.

FILED JULY 12, 1907. No. 14,381.

1. **Banks**: RECEIVER: NOTICE. In an action against an insolvent banking corporation for the appointment of a receiver to wind up the affairs of the bank for the benefit of its creditors, notice of the filing and pendency of the action should be given before a receiver is appointed.

2. ———: ———: ———. Where in such action a receiver is appointed without notice to the bank, except such as is implied from being dispossessed of its property, and the receiver proceeds by direction of the court, without objection, to convert the assets of the bank into cash and pays the proceeds out to the creditors, the proceeding is not void to the extent that the status of the property involved is open to collateral attack.

3. ———: LIABILITY OF STOCKHOLDERS. A judicial ascertainment of the liabilities of an insolvent banking corporation, such as is necessary before an action can be maintained to enforce the liability of the stockholders, can only be had in an action where the bank, being a party, has been properly served with notice of the pendency of the proceeding, or where it has voluntarily appeared and submitted to the jurisdiction of the court.

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

H. M. Sullivan, for appellants.

C. L. Gutterson, C. H. Holcomb and *Hall, Woods & Pound, contra.*

JACKSON, C.

The Farmers Bank of Custer county was organized under the state law and was conducting a banking business at Broken Bow. On the 28th day of September, 1901, the district court for that county, upon the petition of the attorney general and at the instance of the state banking board, appointed a receiver to wind up the affairs of the bank. The receiver qualified, took charge of and converted the assets of the bank into cash and published a notice to the creditors of the bank, requiring them to file and prove their claims against the bank. Pursuant to this notice claims were filed and proved by creditors to the amount of $56,090.63. These claims were all allowed by the receiver, who reported the same to the court, caused his action in that respect to be approved, and he was by the court authorized and required to pay dividends thereon amounting to 47 per cent., and thereupon, it appearing that the assets of the bank were insufficient to pay the liabilities, the receiver was directed by the court to institute a proceeding to enforce the constitutional liability of the stockholders. Action was taken in the district court for Custer county for that purpose, resulting in a judgment favorable to the receiver, from which the stockholders appeal.

Upon the petition of the attorney general for the appointment of a receiver, no summons was ever issued or other notice given to the bank, except such notice as might be implied from the action of the receiver in taking charge of the assets of the bank and distributing them under the direction of the court. The bank made no appearance, by objection to the jurisdiction or otherwise, and we are met at the outset by the contention that the order appointing the receiver, all acts of the receiver and all

proceedings of the court in the matter of the receivership were void for want of jurisdiction. The attitude of the defendants, if sustained to the full extent that it is insisted upon, might result in serious consequences. Under the provisions of the state banking act, it is the duty of the banking board, whenever it shall appear to them from an examination or from the report of a bank examiner that the capital of a state banking concern is impaired, or that it is conducting its business in an unsafe and unauthorized manner, to communicate such fact to the attorney general of the state, and it is the duty of the attorney general thereupon to apply to the district court, or a judge thereof, for the county where such concern is located, or, in case of the absence of the district judge from the county, to a justice of the supreme court, for the appointment of a receiver to wind up its affairs. The only other provision of the act relative to the procedure in making the appointment relates to the personnel of the receiver and the bond required.

The appellee contends that the banking act contemplates a method of appointing receivers for insolvent banks independent of the provisions of the code relative to the appointment of receivers in general, and that, no provision having been made for notice to the bank of the application for the appointment, none was necessary. But the banking act does not provide that receivers may be appointed under its provisions without notice, nor do we think it contemplates any such course. It was evidently the intention of the legislature to provide for receivers in certain contingencies not included in the general provisions of the code then in force, that is, to provide additional cases in which receivers might be appointed, and, except as the general provisions of the code are modified by the act, we are left to an examination of such general provisions to ascertain the necessary procedure. It is there provided that "no receiver shall be appointed except in a suit actually commenced and pending, and after notice to all parties to be affected thereby."

Code, sec. 267. The deductions to be drawn from a construction of the banking act in connection with the provisions of the code are that, before a receiver may be appointed for an insolvent bank, notice must be given to the bank and an opportunity had for a full investigation by the court or judge as to the necessity for the appointment. The delay incident to such a course is in nowise prejudicial to the state or to the creditors of the bank whose rights are protected by that provision of the banking act authorizing any bank examiner to take possession of the property of the bank and hold the same until the necessity for the appointment of a receiver is determined by the court. A feature of the proceeding as modified by the banking act is that no bond is required of the plaintiff. It does not follow, however, that the failure to give the required notice renders the entire proceeding nugatory or void for all purposes. The court acquired jurisdiction over the subject matter by the seizure of the property. The bank had notice of the sequestration of its property because it was taken from the possession of its officers. The failure to give the notice and of the bank to appear rendered the proceeding one *in rem,* and the status of the property when adjudicated should not therefore be open to collateral attack, although the procedure was irregular. Furthermore, the bank permitted the receiver to act without objection and property rights to be acquired without suggestion of wrongful act during the term of years covered by the receiver's administration, and should now be estopped from attacking the status of the property involved in the receivership.

But whether an action to enforce the constitutional liability of the stockholders of the bank may be grounded upon such a proceeding is quite another question. Before such action may be maintained a judicial ascertainment of the corporate debts must be had. *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353; *Globe Publishing Co. v. State Bank,* 41 Neb. 175; *State v. German Savings Bank,* 50 Neb. 734. For the purpose of such ascertainment it

is doubtless unnecessary for each creditor to prosecute an independent action against the bank. The remedy may be applied in the action where the receiver is appointed by the presentation and allowance of claims, provided the petition is sufficient and the order appointing the receiver contemplates that course, but a judicial ascertainment of the debts of a corporation, within the meaning of the rule, involves the fixing of a personal liability by judgment, and, while it is true that in an action *in rem* upon constructive notice only the court may determine the status of the property involved, it is equally true that upon that character of notice no personal judgment can be rendered. *Anheuser-Busch Brewing Ass'n v. Peterson,* 41 Neb. 897. The stockholders' liability is not a part of the *res* seized by the receiver. It is a liability for the benefit of the creditors. It is a secondary liability, not primary. It can only be enforced after the property involved in the receivership has been exhausted. It follows that in an action against an insolvent bank for the purpose of the appointment of a receiver and winding up its affairs, where personal service of summons is not had on the bank or the bank does not voluntarily appear, no ascertainment of its indebtedness can be had upon which to predicate an action to enforce the stockholders' liability. Such ascertainment of the bank's indebtedness as was in fact had was sufficient to justify the receiver in the distribution of the proceeds of the property taken by him, but it has no other force.

The judgment was erroneous and should be reversed.

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.

REVERSED.

SANFORD RICHARDS, APPELLANT, V. HARLAN COUNTY, APPELLEE.

FILED JULY 12, 1907. No. 14,690.

Taxation: ASSESSMENT. The state board of equalization is not authorized to adopt rules for the government of assessors which require the assessment of the property of an individual in excess of its value.

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

Gomer Thomas and *Power & Mecker*, for appellant.

W. A. Myers, contra.

JACKSON, C.

The plaintiff seeks to reduce the valuation of his property as returned by the assessor for the purpose of taxation. The case was submitted in the district court upon the following stipulation of facts: "It is hereby stipulated between the parties hereto that, if the parties hereinafter named were present in court, they would testify as herein set forth, and that the same is to be considered by the court as the testimony of the respective parties to this action. That the plaintiff would testify that the assessor for Harlan county, Nebraska, in listing and assessing plaintiff's personal property for taxes for the year 1905, after listing all of his said property, including the grain and live stock and cash on hand at the time of making said assessment, at the actual cash value, to wit, the sum of $7,090, as shown by the schedule, making an assessed valuation of $1,418, added to the said actual value the sum of $1,000, and making the assessed valuation thereof the sum of $200, in addition to the said sum of $1,418. That all of his property was assessed before the said $1,000 was added to the said assessment. That the average amount of capital used by the plaintiff in his business of buying and selling grain did not exceed the

amount of grain and cash on hand at the time such assessment was made, and which was all included in his said assessment before the said $1,000 was added thereto. That he had not taken any capital out of said business, and the amount of cash and grain then on hand was more than the amount or average amount of capital used in 1904 or in the year 1905, as a large amount of the profits of said business was included therein. That the plaintiff objected to the assessor adding the $1,000 in said schedule, and informed the assessor that the amount of grain on hand and cash, which was already in said assessment, was all the capital invested by him in said business, but the assessor arbitrarily added said $1,000 to said assessment, without regard to the amount or value of plaintiff's property. That the county assessor, A. H. Munson, would testify that he assessed the plaintiff's property for the year 1905, that after listing his personal property, including grain and cash on hand, at the total amount of $7,090, and the assessed valuation thereof at $1,418, the said A. H. Munson examined the plaintiff's books to ascertain as near as possible the total value or amount of grain shipped by the plaintiff for the last 12 months prior to the time of making said assessments. That after finding the value or amount of said shipments for 12 months, as instructed by the state board of equalization, he divided the amount thereof by 24, and from the amount of this quotient or answer he subtracted the amount of grain and cash on hand, as appeared in the schedule of assessment, which left a balance of $1,000. That he added the said $1,000 to the amount of property listed and made the assessed valuation thereof the sum of $200. That the manner of making said assessment was according to the written instruction of the state board of equalization, and that the assessment was, in his opinion, fair and just." The judgment was for the defendant, and the plaintiff appeals. There is presented the single question of the sufficiency of the evidence under the law to sustain the judgment.

It is provided by section 66, art. I, ch. 77, Comp. St. 1905, as follows: "Every person, company or corporation engaged in the business of buying and selling grain for profit, shall be held to be a grain broker, and shall at the time required by this act, determine under oath the average amount of capital invested in such business, exclusive of real estate or other tangible property, assessed separately, for the preceding year, and taxes shall be charged upon such average capital the same as on other property. For the purpose of determining the average capital of such grain broker the county assessor or deputy assessor shall have the right to inspect all the books of account and the check books of such grain broker and shall determine and fix the amount of such capital by such inspection." By this statute the average amount of capital employed during the preceding year is made the basis for taxing grain brokers. It appears from the direct evidence of the plaintiff that the sum of $7,090 listed by him as the value of the grain and cash on hand exceeded the average amount of capital employed by him during the preceding year, that it in fact included a large amount of the profits of his business. This, it seems, should be sufficient *prima facie* to overcome the valuation returned by the assessor, which was obtained in the manner he describes. *Central Granaries Co. v. Lancaster County,* 77 Neb. 319, and cases cited. To meet this the testimony of the assessor discloses that he divided the total value of all of the grain handled by the plaintiff during the preceding year by 24, and the quotient he used as a basis for taxing the plaintiff's property: By so doing he increased the amount listed in the sum of $1,000. It is explained that this was done under directions from the state board of equalization. We are unable to understand how this method can be said to be fair and just. Manifestly the state board of equalization can adopt no rules for the government of assessors that will require them to assess the property of an individual in excess of its cash value, and if, as appears from the stipulation of

facts, the rule adopted by that board for the government of assessors required an assessment of grain brokers in excess of the average amount of capital employed by them, such rule will not stand the test of the law.

We are of the opinion that the evidence on behalf of the defendant fails to overcome the *prima facie* case made by the plaintiff, and we recommend that the judgment of the district court 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.

STATE OF NEBRASKA, APPELLANT, V. SEVERAL PARCELS OF LAND ET AL., APPELLEES.

FILED JULY 12, 1907. No. 14,829.

Taxation: JURISDICTION. Where the amount or existence of a tax involved in a scavenger suit is not put in issue or determined as a controverted question prior to the entry of decree, the court retains jurisdiction of the subject matter for the purpose of correcting mistakes and preventing injustice until the confirmation of the sale.

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

H. E. Burnam and *I. J. Dunn,* for appellant.

Hamilton & Maxwell, contra.

JACKSON, C.

Tax lot 2,376 in Douglas county consists of lot 6 in block 182½, in the city of Omaha. Tax lot 2,375 is an

eight foot strip lying immediately west of lot 6 in block 182½. The two lots were taxed as one tract. The Union Trust Company holds a mortgage on tax lot 2,376, but has no interest in lot 2,375. The taxes for the years 1894 to 1903 were delinquent, and the county treasurer of Douglas county proceeded in the name of the state under the scavenger act for the collection of this tax. His petition included some 26,000 tracts in all. In preparing the petition the treasurer, by mistake, showed all the delinquent state and county tax levied on the two tax lots as having been levied on lot 2,375. The Union Trust Company was made defendant, appeared in the scavenger suit, and contested the legality of certain special taxes and assessments levied by the city authorities. At the October, 1904, term of the district court for Douglas county, decree was entered to conform with the prayer of the petition in so far as the state and county taxes were involved. Under the decree both tax lots were sold to the city of Omaha on May 17, 1905, and certificates of sale issued pursuant to the provisions of the act under which the proceedings were had. Thereafter the error in the original petition was discovered, and on April 9, 1906, the plaintiff filed its petition in the scavenger suit, asking that the decree rendered therein, in so far as it affected tax lots 2,375 and 2,376, be vacated, the tax sale certificates canceled, and that the taxes levied on those lots be apportioned according to the assessed valuation. The allegation of the petition important to the inquiry is: "That in the compilation of the petition and tax record the treasurer of Douglas county and his employees by accident, oversight, mistake and clerical error included therein the regular state and county taxes for said years as having been levied and assessed only against said tract No. 2,375, and did not include in said petition any tax record or set forth therein any part of any regular state and county taxes as being levied and assessed against said tract 2,376, and that said oversight, mistake and clerical error was not discovered until after the sale of said property here-

inafter referred to and after the adjournment of the court term at which the decree against said property was entered." To this petition the Union Trust Company interposed a general demurrer, which was sustained by the trial court and the state appeals.

It is stated in appellant's brief that the district court based its ruling in sustaining the demurrer upon the proposition that as the state was bound to include in its tax suit and tax record all taxes against each parcel of land then due and delinquent, and a decree of the court having been entered foreclosing the taxes as they appeared in the petition and on the tax record, the Union Trust Company had acquired a vested interest in that decree, which the court held amounted to a final judgment and adjudication; that there were no other taxes or assessments against said tract No. 2,376, and therefore plaintiff was not entitled to have the decree vacated or to assert its liens for state and county taxes from 1894 to 1903. This conclusion, if correct, is one of serious import to the state. We are, however, unable to agree with the learned trial court. It is true that under the provisions of the scavenger act it is the duty of the county treasurer to include in his petition all of the tax delinquent upon the property involved, but we do not think that his failure to do so must result in a loss to the revenues of the state. No confirmation of the sales under the decree could have been had at the time the state asked to have the decree vacated and the sales set aside. Neither the amount of general tax nor the existence of such tax was put in issue, considered or determined by the court as a controverted question. The taxes which the state now desires to apportion were all assessed by the court against tax lot 2,375 by default and through mistake. The authority of the district court to vacate its decree of foreclosure in a scavenger suit continues until the confirmation of the sale, and mistake is one of the grounds upon which the decree may be vacated. Comp. St. 1905, ch. 77, art. IX, secs. 38, 39.

Any person having an interest in the real estate may

apply to the court for relief under the statute. The provisions of the statute evidence a purpose on the part of the legislature to enable the court to deal in an adequate manner with fraud, gross injustice or mistake, so long as its jurisdiction over the subject matter continues. It follows that the district court was not without jurisdiction to set aside the sales and vacate the decree for the purpose of preventing injustice and correcting a mistake. The petition, in our judgment, shows a sufficient reason for the exercise of that jurisdiction, and we recommend that the judgment be reversed and the cause remanded for further proceedings.

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

REVERSED.

JESSE W. TODD, APPELLEE, V. CITY OF CRETE, APPELLANT.*

FILED JULY 12, 1907. No. 14,898.

1. Cities: POWERS. A city of the second class of less than 5,000 inhabitants is authorized by the law of this state to operate an electric lighting plant for municipal and commercial purposes.
2. ———: LIABILITY. Where such city is engaged in the operation of an electric lighting plant for commercial purposes, and one of its wires is negligently left in a position to cause injury to one who is without fault on his part, the fact that such wire was not in use at the time the accident occurred constitutes no defense to an action for damages.

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

M. H. Fleming and *Tibbets & Anderson,* for appellant.

Flansburg & Williams and *Hastings & Ireland, contra.*

*Rehearing allowed. See opinion, p. 677, *post.*

JACKSON, C.

The plaintiff had judgment, from which the defendant appeals. The defendant is a city of the second class with less than 5,000 inhabitants, and owns and operates an electric lighting plant within its boundaries. The plaintiff was a railway brakeman in the employ of the Chicago, Burlington & Quincy Railway Company, which operates a line of railway through the limits of the defendant city. The plaintiff's cause of action is based upon the complaint that the defendant, in the operation of its lighting plant, had stretched wires over and across the right of way of the railway company in so negligent and careless a manner that they were not sufficiently high to clear the body of a man standing on top of a freight car in the usual course of the operation of the trains of the railway company, and that the plaintiff, while engaged in his duties as a brakeman, was required and compelled to serve on top of such cars while the trains were switching in the transaction of the business of the company at the station in the defendant city, and that, while so employed, without knowing the dangerous situation of the wires, and in the darkness of the night, was caught by one of the wires of the defendant's lighting system, thrown to the ground and seriously injured. The answer admits that the plaintiff fell from the train and sustained an injury, denies the other allegations of the petition, charges the contributory negligence of the plaintiff and negligence on the part of the railway company. The reply is a general denial.

The first assignment of error discussed by appellant is that the verdict of the jury is not sustained by the evidence. The train on which the plaintiff was employed was in charge of conductor Hart. The plaintiff and Garner were his brakemen. The plaintiff was on top of the car immediately in front of the car upon which Garner was located. They were switching in the yards in the night season, the train moving east, when Garner heard the plaintiff cry out, saw his lantern drop, and the plaintiff

himself fall from the train, apparently between two cars. He notified the conductor, who was near at hand. The conductor signaled the train to stop, and he, together with Garner, went to where the plaintiff was found lying on the ground in an unconscious condition. They placed him on a grain door taken from one of the cars, carried him to the temporary depot then being used by the railway company, and called physicians. Acting on the advice of the physicians, they put him in the caboose and took him to Lincoln, and immediately came back to Crete for the train and to ascertain, if possible, how the accident occurred. The cars upon which the plaintiff and Garner had been employed had been left standing on the switch where they were when the accident happened, the engine was coupled onto these cars, and the train backed west until they came to a point immediately under where the electric light wires of the defendant passed over the track, when it was discovered that one of the wires had sagged and was at a height above the ground, as shown by actual measurement, where it would have caught the plaintiff under the chin had he been standing erect on top of the car. The testimony of the plaintiff's witnesses, if true, was sufficient to show that no other obstruction existed along this side-track which could have thrown the plaintiff from the train. The plaintiff himself was rendered unconscious by the injury, and remained in that condition for many days, and was unable to give any explanation of the accident. His injuries consisted in bruises about the head and other parts of the body, which the jury might have found to have been occasioned by his fall. The physicians who took charge of him upon his arrival at Lincoln, and other witnesses on behalf of the plaintiff, testify to an injury some four or five inches in length under the chin. The physicians describe this injury as a burn, saying that it was superficial, that is, not burned deeply, but enough so that it admitted of bleeding. The wires used by the defendant in its lighting plant were

copper and insulated. It is the theory of the plaintiff that this burn was caused from coming in contact with the wire. Both Hart and Garner testify to having found the place where the plaintiff fell and identified it by marks in the dust and dirt. The conductor described it as the exact place where he lay. Garner testified that this place was about 15 to 25 feet east of the wire. It is the theory of the defendant that the plaintiff was thrown from the train by the limb of a box elder tree at a point 200 feet or more east of the wire. The testimony of the defendant's witness, if true, proves that a limb from that tree extended out over the track sufficiently low to have caused the accident, and tends to prove that the body of the plaintiff was found at a point east of this tree. With respect to these facts there is a direct conflict in the evidence. The weight to be given to the testimony of the witnesses was, however, for the consideration of the jury, and from a careful reading of all the evidence we are convinced that there was sufficient evidence to justify the submission of the case to the jury, and we do not feel at liberty to disturb their verdict.

On the cross-examination of the witness Garner, he testified that one of the physicians called to see the plaintiff at Crete asked him how the accident occurred, and he answered that he told him that he thought the limbs of a tree knocked Todd off and hurt him; that he did not know at that time where the wires were with reference to the tree. The defendant offered to prove by this witness that at the time the accident occurred he knew that they had not passed the tree. Objections to the offer were sustained. The conversation with the doctor was immediately after the injury and before the witness had made any investigation with reference to surrounding objects. His testimony as to the point where the plaintiff fell was based entirely upon the condition of the ground ascertained from a subsequent examination of the premises. Until that examination was made, he had no knowledge of the existence or location of the wires, and, had he tes-

tified as the defendant's offer presumed that he would, the testimony would in nowise have conflicted with his previous statements. There was no error, therefore, in sustaining the objection.

The plaintiff himself testified that his average earnings at the time of the accident were $75 a month. On cross-examination the defendant sought to prove that out of the plaintiff's earnings he contributed to the Burlington Voluntary Relief Association. He was permitted to answer that he did, but objections to interrogatories tending to draw out from the witness how much he contributed were sustained. We are unable to understand how the rights of the defendant were affected in anywise by this ruling of the court. There is nothing in the record tending to show the character of this association or the purpose of making such payments, except as the witness stated that they were for an equivalent. He stated that he had not been paid in full by this department for loss of time and service occasioned by the accident, that he had made no settlement with the railway company in any way. He was asked: "Did you not give the Burlington Voluntary Relief Department a receipt in which it was stated that, in consideration of their paying you money, you waived all damages against the Burlington road?" An objection to this question was sustained, and the ruling is assigned as error. The question was not followed by an offer of proof, and in any event was entirely immaterial. It seems to be the theory of the defendant that the railway company was a joint tort-feasor with the defendant, and that a release from the railway company would discharge the liability of the defendant. A sufficient answer to this claim is that it would be an affirmative defense and is not pleaded.

The defendant also offered to prove that at the time these wires were strung across the Burlington tracks a station agent in the employ of the railway company directed the height at which they should be erected. This evidence was excluded by the trial court. If admitted,

it would have been immaterial. It is shown without dispute that shortly before the accident the Burlington station at Crete was destroyed by fire and the wires in question were loosened. Immediately after the fire an electrician in the employ of the defendant undertook to make the wires secure at the exact place where the accident occurred, so that the question was not as to how the wires were originally strung and under whose direction, but in what condition they were left by the employees of the defendant before the accident occurred.

It is urged that the city is not liable because at the time the accident occurred, and since the destruction of the Burlington depot, the wires were not in use, their commercial use having been abandoned. It is conceded that, had the accident occurred while the wires were in actual use, the defendant would have been liable for the negligent acts and omissions of its servants. We cannot concur in this contention. The wires were originally placed there for commercial purposes. After the accident they were removed by the city authorities and stored with other property belonging to the defendant. The city had attempted to make the wires secure immediately after the fire. The agent of the defendant who performed that service was acting in the line of his duty. Cities of the class of the defendant are expressly authorized by statute to erect and maintain electric lighting plants, and a municipality that lawfully engages in commercial enterprises is liable to the public the same as an individual.

And, finally, it is urged that the court erred in overruling the motion for a new trial. One of the grounds set out in the motion for a new trial was newly discovered evidence. Affidavits were filed in support of that branch of the motion. We have examined the affidavits, and, had the persons who subscribed to these affidavits testified as disclosed by the affidavits that they would, their evidence would have been cumulative only, and the trial court was chargeable with no abuse of discretion in overruling the motion for that reason.

We find no reversible error, and recommend that the judgment be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed February 20, 1908. *Former judgment of affirmance adhered to:*

1. Trial: EXAMINATION OF WITNESS. It is a valid objection to a question upon cross-examination that it is unnecessarily complex in form and involved in meaning, and it is not error to sustain an objection to such a question upon that ground, especially where the party makes no offer to put his interrogatory in a simpler and clearer form.

2. New Trial: SHOWING. An affidavit for a new trial on the ground of newly discovered evidence must state facts and circumstances from which the court may determine that the party applying exercised diligence in endeavoring to procure such evidence before the trial.

CALKINS, C.

The facts in this case are set forth in the former opinion, *ante*, p. 671. The correctness of the proposition stated in the first and second points of the syllabus was not challenged upon the reargument; but it was insisted that the court did not sufficiently consider the error alleged in sustaining objections to a question asked by the defendant in the cross-examination of the witness Garner, nor the alleged error in the overruling of the motion for a new trial on the ground of newly discovered evidence.

1. The witness Garner had testified to the examination made by him and his associates after their return from taking the plaintiff to Lincoln, and to the discovery that the wire in question was low enough to have caused the accident, and that there was no other obstruction which could have caused the same. Upon the cross-examination

he admitted that he told Dr. Foss before making this investigation that he thought the limbs of the tree knocked the plaintiff off the cars. The cross-examination was continued by the defendant as follows: "Q. Now, Mr. Witness, you knew that this tree was there, did you? A. Yes, sir. Q. And you knew that before you told Dr. Foss of it? A. Yes, sir. Q. And you knew where the tree was, didn't you? A. Well, I knew about where it was; yes, sir, right there beside the track. Q. And you knew that the point where you saw Mr. Todd fall off and where this wire was over west of this tree, didn't you know it at that time? A. That where Todd fell was over west of the tree? Q. Yes, sir; that is, where you claimed he fell off? A. Well, sir, I can't say as to how far it was from the tree. Q. Didn't you know at that time it was some ways west? Didn't you know that the wire was some distance west of that tree? A. Well, I can't say that I did. Q. Well, did you know at the time that you were talking with Doctor Foss that you hadn't passed that tree, if what you have stated heretofore was true, that Todd fell off west of it, at the time the accident occurred?" To this question the plaintiff objected as not a cross-examination, and because the question was not intelligible, and assumed certain facts not shown to have been testified to. This objection was sustained. The question was complex in form and involved in meaning, and such as might be uncomprehended or misunderstood by the witness, and we think the court properly sustained the objection on that ground. The defendant did not make any offer to simplify the question, ending his cross-examination with the sustaining of this objection. We still agree with the statement in the former opinion that, if the witness had made the admission sought to be elicited by the question, it would not have conflicted with his former statements; but, whether this be so or not, the question in the form in which it was put was objectionable for the reasons we have stated, and the district court was right in sustaining the objection thereto.

2. To entitle a party to a new trial on the ground of

newly discovered evidence, it is necessary for him to show that he could not with reasonable diligence have ascertained its existence and produced this evidence at the trial; and this must be established, not by the conclusions of the witness supporting the application, but by facts and circumstances from which the judge may determine whether the party did in truth use such diligence. The allegations in the affidavit made by the attorney for the defendant to establish such diligence are that he made inquiry of all whom "affiant had reason to suspect knew anything of the fact"; and in making such inquiries for facts "affiant talked with every one who he had reason to suppose would be informed as to such facts, and all that affiant had any reason to believe would have been in the vicinity of the accident at the time it occurred, and all that affiant had any reason to suppose had any business near the accident at the time it occurred." This affidavit made the witness the sole judge of where and of whom his inquiries should be made. It stated no facts from which the court could say whether the judgment of the witness was properly exercised, and in this we think it was fatally defective. *Goracke v. Hintz,* 13 Neb. 390, and cases there cited; *Richter v. Meyers,* 5 Ind. App. 33; *Smith v. Williams,* 11 Kan. 104. For this reason alone the application should be denied, and it is not necessary for us to reexamine the question whether the newly discovered evidence was cumulative or not.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

IN RE ESTATE OF THOMAS POWERS.

JOHN POWERS ET AL., APPELLANTS, V. HANS PETERS ET AL., APPELLEES.

FILED JULY 12, 1907. No. 14,923.

1. **Wills: APPEAL.** In case of contest over the probate of a will, the filing of an appeal bond within thirty days after judgment in the county court, and of a transcript of the proceedings had in that court in the office of the clerk of the district court within ten days thereafter, is sufficient to vest the district court with jurisdiction under the provisions of chapter 20 of the Compiled Statutes.

2. ———: ———: **EVIDENCE.** A judgment admitting a will to probate will not be set aside on appeal because of conflicting evidence on the question of whether or not the testator expressly directed the draughtsman to sign his name to the will.

3. **Witnesses: COMPETENCY.** A beneficiary under the provisions of a will is not an incompetent witness to testify to a conversation between the testator and a third person, in which the witness took no part.

4. **Wills: EVIDENCE.** The testimony of subscribing witnesses to a will, tending to show that the testator was capable of transacting ordinary business, is sufficient to make a *prima facie* case of testamentary capacity.

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

E. S. Nickerson and *Hall & Stout,* for appellants.

W. R. Patrick and *B. S. Baker, contra.*

JACKSON, C.

This is an appeal from a judgment of the district court for Sarpy county admitting to probate the will of Thomas Powers, deceased.

The first assignment of error relates to the jurisdiction of the district court, and is disposed of in appellant's brief by the statement that no appeal had been taken to the district court from the county court (where the judgment

was favorable to the contestant) by any person entitled to appear, and in the manner provided by law. Counsel have failed to call our attention to any matter which would render the jurisdiction of the district court faulty. Judgment was entered in the county court on the 22d day of August, 1905. The proponent filed and procured to be approved an appeal bond on September 13, 1905. A transcript of the proceedings had in the county court was filed in the district court on September 22 of that year. The provisions relative to appeal in probate matters are to be found in sections 42-47, art. I, ch. 20, Comp. St. 1905. In substance they are that appeals shall be allowed from any final order, judgment or decree of the county court to the district court by any person against whom such order, judgment or decree may be made, or who may be affected thereby. The party appealing is required to give bond in such sum as the court shall direct, conditioned that the appellant will prosecute such appeal to effect without unnecessary delay, and pay all debts, damages and costs that may be adjudged against him. The bond shall be filed within 30 days from the rendition of such decision, and the transcript of the proceedings in the county court is required to be transmitted to the clerk of the district court within ten days after the perfection of the appeal. Upon the filing of such transcript in the district court, that court is possessed of the action, and shall proceed to hear and determine the same as upon appeals in civil actions. So far as we are able to determine without the aid of suggestion of counsel, the appeal conforms in all respects with the requirements of the statute and the district court was not without jurisdiction.

It is next urged that the will was not executed according to the provisions of the statute. In this state wills, other than nuncupative wills, are ineffectual to pass an estate unless in writing, signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses. The evidence discloses

that the testator was unable to write and could not sign his own name, and it is the claim of the contestant that the name of the testator was not signed to the instrument by his express direction. D. J. Ryan, the proponent, was a witness in his own behalf. There is no dispute about the fact that the will was written by one Burbank at the dictation of the testator. Ryan's testimony is to the effect that after the will had been written out Burbank said to the testator: "The will is now finished, Tom, and I want your signature to it. You may sign it." Mr. Powers said: "I cannot sign my name. You sign for me." It further appears from the evidence of Ryan and other witnesses that Burbank signed the name of the testator to the will, and that with the hand of the testator resting upon the pen a cross was made representing his mark; that the will was read over to the testator, and that he, in the presence of two attesting witnesses, declared that it was just what he wanted, and the witnesses thereupon subscribed their names to the instrument as such. Ryan was the principal beneficiary under the will, and it is said that he was an incompetent witness under the provisions of section 329 of the code. The testimony of the witness Ryan, however, relates to a conversation between the decedent and Burbank, in which the witness took no part, and construing the provisions of section 329, *supra,* in *Kroh v. Heins,* 48 Neb. 691, it is said that one having a direct legal interest in the event of a suit was not disqualified to testify to a conversation between the deceased person and a third party. Under the rule there announced the proponent was a competent witness to the extent that he was examined in support of the will. There is some conflict in the evidence as to whether or not the testator in fact requested Burbank to sign his name, but the testimony of the witness Ryan is corroborated by the fact, testified to by all the witnesses, that the testator placed his hand on the pen while his mark was being affixed to the signature, and the question was for the jury, whose finding under the record should not be disturbed.

The third assignment of error relates to the complaint that there was no competent testimony to go to the jury on the testamentary capacity of the testator. This necessarily involves the question of the burden of proof where the probate of a will is contested on the ground of lack of testamentary capacity. The general rule is that all persons are presumed to be sane and to possess sufficient mental capacity to execute all documents in the various transactions of human affairs. The business of the world is carried on upon that presumption. It prevails in all cases of conveyances executed in conformity with statutory requirements, and there seems to be no good reason for departing from it where the contest involves the validity of a will. Lack of testamentary capacity is ordinarily an affirmative defense, and if relied upon should be, as it was in this case, pleaded by the contestant. This rule, however, seems to have been modified by the statute, and it was so held in *Seebrock v. Fedawa,* 30 Neb. 424, where it is said to be the duty of the proponent, in the first instance, to offer sufficient testimony of the capacity of the testator to make out a *prima facie* case. Before the will was received in evidence, the attesting witnesses were called and examined on behalf of the proponent, and both testified that the testator was capable of transacting ordinary business. We are not prepared to say that, where a proponent proves the testator to have been capable of transacting ordinary business, he is required to go further in order to make a *prima facie* case of testamentary capacity. The testimony in support of the contestant's case was, in our judgment, entirely insufficient to overcome the presumption arising out of the *prima facie* case made by the proponent.

Some objections are urged against the instructions, mostly in the nature of a general complaint that they were erroneous and prejudicial. We have carefully examined the instructions, and think that they were fully as favorable to the contestant as the circumstances would justify.

We find no prejudicial error, and recommend that the judgment be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

JEFF HAINES, APPELLANT, V. KEZIAH FRANCES HAINES, APPELLEE.

FILED JULY 12, 1907. No. 14,931.

Divorce: EVIDENCE. It is not error to deny a divorce from the bonds of matrimony on the charge of extreme cruelty on the part of the wife, where the evidence of the husband as to alleged misconduct is not corroborated, and discloses, at most, occasional ill temper.

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

Hamer & Hamer, for appellant.

JACKSON, C.

The plaintiff has appealed from a judgment of the district court denying a divorce from the bonds of matrimony. The action is grounded on the charge of extreme cruelty. Personal service of summons was had on the defendant, who failed to appear, and the hearing was *ex parte.*

The plaintiff and defendant were married in 1874, and became the parents of six children, the youngest of whom was a boy 16 years of age at the time of the trial. The plaintiff testified in his own behalf that at times when he would come home his wife would "put on her old sunbonnet, pout around and wouldn't say anything for a week"; that she called the plaintiff a "darned fool" and

a "dunce," and said "if he had his rights he would be in the asylum or pen"; that on two occasions before the separation she threatened violence, once that she would finish him, and at another time that she would put a pill in his biscuit and fix him, and on one occasion she shook her fist at him. The period covered by this alleged misconduct on the part of the wife was of some years' duration. They, however, continued to live together until the second day of July, 1904, at which time the defendant went to visit her brother in Iowa, her only visit away from home during the lifetime of the youngest child. The plaintiff objected to this visit, because, as he says, he was engaged in carpenter work with men in his employ, and needed the wife at home. However, a daughter 26 years of age remained at home during the absence of her mother and kept the house. The plaintiff declined to live with the defendant further. There was no corroboration of the plaintiff's testimony as to the misconduct complained of, and we do not think that the court erred in refusing the plaintiff a divorce.

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

AMES and CALKINS, CC., concur.

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

AFFIRMED.

MARTIN HERPOLSHEIMER ET AL., APPELLEES, V. CITIZENS INSURANCE COMPANY, APPELLANT.

FILED JULY 12, 1907. No. 15,121.

1. **Witnesses**: PRIVILEGED COMMUNICATIONS. A waiver of protection against the disclosure of privileged communications may be withdrawn at any time before acted upon.

2. **Insurance**: PLEADING. In an action on a fire insurance policy,

where the destruction of the property by the insured is relied upon as a defense, such defense should be affirmatively pleaded.

3. **Pleading**: GENERAL DENIAL. A general denial in an answer puts in issue only such pleaded facts as are necessary for the plaintiff to prove in order to enable him to recover.

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

Greene, Breckenridge & Matters, for appellant.

Field, Ricketts & Ricketts, contra.

JACKSON, C.

This is one of a series of cases that have been before the court, first on appeal from judgments favorable to the plaintiffs, and later from judgments denying petitions for new trials in the cases already determined. *Citizens Ins. Co. v. Herpolsheimer,* 77 Neb. 232, 78 Neb. 707. The judgment was for plaintiffs. Some of the questions presented by the assignments of error are identical as to facts and the application of the law with the questions determined in the previous cases, and will not be noticed again.

One assignment of error relates to a claim that a portion of the property damaged or destroyed was not on the premises described in the policy, but that contention was waived in the oral argument. Soon after the loss the plaintiffs employed F. P. Olmstead, an attorney at law residing at Hastings, to prepare their proofs of loss and otherwise represent them in their negotiations with the insurance companies to secure payment of the indemnity provided by the contracts of insurance. Rudolph Herpolsheimer, one of the plaintiffs, was a witness on behalf of plaintiffs, and on cross-examination testified that Olmstead was no longer in their employ, that he remembered of making no statements to Olmstead as to the origin of the fire, but would waive any objections to having Olmstead's testimony taken on that point. It is also in evidence that at the trial of the former cases, which was to

the court, counsel representing plaintiffs offered in open court to waive objections and permit Olmstead to testify, an offer that was not then taken advantage of. At the trial of the present case, however, the defendant produced Olmstead as a witness, and offered to prove by him that Rudolph Herpolsheimer told him he had caused the fire, and gave the details of how the arrangements were made to have the fire started. To this offer the court sustained an objection that the communication was privileged and not within the issue. The objection was properly sustained on both grounds. Where the destruction of property by the owner is relied upon as a defense in an action on a fire insurance policy, it should be affirmatively pleaded.

It is urged, however, that the obligation to plead this defense was rendered unnecessary by reason of an allegation in the petition that "the fire did not originate by an act, design or procurement on the part of the plaintiffs," and a denial of such allegation in the answer. The identical question was involved in *Morley v. Liverpool, L. & G. Ins. Co.*, 92 Mich. 590, and it was held that the pleadings did not present the issue that the owner destroyed the insured property. This is in accord with the general rule that a denial puts in issue only such allegations of the petition as the plaintiff is required to support by proof in order to recover on his cause of action. The policy required the insured to furnish proofs of loss with a statement of the knowledge and belief of the insured as to the time and origin of the fire. Olmstead prepared the proofs while serving as attorney for plaintiffs, and any communications made to him by his clients touching the origin of the fire were privileged and should not be disclosed, unless the privilege was waived. The claim of waiver by counsel for plaintiffs at the trial of the former cases requires no discussion, because, even if there was a waiver at the previous trial of this case, the waiver would not continue to a second trial. *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Briesenmeister v. Supreme Lodge*, 81 Mich. 525. And we are inclined to the rule that the waiver of a

privileged communication may be withdrawn at any time before acted on, and where no advantage has accrued to either litigant on account thereof. Besides, there are three plaintiffs jointly interested in the action, and a waiver by one should not be permitted to operate to the prejudice of the others who may claim the benefit of the privilege.

A portion of the property covered by the insurance consisted of a stock of buggies, a part of which were totally destroyed, and others were somewhat damaged. The plaintiffs had a public sale of the damaged property. The policy in suit provides that the company should not be liable beyond the actual cash value of the property insured at the time of loss, and that the damages should not exceed what it would cost to repair or replace the same with material of like kind and quality; that an estimate shall be made by the insured and the company, and if they differ, then by appraisers to be selected as provided in the policy, and the company had the option to take all or any part of the articles at the ascertained or appraised value, and also to repair, rebuild or replace the property with other of like kind and quality, but the insured had no option to abandon to the company the damaged goods. The defendant now insists that the sale of the damaged buggies by plaintiffs operated to deny it the option of taking the same at its ascertained or appraised value, and that the policy was thereby forfeited. In connection with this claim it may be said to be settled in advance that the stipulation for arbitration will not be enforced in this state, and that forfeitures are not favored. Certain admitted facts also have an important bearing on the conclusion to be reached.

The fire occurred on August 22, 1904. Mr. Hamlin, the company's adjuster, visited the scene of the fire on the second or third day following, and attempted to agree with plaintiffs on a basis for an adjustment of the loss. He remained two days or more in the pursuit of this purpose, which failed. He was there again some four or five days later, and inspected the damaged property with the

same purpose, and again on September 14. The sale of the damaged goods occurred September 17, and Mr. Hamlin was advised of the purpose to sell as early as September 9. His testimony discloses that a mutual agreement as to the amount of the loss had become hopeless when he was last there, and at that time he made a written demand for an appraisement. Upon this demand and the refusal of the plaintiffs to comply therewith, and the fact that the defendant, by the terms of the policy, was given 30 days after proof of loss to exercise the option, and the fact that the sale occurred within 30 days from the time proof of loss was made, is predicated the claim of forfeiture. Mr. Hamlin had resided in Nebraska for 39 years, and had been an insurance adjuster for more than 30 years. A suggestion that he did not know when this demand was made, that it was futile, and that upon it the company could base no rights, would be taken by him as an insult. Proof of loss, under the repeated holdings of this court, had been waived by the appearance of the adjuster, and the negotiations already had for the purpose of ascertaining such loss and proof thereafter furnished became immaterial. The defendant had ample opportunity to and did inspect the damaged property for the purpose of ascertaining the loss before the sale, and the case does not come within the rule of *Oshkosh Match Works v. Manchester Fire Assurance Co.*, 92 Wis. 510, cited by the defendant in support of this branch of the case, and should also be distinguished from those cases determined by the courts where the appraisement clause is enforced. There is no claim that the damaged property did not sell for its actual value in its damaged condition. The defendant therefore suffered no loss and was not prejudiced by the sale. The optional features of the policy are unilateral. To the insured no option is given. He must bare his neck to the ax and take the blow when it falls. Contracts of insurance, like other contracts, should be construed with reason. Ample opportunity should be afforded the insurer

to inspect the property damaged by fire and to discover the actual loss. When that has been done, no reason remains why the insured should not protect himself from further loss from deterioration of his property.

The trial court instructed the jury, in effect, that the demand for an appraisal was a waiver of the option to take the damaged property after the loss had been ascertained. This instruction, in view of the conclusion already reached, if erroneous, was without prejudice, although it has support in authority. *Elliott v. Merchants & Bankers Fire Ins. Co.*, 109 Ia. 39; *Platt v. Ætna Ins. Co.*, 153 Ill. 113. One reason urged why the instruction was erroneous is that, because the law would not compel an appraisement, no waiver could be predicated upon the demand. There is some incongruity in the attitude of the defendant. It insisted upon its right to an appraisal while attempting to adjust the loss, and now insists upon the protection of a right growing out of the fact that it was not entitled to an appraisement. It will not be permitted to take one ground prior to actual litigation, and change its base after litigation has commenced.

The policy in suit was for $3,000, the plaintiffs limited their demand for recovery to the sum of $2,000, the total insurance on the property was $8,000. The court instructed the jury as follows: "You are instructed that, if from the evidence and the law as given to you in these instructions you should find for the plaintiffs, then the amount for which the defendant would be liable would be three-eighths of the entire amount of plaintiffs' loss and damage, which you find they have sustained by reason of said fire, upon the goods covered by said policy; but in no event should your verdict exceed the sum of $2,000, with interest thereon at the rate of 7 per cent. per annum from November 15, 1904, which is the amount prayed for by plaintiffs in their petition." Adopting the language of the brief of the defendant, the complaint against the instruction is that "the jury should have been told that, in order to recover the face of this policy, the loss must reach

or exceed $8,000, but that if the proportion of the loss chargeable against this policy should exceed $2,000 the plaintiffs' recovery must nevertheless be limited to $2,000. But the instruction permits a recovery of $2,000 if the jury should find that three-eighths of the loss equals that sum, and is a specific direction to find for the plaintiffs in that amount." We are unable to distinguish between the instruction actually given and the rule contended for in the above quotation.

There is no claim that the amount of recovery was not justified by the evidence, and we recommend that the judgment be affirmed.

AMES and CALKINS, 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 SALLIE A. HESSLER.

FLOYD H. HESSLER ET AL., APPELLANTS, V. NELLIE E. CADY, APPELLEE.

FILED JULY 12, 1907. No. 14,897.

Descent and Distribution: GIFT TO ANCESTOR. After the death of one to whom has been made a gift or loan, the distributive shares of the children of the debtor or donee, as heirs at law of the creditor or donor, cannot without their consent be diminished by charging a gift or loan as an advancement to their ancestor, which has not acquired that character during the lifetime of the latter.

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

Talbot & Allen, for appellants.

T. T. Bell, contra.

AMES, C.

After the death of Mrs. Sallie A. Hessler, there was found among her papers a writing in her own hand and signed by her, which would have been effectual as her last will, except for the fact that it lacked the formal execution required by statute. She left surviving her a son and a daughter and two minor children of a deceased son, named Herbert. The writing purports to dispose of her estate among her heirs at law, apparently as nearly as possible in conformity with the disposition made of it by the statute of descents and distribution, except that it contains the following clause: "While Herbert Hessler was living he used $400 of his part, so that must be considered a loss to his children, Floyd Hessler and Wallace Hessler." The county court in making his order of distribution treated the language quoted as sufficient to charge the $400 mentioned as an advancement, and diminished the amount otherwise distributable to the children of the deceased by that sum. On appeal to the district court, the order of distribution was affirmed, and from the judgment of affirmance this appeal is prosecuted.

There is no dispute about the facts, and the only question involved is that of the interpretation of section 37, ch. 23, Comp. St. 1905, entitled decedents, which is as follows: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." Now, it is not inferable from the above quoted language of the document written by Mrs. Hessler that the $400 mentioned therein was a gift or grant by her to her deceased son, nor is there anything therein, or in the evidence preserved in the bill of exceptions, to indicate how or when or why or under what circumstances he obtained it, except the expression that he used that sum. Whether such use was without the consent or knowledge of the intestate is a matter of

conjecture, which derives no certainty even from the presumption of innocence. But in the absence of evidence the law does raise a presumption that by such use he became indebted to her in that sum. How, then, could that debt have become afterwards converted into an advancement and chargeable against his distributive share of her estate at her death? Plainly, we think, not without the consent of both parties to the existing expressed or implied contract of debtor and creditor. Certainly she or her personal representative would not have been bound by an "acknowledgment in writing" by him in which she did not concur, and which, if valid, would have discharged his debt, and he, if living, might presumably have had reasonable grounds for objecting that an alleged debt which he may have paid, or against which he had a valid legal or equitable defense, should be charged arbitrarily against his distributive share. It is true that no one is heir of the living, and that he or his children might have been cut off by will without regard to his having or not having obtained an advancement, but such an event would not have affected the relation of debtor and creditor, and on the instant of her death, intestate, the title of his minor children to their distributive shares became irrevocable. Their *status* as heirs at law of the intestate would not have been affected even by a will disposing of all her estate to their exclusion, and it follows of necessity, we think, that their inherited interests could not have been diminished or affected in consideration of an indebtedness of their deceased parent or otherwise, except by testamentary disposition. There is authority for holding that a gift or grant can be given the character of an advancement only at the time it is made. *Ludington v. Patton*, 121 Wis. 649; *Lodge v. Fitch*, 72 Neb. 652. Whether the doctrine as thus stated is not somewhat too broad, or rather is not somewhat misleading, it is not now necessary to inquire. It is at any rate quite clear to us that, after the death of one to whom has been made a gift or loan, the distributive shares of the children of the debtor or donee, as heirs at

law of the creditor or donor, cannot without their consent be diminished by charging the gift or loan as an advancement to their ancestor, which has not acquired that character during the lifetime of the latter.

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

JACKSON and CALKINS, 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 consonant with this opinion.

REVERSED.

DOROTHEA RAU, APPELLEE, V. JULIUS E. RAU, APPELLANT.

FILED JULY 12, 1907. No. 14,901.

Oral testamentary agreements must be established, if at all, by clear and satisfactory evidence, of which the record in this case falls short.

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

Harry Fisher, J. D. Ware and *Frank Heller,* for appellant.

J. H. Van Dusen, contra.

AMES, C.

This is an action to recover the possession of a lot of ground and appurtenances situated in a suburb of the city of Omaha. The plaintiff is a widow, who at the time of the trial was 76 years of age, and the defendant is her son. She bought the ground and erected a cottage upon it with her own means in 1885, when she was 55 and the defendant

18 years old. It is said that the son furnished $200 toward building the cottage, for which she gave him a due bill which has never been paid. How or from what source he obtained the money is not stated. She occupied the cottage as a home until 1896, her son living with her until 1896. In that year was erected upon the lot, without disturbing the cottage, a brick store building two stories in height and having a basement room or cellar. For the construction of the building she furnished $800 of her own money and $1,600 which she borrowed of a daughter and secured by her own note and a mortgage on the property, making $2,400 in all. There is a dispute and uncertainty whether this was the entire sum expended on the building, or whether it cost some $500 or $1,000 more, which was contributed by the children of the plaintiff, including the defendant. The object for which the building was erected was to enable the defendant, who had attained his majority, to engage in business, which he did, using the lower room and basement for that purpose. The upper room was used as a dwelling for the family, of which the mother continued to be the head and for which she did the household work, and the cottage was rented. The defendant thenceforward occupied the store room and basement free and received the rents from the cottage and paid the taxes on the entire property, which latter item the rents and rental values considerably exceeded. There was no accounting made or demanded or, apparently, expected. During some or all of the time the defendant paid his mother $3 a week for his board, and claims to have contributed some indefinite sums toward the support of the family, of which one of his sisters and a niece were members for a part of the time, by way of furnishing groceries and refunding sums contributed by the other children of the plaintiff toward erecting the building. The situation continued substantially as above narrated until December, 1904, when the defendant married and introduced his wife into the family. Shortly after the latter event dissensions arose, resulting in the removal of the

defendant and his wife to the cottage. This action was begun in May, 1905. The defendant filed a cross-bill, in which he alleges that at the solicitation of his mother he threw up a profitable employment, at wages, and devoted his time, money and attention to the selection of the lot of ground and the erection of the buildings thereon, and generally to assisting in the maintenance of the home, in consequence of and in reliance upon her oral promise that at her death the property should become his own by testamentary devise, and prays that the agreement may be specifically enforced by perpetually enjoining the plaintiff from disturbing his possession or making any disposition of the title inconsistent therewith. The district court, after a trial, rendered a decree dismissing the cross-bill and quieting a title and possession in the plaintiff. The defendant appealed.

The sole evidence of the alleged oral testamentary agreement is the testimony of the defendant, which is flatly contradicted by his mother, but which his counsel contend is corroborated by the testimony of one of his sisters and her husband, that the mother had told them she intended that the defendant should have the property at her death, and intended to make a will to that effect, and that she had in fact executed such a will. The plaintiff does not deny having said something of this purport both to the witnesses and to the defendant, but she says that her statement or promise, if it may be regarded as such, was always coupled with the condition that her son should treat her kindly, and that she should continue to live with him upon the premises until her death. But she says that the condition has been broken and the promise forfeited by abusive and cruel treatment and abandonment of her since it was made. Concerning this latter matter there is, of course, a conflict of testimony which we think it unnecessary to set forth. The conditional feature of the promise is corroborated by at least one of the witnesses and is established by a preponderance of the evidence, and we think that under such circumstances the question whether the treatment

was sufficiently kind and considerate must be left very largely to the feelings and judgment of the promisor. But, even if it be supposed that the condition was not made and that the promise was absolute, which the burden is upon the defendant to prove, the evidence falls far short, in our opinion, of sufficiency to show that it was made at such a time or in such circumstances or with such solemnity as to constitute a binding testamentary agreement. It does not appear to us that the defendant has expended any considerable time, labor, skill or money in behalf of his mother beyond what was demanded from him by the obligations of filial affection, or for which he has not been fully compensated by his use and enjoyment of the home and property. This court has repeatedly held that such agreements must be established, if at all, by clear and satisfactory evidence. *Teske v. Dittberner,* 65 Neb. 167, 70 Neb. 544; *Peterson v. Estate of Bauer,* 76 Neb. 652, 661. In this connection we quite approve and adopt the language of the supreme court of Pennsylvania in the somewhat similar case of *Poorman v. Kilgore,* 26 Pa. St. 365. "We may notice still another principle of law that is applied very beneficially to restrain the exceptions to the statute, and which is of special importance in this case, though its application is not peculiar to cases under this statute. We allude to the law of evidence that grows out of family relations. It is so usual and natural for children to work for their parents, even after they arrive at age, that the law implies no contract in such cases. And it is so natural for parents to help their children by giving them the use of a farm or house, and then to call it theirs, that no gift or sale of the property can be inferred from such circumstances. It is so entirely usual to call certain books, or utensils, or rooms, or houses, by the name of the children who use them, that it is no evidence at all of their title as against their parents, but only a mode of distinguishing the rights which the parents have allotted to the children as against each other, and in subjection to their own paramount right. The very nature of the relation,

therefore, requires the contract between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have special reference to it, and nothing else. * * * The importance of this rule is very apparent; for it requires but a glance over the cases of this class to discover how sad has been the experience of courts in family disputes, growing out of the exceptions which have been allowed to this statute; and how many and how distressing must have been the ruptures of the closest ties of kindred that have been produced and perpetuated by the encouragement thus given to try the experiment of extracting legal obligations out of acts of parental kindness."

We very much doubt if in this case the mother ever made, or intended to make, or was ever, at the time of speaking, understood as making any promise at all. Because of the social as well as blood relationship between the plaintiff and the defendant who, it would seem, was the youngest child and only son, she had formed an intention of bestowing the home upon him at her death. Of this intention she made no secret, and she gave expression to it without hesitation whenever an occasion suggested her doing so. But by reason of a natural and almost inevitable caution she accompanied each such expression with an admonition that her beneficence would be dependent upon the receipt of an equivalent in the way of kind, dutiful and affectionate treatment and regard. To distort such expressions, made in such circumstances, into obligatory testamentary agreements would be to sow the seeds of dissension among near kindred, and to destroy those ties of mutual affection and confidence upon which the happiness of domestic life depends.

We have no doubt that the judgment of the district court is right or that it should be affirmed.

JACKSON and CALKINS, CC., concur.

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

AFFIRMED.

ELIZABETH J. NELSON ET AL., APPELLEES, V. JAMES NEVELS ET AL., APPELLANTS.

FILED JULY 12, 1907. No. 14,920.

Intoxicating Liquors: LOSS OF SUPPORT. In a suit by a married woman in behalf of herself and minor children, under the statute relative to the sale of intoxicating liquors, for damages due to the incapacitation of the husband and father, the gist of the action is the loss of the means of support, and not any personal injuries he may have suffered as a result of intoxication.

APPEAL from the district court for Platte county: JAMES G. REEDER, JUDGE. *Affirmed.*

McAllister & Cornelius, for appellants.

J. J. Sullivan and *W. N. Hensley, contra.*

AMES, C.

This is an appeal from a judgment recovered by a mother in behalf of herself and her minor children for damages, for loss of maintenance, against two saloonkeepers having separate licenses and engaged in several businesses in the same town. The petition alleges in substance that the wrongs complained of, and consequent loss of support, began on the 1st day of March, 1905, and were continuous from that date until the time of the commencement of the action, and that particularly on the 1st day of July, 1905, the husband and father became intoxicated by reason of liquors sold or given to him by the defendants, so that he became mentally and physically incapacitated to such a degree that he fell into an excavation in the city and suffered such injuries therefrom that he became thenceforward wholly unable to perform any labor or fur-

nish any means for the support of his family; whereas prior to the wrongful acts complained of he had been capable of earning and had customarily earned the sum of $4 a day, which was devoted to such support. The answer is a general denial of the sale or furnishing by the defendants any liquors at any time. There is sufficient evidence that the defendants had sold and furnished the husband liquors subsequently to the 1st day of March and prior to the day of his injury on July 1, but there is not sufficient evidence that either of them sold or furnished him any such liquors on the latter named day.

The court instructed the jury that the gist of the action is not the personal injuries to the husband, but the loss of means of support, and that they were at liberty to compensate the plaintiffs for any such loss due to the defendants' traffic in intoxicating liquors bewteen the 15th day of March, 1905, and the date of the beginning of this action. This instruction was excepted to and is assigned for error, but we think it states the law correctly. The fall and consequent injury are not substantive facts, nor is the husband's subsequent incapacitation such, if the latter is not traceable through the fall or otherwise to the traffic in liquors, but if it had been so traceable we think the fall, as an incident in the chain of causation, would have been provable without specific pleading. Failure of evidence in this particular diminished the amount, but did not affect the right, of recovery.

A verdict of $270 indicates that the jury did not mistake the issues or evidence or misunderstand the instructions of the court, and we are of opinion that the judgment ought to be affirmed.

JACKSON and CALKINS, CC., concur.

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

AFFIRMED.

GEORGE W. SAPP, APPELLEE, V. CHRISTIE BROTHERS, APPELLANTS.*

FILED JULY 12, 1907. No. 14,924.

Master and Servant: APPLIANCES: ASSUMPTION OF RISK. "Where a servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not as a matter of law assume the risk of injury from accident resulting from the master's negligence." *Lee v. Smart*, 45 Neb. 318; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578.

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

Lambert & Winters, for appellants.

W. R. Patrick and *Jacob Fawcett, contra.*

AMES, C.

This is an appeal from a verdict and judgment awarding damages in an action for personal injuries. There is no considerable dispute of fact. The plaintiff was a man 25 years of age, reared on a farm, and accustomed to the use of teams of horses, harness and wagons, and their appliances, and somewhat familiar with the streets and general conditions of South Omaha, Nebraska, in which city the defendants were engaged in the retail coal and feed business. On a Saturday he applied to the defendants for employment in the driving and management of a delivery wagon in connection with their trade, he to furnish a team of horses and harness. One Sherwood, who was in general charge or management of the defendant's business, or some branch of it, directed the plaintiff's attention to a light wagon which had been in use about six months, and which he stated the latter would be required to use in case of the

*Rehearing allowed. See opinion, p, 705, *post.*

hiring. It was noted that the wagon was not then, and never had been, provided with a brake, and that the neck-yoke appeared to be somewhat old and season-cracked, and that the "pole eye," a leather attachment in which the end of the wagon pole is inserted and by which the latter is supported when in use, was considerably worn and weakened. Nothing further was said about any of these matters, except that Sherwood furnished the plaintiff with some baling wire, which the latter wound about the neck-yoke, so as to add to its strength and to that of the leather, and remarked that the defendants were rushed with business just then, but that, when they had caught up with their orders, they "would have these things fixed up a little better." The plaintiff engaged for the services of himself and team and harness for the term of six months, and begun work on Monday morning, when the foregoing conversation took place at the time of attaching the team to the wagon. Plaintiff remained in the employment thence continuously until about noon of the following Thursday, when he attempted to deliver a load of feed to one McMasters. A shed or stable to which the delivery was to be made stood adjoining an alley, extending through a block of ground and connecting two streets. It was a public way much used or traveled, but the surface of the ground was some 10 or 12 feet lower where the building stood than was that of the street, 61 feet distant, whence the plaintiff approached it. The plaintiff, sitting on the wagon, having reached the summit of the declivity, paused a moment to survey the situation, and then reined his team into the alley and started down the incline. McMasters was present, having first provided himself with a "chuck block" to put under a wheel and stop the descent when necessary. In some manner, no one knows just how or from just what cause, possibly from contact with the coal or feed house, one end of the neck-yoke, to which the hame straps were attached, broke off while the wagon was descending, and that end fell down; immediately the leather "pole eye" gave way, the pole dropped to the ground, struck an ob-

struction, bent and broke, and a piece of it flew upward and hit the plaintiff, knocking him from his seat and inflicting injuries complained of. The team ran away. The answer consists of denials and a plea of contributory negligence.

The contention on behalf of the defendants is that the facts are insufficient to support the verdict. Of course, the first matter to be considered in this connection is whether the defendants are guilty of negligence, and this inquiry resolves itself into the preliminary question whether it was an act of negligence to use the wagon without a brake and with the defective neck-yoke for the transportation and delivery of comparatively heavy loads over the steep grades and precipitous streets and alleys of the city of South Omaha. To the eye of natural reason this question, under the circumstances of this case, would, we think, appear to be wholly immaterial. It is not a case in which the servant was ordered or commanded by his master to put himself in a place of danger or to use dangerous or defective tools, machinery or appliances, nor is it a case in which the servant relied upon the real or supposed superior knowledge, experience or judgment of his master. On the contrary, the plaintiff and the defendants, or Sherwood, the representative of the latter, seem to have been about equally capable and well informed, and the former acquainted himself with all the deficiencies of the vehicle and dangers of its use before he entered upon his service with it. If such use could have been reasonably anticipated to result in injury to a third person and had done so, or had been a criminal offense under a statute, it cannot be doubted that in the one instance the parties would have been joint tort-feasors, or that in the other they might have been jointly indicted and convicted. How then can it be said that either party can impute to the other the consequences of a wrongful or negligent act in which both participated? The plaintiff was under no compulsion, legal or moral, the relation of master and servant or of employer and employee did not exist, and no contractual

obligation was assumed, until after all the elements of danger to which he exposed himself by entering upon the service had become fully known to him.

But it is said that the plaintiff relied, and rightfully so, upon the promise of Sherwood to repair. It is hardly a fair construction of the indefinite remark that, "when they caught up with their orders, they would have these things fixed up a little better," which treats it as a definite promise or contractual obligation to repair. But, supposing it to be such, counsel for plaintiff cites and relies upon two former decisions of this court. The first is *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578, in which it is said that "the true rule might be stated to be that, if the defective machinery, though dangerous, is not of such a character that they may not be reasonably used by the exercise of care, skill and diligence, the servant does not assume the risk. If the servant, in obedience to the requirement of the master, makes use of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the master would be liable for a resulting accident." This language is quoted with approval and adopted as a basis for judgment in *Lee v. Smart,* 45 Neb. 318. In both cases the servant well knew the defects and dangers which resulted in his injury. In the latter instance they came to his knowledge at the time he entered upon his employment, and in the former the promise to repair was no better than that above quoted, so that we are unable to distinguish the cases from that now before us. Owing to a lack of mental acumen the writer is unable to reconcile them with the general rules of law or with the principle underlying the doctrine of contributory negligence, but that does not matter. Under the authority of those decisions, if it was negligent to use the wagon for the purpose and under the circumstances above narrated, it was the negligence of the defendants alone, and whether it was such is a question of fact for the determination of the jury. And, in like manner, it was a

question of fact for the decision of the jury what degree of care and skill was required by the plaintiff in the use of the wagon, and whether he made use of so much on the occasion of his injury. It is not complained in brief or or argument by counsel that these questions were not fairly submitted to the jury by instructions, and the judgment ought therefore, upon the authorities cited, to be affirmed.

JACKSON and CALKINS, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed March 5, 1908. *Former judgment of affirmance adhered to:*

Master and Servant: APPLIANCES: NEGLIGENCE. A servant, who has been induced by a master's promise of repair to begin or continue to work with defective appliances, may use such defective appliances without being guilty of contributory negligence and without assuming the risk of injury from such defects, so long as he may reasonably expect the master's promise of repair to be kept, unless the danger from using such defective appliances is so obviously imminent and immediate that no reasonably prudent person would begin or continue to work with them.

GOOD, C.

This cause is now before us upon a rehearing. The former opinion is reported, *ante,* p. 701, where a statement of the facts essential to an understanding of the case will be found.

At the outset it may be well, perhaps, to state that we think the following language used in the former opinion: "The relation of master and servant or of employer and employee did not exist, and no contractual obligation was assumed until after all the elements of danger to which he exposed himself by entering upon the service had be-

come fully known to him"—is somewhat misleading, and is an erroneous statement of the record. The record discloses that the contract was entered into upon Saturday, the 3d day of October, 1903, to begin on the following Monday, when, pursuant to the agreement, Sapp reported with his team to Christie Brothers for duty, and was, by a member of the firm, directed to take his team and harness to one Sherwood, who would direct him in the performance of his duties. Pursuant to these directions, Sapp then entered upon his employment, and went with his team to the office where Sherwood was, who then took Sapp out to the wagon and directed him to use it. In the course of hitching to the wagon, Sapp discovered the condition of the neck-yoke. We think the relation of master and servant, under the circumstances, began from the moment that Christie Brothers directed Sapp to take his team and harness to Sherwood. It will be conceded, of course, that the discovery by Sapp of the defective condition of the neck-yoke was at the outset of his employment; but the discovery was made after the actual employment had begun. Counsel for appellants lay some stress upon the fact that in the former opinion the foregoing language was used, and that, since the relationship of master and servant did not exist, therefore, the rule laid down in *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578, and *Lee v. Smart,* 45 Neb. 318, had no application to the case at bar. We are inclined to the view that it would be immaterial whether the discovery of the defect by Sapp was made before or after he entered the employment of Christie Brothers. In *Crooker v. Pacific L. & M. Co.,* 34 Wash. 191, 75 Pac. 632, it is held that, if the employee at the time of his employment and at the time of the accident saw the defect and complained of the same to the master, who promised to repair the same, and went to work and continued to work under the promise, where the danger was not so imminent and immediate that a reasonably prudent man would not go to work or continue to work, then the employee did not assume the risk

of an injury resulting from the defect. In the instant case, it appears that the appellee had made special preparation, by the purchase of an additional horse and a set of harness, for the express purpose of enabling him to carry out his contract of employment with the appellants. There would be as strong an incentive for him to wish to enter upon the employment and carry out his contract as there would have been if he had been employed for some time. In the present case, practically the only question at issue is whether or not there is sufficient evidence to sustain the verdict.

The evidence is undisputed that the neck-yoke which was furnished to the appellee was defective and unsafe, and that this was known to both parties before Sapp used it. The rule is well settled that it is the duty of the master to exercise reasonable care to provide reasonably safe tools and appliances for his servants. In this respect appellants were negligent, and the only question is as to whether or not the appellee was guilty of contributory negligence, or assumed the risk of injury, by using the defective and unsafe neck-yoke. The rule of law is well established that, where the servant has knowledge that the tools and appliances furnished him are defective and unsafe and he continues to use the same without objection or protest, he then assumes the risk. *Vanderpool v. Partridge, ante,* p. 165. In the case at bar, however, the servant did not use the appliances without protest, but made timely objections, and was met by the master with assurances that the defect would be remedied. The foreman said that "the neck-yoke was all right, just to take it along, and the first time we got the orders caught up, or when they got them caught up, they would have things fixed up a little better." The servant further protested, and the foreman procured a piece of wire, and told Sapp to wrap that on the neck-yoke, and assured him that the neck-yoke would be repaired when the orders were caught up. There was other evidence which tended to show that the foreman represented to Sapp that, consider-

ing the loads he would have to haul and the roads over which he would have to drive, the neck-yoke was sufficient. These representations, assurances and promises of the foreman were, no doubt, put forth for the purpose of inducing Sapp to go on with the work until the neck-yoke could be repaired, and we think the jury were justified in finding that Sapp relied upon these assurances and promises. Under this state of facts, can it be said that Sapp was guilty of contributory negligence in using the neck-yoke, or that he assumed the risk incident to its use, by remaining in the employment and continuing to use it from Monday until the following Thursday?

The rule which we think applicable to the case is laid down in 1 Shearman and Redfield, Negligence (5th ed.), sec. 215, in the following language: "There is no longer any doubt that, where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept." In 2 Cooley, Torts (3d ed.), 1157, it is said: "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risk." The rules, as here announced, are fully discussed and followed in the case of *Hough v. Texas & P. R. Co.*, 100 U. S. 213, and the rule is there stated in the following language: "If the servant, * * * who has knowledge of defects in machinery, gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it in the well-grounded belief that it will be put in proper condition within a reasonable

time, does not necessarily, or as matter of law, make him guilty of contributory negligence. It is a question for the jury whether in relying upon such promise and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care. The burden of proof, in such a case, is upon the company to show contributory negligence." This case has become a leading case upon the subject, and has been quite generally followed and approved in the courts of last resort in a large number of states, and we think it is now the generally recognized rule of law in this country. Among the many cases, in which the *Hough* case has been cited and approved, are the following: *Crooker v. Pacific L. & M. Co.*, 29 Wash. 30, 34 Wash 191; *Lyttle v. Chicago & W. M. R. Co.*, 84 Mich. 289; *Roux v. Blodgett & Davis L. Co.*, 85 Mich. 519; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148; *Maryland Steel Co. v. Engleman*, 101 Md. 661; *Dowd v. Erie R. Co.*, 70 N. J. Law, 451. The reason, upon which the rule is grounded, is that the master, by inducing his servant to go to work or continue at work with dangerous or defective tools or appliances, under a promise to repair the same, insures the servant against injury from such defects during the time that the servant labors with the defective tools or appliances relying upon the promise to repair. By his promise to repair, the master waives any right to complain of what would otherwise be the contributory negligence of the servant. And, where, by promises of repair, he has induced the servant to continue in the use of defective appliances, the master has thereby debarred himself from pleading any assumption of risk by the servant. Under this rule, Sapp had a right to rely upon the promise of the appellants to remedy the defects complained of, and would not be guilty of contributory negligence, nor would he assume the risk of injury arising from the use of the defective appliance until after the lapse of such a period of time as would preclude all reasonable expectation that the promise of repair would be kept.

Appellants contend that the promise was too vague and indefinite, and that more than a reasonable time had elapsed after the promise, and that therefore it should have been held, as a matter of law, that Sapp assumed the risk. With reference to the first of these contentions, it is sufficient to say that the assurances, though somewhat indefinite, were apparently sufficient to induce the servant to rely upon them. And, where the master has induced the servant to rely upon his promises, though vague and indefinite, he is in no position to complain. If the promises and assurances were sufficient to induce the servant to rely upon them, they should be sufficient for his protection. With reference to the second of these contentions, we think it was properly a question of fact to be determined by a jury, as to what was a reasonable time under all the circumstances. We are not at liberty, under the evidence in this case, to say, as a matter of law, that the time from Monday morning to the following Thursday forenoon was sufficient to induce the servant to believe that the master would not fulfil his promise.

Appellants also contend that the promise was not one for immediate fulfilment, but was not to be fulfilled in any event until the orders were caught up, and, pending the time that the orders would be caught up, the servant must assume the risk. This contention seems to be supported by the case of *Standard Oil Co. v. Helmick*, 148 Ind. 457. We do not think this doctrine is sound, for it is the duty of the master to make repairs, and this is a continuing duty; and, when he, by promises of repairs, induces the servant to continue in the employment with dangerous and defective appliances, he ought, upon sound reason, to be debarred from alleging contributory negligence or assumption of risk in that respect.

Appellants further contend that, when Sapp was at the top of the little hill, down which he had to drive before reaching McMaster's shed, he there stopped and considered whether or not it was safe to drive down the steep hill with his wagon-load, knowing the neck-yoke was defective,

and that he was liable to be injured. The evidence does not disclose such a state of facts. It only shows that he stopped for an instant at the top of the hill before driving down it, apparently to take such precaution as he could to drive carefully.

Appellants also complain because the evidence discloses that the strap attached to the end of the neck-yoke first gave way, and that that was the cause of the accident. It is true that the evidence shows that this strap did first give way, but the evidence also discloses that the pole eye of the neck-yoke gave way, and this it was which let the tongue down and permitted it to run into the ground. We think the question was one for the jury. The case was properly submitted to the jury, and we think its findings are conclusive upon this court.

Some complaint is made of one of the instructions, but it is in harmony with the law as herein expressed, and was properly given.

The judgment of the district court was right, and we recommend that the former judgment of this court be adhered to.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

MARY A. BAIN, APPELLANT, V. JAMES A. BAIN, APPELLEE.

FILED JULY 12, 1907. No. 14,928.

Divorce. It is not ground for divorce in this state that a man asserts and exercises the right to govern his own household, or that he indulges in the habitual, if moderate, use of intoxicating liquors.

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

John C. Watson, for appellant.

W. F. Moran and *Pitzer & Hayward, contra.*

AMES, C.

This is an action for divorce for two alleged causes, viz., habitual drunkenness and extreme cruelty. The district court denied a decree, and the plaintiff appealed.

As respects the latter charge, it appears that the wife, who is plaintiff, was indulging in profane and obscene language in the presence of a little child of the marriage, and that the husband threatened to remove her from the room and house unless she refrained from so doing, and that upon her persisting he carried out his threat, using no more force than was necessary for that purpose. She immediately returned to the room, and no other instance of violence or cruelty is alleged or proved. Afterwards, continuously down to the time of the trial, the parties continued to occupy the same house and the same room, although, she says, not the same bed.

As respects the other charge, it seems that the defendant was a frequent and perhaps habitual user of intoxicating liquors, which he often had about his person or in his room, and the plaintiff and her witnesses, daughters by a former marriage, testify that he was constantly intoxicated, but to what degree they do not attempt to describe, nor do they undertake to say that by reason of such habits he was neglectful of or abusive to his family, or wasteful of his earnings or property, or was incapacitated for the conduct of his business, which was that of a hotel or restaurant keeper. On the contrary, several disinterested witnesses, tradesmen, who had known him familiarly and who had had business with him for many years, testified that they saw him daily or frequently, and that he exhibited no evidences of such incapacitation.

It is not ground for divorce in this state that a man asserts or exercises the right to govern his own household, or that he indulges in the habitual, if moderate, use of in-

toxicating liquors. This is the extreme of what the evidence establishes in this case. There is still a discernible interval between the statutes of this state and the right of free divorce, which needs to be bridged, if at all, by the legislature, and not by the courts.

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

JACKSON and CALKINS, CC., concur.

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

AFFIRMED.

MARY BUTLER, APPELLEE, V. OSCAR PETERSON ET AL., APPELLANTS.*

FILED JULY 12, 1907. No. 14,932.

Quieting Title: ACCOUNTING. Upon the facts disclosed by the record, the title to the lands in controversy is found to be in the plaintiff, but it seems that the defendant is entitled to an accounting for taxes and mortgage liens discharged by himself and his immediate grantor, and to be subrogated therefor.

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

J. A. Douglas, for appellants.

W. R. Butler and *M. F. Harrington, contra.*

AMES, C.

This is an action both by petition and cross-petition to determine and quiet title and possession in a tract of land. The facts so far as they are disclosed by the record are not in dispute. The common source of title or alleged title is one H. N. McKee, who on May 16, 1890, executed and de-

*Rehearing allowed. See opinion, p, 715, *post.*

livered to one Edgeworth a warranty deed of the premises for an expressed consideration of $8,000, but the name of a grantee was intentionally omitted from the instrument, which was intended as security for a loan of money then made or thereafter to be procured. Four days afterwards Edgeworth inserted his own name as grantee and caused the deed to be filed for record with the register of deeds. In May, 1891, Edgeworth died. Afterwards a paper, purporting to be a deed of the land from Edgeworth to one Allen, and executed and acknowledged October 3, 1891, was filed for record. This latter deed is therefore presumably a forgery. There is nothing in the record to rebut this presumption, against which counsel claiming thereunder does not contend. Afterwards Allen conveyed to one Baxter, and Baxter to the defendant Peterson. Both Baxter and Peterson seem to have relied in good faith upon the record title. Peterson has been in possession several years, paying taxes on the premises, and his grantor, Baxter, in good faith paid off and discharged a mortgage thereon executed by McKee. In September, 1905, some 15 years after the date of the Edgeworth deed and three years after that of the deed to the defendant, McKee conveyed the premises to the plaintiff. Until within a few months before the execution of this last mentioned deed, McKee was ignorant that his deed to Edgeworth had been completed by the insertion of the name of a grantee or had been filed for record. This state of facts establishes the title in the plaintiff beyond controversy, and the trial court so found and rendered a decree accordingly, from which the defendant appealed.

The petition prayed an accounting of rents, issues and profits, which the trial court ignored. The defendant, relying upon the chain of conveyances apparent upon the public record, insisted upon his title only. He now desires to be subrogated to the mortgage debt discharged by his immediate grantor. We think the claim is not inequitable, if upon further investigation the evidence warrants it, and we recommend that the cause be remanded, with

leave to the parties to amend their pleadings in this respect, and with instructions to the district court to take and state an account of rents and profits and of liens paid by defendants, and adjudged subrogation therefor, and in other respects that the judgment be affirmed.

JACKSON and CALKINS, CC., concur.

By the Court: This cause is remanded, with leave to the parties to amend their pleadings with respect to taxes and mortgage liens upon the premises in controversy discharged by the defendant or his immediate grantor, and with instructions to the district court to take and state an account between the parties, and adjudge subrogation therefor. In other respects the judgment is affirmed.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed May 7, 1908. *Former judgment vacated and judgment of district court reversed with directions:*

1. **Deeds:** ALTERATIONS. Evidence examined, and found insufficient to support a finding that the name of a grantee was inserted without authority in a deed regular upon its face, and that the same was intended as a mortgage.
2. **Quieting Title:** LACHES. An unexcused delay of 14 years during which a party has exercised no act of ownership over land should preclude him from maintaining an action to quiet title in himself, on the ground that a deed, regular in form and duly recorded, was executed by him in blank and the name of the grantee inserted without authority, and that the same was intended as a mortgage.

CALKINS, C.

It appears by the record in the office of the register of deeds of Rock county that in December, 1889, one H. N. McKee was the owner of the two tracts of land in controversy; that on May 16, 1890, he conveyed the premises to one A. J. Edgeworth; that Edgeworth in October, 1891, conveyed to one H. A. Allen; and that Allen in 1895 con-

veyed to one Hugh Baxter, who afterwards deeded the premises to the defendant Oscar Peterson, who since that time has been in possession of the same. In October, 1905, McKee made a deed conveying this land to the plaintiff, who brought this action, alleging that the defendant had gone into possession under the deed from Baxter. It was charged that this constituted a cloud upon plaintiff's title. The defendant had paid certain taxes, which the plaintiff offered to reimburse, and prayed that the title be quieted in her. It was not contended that McKee did not in fact execute the deed appearing in the record as a conveyance to Edgeworth; but it was claimed that, when this deed was executed, the name of the grantee was left blank, and that in such form the deed was delivered to one Williams as security for a debt; that Edgeworth procured the deed from Williams, and without authority inserted his name as grantee, and caused the deed to be recorded. The genuineness of the deed from Edgeworth to Allen was questioned, it being claimed that Edgeworth died six months before the date of the execution thereof. On the trial in the district court there was a finding for the plaintiff, and a judgment quieting the title in and awarding possession to her, from which the defendant appealed to this court. The case was first disposed of in an opinion by AMES, C., *ante*, p. 713, which recommended the cause to be remanded with leave to parties to amend their pleadings with respect to taxes and the mortgage liens upon the premises in controversy discharged by the defendant or his immediate grantor, and with instruction to the district court to take and state an account between the parties, and adjudge subrogation therefor, and affirming the judgment in other respects. Both plaintiff and defendant filed motions for rehearing, the former on the ground that there was no fact shown by the record that would entitle the plaintiff to be subrogated to the lien of the mortgage and taxes paid by his grantor, and the latter on the ground, first, that the evidence was insufficient to support a finding that the deed executed by the former owner was not in fact what it

purported to be, but a mortgage; and, second, that the delay in bringing the action constituted such laches as should preclude the plaintiff's right to a recovery. A rehearing having been granted, the case has again been argued and submitted.

1. The claim that the deed from McKee to Edgeworth, made and recorded in 1890, was other than what it appears, or was by the parties intended as a mortgage, depends upon the testimony of McKee, which was taken by deposition. This witness states that he was in 1890 the owner of a large number of tracts of land in different counties in western Nebraska and Kansas. He says that this deed to Edgeworth was made out in blank and delivered to one Williams as security for a loan made by Williams to him, and that Williams delivered the deed to Edgeworth. He further states that he demanded a return of the deed from both Williams and Edgeworth, who promised but failed to redeliver the same. This was in the year 1890, and nothing further appears to have been done by McKee toward securing a return of the deed. Neither did he take any steps to ascertain the amount of, nor to pay, the taxes assessed against the land, nor in any manner bestow any care upon nor exercise any dominion over the same. He states that he had no record of the description of the land; that he did not know it personally; and that he was only able to identify the same in his testimony from information received from the plaintiff's agent concerning the condition of the record title. As to the transaction between himself and Williams and Edgeworth, his testimony seems to us nebulous and uncertain. He does not give the first name of the man Williams, nor any clue by which his identity could be ascertained. He does not state the circumstances of the loan with any degree of particularity. We are left in doubt as to its amount and date, and are unable to gather from the testimony when and how it was paid, if in fact it ever was liquidated. The statement of the witness in reference to this and other deeds is: "They were held and made out in

blank. I put them up for a loan from a man named Williams." The witness does not give us the facts and circumstances from which we can determine whether the delivery of this deed was intended by the parties thereto as a conveyance or as a mortgage; in other words, he testifies to a conclusion. Against the correctness of that conclusion there is the evidence of the deed itself, and the fact that the witness for 14 years wholly failed to exercise any act of ownership, or to in any way assert the right or perform the duties of an owner of the land. To vary the legal import of an absolute deed the testimony must be clear, certain and conclusive. *Deroin v. Jennings,* 4 Neb. 97; *Schade & Schade v. Bessinger,* 3 Neb. 140; *Stall v. Jones,* 47 Neb. 706. The latter case was by this court reversed and dismissed because the testimony was not sufficiently clear and convincing, although it seems to us from the statement in the opinion that it was much more credible than that of McKee. Where the witnesses testify orally, giving the trial judge opportunity to observe their demeanor, consideration is properly accorded to his finding; but in this case the testimony of McKee was taken by deposition, and came before the trial court in the same manner in which it appears before us. It is not only neither clear nor convincing, but it fails to establish by a preponderance of the evidence the fact claimed.

2. It is hardly necessary to say that the plaintiff has no greater rights than could have been asserted by Mr. McKee if he, instead of conveying to her, had brought the action himself at the time it was instituted by the plaintiff. It is one of the maxims of equity that "equity aids the vigilant, not those who slumber on their rights"; and out of this maxim grows what is commonly called the doctrine of laches. "The scope and effect of the general principle as a rule for the administration of reliefs irrespective of any statutory limitations was stated by an eminent English chancellor in the following language: 'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands,

where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, *and reasonable diligence.*'" 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 419. Some 14 years elapsed between the delivery by McKee of the deed which placed the apparent record title in Edgeworth and the bringing of this action. No excuse of any kind is suggested for this delay. The plaintiff seeks to avoid the effect of this by attacking an intermediate conveyance, that of Baxter to the defendant; but Baxter's title or color of title was derived from the original deed made by McKee. Without that deed the record would not have shown the title in Baxter, and the defendant would not have been induced to invest his money in the land upon the strength of such record. Granting that the deed from Edgeworth was a forgery, such forgery could not have harmed the defendant but for the deed to Edgeworth, and this action must be tried as one to remove the cloud created by that deed. We think that an unexecused delay of 14 years, during which a party has exercised no act of ownership over land, should preclude him from maintaining an action to quiet title, on the ground that a deed appearing in the record was executed by him in blank and the name of the grantee inserted without authority, or that the same was intended as a mortgage.

We therefore recommend that the former judgment of this court be set aside, the judgment of the district court reversed, and the cause remanded, with instructions to dismiss the plaintiff's petition.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is set aside, the judgment of the district court reversed, and the cause remanded, with instructions to dismiss plaintiff's petition.

JUDGMENT ACCORDINGLY.

CLEVELAND F. MOULTON, APPELLEE, V. CLARENCE E. LAWSON, APPELLANT.

FILED JULY 12, 1907. No. 14,935.

Landlord and Tenant: SALE OF PREMISES: FORFEITURE. A grantee of lands subject to a lease for a term of years, reserving rent payable in instalments, cannot declare a forfeiture and recover the premises by proceedings in forcible detainer, because of a default in the payment of an instalment accruing to his grantor in which he has no interest and falling due before the execution of his conveyance.

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

Patterson & Patterson, for appellant.

Martin & Ayres, contra.

AMES, C.

William Lawson was the owner of a tract of farm land lying in Merrick county, in this state, which was subject to a lease to the defendant, Clarence E. Lawson, for a term of ten years beginning May 16, 1903, for an annual rental of one-third of the grain raised thereon. On December 18, 1905, William Lawson conveyed the premises to the plaintiff, Moulton, by a warranty deed containing the following clause: "This deed is made subject to a lease to Clarence E. Lawson, but with the understanding that the said C. F. Moulton succeeds to my rights under the terms of the lease." It is not disputed that the grantor reserved or retained the right to the rent for the year 1905, which the tenant refused or neglected to pay, and for which the former recovered a judgment which remains unsatisfied. On the 14th day of February, 1906, before any rents subsequently accrued under the lease, Moulton began this action against the tenant, Clarence E. Lawson, in forcible detainer to recover the premises for an al-

leged forfeiture of the remainder of the term for nonpayment of rent for the preceding year. There is no dispute about the facts, and only one question in the case, namely, whether Moulton, the grantee, can declare and enforce a forfeiture for a default in payment of rent which accrued to his grantor in the preceding year, in which instalment he has no interest, and from which default he has suffered no injury. From a judgment for the plaintiff the defendant appealed.

Without doubt, the case falls within the letter of the first clause of section 1020 of the code, which is as follows: "Proceedings under this article may be had in all cases against tenants holding over their terms, and a tenant shall be deemed to he holding over his term whenever he has failed, neglected, or refused to pay the rent or any part thereof when the same became due." But is it within the spirit of the statutes? Neither party cites authority exactly in point, and we do not know that there is any; but it appears to us that the section, so far as it applies to cases of nonpayment of rent, is one of penalties and forfeitures, and to be strictly construed, and we take it that the general rule is that a forfeiture cannot be declared for a breach of duty, except by the person to whom the obligation is due, and who may, if he pleases, waive his right. In other words, the nonpayment of an instalment of rent does not of itself avoid the lease, so as to convert the lessee into a mere tenant at will or by sufferance; but, if a forfeiture is not declared by the lessor, the instrument remains in force and continues to measure the rights and liabilities of the parties.

Relative to a somewhat similar question the supreme court of Maine used the following language in *Small v. Clark*, 97 Me. 314: "The inquiry suggests itself in this connection, whether the legislature did not intend to give the word 'forfeited' and the phrase 'make void' the same meaning and effect which the common law gives to similar expressions in leases. We think such was the intent.

'The modern decisions,' says Mr. Taylor in his work on Landlord and Tenant, sec. 492, 'establish that the effect of a condition, making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of his privilege.' The editor of the Am. & Eng. Ency. of Law lays down the doctrine, book 18, p. 380, 2d ed., which seems to be supported by the authorities cited, that the construction of provisions for forfeiture of a lease for nonperformance by the lessee, of conditions, is that the lease is voidable only at the election of the lessor, and is not rendered absolutely void though it provides that it shall be null and void in case of such breach. And this rule applies to leases by the crown, and when the provision is by statute, p. 381."

The lease therefore was valid and the term subsisting at the time of the conveyance of the fee and at the time that this proceeding was begun, although the defendant had incurred a forfeiture to the plaintiff's grantor. But there is no evidence that the latter intended to insist upon the forfeiture, and the fact that he conveyed the premises by a deed reciting the lease and treating the term created thereby as still existing may be regarded as at least an implied expression of his intention to waive, of which, of course, the plaintiff had notice.

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

JACKSON and CALKINS, 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.

PETER HEMPLE ET AL., APPELLEES, V. CITY OF HASTINGS, APPELLANT.

FILED JULY 12, 1907. No. 14,858.

1. Cities: ADDITIONS. The subdivision into lots of property contiguous to but outside the corporate limits of a city, and the filing of a plat of such subdivision by the owner thereof, does not have the effect of changing the boundaries of the city so as to include therein such property.
2. ———: ———. Where proceedings are had to incorporate a city, or to add to the territory of one already existing, if the body exercising the power to establish or attach the territory possesses jurisdiction, its action cannot be collaterally attacked; but this rule does not apply where there is no attempt to exercise such jurisdiction except the act of the county clerk in extending upon the tax list city taxes against property outside the city limits.
3. ———: TAXATION: ILLEGAL LEVY: INJUNCTION. The levy of city taxes upon property outside its boundaries is without authority, and such taxes are illegal and void as to such property, and their collection may be restrained by injunction.

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

W. F. Button, for appellant.

R. A. Batty, F. P. Olmstead and *John Snider, contra.*

CALKINS, C.

In 1887 one Bostwick, being the owner of a tract of land contiguous to, but not within, the corporate limits of the city of Hastings, subdivided the same into blocks and lots, and, having made a plat thereof as provided by statute, caused the same to be recorded in the office of the register of deeds of Adams county. In this plat and the certificate attached, the subdivision was called "Bostwick's Second Addition to Hastings." No ordinance was passed by the city, nor was any proceeding had or taken,

by which the property in question was included or attempted to be included within the corporate bounds of the city, but city taxes were levied against the same for the years 1888, 1889, 1890, 1891. In 1891 the then owners vacated the plat under the provisions of the statute, and no city taxes were levied against the same until the year 1904, in which year, as well as in 1905, the county clerk extended upon the tax list city taxes levied by the city of Hastings as against these lands. The plaintiffs having become the owners of the land at this time brought an action in the district court to declare such taxes void and to restrain their collection. This action resulted in a decree for the plaintiffs, from which the defendant, the city of Hastings, appeals.

1. The filing of a plat by the owner of property contiguous to, but outside, the corporate limits of a city does not have the effect of changing the boundaries of the city so as to include such property. The power to establish and change boundaries of a municipal corporation is a legislative one, and must be exercised either directly or in the method prescribed in the constituent act or other statute upon the subject. 1 Dillon, Municipal Corporations (4th ed.), sec. 124; *City of Hastings v. Hansen*, 44 Neb. 704. It has sometimes been provided that the subdivision of property into city lots should be the test whether it is rural or urban in its character, and that the circumstance of such subdivision should be one of the jurisdictional facts upon which to found proceedings to extend the boundaries so as to include within the corporate limits of the city such property; but it has nowhere been provided that the filing of such a plat should of itself have that effect.

2. It is contended by the defendant that the question whether this land was within or without the city limits cannot be determined in a suit to declare the taxes invalid. It is said that to so proceed is to attack collaterally the validity of the organization; and we are cited to the cases of *South Platte Land Co. v. Buffalo County*,

15 Neb. 605, and *McClay v. City of Lincoln*, 32 Neb. 412, to sustain this proposition. In the former case the town of Kearney was incorporated under the act of 1866, which provided that, if a majority of the taxable inhabitants of any town should present a petition to the county commissioners designating the name they wished to assume, etc., such commissioners, upon being satisfied that a majority of the taxable inhabitants had signed such petition, might declare the town incorporated. The boundaries, as stated in the petition and the order of the county commissioners, included a large amount of agricultural land. The owners of this land, some 12 years after the incorporation, brought an injunction suit to restrain the collection of taxes, on the ground that the land, being purely agricultural land, could not be included within the boundaries of the corporation nor subject to municipal taxation. The court held that the petition for incorporation gave the commissioners jurisdiction, and that, there being no allegation of fraud brought, their action could not be collaterally attacked. This case and the cases following it establish no more than that, where there are proceedings to incorporate a city or to add to the territory of one already existing, if the body exercising the power to establish or to attach territory possesses jurisdiction of the subject matter, its action cannot be collaterally attacked. In cases, however, where the body essaying to exercise this power does so without jurisdiction, its action is void and may be collaterally attacked. *State v. Several Parcels of Land*, 78 Neb. 703; *Forsythe v. City of Hammond*, 142 Ind. 505, 30 L. R. A. 576. If the city of Hastings had instituted proceedings to include the land in question within its limits, and had gone so far as to acquire jurisdiction, the decision in such case could not be collaterally attacked, no matter how erroneous it might have been. In this case there was no attempt to acquire or to exercise jurisdiction, and the principle relied upon by the defendant has no application to the facts.

3. It is further contended that a suit for injunction will

not lie because of the provision of section 162 of the revenue act, which is that an injunction shall not be granted to restrain the collection of a tax, except such tax, or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose. Section 144 of the revenue law of 1879 contained the provision above referred to, and was frequently the subject of judicial construction. It was settled that, where a tax is void, *i. e.*, where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by injunction, notwithstanding such provision. *Earl v. Duras,* 13 Neb. 234; *Burlington & M. R. R. Co. v. Cass County,* 16 Neb. 136; *Touzalin v. City of Omaha,* 25 Neb. 817; *Bellevue Improvement Co. v. Village of Bellevue,* 39 Neb. 876. The levy of a tax by a municipal corporation upon property outside its boundaries is without authority and illegal. *Thatcher v. Adams County,* 19 Neb. 485.

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

JACKSON and AMES, CC., concur.

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

AFFIRMED.

MINNIE E. BREWER, APPELLANT, V. WILLIAM M. BREWER, APPELLEE.

FILED JULY 12, 1907. No. 14,904.

1. **Husband and Wife:** MAINTENANCE. A wife may bring a suit in equity to secure support and alimony without reference to whether the action is for divorce or not.

2. ———: ———. Every wife is entitled to a home corresponding with the circumstances and condition of her husband, over which

she shall be permitted to preside as mistress, and she does not forfeit her right to maintenance by refusing to live in the home with and under the control of the husband's mother.

APPEAL from the the district court for Platte county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

R. W. Hobart, for appellant.

J. J. Sullivan, contra.

CALKINS, C.

In November, 1904, the defendant, aged 22 years, was married to the plaintiff, aged 19. Before his marriage the defendant had lived with his mother, a widow, and a minor brother, in a seven-room house, which had been bought with the proceeds arising from the sale of the property that constituted the family homestead at the time of the death of the father. Some time before the marriage the defendant's mother, being in ill health and anticipating her possible death, conveyed the home to defendant, with the understanding that, when the minor son should attain his majority, the defendant should pay him $650. During the courtship the defendant informed plaintiff that he owned the house, and it was understood that the plaintiff and defendant should occupy the same, and that the defendant's mother should have a room therein for her own use. Shortly before the marriage the defendant conveyed the property to his mother, for the reason, as he says, that he did not want the plaintiff's mother to think that she could take charge of things. The fact of this conveyance was not divulged to the intended wife before the marriage. After the marriage the plaintiff and defendant went to live at the house, where they all seem to have dwelt as one family. About two weeks after the marriage the plaintiff discovered, from reading a list of transfers of real estate in a local paper, the fact of the conveyance of the home by the defendant to his mother, and asked an explanation. From this time on the

relations between the plaintiff and her husband's mother became strained, the plaintiff alleging that the mother allowed her no voice in the management of the household affairs, and told her she was no housekeeper and not a fit wife for her son, and that on one occasion the mother threw a book at her, which struck her in the face. The mother does not deny that she took control of the house, but disputes the other statements, and says there were no words between them, but that plaintiff became sulky after learning of the transfer. The plaintiff also says that she never received a cent of money from her husband, which is not denied, and which tends to corroborate her statement that the management of the household was given to the mother. On the 20th of February, 1905, the plaintiff left the house and went to her mother. There is some dispute as to whether she gave her reasons before leaving; but in her testimony she asserts that she has all the time been willing to live with the defendant if he would provide her a home where she would not be subject to the control of defendant's mother, and that she was willing that the mother should live in the house with them if the plaintiff could have control of her part of the house. The defendant did not offer to accede to these conditions, and the plaintiff in June, 1905, brought this action for her support and maintenance. She had become pregnant soon after the marriage, and was confined at her mother's house in September, 1905, defendant refusing to contribute anything to the expenses of her confinement or to the support and care of either the mother or child. The defendant is a carpenter, and, while he has no property except his interest in the home, earns the wages usually paid to workmen in his trade during the season, and is financially able to support his wife and child. The court below denied the plaintiff any relief, and she appeals from the judgment dismissing her petition.

1. Contrary to the law in many jurisdictions, it has been settled in this state that the wife may bring a suit

in equity to secure support and alimony without reference to whether the action is for divorce or not. This doctrine was first announced in *Earle v. Earle,* 27 Neb. 277, which was followed by *Cochran v. Cochran,* 42 Neb. 612. As a husband is bound to support his wife and child, the plaintiff is entitled to some relief in this action, unless the requirements she made as a condition to her return to the house of defendant's mother were unreasonable.

2. The husband has the right to direct the affairs of his own house and to determine the place of the abode of the family, and it is in general the duty of the wife to submit to such determination. The right which the husband exercises in these matters is not, however, an entirely arbitrary power. He must have due regard for the welfare, comfort and peace of mind of his wife. *Dakin v. Dakin,* 1 Neb. (Unof.) 457. The cases cited by the appellant establish the doctrine that a husband may not require his wife, against her will, to reside in the family of his mother, especially in a subordinate capacity. *Powell v. Powell,* 29 Vt. 149; *Shinn v. Shinn,* 51 N. J. Eq. 78. Every wife is entitled to a home corresponding with the circumstances and condition of her husband, over which she shall be permitted to preside as the mistress. The defendant in this case has shown a strong sense of filial duty. This is commendable, but it must not conflict with the conjugal duty he owes to his wife. The family is the unit of the social organism, and, while the institution of new families to some extent involves the disintegration of the older household, it is absolutely necessary to continued social existence. When a man marries and founds a new family, he assumes new duties and obligations; and, when these conflict with his former ties, they must be held paramount. The very existence of the family depends upon the enforcement of this principle. Whatever his filial obligation may be, a man may not bring his mother to preside in his new home. That place belongs to the wife. Neither may he, without her consent, take

her to the home of the mother, there to be under her domination and control. And, when the wife objects to this, she does not thereby forfeit her right to support and maintenance.

We therefore recommend that the judgment be reversed and the cause remanded to the district court, with directions to award a suitable sum for the maintenance of the plaintiff and her child.

JACKSON and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded to the district court, with directions to award a suitable sum for the maintenance of the plaintiff and her child

REVERSED.

PLATTE VALLEY MILLING COMPANY, APPELLANT, V. LARS J. MALMSTEN, COUNTY TREASURER, ET AL., APPELLEES.*

FILED JULY 12, 1907. No. 14,908.

1. **Taxation: LIEN.** The filing with the treasurer of a tax list without the warrant required by section 83 of the revenue law of 1879 (laws 1879, p. 306) does not create a lien upon the personal property of the person assessed under the provisions of section 139 of the same act. The words "tax books" in the latter section *held* to mean the tax list with warrant attached.

2. ———: ———: **CHATTEL MORTGAGE.** The lien of a chattel mortgage taken before the tax books were delivered to the treasurer is superior to the lien for taxes for that year, created by such delivery, under the provisions of section 139 of the revenue law of 1879 (laws 1879, p. 332), but inferior to the lien for subsequent years. *Woolsey v. Chamberlain Banking House*, 70 Neb. 194, followed.

3. **Equity: OFFER IN PETITION.** An offer to do equity is only required to be made in the petition in those cases where an equitable duty or obligation rests upon the plaintiff, and where such duty or obligation could not be enforced by the court except for such offer.

*Rehearing allowed. See opinion, p. 735, *post*. Second rehearing denied. See opinion, p. 741, *post*.

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

E. A. Cook and *G. W. Fox,* for appellant.

J. H. Linderman and *T. L. Warrington, contra.*

CALKINS, C.

In 1892 the Star Mills & Grain Company owned a flouring mill and machinery located upon the right of way of the Union Pacific railroad in Dawson county. Taxes were assessed against this company and entered upon the tax lists for the years 1892, 1893, 1894. These lists were within the proper time delivered to the county treasurer, but the county clerk failed to attach the warrant required by section 83, ch. 77, Comp. St. which was then in force. Taxes were levied against this company for the years 1898, 1899, 1900, and 1901, and the tax lists delivered to the county treasurer on the 1st day of October in each of these years. The county clerk attached the warrant to these lists shortly after the delivery to the treasurer, and during the month of October in each year, except 1900, in which year the warrant was not attached until November 24. On the 1st day of May, 1897, the said Star Mills & Grain Company executed a chattel mortgage upon the mill and machinery, which was renewed by another chattel mortgage executed on the 1st of May, 1898. The latter mortgage was foreclosed by action in the district court, and the premises were, in pursuance of the order made by said court in said proceedings, on the 6th day of December, 1901, conveyed by the sheriff to the mortgagees, who afterwards sold the same to the plaintiff. In May, 1906, the county clerk attached warrants to each of the tax lists for the years 1892, 1893, 1894. None of said taxes being paid, the treasurer then issued a distress warrant to the sheriff as special collector, commanding him to collect from the Star Mills & Grain Company, by distress and sale of its goods and chattels, the entire amount of

the taxes of 1892, 1893, 1894, 1898, 1899, 1900, 1901. Under this warrant the sheriff threatened to seize the mill and machinery, which had been conveyed to the plaintiff; and the plaintiff brought this action to restrain the treasurer and the sheriff as such special collector from levying upon the said mill and machinery for the collection of said taxes. The district court found for the plaintiff as to the taxes of 1898, and against the plaintiff as to the taxes of each and all of the other years, and from a verdict rendered upon this finding the plaintiff appeals.

1. The revenue law in force prior to September 1, 1903, provided that the tax list should be completed and delivered to the county treasurer on or before the 1st day of October annually, and that before its delivery the county clerk should attach thereto a warrant under the seal of the county, which warrant should be signed by the clerk, and should in general terms command the said treasurer to collect the taxes therein mentioned according to law; but that no informality or delay in delivering the same after the time specified should affect the validity of any taxes or sales or proceedings for the collection of taxes. Comp. St. 1881, ch. 77, art. I, sec. 83. The same statute provided that the taxes assessed upon personal property should be a lien upon the personal property of the person assessed from and after the time the tax books were received by the collector. Section 139. The power of the treasurer to collect personal taxes without the warrant of the county clerk attached to the list has been denied by this court. *Reynolds v. Fisher,* 43 Neb. 172; *Grant v. Bartholomew,* 57 Neb. 673. In the former case the court, referring to section 83, say: "The warrant provided for in this section is the treasurer's authority for enforcing the collection of any and each particular tax of the list to which it is attached when it becomes necessary to resort to any of the proceedings provided by law. To collect the tax, then, the warrant must be in the hands of the collector, and, in this state, attached to the tax list, as his authorization to institute such proceedings. If he pro-

ceeds without it, he becomes a trespasser. An officer of the law who makes a levy must be empowered to do so by the proper writ in his possession. So with the treasurer. The warrant required by the law to be attached to the tax list is the source of the right to use the means of collection provided by the statute." The law requires the list of the taxes to be made, and, when the warrant of the county clerk under the seal of the county is attached thereto, that the completed document be filed with the county treasurer. This constitutes the tax books mentioned in section 139. It was not contemplated that the list should be filed with the treasurer until the warrant was attached. On the contrary, the statute expressly provides that the warrant must be attached before the delivery. The list unsigned and unauthenticated could not have any legal or binding force. Such is the universal rule with reference to documents issued by one public officer and filed in the office of another. A familiar illustration is the rule frequently announced by this court that an unsigned and unauthenticated transcript gives it no jurisdiction, and that the filing of an unauthenticated bill of exceptions has no effect. The principle is the same, and we are of the opinion that the filing of the list without the warrant attached did not create a lien upon the personal property of the Star Mills & Grain Company. The defendant argues that the filing of the warrant with the treasurer in May, 1906, validated this tax; but this argument is based upon the assumption that the lien already existed, and it must necessarily fall with the negation of that assumption.

2. This brings us to the taxes of 1898, 1899, 1900, 1901. As we have seen, the court below enjoined the collection of the taxes of 1898, and refused to restrain the collection of those levied for the other years above mentioned. This was done upon the authority of the case of *Woolsey v. Chamberlain Banking House,* 70 Neb. 194, where it was held that a chattel mortgage taken upon property before the tax books for the year in which the mortgage is given

are delivered to the treasurer is superior to the lien of the taxes of that year. That case is in point, and we are satisfied with the rule there adopted for the reasons set forth in the opinion in that case.

3. The defendant interposes an objection to the sufficiency of the petition, on the ground that the plaintiff does not offer to pay the taxes which were a lien upon the property in question. It is a familiar maxim of equity that he who seeks equity must do equity, and in some cases it is held that the offer to do equity must be contained in the bill; but in most instances this principle is satisfied by the court's making, in its decree, the relief awarded the plaintiff conditioned upon his performance of such equitable obligations as may be imposed upon him. The rule seems to be that the offer to do equity must be made in the petition in those cases where the court could not otherwise enforce the obligation: but, if the right of the defendant does not depend upon any offers or concessions which the plaintiff makes in his bill, it is then unnecessary. *Barnard v. Cushman*, 35 Ill. 451. In this case the taxes were not levied against the plaintiff, and the plaintiff was under no obligation to pay them. It might be compelled to pay such as were a lien to save its property from sale, but this liability was a purely legal and not an equitable one. The plaintiff contested, not the taxes, but the right of the county to satisfy the same out of his property, and it follows from the conclusions hereinbefore stated that a part of these taxes were a lien upon property which the plaintiff had acquired. The plaintiff might have entitled itself to costs and to a suspension of the interest by a proper tender of the amount of the taxes which were an actual lien upon its property before the commencement of the suit; but it was not necessary for it to do so in order to prevent the sale of its property for taxes which were not a lien upon it. The right of the defendant to have the taxes which constituted a lien upon the plaintiff's property paid can be satisfied, and the maxim of equity above quoted enforced, by making the

relief granted the plaintiff conditioned upon the payment, within a time to be fixed by the court, of the taxes which are found to be a lien upon the said property.

We therefore recommend that the judgment be reversed as to the taxes of 1892, 1893, 1894, and the cause remanded for further proceedings in accordance with this opinion.

JACKSON and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed as to the taxes of 1892, 1893, 1894, and the cause remanded for further proceedings in accordance with said opinion.

REVERSED.

The following opinion on rehearing was filed June 4, 1908. *Former judgment of reversal as modified adhered to:*

1. **Taxation**: SEIZURE OF PERSONALTY. The tax list in the hands of the county treasurer will authorize him to receive and collect the taxes described therein; but to invest him with jurisdiction to seize personal property for the satisfaction or enforcement of a tax lien thereon, the clerk's warrant provided for by statute must be attached to such list.

2. ———: ———. Until such a warrant is attached to the tax list there exists no enforceable lien for the payment of the taxes against the personal property of a tax debtor.

3. ———: LIENS: PRIORITIES. A purchaser of personal property under mortgage sale, before the tax lien has attached, takes it free of all claims for the taxes.

BARNES, C. J.

This case is before us on a rehearing. Our former opinion will be found, *ante*, p. 730, where the facts appear so fully that no additional statement is required.

It was urged by the defendants in support of the motion for a rehearing, and is now contended, that so much of our former opinion as holds that the delivery of the

tax books to the county treasurer, without the clerk's warrant attached directing him to collect the taxes described therein, did not create a lien upon the personal property of the tax debtor; that the tax books mentioned in section 83 of the revenue law of 1879 (laws 1879, p. 306), now superseded by section 11040, Ann. St. 1907, are not the tax books, within the meaning of that section, without the clerk's warrant attached thereto; and that so much of our judgment as restrains the defendant from collecting the taxes assessed against the Star Mills & Grain Company for the years 1892, 1893 and 1894, by levy and sale of the flouring mill and machinery formerly owned by that company, but now owned by the plaintiff, should be reversed.

After again considering this question, we are satisfied that the conclusion reached by our former opinion is correct. We believe, however, that some of the expressions contained therein should be modified. By section 139 of the revenue law of 1879 (laws 1879, p. 332), it was provided: "The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed, from and after the time the tax books are received by the collector," and it was said in our former opinion that the treasurer has no power to collect personal taxes without the warrant of the county clerk attached to the tax list. It is settled beyond question that the warrant is the authority for enforcing the collection of any and each particular tax of the list to which it is attached, when it becomes necessary to resort to any of the proceedings provided by law for that purpose. This, however, does not affect the right of the treasurer, when the tax list is in his hands, to receive and collect personal taxes without distress and sale; but, in order to authorize him to enforce collection by such proceedings, the clerk's warrant must be attached to the tax list as his authority therefor. It has been held by a majority of the courts, and we think correctly so, that the levy of the tax, the making of the tax list, and the placing of the same in the

hands of the county treasurer, creates what may be termed a general lien for the payment of the taxes described therein upon all of the personal property of each tax debtor, that this amounts in law to a judgment, and that the clerk's warrant, which the statute provides shall be attached to the tax books, is in effect an execution. In order, however, to create a specific lien upon any of the property owned by a tax debtor, a distress warrant must be levied thereon.

It is conceded in this case that no warrant for the collection of the taxes was attached to the tax lists for the years 1892, 1893 and 1894, until some time in the year 1906. So, while the tax books and the tax proceedings may have constituted what may be called a general lien upon the property of the Star Mills & Grain Company, yet it was not such a lien as the tax collector could enforce. The treasurer could not at any time after the taxes in question were assessed and levied, and before the property of the Star Mills & Grain Company was sold to the plaintiff, have levied upon any of the property of the tax debtor, and thereby have rendered the lien specific. This being the case, a *bona fide* purchaser, which the plaintiff is conceded to be, of any of the property of the tax debtor would take the same discharged of any lien for the taxes of those years.

It is fundamental that taxes are not a lien either upon real or personal property unless made so by statute. The section of our former statute which created a lien for personal taxes was taken from, and is a literal copy of, the revenue law of the state of Illinois on that subject. It was said by the supreme court of that state in *Gaar, Scott & Co. v. Hurd,* 92 Ill. 315: "The mere assessment of taxes in respect of personal property will not create a lien upon such property. The warrant for the collection of such taxes will, however, become a lien upon the personal property of the person assessed, from the time it comes to the officer's hands. But, if the party assessed

should sell or mortgage the property before the warrant comes to the hands of the officer, the purchaser or mortgagee will be protected as against any subsequent seizure and sale of the property under such warrant for the taxes assessed against the vendor or mortgagor." In *Hill v. Figley,* 23 Ill. 418, in speaking of the effect of the section in question, the supreme court of that state said: "It is true that the statute declares that the assessment shall be a lien from and after the delivery of the books to the collector. A lien upon what? * * * Not upon the property assessed for taxation, but upon his personal property. The language is manifestly broad enough to embrace, and we think does embrace, all of the personal property which he owned at that time. We have no doubt that such was the intention of the legislature in adopting this provision. The object the legislature had in view was to secure the collection of the revenue, and, if the construction were given that the lien only extended to the specific articles assessed, the object would not be attained. The assessments are made in May and June, and the collector's books do not come into the hands of the officer before November, so that with traders and business men of the country all, or the greater portion, of the property assessed by them, in the interim, changes hands, and much of it is consumed. And with others, a large portion changes hands, is removed, or cannot be identified. If the lien is to be confined to the property assessed, by the same rule of construction, we must hold that it attaches to each article of property to the extent only of the amount of tax assessed upon it. This would lead to great perplexity and confusion, as each specific article of property is not, nor does the law require it to be, enumerated, with its value annexed. The amount of the tax on personal property is given in an aggregate sum on the collector's books, and it would be impossible to ascertain the precise amount for which the books were a lien on each article. The legislature never could have designed to impose such difficulties in the collection of the revenue. * * * We

have no hesitation in believing that the legislature intended to bind all the personal property in the hands of the taxpayer, from the time the collector receives his warrant until it is paid, precisely as an execution binds the property of the debtor on its delivery to the officer." It would therefore seem that the existence of an enforceable lien against the property of the tax debtor depends upon the fact that the tax books placed in the hands of the collector have attached thereto the clerk's warrant. In *Ream v. Stone,* 102 Ill. 359, it was said: "It will thus be seen that the warrant is an indispensable part of the tax books, and that it is that which confers power upon the collector to levy and distrain for the payment of the tax. And so, in *Hill v. Figley,* 23 Ill. 418, we said: 'We have no hesitation in believing that the legislature intended to bind all the personal property in the hands of the taxpayer, from the time the collector receives his warrant until it is paid, precisely as an execution binds the property of the debtor on its delivery to the officer.' And again, in *Binkert v. Wabash R. Co.,* 98 Ill. 218, we said: 'When the tax books come to the collector's hands, the personal taxes at once, and not before, just like an execution, become a lien upon the personal property which the person assessed then owns, without regard to what he may have owned when the assessment was made.' And the same analogy requires us to hold that, if no levy shall be made by the expiration of the time within which the collector is required to make return, the warrant is officially dead, and then all liens which might have been, but were not, perfected by a levy, are gone. * * * It is here shown no warrants were annexed to the collector's books for the years 1873, 1874 and 1875, and so no distress was nor could have been made for the taxes of those years. * * * Back taxes cannot be made a lien, any more than current taxes, upon personal property, until the collector's books, with a warrant authorizing their collection, is placed in the hands of the collector. * * * We held in *Binkert v. Wabash R. Co., supra,* and in *Gaar, Scott & Co. v. Hurd,* 92 Ill. 315, that

the purchaser of personal property, under mortgage sale, before a lien for the taxes had attached, took the property free of all claim for the taxes, and, inasmuch as no lien was here perfected upon the property before the purchase and possession by complainant, we cannot regard it as of consequence whether the mortgage was, or not, properly acknowledged as a chattel mortgage. It was certainly sufficient, where possession was obtained by a purchaser under it, as against subsequent claims." In *Woolsey v. Chamberlain Banking House,* 70 Neb. 194, it was held that a lien of a chattel mortgage given after the taxes were levied, but before the tax books came into the hands of the collector, was superior to the lien of the taxes for that year. In that case the warrant was properly attached to the tax list when delivered to the county treasurer. In *Grant v. Bartholomew,* 57 Neb. 673, it was said: "The personal tax list, when delivered to the county treasurer, is analogous to a judgment, and to enable the treasurer to satisfy the tax—judgment—by the seizure of the personal property of the tax debtor, it is essential that the treasurer should be armed with the tax warrant, which in that case is his execution." From the foregoing authorities it seems clear that, when, in the year 1901, the property of the Star Mills & Grain Company, the tax debtor, was sold and delivered to the plaintiff, there was no enforceable tax lien existing against it, for the reason that no clerk's warrant was attached to the tax lists then in the hands of the county treasurer. The plaintiff therefore took the property in question free and clear of any lien for personal taxes assessed against its former owner. It also seems clear to us that attaching the warrant to the tax list in question in the year 1906 created no lien against the property theretofore purchased by the plaintiff, and had no retroactive effect, so far as his rights are concerned.

For the foregoing reasons, our former judgment as herein modified is adhered to.

JUDGMENT ACCORDINGLY.

The following opinion on motion for second rehearing was filed October 8, 1908. *Motion overruled:*

BARNES, C. J.

Appellant has filed a motion for a rehearing in this case for the reason, among others, that he is in doubt as to what disposition was made of the taxes of 1898, 1899, 1900 and 1901. We hardly think he intends to seriously urge that contention, for, after quoting from the opinion the words, "when in the year 1901 the property of the Star Mills & Grain Company (the tax debtor) was sold and delivered to the plaintiff, there was no enforceable tax lien existing," he says: "We think this language was not intended to apply to anything but the question presented to the judges on the rehearing." We do not see how any doubt could have arisen in the mind of any one about the matter. In our first opinion only so much of the judgment of the district court as related to the taxes of 1892, 1893 and 1894 was reversed, and as to the taxes of the subsequent years that judgment was affirmed. On the rehearing the only question discussed or considered was whether we would adhere to our former opinion. The rehearing in this case was allowed, and the present opinion written, solely for the purpose of correcting the statement that "the treasurer is without power or authority to collect or receive taxes assessed on personal property when no warrant is attached to the tax list." By the present opinion this correction is made, and in all other things our former judgment is adhered to. Again, the words "unenforceable lien," found in our opinion, have been made the subject of some criticism. This does not merit our serious consideration, for we find warrant for the expression in the decisions of the courts of Arkansas, California, Michigan, Missouri and North Carolina.

Finally, the effect of the present opinion, in so far as it affects the taxes of 1898, is to approve of *Woolsey v. Chamberlain Banking House,* 70 Neb. 194, and, also, to adhere to

the rule that the treasurer may sell real estate for the taxes delinquent thereon, notwithstanding the fact that no warrant is attached to the tax list. See *Grant v. Bartholomew,* 57 Neb. 673. We thus harmonize our earlier decisions, and adhere to the rule that, where no clerk's warrant is attached to the tax list, the treasurer is without power to collect personal taxes by distress and sale; and, while he may receive voluntary payment of such taxes, still, until the tax warrant provided for by our former statute is attached to the tax list, there exists no enforceable lien against the property of the tax debtor.

The motion for a rehearing is therefore

OVERRULED.

KATHERINE RIHNER ET AL., APPELLANTS, V. PETER B. JACOBS ET AL., APPELLEES.

FILED JULY 12, 1907. No. 14,911.

1. **Cancelation of Instruments:** PLEADING. In a petition to cancel a conveyance of real property alleged to have been obtained by false and fraudulent representations, an allegation that the plaintiff, in reliance upon such representations, parted with the title to the land is a sufficient plea that he was damaged by the fraud.
2. **Evidence** examined, and found sufficient to sustain finding of the district court.
3. **Deeds:** CONSTRUCTION. Where a deed given in January recites that it was made in lieu of one for the same property executed in the preceding October, and there is neither evidence nor allegation of any new consideration or change of circumstances between the parties during the interval, the two deeds are to be considered as a part of the same transaction.
4. **Equitable Estoppel:** TRUST RELATIONS. In the application of the doctrine of equitable estoppel to a transaction where the true owner of property permits another to hold the legal title in trust for him, and credit is given the trustee personally upon the faith of such apparent ownership, cases, where the trust relation is between relatives and arises out of contract, distinguished from those where the trust arises *ex maleficio* and the relation is between strangers.

5. ———: ———. Where a conveyance of real property is obtained from the owner by fraud, and a general creditor of the fraudulent grantee asserts that he gave credit upon faith in such apparent ownership, and claims that the owner should be estopped to deny the title of the fraudulent grantee, such estoppel will be denied where the reliance upon such apparent ownership is not clearly established, and the creditor appears to have been as negligent in extending credit as was the owner in the original transaction.

APPEAL from the district court for Sarpy county: GEORGE A. DAY, JUDGE. *Affirmed in part: Petition of intervention dismissed.*

Charles Battelle and *J. J. Hess,* for appellants.

Byron G. Burbank and *Will H. Thompson, contra.*

CALKINS, C.

In October, 1904, one Samuel Rihner of Pottawattamie county, Iowa, conveyed to one Peter B. Jacobs, of the same place, a farm of 312 acres situate in Sarpy county in this state, subject to a mortgage of $11,500. The consideration was $31,200, and Jacobs paid in cash $100, and gave his notes, secured by 196 shares of the capital stock of the Northwestern Trust Company of Guthrie, Oklahoma, of the par value of $100 a share, for the remainder of $19,600. The deed given by Rihner was recorded January 5, 1905, and another deed for the same property was executed by and to the same parties on January 21, 1905, which latter deed was recorded February 2, 1905. The deed last mentioned is said to have been given to more fully describe the property intended to be conveyed, and contains the statement: "This deed is made in lieu of the deed made and signed by Samuel Rihner, Sr., and Katherina Rihner, his wife, on the 17th day of October, 1904, the signers of this deed being both the same persons." On the 17th day of March, 1905, Rihner, becoming suspicious that the stock of the Northwestern Trust Company given him as security was of

little value, charged Jacobs with fraud in obtaining the deed. Jacobs had paid off the mortgages existing on the land at the time he received the deed, and had executed new ones for a larger amount by from $3,100 to $3,300. Rihner's attorney demanded that he make a mortgage on the 312 acres in Sarpy county for the $19,600, and include in that mortgage additional land to equal the difference between the old mortgages he had paid off and the new ones he had executed upon the land. Mr. Jacobs professed to be willing to do this, saying that the transaction was not as it should have been, but that he never meant to cheat Mr. Rihner out of anything. Such a mortgage was drawn and signed by Jacobs. This was done at Omaha, and, Mrs. Jacobs being in Iowa, Mr. Jacobs promised to have his wife sign it the next day; but, when that time arrived, refused to complete the transaction, and on the same day Rihner filed his petition in this case, alleging that Jacobs obtained the deed by false and fraudulent representations, and praying that the conveyance of said property to Jacobs be declared void for such fraud, and that he have a reconveyance of the land in question. An amended and substituted petition was filed on the 13th day of June, 1905, making the Northwestern Trust Company, Alexander Buchanan, its secretary, and one Kapke, a tenant, parties. Issue was formed on this petition by the answer of the above named parties, who denied the false representations. Meanwhile, on the 13th day of March, 1905, Jacobs made to a bank in Iowa his promissory note for $1,300, due in one year from that date, and procured Peter and Claus Danker to sign the same as sureties. In the October following, the Dankers paid the principal of the note and interest earned up to that date, and the bank thereupon indorsed and delivered the note to the plaintiffs. They, in December, 1905, began an action in the district court for Sarpy county upon this note, procuring an order from the county judge of Sarpy county allowing an attachment under the provisions of section 237 of the code permitting that remedy to credi-

tors on claims before due in certain cases, and caused the same to be levied upon the above lands so as aforesaid deeded by Rihner to Jacobs. On the 8th day of December, 1905, the Dankers filed a petition of intervention in this action, claiming an interest in the premises in litigation by reason of their attachment, and alleging that they signed the notes in question upon the representation of Jacobs that he owned the premises in controversy, and claiming that the plaintiff Rihner was estopped to deny that Jacobs was the owner of said premises, also denying the allegations of fraud on the part of Jacobs set up in the plaintiffs' petition. Issue was joined upon this petition of intervention, and the court in its final decree found in favor of the plaintiffs upon the issues in the main case, and upon the issues in the petition of intervention in favor of the interveners, decreeing that, if their attachment should be sustained in the suit brought by them, the amount of the judgment therein should then be a first lien upon the real estate, and that the sheriff or special master should make and execute to the plaintiffs a deed to said premises subject to the contingent lien of said interveners. From this decree upon the intervention the plaintiffs appeal, and the interveners file a cross-appeal, complaining of so much of the decree in their favor as made the same dependent upon the final issue in the attachment suit, and that the evidence did not sustain the finding in the main case that the deed from Rihner to Jacobs was obtained by fraud.

1. The interveners argue that the amended petition is not sufficient because, as they allege, there is no allegation that Rihner was in any manner damaged by his reliance upon the statement of Jacobs. It is alleged in the petition that the defendants represented the stock of the Northwestern Trust Company to be worth par and paying an annual dividend of 12 per cent.; that these representations were false and known by Jacobs to be false at the time of their being made, the said stock being in fact worthless, but that Rihner, fully believing the said

representations to be true, accepted the said stock as security, and parted with the title to his land on the strength thereof. The allegation that he parted with the title to the land upon the strength of these representations is a sufficient allegation of the damage he suffered by relying upon the same, and the petition is not defective in this respect.

2. The interveners urge that the evidence is not sufficient to support the finding in favor of the plaintiffs, although, in what particular, the brief and argument of the interveners does not specify. The making of the representations, and the reliance of Rihner upon them, and the making of the deed in consequence, is fully established, and, if there was any want of proof of the falsity of the representations concerning the character and value of the stock, we think it is supplied by the answer of the defendants, which is to the effect that the sale was really made to the trust company, Jacobs being a trustee, and that the stock was issued in payment of the purchase price of the land; in other words, that the land was paid for with the stock, and the stock was paid for by the land. This, we think, is an admission that the stock was not, as represented by Jacobs, fully paid up and earning a dividend of 12 per cent. In addition to this there was the admission of Mr. Jacobs "that the transaction had not been a square one"; and, again, "that it had not been just as it should have been and he would give additional security to make it right." We think the evidence sufficient to support the finding of the trial court.

3. The interveners contend that there is no allegation or proof to show under what circumstances the second deed was given or to impeach its validity. The deed itself, as we have seen, contains the statement that it is given in place of the first deed, and, in the absence of any showing that there was any new or different consideration, we think the two should be considered, in view of this recital, as one conveyance, and that they must stand or fall together. It is, however, urged that by giving the second

deed Rihner ratified and confirmed the contract, and this is founded upon the statement in the interveners' brief that Rihner was informed prior to December 25, 1904, that the stock received in trade for the farm was worthless. The only testimony upon which this statement could be predicated is that of Mr. William C. Stuhr, who at the time of the transaction was called in by Mr. Rihner "to see if the papers were made out correctly." He testifies that he at that time told Mr. Rihner to be careful what he was doing, and that he (Stuhr) did not think the stock was worth what Jacobs represented it to be, and that some time after that he told Mr. Rihner that he thought it was worthless, and Rihner replied that he believed it was all right. Being pressed for the date of this statement to Rihner, Mr. Stuhr finally said that he thought it was before Christmas, but he expressly disclaimed any knowledge of the matter, and was merely stating his opinion or suspicion. It cannot be said that Mr. Rihner discovered the worthless character of the stock until the facts upon which its value depended were brought to his notice.

4. It is a general principle that an attachment reaches only the actual interest of the debtor in the property attached. *Barnes v. Cox*, 58 Neb. 675; *Chicago, B. & Q. R. Co. v. First Nat. Bank*, 58 Neb. 548. But in this case the interveners contend that they became Jacob's surety in reliance upon his apparent ownership of the Sarpy county land, and that the plaintiffs ought therefore to be estopped to claim, as against them, that it was not in fact Jacobs' property, invoking the principle that, where one of two innocent persons must suffer by the fraud of a third, he who trusted the third person and placed the means in his hands to commit the wrong must bear the loss. If Jacobs had mortgaged the land in question to secure the interveners against the liability incurred by them, there can be no question that the rule stated above would have applied, and that the mortgage would have been valid. *Hansen v. Berthelsen*, 19 Neb. 433. In such case, Jacobs

would have exercised the power which Rihner conferred upon him by investing him with the legal title, and the interveners would have relied upon the existence of such title in Jacobs. Here we are, however, asked to go one step further, and to hold that, where the legal title to land is fraudulently obtained, the victim of such fraud is estopped to claim the title as against the general creditor, who takes no lien upon the land, but who asserts that he gave credit to the fraudulent grantee upon the strength of such apparent ownership. To sustain this claim we are cited to *Roy v. McPherson,* 11 Neb. 197; *Early v. Wilson,* 31 Neb. 458; *Adler & Sons Clothing Co. v. Hellman,* 55 Neb. 266; *Hoagland Bros. v. Wilson,* 15 Neb. 320. In each of the cases cited the trust was intentionally created, and the transaction was between relatives, both of which elements are lacking in the case at bar. There was no intention by Rihner to place the title in Jacobs and retain a beneficial interest, thereby making Jacobs his trustee. The trust in this case arose by operation of law, and was not contemplated by the parties at the time of the transaction, and there can, of course, be no question of *bona fides,* such as always exists in transactions between near relatives where one places or allows the legal title to remain in the other while he or she retains the beneficial interest. Rihner did not knowingly trust his title to Jacobs. He supposed he was receiving adequate security for the payment of the remainder of the purchase price of his land. It is true he relied on the veracity of Jacobs, but not on his business integrity or ability, as where one deeds land to another to hold for the use and benefit of his grantor. Neither could he have had it in contemplation that the holding of the title would enable Jacobs to obtain credit which he would not otherwise have been able to secure. He evidently believed the stock that Jacobs parted with was as valuable as the land, or he would not have accepted it as security. If it had been as represented, Jacobs' borrowing power would not have been enhanced by the transaction, for he would have lost in parting with

the stock what he gained in obtaining the title to the land. We do not therefore think that the decisions in the cases above cited necessarily control the disposition of this case.

5. There is a theory approved and adopted by the courts of some states which makes the very essence of equitable estoppel to consist of fraud, and affirms that an actual fraudulent intention to deceive or mislead is a necessary requisite in the conduct of the party in order that it may create an equitable estoppel. *Boggs v. Merced Mining Co.*, 14 Cal. 279; *Martin v. Zellerbach*, 38 Cal. 300. In a general discussion of the principles, elements, operation and effect of equitable estoppel, Mr. Pomeroy comes to the conclusion that such fraud is not a necessary element, except as the word fraud is used as synonymous with "unconscientious" or "inequitable," and that it is accurate to describe equitable estoppel in general terms as such conduct by a party that it would be fraudulent or a fraud upon the rights of another for him afterwards to repudiate and to set up claims inconsistent with it. 2 Pomeroy, Equity Jurisprudence (3d ed.), sec. 803. Applying this rule, which is most favorable to the existence of such estoppel, to the facts before us, we are led to inquire whether it is unconscientious or inequitable for Rihner to assert that Jacobs was not really the owner of this land because of the fraud he had practiced in obtaining it. If the interveners had taken a specific lien upon the land, the solution would have been, as we have already seen, very simple. In such case there could have been no question as to their reliance upon Jacobs' act, nor of negligence upon their part. But the facts before us present an entirely different case. The interveners both testify that Jacobs told them he had a deed to the farm, and one of them says that he had heard of it the fall before. While they both say that they would not have signed the note if they had not believed Jacobs owned the farm, there is no evidence that either saw the deed, or knew the land, or examined the record. They relied upon

the statement of Mr. Jacobs as completely as did Rihner, more so in fact, for Mr. Rihner, while he relied upon Jacobs' statement as to the value of the stock, required it to be assigned to him; but the interveners, though relying upon his statement as to the ownership of the farm, did not take the precaution to secure the pledge of that property. If Rihner was guilty of negligence in deeding the land to Jacobs upon his unsupported statement of the value of the stock, the interveners were equally negligent in taking Jacobs' unsupported statement as to the ownership of the land. If it be said that an inspection of the record would have supported Jacobs' statement, the answer is that the real question is upon what did the interveners rely. Again, the testimony of a party as to the operation of his own mind should be received with caution, and weighed in the light of surrounding facts. Assuming it to be altogether candid, it is yet a conclusion or an opinion of the witness. The interveners had been acquainted with Jacobs for some years, and must have had an opinion concerning his financial ability and integrity. They knew that buying a farm did not make a man solvent, and they omitted to ask him the crucial question as to whether he had paid for it. Giving the utmost effect to their testimony, they relied upon the fact that Jacobs said he was the owner of the farm, and not upon the fact that Rihner had made the deed. We do not determine the question whether a person who has parted with the title to real estate, in reliance upon false and fraudulent representations, is estopped to assert his rights as against a mere general creditor of the fraudulent vendee who has obtained no interest in, nor lien upon, the land itself. It is significant that we are not cited to any decision which holds that an equitable estoppel may arise in such a case. We are satisfied that in this case the negligence of the interveners was fully as great as that of Rihner, and that there is nothing in the facts and circumstances that makes it unconscientious or inequitable for Mr. Rihner to now assert that Jacobs, because of his

fraudulent representations, obtained no real interest in the land.

We therefore recommend that the finding and decision of the court below upon the petition of intervention be reversed and said petition dismissed, and that the judgment be otherwise affirmed.

JACKSON and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the finding and decision of the court below upon the petition of intervention is reversed and said petition dismissed, and the judgment is otherwise affirmed.

JUDGMENT ACCORDINGLY.

NELLIE NEELEY, APPELLEE, V. HELEN TRAUTWEIN ET AL., APPELLANTS.

FILED JULY 12, 1907. No. 14,936.

1. **Instructions** must be considered together, and their true meaning and effect must be determined by considering all that is stated on each particular subject or branch of the case.
2. **Instructions** examined, and found not objectionable as giving undue prominence to portions of the evidence.
3. **Question for Jury.** The question of the veracity of witnesses is for the jury.

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

Billingsley & Greene, for appellants.

H. F. Guile, J. M. Guile and *B. F. Johnson, contra.*

CALKINS, C.

Mrs. Meserve was a masseuse, and in February, 1905, she was the proprietor of Meserve's Massage Parlors in Lincoln. At this time the plaintiff became connected

with the business, going there, as she claims, under an agreement that Mrs. Meserve was to attempt to teach her the trade, and, if she succeeded in learning it, she was to buy the fixtures and good-will of the business. This arrangement, it is claimed, was carried out by the plaintiff, on the 15th of April, purchasing the fixtures and good-will for the sum of $300. It is not denied that this sum was an adequate price, but the defendants claim that the plaintiff was only an employee, and that the sale was a pretended one. The defendants on the 8th day of May, 1905, recovered a judgment against Mrs. Meserve in justice court, and on the same day caused an execution to be issued and levied upon a part of the fixtures of the business, as aforesaid claimed to have been purchased by the plaintiff. This the plaintiff seeks to recover by replevin in this action. There was a trial to a jury in the district court, and a verdict for the plaintiff. From a judgment upon this verdict the defendants appeal.

1. The fifth instruction given by the court to the jury upon its own motion was as follows: "You are instructed that, if you find that the property in controversy had been the property of Mrs. Meserve and in her possession, and that until the constable levied upon and took the same there had been no change of possession evidenced by any acts that would give notice to outsiders of such change, such as a change of location of the property, or transfer of the keys where the property was kept, change of business signs, change of business advertising, change of dominion or control thereof, or other visible acts indicating a change of ownership to such an extent that one would say there had been no apparent change of possession, and, if you find that Helen Trautwein was a creditor of Mrs. Meserve at the time said property was taken in execution, then the sale claimed by the plaintiff is presumed to be fraudulent and void, and the burden of proof is upon the plaintiff in such case to establish that such purchase was made in good faith and without fraudulent intent. The burden, however, in this case would be

upon the defendants to show that there was no apparent change of possession such as above indicated, provided you find that at the time of the levy the goods were in the immediate possession of the plaintiff." The defendants especially object to the last clause of this instruction, and contend that it was the only instruction given as to the burden of proof, and that, while nothing less than proof of changed ownership would support the plaintiff's claim, this instruction adopts a different rule. Instructions must, however, be considered together. *Philamalee v. State,* 58 Neb. 320. Their true meaning and effect must be determined by considering all that is stated on each particular subject or branch of the case. *St. Louis v. State,* 8 Neb. 405. In the fourth instruction the jury were told that a sale made by one of goods and chattels in his possession is presumed to be fraudulent and void as to his creditors, unless such sale be accompanied by an immediate delivery and be followed by the actual and continued change of possession of the thing sold, and is conclusive evidence of fraud, unless it be made to appear on the part of the person claiming under such sale that the same was made in good faith and without any intent to defraud such creditors. When the jury were told that the failure to make a delivery, followed by an actual and continued change of possession, would be conclusive evidence of fraud, unless it was made to appear by the person claiming under sale that the same was made in good faith, they were clearly told that the plaintiff in such case must prove her *bona fides,* and it was thus informed where the *onus probandi* lay. It is not necessary to use the words "burden of proof" in instructing a jury. Other words may as well and aptly convey the idea. If the last clause in instruction No. 5 had unconditionally stated that the burden of proof was upon the defendants to show the want of delivery and that there was no apparent change in possession, the question the defendants now seek to raise would have been presented. This clause

was, however, limited by the statement, "provided you find that at the time of the levy the goods were in the immediate possession of the plaintiff." If the goods were in the immediate possession of the plaintiff at the time of the levy, and there was evidence that would have supported such a finding, then there was such a change of possession as is required by the statute, and the presumption of fraud fails. If the delivery is made at any time before the levy it is sufficient. The term creditors in the statute under consideration means attaching or execution creditors, and they must perfect their lien by a levy before delivery in order to claim the benefit of its presumption. *Forrester & Co. v. Kearney Nat. Bank,* 49 Neb. 655; *Meyer & Raapke v. Miller,* 51 Neb. 620; *Wilson v. Lewis,* 63 Neb. 617. If this clause would have been objectionable without the proviso, it was thereby made harmless to defendants.

2. The defendants also object to instructions Nos. 6 and 8 as slighting the evidence. Instruction No. 6 stated that the failure of a purchaser of goods to take possession of the kind described in instruction No. 5 does not render the sale conclusively void as against creditors; it merely casts upon the purchaser the burden of proving his good faith in the transaction after it has been shown that there was no apparent change of possession; that, if they found that the plaintiff was a purchaser in good faith of the goods in controversy without the knowledge of any fraudulent intent upon the part of Mrs. Meserve, the failure upon her part to take possession would not render the sale to her void. Instruction No. 8 was to the effect that a change of location of the property sold is not necessary to make a *bona fide* sale, if from all the evidence the jury find that, notwithstanding there was no change in the location of the property, the purchase was made in good faith; that, on the other hand, the fact that there was or was not a change in the location of the property sold is one proper to be considered in so far as it may bear upon the question whether or not there was an apparent change

of the property, or whether or not purchase was made in good faith by the purchaser. These instructions state the law as favorably to the defendants as they are entitled to claim it should be. They were applicable to the evidence, and do not, in our opinion, give undue prominence to any particular part thereof.

3. Finally, the defendants urge that the evidence does not sustain the verdict. If the jury believed the testimony of Mrs. Meserve and the plaintiff, they could come to no other conclusion than they did; and the question of their veracity was a question for them to determine.

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

JACKSON and AMES, CC., concur.

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

AFFIRMED.

KATHERINE WICKER, APPELLANT, V. MYRTLE MOORE ET AL., APPELLEES.

FILED JULY 12, 1907. No. 14,938.

1. **Partition:** DEVISEES. One of four children who claim under a will devising lands to such of said children as shall survive a period of ten years after the testator's death cannot maintain partition against his codevisees before the end of such period.

2. ———: ———. Where property is devised in trust for minor children for a period of ten years after the testator's death, then to be divided amongst such of his children as shall survive the period, one of such children cannot maintain partition during the existence of the trust.

APPEAL from the district court for Keya Paha county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

R. R. Dickson, for appellant.

C. E. Lear, contra.

CALKINS, C.

John S. Moore died seized of real and personal property, leaving him surviving four children, the plaintiff, now aged 21 years, and the defendants, all over 14 years of age, but none of whom have attained their majority. The decedent's will, which has been admitted to probate, provides that, after payment of his debts, the remainder of his property be "turned over and delivered" to two trustees named therein, who are directed to carry on the business of stock raising upon the testator's ranch for the space of ten years after the testator's death in, as nearly as can be, the same manner that the testator had carried on the said business, and out of the receipts to provide for his said children. At the end of said term the whole estate, less the legitimate costs and expenses of guardianship and administration, was to be divided amongst his four children, share and share alike. The will also contained the provision that, in case of the death of any of said children within ten years after the death of the testator, the share of such child should be divided amongst those surviving. The testator's object was expressly stated to be to keep and hold the property together, for the term named, for the benefit of his children. He died on the 27th day of December, 1901, and on the 28th day of December, 1905, the plaintiff filed her petition, describing the land of which the testator died seized, and, exhibiting to the court the foregoing facts, prayed for a partition of the said land amongst the parties, and, if a partition could not be made, for a sale and division of the proceeds. To this petition a demurrer was interposed, which was sustained, and from a judgment rendered dismissing the action the plaintiff appeals.

1. The plaintiff does not attack the validity of the will, nor the right of possession of the trustees, who are not made parties to the action. The will, as we have seen, directs the trustees named therein to take possession, and manage the testator's property for ten years after his

death, at the end of which period the same is to be divided amongst such of his four children as shall then survive. The estate which the children take under the will is upon condition. It cannot be known that the plaintiff will be entitled to any share, nor into how many shares the property will be divided, nor what the share of any one child will be, until it is determined how many and which of said children shall survive the period fixed for such division. It would seem that neither argument nor authority are needed to establish the doctrine that a claimant whose interest is contingent and may never take effect cannot maintain partition.

2. It was the ancient doctrine under the statute of Henry VIII that no persons could be made parties to a writ in partition, or be affected by it, but such as were entitled to the present possession of their share in severalty. 4 Kent, Commentaries (rev. ed.), *364, note. And this rule prevails generally in this country, where not changed by statute. 1 Washburn, Real Property (5th ed.), p. 715; *Nichols v. Nichols,* 28 Vt. 228; *Stout v. Dunning,* 72 Ind. 343; *Wood v. Sugg,* 91 N. Car. 93, 49 Am. Rep. 639; *Merritt v. Hughes,* 36 W. Va. 356, 15 S. E. 56; *Wood v. Bryant,* 68 Miss. 198, 8 So. 518; *Stevens v. Enders,* 13 N. J. Law, 271. In New York and Illinois the rule is different (*Bradshaw v. Callaghan,* 8 Johns. (N. Y.), *558; *Hill v. Reno,* 112 Ill. 154), and has been changed by statute in New Jersey (*Smith v. Gaines,* 38 N. J. Eq. 65). But, even in those states that do not require a present right of possession as a prerequisite to the right to maintain partition, the principle is recognized that equity will not award a partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one from whom he claims. *Hill v. Reno, supra.* And it has been expressly held that, where the will shows that the testator did not contemplate a division of the trust property, it should not be divided. *Outcalt v. Appleby,* 36 N. J. Eq. 73; *Blake v. Blake,* 118 N. Car. 575, 24 S. E. 424.

In any view of the case, the judgment of the district court is right, and we recommend that it be affirmed.

JACKSON and AMES, CC., concur.

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

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1907.

STATE, EX REL. RAY O. CASTLE, RELATOR, V. WILLIAM SCHROEDER ET AL., RESPONDENTS.

FILED SEPTEMBER 19, 1907. No. 15,209.

1. Cities: FILLING VACANCIES IN OFFICES. The provisions of the general election law (Comp. St., ch. 26, secs. 105, 107) for filling vacancies in office apply to the office of alderman of the city of Lincoln, there being no special provision of the act governing cities of that class, nor of the ordinances enacted thereunder, which are inconsistent therewith.

2. ———: ———. One appointed to fill a vacancy in the office of alderman of a city of the first class having more than 40,000 and less than 100,000 inhabitants holds only until the next general election (Comp. St., ch. 26, sec. 107), which is the next election at which the vacancy can be filled (sec. 105), to wit, the next regular municipal election.

ORIGINAL application for a writ of mandamus to compel respondents, as members of city council, to canvass vote. *Writ allowed.*

W. L. Anderson, Roscoe Pound and *John S. Bishop*, for relator.

A. S. Tibbets, E. C. Strode and *T. J. Doyle, contra.*

SEDGWICK, C. J.

By an amendment to the statute governing cities of the first class enacted in 1905, it was provided that at a special election in that year seven aldermen should be elected,

who should hold their office for the term of four years, until the municipal election in the year 1909. One of the aldermen elected at the special election died in November of that year, and the respondent, William Schroeder, was appointed to fill the vacancy caused by his death. At the general municipal election in 1907 the relator was nominated by one of the political parties, and, having been a candidate for election, received the highest number of votes for that office, and demanded that the respondents, as councilmen and aldermen of the city, canvass the vote cast at that election for aldermen and declare the result. They having refused to do so, this application was made to this court for a writ of mandamus. The question thus presented is whether respondent, Schroeder, by virtue of his appointment, is entitled to hold the office for the remainder of the unexpired term of the deceased alderman, or at the next municipal election thereafter, which was the spring election of 1907, an alderman should be elected for the remainder of that term. It has always been the general policy of this state that the governing officers of the cities and towns should be selected by a vote of the electors, and, generally speaking, statutes providing for filling vacancies in elective offices authorize the filling of such vacancies by appointment beyond the time required for holding a special election to avoid the inconvenience of such special election, and persons so appointed usually hold the office only until the vacancy can be filled by the electors at a general election. This general policy of the state is declared in the general election law, section 107, ch. 26, Comp. St. 1905, which is as follows: "Vacancies occurring in any state, judicial district, county, precinct, township, or any public elective office, thirty days prior to any general election, shall be filled thereat. Vacancies occurring in the office of county judge or justice of the peace shall be filled by election, but when the unexpired term does not exceed one year the vacancy shall be filled by appointment, as provided in section one hundred and three. Vacancies occurring in the office of any police mag-

istrate in cities where the unexpired term does not exceed one year shall be filled by appointment, but vacancies occurring in such office less than thirty days prior to any city election, and where the unexpired term exceeds one year, shall be filled by special election. And any person so appointed or elected under the provisions of this section shall hold his office for the unexpired term." And section 105 is as follows: "Appointments under the provisions of this chapter shall be in writing, and continue until the next election at which the vacancy can be filled and until a successor is elected and qualified, and be filed with the secretary of state, or proper township clerk, or proper county clerk respectively." Subdivision XLIX, sec. 129, art. I, ch. 13, Comp. St. 1905, providing for government of cities of the first class, authorized such cities "to provide for filling such vacancies as may occur in any elective office by appointment by the mayor, by the advice and consent of the council, to hold until the next general election." The office of alderman in the city of Lincoln is an elective office. The policy of the state is to provide means whereby the people shall be represented in that office by officials of their own selection, so far as possible, and it is the duty of the courts to keep that policy in mind when construing the various acts of the legislature in relation thereto, which may be thought indefinite, or to contain inconsistencies and conflicting expressions. The language of the general election law above quoted expressly applies to municipal offices, and in *State v. Hamilton*, 29 Neb. 198, it was held to apply to councilmen of the city of Lincoln. It, of course, applies in this case, unless the statute governing cities of the first class, or ordinances of the city of Lincoln authorized by that statute, furnish a different rule.

It is contended that the words "general election" used in this section of the election law mean the next election provided by law for the regular election to the office in question for the full term; that is, the next general election as applied to the office of alderman is not the next election at which municipal officers in general are elected,

but the election expressly appointed by statute for the election of aldermen, which in this case would be the municipal election of 1909. There are authorities apparently supporting the contention. *People v. Hardy,* 8 Utah, 68, 29 Pac. 1118, is cited and especially relied upon. The decision in that case is based upon what the court think to be a necessary construction of the wording of their statute. The office of county collector for Salt Lake county was in controversy. The statute provided that "annually on the first Monday in August there shall be a general election held in each precinct in the several counties for choosing all officers not otherwise provided for." The court concluded that the office of county collector was "otherwise provided for," because the statute creating the office provided that the county collector should be elected in 1878, and biennially thereafter. And although the statute provided that the election of county collector in 1878, and thereafter, should be "at the general election," this was considered to be such a special provision for election of county collectors that the words "the general election" in the statute providing for the filling of vacancies in that office must be construed to refer only to the regular election held in the even numbered years. If the construction which that court placed upon the statute seemed reasonable, it would still be of no assistance to us in this case in construing very different legislation. That court cites many authorities which it says "bear upon this question, but they depend largely upon the statutes of the several states where the decisions are rendered." In the sections of our statute above quoted the expression "the next general election" appears to be used interchangeably with the expression "the next election at which the vacancy can be filled." Other instances of the use of these expressions as the equivalent of each other may be found in our laws. The words "general election" have no uncertain meaning in this state, and, when used with reference to city elections without any qualifying words, must mean the election for municipal officers in general.

2. It is contended that the statute governing cities of the first class is inconsistent with the general election law in its provisions for filling vacancies in municipal offices, and requires a different construction. In *State v. Rankin*, 33 Neb. 266, the law, as declared in the first paragraph of the syllabus, was found to be: "Where a law creating an office specifically provides how vacancies occurring in such office shall be filled, such provision, and not the general law on the subject of vacancies, governs and controls the method of filling vacancies in such office." It is suggested that this principle has some application to the case at bar. It is said that the statute providing for the government of cities of the first class contains a section providing for the appointment of officers provided for in the act. This section referred to as containing this provision provides for the appointment of certain minor officers and agents of the city by the mayor, and their confirmation by the council, but contains no reference to the filling of vacancies in elective offices. The suggestion therefore cannot be regarded as seriously made. We have already called attention to the statute providing that the city council may regulate the filling of vacancies in elective offices by ordinance. Pursuant to this statute, the city council enacted an ordinance providing that "all vacancies in any elective office shall be filled by the mayor, by and with the assent of the council. Such appointee shall hold until the next general municipal election." It was contended upon the argument that this ordinance is not now operative for several reasons, but we do not find it necessary now to enter into this discussion. The general election law above quoted applies to the filling of vacancies in all elective offices. This, as before pointed out, is the plain purport of the language, and has been expressly held in *State v. Hamilton, supra.* In case of a conflict between the provisions of a general statute of this nature and the special provisions of a statute governing the filling of vacancies in a specified office, the special statute will control. *State v. Rankin, supra.* Unless the sections of the statute and the city ordinance

relied upon by the relator have special application in this case, and are sufficient to control the decision, there are no provisions of law applicable, except the general election law above quoted. The purpose of the statute is to supply a general rule applicable in all cases, unless for special reasons the legislature may provide a different method for filling vacancies that may occur in a specified office. Even in such cases the general statute must govern, if the provisions of the special act are capable of being reconciled therewith. Since the relator is entitled to have the vote in question canvassed, it is immaterial whether the appointment of the respondent was in regular form.

The writ will be issued as prayed, and the costs of the proceedings taxed against the respondents, Schroeder, Hoppe, Marshall, Houschildt, Bauer, Bishop, Quiggle, Sawyer, and George, who voted against the motion to canvass the vote. *State v. Carlson*, 72 Neb. 837.

WRIT ALLOWED.

IRA C. MUNGER, APPELLEE, V. T. J. BEARD & BROTHER ET AL., APPELLANTS.

FILED SEPTEMBER 19, 1907. No. 14,826.

1. **Lis Pendens: CONSTITUTIONAL LAW.** The amendment to section 85 of the code made in 1887, enlarging the scope of our *lis pendens* statute, is not unconstitutional.

2. **———: OBJECT OF STATUTE.** It was not the intention of the legislature, in providing for filing a notice of *lis pendens* in actions wherein the title of real property is involved, to make persons holding unrecorded conveyances of such property, or unrecorded incumbrances against the same, parties to the action, and to summon them into court by means of such *lis pendens* notice; nor is the effect of the amendment such as to make them parties, or to serve such holders of unrecorded interest with notice by publication. The true meaning of the amendment is to provide a means by which a party holding unrecorded instruments, or undisclosed or secret interests affecting the property in litigation,

may be estopped from asserting the same against the judgment finally entered in the action.

3. **Lis Pendens:** EFFECT OF JUDGMENT. The right of the legislature to provide that an unrecorded conveyance shall not be asserted against a subsequent conveyance made to a good faith purchaser is undoubted, and on the same principle its right to declare a judgment, defining the interest of a party to the suit in real estate involved in the action, paramount and superior to the interest conveyed by an unrecorded instrument, executed prior to the filing of a notice of *lis pendens*, cannot be doubted or questioned. *Sheasley v. Keens*, 48 Neb. 57, in so far as it holds any part of the amendment to section 85 of the code unconstitutional, disapproved and overruled.

4. ———: NOTICE OF INTEREST IN PROPERTY. The filing of a *lis pendens* notice does not cut off or affect the rights of one whose interest in the property affected by the suit is known to the plaintiff when the notice is filed.

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

John O. Yeiser, for appellants.

C. E. Herring, contra.

DUFFIE, C.

The following facts appear from the record in this case: One Anna J. Fitch, being the owner of lots 12 and 13, in block 99, in Dundee Place, an addition to the city of Omaha, executed a mortgage thereon to the Patrick Land Company, which mortgage was duly recorded August 31, 1888. The note which the mortgage was made to secure was sold and delivered to Ira C. Munger, and the mortgage duly assigned to him by the Patrick Land Company. January 17, 1894, Munger commenced an action to foreclose this mortgage, at the same time filing a *lis pendens* notice with the recorder of deeds of Douglas county. This action resulted in a decree of foreclosure, upon which a sale was made and a deed issued to the plaintiff, Ira C. Munger, of date March 9, 1896, and this deed was recorded August 26, 1899. In said foreclosure action T. J. Beard & Brother,

the appellants herein, were made parties defendant, being the owners of a judgment against Anna J. Fitch, the mortgagor, and which judgment they are now seeking to enforce against the mortgaged property. They made a personal appearance in the foreclosure action, but failed to answer or plead therein, and their default was duly entered. The foreclosure decree found $2,100 due on the mortgage, and the sale realized the sum of $1,200. The decree found that the mortgage was a first lien upon the premises, and foreclosed all the parties defendant of all equity of redemption or other interest or claim in the mortgaged premises. Anna J. Fitch, the mortgagor, was not served with summons in the foreclosure proceedings. It appeared that she had deeded the property to R. C. Patterson, who held the legal title at the commencement of the foreclosure proceedings, and who was made a party defendant. In his answer in that action, Patterson alleged facts showing that his deed from Mrs. Fitch was taken as security for money due from her, and it is upon this phase of the case that the appellants base their claim. Long after sale and recording of the deed growing out of the foreclosure proceedings, and some time prior to March 15, 1904, the appellants revived their judgment against Mrs. Fitch, caused execution to be issued thereon, and the mortgaged property, foreclosed in the above mentioned action, levied on by the sheriff of Douglas county, Nebraska, as the property of Mrs. Fitch, and the sheriff advertised said lots to be sold on March 15, 1904. The appellee brought this action to enjoin the sheriff and the defendants from proceeding with the sale, their petition setting up the facts above recited. The answer of the appellants admits the facts above set forth, but alleges that it was disclosed by the answer of R. C. Patterson in the foreclosure proceedings that the deed taken by him from Mrs. Fitch was taken as security and was, in fact, a mortgage; that Mrs. Fitch was the real owner of the lots in question at the time of the foreclosure proceedings; that, not being served with summons and not ap-

pearing in the action, her interest in the property was not affected by the foreclosure decree, and that she is still the owner of the fee, which is subject to levy and sale to satisfy the appellants' judgment. The district court sustained a demurrer to this answer, and entered a decree finding that Munger is the owner in fee of the lots in question; that the defendants are attempting to sell the property at sheriff's sale, and asserting a lien against the property by virtue of their judgment against Anna J. Fitch; that their judgment is not a lien upon the lots, and that they are precluded and estopped from asserting any lien against said property by virtue of their said judgment and levy. A perpetual injunction also issued against the defendants enjoining them from asserting in any manner a lien against said real estate or from selling the property at sheriff's sale.

The appellants assert with great confidence that, R. C. Patterson having disclosed in his answer in the foreclosure proceedings that his deed from Mrs. Fitch conveying the lots in controversy was taken as security, and not as an absolute, unconditional conveyance of the lots, the court had no jurisdiction of the property in the foreclosure proceedings, Mrs. Fitch not being served with summons and not appearing in said action to assert her claim in any manner. The fact that a notice of *lis pendens* was filed at the commencement of the foreclosure proceedings requires us to again examine our *lis pendens* law in connection with the decision of *Sheasley v. Keens,* 48 Neb. 57. Prior to 1887 the statute read as follows: "When the summons has been served, or publication made, the action is pending, so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title." Code 1885, sec. 85. Experience has demonstrated that this statute was defective, and that many decrees affecting title to real estate were wholly ineffective because intermediate the filing of a petition and the service of summons the holder of the legal

title had transferred the property, or an interest therein, to some third party whose rights could not be affected by the decree. A second class of persons were also beyond the reach of the original statute. They were parties who had taken title or acquired an interest in the property in litigation prior to the commencement of the action, but who had failed to record their conveyances, and who would therefore be unknown to the plaintiff, who could not on that account implead them in the action to cut off whatever interest they might have. To meet these difficulties, the legislature in 1887, and prior to the making of the mortgage in suit, amended section 85 by providing that, in all actions wherein the title to real property was brought in question, the plaintiff, at the time of filing his petition, or afterwards, might file a notice of *lis pendens* in the office of the register of deeds, the notice to contain the names of the parties, the object of the action, and a description of the property to be affected by the suit. A defendant who sought for any affirmative relief by way of cross-petition might also file such *lis pendens* notice, and it is provided that "from the time of filing such notice shall the pendency of such action be constructive notice to any purchaser or incumbrancer to be affected thereby, and every person whose conveyance or incumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or incumbrancer and shall be bound by all proceedings taken in said action after the filing of such notice, to the same extent as if he were made a party to the action." Code 1887, sec. 85. The effect of this amendment was before the court in *Sheasley v. Keens, supra,* and it was there held that the amendment was unconstitutional and void so far as it sought to bind a party who had taken title to property involved in an action prior to the commencement of the action, but who had failed to record his conveyance or incumbrance upon the property. The reasoning upon which this conclusion was reached is found at page 64 of the opinion. The argument adduced is that the holder of

an unrecorded deed or mortgage affecting the real estate involved in the litigation, though such deed or mortgage was executed long prior to the time of filing a *lis pendens,* is, by the amendment, in effect, made a party to the suit in which the *lis pendens* is filed, and declared to be bound by the judgment rendered in that action in the same manner as if he was in fact made a party to the suit and served with notice by publication. It is then said that this constitutes an amendment to section 77 of the code, providing for constructive service upon the parties to an action; and, because section 77 was not referred to or amended by the act, it was in violation of section 11, art. III of the constitution, which declares that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed."

If it be once established that it was not the object or purpose of the amendment to section 85 to make the holders of unrecorded conveyances or interests parties to the suit, or to summon them into court to have their interests adjudicated in the action in which the *lis pendens* notice is filed, then the reasons urged in *Sheasley v. Keens, supra,* for holding the act unconstitutional have nothing to rest upon. No court, so far as our investigation has extended, had, before the case of *Sheasley v. Keens,* in holding that parties were bound by the decree because of a *lis pendens* filed, put it upon the ground that such persons were parties to the action. As a matter of fact such persons are not parties to the action. No one is a party to an action unless made so by the record in the case, or unless they instituted the action in the name of another, or, being interested in the subject matter of the litigation, employ counsel to conduct the suit or direct and conduct its prosecution. The rule that a *pendente lite* purchaser took title to property involved in litigation, subject to the judgment finally entered, was adopted out of considerations of public policy and to inspire confidence in titles

based upon the judgment or decree of court. Section 85 of the code, as originally enacted, defines the persons who shall take title to the property subject to the judgment entered, and, as amended, it adds another class of persons who take title intermediate the filing of the petition and the service of the summons, and still another who, having acquired a title or interest in the property prior to the date of the commencement of the action, shall be estopped from asserting such interest against the plaintiff's rights as determined by the judgment entered in the suit. There was no intent to make persons holding unrecorded interests *parties to the action.* That was not the aim or purpose of the amendment, and it does not in fact make such persons parties. The old statute did not fully meet the requirements of the situation. Under it the owner of the legal title to real estate, after the filing of a petition to foreclose a mortgage thereon or to establish any other interest therein, could transfer the title to some third party, and, if this was done before service of the summons, the plaintiff's judgment was fruitless of any beneficial results. Another action against this person would be followed by the same result, and no one could tell whether a decree followed by a sale of property gave the purchaser a valid title. Another class were those where the owner of incumbered real estate transferred the title in anticipation of an action, and the grantee did not put his conveyance of record until after judgment in the suit. His interests would not, under the original statute, be affected by the decree, and another action to determine his rights would have to be instituted.

How could these evils be remedied? The question was not how to implead and serve parties having unrecorded interests. The legislature understood, as well as any one else, that parties secretly holding title or liens could not be known to the plaintiff, could not be made parties, could not be served, and the question was how to cut them off from asserting their interest after a judgment against the persons appearing of record as the only ones having any

interest. The plain way to accomplish this end was to declare that all parties with unrecorded interests should be bound by a judgment against those whose interests were known or appeared of record. It was the application in another way of the doctrine that the party who fails to record his title shall be estopped from asserting it against a subsequcnt good faith purchaser. The legislature, in the use of an undoubted power, exercised its right to say that a party who failed to place of record any interest held by him in real estate should be bound by a judgment entered in an action involving such property, where the record owners were made parties. In other words, the purchaser of real estate, under a decree of court in which a *lis pendens* has been filed, takes title paramount to any conveyance or incumbrance not known to the plaintiff or found of record when the *lis pendens* was filed; and this upon the same theory that a subsequent good faith purchaser acquires good title against a prior conveyance which was not of record when the second party made his purchase. One who would deny the power of the legislature to declare a judgment entered against parties holding the record title to real estate paramount to the rights of a party who acquired an interest in the property prior to the commencement of the action, but who failed to record his conveyance or incumbrance, would have to deny the right of the legislature to say that a subsequent *bona fide* purchaser can take title as against a prior unrecorded conveyance. Such a party would have to argue that our recording acts are unconstitutional as taking from a man his property without due process of law. We might go further than this, and assert that it is the undoubted privilege of the legislature to say that no deed or instrument affecting real estate shall be of any validity or force whatever until it is recorded, and, when possessed of this power, its right to ordain that an unrecorded conveyance or interest in real property shall not be asserted against a judgment or decree of court affecting the property, where all known owners thereof are made parties to

the suit, cannot be questioned or disputed. This being the case, it might have provided in the amendment to section 85 that a judgment against the owner or record owner of real estate should bind those holding unrecorded interests therein, and have dispensed altogether with the filing of a *lis pendens* notice by the plaintiff; and we cannot see how the provision for a notice, which the legislature might have dispensed with altogether, can be used as an argument to make the amendment unconstitutional. The thought of the legislature in providing for a notice to be filed with the register of deeds undoubtedly was to protect the interest of secret owners or lien holders so far as might be done without prejudice to the plaintiff, and to allow them to come into court and have their rights adjudicated. Realizing that owners of secret interests could not be known to the plaintiff, and that they could not be made parties or served with process, in order to protect them, so far as could be done with justice to the plaintiff, the statute, as amended, requires the plaintiff to file with the register of deeds a notice of the action, containing "the names of the parties, the object of the action, and a description of the property sought to be affected thereby," thus putting of record in the office where such third person's conveyance ought to appear, and where he would be most likely to discover it, a notice that the property in which he may have an interest is in litigation, and giving him the opportunity to inform and make himself a party to the action and to have his rights determined before closing his mouth.

The amendment to the statute was adopted from the state of New York, where it had received a construction prior to its enactment by our legislature. In *Fuller v. Scribner*, 76 N. Y. 190, it was held: "Where, after the filing of a notice of *lis pendens* in accordance with section 132 of the Code of Procedure, and service of summons upon one or more of the defendants in an action for the foreclosure of a mortgage, a judgment is perfected and docketed against the owner of the equity of redemption, the judg-

ment creditor is bound by the judgment in the foreclosure suit, the same as if he were a party thereto; and this, although, at the time of the entry of his judgment, said owner had not been served with summons in the foreclosure suit." In *Ayrault v. Murphy*, 54 N. Y. 203, it is said: "The mortgage which the plaintiff seeks to enforce, was not recorded until two days after the commencement of that action, and notice of its pendency duly filed in the office of the clerk of the county where the premises were situated; and, hence, the plaintiff became bound by the proceedings in that action in which the title of the mortgagor was as against Savage as receiver, and Mead and Holcomb judgment creditors of George Murphy, held to be fraudulent and void, and in pursuance of an order contained in that judgment, Savage as receiver, had, before the commencement of this action, become invested with the title to the mortgaged premises." The mortgage spoken of in that case was made prior to the commencement of the action, but was not recorded, and the court of appeals, speaking of the effect of their *lis pendens* statute, further said: "The court at special term was, therefore, right in holding that the title or lien of the defendant Savage as receiver, and of Mead and Holcomb as judgment creditors, had by the proceedings in that action, become prior to and superior to the lien of the plaintiff's mortgage; or in other words, that the plaintiff by reason of his mortgage not having been recorded prior to the notice filed of the pendency of that action, became an incumbrancer subsequent to Savage, Mead and Holcomb."

The opinion in *Sheasley v. Keens, supra*, was filed April 10, 1896, and has stood as the law of this state for more than ten years. Were it possible, with that opinion standing unreversed, for the legislature to exercise its discretion in passing a *lis pendens* law in conformity with its judgment, and to bind thereby all such parties as it saw fit, we would not feel like interfering with the holding in that case; but, as long as that opinion stands, the hands of the legislature are tied, and it will be impossible for it to

enact a law estopping parties holding unrecorded conveyances or liens made prior to the filing of a *lis pendens* notice from asserting such conveyance in opposition to the judgment rendered. This being the case, we have, after much consideration, deemed it our duty to overrule the holding in *Sheasley v. Keens*, so far as it declares unconstitutional the amendment to our *lis pendens* laws passed in 1887, declaring parties whose interest in the real estate in controversy "are subsequently recorded" bound by the decree entered, to the same effect as if they were parties to the action, and to hold that the statute, as amended, is valid and effective. Having no doubt that the statute, as amended, is constitutional and valid, and that it should be enforced, its effect would have been to bind Mrs. Fitch, who, it is claimed, held an unrecorded interest in the property foreclosed, were it not for one fact alleged in the answer of Beard & Brother, and admitted by the demurrer filed by the plaintiff. The answer alleges that Mrs. Fitch has been in possession of the property for the past 14 years. This would carry her possession back to a period anterior to the commencement of the foreclosure suit, and, being in possession, the plaintiff was bound to take notice of any rights or equities which she had in the premises, and to make her a party and bring her into court.

In Wiltsie, Mortgage Foreclosure, sec. 157, it is said: "The occupant or person in possession of the premises at the time of the commencement of the foreclosure is also indispensable, no matter how or under what circumstances he came into possession. * * * His omission will, moreover produce such a defect of title as to relieve a purchaser at the sale of his bid. The statute of *lis pendens* does not relieve the plaintiff from making parties to an action all persons having an interest in the property when the action is commenced, if such interest is known to him. In the leading case of *Lamont v. Cheshire*, 65 N. Y. 30, the question was elaborately considered, and it was there held that a party holding an unrecorded interest in the

real estate in controversy was not affected by the filing of a notice of *lis pendens,* provided the plaintiff had actual notice of his interest. This is undoubtedly a correct construction of the statute, the intent of the legislature being to give the plaintiff the benefit of a *lis pendens* notice as against parties holding secret liens, and not against those whose liens or interests were actually known to him. It being admitted that Mrs. Fitch was in possession when the foreclosure proceeding was commenced, her possession was actual notice to the plaintiff in that action of whatever interest she may have had in the property, and, having such actual notice, it was his duty to make her a party that her rights might be litigated.

We recommend a reversal of the judgment and remanding the cause for further proceedings not inconsistent with this opinion.

EPPERSON and GOOD, 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 not inconsistent with said opinion.

REVERSED.

ELIZA WALKER ET AL., APPELLEES, V. HENRY EHRESMAN ET AL., APPELLANTS.

FILED SEPTEMBER 19, 1907. No. 14,913.

1. **Public Lands:** DEATH OF ENTRYMAN: RIGHTS OF DEVISEES. Deceased entered certain public land as a timber-culture claim under the laws of the United States, but the patent was not issued until after his death. *Held,* That the legal title to such land remained in the general government, that such entryman had no devisable interest therein, and that the devisees named in his will acquired no title to the premises.

2. ———: ———: PROBATE COURT: JURISDICTION. *Held,* further, that, as the land did not belong to the estate of the deceased and was

not devisable by him, the county court had no jurisdiction to determine the title to the real estate by adjudging that the devisees named in the entryman's will were the owners of the premises to the exclusion of the heirs at law in whose name the patent was issued by the United States.

3. **Equitable Estoppel.** To constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice.

APPEAL from the district court for Buffalo county: HANSON M. GRIMES, JUDGE. *Affirmed.*

J. M. Easterling and *F. A. Nye,* for appellants.

Muldoon & Shuman, contra.

EPPERSON, C.

October 3, 1888, John A. McDonald made timber-culture entry under the laws of the United States on certain land in Buffalo county. He departed this life October 6, 1893, leaving a will purporting to devise the tract to his wife for life, remainder to his son. November 13, 1897, said devisees made final proof, and a patent from the general government was issued August 5, 1898, to the "heirs of John A. McDonald," deceased. January 19, 1898, decedent's will was admitted to probate, and the estate was later assigned to the devisees therein named. Defendant Ehresman acquired title from said devisees by mesne conveyances. his action was instituted by certain heirs of John A. McDonald to cancel the decree of the county court admitting the will to probate, and to quiet title. The district court canceled the decree and quieted title as prayed, and the devisees and those claiming under them appeal.

1. The first question for determination is whether John A. McDonald, an entryman under the timber-culture act of the United States, had a devisable interest in the land be-

fore receiving a patent? He filed on the land in 1888, and died in 1893, or three years prior to the date at which proof could have been made. Every person of full age, etc., seized of lands, "or entitled to any interest therein descendable to his heirs," may devise the same by will. Ann. St., sec. 4988. The United States timber-culture statute provides in part: "No final certificate shall be given, or patent issued, for the land so entered until the expiration of eight years from the date of such entry; and if, at the expiration of such time, or at any time within five years thereafter, the person making such entry, or, if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses * * * they shall receive a patent for such tract of land." 20 U. S. St. at Large, ch. 190, p. 114. Was John A. McDonald entitled to an interest in the land "descendable to his heirs"? If not, he possessed no devisable interest, and disposition thereof could not be made by will. In *Kelsay v. Eaton,* 45 Or. 70, 76 Pac. 770, it was held that an entryman before final certificate has no devisable interest in the land, citing to the same effect *Cooper v. Wilder,* 111 Cal. 191, 52 Am. St. Rep. 163, wherein Temple, J., uses the following language: "Obviously the privilege or right acquired by the entry and filing is personal, and cannot be transferred except as authorized in the act. The death of the applicant before performance renders him incapable of performance, and that event would end the claim but for the provisions of the act, which authorize the heirs to prove that he or they has or have performed. Does the heir in such case take by inheritance from the applicant, or is he by appointment in the act itself a substituted beneficiary of the government to whom the title goes by direct grant? It is admitted, at once, that the condition of the applicant prior to full performance is in nowise analogous to that of a pre-emptor either before or after the pre-emptor has received his certificate of purchase. The applicant has a right to the land of which the government cannot deprive him, but which will be lost if he fails to perform. And

death, before performance, renders such failure certain, and ends the estate of the applicant. In view, however, of the hardship of such a result the law continues its offer to certain persons whom it is presumed the applicant himself might have selected. But they take not by inheritance from the deceased, but as grantees from the government." Other cases more or less in point are: *Gould v. Tucker,* 18 S. Dak. 281; *Cutting v. Cutting,* 6 Fed. 259; *Hall v. Russell,* 101 U. S. 503. A similar rule seems to prevail under the homestead law. See *Marley v. Sturkert,* 62 Neb. 163; *Gjerstadengen v. Van Duzen,* 7 N. Dak. 612. *Gould v. Tucker, supra,* was before the court on rehearing (20 N. Dak. 226), and reaffirmed, citing *Aspey v. Barry,* 13 S. Dak. 220; *Towner v. Rodegeb,* 33 Wash. 153, 99 Am. St. Rep. 936. See, further, *Wittenbrock v. Wheadon,* 128 Cal. 150; *Demars v. Hickey,* 13 Wyo. 371; *McCune v. Essig,* 199 U. S. 382. The decisions of the department of interior seem to announce a different rule. (*Bone v. Dickerson's Heirs,* 8 Land Dec. [U. S.] 452), but, under the authority of the adjudged cases, we are of opinion that John A. McDonald had no devisable interest in the real estate involved in this litigation, and that his heirs took the premises as donees of the United States, and not by inheritance. The department of interior seems to have issued the patent to the heirs, and not followed its previous decisions in the case in hand. The court in *Kelsay v. Eaton, supra,* answering a similar objection, said: "Our attention has been called to decisions made by the department of the interior that would seem to lead to a different conclusion, but, as such decisions are not conclusive in the determination of questions of law, we think the better reason supports the opposite view, and therefore such decisions will not be followed."

2. It is argued, however, that, the county court having probated the will, it is conclusive, and not subject to collateral attack, and defendants' title cannot be questioned. It is evident that, if the county court had no jurisdiction to render the decree, its judgment is void and may be as-

sailed in a collateral proceeding. *Johnson v. Parrotte,* 46 Neb. 51. It is not questioned that a county court has jurisdiction to probate a will. "Probate of a will is defined to be: 'The proof before an officer authorized by law that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.' * * * In other words, probate is proving the instrument purporting to be a will to have been signed by the testator in the presence of at least two witnesses, who at his request signed the same as witnesses; and that the testator, at the time of the execution thereof, was of sound mind." *Pettit v. Black,* 13 Neb. 142. The constitution of our state expressly denies county courts jurisdiction "in actions in which title to real estate is sought to be recovered, or may be drawn in question." Const., art. VI, sec. 16. As the land did not belong to the estate of the deceased, it was not devisable by him, as we have determined in the first division of this opinion, and it is apparent that the county court had no jurisdiction to determine the title to the real estate by adjudging that the devisees under the will were the owners of the premises to the exclusion of the heirs at law of the deceased. Such undoubtedly is the effect of the decisions of this court in *Finders v. Bodle,* 58 Neb. 57; *Youngson v. Bond,* 69 Neb. 356. *Gjerstadengen v. Van Duzen, supra,* is a case in point. Corliss, C. J., says: "As the land did not belong to the estate of the deceased, it is obvious that the court was without jurisdiction to order the sale thereof. When the land directed to be sold is the property of a stranger, the probate court possesses no jurisdiction over such property; nor has it any power to try the question of title in such a proceeding, or at all. Should the owner of the land appear in the proceeding, and set up his title, and be defeated, it would nevertheless be true that the court would be without jurisdiction. For the statutes do not contemplate that a probate court shall hear and determine questions relating to the title to land. It has power to act only when the real estate is in fact the

property of the decedent. All that it ever pretends to do in a proceeding of the character of that which is here assailed is to order the sale of whatever interest the decedent may have had in the land at the time of his death. It never assumes to decide whether he was in fact the owner thereof. Nor can it decide such question, even when voluntarily litigated before it. Such a matter is as much beyond the jurisdiction as a suit in equity is beyond the jurisdiction of a justice of the peace; and it is familiar law that consent will not vest in any tribunal power which has been withheld from it. These principles are elementary, and we have recently had occasion to discuss them in a somewhat similar case. See *Arnegaard v. Arnegaard*, 7 N. Dak. 475." See, also, *Stewart v. Lohr*, 1 Wash. 341, Am. St. Rep. 150; *Burns v. Hamilton's Adm'r*, 33 Ala. 210, 70 Am. Dec. 570; *Hamn v. Hutchins*, 19 Tex. Civ. App. 209, 46 S. W. 873.

3. Defendants' third insistence is that plaintiffs, having "stood by and watched the probate proceedings, and having had full knowledge of the transfers and made no objections to the probate of the will," are estopped from now asserting rights or title to the land in question. It does not appear that plaintiffs were apprised of the true state of their title, or that their conduct was intended to deceive, or that defendants were destitute of all convenient or ready means of acquiring knowledge of the true state of the title, or that they relied upon the conduct of the plaintiffs to their detriment. Under the circumstances disclosed, it cannot be said that plaintiffs were estopped from asserting title to the real estate, which was not subject to devise, and which did not belong to the estate at the time of the conduct complained of. The facts all appeared of record, and defendants' mistake was a mistake of law. We are of opinion that the facts relied on lack the essential element of an estoppel. *Gjerstadengen v. Hartzell*, 8 N. Dak. 424; *Gjerstadengen v. Van Duzen*, *supra*; *Boggs v. Merced Mining Co.*, 14 Cal. 279; 16 Cyc. 726.

Other assignments of error are argued in the briefs, but are not presented in the record before us.

The judgment of the district court conforms with law, and its affirmance is recommended.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

IN RE MARTIN L. SAPP.

FILED OCTOBER 3, 1907. No. 15,326.

1. Cities: POWERS. A city of the second class cannot by ordinance limit the liberty of its citizens, unless the power to do so is given in its charter.
2. ———: ———. The statutes governing cities of the second class do not confer power upon the mayor and council to prohibit by ordinance the keeping of "card tables" for sale in a place of business, nor to make it unlawful to permit card playing under any and all circumstances "in any place of business or adjacent thereto."

ORIGINAL application for a writ of habeas corpus. *Writ allowed.*

Adam McMullen and *L. M. Pemberton,* for petitioner.

E. N. Kaufman, contra.

SEDGWICK, C. J.

This application for writ of habeas corpus presents the question of the validity of an ordinance of the city of Wymore. Section 1 of the ordinance in question is as follows: "That it shall be unlawful for any person in the city of Wymore to set up or keep any card table in or adjacent to any place of business or place of public resort,

or to permit card playing in any place of business or adjacent thereto or place of public resort." The complaint against the petitioner, filed in the police court of the city, charged that on the day named in the complaint, and within the city of Wymore, the defendant "did keep card tables in his place of business, and did permit card playing thereon in his place of business, unlawfully and against the peace and dignity of the people of said city." There was a trial upon this complaint, resulting in the conviction of the defendant, and a fine of $5 and costs. The defendant, having been committed for a failure to pay this fine and costs, made this application to this court for a writ of habeas corpus.

A city of the second class cannot by ordinance limit the liberty of its citizens, unless the power to do so is given in its charter. The city of Wymore is a city of the second class, and we are referred to several sections of the statute governing such cities as containing the power exercised by the city in this case. They are sections 8639, 8642, 8650 and 8723, Ann. St. The first section cited gives the city power "to restrain, prohibit, and suppress billiard tables and bowling alleys kept for public uses, houses of prostitution and unlicensed tippling shops, gambling and gambling houses, and other disorderly houses and practices, and all kinds of public indecencies, and all lotteries or fraudulent devices and practices for the purpose of obtaining money or property." Clearly playing a game of cards for amusement is not within the purview of this section. Section 8650 relates to places of amusement, and gives the city power to determine when such places "are not safe for such uses," and when such places are not provided with sufficient and ample means of exit and entrance, or are not safe as places of amusement, or when the party licensed to conduct such place has been convicted of any violation of the ordinances in relation thereto, the city is given power to revoke the license. Section 8653 confers the power to license, tax, suppress, regulate and prohibit hawkers and others named therein, including "keepers of

ordinaries, theatrical, and other exhibitions, shows, and other amusements, and to revoke such license at pleasure." This section, of course, does not give the city power to suppress all amusements. The words "other amusements" must be construed in the light of the purpose of the section, and must be limited to amusements of the kind and character named in the section. It cannot be extended to include private amusements which are in themselves harmless.

Section 8723 gives the city general power "to make all such ordinances, by-laws, rules, regulations, resolutions not inconsistent with the laws of the state, as may be expedient, in addition to the special powers in this chapter granted, maintaining the peace, good government, and welfare of the corporation, and its trade, commerce, and manufactories." It is contended that this language is broad enough to include the power exercised in enacting the ordinance in question. That part of the ordinance under which this prosecution was brought attempts to make it unlawful to "keep any card table in or adjacent to any place of business or place of public resort, or to permit card playing in any place of business." If a card table was kept for sale in a place of business, it would seem that the ordinance would be violated, and to allow a game of cards for amusement after business hours, when the building was closed and no other persons present except those engaged in the amusement, would seem also to be a violation of the ordinance. Such regulations cannot be included in the general power to maintain "the peace, good government and welfare of the corporation, and its trade, commerce and manufactories." If card playing in privacy for amusement only can be prohibited, then any other kind of amusement under the same circumstances might be prohibited also. It may be doubted whether such legislation would be within the power of the state itself, and the statutes referred to cannot be construed as an attempt to confer such power upon the city authorities.

The ordinance being void, the court was without jurisdiction, and the petitioner unlawfully restrained of his liberty.

PETITIONER DISCHARGED.

D. ALLEN CROWELL V. STATE OF NEBRASKA.

FILED OCTOBER 3, 1907. No. 14,990.

1. **Criminal Law: EVIDENCE: INSTRUCTIONS.** Evidence that the defendant in a criminal case has hired or procured a witness for the prosecution to leave the state and not appear at the trial as a witness against him is competent as an incriminating circumstance tending to establish his guilt; and it is proper for the court to charge the jury that such fact is a circumstance which may be considered by them, with all of the other evidence in the case, in determining the guilt or innocence of the accused.

2. ———: MISCONDUCT OF JURY. The fact that the officer in charge of a jury, in taking them to their boarding place, conducted them along the street where the crime was alleged to have been committed, was not such misconduct on the part of the jury as to require a reversal of the judgment.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Hamer & Hamer, for plaintiff in error.

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

BARNES, J.

The plaintiff in error was convicted in the district court for Buffalo county of the crime of burglary, and has brought the case here for review. His contentions are but two in number, and will be disposed of in the order in which they are presented.

1. It is first insisted that the court erred in giving the following instruction: "The court instructs the jury that

if you believe from the evidence that the defendant had been arrested and had his preliminary examination, and that the witness Swinyer had testified at such examination as a witness, and that thereafter the defendant hired or procured, or attempted to procure, the witness Swinyer to leave the state and not appear as a witness in the district court against the defendant, then I charge you that such conduct on the part of the defendant is a circumstance to be considered by the jury, in connection with all of the evidence in the case, in determining the guilt or innocence of the defendant." Counsel for the accused admit that the instruction correctly states the law, but contend that its effect is to single out and give undue prominence to a certain portion of the evidence, and is within the inhibition of the rule announced in *Haskins v. State,* 46 Neb. 888; *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.,* 42 Neb. 105, and *First Nat. Bank v. Lowrey Bros.,* 36 Neb. 290. From an examination we find that in *Haskins v. State* the jury were instructed, in substance, that if they found the defendant sold or attempted to sell the property he was alleged to have stolen, or any part of it, with intent to convert the proceeds thereof to his own use, the crime charged was sufficiently proved, unless the defendant should satisfactorily explain such sales, or attempted sales, and they should find the defendant guilty. It was held that the instruction shifted the burden of proof to the defendant, and was therefore erroneous. We further find that *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co., supra,* has no bearing on the question here presented. Again, in *First Nat. Bank v. Lowrey Bros., supra,* the jury were told that certain things, particularly mentioned, were strong evidence of a secret trust; and it was held that it was the province of the jury to determine what weight should be given to the different items of the evidence. So, by a comparison of the instruction here complained of with those held to be erroneous in the foregoing cases, it at once appears that those cases do not

sustain counsel's contention. As above stated, it is conceded that the instruction contains a correct statement of the law as announced in Underhill, Criminal Evidence, sec. 121; Wharton, Criminal Evidence (8th ed.), sec. 749; 12 Cyc. 398; *Blair v. State,* 72 Neb. 501; *State v. Keith,* 47 Minn. 559. And it seems clear that, instead of invading the province of the jury, the instruction carefully guarded the rights of the accused by informing them that the fact, if they found it to exist, that the accused had for a consideration procured the absence of a particular witness could only be taken by them, when considered with all of the other evidence, as a circumstance tending to establish his innocence or guilt. We think the question is ruled by *Collins v. Commonwealth,* 75 Ky. 271, where the following instruction was approved: "The fact that the accused participated in making arrangements for one of the witnesses against him to leave the place at which the trial was in progress was a circumstance the jury might consider, just as in similar cases the flight of the accused might be considered." So we are of opinion that the instruction complained of is not erroneous.

2. Finally, it is contended that the judgment should be reversed because of misconduct of the jury. It is stated, and shown by certain affidavits, that after all of the evidence had been introduced, after the argument of counsel and after the charge of the court to the jury, the bailiff, in taking them to supper, on the evening after the completion of the trial, and before they had agreed upon their verdict, conducted them down the street where the burglary was alleged to have been committed. Two members of the jury make affidavit that, while they were not permitted to stop and examine the situation there presented, they walked slowly past the place, and made such observation as they could; that the moon was shining, and a bright electric light was burning in the center of the street at the time, and presumably the conditions were about the same as they were at the time when the burglary was alleged to have been committed. It appears that one of the

witnesses for the prosecution testified that he recognized the defendant, saw him go to the window of the feed store in question, break it, and reach in and take from the building a sack of flour. The affidavits further show that, after the jury returned to their room, the jurymen who made them discussed the situation with their fellow jurors, and presented the argument that the light was not sufficient to enable the witness to recognize the accused. It seems, however, they were not sufficiently positive of this fact to prevent them from finally agreeing to a verdict of conviction.

It is a general rule that affidavits of jurors showing the mental process by which they arrived at their conclusion will not be received for the purpose of impeaching their verdict, and it would seem that the affidavits above mentioned should not have been considered in deciding the motion for a new trial. The rule above stated is a salutary one, and its violation cannot be too strongly condemned. But as the affidavits were received without objection, and are here before us, their effect will be considered. It is a well-established rule that irregularity or misconduct of members of a jury is not a ground for granting a new trial, where it is presumed that such misconduct did not produce injury to the moving party. The alleged misconduct in this case was the fact that the jury were conducted down the street past the place where the crime was said to have been committed. They were not taken there for the purpose of examining the premises in the absence of the defendant, and they were not permitted to stop and comment on the situation. Perhaps it would have been better if the officer had conducted them to their supper by another route, but we are not prepared to say that it was misconduct on his part in not doing so, and the only inquiry which seems pertinent is: Did the incident complained of operate to the prejudice of the accused? According to the testimony of the jurors themselves it did not. If it had any effect at all upon the jury, it seems to have in some measure shaken the confidence of

some of its members in the truth of the statement of the witness Swinyer, who claimed to have seen and recognized the accused while he was in the act of committing the crime for which he was convicted. So, instead of strengthening the evidence against the accused and rendering his conviction more certain, it seems to have had the opposite effect. In *Tudor v. Commonwealth,* 43 S. W. (Ky.) 187, it was said: "The mere fact that the jury, while in charge of the sheriff, taking exercise, went to the store where the killing occurred, for the purpose of procuring some tobacco, did not constitute the receiving of evidence out of court." In *McDonald v. State,* 15 Tex. App. 493, while considering their verdict, the jury were permitted to visit and examine the room in which the homicide was committed, and read the penal code on the subject of murder, it not being shown that they were influenced thereby in arriving at their verdict, and it was held that the complaint of misconduct was futile.

For the foregoing reasons, we are of opinion that the alleged misconduct of the jury in this case was not such as to entitle the accused to a new trial. The judgment of the district court is therefore

AFFIRMED.

JOSEPH F. PARKINS, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 3, 1907. No. 15,069.

1. **New Trial.** A new trial will not be granted upon the ground of newly discovered evidence, where such evidence is merely cumulative and would not, in all probability, affect the result if a new trial were granted.
2. ———. Under the facts stated, *held* that the defendant is not entitled to a new trial upon the ground of surprise.
3. Evidence examined, and *held* sufficient to sustain the verdict.

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

James W. Orr, B. P. Waggener and *E. R. Ringo,* for appellant.

F. T. Ransom, H. Z. Wedgwood and *W. R. Patrick, contra.*

LETTON, J.

This is the third time this case has been before this court for review. In the last opinion, written by Mr. Commissioner ALBERT (76 Neb. 242), nearly all of the questions which are now presented in the brief of the appellant were considered and determined. The case has again been submitted to a jury upon the issue whether the gravel furnished and to be furnished was in fact suitable in the judgment of the defendant's superintendent for ballasting defendant's roadbed. The evidence at this trial was substantially the same as at the former trials. The former opinions of this court, wherein it is held that the petition stated a cause of action, that the contract was an entire contract for 50,000 yards of gravel, that the letters of the defendant's officials were competent evidence, that the gravel taken from the Union Pacific pit was proper to be supplied under the contract, and that interest is recoverable from the date of the expiration of the contract, settled the law of the case, and we see no reason for departing from the conclusions then arrived at.

The main point in controversy at this time is whether or not the amount of damages awarded to the plaintiff by the jury is warranted by the evidence, and whether there was such surprise to the defendant at the trial, and discovery of new evidence since the trial, as rendered it error upon the part of the trial court to refuse to set aside the verdict and grant a new trial. Since the amount of the plaintiff's damages was based upon the loss of profits which he had sustained by reason of the refusal of the defendant to accept the gravel purchased, it was incumbent upon him to prove the actual cost to him of the gravel loaded upon the cars according to contract. He

proved that he had a contract with one Innhilder to load the gravel upon cars at the Springfield gravel pit for 15 cents a cubic yard, and as to the cost of loading at the other pit the plaintiff testified that he could take out 1,000 yards of gravel a day from the Union Pacific pit with an elevating grader; that it would take 15 or 20 teams to haul it to the railroad track, a distance of about 2,500 to 3,000 feet; that in 1893, 1894 and 1895 he could procure all the teams and men he wanted at the rate of $2.50 a day for man and team, and that a man and team could haul 20 loads of gravel a day to the cars. In this connection he further testified that he could load the gravel upon the cars at the switch for 20 cents a cubic yard, and that he had an arrangement with one Al Brainard to take the gravel from the pit and load it upon the cars for 20 cents a cubic yard. Upon cross-examination it was disclosed that, while he had testified at former trials that he could load the gravel for 20 cents a yard, he had not previously testified as to any arrangement or contract of this kind with Brainard. The defendant introduced the testimony of two civil engineers and two gravel shippers substantially to the effect that it would cost from 45 to 70 cents a cubic yard to load and ship this gravel if it had to be hauled to the Union Pacific tracks. There is other evidence, however, offered by the defendant, that in 1897 the plaintiff made a written offer to sell gravel to the defendant at 45 cents a cubic yard upon the cars at the gravel pit track, or from the pits worked by the Union Pacific Railroad at 55 cents a cubic yard, saying "this would have to be hauled 3,000 feet, which would add the extra cost." Upon a consideration of all the evidence as to the cost of furnishing the gravel, the jury allowed the plaintiff a net profit of about 14½ cents a cubic yard. This fixed the cost to the plaintiff of the gravel hauled to the cars and loaded at about 30 cents a cubic yard. This fixes the cost at a greater sum than that which the evidence offered by the plaintiff tended to establish, and at a lower cost than the testimony of the

defendant's witnesses would indicate the cost to be. In view of all the testimony, we cannot say that the verdict is unsupported by the evidence, and under the established rule the verdict of the jury must be taken as final upon the question of fact.

After the verdict, and before a hearing upon the motion for a new trial, the defendant procured the affidavit of one Al Brainard, who appears to be the same individual with whom the plaintiff testified he had an agreement to load the gravel for 20 cents. The affidavit is to the effect that Brainard had never had any agreement with Parkins to load gravel for 20 cents a cubic yard, and that from his experience in work of that kind he would testify that the digging, hauling and loading of the gravel was worth about 47 cents a cubic yard. Many grounds were assigned in the motion for a new trial, but among those most insisted upon were that the defendant was surprised by the evidence of Parkins as to the contract with Brainard to load the gravel for 20 cents, and on account of newly discovered evidence, being that of Brainard that he had no such agreement with Parkins, and that the loading of the gravel would in fact cost a much greater sum. The motion for a new trial was overruled by the court. Most of the grounds assigned therein were disposed of when this case was here before, but the assignment of error for overruling the motion upon the grounds of surprise and newly discovered evidence remains to be considered.

The verdict of the jury is evidently not based upon the testimony of Parkins that he could load the gravel for 20 cents a cubic yard, or that he had an arrangement whereby it was to be loaded for that price, for they fixed the cost at a sum greater by one-half. No surprise at the testimony of Parkins that the gravel could be loaded for 20 cents a cubic yard could be claimed by the defendant, since at former trials his testimony had been to the same effect, but it is urged that, since he had never testified to a contract with Brainard, the defendant was surprised

by this testimony. It is shown, however, that he had never been asked as to the existence of any contract to load the gravel at this price, and there is nothing in the record which shows that the defendant might not have ascertained the claim of Parkins that such a contract existed by the ordinary process of cross-examination. The defendant was not surprised by the claim that the cost of loading was only 20 cents a cubic yard, but claimed to have been surprised merely by the collateral fact that one Brainard was ready and willing to load the gravel for Parkins at that price. It will be observed that when this testimony was given the defendant made no effort to obtain a continuance in order to procure the evidence of Brainard, and did not complain of surprise until after the verdict had been rendered. If it had deemed the surprise material, it should have immediately applied for time to procure the necessary testimony to meet the new fact, and not waited until an unfavorable verdict had been reached before it acted. We think, upon the whole record, the defendant was not entitled to a new trial merely upon the ground of being surprised by Parkins' evidence regarding his arrangement with Brainard.

We are further of the opinion that a new trial should not be granted upon the ground of newly discovered evidence. The defendant had ample notice at former trials of what Parkins' testimony would be as to the cost of loading the gravel. At this trial it introduced the testimony of several witnesses upon this point, and the additional evidence of Brainard as to the cost of loading the gravel would merely be cumulative. We do not think it cumulative to such a degree or of such importance that its production would be apt to change the result.

The verdict seems large, but, when the amount of interest allowed under the instructions of the court is deducted, it leaves the recovery for loss of profits, as we have seen, at less than 15 cents a cubic yard, and this, under the law as formerly settled in this case and the evidence adduced, seems to be as fair an estimate as a jury is

ever liable to make in a case where there is such a decided conflict in the testimony.

For these reasons, the judgment of the district court is

AFFIRMED.

JOHN W. BURKE, APPELLEE, V. CITY OF SOUTH OMAHA, APPELLANT.

FILED OCTOBER 3, 1907. No. 14,885.

Cities: LIABILITY. The making, improving and repairing of streets by a municipal corporation relate to its corporate interest only, and it is liable for the wrongful or negligent acts of its agents in performing such duties. *City of Omaha v. Croft*, 60 Neb. 57.

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

Lambert & Winters, for appellant.

H. C. Murphy and *Benjamin S. Baker, contra.*

DUFFIE, C.

Plaintiff was employed by the defendant city in repairing one of its streets. Through the negligence of the foreman in charge of the work he was injured by the action of an uncontrollable and vicious team, being thrown into a pit or washout some 30 feet in depth which was being filled, and he sustained injuries to his damage, fixed by the jury at $2,387.50. Upon the return of the verdict, defendant filed a motion for judgment *non obstante veredicto*, under section 440 of the code. This motion was overruled, and defendant appeals.

No complaint is made of the amount of damages awarded or of errors committed upon the trial, and the only question submitted for our determination is whether or not, under the facts above set out, the city is liable to an employee engaged in the repair of its streets for

negligence resulting in injury to the employee. In other words, does the doctrine of *respondeat superior* apply? Under its charter, general power is conferred upon the defendant city to create improvement districts for the purpose of improving the streets, boulevards, alleys or other public grounds therein by paving, repaving, macadamizing, curbing, guttering, grading or changing the established grade in such manner as may be determined upon. Comp. St. 1905, ch. 13, art. II, sec. 128, subdiv. III. It is also empowered to open, vacate, widen and narrow streets, avenues and alleys within the city; to exercise the right of eminent domain, and appropriate private property for the use of the city for streets, alleys, avenues and other public purposes. Section 128, *supra,* subdiv. XXXIII. It is to control and direct all work upon the public streets, except as otherwise provided. Section 128, *supra,* subdiv. XXXI. It is to care for, supervise and control all public highways, bridges, streets, alleys, public squares and commons within the city, and cause the same to be kept open and in repair and free from nuisance. Section 128, *supra,* subdiv. LVI. It might be further observed that the state has reserved no control of the streets in cities, and has relieved the counties of all responsibilities for the repair or good order of streets in cities and incorporated towns. From this it will be seen that the defendant city has absolute care and control of the streets within its limits, that its duty is to keep them in repair and safe for travel, and whether, when engaged in opening, working and repairing its streets, it is engaged in a corporate capacity or in a governmental duty is the question to be solved and upon which its liability in this case depends. The state cannot, without its consent expressed through legislation, be sued for injuries resulting from an act done in the exercise of its lawful governmental powers and pertaining to the administration of government. When this power is exercised, as it must be, through an agent, the agent cannot be sued for injuries resulting from a strict performance of the agency.

In such case the act is regarded as the act of the state, and not of the agent, who is the mere instrument of the state, and nothing more; and, if the agent employs servants in the performance of the act, he cannot be sued for injuries resulting from the negligence of the servants. The rule of *respondeat superior* does not apply. The state, and not the agent, is the real superior. But when the state, by way of grant or special privilege, authorizes private persons in part for their personal benefit to perform such governmental acts, these persons are not clothed with this immunity of mere agents of the state, although the authority given them may include the exercise of power such as that of eminent domain, which can only be exercised by the state or its agents. *Hourigan v. City of Norwich,* 77 Conn. 358. Municipal corporations are agents of the state in the exercise of certain governmental powers. The preservation of the health and peace of its inhabitants and fire protection afforded the property owner are governmental functions. *Gillespie v. City of Lincoln,* 35 Neb. 34; *Village of Verdon v. Bowman,* 5 Neb. (Unof.) 38. So, also, where an independent officer or board is created by state law to perform certain duties within the corporate limits of a city, and over whose action the city has no control, the city will not be liable for the acts of such officer or board, as their acts are governmental in their character. *Murray v. City of Omaha,* 66 Neb. 279.

But municipal corporations are also treated in certain respects as private corporations; and this when they are authorized by way of special privilege to perform certain acts in part for the special benefit of the corporation and its inhabitants, which, if performed by the state, would undoubtedly be an exercise of its governmental power. When the state imposes upon an incorporated city the absolute duty of performing some act which the state may lawfully perform, and pertaining to the administration of government, the city, in the performance of that duty, may be clothed with the immunities belonging to the mere

agent of the state; but when the city is merely authorized by way of special privilege to perform such an act in part for its corporate benefit and the benefit of its inhabitants, the city is not clothed with these immunities, and is liable to be sued for injuries inflicted through its negligence in the performance of such an act. Cities in this state are granted special privileges for the benefit of their inhabitants in the control of the streets and alleys within their corporate limits. They may create improvement districts, and grade, gutter and pave their streets, and for this purpose they may levy a special tax upon the property of the inhabitants. They are invested with the extraordinary power of eminent domain in taking private property for street and alley purposes. They are privileged to control and direct the work upon the streets; and these are special privileges extended by the state, and, as said in *City of Omaha v. Olmsted,* 5 Neb. 446, "a sufficient consideration for the duties which the law imposes." As well said in that case: "The state grants to the municipality a portion of its sovereign authority, in greater powers of self-government than are given to *quasi* corporations, in increased facilities for the acquisition and control of corporate property, and in the special authority over, and control of, the streets, and their adaptation to the wants and convenience of the citizens of the municipality. The acceptance of these privileges is considered as raising an implied promise on the part of the city to perform its corporate duties; and this implied agreement made with the sovereign power inures to the benefit of every individual interested in the proper performance of such duties." This course of reasoning leads to but one conclusion, namely, that it is a corporate duty of the city to keep its streets in good repair and safe for travel. In numerous cases we have steadfastly adhered to the rule that a city is responsible to a traveler injured by reason of a defective street or walk. This is the doctrine adopted by a large majority of the states. In *Barnes v. District of Columbia,* 91 U. S. 540, the court, at page 551, has listed the states follow-

ing this rule up to 1875, the year in which the opinion was filed. Among them are New York, Illinois, Alabama, Connecticut, North Carolina, Maryland, Pennsylvania, Wisconsin, Virginia and Ohio. The only states mentioned as repudiating the rule are Massachusetts and Michigan. The court, in its opinion, notices and comments upon the fact that in these states which have followed this rule the courts have refused to apply it to counties and towns, and it ends the discussion of that question in the following words: "Whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed. Decisions or analogies derived from this source are of little value in fixing the liability of a city or a village."

If a city is liable to a traveler for injuries incurred in consequence of the defective condition of its streets, on principle it ought to be liable for negligence toward those whom it employs to repair them. In *Barree v. City of Cape Girardeau,* 6 L. R. A. (n. s.) 1090 (197 Mo. 382), the following was held: "The making and improving of streets by a municipal corporation relate to its corporate interests only, and it is therefore liable for the wrongful acts of its agents in performing such duties." In a note to *McMahon v. Dubuque,* 70 Am. St. Rep. 143 (107 Ia. 62), it is said: "Municipal corporations, acting within the purview of their authority, and in their ministerial or corporate character, in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, are impliedly liable for damage caused by the negligence of their officers and agents, though they may be engaged in some work that will inure to the general benefit of the municipality. Grading streets, cleansing sewers, or keeping wharves in safe condition, from which a profit is derived, are duties of this character: *Moffitt v. Asheville,* 103 N. Car. 237, 14 Am. St. Rep. 810; *Hitchins v. Mayor,* 68 Md. 100, 6 Am. St. Rep. 422; *Gibson v. Huntington,* 38 W. Va. 177, 45 Am. St. Rep. 853; *Heigel v. Wichita County,* 84 Tex.

392, 31 Am. St. Rep. 63." In a note to *Barree v. City of Cape Girardeau, supra,* the author says: "A conflict is found among the authorities dealing with the question under annotation. It is apparent from an examination of these authorities that, in the absence of statutory liability, this conflict does not arise from any distinction between the liability of a municipality for injuries caused by a defective highway and those caused by the municipal employees while engaged in the construction or repair of the highway, but that these liabilities rest upon the same ground, namely, whether or not the construction and repair of highways constitute a public or governmental function instead of a private or corporate function; and that the courts, in passing upon the liability of the municipality for injuries inflicted in the carrying on of the work of construction or repair, divide in accordance with the manner in which this fundamental question has been determined in their respective jurisdictions. Thus, in Colorado, where the construction and maintenance of highways is held to be a corporate, and not a public, duty, the municipality is held liable for the negligent injury of a person engaged in digging gravel from a pit for use in repairing a highway. *Colorado City v. Liafe,* 28 Colo. 468, 65 Pac. 630. And in *Denver v. Peterson,* 5 Colo. App. 41, 36 Pac. 1111, the municipality was held liable for injuries resulting from the frightening of a horse by a steam roller." The same rule was held in New York under like conditions. *Paine v. City of Rochester,* 14 N. Y. Supp. 180. We think our former decisions are clearly to the effect that the care of highways within the municipal limits is a corporate, and not a governmental, function, and, if so, the city is liable to any one injured through its neglect in the performance of that duty. *City of Omaha v. Croft,* 60 Neb. 57.

We recommend an affirmance of the judgment.

GOOD, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is

AFFIRMED.

PROSPER AMELL, APPELLEE, V. CLARENCE FISHER, APPELLANT.

FILED OCTOBER 3, 1907. No. 14,900.

Judgment: VACATING. A motion does not lie to vacate a judgment of the district court filed at a term subsequent to the rendition of the judgment, and not founded on any of the grounds set forth in section 604 of the code.

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

H. Chase, for appellant.

E. J. Smith and *Thomas L. Sloan, contra.*

GOOD, C.

This was a suit in equity to determine the title to 40 acres of land in Thurston county, Nebraska. Both the parties claim title to the land as the next of kin to Peter Babtiste Amell, who died intestate and without issue, and after the death of his mother. Prosper Amell, the plaintiff, claimed as the father of said intestate. Clarence Fisher, the defendant, claimed as the half-brother of said intestate, and denied that Prosper Amell was the father of said Peter. There are many other allegations in the pleadings relative to the relation of the parties that need not be noticed. Trial was had to the court, resulting in findings and a judgment for the plaintiff. This judgment was entered on the 9th day of October, 1905. Defendant took no steps for a new trial or to vacate such judgment until the 24th day of March, 1906, and at a

term of court subsequent to that at which the judgment was rendered, when he filed a motion to set aside and vacate the judgment notwithstanding the findings of the court, and for judgment in his favor upon the pleadings. This motion was overruled by the trial court on the same day that it was filed. The defendant filed a transcript of the proceedings in this court on the 24th day of September, 1906, more than eleven months after the rendition of the original judgment and just six months after the overruling of said motion.

The appeal was not docketed in this court in time to give this court jurisdiction to review the original judgment, so that but a single question is presented by this record, namely, did the district court err in overruling the defendant's motion to vacate and set aside the judgment. Section 602 of the code points out the grounds upon which a judgment of the district court may be vacated at a term subsequent to its rendition. Sections 603 and 604 point out the manner in which such relief may be sought. Section 604 designates all of the grounds upon which such relief may be granted by a motion. The defendant's motion to vacate the judgment did not fall within any of the provisions of this section, and the district court was therefore without any authority to grant the relief which the defendant sought by this motion. Any ruling upon this motion could not affect the judgment that had been rendered at a previous term of court. The judgment of the district court in overruling this motion was right and should be affirmed. We recommend that the appeal be dismissed.

DUFFIE, C., concurs.

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

DISMISSED.

UNION PACIFIC LODGE NO. 17, A. O. U. W., APPELLEE, V. BANKERS SURETY COMPANY, APPELLANT.

FILED OCTOBER 3, 1907. No. 14,945.

1. **Evidence.** In an action by a subordinate lodge of a fraternal beneficial association, the books and records of the lodge when properly identified are receivable in evidence against the members of the lodge and their privies.
2. **Corporations:** INSURANCE: ESTOPPEL. Where a surety company issues an indemnity policy insuring a fraternal beneficial association from loss by larceny or embezzlement of its officers, the contract not being illegal, the company will be estopped from denying the legal capacity of the association in an action on the policy by the association against the company.

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

E. M. Bartlett and *W. N. Chambers,* for appellant.

Weaver & Giller, contra.

JACKSON, C.

The plaintiff had judgment in an action on an employer's indemnity policy issued by the defendant for the protection of the plaintiff against loss by larceny or embezzlement of its officers. The financier and receiver are among the principal financial officers of the plaintiff. The contract of indemnity covered both of these offices. During the period involved in the transactions in suit, Henry McCoy was the financier and Ross C. Rowley the receiver. It was claimed in the petition that both of these officers were short in their accounts, and judgment was asked to cover the default of both. The court directed a verdict in favor of the defendant as to the claim of shortage against the financier, and the case having been submitted to a jury as to the receiver a verdict was returned against

the defendant, upon which the judgment involved in this appeal was entered.

The plaintiff is the subordinate lodge of a fraternal beneficial association, which issues certificates of indemnity on the lives of its members, who are periodically assessed to pay death claims. The accounts between the lodge and its members are kept in a ledger, where each member is charged with assessments for death losses and other demands incident to the conduct of the affairs of the lodge and the grand lodge to which it is subordinate, and credited with payments as they are made. This ledger or book of account is required to be kept by the fundamental law of the order and is one of the records of the lodge. The proceedings of the lodge are recorded in a minute book by an officer styled the recorder, in which the receipts and disbursements of the lodge are required to be entered. The financier receives the funds due the lodge, and keeps the accounts between the lodge and its members. The funds collected by him are required to be turned over to the receiver to be disbursed under the direction of the lodge. The financier is provided with blank books of receipts to be filled out by him and delivered to persons from whom funds are received. Stubs of receipts are retained in his office showing the purpose for which the receipt was issued, the amount received, and from whom. He also keeps a cash book, in which entries are made of cash received. At the trial the court received in evidence the minute book of the lodge, showing the receipts and disbursements, together with the ledger accounts between the lodge and its members, and an expert accountant testified to having made an examination of these books, and from the books to the condition of the accounts between the lodge and its financier and receiver. From the testimony of the plaintiff's witnesses it appeared that the cash book kept by the financier and stubs of receipts could not be found, except for a period of two or three months of the latter part of McCoy's term of office, and, except for that period, were not produced in evidence. The appellant

complains of the admission of the minute book and the ledger accounts, because it is said they are not books of original entry. The charges against the members are entered in the ledger only. The credits were entered both from the cash book and the memory of the officer, so that the ledger account is the only book of account showing the complete financial transactions between the lodge and its members, and for that purpose is a book of original entry. The recorder ordinarily kept the minutes of the lodge in shorthand notes, which were transcribed into the record. This record appears to have been read in open lodge, and had the approval of its members. Both books were required to be kept by the law of the order, and were part of the records of the lodge, and as such, when properly identified, are admissible in evidence against the members of the lodge and their privies, in an action by the lodge.

The court instructed the jury as follows: "You are instructed that mere discrepancies in accounts do not constitute larceny or embezzlement, but that the larceny or embezzlement, if any, must be shown by the plaintiff as a material fact, and in that regard you may consider the accounts of the lodge, as shown by the books received in evidence, and as bearing upon the question as to whether or not the said Rowley did, as such officer, during said time covered by defendant's bond, have plaintiff's moneys in his possession that were not paid out according to the direction of the lodge, nor turned over to his successor in office." It is said that this instruction is erroneous, because of a lack of evidence to show that the receiver had money in his possession that was not paid out according to the direction of the lodge or turned over to his successor in office, and that therefore there was no evidence of larceny or embezzlement. If the testimony of the expert accountant is to be believed, there is no merit in this contention, and the weight to be given to the evidence was a matter exclusively for the jury.

The defendant requested the court to instruct the jury that a surety is entitled to stand upon the strict terms of

his contract; he is bound only to the extent and in the manner pointed out in his obligation; and, further, that fraud is never presumed, but must be proved by the party asserting it by a fair preponderance of the evidence. The court refused these instructions, and of this ruling the defendant complains. The rules announced in the instructions requested are doubtless correct as abstract propositions of law, but our attention has not been called to any facts involved in this controversy which would make the refusal of the trial court to give the instructions prejudicial error, and it is not explained how such instructions would have aided the jury to arrive at a different conclusion.

The defendant produced, and sought to have introduced in evidence, a letter received by the plaintiff from the recorder of the grand lodge. On objection the offer was denied, and it is said that this letter discloses inaccuracies in the accounts of the lodge. The trial court did not err in excluding this letter from the consideration of the jury. The books of the lodge were in evidence, they were examined by accountants on behalf of the defendant, and the grand recorder himself was present at the trial and examined as a witness. If the books were inaccurate, the proof was at hand, and in any event there seems to be no theory presented by the record upon which the letter was admissible.

Many other rulings of the trial court on the admission of evidence are discussed in the brief. None of the rulings, however, are found to be prejudicial to the defendant.

Finally, it is urged that the petition does not show the legal capacity of the plaintiff to sue. The defendant is not favorably situated to raise this question. It contracted with the plaintiff, and the contract is not illegal. It is therefore estopped from denying the legal capacity of the plaintiff.

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

AMES, C., concurs.

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

AFFIRMED.

PRUDENTIAL REAL ESTATE COMPANY, APPELLANT, V. THOMAS F. HALL, APPELLEE.*

FILED OCTOBER 3, 1907. No. 15,234.

1. **Judgment:** VACATING. The power of the district court to modify or vacate its judgments during the term at which the judgment was rendered is discretionary.
2. **Taxation:** VALIDITY OF TAX. The validity of taxes involved in a default decree rendered in a scavenger suit may be contested upon an application to confirm the sale.

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

D. C. Patterson, for appellant.

H. P. Leavitt, contra.

H. E. Burnam, I. J. Dunn and *John A. Rine,* for the state.

JACKSON, C.

This action presents another feature of the scavenger act, and grows out of a controversy over the confirmation of the sale of tract No. 18,264, being a part of lot 6, block 9, in McCague's addition to the city of Omaha. The decree included a considerable amount of special taxes and assessments. The tract was sold March 15, 1905, to D. C. Patterson, trustee, for $50, to whom a certificate of sale was issued, which was afterwards assigned to the Prudential Real Estate Company, the appellant herein. Thomas F. Hall became the owner of the equity of redemption after the tax sale, and Fred Sellick was his tenant. Final

*Rehearing allowed. See opinion, p. 808, *post.*

notice of an application to confirm the sale was served on Hall and Sellick on the 13th day of December, 1906. The entry in the confirmation record is of the date of March 14, 1907, and on March 16, 1907, at the February term of the district court for Douglas county, an order confirming the sale was entered. On the 20th of that month, and at the same term of court, Hall filed a motion to set aside and vacate the order of confirmation, accompanied by objections to the confirmation of the sale, supported by a showing of the reasons why objections were not sooner made. On March 23, at the same term of court, the order of confirmation was vacated, and permission given to file and enter objections to confirmation. On April 2 of that year supplemental objections were filed, charging in effect that all persons occupying the tract had not been served with notice of the application to confirm, and that the court had no jurisdiction to enter the confirmation of sale; that the city council of the city of Omaha, in whose behalf the special taxes and assessments had been levied, had passed a resolution instructing the tax commissioner or other officer of the city to be present at the sale of all property under the decree involved, and to bid on behalf of the city of Omaha on all properties offered for sale a certain percentage of the assessed valuation as made by the tax commissioner; that such percentage should stand as the lowest bid to be received on any property within the city of Omaha at such sale; that such resolution was published in the daily papers of the city of Omaha prior to the sale in the fall of 1904 and the winter and spring of 1905, and that it was understood by all persons intending to participate in said sale that no bid would be received on any city property for less than the percentage named in said resolution; that Thomas F. Hall intended to be present at the sale and bid a sum largely in excess of the sum bid by Patterson, but that he was induced and influenced to remain away from the sale, and took no part therein, by reason of a conversation with the tax commissioner of the city of Omaha, who informed him that no bids would

be received of a sum less than the percentage required by the resolution adopted by the city council; that such percentage exceeded the amount which Hall intended to bid for the tract, and that Hall had no notice of the fact that sale had been made to Patterson until long after the date of such sale; and that all these facts were known to Patterson. Upon the hearing of the objections to the confirmation of the sale, the sale was vacated upon the condition that, if a supersedeas was not filed for the purpose of a review in this court, Thomas F. Hall should deposit with the county treasurer of Douglas county the sum of $300 as a guarantee that he would bid at least that amount at the next sale of the property. The Prudential Real Estate Company appeals.

The first assignment of error discussed relates to the order of the trial court setting aside the confirmation of the sale. It is a familiar rule, however, that the power of the district court over its own judgments during the term at which the judgment is rendered is discretionary, and is not subject to review in this court. So that we come at once to the question of the correctness of the ruling of the district court in vacating the sale. The decree, as affecting the tract involved, was by default, and by it the owner was not deprived of the legal right to have the validity of the taxes determined prior to the confirmation of the sale. *State v. Several Parcels of Land,* 75 Neb. 538.

There is no complaint that the evidence is insufficient to sustain the judgment, if, as a matter of law, the court had jurisdiction to entertain the application, and it is recommended that the judgment be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed April 10, 1908. *Former judgment of affirmance adhered to:*

1. Taxation: JUDICIAL SALE: POWER OF COURT. The court is the vendor in a judicial sale, and he may reject any bid which for any reason appears to him to be inadequate, and while a proceeding remains within his jurisdiction he may vacate any erroneous or improvident order he may have made during its progress. This power is not affected by the statute providing a procedure for the collection of taxes, and commonly called the "Scavenger Act."

2. Judicial Sale: JURISDICTION: ESTOPPEL. When the owner of property sold at judicial sale moves the court to deny confirmation because of inadequacy of price, and offers in event of resale to increase the bid thereat, he, by so doing, admits the jurisdiction of the court and confesses the justice of the decree of sale, and is estopped afterwards to dispute either.

AMES, C.

This is a rehearing from a former decision of the same case published *ante,* p. 805. The only brief filed upon the reargument is that in support of the motion for a rehearing. The cause was brought to this court by an appeal from an order vacating and setting aside a sale of real estate, and ordering a resale thereof, for delinquent taxes, pursuant to a decree therefor made in a proceeding for statutory foreclosure under an act of the legislature commonly known as the "Scavenger Act." As will be seen by reference to the former opinion, the sale had at first been confirmed; but at a subsequent day of the same term at which the order of confirmation was entered one Hall, who alleged to have purchased the premises subsequently to the sale, but before confirmation, applied to the court by motion for an order setting aside the confirmation and exposing the premises to another sale. It was from an order granting this motion that this appeal is prosecuted.

The former opinion recites the reasons given in the motion for the relief prayed, but this court expressly declined to decide upon the validity or sufficiency of all

or of any of them, holding that the case, in this respect, falls within the familiar rule "that the power of the district court over its own judgments during the term at which the judgment is rendered is discretionary, and is not subject to review in this court." To the correctness of this decision in this respect, that is, in so far as it refuses to disturb the order of the district court setting aside the confirmation, counsel have made no objection, and, of course, the logical result and necessary implication of that order is a resale of the premises. But counsel do complain, if we understand them, because this court did not decide upon the sufficiency of the grounds of the motion to entitle the party, as a matter of legal right, to the relief which he obtained; in other words, whether the reasons urged were of such compelling force that the court would have erred by denying the motion. We do not see that this question is involved in the record before us, and whatever we or the court might say with reference to it would be mere *obiter dicta,* without judicial force or significance. Doubtless the discretion mentioned is not wholly uncontrolled, and doubtless different rules apply to an order vacating a judgment during the term at which it is rendered, than to one refusing so to do; but it does not appear that we are now called upon to discriminate between the two classes of cases.

The former decision further says: "The decree, as affecting the tract involved, was by default and by it the owner was not deprived of the legal right to have the validity of the taxes determined prior to the confirmation of the sale. *State v. Several Parcels of Land,* 75 Neb. 538." Counsel for appellant are right in saying that the validity of no tax is put in issue by the present proceeding, and that this question is not involved in an appeal from the order denying confirmation and ordering a resale, and therefore ought not to have been decided. We do not see, however, how this error, which amounts merely to citing a former decision of this court which is not in point, can have wrought appellant any wrong or prejudice.

The statute pursuant to which this proceeding is had requires of the court the exercise, so far as may be, of the powers of a chancellor in foreclosure cases. It is not doubted that in such cases the court is the vendor, or that he may reject any bid which for any reason appears to him to be inadequate, or that, while the proceeding remains within his jurisdiction, he may vacate any erroneous or improvident order he may have made during its progress. The statute in question does not express an intent either to enlarge or to restrict, or in any way to affect, the exercise of this power, which has hitherto been regarded as inherent in a court of equity, and of which it may be doubted that the legislature has the power to deprive it. In what circumstances, if any, it may be abused in such manner as to require correction upon an appeal, it is not worth while now to speculate. There is no evidence of such abuse in this record. Hall, the appellee, purchased the equity of redemption, subject to the lien of the tax, intermediate the sale and the confirmation. There are two tracts, each of which was struck down for a trifling sum as compared either with the value of the property or the amount of the tax. By the application to set aside the confirmation he submitted to the decree of foreclosure, and offered, in case of a resale, to increase the sum bid by at least six times its amount, and to guarantee the good faith of his proposal by a deposit of the money with the court. It would be extremely unwise so to tie the hands of the district judge as to deprive him of the power to avail of an opportunity so advantageous for the public, and this court, at least in the absence of constraint by positive law, will not take so unprecedented a step.

A large number of questions, not above adverted to, were argued on the rehearing, and this court was severely criticised for having, it was contended, pronounced opinions in the case above cited upon matters not involved in the record therein. We have tried in the present instance to avoid a repetition of that offense.

We recommend that the former decision of this court

be adhered to, and the judgment of the district court affirmed.

EPPERSON and CALKINS, CC., concur.

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

AFFIRMED.

JUDGE P. COHOE V. STATE OF NEBRASKA.*

FILED OCTOBER 16, 1907. No. 15,084.

1. **Criminal Law**: PRELIMINARY EXAMINATION. Upon complaint duly made, a judge of the district court may sit as an examining magistrate to try whether a crime has been committed, and whether there is probable cause to believe that the person charged has committed the crime.

2. ———: ———: WARRANT. When such complaint is filed in the district court and the person charged with crime in said complaint is present in court, the judge may in his discretion call upon the defendant to plead to the complaint, and proceed with the examination without the issuing of a warrant upon the complaint.

3. **Larceny**: RETURN OF PROPERTY: INSTRUCTION. The return to the owner of a part of the money stolen will not of itself prevent a prosecution for the larceny, and in a proper case it is not error for the court to so instruct the jury.

4. ———: TRESPASS. Trespass is one of the elements of the crime of larceny. There can be no conviction under section 114 of the criminal code unless the taking of the property by the defendant was unlawful.

ERROR to the district court for Nemaha county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

E. B. Quackenbush, for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin, E. Ferneau and *H. A. Lambert, contra.*

*Rehearing denied. See opinion, p. 819, *post.*

SEDGWICK, C. J.

The defendant in this case was charged in the information with the larceny of $1,000 in gold. Upon the trial in the district court for Nemaha county he was found guilty and sentenced to imprisonment in the penitentiary.

1. The prosecuting attorney filed in the district court an application for leave "to file information in this court before the judge thereof as examining magistrate." The record recites that a showing was made to the court that the county judge "is incompetent to hear the same." Leave was given the county attorney as requested, and a complaint was filed in two counts, the first charging the defendant with the larceny of $1,000 in gold, and the second charging the defendant with the larceny of $1,000 in gold coin; "and paper money or currency of the amount and value of $1,000 lawful currency of the United States of America." No warrant was issued upon this complaint, the defendant being present in court. When the defendant was called upon to plead, he refused to do so, and a plea of not guilty was entered for him, and an examination had upon the complaint by the judge of the district court sitting as an examining magistrate. The judge found from the evidence that the crime charged in the first count of the complaint had been committed, and there was cause to believe that the defendant committed the same. The defendant was therefore held for trial in the district court. The first objection made to these proceedings is that the judge, as an examining magistrate, acquired no jurisdiction in the case because no warrant was issued for the arrest of the defendant. Some suggestions are also made of doubt as to the authority of the district judge to act as an examining magistrate, but this jurisdiction is given by the plain provisions of the statute (Cr. code, sec. 262), and has been recognized by this court in *State v. Dennison,* 60 Neb. 192, and *Van Buren v. State,* 65 Neb. 223. Section 286 of the criminal code provides that, when a complaint is filed, "it shall be the duty of such magis-

trate to issue a warrant for the arrest of the person accused." Section 288 prescribes what the warrant shall be, and it is manifest from these two sections that the sole object of the warrant is to bring the offender within the jurisdiction of the court. No authority is cited for the proposition that the formality of issuing and returning the warrant must be gone through with when the person accused is already in the court, and we see no reason for such a ruling under the provisions of the statute.

2. The second contention is that the court erred in arraigning the defendant. While the jury were being examined as to their qualifications to sit as jurors in the case, it was discovered that the defendant had not been arraigned on the information. No evidence had been taken, nor indeed had a jury yet been accepted and sworn to try the case. After the defendant had been duly arraigned, the jurors were re-examined as to their qualifications to try the case, so that the whole trial was had after the arraignment of the defendant. There was no error in this proceeding on the part of the court.

3. The defendant admitted that the money described in the information had been in his possession, and he afterwards returned $145 thereof to Boyd, the guardian. The court instructed the jury that the return of this money by the defendant "is not of itself sufficient to entitle the defendant to an acquittal." The court in this instruction set forth the elements of the crime charged, and told the jury that if all these had been proved beyond a reasonable doubt the defendant would be guilty, notwithstanding the subsequent return of a part of the money. This instruction is complained of in the brief, but we think the objection is without merit. The fact of the return of this money having been proved, it was proper that the jury should know the legal effect of such evidence, and we cannot see that the defendant was prejudiced thereby.

4. The defendant, as before stated, was charged with the larceny of the gold. He insisted upon the trial that he came lawfully into possession of the gold, and could

not therefore be convicted of the crime of larceny. The legislature has provided without possibility of misunderstanding that larceny and embezzlement constitute two crimes; that no one can be convicted for the one upon information or charge of the other crime. Section 114 of the criminal code makes it criminal to steal money or other property therein named of the value of $35 or upwards, and provides the punishment therefor. The section does not define larceny, and does not prescribe what acts shall constitute stealing, and early in the jurisprudence of this state it was decided that resort must be had to the common law to ascertain the constituent elements of the crime. *Thompson v. People,* 4 Neb. 528. And in *Barnes v. State,* 40 Neb. 546, it was determined that the word "steal," as used in this section of the criminal code, includes all the elements of larceny at common law, and that an instruction defining it is faulty if it omits any essential element. In *Bubster v. State,* 33 Neb. 663, it was decided that in a prosecution for larceny, unless some good reason exists for not doing so, the owner of the property stolen must be called as a witness to prove that he did not consent to the taking possession of the property by the defendant, and in *Perry v. State,* 44 Neb. 414, it was held that, if the owner of the property alleged to have been stolen is examined as a witness upon the trial, there can be no conviction unless he testifies that he did not consent to the taking of the property. There is no uncertainty in the common law upon this question. If the original taking of the property is with consent of the owner, the crime of larceny is not committed.

Section 121 of the criminal code defines embezzlement, generally, and prescribes the punishment therefor, and in other cases not covered by this section, if one obtains possession of property with the consent of the owner, so that he does not become a trespasser in so doing, and afterwards converts the property to his own use with intent to steal the same, he may be prosecuted under the act of 1875. Laws 1875, p. 26. Under the information in this

case charging that the defendant did steal the property in question, there could be no conviction without proof that the owner did not consent that the defendant should take and remove from its hiding place such secreted valuables as he might find on the premises. If the owner consented that the defendant should take possession of the property found for the purpose of delivering it to some other person, or for any purpose whatever, such taking of the property would not be unlawful, and there can be no larceny without an unlawful taking.

It appears from the evidence that one Ulbrich had before the time of the alleged larceny been found to be insane, and one Boyd had been appointed as his guardian. Ulbrich, shortly before his insanity, had sold property and received several thousand dollars therefor, and the guardian was unable to find or satisfactorily account for this money. It was supposed that Ulbrich had concealed the money upon the premises in Auburn, where he resided at the time he became insane. These premises were rented to the defendant, and he was living there with his family at the time of the transaction complained of. It was conceded that the defendant found the money, which he is charged with having stolen, upon the premises in question, and that soon after finding the gold he took it to Nebraska City, and, having squandered at least a part of it, then went to Omaha, and afterwards returned to Auburn, and informed the guardian that he had lost all the money while drunk except $145 in gold, which he returned to the guardian. He insisted that he had been authorized to take possession of the gold, and that his wrong doing consisted in not delivering the gold to the guardian, as he had been instructed to do; whereas, the prosecution insisted that he had no authority to take possession of the gold, but that it was his duty, without taking the gold, if he found it, to inform the guardian. The defendant insisted that, under the evidence in this case, this question should be submitted to the jury, but the court held, over the objection of the defendant, that there was

no evidence tending to show that the defendant was authorized to take possession of the gold for any purpose, and refused to submit that question to the jury under proper instructions requested by the defendant. We think there is no doubt that the learned trial judge was mistaken in this holding. There is much evidence tending to show that the defendant was not authorized to take possession of the gold, and that he intended from the first to find the money, if he could, and to convert it to his own use. It appears that upon a former occasion he had reported to the guardian that he had found $50 upon the premises, and that he returned this $50 to the guardian, and received a reward. Later he reported to the guardian that he had found some money. His statements in regard to it and in regard to the amount that he had found were confused and evasive. He first represented that at this second finding the amount found was $800, but afterwards admitted that he had found $1,800, and, finally, after much hesitancy and quibbling, gave the $1,800 to the guardian. He demanded a share of this money for his services and was allowed a liberal reward. On the other hand, there was clear and substantial evidence that he was authorized and instructed to look out for hidden money while he was making certain repairs on the premises, and, if he found it, to deliver it to the guardian. Mr. Boyd, the guardian, testifies that he rented the place to the defendant for the agreed price of $100 a year; that the defendant was to pay for the first six months' rent by labor on the place, and the next six months he was to pay cash. And he further testified that, "when he started to fix up this place, I told him to be particularly careful when he changed anything in the way of plastering, or cupboards or boards, anything of that kind; that I thought Mr. Ulbrich had hid some treasure there, some money and papers, as I was unable to find anything up to that time, and I wanted him to be particularly careful to see just how the stuff was hidden so we might make a thorough search for it." In his cross-examination, describing this conversation with the defend-

ant, the witness said: "I wanted to get possession of them, and I also wanted to know how Mr. Ulbrich had hidden his stuff; that I believed he had some money hid away, and I knew he had some papers hid away, and I wanted to know how he had hidden them."

It appears that, when the defendant found the $1,800, Mr. Boyd went with him to the county judge, and that the county judge took part with Mr. Boyd in questioning the defendant and instructing him how to proceed in the future, and the county judge testified in regard to this conversation as follows: "At the last of the conversation I asked him if he found any more money down there would he bring it to Mr. Boyd or myself at once and turn it over to us, and he promised us he would, and I repeated the injunction to him several times and cautioned him about it. If you find any more money down there, you will bring it to us. And he promised us he would. Not only promised us he would, but appeared sincere in it." This testimony was substantially repeated by this witness upon his cross-examination. Mr. Boyd was again upon the witness stand, and testified that he heard this instruction by the county judge to the defendant, and that he heard the defendant promise that, if he found any more money, he would immediately take it to the county judge or to Mr. Boyd, and was asked if he made any objection to the instruction given the defendant by the county judge. He was not allowed to answer this question, apparently because it was not supposed to be proper cross-examination of the evidence which he had given in chief when first upon the witness stand. We can see no other reason why this evidence should be excluded, and it is not very apparent that there is any just ground for excluding it.

When the defendant had found this gold, he started to Nebraska City with it. On the way to the train he met an acquaintance, and told him that he had found some money, and that he was going to Nebraska City to deposit it in a bank, and borrowed $5 of him. He was asked if the

defendant told him why he wanted to borrow $5. He said that he did, but was not allowed to say what reason the defendant gave him for wanting to borrow the money. An offer was made to show that the defendant then said that he wanted to borrow the $5 to pay his expenses in going to Nebraska City because he did not want to use any of the money he had found on Ulbrich's premises, but this evidence was not allowed. The defendant was very much intoxicated. While on the train from Auburn to Nebraska City he was frequently drinking whiskey from a bottle, and was, in the language of an apparently disinterested witness, who saw him, "quite drunk and was drinking all of the time." Upon arriving at Nebraska City he was refused liquor because of his drunken condition, and went soon to a gambling room, and from one gambling room to another, where he lost considerable money, and afterwards, about 1 o'clock in the morning, left Nebraska City for Omaha. The evidence is not very satisfactory as to how much money he lost in gambling, nor as to what he did with the remainder of the money, but, when he returned to Auburn, he reported to Mr. Boyd that he had $145 left, which he delivered to Mr. Boyd. It was insisted that he was not responsible for his acts by reason of his drunkenness. This question was apparently fairly submitted to the jury and was resolved against the defendant. If the jury entertained a reasonable doubt as to whether the defendant was directed by the owner of the property to take possession of any papers or money which he might have found on the premises in question and deliver the same to the guardian or the county judge, the law would require that doubt to be resolved in favor of the defendant. The county judge appeared to speak with authority when, in the presence of Mr. Boyd, he directed defendant to take the money or property he might find and bring it to Mr. Boyd or to himself. Mr. Boyd had taken the defendant to the county judge as one who could speak with authority on the matter, and, if Mr. Boyd did not concur in the instructions given to the defendant, he

should have so informed the defendant at the time, and manifestly the evidence was in such condition as to require that question to be submitted to the jury under proper instructions. The court erred in refusing to do this at the request of the defendant.

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

REVERSED.

The following opinion on motion for rehearing was filed December 18, 1907. *Rehearing denied:*

Insane Persons: TRESPASS. A guardian of the person and estate of his ward may authorize a third person to find and take possession of the ward's property, and such person, when so authorized, is not a trespasser in so doing.

SEDGWICK, C. J.

A motion for rehearing has been filed in this case, which is supported by an exhaustive brief in which it is strenuously maintained that the court erred in holding that the question should have been submitted to the jury whether the defendant was a trespasser in taking possession of the property when found. The gist of the argument is thus stated in the brief: "It attempts to shift the issue as to the ownership and possession of the money stolen. In theory this decision is based upon the proposition that the guardian, at the time of the conversation in the county judge's office with the defendant, was in control of, and had the right to order a change in the possession of, the $1,000 in gold, and from that time any trespass which might be committed as to this money would be against the guardian, and would be excused by the consent implied in his direction to the defendant. It is clear that the owner placed the money in the jar in the earth, and while it remained there undisturbed it was in his possession. The right of possession in the guardian under the law must not be confused with the possession of the real owner. The owner's possession was disturbed the first time when the

defendant removed the jar and took the money. * * * Assuming that it is established by the verdict of a jury that the guardian told the defendant if he found more money to bring it to him, did the guardian thereby excuse the defendant from larceny committed against the true owner of the money, or did this direction from the guardian change the offense from larceny to some other form of crime? The guardian not having at any time the possession of this money, it is clear that larceny from him as to this sum could not be maintained." Throughout the brief it is concluded, without very much argument of the point, that if the ward, when the guardian was appointed, was in the constructive possession of the gold he would remain in such constructive possession until the guardian had taken actual possession of the gold. The argument does not admit that constructive possession is in the holder of the legal title, that is, in the one to whom the right of possession has been legally transferred. It assumes that one in constructive possession of property must remain in constructive possession until the absolute possession has been changed; that is, that constructive possession cannot be transferred. It is probably unnecessary to discuss this proposition, since the conclusion does not depend upon it, as will appear from a careful consideration of the above quotation from the brief.

There can, of course, be no doubt that, when the guardian was appointed and the ward was deprived of his personal liberty—incarcerated in the asylum—the guardian had the right of possession of the ward's property, wherever situated, and in law was in control thereof. The guardian could, of course, take possession of the gold if he found it himself. It would be his duty to do so. If he had been present with the defendant at the time, he could, of course, have entrusted the gold to his possession. And, also, the guardian could, if he supposed that there was a probability that property of his ward of any description was hidden upon the premises, send his agents to take the property and to dispose of it for him. By doing so he would

not "excuse the defendant from larceny committed against the true owner of the money," but he would authorize the defendant to take possession of the money, and the defendant being so authorized would not be a trespasser in so doing. There can be no larceny without trespass, and no one can be guilty of trespass in doing that which he has been authorized by proper authority to do. It seems to us that there can be no doubt that the guardian was clothed with power to direct the disposal of this money when found, and that no authority as to its possession could be derived from any other source, and one who acted under the instructions of the guardian with regard to the possession of the money could not be a trespasser in so doing.

The question whether the instructions of the guardian, if they were as claimed by the defendant, would result in giving to the defendant the custody merely of the property as the servant of the guardian and for a specified purpose, is a more serious question, a question not presented in the original briefs and not much discussed in the present one. If the defendant and the guardian had been present when the jar containing the gold was found, and the guardian had entrusted the defendant with the jar to be delivered in a certain place, and the defendant had afterwards broken the jar with intent to steal the gold, there can be no doubt that the breaking of the jar and taking possession of the gold would be a trespass against the rights of the guardian upon the part of the defendant, but this was not the case here. It was, according to the defendant's theory, the money and not the unbroken package that was entrusted to the defendant to be delivered to the county judge or to the guardian, and this question, as well as the other questions pointed out, should have been submitted to the jury under proper instructions. The technical and exact distinctions between larceny by bailee and larceny in general, created by the statute, must be observed by the courts. The defendant cannot be charged with the crime of larceny in general and convicted of the crime of larceny as bailee. The distinction of the common law between

these two crimes is expressly preserved by the legislature, and must be regarded by the courts. When there is conflicting evidence as to which of two crimes thus described has been committed, the question must be submitted to the jury, and cannot be determined by the courts.

We think that the judgment complained of is right, and it is therefore adhered to. Motion for rehearing

OVERRULED.

STATE OF NEBRASKA, EX REL. JOSEPH EINSTEIN, RELATOR, v. HOMER H. NORTHUP ET AL., RESPONDENTS.

FILED OCTOBER 16, 1907. No. 15,187.

1. **Cities of Second Class.** Under the provisions of section 1, art. I, ch. 14, Comp. St. 1903, each village in this state containing the population required by the statute becomes a city of the second class without any action being taken on the part of the municipality.

2. ———: ELECTION OF OFFICERS. At the time the board of trustees of the village of Arapahoe passed a resolution and ordinance declaring the population sufficient to make it a city of the second class and providing for the election of city officers the village had less than the requisite number of inhabitants to constitute it such a city. At the time of election the population had increased so that at that time it had the requisite number. *Held*, That, though the action of the village board in providing for the election of city officers was at that time unauthorized, this would not invalidate or render void the election of such officers.

ORIGINAL proceeding in *quo warranto* to determine the right of respondents to exercise the duties of the office of councilmen of the city of Arapahoe. *Judgment against respondents Schwerdtfeger and Tomblin.*

W. T. Thompson, Attorney General, and *W. S. Morlan,* for relator.

Roscoe Pound, John C. Stevens and *Flansburg & Williams, contra.*

LETTON, J.

This is a *quo warranto* proceeding brought by the attorney general upon the relation of Joseph Einstein, an inhabitant of the village of Arapahoe, against Homer H. Northup, Frank A. Brewster, George M. Schwerdtfeger and Fred F. Tomblin, claiming to act as councilmen of the city of Arapahoe, questioning the respondents' right to exercise the duties of the office of councilman; the relator's contention being that no legal incorporation of the city of Arapahoe as a city of the second class has ever taken place, that the office of councilman of said city has no legal existence, and that the officers of the village of Arapahoe are entitled to administer the government of the municipality.

The village of Arapahoe has been under village government for more than 30 years. During this period there has been a slow but steady growth in the population. In the year 1906 the board of trustees of the village caused a census to be taken by the village clerk, Dick Emmett, for the purpose of ascertaining the number of inhabitants, with a view of incorporating as a city of the second class if it should prove that there were the requisite number of people within the corporate limits to allow of such an incorporation. The result of the enumeration taken and reported to the village board showed a population of 1,010 inhabitants. The census was taken in the months of May and June, 1906, and was reported to the board of trustees soon afterwards. No action was taken upon the report until the 11th day of January, 1907, when a resolution was passed declaring that the population of the city was more than 1,000 and that Arapahoe had become a city of the second class. At the same time an ordinance was passed dividing the city into two wards, and requiring the election of two councilmen from each ward, a mayor, and other city officers at the regular municipal election in 1907. The respondents, Northup and Brewster, were candidates for the office of councilmen from the second ward

at that election and were duly elected. Two other councilmen were elected from the first ward. The vote upon mayor was a tie between T. L. Quier and Cyrus Horton. The village board declared the vote upon mayor to be a tie, and that no one was elected to that office, and thereupon appointed Horton to fill the vacancy. Quier then began a proceeding in the county court to contest the election of Horton, alleging that the city council had canvassed the votes and granted a certificate of election to Horton. Horton answered, asserting the invalidity of the election and disclaiming any interest in the alleged office, and it was adjudged that the election was regular and that Quier was entitled to hold the office of mayor. The two councilmen elected in the first ward refused to qualify. Thereupon the respondents Schwerdtfeger and Tomblin were appointed by the other councilmen, Northup and Brewster, as councilmen for the first ward. After the organization of the new council it became apparent that it was their policy to issue no licenses to saloons or pool-rooms, which was a reversal of what had been the practice in Arapahoe for many years. On the 15th day of April, after the result of the election had been announced, and after the contest of the office of mayor had been instituted by Quier, the village board met and passed a resolution reciting, in substance, that the resolution and ordinance whereby the form of government of the village was to be changed had been passed under a misapprehension of the true facts; that after eliminating from the enumeration "those who are personally known not to be residents of said village" there did not exist 915 actual residents; that an additional canvass made of the village within the past ten days showed that there was not at the time of the passage of the ordinance and resolution, nor has there been since, to exceed 960 inhabitants of the village of Arapahoe, and further reciting that the change of government was without authority of law, and that it rendered void all acts as a city of the second class; and it was resolved that the ordinance of incorporation be repealed and the village government as

it heretofore existed is still in existence. From this time on both the respondents, claiming as the city council of the city of Arapahoe, and the former board of village trustees, claiming to act as officers of the village of Arapahoe, sought to hold sway within the corporate limits. The relator Einstein then brought this action questioning the right of the respondents to the office of councilmen. Early in May, 1907, a census was taken by William Helman, H. A. Phillips and F. W. Wagner, whom the evidence shows were in sympathy with the retention of the village government. They returned 926 as being inhabitants upon the 11th day of January, 1907, the date when the resolution and ordinance were passed. When placed upon the witness stand to verify the accuracy of this census, it was conceded by them that a number of names had been omitted by mistake from their list in evidence, and it was shown that much of the information upon which the enumeration was based was merely hearsay, and that in many cases the result was not given from the personal knowledge of the enumerator, but merely upon his judgment as to the facts which had been communicated to him by others. We are now asked to determine as a matter of fact from the enumeration made under the authority of the village board in May, 1906, and from this enumeration made in May, 1907, each including many names not shown by the other, and without clear, definite and reliable testimony, how many inhabitants there were in the village of Arapahoe upon the 11th day of January, 1907, a period remote about four months from the enumeration nearest in point of time. It must be evident that an accurate determination of the number of inhabitants at that time is impossible under such a condition of the evidence.

The persons whose eligibility to be considered as inhabitants is in question fall into several classes. For instance, in one class are persons under legal age whose parents reside in the village, but who are temporarily absent attending school or engaged in some employment. Persons of this class are entitled to be considered as inhabitants of

the village. On the other hand minors who are temporarily residing in Arapahoe, either attending school or under employment, but whose parents reside elsewhere, and who are still under their parents' control, we have excluded from the list. One of the later census takers very frankly concedes that both these classes were excluded in his enumeration—in the one case because he thought they were not inhabitants by reason of their parents not residing in Arapahoe, and in the other because, although the parents resided in Arapahoe, the children were not present, but absent attending school, or the like. It is clear that under any view, if persons belonging to one of these classes were excluded, those belonging to the other should have been included. Another class of persons whom we have included are unmarried persons of full age whose employment and home seems to be in Arapahoe, but who occasionally visit their parents at other points. Distinguished from this class, and excluded from consideration, are persons of somewhat like condition whose parents reside at other points, who keep their personal belongings, or a portion of them, at their parents' home, and consider it to be their home, and who are usually only absent therefrom for short periods of time. In such case it is our opinion that the home of the parent should be taken as the home of such person. Another class of persons whom we have included are inhabitants of the village whose household goods remain in their homes, but who have been absent for some time, either with the intention of looking for a new location or merely visiting or traveling, but who have not lost their domicile or legal residence in Arapahoe, and in whom the intention not to remain has not been disclosed.

Taking the enumeration of May, 1907, as shown by exhibit "D," as a basis, examining page by page, and determining according to established principles, as nearly as we can from the competent evidence, the question of whether the persons named were inhabitants of the village of Arapahoe on January 11, 1907, it appears that there

are 918 names of persons who are entitled to be considered in estimating the population. It is conceded by the relators that 13 names were omitted by mistake from this list, so that 931 names should be taken as being shown by exhibit "D." In arriving at this conclusion we have deducted from the list the names of many persons whom we think were not entitled to be considered as inhabitants. From testimony of the respondents we find that there were inhabitants whose names should have been counted, in addition to those named in exhibit "D," to the number of 57, making a total of 988 upon January 11, 1907, as near as we can determine from the evidence. Coming now to the Emmett list, while much of the testimony offered for the purpose of contesting the accuracy of the May, 1906, census is subject to the same infirmities as that offered with reference to the May, 1907, enumeration, still, viewed in the light of the foregoing principles, it discloses that the names of many persons were erroneously included who were not entitled to be considered as inhabitants of the village. With reference to this list, as also with reference to exhibit "D," it would be a useless and unprofitable task to set out the names and discuss the qualifications of each of the many persons whose right to be enumerated is attacked. The determination of the status of each and all of them falls within well-recognized principles, which have already been alluded to. It seems clear to us that since the enumeration of May, 1906, when critically examined, fails to show 1,000 inhabitants, and since from all the other evidence we have been unable to find that there were 1,000 inhabitants in the village upon the 11th day of January, 1907, the resolution for the incorporation as a city of the second class at that time was unauthorized. In the foregoing computations we have not included the names of persons who lived upon the Murray tract, which was sought to be included within the corporation after the city government was formed, nor those who came to the village after the 11th day of January. We find, however, that 27 persons left

the village between the 11th day of January and the 2d day of April, the date of the election, and that 50 persons became inhabitants during that interval. This leaves a net accession to the population of 23 persons which, added to the number of inhabitants which were found on January 11, shows that more than 1,000 persons were inhabitants of the village upon the day of election.

In *Osborn v. Village of Oakland*, 49 Neb. 340, it is said by NORVAL, J., writing the opinion of this court, after quoting the statutory provision, section 1, art. I, ch. 14, Comp. St. 1895: "By the foregoing provision each village in this state containing the population required by statute is a city of the second class without any action on the part of the municipality, and it is the duty of the board of trustees to divide the territory embraced therein into not less than two wards, and call an election at the proper time for the election of city officers." *State v. Holden*, 19 Neb. 249; *State v. Babcock*, 25 Neb. 709. If the village became a city of the second class without any action on the part of the municipality as soon as it contained 1,000 inhabitants, then Arapahoe became a city at some time between the 11th day of January, 1907, and the day of election. It was a city of the second class upon election day. Whether or not it was such a city at the time the village board called the election is not of great materiality. The village board merely provided administrative detail for the change of form by their act in providing for the election of city officers, and, even if they erred in their judgment as to the conditions, the machinery they provided was no less effective in evidencing the popular will. As soon as the population reached more than 1,000 the village board became officers of the city. *State v. Babcock, supra.* They left the ward boundaries as they had previously fixed them. The inhabitants had the right to select a mayor and councilmen and other officers at the time that the election was held. They elected the respondents Northup and Brewster as councilmen at that

time. Their right to hold the office is therefore unquestionable.

As to the other respondents, it is clear that the two councilmen from the second ward acting alone had no power to appoint them to the office of councilman. There is no special provision in the statute governing cities of the second class providing for the filling of vacancies in the office of councilman; but by the general election law, section 103, ch. 26, Comp. St. 1905, it is provided that vacancies in city offices shall be filled by the mayor and council. This does not mean by the mayor alone, nor by the council alone. Hence, the action of the two councilmen without the concurrence of the mayor in the appointment was invalid. No action by the mayor and council is alleged to have been taken, and the relator is entitled to a writ against the respondents, Schwerdtfeger and Tomblin, ousting them from the office of councilman of the first ward of the city of Arapahoe.

It is seldom that a case is presented to this court in which the evidence is so unsatisfactory as in this case. Nearly three months elapsed after the resolution and ordinance were passed before the date of the city election, and up until that time no proceedings were begun by any person seeking to question the authority of the board. It was not until after the election that there seemed to be any question in the mind of the relator as to the legality of the proceedings, and the delay resulted in making the evidence difficult to procure and unsatisfactory in its nature. We have considered throughout that, under the rule in this state, the burden of proof has been upon the respondents. *State v. Davis,* 64 Neb. 499. The relator, however, has furnished the largest quantum, and this, with the respondents' testimony showing the persons omitted, has supplied the necessary proof, though in such a confused and ill-ordered manner as to impose an unnecessary burden on the court.

For the reasons stated, we find for the respondents Northup and Brewster, and against the respondents

Schwerdtfeger and Tomblin. Judgment and writ accordingly. Costs taxed, one-half to relator, and one-half to the respondents ousted.

JUDGMENT ACCORDINGLY.

CYNTHIA BERARD ET AL., APPELLEES, V. ATCHISON & NEBRASKA RAILROAD COMPANY ET AL., APPELLANTS.

FILED OCTOBER 16, 1907. No. 14,946.

1. **Appeal: EVIDENCE.** A verdict which there is no competent evidence to sustain will be set aside.
2. **Damages.** The measure of damages for the destruction of a growing crop is the value of the crop at the time of its destruction.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

J. W. Deweese, F. Martin and *Frank E. Bishop,* for appellants.

John Gagnon and *C. Gillespie, contra.*

DUFFIE, C.

The plaintiff, Cynthia Berard, is the owner of about 140 acres of land lying on the north side of the Nemaha river in Richardson county, and about one mile north of the railroad embankment reaching from the station of Preston to the Nemaha river, across which a bridge had been constructed about 90 feet in length, the opening underneath being the only opening left for the passage of the waters of said river. The embankment from the station of Preston to the east end of the bridge is about one mile in length and 12 feet high, and it is claimed that during the season of 1902, 1903 this embankment dammed up the water of the river, causing it to back up over the plaintiff's lands, destroying the crops growing thereon.

This land was rented to Threlkel for the years 1902 and 1903 for a share of the crops, and he joined in this action to recover from the railroad company the crops alleged to have been destroyed in consequence of its negligence in not providing more adequate means for the escape of the flood waters of the river.

The evidence discloses that from the station of Preston to the Nemaha river a solid embankment has been thrown up across the valley for the whole distance; that the only opening left for the flow of water is beneath the bridge, which, at the date of the injury complained of, was about 90 feet in length, and wholly inadequate to allow the escape of the flood waters accumulating in the valley. It was shown that on the north side of the embankment the waters were dammed up to a depth of several feet, while on the south side the land was free of water, and cattle were grazing in the fields. It is quite clear from the testimony given that the embankment caused the waters to dam up on the north side thereof and to overflow the plaintiff's lands, and that this overflow continued for a space of from five to seven days, entirely destroying the crops. As we view the evidence, it was amply sufficient to warrant the jury in finding that the negligent construction of the railroad across this valley was the cause of the loss of plaintiff's crops. The authorities are quite uniform that the rule of damage for the loss of a growing crop is the value of the crop at the time of its destruction or of the damage sustained. No witness testified to the value of the crop at the time of these overflows. The renter testified to the condition of the crop and the amount that it would produce had it not been destroyed. He also testified to the market value of corn and oats in the fall of 1902, 1903, and from this data he estimated that the damages to the crop amounted to $1,700 or $1,800. No evidence was given or offered of the necessary expense in raising, harvesting and marketing the crop, and the jury could only guess at the damage actually suffered. The general rule is that the value of a growing crop in the

condition in which it exists at the time of its destruction is the measure of damages. *Fremont, E. & M. V. R. Co. v. Harlin,* 50 Neb. 698; 13 Cyc. 153, and authorities cited.

For the reason that there was no competent evidence before the jury upon which to base an estimate of damages, we recommend a reversal of the judgment and remanding the cause for another trial.

EPPERSON and GOOD, CC., concur.

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

REVERSED.

ENGELBERT J. HERBES V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1907. No. 15,204.

Disorderly Conduct: INFORMATION. An information for an offense made criminal by statute or ordinance must charge every element of the offense as defined by the statute or ordinance.

ERROR to the district court for Cedar county: ANSON A. WELCH, JUDGE. *Reversed and dismissed.*

C. B. Willey, for plaintiff in error.

W. T. Thompson, Attorney General, Wilbur F. Bryant and *R. H. Hagelin, contra.*

DUFFIE, C.

An ordinance of the village of Randolph is in the following words: "All persons participating in riots, disturbances, and disorderly assemblies; all persons fighting, or offering to fight, or conducting themselves in a disorderly or indecent manner; all persons using vulgar, profane or indecent language in a public place to the annoyance of others; all persons found in a state of intoxication in the village of Randolph, Nebraska, shall, upon

conviction thereof, be fined not less than $5 nor more than $75, and costs of prosecution, and shall stand committed to the village jailor to the county jail of Cedar county, Nebraska, until the fine and costs are paid." Engelbert Herbes, the plaintiff in error, was informed against under this ordinance. The information was in two counts. The first charging that on February 10, 1907, he was found in a state of intoxication within said city of Randolph. The charging part of the second count is in the following words: "That E. J. Herbes, full and Christian name unknown, late of said county, at and within said city of Randolph, and in the county of Cedar, and state of Nebraska, on, to wit, the 10th day of February in the year of our Lord one thousand nine hundred seven, did conduct himself in a disorderly and indecent manner, and did then and there use vulgar, profane and indecent language in a public place, to wit, on the streets of said city of Randolph, contrary to the form of statute in such case made and provided, and against the peace and dignity of the state, and contrary to the form of the ordinance of the city of Randolph in such case made, ordained and provided, and against the peace and dignity of the city of Randolph." He was convicted on the charge made in the second count, and from the fine assessed by the court he has taken error to this court.

The second count of the information is an attempt to charge him with a violation of the ordinance in using vulgar, profane or indecent language, and it is defective in omitting one element of the offense as defined by the ordinance, to wit, the use of such language "to the annoyance of others." The authorities are uniform that in an information for a statutory offense the information must charge, and the evidence show, every element of the crime. *Gilbert v. State,* 78 Neb. 636, and authorities there cited. We are clear that the second count of the information did not charge an offense, and that the objection to any evidence in support thereof should have been sustained.

For the errors above pointed out, we recommend a reversal of the judgment and a dismissal of the action.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the case dismissed.

REVERSED.

KATHERINE M. SHEPHERD, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED OCTOBER 16, 1907. No. 15,239.

1. **Evidence**: COLLATERAL FACTS. Where there is a direct conflict in the evidence of the witnesses relating to a material issue in the case, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury.
2. **Appeal**: EVIDENCE: INSTRUCTIONS. A judgment will not be reversed where the evidence relating to the amount of damages is conflicting, and where the rule of damages to be allowed is submitted to the jury under proper instructions.

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

Clark & Allen, for appellant.

John M. Stewart and *H. F. Rose, contra.*

DUFFIE, C.

In her petition, the plaintiff alleges that she was a passenger on one of the cars of the defendant company, which she desired to leave upon reaching Twenty-Eighth street; that she notified and properly signaled the motorman, who was in sole charge of the car, to halt the car for that purpose; that the motorman slackened the speed, stopped

the car, and while the plaintiff was in the act of alighting from the same, without negligence on her part, and so known to the defendant's said servant to be so alighting, he so negligently and unskillfully controlled and managed said car and its brake and motive power and machinery that, without notice or warning to plaintiff, said car was negligently, suddenly and violently jerked and started forward along said railroad, thereby violently throwing plaintiff against said car and upon the brick pavement. The answer was, first, a general denial, and, second, contributory negligence on the part of the plaintiff, in that while the car was in motion, and before it reached the intersection of Twenty-Eighth and O streets, the plaintiff carelessly and negligently left her seat and stood on the footboard of the car; that before the car stopped, and before it reached the crossing on said street, she carelessly and negligently alighted from the car and stepped down upon the street, without taking precaution to avoid falling; that, by reason of her negligence and carelessness in standing on the footboard and alighting from a moving car, she fell upon the pavement, and that the injuries complained of, if any were received, were solely the result of her own carelessness and negligence in so alighting.

It will be observed that the material issue upon the trial was whether the car upon which the plaintiff was riding had come to a full stop before she attempted to alight therefrom, or whether the plaintiff attempted to alight from the car while it was in motion and before it was brought to a full halt. The plaintiff and two of her witnesses testified that the car had been brought to a full stop when she stepped upon the footboard and before she attempted to leave the same; while the motorman and two of defendant's witnesses, passengers upon the car at the time, testified that the car was in motion when the plaintiff alighted therefrom. It developed from the evidence given on the trial that the night upon which the accident occurred was quite dark; that there was no light at the

intersection of Twenty-Eighth and O streets; that there was no conductor upon the car, and that the motorman in charge was inexperienced, having had charge of the car for a week or ten days only, his services prior to that time being under the direction of another motorman who was instructing him in the management and conduct of a car. In this condition of the record, the defendant asked instructions numbered 4 and 5 in the following language: "(4) The plaintiff does not allege in her petition that the defendant employed an unskilled motorman, and you will not consider this issue in determining whether defendant was negligent. (5) You are instructed that the absence of a conductor is not an issue in this case. The plaintiff does not charge in her petition that the defendant was negligent in operating its car without a conductor, and you will not consider this question in determining whether the defendant was negligent." The court modified these instructions so that, as given to the jury as numbers 13 and 14 of its charge, they read as follows: "(13) The plaintiff does not allege in her petition that the defendant employed an inexperienced motorman. A failure to employ an experienced motorman is not alleged as a ground of negligence and recovery therefor. Evidence bearing upon this question is to be considered by you only as it bears upon the question whether the defendant was guilty of the negligence alleged in plaintiff's petition. (14) The plaintiff does not allege in her petition that the absence of a conductor on the car constituted negligence on the part of the defendant, and such absence is not an issue in the case, and is to be considered by you only as it may bear upon the question whether the defendant was guilty of negligence as alleged in the petition, or the plaintiff was guilty of contributory negligence as alleged in the answer." Exceptions were taken to the refusal of the court to give the instructions in the language asked by the defendant, and, also, to the giving of the instructions as modified by the court, and it is now urged that, as the only material point in issue between the par-

ties was whether the car had been brought to a full stop before the plaintiff attempted to alight therefrom, whether the motorman was experienced in the duties of his position or otherwise was wholly immaterial, as was also the question of the presence or absence of a conductor on the car.

The effect of these two instructions, as given by the court is to tell the jury that they may, in reaching a verdict, consider the experience of the motorman in handling cars of the kind, as well, also, as the absence of a conductor from the car when the accident occurred. Whether a car is at rest or in motion at a certain time is a matter of observation on the part of those who are passengers or onlookers, and our first impression was that the question was one which should be determined from the evidence of those who saw and observed the conditions at the time. If there was no conflict in the evidence of the several witnesses of the occurrence, then collateral facts which did not go directly to the issue involved would hardly be competent either to support or contradict such direct testimony; but in this case there was a sharp conflict in the evidence, witnesses on one side testifying that the car had come to a full stop prior to the plaintiff's attempt to alight, and others testifying with equal certainty that the car was then in motion. In this condition of the case, it was left to the jury to say which set of witnesses they would believe, or whose testimony was more likely to be correct, and any collateral fact that would throw light upon this subject was proper for the consideration of the jury. In 1 Elliott, Evidence, sec. 144, it is said: "As a general proposition, therefore, it may be said that any evidence that tends in any reasonable degree to establish the probability or improbability of a fact in issue, no matter how slight its weight may be, is relevant. * * * It is not necessary, however, that it should in itself bear directly upon the point in issue, for if it is but a link in the chain of evidence tending to prove the issue by reasonable inference, it may nevertheless be relevant. Indeed, evidence which tends to make the testimony of witnesses

probable or improbable may sometimes be competent." In *Platner v. Platner*, 78 N. Y. 90, it is said: "Whatever evidence is offered which will assist in knowing which party speaks the truth of the issues in an action is relevant; and, when to admit it does not override other formal rules of evidence, it should be received." *Whitney v. Inhabitants of Lcominster*, 136 Mass. 25, was an action brought against the town for injuries occasioned by an alleged defect in the highway. It was in controversy whether the plaintiff was in the exercise of due care when the accident occurred; there being evidence tending to show that he was driving at a high rate of speed, one witness estimating it at 15 miles an hour. As tending to show the capacity of the plaintiff's horse for speed, and as bearing upon the probability of the testimony as to his actual speed at the time of the accident, the defendant was permitted to show that the horse had been driven on a race course at the rate of a mile in three minutes, and the evidence was held competent and relevant. It is natural, therefore probable, that an inexperienced motorman would be more likely to mismanage the car upon which the plaintiff was riding than one of much experience. His want of acquaintance with the route and the crossings where stops were to be made, especially on a dark night, would more likely lead to his confusion and inability to handle the car with the same degree of care as one of more experience. So, also, the presence of a conductor, whose business it is to direct the halting and starting of the car by signals given the motorman, would tend greatly to increase the probability of the car being handled in the careful manner that would not otherwise obtain. This being so, these are circumstances which the court might properly direct the jury they were at liberty to consider in determining whether the witnesses for the plaintiff or defendant were most likely to be correct upon the question of whether the car had been brought to a halt at the time plaintiff attempted to alight therefrom, and had been suddenly started while she was in the act of getting off. The prob-

ability that an inexperienced motorman, having no assistance from a conductor in the management of his car, would be likely to mismanage the same to the injury of some of the passengers is a circumstance which may properly be considered in support of those witnesses who testify to mismanagement, in opposition to those who testify that there was no mismanagement on the part of the motorman. Here was a conflict which the jury had to determine. Any fact or circumstance which would aid them in that duty was relevant to the issue and was for their consideration. Any circumstance which rendered more probable the fact testified to by one set of witnesses, when opposed to that of another set, is a relevant fact proper to be considered. See *Lincoln Vitrified P. & P. B. Co. v. Buckner,* 39 Neb. 83.

Relating to the damages, the amount was fixed by the jury under proper instructions. There was also a sharp conflict in the testimony of the witnesses relating to the degree of injury received by the plaintiff and as to its permanent character. These were matters for the jury to pass on under the instructions of the court, of which no complaint is made; and, under the general rule governing cases of this character, we cannot interfere with the finding.

There being no reversible error in the record, we recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

WILLIAM O'CONNER, APPELLANT, V. H. C. FIELDS ET AL., APPELLEES.

FILED OCTOBER 16, 1907. No. 14,895.

1. **Exceptions, Bill of.** To be considered in this court a bill of exceptions must be authenticated as required by law.
2. ———: WITHDRAWAL. This court, on proper application and showing, will permit a bill of exceptions to be withdrawn for the purpose of having the certificate of the clerk of the district court atttached thereto.
3. ———: ———. A certificate of the clerk of the district court attached to a bill of exceptions after it has become one of the files in this court, and procured without authority of this court, is unwarranted, and will be wholly disregarded.
4. **Judgment** of the trial court examined, and *held* responsive to the pleadings.

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

William V. Allen and *C. A. Kingsbury,* for appellant.

John V. Pearson, McCarthy & McCarthy and *R. E. Evans, contra.*

EPPERSON, C.

The judgment appealed from was rendered March 30, 1906. On September 21, 1906, plaintiff filed with the clerk of this court a transcript of the pleadings and judgment of the district court, and also a purported original bill of exceptions which had not then been authenticated. This court has been at no time requested to permit the bill of exceptions to be withdrawn for the purpose of having it authenticated, or for any other purpose, notwithstanding which, there now appears upon the bill the filing mark of the clerk of the district court indicating that it was filed in his office May 7, 1907; and on the same date the clerk certified that it was the original bill of exceptions. At

that time the bill was part of the records of this court. No one had authority to withdraw it for the purpose of filing it in any other court, or for the purpose of adding anything whatever thereto. This court, on proper application and showing, will permit a bill of exceptions, for the purpose of having the certificate attached, to be withdrawn, but it must be upon an application and a showing that the party is entitled to have it withdrawn. The withdrawing of the bill and the adding thereto the filing mark and certificate of the clerk of the district court is an unwarranted interference with the records of this court. No right should or will be predicated upon such interpolation. Such amendments will be wholly disregarded.

Plaintiff suggested a diminution of the record, and asked this court for an order directed to the clerk of the district court requiring him to certify that the bill of exceptions was filed in his office on the date that the transcript was certified and transmitted. The evidence fails to sustain the plaintiff's contention in this regard; and, in view of the affidavit of the clerk of the district court positively denying that the bill was ever filed in his office or presented to him prior to May 7, 1907, and the other evidence corroborating him, we cannot recommend the amendment suggested. But, were we to allow the amendment and grant the plaintiff everything he asks for in the motion, the bill of exceptions would yet remain unauthenticated. Under the rule frequently announced, we cannot consider the bill of exceptions, but are confined in our inquiry to the sufficiency of the pleadings to support the judgment.

The form and substance of the judgment are objected to. The judgment, after awarding to the plaintiff the amount of the verdict, proceeds as follows: "And the jury having found the mill of the defendants to be of public utility, and having by their verdict assessed the damages the plaintiff has sustained and will sustain by the erection and continuance of the milldam complained of in this action, it is further ordered and adjudged that such assessment of damages, when fully paid and satisfied, the same

being hereby approved and confirmed by the court, shall bar the recovery by the plaintiff, his heirs and assigns for any damages or injury sustained previous or subsequent to the date of the *ad quod damnum* jury impaneled in this action and caused by the dam of the defendants as then maintained." Originally the action was for a writ of *ad quod damnum* by plaintiff, an upper landowner, against the defendants, the owners of the grist-mill, who had, it is alleged, maintained the dam in connection with their mill since 1898. A jury of inquest was appointed, but as to their proceedings the record is silent. It seems that they disagreed. Later an amended petition was filed, containing more definite statements as to the alleged damages, and praying judgment for $5,000, and for a writ *ad quod damnum,* and that his permanent and other damages caused by the overflow be ascertained as required by law. Plaintiff abandoned his demand for a writ and proceeded as in an ordinary case for damages.

It is contended by defendants that plaintiff had no right to proceed until a jury of inquest had made a return, as plaintiff had elected to sue out a writ of *ad quod damnum* under his original petition. It is unnecessary to determine this point upon plaintiff's appeal. It seems that under section 7313, Ann. St., plaintiff had the right to proceed as he did. See *Kyner v. Upstill,* 29 Neb. 768. It was the plaintiff's theory, upon which the case was tried, as shown by the pleadings and judgment, that the action was for the purpose of determining his damages under the mill and milldam act. The only irregularity, if any, being the abandonment of the inquest, and of this the plaintiff cannot and does not complain. Section 7316, Ann. St., provides: "Where the petition is brought to obtain leave to build or continue a milldam, and such leave is granted, or where it is brought against the owner of a milldam as aforesaid, the court may render judgment for the damages assessed against the person owning or proposing to build such mill; and such assessment of damages, when fully paid and satisfied, after confirmation

thereof by the court, shall bar a recovery for any damages or injury sustained previous or subsequent to such inquest in any and every action at law. Provided, however, that where the petition is brought against the owner of a mill-dam already built as aforesaid, unless the mill is found to be of public utility, such assessment, though paid and satisfied, shall not bar a recovery for damages or injuries which may accrue thereafter." The judgment being responsive to this section of the statute should not be disturbed.

Defendants filed a cross-appeal, but do not urge their assignments of error. Instead, they insist upon an affirmance of the judgment. We therefore do not consider their appeal.

We recommend that the judgment of the district court be affirmed, and that plaintiff's motion to supply the record be overruled.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and the motion to supply the record overruled.

AFFIRMED.

BARNEY BROCKMAN, APPELLEE, V. F. OSTDIEK, APPELLANT.

FILED OCTOBER 16, 1907. No. 14,692.

Payment: AGREEMENT OF PARTIES. What may be received in payment of a debt is a matter of contract between the interested parties, with which, in the absence of fraud or mistake, the courts will not interfere.

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

G. W. Stubbs, F. H. Stubbs and *O. L. Wroughton,* for appellant.

W. A. Bergstresser, contra.

JACKSON, C.

The action is on a promissory note. The defendant pleaded failure of consideration and the statute of limitations. The parties waived a jury, and the finding and judgment of the district court was for the plaintiff. On the appeal to this court the single question of the statute of limitations is discussed.

The note in suit is dated June 13, 1893, and was payable one day after date. The action was commenced December 30, 1904. The controversy arises over the indorsement of a payment of $7.60 on March 6, 1902, in the absence of which the action would be barred. It appears that the defendant was a partner in a firm engaged in the mercantile business, to which firm the plaintiff was indebted for merchandise. The defendant's partner was urging payment of the account, and the plaintiff appealed to the defendant to adjust this item of indebtedness for him. Both agree that the defendant consented to do so. The defendant, however, claims that he authorized the plaintiff to credit the amount of the account on an indebtedness other than the note in suit, while the plaintiff claims that the defendant consented to have the amount of the account indorsed on the note. The plaintiff's contention is corroborated by other testimony, and the finding of the trial court in a law action carries with it the same weight as the verdict of a jury, and, being based on conflicting evidence, will not be disturbed on appeal.

The defendant, however, insists that as a partner he was not authorized to apply an indebtedness due to his firm in satisfaction of his individual debts. What the result might be if the partnership were in court contesting the right of the defendant to so deal with the partnership assets, it is unnecessary to determine, and the presumption will not prevail that the defendant has not reimbursed the partnership for the diminution of partnership assets on his account. The parties appear to have acted in good faith, and if they chose to agree that the indebtedness of

the plaintiff to the partnership should be applied as a payment on the defendant's note, the courts should not interfere, except at the instance of the partnership.

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

AMES and CALKINS, CC., concur.

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

AFFIRMED.

UNION STOCK YARDS NATIONAL BANK, APPELLEE, V. CHARLES D. DAY ET AL., APPELLANTS.

FILED OCTOBER 16, 1907. No. 14,942.

1. **Ejectment:** DEFENSES: EQUITY. An equitable defense may be interposed in an action in ejectment, but one who seeks the intervention of a court of equity must offer to do equity before he is entitled to equitable relief, whether he be plaintiff or defendant.
2. **Evidence** examined, and *held* to be sufficient to sustain the judgment.

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

Aaron Wall, C. L. Gutterson and *Hall, Woods & Pound,* for appellants.

H. M. Sullivan, contra.

JACKSON, C.

The plaintiff's action is to recover the possession of the south half of the southeast quarter, the southeast quarter of the southwest quarter, and lot 4, all in section 19, township 19, range 24, Custer county. All parties to the action claim the right to possession through a common source of title. The petition is an ordinary declaration in eject-

ment. William McCombs held the legal title to the land on March 2, 1901, and, joining with his wife, he on that date conveyed the premises by warranty deed to Shelly Rogers Company of South Omaha. Plaintiff's title is through a warranty deed from McCombs' grantee. The defendants' claim of title is grounded on an alleged contract of purchase under date of November 2, 1898, and a claim of possession since that date sufficient to put the plaintiff and its grantor on inquiry as to their rights. The contract is as follows: "Merna, Nov. 2, 1898. I solde to C. D. Day the farm knone as the Baker place whitche I greede to see that he has a warntte Deade except Shele & Rodgs morge & taxes. Witch I receve payment for same. R. W. McCombs." The finding and judgment in the trial court was for the plaintiff, and the defendants appeal.

William McCombs was indebted to Shelly Rogers Company, the indebtedness being secured by real estate mortgage covering the land in dispute. The deed to Shelly Rogers Company was taken in satisfaction of the debt. R. W. McCombs is a son of William McCombs, and on behalf of the defendants it is claimed that William McCombs orally authorized the son to sell the land and retain whatever consideration he might receive in excess of an amount sufficient to pay the debt to Shelly Rogers Company, and that the contract of November 2, 1898, was made pursuant to this oral agreement; that the consideration for the contract was a horse of the value of $100, which was then delivered to R. W. McCombs. It appears from the testimony of William McCombs that he never saw the contract with Day until about a month prior to the trial. On his examination he testified as follows: "Q. What dealings did you have with Day? A. I never had any in fact. Q. Has your wife had any dealings or business transactions with Day? A. No. Q. Were you selling the land a second time when you sold it to Shelly Rogers Company? A. No. Q. Then the transaction that your son Wesley had with Day was not a sale, was it? A. I should say it was if he had complied with the contract. Q. If who complied

with the contract? A. Mr. Day. Q. Did you ever ask him to comply with the contract? A. I don't know that I ever did." A reasonable inference from this testimony is that William McCombs would have been willing to have conveyed the land to Day, provided Day paid the indebtedness to Shelly Rogers Company. There is no claim that Day ever offered to do so, or that the debt was in fact paid, except by the conveyance of the land. The defense pleaded is an equitable one, and the answers contain no offer to pay the debt. The rule that one who seeks equity should do equity is peculiarly applicable to the circumstances of this case, but, independently of the infirmity of the position assumed by the defendants in that respect, the judgment of the district court was right.

The contract was never recorded, and the evidence of possession is of so unsatisfactory a nature as to justify the conclusion reached. It is true that the defendants testified generally that they entered into possession of the land at the time the contract was made and have ever since that date continued in possession, but the facts testified to by them, construed in a light most favorable, disclose that the locality where the land is situated was occupied largely by cattlemen for grazing purposes; different proprietors had large tracts of land inclosed by fence for pasture. After securing the contract, the defendant C. D. Day, by closing up gaps between the pasture fences of other proprietors, inclosed about 30 acres of the land in dispute, with some 7,000 acres of government land, to which he made no claim of title, and a section of school land that he did claim, and occupied the land within the inclosure as a pasture for his own stock and the stock of other persons, which he pastured for a consideration. About 100 acres of the land was under cultivation at the time of the contract with Day, and was not inclosed by fence until the fall of 1901, after the deed to Shelly Rogers Company had been executed. This cultivated land the defendants claim to have farmed, but no one fixed the date when they commenced to farm the land earlier than the

latter part of the month of April, 1901. About 30 acres of the land is inclosed in the pasture of another ranchman and has never been used by the defendants. Under this state of facts, the trial court could not do otherwise than find that the claim of possession was not supported by sufficient facts to put the plaintiff's grantor upon inquiry. William McCombs testified that at the time the deed to Shelly Rogers Company was made Mr. Rogers of that firm transacted the business on behalf of his company, and that he informed Rogers that he had some kind of a contract against this land with Day, and that Day had agreed to pay the indebtedness. However, Mr. R. H. Olmsted, an attorney at law of Omaha, testified that he personally conducted the negotiations through which the title was acquired, and took the deed to his clients; that Mr. Rogers was not present, and that nothing was said concerning the contract with Day. Mr. Rogers himself testified that he was not present, and that he had no knowledge or information concerning such a contract. We think the clear weight of testimony discloses that no such information was given to the firm of Shelly Rogers Company.

The judgment of the district court is amply supported by the evidence, and violates no principle of law, and it is recommended that it be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

WORLD PUBLISHING COMPANY, APPELLANT, V. DOUGLAS COUNTY ET AL., APPELLEES.

FILED OCTOBER 16, 1907. No. 14,933.

Counties: CONTRACTS. A resolution set out in the opinion, adopted by a county board, and designating a certain newspaper as one in which the county treasurer shall publish certain notices, does not, in the circumstances of the case, constitute a contract between the county and the proprietor of the newspaper.

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

Hall & Stout, for appellant.

James P. English and *A. G. Ellick, contra.*

AMES, C.

In August, 1904, the county board of Douglas county adopted a resolution of which the following is a copy: "Resolved, that the Evening World-Herald, published in Omaha, Douglas county, Nebraska, be, and the same is hereby, designated as the newspaper in which the county treasurer of Douglas county shall cause the delinquent tax list to be published for three successive weeks, commencing the first week in October, 1904, as required by section 196, art. I, ch. 77, Comp. St. 1903, and that the said newspaper is hereby designated as the newspaper in which shall be published the notices provided to be published by sections 7, 17, 18, 32-34, of art. IX, ch. 77, Comp. St. 1903, and that said newspaper is hereby designated as the official paper for the publication of the official advertising of said county for the year ending September 1, 1905; and be it further resolved that the county clerk is hereby instructed to transmit a certified copy of this resolution to the county treasurer of said county." The several sections of the statute recited in the resolution enact

that it shall be the duty of the county treasurer to publish the notices therein mentioned in a newspaper or newspapers that shall have been designated for such publication by the county board. Our attention has not been called to any statute requiring or empowering a county board to create or appoint, generally, an "official newspaper" for the county, or a newspaper in which all of the "official advertising" of the county shall be published, but they are required, as has been already stated, to designate newspapers for the publication of particular notices in specified cases. It follows that the last clause of the foregoing resolution is *ultra vires* and nugatory, unless it was passed under such circumstances as to constitute in whole or in part an exercise of the general powers of the board to make contracts on behalf of, and to manage and control the business affairs of, the county. But there is no allegation of a breach or threatened breach of this clause of the document, and the question need not, therefore, be further pursued.

In March, 1905, the personal and political complexion of the board having changed, a resolution was offered, and referred to a committee, which is a copy of the foregoing, except that it omits this third or last clause, and except that in the preceding part thereof the name of the "Omaha Evening Bee" is substituted for that of the "Evening World-Herald." Thereupon, this suit was begun, seeking perpetually to enjoin the board from adopting this second resolution, or taking any like action, on the ground that such a course would inflict upon the plaintiff irreparable injury, for which there would be no adequate remedy at law, through the breach of a contract which, it was alleged, was evidenced by the first named resolution, and an acceptance of its terms by the plaintiff, as was shown by its having published certain of the notices required by the statutes named and referred to in the resolution. The district court sustained a general demurrer to the petition and dismissed the action. The plaintiff appealed.

Whether or not the statutes recited in the first two clauses of the resolution contemplate a contract between a county and a newspaper for the publication for a limited and specified time, of notices for which the statute prescribes rates of compensation need not now be decided, because the resolution does not purport to have that effect, and it has not been contended, nor, we presume, will be, that the board could bind the county by a contract in perpetuity. The document contains none of the ordinary forms or phraseology of a contract or of a proposal to enter into one with the plaintiff, which should become obligatory upon acceptance by the latter, or otherwise; but it purports to be, what the statute seems to contemplate, an exercise of the supervisory power of the board over the official conduct, in this particular, of the county treasurer. It is the county treasurer, not the board, who causes these notices to be published, and who by so doing obligates the county to pay the statutory fees as compensation for the service. *State v. Fink,* 73 Neb. 360. All that the board is authorized or required to do is to designate the person or persons with whom the treasurer may lawfully so deal, and we think it quite clear that they may change such designation from time to time as the interest of the public or their own inclination may dictate.

If the foregoing conclusion is right it disposes of the case, and we recommend that the judgment of the district court be affirmed.

JACKSON and CALKINS, CC., concur.

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

AFFIRMED.

WILLIAM KING, APPELLEE, V. WINIFRED KING, APPELLANT.

FILED OCTOBER 16, 1907. No. 14,770.

1. **Divorce: FINDINGS: REVIEW.** The findings of a trial judge as respects the value of real property situated in localities with which he is familiar, and made, after hearing conflicting testimony of witnesses, as the foundation for a decree of alimony, when not assailed for bias or prejudice or obvious mistake, are entitled to some consideration, and will not be disregarded upon appeal, unless it is made to appear that inferences from the evidence drawn by this court are more likely to be correct than were his.

2. ———: **ALIMONY.** The court, in awarding permanent alimony, will not speculate upon a future income from a continuous and persistent career of vice and criminality, and adopt as a basis for its decree a division of the anticipated spoils of iniquity.

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

Hamer & Hamer and *R. C. Noleman,* for appellant.

William Mitchell and *T. J. Doyle, contra.*

AMES, C.

The defendant obtained upon a cross-petition in the district court a decree of divorce from her husband on the ground of adultery. The plaintiff acquiesced in the decree, which is sufficiently supported by pleading and proof; but the plaintiff appealed to this court from a collateral judgment awarding alimony.

There were at the time of the trial four children of the marriage; one boy aged 13 years, and another aged 12 years, and one girl aged 11 years, and another aged 9 years. The wife was awarded the care and custody of the children during their minority, and provided for their maintenance with an annuity from her husband of $300 for nine years, or until the youngest, if she shall live so long, will attain her legal majority. The defendant was the owner in her own right, at the time of her marriage

and also at the time of the trial, of property of the value of $2,000, and she also had, at the time of the trial, the title of other property acquired, as the court found, by the joint effort of the parties, of the value of $13,250. The decree awards the wife $970 as permanent alimony, and $400 as "suit money." The amount of the permanent alimony, subtracted from the value of the possessions of the husband and added to that of the possessions of the wife, produces two equal sums, viz., $16,220.

The foregoing facts and valuations are such as were found and established by the district court. There is conflicting testimony, as there usually is upon such inquiries, with respect to the value of the various items of real property; but the deductions therefrom made by the trial judge appear to us to be reasonable, and are not assailed for bias or prejudice or obvious mistake. Under a recent statute, they are not conclusive upon this court; but the judge saw and heard the witnesses, and has been for many years a resident of the district and familiar with the localities in which the properties lie. His opinion, therefore, upon such questions may be given some consideration, quite aside from the legal presumption, now abolished, but formerly obtaining, in its favor. Independently of that presumption, we think it ought not to be wholly disregarded without some forceful reason for so doing; in other words, without something to indicate, with a considerable degree of certainty, that inferences drawn by this court, with necessarily less light upon the controversy than that which he had, are more likely to be correct than are his. Nothing of that nature has been brought to our attention.

What has just been said with respect to values we think is, in great measure, true, also, as to permanent alimony and suit money. The trial judge knew far better than the members of this court do, or possibly can know, the amount of time, labor, money and skill required of the defendant and her attorneys and expended by them in the preparation and trial of the case, and he knows better

than they the cost of maintenance and education of the children in the neighborhood in which they live, and the ability of the husband to pay. He is the proprietor of several liquor saloons, some or all of them, it was said in the argument, having gambling room attachments, and it is alleged that he enjoys a net annual income from all these sources of $6,000, and so, it is attempted to be argued, has an "earning capacity" of that sum. We are not prepared to hold that precarious gains from immoral and prohibited occupations are evidence of any earning capacity at all, or that accumulations from such sources can, so long as their possessor continues in the pursuit of his devious ways, be looked upon as constituting an established estate. The court, even in awarding alimony in a divorce suit, will hardly go so far as to speculate upon a future income from a continuous and persistent career of vice and criminality, and adopt as a basis of its decree a division of the anticipated spoils of iniquity.

We discover no fault in the record or judgment of the district court, and recommend that the latter be affirmed.

JACKSON and CALKINS, CC., concur.

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

AFFIRMED.

FAIRBURY BRICK COMPANY, APPELLEE, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 16, 1907. No. 14,914.

Waters: RAILROAD EMBANKMENTS: NEGLIGENCE. Although a rainfall may be more than ordinary, yet, if it be such as has occasionally occurred at irregular intervals, it is to be foreseen that it may occur again; and a party engaged in a public work, the construction of which involves the change or restraint of the flow of water in a natural channel, is guilty of negligence if he

fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur.

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

M. A. Low, W. D. McHugh and *Hazlett & Jack,* for appellant.

Heasty & Barnes, contra.

CALKINS, C.

In 1887 the defendant constructed its railway across the valley of the Little Blue river at a point where the first bottom is from one-half to three-quarters of a mile wide. It built a bridge across the river proper, with approaches consisting of earthen embankments and open trestle work, making in the aggregate a waterway of about 950 feet. In 1895 the defendant filled up these trestles with solid embankments of earth, reducing the waterway across the bottom by from 350 to 400 feet. In 1902, during a period of high water, one of these embankments was washed out; but it was again filled up, to be again carried away in 1903 at the time of the high water which caused the damage which is the subject of this action. The plaintiff was the proprietor of a brick yard situated in the valley a short distance above the defendant's railway. About the 1st day of June, 1903, heavy rains had fallen along the river, causing it to rise above its banks, and, the flood waters being dammed by the embankments of the defendant's railroad, backed up and submerged the plaintiff's yards, damaging and destroying its machinery, tools and partially manufactured products. This action was brought against the defendant to recover the damages so suffered, on the ground that the defendant did not use reasonable and proper care in the construction and maintenance of its embankments, having insufficient openings to accommodate the stream

in times of high water. There was a trial to a jury, and a verdict for the plaintiff. From the judgment rendered upon this verdict the defendant appeals.

The sole question in the case is how far a party, in the execution of a public work which crosses a watercourse and necessarily interferes with the natural drainage, is bound to take notice of and provide for those storms which, although unusual, have occasionally occurred at rare and irregular intervals within the memory of living men. It appears that, during the 18 years next prior to the construction of defendant's railway, there had occurred floods at the place in question in the years 1869, 1875 and 1881, practically as high as the one which did the damage complained of. But the defendant claims that these were extraordinary, and that it was not, therefore, required to take notice of and provide for such floods. At the request of the defendant the court gave to the jury 11 different instructions, in each of which the jury were told that the defendant would not be liable for damages caused by water backed up by its embankment, if the flood was so large and unusual as not reasonably to be expected to pass in said stream; and in one of these instructions the jury were told that, to constitute a flood so large and unusual as not to be reasonably expected, it was not necessary to show that such flood had never occurred theretofore in history. It is not complained that this view of the case was not presented to the jury with sufficient iteration; but, in the second instruction given to the jury at the request of the plaintiff, the jury were told that it was the duty of the defendant company to exercise due care in the construction and maintenance of its embankments with reference to such extraordinary floods as had occurred within the memory of men then living, and, as far as engineering skill and foresight could reasonably anticipate, to avoid damage to property above such embankments by a recurrence of such floods; in the third instruction given at the request of the plaintiff the same doctrine was practically reiterated; and in the

fourth the jury were told: "By the term 'act of God' is meant those events and accidents which proceed from natural causes, and cannot be anticipated and guarded against, or resisted, such as unprecedented freshets, earthquakes, cyclones and lightning. For injuries occurring by any of these means there is no liability, providing reasonable and ordinary care has been exercised by defendant to guard against such injuries." Of all these instructions the defendant complains and insists that the case should be reversed on account of their having been submitted to the jury.

This question is not a new one. In the case of *Mayor v. Bailey,* 2 Denio (N. Y.), 433, the court by Chancellor Wallworth said: "The degree of care which a party who constructs a dam across a stream is bound to use is in proportion to the extent of the injury which will be likely to result to third persons, provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods. If the stream is occasionally subject to great freshets, those must likewise be guarded against." And again: "Although the flood of 1841 was not an ordinary one, I think the evidence of the plaintiffs was sufficient to authorize the jury to find that it was one of those occasional floods to which the Croton had sometimes been subject, and which should therefore have been provided against by those whose duty it was to guard against the probable consequences of such a flood." This case was followed in *Ohio & M. R. Co. v. Ramey,* 139 Ill. 9, 32 Am. St. Rep. 176, in which the court say: "The principle, clearly, is that, although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred, and, it may be, at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. It is within the knowledge of all who have long resided in this state that our streams are occasionally subject, after intervals which are sometimes of shorter

and at other times of longer duration, to great floods, occasioned by very heavy rainfalls, and their heights are known by those who have felt interested in them. Such rainfalls were not usual and ordinary, but they were unusual and beyond ordinary—*i. e.*, they were extraordinary; and yet it is just as certain that like rainfalls will occur in the future as it is that the same laws of nature by which they are produced, and the same conditions to be affected by those laws, will continue to exist in the future as they have in the past. Though of rare occurrence, such rainfalls are not phenomenal, and therefore beyond reasonable anticipation, and it is hence but the prudence that a discreet man would exercise in his own affairs to provide against injury from them. The question, then, is not whether appellant has sufficiently provided for the escape of the water of ordinary floods, but, has it provided for the escape of the water of such unusual or extraordinary floods as it should have anticipated would occasionally occur in the future, because they had occasionally occurred after intervals, though of irregular duration in the past." This doctrine is also supported by the following cases: *Gulf, C. & S. F. R. Co. v. Pomeroy,* 67 Tex. 498, 3 S. W. 722; *Gray v. Harris,* 107 Mass. 492; *New York, C. & St. L. R. Co. v. Hamlet Hay Co.,* 149 Ind. 344; *Columbus & W. R. Co. v. Bridges,* 86 Ala. 448, 11 Am. St. Rep. 58. And, while the question has not been so precisely presented in our own court, we think it is within the rule adopted in the case of the *Omaha & R. V. R. Co. v. Brown,* 14 Neb. 170, where it was said by COBB, J.: "It was the duty of the railway company, in planning and constructing its bridge, to bring to their execution the engineering knowledge and skill ordinarily practiced in such works, and to see to the practical application of such knowledge and skill to the work in hand, among other things, so as to allow of the passage of water and ice, such as is known to pass in the stream annually, *or which may reasonably be expected to occur occasionally,* without regard to such

great or sudden overflows as are often designated as acts of God." The words in italics cover the same grounds as the cases from other states to which we have referred. The court adhered to this rule in *Omaha & R. V. R. Co. v. Brown,* 16 Neb. 161; *McCleneghan v. Omaha & R. V. R. Co.,* 25 Neb. 523; *Chicago, R. I. & P. R. Co. v. Buel,* 76 Neb. 420.

The defendant claims that its position is sustained by the case of *Central Trust Co. v. Wabash, St. L. & P. R. Co.,* 57 Fed. 441, and that of the *Pittsburg, Ft. W. & C. R. Co. v. Gilleland,* 56 Pa. St. 445, 94 Am. Dec. 97. In the former case the culvert, which it was claimed was of insufficient size, had been built in 1856, and had proved sufficient until the flood in May, 1886, following a cyclone of the day preceding, and another flood in July, 1888, resulting from unusual, extraordinary and unprecedented rainfalls. In this case there was no question of conditions before the construction of the culvert, the first serious flood occurring 30 years after it was built. The case cannot, therefore, be of much weight in solving the question of whether the defendant should, in constructing its railway, have considered the previous floods of 1869, 1875 and 1881, especially as the decision of the case is put upon the ground that the receiver, who then had charge of the railway company, was not liable for maintaining the culvert as a nuisance, the receiver not having any notice of its insufficient character. The case of the *Pittsburg, Ft. W. & C. R. Co. v. Gilleland, supra,* was another where a culvert proved of insufficient capacity. It was constructed in 1849, and the plaintiff gave evidence of floods, one in June and another in July, 1865, the water of which the culvert was insufficient to carry away. There was also evidence of another flood in 1866. The trial judge, in an instruction which conceded the extraordinary character of the floods, submitted the question to the jury as to whether the defendants should, after the first and second floods, have altered their culvert by enlarging its capacity. The supreme court held that this

was error, saying that if all the floods were extraordinary, as the instruction concedes, the surprise at the second and third could not have been less than at the first, and it was still more surprising that they should come in this rapid succession. There is nothing in the reported case to inform us why the floods were considered extraordinary, and we must conclude that it was on account of their infrequency. The learned judge does not tell us how many times a phenomenon, regarded as extraordinary because of its infrequency, must be repeated in rapid succession in order to become ordinary; and it is not necessary to discuss that question here, for in the case cited there was no question of previous experience. We do not think the latter case in point, and in so far as the same is inconsistent with the doctrine laid down in the cases of the *Mayor v. Bailey, supra,* and *Ohio & M. R. Co. v. Ramey, supra,* we think the latter should prevail. The mere fact that a flood is extraordinary is not sufficient to absolve the defendant from liability. Although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred at irregular intervals it is to be foreseen that it may occur again; and a party engaged in a public work, the construction of which involves the change or restraint of the flow of water in a natural channel, is guilty of negligence if it fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to recur.

It therefore follows that there was no error in the instructions complained of, and we recommend that the judgment of the court below be affirmed.

JACKSON and AMES, CC., concur.

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

AFFIRMED.

INDEX.

Abatement. See CRIMINAL LAW, 1-3.

A cause of action by a husband for loss of services and expenditures for medical attendance on his wife is one which survives and is assignable. *Forbes v. City of Omaha,* 6

Abortion.

1. The words at any stage of utero-gestation, as used in sec. 6 of the criminal code, *held* to mean at any stage of pregnancy. *Edwards v. State*..... 251
2. In a prosecution for homicide in procuring an abortion under sec. 6 of the criminal code, dying declarations of the deceased may be admitted in evidence. *Edwards v. State*.. 251

Acknowledgment.

1. A certificate of acknowledgment of a notary without the date of the expiration of his commission is void. *Sheridan County v. McKinney*..... 220
   Held valid on rehearing. *Sheridan County v. McKinney*... 223
2. A certificate of acknowledgment of a deed in proper form can be impeached only by clear proof that it is fraudulent. *Sheridan County v. McKinney*..... 223

Adoption.

1. Under sec. 797 of the code, an adoption without consent of the parents must come clearly within the exceptions contained in the statute. *Tiffany v. Wright*..... 10
2. To warrant an adoption under subd. 6, sec. 797 of the code, against the objection of a living parent, it must clearly appear that such parent had abandoned the child for a period of at least six months, and that the party consenting to such adoption has had the lawful custody during such period. *Tiffany v. Wright*..... 10

Adverse Possession. See PLEADING, 5.

1. One who enters into the occupancy of real estate under contract cannot afterwards obtain title by adverse possession, unless his occupancy assumed an adverse character continued for the statutory period. *Lanham v. Bowlby*.... 39
2. Privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other. *Holdrege v. Livingston*..... 238

Alimony. See DIVORCE.

Alteration of Instruments.

Evidence *held* insufficient to support a finding that the name of a grantee was inserted without authority in a deed. *Butler v. Peterson* 715

Appeal and Error. See CRIMINAL LAW. EXCEPTIONS, BILL OF. TRIAL.

1. Errors in instructions not called to the attention of the trial court in the motion for a new trial will not be considered on appeal. *Tarpenning v. Knapp* 62
2. Refusal of instructions, the substance of which has been embodied in the court's charge, *held* not error. *Coffey v. Omaha & C. B. Street R. Co* 286
3. Instructions in an action against a carrier for injury to a passenger *held* proper. *Coffey v. Omaha & C. B. Street R. Co* 286
4. Instructions must be considered together. *Neeley v. Trautwein* 751
5. Instructions *held* not objectionable as giving undue prominence to portions of the evidence. *Neeley v. Trautwein* ... 751
6. The supreme court will not consider an assignment that the trial court erred in receiving evidence, unless attention is called to the specific evidence received. *Tarpenning v. Knapp* 62
7. A decision granting an application for a new trial for newly discovered evidence will not be reviewed in the absence of a bill of exceptions containing the evidence. *Dickinson v. Aldrich* 198
8. Where an objection to plaintiff's evidence is sustained on the ground of a defect in his petition, and he files an amended petition, he waives his exception to the order sustaining such objection. *Hackler v. Miller* 209
9. A transcript which does not contain a final order or judgment presents nothing for review. *Propeck v. Propeck* 218
10. In an action against a carrier for injury to a passenger, rulings on admission and exclusion of testimony *held* not erroneous. *Coffey v. Omaha & C. B. Street R. Co* 286
11. The withdrawal of a case from the jury, *held* not erroneous on account of the reason given therefor, if the withdrawal is proper for any reason. *Kohler v. Hughbanks* 320
12. A transcript of proceedings before a license board on an application for a liquor license, which does not contain a certified copy of the final order, presents no question for review. *Borland v. Heges* 325
13. Where the petition does not state a cause of action, plaintiff

Appeal and Error—*Concluded.*

cannot amend as a matter of right; and, where the record does not show the character of the amendment, review of refusal of leave to amend will be denied. *Minton v. Palmer*, 351

14. Where the court permits defendant to offer testimony taken at a former trial, and includes it in the bill of exceptions, it will not be stricken on appeal. *Anthes v. Schroeder* 355

15. The decree dismissing plaintiff's action will be affirmed, where the only relief sought was against a nominal defendant who did not appear and was not served with process. *Elmore v. McMillan*..... 621

16. A judgment will not be reversed where the evidence relating to the amount of damages is conflicting, and the rule of damages is submitted under proper instructions. *Shepherd v. Lincoln Traction Co*..... 834

17. Where a verdict for defendants is the only one which can be upheld, the plaintiff cannot predicate error on the instructions. *Hackler v. Miller*..... 209

18. A verdict which there is no competent evidence to sustain will be set aside. *Berard v. Atchison & N. R. Co*..... 830

Arson.

Evidence *held* insufficient to sustain verdict. *Heidelbaugh v. State* 499

Attachment.

1. The actual residence of the debtor, and not his domicile, determines the status of the parties in attachment. *Webb v. Wheeler* 172

2. A third party claiming an interest in attached property cannot intervene to dissolve the attachment. *Danker v. Jacobs* 435

3. Where the payee of a note before maturity indorses it to a surety thereon, the surety may attach under sec. 237 of the code authorizing attachment on claims before due. *Danker v. Jacobs* 435

4. Evidence *held* to support decision refusing to dissolve attachment. *Danker v. Jacobs*..... 435

Attorney and Client.

1. Under sec. 3607, Ann. St., providing for attorneys' liens, a judgment for prosecutrix in a bastardy proceeding is subject to the lien of her attorneys. *Taylor v. Stull*..... 295

2. An assignment of such judgment after filing of the attorney's lien does not affect the lien, and the assignee takes subject to it. *Taylor v. Stull*..... 295

Banks and Banking.

1. In a suit against an insolvent bank for the appointment of a receiver, notice of the filing and pendency of the suit should be given. *Holcomb v. Tierney*..... 660
2. Where in such suit a receiver is appointed without notice, and without objection he converts the assets and pays the proceeds to the creditors, the proceeding is not void so that the status of the property involved is open to collateral attack. *Holcomb v. Tierney*..... 660
3. A judicial ascertainment of the liabilities of an insolvent bank, such as is necessary before suit to enforce the liability of stockholders, can only be had in a suit where the bank, being a party, has been served with notice or has voluntarily appeared. *Holcomb v. Tierney*..... 660

Boundaries.

That boundary lines of fields and highways, as established by early settlers, are in harmony with disputed monuments is relevant to prove that such monuments are the true corners. *Bridenbaugh v. Bryant*..... 329

Cancelation of Instruments.

In a petition to cancel a conveyance, an allegation that plaintiff was induced by false representations to part with his title is a sufficient plea that he was damaged by the fraud. *Rihner v. Jacobs*..... 742

Carriers.

1. The consignor of a horse shipped over two connecting lines, on the arrival of the horse at the connecting point, may on payment of the charges of the first carrier demand a redelivery. *Wente v. Chicago, B. & Q. R. Co*..... 179
2. Where the evidence shows that an animal has not suffered through the neglect of a carrier, the rule that proof of the receipt of animals by a carrier in good order and delivery in bad order makes a *prima facie* case against the carrier has no application. *Wente v. Chicago, B. & Q. R. Co*..... 175
3. One cannot be charged with contributory negligence for taking a place on a crowded street car designated by the conductor. *Boesen v. Omaha Street R. Co*..... 381
4. In an action for death of a horse, *held* a question for the jury whether the shipper acted as a reasonably prudent man. *Wente v. Chicago, B. & Q. R. Co*..... 179
5. It is a question for the jury whether a passenger, in riding on the lower step of a crowded street car, is guilty of contributory negligence. *Coffey v. Omaha & C. B. Street R. Co.*, 286
6. Evidence of negligence of defendant in the operation of a street car *held* sufficient to require its submission to the jury. *Coffey v. Omaha & C. B. Street R. Co*..... 286

Carriers--*Concluded.*

7. Evidence *held* to sustain finding that delay of carrier was negligence, the proximate cause of death of a horse. *Wente v. Chicago, B. & Q. R. Co*..... 179

8. In an action for damages for being thrown from a street car, plaintiff testified that after reentering the car the conductor asked her if she was hurt, and she replied that she was, *held* competent. *Nixon v. Omaha & C. B. Street R. Co.*, 550

Chattel Mortgages. See TAXATION, 13, 16.

Colleges and Universities.

Sec. 19, ch. 87, Comp. St., which provides that in the year 1899, and annually thereafter, a one mill tax shall be levied on all of the taxable property in the state, the proceeds to constitute a fund for the maintenance of the university, was not repealed by implication by the revenue law of 1903. *State v. Searle*..... 111

Commerce.

An ordinance limiting the speed of trains to ten miles an hour within the corporate limits of a municipality, *held* not void as imposing an unreasonable restriction on interstate commerce and the transportation of mail. *Peterson v. State* 132

Compromise and Settlement.

The giving of a note in settlement of an account is a good defense in an action by the maker against the payee to recover prior claims, in the absence of fraud or mistake, but such defense must be pleaded. *Gandy v. Wiltse*..... 280

Constitutional Law.

The amendment to sec. 85 of the code made in 1887, enlarging the scope of the *lis pendens* statute, *held* constitutional. *Munger v. Beard & Bro*..... 764

Contracts.

Evidence in an action for breach of contract *held* to sustain verdict for plaintiff. *Parkins v. Missouri P. R. Co*..... 788

Corporations.

1. A court having jurisdiction of an insolvent corporation for winding up its affairs cannot render a personal judgment against one of its stockholders not a party to the suit, nor can it adjudicate the fact of membership. *Howell v. Malmgren* 16

2. Where serious injury requiring immediate surgical services is incurred by an employee of a company, any general officer may engage such surgical treatment as the case requires, and bind the company for the reasonable value thereof. *Salter v. Nebraska Telephone Co*..... 373

Corporations—*Concluded.*

3. In case of serious injury to an employee of a company, if no general officer is present, the person highest in authority may bind the company for such surgical services as the emergency may demand. *Salter v. Nebraska Telephone Co.* 373
4. Emergency treatment to an employee should extend for a time sufficient for the party employed to communicate with the company, and, if it decline to be further responsible, for notice to the proper poor authorities, if the injured party is entitled to public care. *Salter v. Nebraska Telephone Co.* 373
5. Any agreement by which a person shows an intention to become a stockholder in a corporation is sufficient as a contract of subscription. *Nebraska Chicory Co. v. Lednicky,* 587
6. A subscription by a number of persons to the stock of a corporation, to be thereafter formed, constitutes a contract between them from the date of the subscription. *Nebraska Chicory Co. v. Lednicky* 587
7. A subscription to stock of a proposed corporation is a continuing offer, which, when accepted, becomes a contract. *Nebraska Chicory Co. v. Lednicky* 587
8. A subscription to stock in a proposed corporation is based on a sufficient consideration. *Nebraska Chicory Co. v. Lednicky* 587
9. A subscription to stock before the corporation is formed, but accepted by the corporation after coming into existence, makes the subscriber a shareholder, and the corporation may sue on the subscription. *Nebraska Chicory Co. v. Lednicky* 587
10. Sec. 39, ch. 16, Comp. St. 1905, authorizing the opening of books for stock subscriptions, does not limit the right of individuals to subscribe for stock by special agreement. *Nebraska Chicory Co. v. Lednicky* 587
11. Where a surety company insures a fraternal beneficial association from loss by embezzlement of its officers, the company is estopped from denying the legal capacity of the association in an action on the policy. *Union Pacific Lodge v. Bankers Surety Co* 801

Counties and County Officers.

1. County officers have by implication powers necessary to perform their duties. *Christner v. Hayes County* 157
2. A county attorney, required by law and by the order of the county board to institute actions for the county, may bind the county to pay the reasonable expenses. *Christner v. Hayes County* 157

Counties and County Officers—*Concluded.*

3. A county warrant issued against the general fund is not payable out of the general fund of a subsequent year, unless included in the estimate of the latter year, or there is a surplus. *State v. Clark*..... 263

4. The amount received by the county treasurer as interest from depository banks should be credited to the general fund immediately on its receipt, and can be disbursed only as other moneys belonging to that fund. *State v. Clark*... 263

5. A county treasurer is not liable for depositing county funds in a legal depository in excess of the depository bank's *pro rata* share of such funds, as provided by sec. 18, ch. 18, art. III, Comp. St. 1905, unless the deposit exceeds the sum allowable under sec. 20. *Holt County v. Cronin*..... 424

6. A county must pay the cost of an action to compel approval of a treasurer's bond for a second term, if objection to his account is not disclosed before action brought. *State v. Vinnedge* 270

7. The bond of a county treasurer elected to serve a second term should be approved when he stands ready to account for all funds collected during his first term, and mere irregularities in disbursing the funds is not a valid objection to his settlement or the approval of his bond, where such irregularities occur on the advice of the county attorney, and without loss to the county, or any one interested in the funds. *State v. Vinnedge*..... 270

8. Action of county supervisors in disallowing a claim against the county is final, unless appealed from. *Lincoln Township v. Kearney County*..... 299

9. The action of the county supervisors in disallowing a claim of a township is not affected by the fact that notice of such disallowance was mailed to an officer of the township who had resigned his office, where the notice was delivered to his successor within five days from the order of disallowance. *Lincoln Township v. Kearney County*..... 299

10. A resolution of a county board designating a certain newspaper in which to publish notices, *held* not to constitute a contract between the county and the newspaper. *World Publishing Co. v. Douglas County*..... 849

Courts.

Where the entryman of a timber-culture claim died before patent issued, *held* that the county court had no jurisdiction to adjudge that his devisees were the owners of the premises to the exclusion of the heirs to whom the patent was issued. *Walker v. Ehresman*..... 775

Criminal Law. See ABORTION. ARSON. FINES. HOMICIDE. INFANTS. INDICTMENT AND INFORMATION. LARCENY. PARDON. ROBBERY.

Abatement.

1. The judgment of a court having no jurisdiction of the subject matter does not constitute a bar to a second prosecution based on the same charge as that upon which the first judgment was pronounced. *Peterson v. State*..... 132
2. Acquittal on the charge of murder of one L., *held* not a bar to a prosecution for the crime of robbery of L. committed at the time of the killing. *Warren v. State*..... 526
3. When former acquittal is a bar to second prosecution stated. *Warren v. State*..... 526

Evidence.

4. The positive testimony of one witness identifying the defendant as the perpetrator of a crime may support a conviction, where the defendant is shown to have been in the vicinity of the crime at the time it was committed, and the *corpus delicti* is clearly proved. *Buckley v. State*..... 86
5. Evidence *held* sufficient to show that the crime was committed in the county where laid. *Foster v. State*..... 259
6. In cases where the guilt of defendant depends on intent, collateral facts in which he bore a part leading up to the crime may be examined, though they show the commission of another crime. *Clark v. State*..... 473
7. On a trial for homicide while in an attempt to rob, it is competent to prove on the question of intent that the proceeds of several robberies by defendant and companions immediately before the homicide were divided, and defendant received a share thereof. *Clark v. State*..... 482
8. In a prosecution for arson, while evidence describing shoes worn by accused and footprints found near the place of the crime is proper, it is error to allow the witness to express his opinion that the footprints were made by the accused. *Heidelbaugh v. State*..... 499
9. In a prosecution for obtaining money under false pretenses, the facts speak for themselves, and other proof of guilty intent is not required. *State v. Sparks*..... 504
10. In such case evidence that accused committed like offenses should not be received. *State v. Sparks*..... 504
11. Where, in a prosecution for obtaining money under false pretenses, the transaction is such as to require other proof of defendant's guilty intent, evidence that he committed like crimes in a similar manner, about the same time, *held* admissible. *State v. Sparks*..... 504
12. Where, in a prosecution for obtaining money by false pre-

Criminal Law—*Continued.*

tenses, it is shown that defendant, after having been paid for work, filed a second claim for the same and received money thereon, and his defense is mistake, evidence that about the same time he obtained double payment of similar claims in the same manner, *held* competent. *State v. Sparks* 511

13. Statements in presence of accused, who remains silent, are admissible, if the time, place and circumstances lead to the inference that the accused by his silence assented to their truth. *O'Hearn v. State*..... 513

14. A statement by one under arrest charged with murder, upon a confession by an accomplice being read to him, *held* not to show assent to the statement rendering it admissible as a tacit confession. *O'Hearn v. State*..... 513

15. Where an accomplice has confessed and testified to the details of the crime, *held* error to allow witnesses, who heard him tell the same story at another time and place, to repeat it. *O'Hearn v. State*..... 513

16. In a prosecution for keeping liquor for sale without a license, *held* not prejudicial error to admit testimony of keeping other liquors, where the evidence shows that the liquors charged in the information were kept for sale and were intoxicating. *Feddern v. State*..... 651

17. Evidence that accused hired or procured a witness for the prosecution to leave the state *held* competent. *Crowell v. State* 784

Instructions.

18. Where the accused testifies in his own behalf, it is error to give undue prominence to his interest in the result by repeatedly calling the attention of the jury thereto and informing them that they must consider that fact in determining the weight and credibility of his evidence. *Burk v. State* 241

19. Error cannot be assigned of an instruction because it fails to cover all questions of law arising in a prosecution. *Clark v. State*..... 473

20. In a prosecution for murder in the first degree, if the evidence establishes that defendant is either guilty as charged or innocent, failure to instruct as to inferior degrees of the crime *held* not prejudicial error. *Clark v. State*..... 482

21. In an instruction defining reasonable doubt, the use of the word "fully" in the phrase, "if the jury are fully satisfied to a moral certainty," *held* not prejudicial. *Wheeler v. State* 491

Criminal Law—*Continued.*

22. Instruction *held* not to permit the jury to go outside of the evidence in determining the weight and credibility of the testimony of a witness. *Wheeler v. State*..... 491
23. It is proper to refuse instructions which the court has given in substance on his own motion. *Wheeler v. State*... 491
24. *Held* not reversible error to fail to instruct on the subject of an alibi, where no request was made. *Heidelbaugh v. State* 499
25. *Held* not error to instruct, as a matter of law, that beer is an intoxicating malt liquor, and within the meaning of the words "intoxicating liquors," as used in Ann. St., sec. 7170. *Feddern v. State* 651

Practice and Review.

26. In a prosecution for unlawfully keeping intoxicating liquor for sale without a license, it is not error for the jury to taste the liquors seized to determine whether it is intoxicating. *Schulenberg v. State*..... 65
27. Where defendant applied for a continuance, setting forth what the absent witnesses would testify to if present, and the state offered to admit that they would so testify, *held* that there was no abuse of discretion in denying the continuance. *Foster v. State*..... 259
28. Where there are several counts in an information, a conviction on one may be sustained, and a judgment on one, with no verdict as to the others, operates as an acquittal on the other counts. *Ford v. State*..... 309
29. Where the question of misconduct of an attorney in argument to the jury has been decided by the trial court on conflicting evidence, the decision will not be disturbed. *Clark v. State*..... 473
30. Where the bill of exceptions is incomplete the supreme court will not consider it; but in a capital case it will examine the record to determine the sufficiency of the evidence to sustain the conviction. *Clark v. State*..... 473
31. It is only in the most flagrant cases of improper language by a prosecuting attorney that defendant's counsel can remain silent until the trial is finished, and then cause the verdict to be set aside on account thereof. *Clark v. State*.. 482
32. On error, where the record does not contain a copy of the warrant of commitment, it will be presumed that it conforms to law. *Leiby v. State*..... 485
33. Where the court finds that a boy is a fit subject for the industrial school, and orders him committed, it will be presumed, in the absence of a showing to the contrary, that

Criminal Law—*Continued.*
the court found all the facts necessary to support the order. *Leiby v. State*..... 485

34. A plea of guilty is equivalent to a finding of guilt, and will sustain an order committing a minor to the industrial school. *Leiby v. State*..... 485

35. A complaint which charges defendant with burglariously breaking and entering a storeroom with intent to steal need not allege the value of the property stolen. *Wheeler v. State* 491

36. Where, on cross-examination of the prosecuting witness, it is sought to discredit him by showing that he has paid money to procure evidence against defendant, he may, on redirect examination, explain the transaction. *Wheeler v. State* 491

37. Where a juror states to his fellow jurors during their deliberations that he had personal knowledge of the facts of the case before trial, but does not disclose the facts within his personal knowledge, *held* not reversible error. *Feddern v. State* 651

38. The supreme court will not consider affidavits made after the trial to determine whether a juror made statements during the deliberations of the jury at variance with his *voir dire* examination, where such examination is not in the record. *Feddern v. State*..... 651

39. Where an officer in charge of a jury conducted them along the street where the crime was committed, *held* not such misconduct as to require a reversal. *Crowell v. State*..... 784

40. A judge of the district court may sit as an examining magistrate. *Cohoe v. State*..... 811

41. Where complaint is filed in the district court and the accused is present, the judge may call on him to plead and proceed with the examination without the issuing of a warrant. *Cohoe v. State*..... 811

Sentence.

42. On the hearing of an application under sec. 551 of the criminal code to determine the sanity of a convict, the judge in his discretion may stay execution of sentence. *State v. Barker*..... 361

43. A sentence is not vacated by a hearing on the question of the sanity of a convict, but the execution thereof is suspended until the day named in the order of stay. *State v. Barker* 361

Criminal Law—*Concluded.*

Verdict.

44. A conviction will not be set aside because of conflicting evidence, where the evidence of the state, if believed, will sustain the verdict. *Wheeler v. State*..... 491

45. Where defendant testifies in his own behalf, and his own and other competent evidence clearly shows that he is guilty, the verdict will not be set aside for error in the admission of evidence. *O'Hearn v. State*..... 513

46. Where the record is silent, it will be presumed that the verdict was properly received and that defendant was present in court. *Feddern v. State*..... 651

Damages. See EMINENT DOMAIN, 5, 6. TROVER, 1.

1. In an action for personal injury, instructions should limit the recovery for future pain to such as is reasonably certain to result. *Nixon v. Omaha & C. B. Street R. Co*..... 550

2. The measure of damages for the destruction of a growing crop is the value of the crop at the time of its destruction. *Berard v. Atchison & N. R. Co*..... 830

Death.

A presumption of death arises from the continued and unexplained absence of a person for seven years. *Holdrege v. Livingston* 238

Deeds.

1. The word quitclaim in a conveyance of real estate conveys the interest of the grantor therein. *Bannard v. Duncan*... 189

2. Evidence in a suit to cancel a deed for fraud *held* sufficient to sustain finding for plaintiff. *Rihner v. Jacobs*..... 742

3. Two deeds, given at different times, *held* parts of the same transaction. *Rihner v. Jacobs*..... 742

Descent and Distribution.

After the death of one to whom has been made a gift or loan, the distributive shares of his children, as heirs of the creditor or donor, cannot without their consent be diminished by charging a gift or loan as an advancement to their ancestor. *In re Estate of Hessler*..... 691

Dismissal.

Under sec. 430 of the code, it is within the discretion of the court to dismiss a petition without prejudice for disobedience of a reasonable order concerning the proceedings in the action. *Howell v. Malmgren*..... 16

Divorce.

1. It is not ground for divorce that a man asserts the right to govern his own household, or that he indulges in the

Divorce—*Concluded.*

habitual, if moderate, use of intoxicating liquors. *Bain v. Bain* 711

2. It is not error to deny a divorce for extreme cruelty of the wife, where the evidence discloses, at most, occasional ill temper. *Haines v. Haines*..... 684

3. Where the evidence is not sufficient to inform the supreme court of the value of the husband's property, and the trial court awarded alimony grossly excessive, considering the value placed on the property by its special findings, the case will be remanded for further evidence. *Yaryan v. Yaryan* 574

4. The findings of a trial judge on conflicting evidence as to the value of real property, made the basis of a decree of alimony, will not be disregarded on appeal, unless inferences from the evidence drawn by the supreme court are more likely to be correct than were his. *King v. King*..... 852

5. Courts, in awarding permanent alimony, will not adopt as a basis for its decree a division of the anticipated spoils of iniquity. *King v. King*..... 852

Domicile.

The domicile of the parents is presumably the residence of their minor children, but that presumption may be overcome by evidence. *Wirsig v. Scott*..... 322

Drugs.

The unlawful sale of a poisonous drug to a minor, a quantity of which he administered to another minor to his injury, does not create a cause of action in favor of the father of the latter. *McKibbin v. Bax & Co*..... 577

Easements.

1. Owners of adjoining lots *held* to have acquired an easement by prescription in a driveway. *Jensen v. Showalter*..... 544

2. An easement by prescription may be acquired in a homestead. *Jensen v. Showalter*..... 544

3. One claiming an easement in mortgaged property has the right of a subsequent incumbrancer, and where the easement has attached by lapse of time he must be made a party to a foreclosure, and, if not, the purchaser at foreclosure sale must question his right before the statute has run. *Jensen v. Showalter*..... 544

4. An easement in real estate may be acquired by open, notorious, adverse possession for ten years. *Agnew v. City of Pawnee City*..... 603

5. An easement in a city street could be acquired by open, notorious, adverse possession for ten years prior to the

Easements—*Concluded.*

amendment of 1899 of sec. 6 of the code. *Agnew v. City of Pawnee City* 603

6. An easement will pass by deed, even if the word "appurtenance" is not used in the instrument. *Agnew v. City of Pawnee City* 603

7. Nonuser of an easement for a less period than ten years will not of itself work an abandonment of the right. *Agnew v. City of Pawnee City* 603

8. The burden of proof is on the party alleging abandonment of an easement, and such abandonment must be pleaded. *Agnew v. City of Pawnee City* 603

Ejectment. See REMAINDERS, 4.

1. In ejectment, the duplicate receipt of the United States land office is sufficient evidence of title, except as against one having a patent to the same land or one claiming under him. *Oldfather v. Ericson* 1

2. In ejectment plaintiff must show a legal estate, right of possession, and unlawful detention. *Bridenbaugh v. Bryant,* 329

3. An equitable defense may be interposed in an action in ejectment. *Union Stock Yards Nat. Bank v. Day* 845

4. Evidence *held* to sustain judgment for plaintiff. *Union Stock Yards Nat. Bank v. Day* 845

5. Evidence *held* to support finding. *Bridenbaugh v. Bryant* .. 329

Electricity.

Where an electric light company placed its wires through the branches of trees so that high potential wires were within 26 inches of low potential wires, *held* that the company was guilty of negligence as a matter of law. *Grimm v. Omaha E. L. & P. Co* 387

Eminent Domain.

1. A railroad company cannot take land for the use of another company. *Beckman v. Lincoln & N. W. R. Co* 89

2. A railroad company which has leased its lines may, if the lease so provide, extend its lines for the benefit of its lessee, and may maintain condemnation proceedings in its own name. *Beckman v. Lincoln & N. W. R. Co* 89

3. Where plaintiff, in a suit to restrain a railroad company from entering upon his land, pleads that it has instituted condemnation proceedings, and that the proceedings are void because the road is being constructed by and for another company, the burden of proof is on him. *Beckman v. Lincoln & N. W. R. Co* 89

4. Evidence *held* insufficient to establish plaintiff's allegation

Eminent Domain—*Concluded.*

that a railroad across his land is not being constructed by and for the corporation seeking to obtain the right of way by condemnation proceedings. *Beckman v. Lincoln & N. W. R. Co*..... 89

5. Where a city partially vacates a street and builds a viaduct thereon opposite plaintiff's real estate, his measure of damages is the difference in the value of the property before and immediately after the improvement. *Gillespie v. City of South Omaha*..... 441

6. In determining such damages, the jury may consider diversion of travel, inconvenience of access, and diminution of business. *Gillespie v. City of South Omaha*..... 441

7. Where a city takes title by eminent domain subject to special and general taxes, it is estopped to deny their validity. *City Safe D. & A. Co. v. City of Omaha*..... 446

8. Sec. 21, art. I of the constitution, which provides that property shall not be taken or damaged for public use without just compensation, does not require that payment shall precede the taking. *State v. Several Parcels of Land*..... 638

9. The appropriation of private lands for boulevard purposes in metropolitan cities is governed by sec. 101*b*, ch. 12*a*, Comp. St. 1897. *State v. Several Parcels of Land*..... 638

10. Sec. 101*b*, ch. 12*a*, Comp. St. 1897, providing for the payment for property appropriated for parks, parkways and boulevards, is not exclusive, but there is a general liability of the municipality therefor. *State v. Several Parcels of Land* 638

Equity.

1. In a suit to set aside a deed, where the right of possession is an issue, the court will determine the right and put the parties entitled thereto into possession. *Hobson v. Huxtable*, 340

2. Where a defendant is entitled to be subrogated to the lien of a mortgage, the court may, as a condition precedent to granting relief, compel payment of the mortgage, though the lien be barred by limitations. *Hobson v. Huxtable*..... 340

3. An offer to do equity is only required in those cases where an equitable duty rests on the plaintiff, not enforceable except for such offer. *Platte Valley Milling Co. v. Malmsten* 730

4. One who seeks equity must offer to do equity to be entitled to relief as plaintiff or defendant. *Union Stock Yards Nat. Bank v. Day*..... 845

Estoppel. See JUDICIAL SALES. MORTGAGES, 4.

1. To constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts were known to the party against whom the estoppel is urged. *City of Lincoln v. McLaughlin*..... 74
2. In the application of the doctrine of equitable estoppel, where property is held in trust, and credit is given the trustee on the faith of his apparent ownership, cases, where the trust relation is between relatives and arises out of contract, distinguished from those where the trust arises *ex maleficio* and the relation is between strangers. *Rihner v. Jacobs* 742
3. Estoppel will be denied where reliance on apparent ownership of realty obtained by fraud is not clearly established, and the creditor appears to have been as negligent in extending credit as was the owner in the original transaction. *Rihner v. Jacobs*..... 742
4. Equitable estoppel defined. *Walker v. Ehresman*..... 775

Evidence. See CRIMINAL LAW, 4-17. TRIAL.

1. In an action for personal injuries, the Carlisle table of expectancy may be given in evidence after the permanent character of the injuries is shown. *Howard v. McCabe*.. 42
2. One who has been engaged in ordinary mercantile business for a considerable time may testify as to the value of his services in such business. *Howard v. McCabe*..... 42
3. In the absence of evidence to the contrary, the laws of a sister state as to the creation of a corporation will be presumed to be the same as those of this state. *Bannard v. Duncan*. 189
4. Evidence of a verbal agreement by a landlord with his tenant to construct a drain made without consideration, and evidence of damage for failure to construct it, is incompetent in an action for accounting, the agreement being omitted from a written lease. *Gandy v. Wiltse*..... 280
5. Admissions against interest are admissible against a party, and, where he is examined as a witness in his own behalf, it is unnecessary to lay a foundation for their admission. *Young v. Kinney* 421
6. Where the evidence furnished by the journals of the legislature is ambiguous as to the actual time of its final adjournment, recourse may be had to other competent evidence. *State v. Junkin*..... 532
7. Legislative journals *held* so ambiguous as to the time the legislature adjourned *sine die* as to permit evidence *aliunde*. *State v. Junkin* 532

Evidence—*Concluded.*

8. Where an instrument is attested, the subscribing witness should be produced at the trial to prove the execution, unless his absence is accounted for, or its execution admitted. *Nason v. Nason*..... 582

9. The courts will take judicial notice of the fact that a city is incorporated, of the time when it was incorporated, and of its geography and history. *Agnew v. City of Pawnee City*, 603

10. In an action by a subordinate lodge of a beneficial association, the books and records of the lodge are receivable in evidence against the members of the lodge and their privies. *Union Pacific Lodge v. Bankers Surety Co*..... 801

11. Where there is a conflict in the evidence, any collateral fact tending to establish the probability or improbability of the fact in issue is relevant. *Shepherd v. Lincoln Traction Co.* 834

Exceptions, Bill of.

1. A bill of exceptions not authenticated as required by law will not be considered. *O'Conner v. Fields*..... 840

2. The supreme court, on proper application, will permit a bill of exceptions to be withdrawn for certification by the clerk of the district court. *O'Conner v. Fields*..... 840

3. A certificate of the clerk of the district court attached to a bill of exceptions without authority after it has been filed in the supreme court will be disregarded. *O'Conner v. Fields* 840

False Imprisonment.

Where a peace officer arrests a person without process, and takes him before a magistrate, filing a complaint describing no offense, and after a hearing the person is set at liberty, an action for false imprisonment lies, against which the statute of limitations begins to run when the accused is released. *Hackler v. Miller*..... 206

Fines.

Fines for violation of the penal laws of the state or city ordinances are not debts within the constitutional provision prohibiting imprisonment for debt. *Peterson v. State*.... 132

Fraudulent Conveyances.

Evidence *held* insufficient to overcome the presumption of fraud in a conveyance by a debtor to his son. *Hulen v. Chilcoat* 595

Guardian and Ward.

1. Parents are guardians by nature and for nurture of all children born to them in lawful wedlock. *Tiffany v. Wright*, 10

Guardian and Ward—*Concluded.*

2. Where minors over the age of 14 years, with the consent of their parents, procure the appointment of a guardian, the proceeding is not open to collateral attack on the ground that the parents are the natural guardians. *Wirsig v. Scott*, 322

Highways. See INJUNCTION, 3.

1. In an action for injuries caused by a barbed-wire fence constructed in violation of secs. 6104, 6105, Ann. St., evidence *held* to support verdict. *Vanderveer v. Moran*..... 431
2. To prove an implied dedication of a highway and its acceptance, it is not necessary to prove that the public authorities improved it, where it required no improving to fit it for public travel. *Brandt v. Olson*..... 612
3. Evidence *held* to raise presumption of implied dedication and acceptance of a public highway. *Brandt v. Olson*..... 612
4. The right of a landowner to recover land used as a highway, *held* barred by prescription. *Brandt v. Olson*..... 617

Homestead.

1. Where a homestead has been selected by husband and wife from the separate property of the wife, the wife cannot by conveyance deprive the husband of his homestead right therein. *Miller v. Paustian*..... 196
2. The actual use of a dwelling as a family home is a sufficient selection under the homestead law. *Hobson v. Huxtable*.. 334
3. Where the homestead is selected from the property of the wife, her consent may be presumed from its use as a family home. *Hobson v. Huxtable*..... 334
4. Where a homestead is selected from the separate property of the wife, upon her death intestate, a life estate vests in the surviving spouse, and remainder in her heirs. *Hobson v. Huxtable* 340

Homicide. See CRIMINAL LAW.

Death penalty *held* excessive, and sentence reduced to imprisonment for life. *O'Hearn v. State*..... 513

Husband and Wife.

1. Where a husband purchases real estate for a family home and has title placed in his wife, the presumption is that it was intended as a gift or advancement to the wife. *Van Etten v. Passumpsic Savings Bank*..... 632
2. A wife may sue for maintenance without suing for divorce. *Brewer v. Brewer* 726
3. A wife does not forfeit her right to maintenance by refusing to live in a home under the control of the husband's mother. *Brewer v. Brewer* 726

Indians.

1. An Indian may recover in an action for mesne profits the rental value of lands allotted to him by the government from one who has occupied the same under a void lease. *Phillips v. Reynolds* 626

2. Petition *held* sufficient to sustain an action for mesne profits. *Phillips v. Reynolds*..... 626

Indictment and Information.

An information for an offense made criminal by statute or ordinance must charge every element of the offense as defined by the statute or ordinance. *Herbes v. State*..... 832

Infants.

1. A county judge, in committing a boy to the industrial school, is not required by sec. 9736, Ann. St., to make a written finding that he is sane and under 18 years of age. *Leiby v. State* 485

2. In committing a boy to the industrial school, the county court should not fix a definite and determinate sentence, and it is sufficient if the warrant contains a statement of his residence and age *Leiby v. State*..... 485

Injunction.

1. Injunction will not lie to restrain the enforcement of a judgment at law, where there is no claim of want of jurisdiction, or of fraud or mistake, and where the situation of the parties remains unchanged. *Cox v. Anderson*..... 76

2. Equity will enjoin repeated acts of trespass committed under a claim which indicates a continuance and constant repetition of it. *Hackney v. McInnch*..... 128

3. Overseers of highways may, when a road is obstructed and its continuance threatened, enjoin the trespasser. *Williams v. Riley* 554

4. The rule that equity will not interfere to protect a legal right in property until title is established at law does not apply where a right has been enjoyed for many years. *Williams v. Riley*..... 554

5. Injunction will lie to protect the owner of an easement in its enjoyment. *Agnew v. City of Pawnee City*..... 603

6. Evidence in a suit to enjoin defendants from disconnecting a telephone *held* to sustain decree for defendants. *Elmore v. McMillan* 621

7. The collection of city taxes on property outside its boundaries may be enjoined. *Hemple v. City of Hastings*..... 723

Insane Persons.

A guardian may authorize a third person to take possession of the ward's property, and such person is not a trespasser. *Cohoe v. State* 819

Insurance.

1. A forfeiture for failure of a literal and technical compliance with the requirements for notice of death and proof of loss should not be declared. *Simmons v. Western T. A. Ass'n.* 20
2. One insured as a commercial traveler, *held* not to have changed his occupation to that of stock farmer, owner or superintendent, classed as more hazardous than that of commercial traveler. *Simmons v. Western T. A. Ass'n*.... 20
3. Letters received in evidence tending to show diligence in making proof of loss, *held* admissible. *Simmons v. Western T. A. Ass'n.* 20
4. Evidence in an action on an accident policy *held* to sustain judgment for plaintiff. *Simmons v. Western T. A. Ass'n*.. 20
5. In an action on a fire insurance policy, where the destruction of the property by the insured is relied on as a defense, it should be affirmatively pleaded. *Herpolsheimer v. Citizens Ins. Co.* 685

Intoxicating Liquors.

1. Under ch. 32, Ann. St., a petition for a liquor license must be signed by *bona fide* freeholders. *Dye v. Raser*..... 149
2. One made a freeholder to qualify him as a petitioner for a liquor license is not a *bona fide* freeholder within the meaning of the liquor law. *Dye v. Raser*..... 149
3. Lapse of time alone will not qualify a bad faith freeholder to sign a petition for a liquor license. *Dye v. Raser*..... 149
4. Under sec. 7165, Ann. St., a saloon-keeper is not liable for damages from the use of intoxicating liquors sold to a third person, who furnished them to one who became intoxicated, if the saloon-keeper had no reason to believe that they were to be furnished such person. *Sullivan v. Conrad* 303
5. One in possession of intoxicating liquors, with the intention of disposing of the same without license, is a keeper under sec. 20, ch. 50, Comp. St. *Ford v. State*..... 309
6. No valid liquor license can be granted by a village board until it has adopted a valid ordinance authorizing issuance of licenses. *Payne v. Ryan*..... 414
7. In a suit by a married woman in behalf of herself and minor children for damages due to the incapacity of the

Intoxicating Liquors—*Concluded.*
husband from inebriety, the gist of the action is the loss of the means of support. *Nelson v. Nevels*..... 699

8. In an action on a saloon-keeper's bond, evidence *held* to prove the intoxication in defendant's saloon of the one who inflicted the injury. *Howard v. McCabe*..... 42

9. In a prosecution under sec. 7170, Ann. St., for keeping intoxicating liquors for sale without a license, *held* competent for a witness to testify that certain liquors seized tasted like beer. *Feddern v. State*..... 651

10. Rulings excluding certain evidence *held* prejudicial. *Sullivan v. Conrad* 303

11. Instructions that withdraw any material issue, properly pleaded and supported by competent testimony, are erroneous. *Sullivan v. Conrad*..... 303

12. In an action on a saloon-keeper's bond for injuries, the giving and refusal of instructions *held* not prejudicial. *Howard v. McCabe.* 42

Judgment. See INJUNCTION, 1.

1. Before the entry of a judgment *nunc pro tunc*, it must appear that there was a failure to record the judgment which the court rendered. *Central West Investment Co. v. Barker Co.* 47

2. An order *nunc pro tunc* will not be allowed for the entry of an order announced where the evidence shows a vacation of the order at the term it was rendered. *Central West Investment Co. v. Barker Co*..... 47

3. A judgment creditor who fails to have execution issued and levied during five years after judgment loses the priority of his lien as against other *bona fide* judgment creditors or purchasers. *Glenn v. Glenn*..... 68

4. A mortgagee of real estate is a purchaser within sec. 509 of the code. *Glenn v. Glenn*..... 68

5. A fact within the jurisdiction of the court, litigated and determined in a forcible entry and detainer suit, cannot again be brought in question between the same parties. *Connelly v. City of Omaha*..... 146

6. Where title to real estate held in trust is in litigation, and the trustee prosecutes or defends with the consent of the beneficiary, the beneficiary will be concluded by the result of the litigation. *Van Etten v. Passumpsic Savings Bank*.. 632

7. A judgment is not an entirety unless the interests of the judgment debtors are inseparable. *Sturgis, Cornish & Burn Co. v. Miller* 404

Judgment—*Concluded.*

8. The vacation of a judgment against one judgment debtor whose interests are inseparable vacates it as to other judgment debtors. *Sturgis, Cornish & Burn Co. v. Miller*..... 404
9. Where a judgment against a principal and sureties was set aside as to the principal, their interests being inseparable, the vacating as to the principal vacated it as to all. *Sturgis, Cornish & Burn Co. v. Miller*..... 404
10. Petition to vacate a judgment for fraud *held* sufficient on appeal. *Wagener v. Whitmore*..... 558
11. Evidence *held* to support finding that the decree sought to be vacated was obtained by fraud. *Wagener v. Whitmore*.. 558
12. A motion does not lie to vacate a judgment after the term, and not founded on any of the grounds set forth in sec. 604 of the code. *Amell v. Fisher*..... 799
13. The power of the district court to modify or vacate its judgments during the term at which the judgment was rendered is discretionary. *Prudential Real Estate Co. v. Hall*..... 805

Judicial Sales.

Where the owner of property sold at judicial sale moves to deny confirmation because of inadequacy of price, and offers an increase on resale, he is thereby estopped to deny the jurisdiction and the justice of the decree of sale. *Prudential Real Estate Co. v. Hall*..... 808

Jury.

Whether or not a right to trial by jury exists must be determined from the petition, and in case of ambiguity by resort to the prayer. *Gandy v. Wiltse*..... 280

Justice of the Peace.

A mere claim of title will not oust a justice of the peace of jurisdiction in a forcible entry and detainer case. *Connelly v. City of Omaha*..... 146

Landlord and Tenant.

1. Estoppel of the tenant to deny the title of his landlord extends to every one in privity with him, and inures to the benefit of any person to whom the landlord's title may pass. *Hackney v. McInnich*..... 128
2. A grantee of lands subject to a lease for years, reserving rent payable in instalments, cannot declare a forfeiture and recover the premises for a default accruing to his grantor before the conveyance. *Moulton v. Lawson*..... 720

Larceny.

1. Trespass is one element of the crime of larceny, and there can be no conviction under sec. 114 of the criminal code

Larceny—*Concluded.*
unless the taking of the property was unlawful. *Cohoe v. State* 811

2. The return to the owner of a part of the money stolen will not prevent a prosecution for larceny. *Cohoe v. State*.... 811

Life Estates.

1. The death of a life tenant terminates the right of possession of his lessee. *Edghill v. Mankey*..... 347

2. Where the lessee of a life tenant plants crops before the death of the life tenant and consequent termination of his lease, he can reenter to cultivate, harvest and remove such crops. *Edghill v. Mankey*..... 347

Limitation of Actions. See MALICIOUS PROSECUTION, 2. MORTGAGES, 2. QUIETING TITLE, 2. REMAINDERS, 1, 3, 4.

1. If a remainderman is under disability when a cause of action to quiet title accrues, limitations will not run against him until the disability is removed. *Hobson v. Huxtable*.. 340

2. Acknowledgment of indebtedness sufficient to toll the statute of limitations should be to the creditor or one authorized to represent him. *Wallber v. Caldwell*..... 418

3. A conveyance of real estate subject to a mortgage which the grantee does not assume does not stay the statute of limitations. *Wallber v. Caldwell*..... 418

Lis Pendens.

1. A took a mortgage from B, and pending foreclosure C brought ejectment against B, and had judgment. *Held*, That the purchaser at foreclosure sale was not affected by the judgment in the action between B and C. *Bannard v. Duncan* 189

2. The rule of *lis pendens* cannot be extended to charge third parties with notice of a cause of action set up subsequently to their purchase by supplemental pleadings. *Hulen v. Chilcoat* 595

3. By filing notice of *lis pendens*, as required by sec. 85 of the code, a creditor cannot impound the property of his debtor for a debt which is not a lien on the property. *Hulen v. Chilcoat* 595

4. The purpose of the amendment of 1887 to sec. 85 of the code is to estop those holding unrecorded instruments or secret interests affecting property from asserting the same against the judgment finally entered in the action. *Munger v. Beard & Bro*..... 764

5. The filing of a *lis pendens* notice does not affect the rights

Lis Pendens—*Concluded.*

of one whose interest in the property is known to the plaintiff when the notice is filed. *Munger v. Beard & Bro...* 764

6. The legislature can declare a judgment defining the interest of a party in realty superior to an unrecorded instrument executed prior to the filing of notice of *lis pendens*. *Munger v. Beard & Bro*..... 764

Malicious Prosecution.

1. Where one maliciously and without probable cause instigates a criminal prosecution, he cannot defeat an action for malicious prosecution by setting up the invalidity of his complaint, or a defect in the judgment. *Hackler v. Miller* 209

2. Limitation of an action for malicious prosecution does not begin to run until the criminal case is dismssed, or the prosecution terminated. *Hackler v. Miller*..... 209

3. An answer in the nature of a general denial in an action for malicious prosecution puts in issue allegations of malice and want of probable cause. *Hackler v. Miller*..... 209

4. Instructions in an action for malicious prosecution *held* to coincide with plaintiff's view of the law, and to furnish no ground for reversal. *Hackler v. Miller*..... 209

Mandamus. See SCHOOLS AND SCHOOL DISTRICTS, 3.

1. Where mandamus is sought to compel the county board to repair a bridge, and it appears that the county, without advertising for bids, has incurred liabilities amounting to $4,000 for sundry repairs, the court will not assume, in the absence of evidence, that any one contract was for more than $100 in violation of sec. 83, ch. 78, Comp. St. *State v. Switzer* 78

2. In determining the character of repairs to bridges, and what bridges shall be repaired, where there are not sufficient funds for all, the court will not control the discretion of county commissioners. *State v. Switzer*..... 78

Marshaling Assets.

The right of a junior mortgagee of a single tract of land to require a senior mortgagee of several tracts to take payment out of those to which he can resort exclusively cannot be defeated by a secret oral agreement between the senior mortgagee and the debtor. *Anthes v. Schroeder*..... 355

Master and Servant.

1. Masters must exercise ordinary care to provide reasonably safe appliances for their servants. *Vanderpool v. Partridge*, 165

2. The foregoing rule has no application where the servant

Master and Servant—*Concluded.*

possesses ordinary intelligence and the appliances are so simple that defects can be readily observed. *Vanderpool v. Partridge* 165

3. A servant who, knowing that a tool furnished by the master is unsafe, continues to use it without objection, assumes all risk. *Vanderpool v. Partridge*..... 165

4. A servant does not assume the risk of dangers due to his master's negligence. *Grimm v. Omaha E. L. & P. Co*..... 387

5. Where a servant, in obedience to the requirements of his master, incurs the risk of appliances which are not such as may not be safely used, he does not as a matter of law assume the risk of injury. *Sapp v. Christie Bros*..... 701

6. A servant, induced to use defective appliances by a master's promise to repair may use them without assuming the risk of injury. *Sapp v. Christie Bros*..... 705

7. Whether an employee assumed the risk and was guilty of contributory negligence were questions for the jury. *Grimm v. Omaha E. L. & P. Co*..... 387

8. In an action for the death of an employee, whether he was guilty of contributory negligence in taking hold of an incandescent lamp charged with electricity was for the jury. *Grimm v. Omaha E. L. & P. Co*..... 395

9. Evidence *held* to show that an employee was killed in the performance of duties within the scope of his employment. *Grimm v. Omaha E. L. & P. Co*..... 387

10. In an action against a master for negligence, the burden of establishing an assumption of risk is on the master. *Grimm v. Omaha E. L. & P. Co*..... 395

11. The instinct of self-preservation, in the absence of evidence, raises the presumption that a person killed exercised ordinary care. *Grimm v. Omaha E. L. & P. Co*..... 395

Money Received.

In an action for money collected and for services, evidence *held* insufficient to sustain verdict of no cause of action. *Jones v. Jones* 63

Mortgages.

1. In a suit to foreclose a mortgage it is unnecessary to prove title in the mortgagor as against such mortgagor and his privies. *Bazelman Lumber Co. v. Hinton*..... 313

2. An action to redeem from a mortgage does not accrue until the mortgagee takes possession after default, and is not barred until ten years thereafter. *Clark v. Hannafeldt*.... 566

3. Conveyance *held* absolute. *Harrah v. Smith*..... 51

Mortgages—*Concluded.*

4. Evidence *held* insufficient to estop defendant from asserting absolute title to property in controversy. *Harrah v. Smith* 51

5. Evidence *held* insufficient to show that a deed was intended as a mortgage. *Butler v. Peterson*..... 715

Municipal Corporations. See INJUNCTION, 7.

1. An ordinance for the protection of life and property is presumptively valid, and the courts will not interfere with its enforcement until its unreasonableness is shown by satisfactory evidence. *Peterson v. State*..... 132

2. A prosecution for violation of a city ordinance, which does not embrace any criminal offense, is a civil proceeding, and does not require proof beyond a reasonable doubt. *Peterson v. State* 132

3. Power given to villages prior to 1903 to require the construction of sidewalks did not include the power to require the lot owner to reduce the sidewalk space to the established grade. *Smith v. Hofeldt*..... 276

4. Prior to 1903, before a village could, by notice, require a lot owner to construct a sidewalk to grade upon an improved street, it must grade the sidewalk space to the established grade. *Smith v. Hofeldt*..... 276

5. To determine whether the owners of a majority of the foot frontage of an improvement district have petitioned for repaving, it is necessary to consider the foot frontage created by the vacation of an abutting street. *Mercer Co. v. City of Omaha* 284

6. One holding title to city lots with authority to improve them is competent to petition for repavement of a street, under the Omaha charter (Ann. St. 1903, sec. 7562). *Mercer Co. v. City of Omaha*..... 284

7. Public parks of a metropolitan city cannot be taxed for any special benefits supposed to have accrued by the establishment of a boulevard. *State v. Several Parcels of Land*.... 638

8. Under sec. 101*b*, ch. 12*a*, Comp. St. 1897, special assessments for boulevards are not limited to property which abuts on or is adjacent to the boulevard. *State v. Several Parcels of Land* 638

9. A city of the second class of less than 5,000 inhabitants is authorized to operate an electric lighting plant for municipal and commercial purposes. *Todd v. City of Crete*..... 671

10. Where such city leaves one of its wires in a position to cause injury, the fact that such wire was not in use at the

Municipal Corporations—*Continued.*
time of the accident is no defense to an action for damages. *Todd v. City of Crete*..... 671

11. A city of the second class cannot by ordinance limit the liberty of its citizens, unless the power to do so is given in its charter. *In re Sapp*..... 781

12. The statutes do not confer power on cities of the second class to prohibit by ordinance the keeping of card tables for sale in a place of business, nor to make it unlawful to permit card playing under any and all circumstances in any place of business or adjacent thereto. *In re Sapp*..... 781

13. The subdivision into lots of property outside the limits of a city, and the filing of a plat thereof, does not change the boundaries of the city to include such property. *Hemple v. City of Hastings*..... 723

14. If the body exercising power to attach territory to a city possesses jurisdiction, its action cannot be collaterally attacked; but the rule does not apply where there is no attempt to exercise such jurisdiction except the act of the county clerk in extending taxes against property outside the city limits. *Hemple v. City of Hastings*..... 723

15. The city engineer of a metropolitan city holds office until his successor is elected and qualified, and where his successor fails to qualify the incumbent may qualify anew under sec. 17, ch. 10, Comp. St. 1905. *State v. Rosewater*.. 450

16. The power of the council to elect an engineer does not exist when one appointed by the mayor and confirmed by the council fails to qualify, and the incumbent may qualify anew for the succeeding term. *State v. Rosewater*..... 450

17. The provisions of the general election law (Comp. St., ch. 26, secs. 105, 107) for filling vacancies in office apply to the office of alderman of the city of Lincoln. *State v. Schroeder* 759

18. One appointed to a vacancy as alderman of a city of the first class holds only until the next general election, under Comp. St., ch. 26, sec. 107, which, under sec. 105, is the next regular municipal election. *State v. Schroeder*..... 759

19. Under sec. 1, art. I, ch. 14, Comp. St. 1903, each village containing the required population becomes a city of the second class without any action on the part of the municipality. *State v. Northup*..... 822

20. Where at the time the trustees of a village passed an ordinance providing for the election of city officers the village had less than the requisite number of inhabitants to constitute it a city of the second class, but at the time of

Municipal Corporations—*Concluded.*

election it had the requisite number, *held* not to invalidate the election. *State v. Northup*..... 822

21. The provisions of sec. 8755, Ann. St., providing that on the passage of ordinances the yeas and nays shall be called, are mandatory. *Payne v. Ryan*..... 414

22. The general statute of limitations does not apply to an action by a city to recover title or possession of a public street. *City of Lincoln v. McLaughlin*..... 74

23. A statutory notice is sufficient if it contains that which the statute prescribes. *Forbes v. City of Omaha*..... 6

24. A citizen could not, prior to 1905, maintain an action on the bond of a patrolman of the city of Omaha. *Cushing v. Lickert* 384

25. In an action for personal injuries, that the jury has, at the request of one of the parties, inspected the scene of the injury does not necessarily preclude such party from complaining that the verdict is not supported by the evidence. *Forbes v. City of Omaha*..... 6

26. A city is liable for the wrongful or negligent acts of its agents in making, improving and repairing streets. *Burke v. City of South Omaha*..... 793

Negligence.

Failure to perform a statutory duty imposed for the protection of the public is negligence. *Vanderveer v. Moran*..... 431

Newspapers.

Where a county board contracts with a newspaper for legal advertisements for a year, and for succeeding years recognizes it as the official paper, such paper is, for the purpose of publication of notices of tax sales, a paper designated by the board of county commissioners, as required by sec. 109, art. I, ch. 77, Comp. St. 1897. *Continental Trust Co. v. Link* 29

New Trial.

1. A new trial will not be granted for newly discovered evidence, unless it would probably have produced a different result. *Dickinson v. Aldrich*..... 198

2. Inability of a party to procure a transcript in time to prepare a bill of exceptions is not ground for new trial where the adverse party offers to permit the bill to be subsequently settled. *Dickinson v. Aldrich*..... 198

3. An affidavit for a new trial for newly discovered evidence must state facts from which the court may determine that the party used diligence to procure such evidence before the trial. *Todd v. City of Crete*..... 677

New Trial—*Concluded.*

4. A new trial will not be granted for newly discovered evidence which is cumulative and will not probably affect the result. *Parkins v. Missouri P. R. Co* 788

5. Under the facts, *held* that defendant is not entitled to a new trial on the ground of surprise. *Parkins v. Missouri P. R. Co* 788

Notaries.

The seal of a notary which contains the words "Notarial Seal," the name of the county, and the word "Nebraska," is sufficient for the authentication of his official acts. *Sheridan County v. McKinney* 223

Officers. See PAYMENT, 1.

1. An action will not lie on an official bond to recover the statutory penalty for taking, charging or demanding illegal fees. *Sheibley v. Cooper* 232

2. In order to subject one to such penalty, it must appear that he was an officer at the time of taking such fees. *Sheibley v. Cooper* 232

3. One whose term of office had expired when such fees were taken is not liable for the statutory penalty. *Sheibley v. Cooper* 232

4. An action to recover a statutory penalty is barred under sec. 13 of the code in one year from the date of its accrual. *Sheibley v. Cooper* 232

5. Sec. 643 of the code, providing for actions on official bonds by any person damaged through the misconduct of an officer, refers only to bonds authorized by statute. *Cushing v. Lickert* 384

Pardon.

1. The governor has no authority to order a sheriff to release a prisoner committed to his custody by judgment of a court. *Campion v. Gillan* 364

2. The governor has no power to pardon a prisoner found guilty of bastardy. *Campion v. Gillan* 364

3. The word "offenses" as used in sec. 13, art. V of the constitution, is equivalent to "crimes," and the governor cannot pardon an offense until after conviction by the judgment of a court. *Campion v. Gillan* 364

Parent and Child.

Where a father sues for loss of services of a minor child, and proves the value of such services, he need not prove how or where the child would probably have been employed. *Vanderveer v. Moran* 431

Parties.

A defect of parties must be taken advantage of by demurrer or answer, or it will be deemed waived. *Nason v. Nason*.. 582

Partition.

1. One of four children who claim under a will devising lands to such of said children as shall survive testator ten years cannot maintain partition against his codevisees before the end of such period. *Wicker v. Moore*..... 755
2. Where property is devised in trust for minor children for ten years, then to be divided among the survivors, one of such children cannot maintain partition during the existence of the trust. *Wicker v. Moore*..... 755

Payment.

1. Where illegal fees are claimed by an officer as a matter of right, and are paid after his term of office has expired, voluntarily and with full knowledge of the facts, they cannot be recovered. *Sheibley v. Cooper*..... 232
2. What may be received in payment of a debt is a matter of contract between the parties. *Brockman v. Ostdiek*..... 843
3. In an action on a note against a member of a partnership, *held* that an indorsement of a debt due the partnership barred the defense of the statute of limitations. *Brockman v. Ostdiek* 843

Pleading. See INSURANCE, 5.

1. Where plaintiff complies without objection with an order requiring him to file an amended petition, he cannot afterwards complain. *Hackler v. Miller*..... 209
2. A petition to enjoin the execution of a judgment of a justice of the peace, which fails to show that plaintiff has exhausted his legal remedy, does not state a cause of action. *Minton v. Palmer* 351
3. Plaintiff cannot, by motion to make specific, be required to disclose in his petition matters of defense. *Vanderveer v. Moran* 431
4. Facts alleged in a petition, to which defendant pleads a waiver, an estoppel, or matter in avoidance, will be treated as admitted, though the answer contains a general denial. *Nason v. Nason* 582
5. Failure to allege that plaintiff had been in the exclusive adverse possession of premises for ten years, and of the court to so find, is not material after judgment, where the evidence shows such fact. *Agnew v. City of Pawnee City*.. 603
6. Where new matter in a reply is not responsive to new

Pleading—*Concluded.*

matter in the answer, and is a departure, it should on motion be stricken. *Hallner v. Union Transfer Co*..... 215

7. The court will, under sec. 145 of the code, disregard a defect in pleading, not affecting the rights of the adverse party. *Waldron v. McBride*..... 429
8. A general denial puts in issue only such pleaded facts as are necessary for plaintiff to prove to enable him to recover. *Herpolsheimer v. Citizens Ins. Co*..... 685

Principal and Agent.

A person or corporation cannot be held for goods sold and delivered to an employee in the absence of a showing that he was authorized to make the purchase. *Young v. Chi Psi Cattle Co.* 268

Public Lands.

Where one entered a timber-culture claim and died before patent issued, *held*, that the legal title remained in the government, and the entryman had no devisable interest therein. *Walker v. Ehresman*..... 775

Quieting Title.

1. Evidence in suit to quiet title, *held* insufficient to sustain allegations of petition. *Lanham v. Bowlby*..... 39
2. Where a defendant in a suit to quiet title claims as cotenant with plaintiff, and there is a decree quieting title in the cotenants, plaintiff and defendant, and against the other defendants, the suit will be deemed one to quiet title, and if limitations would run against any defendant he will be barred. *Hobson v. Huxtable*..... 334
3. In a suit to quiet title, evidence *held* to show title in plaintiff, with the right in defendant to an accounting for taxes and mortgage liens discharged by him. *Butler v. Peterson*.. 713
4. An unexcused delay of 14 years *held* to preclude one from maintaining an action to quiet title. *Butler v. Peterson*.... 715

Railroads.

Where cattle are allowed to wander from a private crossing along the right of way of a railroad company, it is not liable for killing an animal, unless it failed to use ordinary care after discovering it on the track. *Hansberry v. Chicago, B. & Q. R. Co*..... 120

Rape.

To sustain a conviction for rape, the record must contain evidence corroborating that of the prosecutrix, and, where the prosecutrix is over 16 years of age, the evidence should show, beyond a reasonable doubt, that she was not previously unchaste. *Burk v. State*..... 241

Remainders.

1. Under secs. 57-59, ch. 73, Comp. St. 1905, a remainderman may sue to quiet title during the life of the life tenant, and the statute of limitations is not in such case postponed until the death of the life tenant. *Hobson v. Huxtable*..... 334
2. Remaindermen may, during the life estate, sue to quiet title under secs. 57-59, ch. 73, Comp. St. *Hobson v. Huxtable,* 340
3. That a remainderman is under disability will not toll the statute as to the other remaindermen not within the exception. *Hobson v. Huxtable*..... 340
4. The remainderman's estate in a homestead will not support ejectment during the lifetime of the life tenant, and limitations will not run until the demise of the life tenant. *Hobson v. Huxtable* 340

Replevin.

1. Petition *held* insufficient to state a cause of action. *Racine-Sattley Co. v. Meinen*..... 32
2. It is not necessary to set forth the facts required by subd. 4, sec. 182 of the code, in an affidavit or in the petition where no order of delivery is desired. *Racine-Sattley Co. v. Meinen* 33
3. In replevin, instructions as to the failure of a purchaser to take possession of goods purchased *held* proper. *Neeley v. Trautwein* 751

Robbery.

The extreme penalty for robbery allowed by the statute should not be imposed for the first offense, when mitigating circumstances are shown. *Buckley v. State*..... 86

Sales.

1. The mortgagee of a conditional vendee is not a purchaser within sec. 26, ch. 32, Comp. St. 1907, and cannot acquire any rights superior to the conditional vendor, though the contract of conditional sale is not filed. *Racine-Sattley Co. v. Meinen* 33
2. Contract *held* to be one of conditional sale. *Racine-Sattley Co. v. Meinen*..... 33
3. Agreement *held* an option to plaintiff to purchase liquors at the price named within the time limited. *Moise & Co. v. Rock Springs Distilling Co*..... 124
4. Agreement to pay interest *held* a part of the price and not a consideration for an option to purchase liquors. *Moise & Co. v. Rock Springs Distilling Co*..... 124
5. An option to purchase goods for which no consideration

Sales—*Concluded.*

was paid may be withdrawn at any time before accepted. *Moise & Co. v. Rock Springs Distilling Co*..... 124

6. Petition *held* not to state a cause of action. *Moise & Co. v. Rock Springs Distilling Co*..... 124

7. Sec. 26, ch. 32, Comp. St. 1905, requiring conditional sales of personal property to be in writing, signed by the vendee, and a copy filed with the county clerk, *held* to apply to a contract of sale made in Iowa of property to be delivered in Nebraska. *Bradley & Co. v. Kingman Implement Co*.... 144

8. A pre-existing debt is a good consideration to support a sale of personal property. *Bradley & Co. v. Kingman Implement Co.* 144

Schools and School Districts.

1. Warrants issued for teachers' wages and current expenses incurred during previous years may be paid from taxes of the current year. *State v. Gardner*..... 101

2. The general fund of a school district is a continuing fund upon which warrants may be drawn for teachers' wages and current expenses, and, if not paid, registered under secs. 10850-10853, Ann. St., and paid in the order of their registration. *State v. Gardner*..... 101

3. Mandamus will not lie to compel school district officers to appropriate the entire revenue of the district to pay registered warrants, but will require them to maintain a school at the least expense, and apply the remainder of the fund to such warrants. *State v. Gardner*..... 101

Specific Performance.

In a suit for specific performance based on an alleged oral testamentary agreement, *held* that the evidence was insufficient to establish the agreement. *Rau v. Rau*..... 694

States.

1. The act approved April 4, 1907, appropriating the special one mill tax for 1907 and 1908, and the unappropriated part of said tax for 1905 and 1906, to the use of the state university for the biennium ending March 31, 1909, is a specific appropriation within the meaning of sec. 22, art. III of the constitution. *State v. Searle*..... 111

2. Where the auditor has audited and allowed a claim payable out of the temporary university fund, and there is an unexpended balance therein, it is his duty to draw a warrant therefor in favor of the claimant, though there may be no money actually in the treasury belonging to said fund. *State v. Searle*..... 111

Statutes.

1. An enrolled bill on file in the office of the secretary of state, bearing the signature of the legislative officers and approved by the governor, is *prima facie* evidence of its passage, and cannot be overthrown by the legislative journals, where they are silent on the matter. *Stratton v. State*..... 118
2. The governor may approve or reject bills within the time limited by the constitution, as long as they remain under his control. *State v. Junkin*..... 532
3. The agreement of the secretary of state to consider a bill which the governor desired to file in his office as having been filed will not take the place of actual filing, if the bill remains in the governor's possession. *State v. Junkin*.... 532
4. In construing a statute it will not be presumed that the legislature intended any provision of an act to be without meaning. *Ford v. State*..... 309
5. When a statute has for nearly 40 years been practically construed by the officers whose duty it is to enforce it, and has been several times reenacted in substantially the same terms, such construction will be regarded as adopted by the legislature. *State v. Sheldon*..... 455
6. Where two sections of the same statute, one general and the other special, relate to the same subject, the special statute controls. *State v. Several Parcels of Land*..... 638

Stipulations.

The definition given by both litigants to equivocal words in a stipulation will control. *Hobson v. Huxtable*..... 340

Taxation. See NEWSPAPERS.

1. Under sec. 78, art. I, ch. 13, Comp. St. 1905, the board of equalization of the city of Lincoln has power, on notice, to assess property omitted from the tax list. *White v. City of Lincoln* 153
2. In the assessment of omitted property, the board of equalization of the city of Lincoln may reach their conclusions as to property to be placed on the tax list from evidence on an investigation in the nature of a judicial proceeding. *White v. City of Lincoln*..... 153
3. Assessment *held* not to be double taxation. *White v. City of Lincoln* 153
4. Money in bank and evidenced by a demand certificate of deposit, *held* liable to assessment as money, and not as a credit, under the revenue laws of 1903. *White v. City of Lincoln* 153
5. Evidence *held* to show appellant a resident of the city of

Taxation—*Continued.*

Lincoln, and liable to assessment as such. *White v. City of Lincoln* 153

6. Under agreed statement of facts, *held* that certain lodge property was not subject to taxation. *Plattsmouth Lodge v. Cass County*..... 463

7. The state board of equalization is not authorized to adopt rules which require the assessment of property of an individual in excess of its value. *Richards v. Harlan County*.. 665

8. Where a petition in foreclosure describes property by lot number and by metes and bounds, and the answer alleges a different boundary, the court may ascertain the true boundary. *Medland v. Van Etten*..... 49

9. The lien for taxes is not satisfied by a statutory sale of the property, nor by payment of prior or subsequent levies by the purchaser; such sale only operating to transfer the lien to the purchaser. *City Safe D. & A. Co. v. City of Omaha* 446

10. In a tax foreclosure under the "Scavenger Act" (sec. 10651, Ann. St.) the petition is *prima facie* evidence of the legality of the taxes and assessments set forth therein. *State v. Several Parcels of Land*..... 638

11. Where the amount or existence of a tax involved in a scavenger suit is not in issue or determined prior to the entry of decree, the court retains jurisdiction to correct mistakes until confirmation of sale. *State v. Several Parcels of Land* 668

12. The filing with the treasurer of a tax list without the warrant required by sec. 83, laws 1879, does not create a lien on personal property under sec. 139. The words "tax books" in sec. 139, laws 1879, *held* to mean the tax list with warrant attached. *Platte Valley Milling Co. v. Malmsten*..... 730

13. The lien of a chattel mortgage taken before tax books were delivered to the treasurer is superior to the lien for taxes for that year under sec. 139, laws 1879, but inferior to the lien for subsequent years. *Platte Valley Milling Co. v. Malmsten* 730

14. A county treasurer has no jurisdiction to seize personal property to enforce a tax lien thereon, unless the clerk's warrant is attached to the tax list. *Platte Valley Milling Co. v. Malmsten*..... 735

15. When the clerk's warrant is not attached to a tax list, there exists no enforceable lien for taxes against personal property. *Platte Valley Milling Co. v. Malmsten*..... 735

16. A purchaser of personal property under mortgage sale be-

Taxation—*Concluded.*

fore a tax lien has attached takes it free of taxes. *Platte Valley Milling Co. v. Malmsten*..... 735

17. The validity of taxes involved in a default decree rendered in a scavenger suit may be contested on an application to confirm the sale. *Prudential Real Estate Co. v. Hall*..... 805

18. While a tax sale proceeding remains within its jurisdiction a court may vacate any erroneous order made during its progress, and this power is not affected by the statute providing a procedure for the collection of taxes, called the "Scavenger Act." *Prudential Real Estate Co. v. Hall*..... 808

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. A cautionary instruction not to give undue weight to certain opinion evidence, *held* not prejudicial. *Oldfather v. Ericson*, 1

2. An instruction not based on the evidence, though correct as a legal proposition, is ground for reversal. *Boesen v. Omaha Street R. Co*..... 381

3. Instructions must be construed together. *Vanderveer v. Moran* 431

4. Where evidence is conflicting on disputed questions of fact, *held* error to direct a verdict. *Plant v. Chicago, B. & Q. R. Co.* 327

5. Unwarranted assault on the character of witnesses by counsel, which tends to inflame the minds of the jurors, constitutes prejudicial error. *Young v. Kinney*..... 421

6. A party is as much entitled to be heard in the trial court on questions of law as on issues of fact. *Wagener v. Whitmore* 558

7. An objection to evidence of a written agreement made on behalf of two or more must be good as to all. *Nason v. Nason* 582

8. The practice in this state is that an action, including a counterclaim, shall be tried as an entirety. *Miller v. McGannon* 609

9. If defendant does not desire to have his counterclaim disposed of, he should withdraw it before final submission of the cause. *Miller v. McGannon*..... 609

10. Defendant pleaded a counterclaim, and on the conclusion of plaintiff's evidence procured an order directing a verdict for defendant on plaintiff's cause of action. *Held*, That he was not entitled thereafter to prove his counterclaim. *Miller v. McGannon* 609

11. It is a valid objection to a question on cross-examination that it is unnecessarily complex and involved. *Todd v. City of Crete*..... 677

Trial—*Concluded.*

12. The question of the veracity of witnesses is for the jury. *Neeley v. Trautwein*..... 751

Trover.

1. In an action by a mortgagor for conversion of personalty by a mortgagee, the measure of damages is the difference between the value of the property and the amount due. *Lusch v. Huber Mfg. Co*..... 45

2. In trover, rulings on instructions and on the admission and rejection of evidence, *held* without error. *Shelton Implement Co. v. Parlor F. & M. Co*..... 411

Vendor and Purchaser.

1. Where a contract for the sale of realty provides that time is material, and that on default the vendor may take possession, a default itself operates as a forfeiture without notice to the purchaser. *Gilbert v. Union P. R. Co*..... 160

2. Damages cannot be recovered for the cancelation of a contract of sale, and a resale, against the vendor by a purchaser who could not have maintained a suit for specific performance had the resale not have been made. *Gilbert v. Union P. R. Co*..... 160

3. A *bona fide* purchaser of real estate who takes title by quitclaim should be protected as against the holder of an unrecorded deed, of which the purchaser had no notice. *Bannard v. Duncan*..... 189

4. A *bona fide* purchaser of real estate, without notice of an existing chattel mortgage by his vendor on a dwelling house situate thereon, takes title free from the lien of the mortgage. *Bazelman Lumber Co. v. Hinton*..... 313

Waters.

1. Judgment in an action for damages caused by maintenance of a milldam, *held* responsive to the pleadings. *O'Conner v. Fields* 840

2. A railroad in constructing embankments, which involves a change or restraint of the flow of water in a natural channel, is guilty of negligence if it fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur. *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co*.... 854

Wills.

1. It is error to submit to a jury whether the facts in evidence are sufficient to operate as a revocation of a will by implication of law. *Dickinson v. Aldrich*..... 198

Wills—*Concluded.*

2. Alterations in a will by a stranger without the knowledge of the testator have no effect. *Monroe v. Huddart*..... 569
3. The attestation clause is not a material part of a will, and the fact that the name of the testatrix is incorrectly given therein does not affect the validity of the will. *Monroe v. Huddart* 569
4. In a contest over the probate of a will, the filing of an appeal bond within thirty days after judgment in the county court, and of a transcript in the district court within ten days thereafter, vests the district court with jurisdiction under ch. 20, Comp. St. *In re Estate of Powers*..... 680
5. A judgment admitting a will to probate will not be set aside on conflicting evidence as to whether the testator expressly directed the draughtsman to sign his name to the will. *In re Estate of Powers*..... 680
6. Parol evidence will be received to show the original contents of a will altered by a stranger. *Monroe v. Huddart*.. 569
7. The testimony of subscribing witnesses to a will, which shows that the testator was capable of transacting ordinary business, is sufficient to make a *prima facie* case of testamentary capacity. *In re Estate of Powers*..... 680

Witnesses.

1. A witness who sees a moving car, and possesses knowledge of time and distance, is competent to express an opinion as to its rate of speed. *Coffey v. Omaha & C. B. Street R. Co*..... 286
2. In an action against the representative of a deceased person on a contract, where the execution and delivery is denied, plaintiff is an incompetent witness to prove delivery. *Russell v. Estate of Close*..... 318
3. A beneficiary under a will is not incompetent to testify to a conversation between the testator and a third person, in which the witness took no part. *In re Estate of Powers*.. 680
4. A waiver of protection against the disclosure of privileged communications may be withdrawn at any time before acted upon. *Herpolsheimer v. Citizens Ins. Co*..... 685